SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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PEDRO TESTA SALGADO, Index No. 714433/18

Plaintiff, Motion
Date: November 27, 2023

-against-

M# 2

ATRIA BUILDERS, LLC, ET AL.,

Defendants.

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The following papers numbered EF 36-96 read on this motion by the defendants/third-party plaintiffs Atria Builders, LLC and LGA Hospitality, LLC for summary judgment dismissing the complaint and all cross-claims and counterclaims against them and granting their contractual indemnification claim against third-party defendant Manhattan Concrete, LLC.

	Papers Numbered
Notice of Motion - Affidavits -Exhibits.....	EF 36-61
Answering Affidavit - Exhibits (Plaintiff)...	EF 83-90, 92-94
Reply Affidavit.....	EF 91, 96
Answering Affidavit - Exhibits (Manhattan)...	EF 92-94
Reply Affidavit.....	EF 96

Upon the foregoing papers it is ordered that the motion is determined as follows:

On August 29, 2018, the plaintiff allegedly was injured while performing work at a construction site located at 112-16 Astoria Boulevard, Queens, New York (the premises). Defendant LGA Hospitality, LLC (LGA) owned the premises and hired defendant Atria Builders, LLC (Atria) as the general contractor for a project to build a hotel at the premises. Atria hired Manhattan Concrete, LLC (Manhattan) as a subcontractor to perform excavation, foundation, and superstructure work at the premises. The plaintiff was employed by Manhattan as a carpenter.

The plaintiff contends that on the date and time of the accident, he was injured when the bucket and/or arm of an excavator struck a stack of wood planks causing the wood planks to strike the plaintiff. Thereafter, the plaintiff commenced this action against Atria and LGA (together the defendants) alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). The defendants commenced a third-party action against Manhattan for, among other things, contractual indemnification. Manhattan served an answer denying certain allegations of the third-party complaint and asserting various affirmative defenses.

The defendants now move for summary judgment dismissing the complaint and all cross-claims and counterclaims insofar as asserted against them and granting their contractual indemnification claim against Manhattan.

Common-law negligence and Labor Law § 200

The defendants argue that they are entitled to summary judgment dismissing so much of the plaintiff's complaint that alleges a violation of Labor Law § 200 and common-law negligence. They maintain that they did not supervise or control the performance of the work, that they did not create the dangerous condition that caused the plaintiff's accident, and that they did not have actual or constructive notice of the alleged dangerous condition.

Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (*see Mondungo v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820 [2d Dept 2020]; *Moscati v Consolidated Edison Co. Of N.Y., Inc.*, 168 AD3d 717 [2d Dept 2019]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a premises condition is at issue, "[f]or liability to be imposed on the property owner, there must be evidence showing the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]). Where the manner of the work is at issue, recovery against the owner cannot be had "unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Kauffman v Turner Constr. Co.*, 195 AD3d 1003, 1006 [2d Dept 2021], quoting *Ortega*, 57 AD3d at 61). Where a plaintiff alleges defects in both the premises and the manner in which the work was performed, the

property owner moving for summary judgment must address the proof applicable to both liability standards (*see Venter v Cherkasky*, 200 AD3d 932 [2d Dept 2021]; *Moscati*, 168 AD3d at 710).

In support of their motion, the defendants submit, among other things, the plaintiff's deposition testimony; the deposition testimony of Chris Stokes (Stokes), Atria's project manager; the deposition testimony Keith Irish (Irish), Manhattan's project superintendent at the time of the accident; the deposition testimony of Jose David Morales Santos (Morales), a Manhattan employee that witnessed the plaintiff's accident; the affidavit of Nicholas Pavon (Pavon), Atria's project superintendent at the time of the plaintiff's accident; and the affidavit of David Marx (Marx), a member of LGA and Atria.

The plaintiff testified at his deposition that he was employed by Manhattan as a carpenter working at the job site at the premises. He further stated that Irish was the Manhattan employee in charge of the project. The plaintiff testified that, in the moments preceding the accident, he needed to retrieve a wood plank from a pile of wood planks approximately six feet high. However, the bucket and/or arm of an excavator was resting atop the pile of wood planks. As such, Irish operated the excavator to lift the bucket and/or arm of the excavator off the pile. After the bucket and/or arm of the excavator was lifted and stopped moving, the plaintiff retrieved a plank of wood. The plaintiff states that, subsequently, the bucket and/or arm of the excavator came down hitting the stack of wood causing wood to hit the plaintiff.

Stokes testified that he was Atria's project manager at the job site at the premises at the time of the plaintiff's accident. He further testified that there were typically three Atria employees at the job site on a daily basis: himself, site superintendent Pavon, and assistant project manager Raynard Landell (Landell). He and Landell spent most of their time in a field office trailer adjacent to the project and Pavon spent most of his time in the field. Stokes states that he did not observe the accident, and that he does not know if Landell or Pavon did. He also states that he did not observe the bucket of an excavator resting atop a pile of wood in the excavation site. Pavon averred, among other things, that he was inside Atria's trailer when he was first notified of the plaintiff's accident by Irish. He stated that he did not witness the accident nor did he observe the bucket of an excavator resting atop a stack of lumber.

