Dated: _May 26,_____ 2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 12

----------X

WALTER CASTELLANOS,

Plaintiff

Index No. 301320/2015

-against-

HON. ROBERT T. JOHNSON

Justice Supreme Court

ART RIVER SCIENCE PARL, LLVC.,
TISHMAN CONSTRUCTION COMPANY, et al,

Defendants

----------X

ART RIVER SCIENCE PARL, LLVC.,
TISHMAN CONSTRUCTION COMPANY, et al,

Third

Party-Plaintiffs,

-against-

ADCO ELECTRICAL CORP.,

Third Party Defendant

----------X

This motion is decided in accordance with the attached Decision and Order.

Dated:_May 26, 2020

_____
HON. ROBERT T. JOHNSON , J.S.C.

☐ CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE

CHECK ONE.....

X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

2. MOTION IS.....

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

3. CHECK IF APPROPRIATE.....

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

_____X

Walter Castellanos,

Plaintiff(s),

DECISION

Index # 301320/2015

-against-

Are-East River Science Park, LLC., Tishman Construction Company, Tishman Construction Corporation of New York, Tishman Construction Corporation, Alexandria Real Estate Equities, Inc., and ADCO Electrical Corp.

Defendant(s).

_____X

Are-East River Science Park, LLC., Tishman Construction Company, Tishman Construction Corporation of New York, Tishman Construction Corporation and, Alexandria Real Estate Equities, Inc.,

Third-Party Plaintiff(s),

-against-

ADCO Electrical Corp.,

Third-Party Defendant(s).

_____X

HON. ROBERT T. JOHNSON:

In this matter plaintiff Walter Castellanos ("plaintiff") claims he was injured while working at a construction project located at 450 East 29th Street in New York City. At the time he was employed by non-party Celtic Sheet Metal, Inc. He alleges that he fell due to sheetrock debris, pieces of wiring and screws which were left on a staircase landing. Defendant Tishman Construction Company/Tishman Construction Corporation of New York/Tishman Construction Corporation ("Tishman") was the general contractor. Defendant/third-party defendant ADCO Electrical Corp. ("ADCO") was an electrical subcontractor on the job site.

ADCO now moves for summary judgment and dismissal of the claims against it, including those for indemnity and contribution. Specifically, it argues that the claim brought against it under Labor Law § 200 should be dismissed because it did not a direct or control plaintiff's work, and there is no evidence that any of its employees were working on the stairwell in question at or around the time the plaintiff fell, and that it was the responsibility of the general contractor to perform debris removal. Additionally, it contends that even if the existence of the debris was because of its work, it had no actual or constructive notice of it. As to the claim brought against it pursuant to Labor Law § 241 (6), the sections of the industrial code cited by the plaintiff are vague, and there is no evidence that it controlled the job site to the extent that it would be able to effect compliance with them. ADCO also contends that plaintiff was the sole proximate cause of his accident, because he saw the debris condition when he had previously descended the stairs, and did not complain about it, and, also, he was carrying a ladder and other work materials which blocked his own view of the landing prior to stepping on it and falling. Finally, ADCO argues that while it had placed appropriate insurance coverage pursuant to its contract, it is not liable for either contractual or common-law indemnity since there is no proof of a negligent act or omission on its part.

Tishman opposes the motion, arguing that questions of fact exist to not only as to ADCO's culpability for plaintiff's fall, but also as to its duty to indemnify, and whether it breached its contract by failing to provide insurance coverage. Tishman argues that ADCO was working there at or around the time of the accident, and that as an electrical subcontractor, it was responsible for modifying holes cut into sheet rock by carpenters to allow access to electrical power sources and lighting. The fact that plaintiff testified that the debris which caused him to fall was not just sheet rock, but was also electrical wiring pieces and screws, shows that a question of fact exists as to whether the debris was created by the electrical subcontractor. Finally, Tishman contends that since a question of fact exists as to ADCO's responsibility for plaintiffs fall, it likewise must exist as to whether ADCO must indemnify Tishman, as required in their contract. While Tishman admits that ADCO had supplied it with a certificate of insurance showing that was that it was an additional named insured, such a certificate is insufficient proof of the existence of applicable insurance.

Plaintiff partially opposes the motion. He admits that Labor Law § § 200 and 241 (6) are not applicable as against ADCO, but argues that a question of fact exists as to the claim of common law negligence. He claims that at the time of the accident ADCO had 50 to 60 employees on the premises, and that it was responsible for the electrical work in the stairwells, including the one where he sustained his fall. Since the debris consisted of pieces of sheet rock, but also electrical wiring and screws, a triable issue of fact exists as to which entity was responsible for the existence of the debris. While carpenters had the responsibility to cut holes in sheet rock to allow access to the electrical system, electricians, including ADCO, would be responsible for further modifying those holes if necessary. While there was at least one other electrical subcontractor other than ADCO working at the job site, that entity was only responsible for working on the installation of fire alarms, not lighting systems, which were the responsibility of ADCO. Finally, plaintiff argues that he did not assume the risk of stepping on the debris because it was not an open and obvious condition and, in any event, there was no other pathway he could have chosen.

