FILED: NASSAU COUNTY CLERK 08/20/2020 02:24 PM INDEX NO. 601084/2017 NYSCEF DOC. NO. 191 RECEIVED NYSCEF: 08/20/2020

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT, Justice.

NATANAHEL DELCID,

Plaintiff,

-against-

THE WE'RE GROUP F/K/A WE'RE ASSOCIATES COMPANY, WE'RE ASSOCIATES COMPANY, L&D BUILDERS CORP., DEVO FIRE PROTECTION, INC., NORTH SHORE PULMONARY ASSOCIATES LLP, NORTH SHORE PULMONARY ASSOCIATES P.C., ST. FRANCIS HOSPITAL, ROSLYN, NY, CATHOLIC HEALTH SERVICES OF LONG ISLAND, LONG ISLAND ONCOLOGY NETWORK IPA, INC. and EMPIRE GENERAL CONTRACTING & PAINTING CORP.,

Defendants.

THE WE'RE GROUP F/K/A WE'RE ASSOCIATES COMPANY and WE'RE ASSOCIATES COMPANY,

Third-Party Plaintiffs,

-against-

ST. FRANCIS HOSPITAL and EMPIRE GENERAL CONTRACTING & PAINTING CORP.,

Third-Party Defendants.

EMPIRE GENERAL CONTRACTING & PAINTING CORP.,

Second Third-Party Plaintiff, -against

B&A COMMERCIAL INC.,

Second Third-Party Defendant.

1 of 7 TRIAL PART 20 NASSAU COUNTY

MOTION# 06, 07, 08, 09 INDEX # 601084/17 MOTION SUBMITTED: JULY 6, 2020

[* 1] FILED: NASSAU COUNTY CLERK 08/20/2020 02:24 PM INDEX NO. 601084/2017 NYSCEF DOC. NO. 191 RECEIVED NYSCEF: 08/20/2020

2 of 7 NYSCEF DOC. NO. 191

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause ..... 1, 2, 3, 4 Cross Motion/Answering Affidavits ..... 5, 6, 7, 8, 9 Reply Affidavits ..... 10, 11, 12 INDEX NO. 601084/2017 RECEIVED NYSCEF: 08/20/2020

Defendant Empire moved for summary judgment dismissing the complaint aagainst it and in the event dismissal is denied for indemnity from defendant B&A (Motion No. 6). Defendants St. Francis and CHS moved for summary judgment dismissing the complaint against them and in the event dismissal is denied for indemnity from defendants Empire and B&A (Motion No. 7). The We're Group defendants moved for summary judgment dismissing the case against them (Motion No. 9) 1 • Defendant North Shore moved for summary judgment dismissing the complaint against it (Motion No. 8). This action arises out of an injury sustained by plaintiff during the demolition phase of a construction project, which included the renovation of a medical radiology facility. Plaintiff alleges that he was removing lead bricks in accordance with instructions given by his employer (defendant B&A). As instructed by B&A, plaintiff used a small crowbar to dislodge the bricks. The crowbar allegedly slipped and struck plaintiffs eye causing the injury. Plaintiff asserts liability on the basis of common law negligence and Labor Law§§ 200 (1), 240(1), and 241 (6). The We're Group defendants are the owners/managers of the building in which the work was performed. St. Francis and its parent CHS are the tenants. Empire was the general contractor hired by St. Francis/CHS to do the renovation project. B&A was the subcontractor hired by Empire to perform the demolition work including removal of the lead bricks. Summary judgment is a drastic remedy and should only be

granted when there are no triable issues of fact (Andre v. Pomeroy, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (Hantz v. Fleischman, 155 A.D.2d 415 [2nd Dept. 1989]). The proponent of a summary

1 Counsel for St. Francis/CHS was substituted as counsel for Empire and adopted the arguments made in Empire's original motion (Motion No. 6) and the original motion of St. Francis/CHS (Motion No. 7).

2

judgment motion "must make a prim a facie showing of entitlement to judgment as a matter oflaw, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

North Shore (Motion No. 8) The testimony submitted by North Shore indicates that North Shore was not an owner, tenant or contractor and did not have any involvement with the building or the work being performed. North Shore made a prima facie of entitlement to summary judgment. Plaintiff offered no evidence to establish a triable issue of fact with respect to North Shore. Summary judgment dismissing the complaint is granted to this defendant.