Irish testified that he was employed by Manhattan as the project superintendent for the job site at the premises at the time of the plaintiff's accident. He testified that, prior to the

accident, the plaintiff asked him to move material, a pile of wood, out of the way so that the carpenters could work in that area. Irish further testified that, once in the excavator, the plaintiff communicated to him to put the bucket of the excavator into the ground to curl the bucket under the pile of wood and lift it up to put a strap on the lumber. In picking up the lumber to put a strap on it, there was a piece of loose lumber that was buried underneath the sand that came up and hit the plaintiff. Irish states that, after the accident, Atria was notified, and Pavon came to the accident site.

Morales testified that he worked for Manhattan at the job site as a carpenter at the time of the plaintiff's accident. Morales further testified that, at the time of the accident, the plaintiff was eight feet in front of Morales. Morales states that the arm of an excavator was resting atop of a pile of wood and, for the plaintiff to retrieve wood, Irish operated the excavator to move the arm. While the arm of the excavator was raised, the plaintiff retrieved wood by putting it over his shoulder and, subsequently, the arm came down and hit the wood on the plaintiff's shoulder, and the plaintiff fell to the floor.

Marx, a member of LGA and Atria, averred that LGA owned the premises and that he would periodically visit the job site once per week or once every other week. During these visits he observed the quality, progress, and budgeting of the project. No one else on behalf of LGA visited the job site. He stated that LGA did not supervise, direct, or control the manner of the excavation work at the job site, and that he was not at the premises at the time of the plaintiff's accident.

Here, the plaintiff's complaint and verified bill of particulars allege both means and methods liability and premises liability. According to Irish's testimony, the allegedly dangerous condition was the loose piece of lumber that was buried underneath the sand. The defendants establish, prima facie, both that they did not create or have actual or constructive notice of this allegedly dangerous condition (*see Hamm v Review Assoc., LLC*, 202 AD3d 934, 939 [2d Dept 2022]; *Rodriguez v Metropolitan Transp. Auth.*, 191 AD3d 1026, 1028 [2d Dept 2021]; *Banscher v Actus Lease Lend, LLC*, 132 AD3d 707, 710 [2d Dept 2015]; *DiMaggio v Cataletto*, 117 AD3d 984, 986 [2d Dept 2014]). However, there are triable issues of fact as to whether the defendants had constructive notice of the allegedly dangerous condition herein.

Labor Law § 240 (1)

Next, the court turns to that branch of the defendants' motion to dismiss the plaintiff's Labor Law § 240 (1) claim. Under Labor Law § 240 (1), "[a]ll contractors and owners...shall furnish or erect, or cause to be furnished or erected...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 [construction workers employed on the premises]" (Labor Law § 240[1]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]). Labor Law § 240 (1) "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). "'Whether a plaintiff is entitled to recover under Labor Law § 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies' " (*Toalongo v Almarwa Ctr., Inc.*, 202 AD3d 1128, 1130 [2d Dept 2022], quoting *Wilinski v 334 E. 92 Hous. Dev. Fund. Corp.*, 18 NY3d 1, 7 [2011]). "The decisive question in determining liability pursuant to Labor Law § 240 (1) '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'" (*Toalongo v Almarwa Ctr., Inc.*, 202 AD3d at 1130, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Here, the defendants fail to establish their prima facie entitlement to judgment as a matter of law dismissing the plaintiff's Labor Law § 240 (1) claim against them. The defendants' submissions in support of their motion fail to eliminate triable issues of fact, among other things, as to how the alleged incident occurred and whether the plaintiff's injuries resulted from the type of hazard contemplated by Labor Law § 240 (1) (*see Jin Kil Kim v Franklin BH, LLC*, 214 AD3d 857, 859 [2d Dept 2023]; *Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dept 2022]). As such, that branch of the defendant's motion for summary judgment dismissing the plaintiff's Labor Law § 240 (1) claim against them is denied.

Labor Law § 241 (6)

Turning to that branch of the defendants' motion to dismiss the plaintiff's Labor Law § 241 (6) claim, owners and contractors have a nondelegable duty to provide reasonable and adequate protection and safety to construction workers (*see Aragona v State*

of New York, 147 AD3d 808 [2d Dept 2017]; *Hricus v Aurora Constr., Inc.*, 63 AD3d 1004 [2d Dept 2009]). "To prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor" (*Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1091 [2d Dept 2019]).