In general, a court's function on a motion for summary judgment is issue finding rather that issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is interested remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders by v Ceppos*, 46 NY2d 223 [1978]). To obtain summary judgment on a Labor Law §200 and common-law negligence claim a defendant must show that there is no triable question of fact as to whether it had control over the work site or constructive or actual notice of a dangerous condition there (see *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52 [2d Dept 2011]), and whether it was free from negligence in the happening of the plaintiff's accident (*Biscup v E.W. Howell, Co., Inc.*, 131 AD3d 996, 998 [2d Dept 2015]).

To recover under Labor Law § 241(6), a plaintiff must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific, applicable safety standards (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047 [2d Dept 2012]). Conversely, to prevail on a motion for summary judgment, a defendant must demonstrate that no triable issue of fact exists as to those violations.. Here, plaintiff alleges that the Industrial Code provisions at issue are 12 NYCRR 23-1.7(e)(1 and 2). These state:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered

tools and materials and from sharp projections insofar as may be consistent with the work being performed.

With reference to both claims brought under Labor Law § § 200 and 241 (6), it must be demonstrated that the entity against which the claims are brought had supervisory control and authority over the activity which gave rise to the accident (*Ross v Curtis-Palmer Hydro-Electric,* 81 NY2d 494 [1993]). Here, plaintiff concedes that ADCO had no such supervisory and control over him and as such, any claims against ADCO under those sections are not applicable. Consequently, ADCO's motion for summary judgment with respect to those claims is granted.

Both Tishman and the plaintiff argue that a triable question of fact exists as to whether ADCO was negligent in creating the condition that caused plaintiff to fall, or in failing to remedy it. Their argument is premised on the evidence that ADCO had done work on the stairwell in question, installing temporary and then permanent lighting, as well as fire alarms. Because electricians would be required to modify the work of carpenters if holes that had been cut in the sheet rock were not of the proper size to access the electrical work, they argue that the debris upon which the plaintiff fell could have been caused by workers from ADCO. In advancing this argument, they rely heavily, if not exclusively, on testimony given at a deposition by ADCO's witness, Joseph Kilgus, who was a foreman at the job site. However, a review of his testimony fails to demonstrate the existence of a triable issue of fact.

While he stated that ADCO had worked in the stairwell in question, he specifically denied that they would have cut or modified any holes in a stairwell because the walls there would be made of "core board ", which is required in a stairwell since it is more resistant to fire, and would have to be cut by carpenters. Additionally, after being shown photographs of the stairwell in question at or around the time of the plaintiffs fall, he indicated that the progress of the work shown meant that ADCO would not have been working there for a period of time. While ADCO was still working at the building at the time of plaintiff's fall, his testimony can best be read that they were not working in the stairwell in question. He also noted that there were several other electrical subcontractors at the job site, one of which was working on the two floors serviced by the stairwell in question.

Tishman also seeks to rely on job progress notice from its own records which, it claims, failed to state that ADCO was not working on the stairwell in question at the time the plaintiff fell. However, the safety note for that day, with reference to that subcontractor, reads " ADCO power, light, fire alarm and generator work"; similar notations are made with reference to ADCO in those records around that time, but none mention the area where the plaintiff fell. While many of the other entries for other subcontractors likewise failed to specify the areas where they were working, some do make specific mention of the floors where a given company was working.

The absence of a specific mention of the area where ADCO was working at the time of plaintiff fell, in Tishman's own records, cannot lead to an assumption that ADCO must have been working in the stairwell since ADCO apparently was working throughout this 17 story building; it does not create a question of fact.

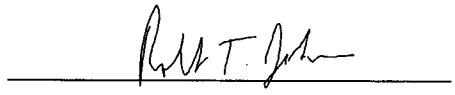
Accordingly, no triable issue of fact exists as to a claim of general negligence against ADCO, and that cause of action against it must be dismissed as well.

Finally, ADCO argues that any claims against it for contractual or common-law indemnification, and contribution, must likewise be dismissed. "A subcontractor may be obligated to indemnify under the common law upon proof that its actual negligence caused an accident, but it can also be held liable where it 'had the authority to direct, supervise and control the work giving rise to the injury' "(*McCarthy v Turner Const., Inc.,* 17 NY3d 369, 376 [2011] ; *Hernandez v Two E. End Ave. Apt. Corp.*, 271 AD2d 570, 571 [2d Dept 2000]). Since the plaintiff has conceded that the statutory claims under the Labor Law are inapplicable to ADCO since it did not have direct or supervisory control, and since this court has determined that ADCO is entitled to summary judgment on any general negligence claim, it follows that ADCO owes no duty of common-law or contractual indemnification to Tishman, nor can it be held liable for contribution. In the absence of any liability for its own acts or omissions, ADCO's contract cannot be interpreted to mandate that it indemnify Tishman. General Obligations Law § 5–322.1 was enacted to void indemnification agreements that seek to exempt the indemnitee from liability based on negligence, irrespective of whether that negligence is wholly or only partially the cause of the injury (*Cavanaugh v 4518 Assoc.*, 9 AD3d 14, 20 [1st Dept 2004]; *Gomez v National Center for Disability Services,* 306 AD2d 103 [1st Dept 2003]).

The motion for summary judgment is granted.

This constitutes the decision and order of the Court

Dated: May 26,2020



ROBERT T. JOHNSON, JSC