The Remaining Defendants 2 (Motions No. 6,7, and 9) Labor Law§ 200 (1) Labor Law § 200 (1) codified the common law duty oflandowners and general contractors to provide a safe workplace. Where the personal injury claim of an employee arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation (see, Lombardi v Stout, 80 N.Y.2d 290, [1992], Kappel v Fisher Bros., 6th Ave. Corp., [1976]). This rule is an outgrowth of the basic common-law principle that "an owner or general contractor [sh]ould not be held

2 "We're Group f/k/a We're Associates Company, We're Associates Company, St. Francis Hospital, Roslyn, New York, Catholic Health Services of Long Island, and Empire General Contracting & Painting Corp" are collectively referred to as the "Remaining Defendants".

3

3 of 7 [* 3] FILED: NASSAU COUNTY CLERK 08/20/2020 02:24 PM INDEX NO. 601084/2017 NYSCEF DOC. NO. 191 RECEIVED NYSCEF: 08/20/2020

4 of 7 NYSCEF DOC. NO. 191 INDEX NO. 601084/2017 RECEIVED NYSCEF: 08/20/2020

responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 [1993]). Empire asserts that as the general contractor its general supervisory authority over B&A did not amount to the "supervision and control" sufficient to impose liability under common law or under Labor Law §200. The We're defendantsand St. Francis/ CHS as tenant also assert that they did not exercise supervision and control. Wojciech Mijewski an employee ofB&A testified that all of the demolition work was directed and supervised solely by B&A. Brian Levine another B&A employee testified that his only interaction with Empire personnel concerned coordination of the work to be performed on a specific day. Ray Liotti, the project manager employed by St. Francis testified that his role in the project was bidding it out, negotiating contracts and making periodic inspections of the progress and quality of the work. Plaintiff himself testified that employees of B&A were the only parties that gave him direction or otherwise supervised his work. This evidence is sufficient to establish a prima facie case for summary judgment on the issue of control and superv1s10n. Plaintiff submitted the contract between St. Francis and Empire, but otherwise offered no evidence to overcome the prima facie case on this issue. The contract alone is insufficient to create a material issue of fact concerning supervision and control.

Labor Law§ 240 (1) "Labor Law 240(1) imposes 'upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide proper protection from elevation-related hazards" (Aslam v Neighborhood Partnership Haus. Dev. Fund Co., Inc., 135 AD 3d 790-791 [2d Dept 2016, quoting Barreto v Metropolitan Trans. Auth. ,25 NY3d 426,433 (2015)], rearg denied 25 NY3d 1211 [2016]). "'To recover on a cause of action pursuant to Labor Law 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident"' (Sarata v Metro. Transp. Auth., 134 AD3d 1089, 1090 91 [2d Dept 2015], citing PrzyborowksivA&MCook, LLC, 120 AD3d 651,653 [2dDept2014]; Blakev Neighborhood Haus. Servs.

4

4 of 7 [* 4] FILED: NASSAU COUNTY CLERK 08/20/2020 02:24 PM INDEX NO. 601084/2017 NYSCEF DOC. NO. 191 RECEIVED NYSCEF: 08/20/2020

5 of 7 NYSCEF DOC. NO. 191 INDEX NO. 601084/2017 RECEIVED NYSCEF: 08/20/2020

of NY. City, 1 NY3d 280,287 [2003]; Vasquez-Roldan v Two Little Red Hens, Ltd.,129 AD3d 828,829 [2d Dept 2015]). The statute protects workers injured from certain types of falling objects. The types include objects being hoisted or lowered, as well as objects which need to be secured (Narducci v. Manhasset Bay Associates, 96 N.Y.2d259, 727N.Y.S.2d 37, 750N.E.2d 1085 [2001]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82). We're, Empire, St. Francis and CHC assert that plaintiffs claim under Labor Law§ 240 (1) does not fall within the ambit of that statute, because the injury was not related to any special elevation risk. Plaintiff was working on a scaffolding when the accident occurred, but there is no evidence that the elevation risk was in any way related to the occurrence. There is some conflicting testimony with respect to whether plaintiff slipped prior to being struck by the chisel, but nothing to suggest that the slip was due to an elevation-related hazard. Plaintiff offered no evidence to support the existence of an elevation related hazard.