Here, the plaintiff's bill of particulars predicates his Labor Law § 241 (6) claim on alleged violations of sections 23.1-5, 23-1.7, 23-1.23 23-2.2, 23-4.1, 23-4.2, 23-4.4, 23-4.5, 23-1.29, 23-1.33, 23-9.2, 23-9.4, and 23-9.5 of the Industrial Code. The defendants argue that they are entitled to summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim insofar as each of these Industrial Code provisions either lacks the requisite specificity or is inapplicable to the plaintiff's accident. In opposition, the plaintiff relies solely upon alleged violations of sections 23-4.2 (k) and 23-9.5 (c) of the Industrial Code and, as such, he has abandoned claims as to the other alleged violations (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 474 [1st Dept 2012]).

Contrary to the defendants' contention, section 23-4.2 (k) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Zaino v Rogers*, 153 AD3d 763, 765 [2d Dept 2017]; *Cunha v Crossroads II*, 131 AD3d 440, 441 [2d Dept 2015]; *Torres v City of New York*, 127 AD3d 1163, 1166 [2d Dept 2015]; *Ferreira v City of New York*, 85 AD3d 1103, 1105 [2d Dept 2011]). Moreover, the defendants fail to demonstrate that this provision is inapplicable to the facts of this case. Section 23-4.2 (k) provides that "[p]ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment." Here, triable issues of fact exist, including but not limited to, whether the plaintiff was "suffered or permitted to work" near the excavator on the day of his accident (*see Zaino v Rogers*, 153 AD3d at 772), and whether he was "struck or endangered by any excavation equipment or by any material being dislodged by such equipment."

The defendants further fail to establish their entitlement to judgment as a matter of law dismissing the plaintiff's Labor Law § 241 (6) claim as is predicated on section 23-9.5 (c) of the Industrial Code. This section provides, in relevant part, that:

> "Excavating machines shall be operated only by designated persons. No person except the operating crew shall be permitted on an excavating machine while it is in motion or

> operation. No person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation. When an excavating machine is not in use, the blade or dipper bucket shall rest on the ground or grade."

Here, triable issues of fact exist, including but not limited to, whether Irish was a "designated person" within the meaning of the Industrial Code insofar as the evidence does not demonstrate that he was "selected and directed" by his employer to operate the excavator (*see* 12 NYCRR 23-1.4 [b] [17]; *Cunha v Crossroads II*, 131 AD3d at 442), and whether the bucket was resting on the ground insofar as the plaintiff and Morales testified that the arm and/or excavator was resting atop a stack wood prior to the subject accident.

Third-party contractual indemnification

Finally, the court turns to that branch of the defendants' motion for summary judgment on its third-party claim for contractual indemnification against Manhattan. "The right to contractual indemnification depends upon the specific language of the contract, and 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" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096 [2d Dept 2018]). In addition "'[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' " (*Rodriguez v Tribeca 105, LLC*, 93 AD3d 655, 657 [2d Dept 2012], quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, the defendants submit the subcontract agreement between Atria and Manhattan, which includes an express indemnification clause in favor of LGA, as owner, and Atria, as general contractor. It states, in relevant part, that:

> "(A) To the extent permitted by law, [Manhattan] shall indemnify, defend, save and hold the Owner, the Contractor and Design Team...harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise

> out of or are connected with, or are claimed to arise out of or be connected with:
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> (1) The performance of Work by the Subcontractor, or any act or omission of Subcontractor;
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> (2) Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work... or (b) while any of the Subcontractor's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work; or
>
> (3) The use, misuse, erection, maintenance, operation or failure of any machinery or equipment."

However, in opposition, Manhattan points out that the above section is followed by language that states, in relevant part, that:

> "To the fullest extent permitted by the law the Subcontractor shall indemnify and hold harmless the Owner Contractor...from and against claims damages losses [and] expenses...arising out of or resulting from performance of the Subcontractor's work under this subcontract...but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-Contractors, anyone directly or indirectly employed by them or anyone for whose acts they be liable regardless of whether or not such claim damage loss or expense is caused in part by a party indemnified hereunder."

Insofar as issues of fact exist, including but not limited to, whether Manhattan's alleged negligence caused the plaintiff's accident, the defendants fail to establish their entitlement to contractual indemnification against Manhattan (*see Zastenchik v Knollwood Country Club*, 101 AD3d 861, 864 [2d Dept 2012]).

Accordingly, the defendants' motion is granted only to the extent that those branches for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim as is predicated on sections 23.1-5, 23-1.7, 23-1.23 23-2.2, 23-4.1, 23-4.2 (a) - (j) and (l), 23-4.4, 23-4.5, 23-1.29, 23-1.33, 23-9.2, and 23-9.5 (a), (b), and (d) - (g) of the Industrial Code are granted.

All other relief is denied.

Dated: March 27, 2024

CARMEN R. VELASQUEZ, J.S.C.