Labor Law §241 (6) Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see, Gonzalez v Perkan Concrete Corp., 110 AD3d, 955, 975 NYS2d 65 [2d Dept. 2013]). In order to show a violation of the statute and withstand a defense motion for summary judgment, a plaintiff must show that defendants violated a specific applicable, implementing regulation of the Industrial Code which sets forth specific safety standards, rather than a provision containing only generalized requirements for worker safety (Jara v New York Racing Assn. Inc., 85 AD3d, 1121, 927, NYS2d 87 [2d Dept. 2011]). We're, Empire, St. Francis and CHC assert that plaintiff has not established a predicate violation of the New York State Industrial Code.

5

5 of 7 [* 5] FILED: NASSAU COUNTY CLERK 08/20/2020 02:24 PM INDEX NO. 601084/2017 NYSCEF DOC. NO. 191 RECEIVED NYSCEF: 08/20/2020

6 of 7 NYSCEF DOC. NO. 191 INDEX NO. 601084/2017 RECEIVED NYSCEF: 08/20/2020

Plaintiff cites 22 NYCRR 23-1.8 (part of the Industrial Code) as the predicate regulation that was violated. 3 That regulation requires protective eye-wear to be provided to workers engaged in any operation which may endanger the eyes. There is contradictory testimony concerning personal protective eye-wear including whether safety goggles were available to plaintiff; whether plaintiff was wearing his own glasses at the time of the injury; whether plaintiff was advised about use of the goggles; and whether the goggles are designed to guard against injury from the type of impact that occurred. There are substantial issues of fact concerning liability of the remaining defendants under Labor Law § 241 (6)

Indemnity Empire asserts that B&A is contractually obligated to indemnify it. B&A does not deny its contractual obligation to indemnify Empire. The We're Group defendants, St. Francis and CHS assert

common law indemnity against Empire, which Empire does not contest.

Decision Based upon the findings set forth above it is: ORDERED, that the motion of North Shore Pulmonary Associates LLP, North Shore Pulmonary Associates P.C. (Motion No. 8) is granted in its entirety and the complaint and any cross claims against it are dismissed; and it is further ORDERED, that the motions of the We're Group f/k/a We're Associates Company, We're Associates Company, St. Francis Hospital, Roslyn, New York, Catholic Health Services of Long Island, and

3 Although plaintiff pleaded violations of two other provisions of the Industrial Code (12 NYCRR 23-1.5 and 23-1.7), those claims were not addressed in the opposition papers and are deemed abandoned (see, Genovese v Gambino, 309 A.D.2d 832, 766 N.Y.S.2d 213, 2003 N.Y. Slip Op. 17562).

6

6 of 7 [* 6] NASSAU CLERK"S FILED: NASSAU COUNTY CLERK 08/20/2020 02:24 PM INDEX NO. 601084/2017 NYSCEF DOC. NO. 191 RECEIVED NYSCEF: 08/20/2020

7 of 7 NYSCEF DOC. NO. 191 INDEX NO. 601084/2017 RECEIVED NYSCEF: 08/20/2020

Empire General Contracting & Painting Corp. are granted to the extent that the causes of action for common law negligence and for violations of Labor Law Labor Law§§ 200 (1), 240(1) are dismissed; and it is further ORDERED, that the motions of the We're Group f/k/a We're Associates Company, We're Associates Company, St. Francis Hospital, Roslyn, New York, Catholic Health Services ofLong Island, and Empire General Contracting & Painting Corp. are denied with respect to the cause of action for violation of Labor Law Labor Law§§ 241 (6); and it is further ORDERED, that the portion of the motion of Empire General Contracting & Painting Corp., which seeks indemnity from B &A Commercial Inc. and portion of the motions of We're Associates Company, We're Associates Company, St. Francis Hospital, Roslyn, New York, and Catholic Health Services of Long Island which seeks indemnity from Empire General Contracting & Painting Corp. are granted.

DATED: August 19, 2020 ENTER

HON. JACK L. LIBERT J. s.c.

ENTERED Aug 20 2020 COUNTY COUNTY OFFICE

7

7 of 7 [* 7]