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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 105124/2007
MATZ, MARGARET
vs.
LABORATORY INSTITUTE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/13/10

EJG
J.S.C.
EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------x

MARGARET MATZ,

Index No.: 105124/07

Plaintiff,

-against-

LABORATORY INSTITUTE OF MERCHANDISING (LIT), CERTIFIED OF NEW YORK, INC., MOTTIS IRON WORKS INCORPORATED and BIG A IRON WORKS, INC.,

Defendants.

----------x

Emily Jane Goodman, J.S.C.:

Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages sustained by an architect when a steel beam fell on her while she was working at a construction site located at 12 East 53rd Street in Manhattan (the premises) on March 15, 2007.

In motion sequence number 001, plaintiff Margaret Matz moves, pursuant to CPLR 3212, for summary judgment in her favor on her Labor Law §§ 240 (1) and 241 (6) claims as against defendants Laboratory Institute of Merchandising (LIT) (hereinafter, LIM) and Certified of New York, Inc. (Certified) (together, defendants), as well as summary judgment in her favor on the issue of liability as against defendant Big A Iron Works, Inc. (Big A) due to its negligence.

In motion sequence number 002, defendant LIM moves, pursuant to CPLR 3212, for summary judgment in its favor on its common-law and contractual indemnification claims as against defendants Certified and Big A.

In motion sequence number 003, defendant Certified moves, pursuant to CPLR 3212, for

summary judgment in its favor on its common-law and contractual indemnification and breach of contract claims as against defendant Big A.

BACKGROUND

Defendant LIM was the owner of the premises where the accident took place. Defendant Certified served as the general contractor on a renovation project at the premises (the project). Certified hired defendant Big A to serve as the steel contractor responsible for the installation of steel in the elevator shaft of the building. Plaintiff, an architect, was employed by non-party Butler Rogers Baskett Architects (BRB), the entity hired by LIM to perform architectural services at the premises.

Plaintiff testified that, on the day of the accident, Certified called her to the jobsite in order to attend an audiovisual meeting for the coordination and location of various audiovisual devices. The meeting was to be followed by a field inspection and the taking of measurements. While at the premises, she observed one of her colleagues in the student lounge area on the first floor of the building. After calling out to him several times with no answer, she set out to join him, venturing into an area of the jobsite where an elevator shaft was under construction. As plaintiff walked past the elevator shaft, she was suddenly struck by a falling steel channel which then pinned her against the wall, causing her injuries.

It should be noted that plaintiff's account of her accident was confirmed in the affidavits of her coworkers, Chan Kapituk (Kapituk) and Erick Hodgetts (Hodgetts). In his affidavit, Kapituk stated that he was standing approximately 10 feet away from plaintiff when he saw "an improperly hoisted steel beam fall down the shaft, swing out and strike Margaret on her right lower leg" (Plaintiff's Notice of Motion, Kapituk Affidavit, dated October 18, 2007). Hodgetts

stated that, although he did not observe the accident as it occurred, after the accident, he observed plaintiff pinned by a steel beam about nine feet long.

John Inglese (Inglese), Certified's project superintendent, testified that LIM was a five-story college in the process of being renovated at the time of the accident (the project). Inglese stated that his duties at the premises included coordinating the various trades, and that he would walk the site on a daily basis for "[q]uality control, as well as site safety" (Plaintiff's Notice of Motion, Exhibit 2, Inglese Deposition, at 18). If, during his walk-throughs, Inglese saw something that he considered unsafe, he had the authority to stop the work. Inglese maintained that the building superintendent also had the ability to stop work if something unsafe was going on. Inglese explained that BRB managed the design of the project, and that he would have interactions with BRB on an hourly, daily and/or weekly basis. Inglese stated that, after the demolition was completed, Certified called in Big A to install the steel in the elevator shaft.

Anthony Albero (Albero), Big A's foreman on the afternoon of the accident, testified that, at the time of the accident, he and his coworker were hoisting a steel beam up the elevator shaft horizontally with a mechanical chain fall. As the beam was a tight fit with the elevator shaft, it was necessary for the men to tilt the beam a bit by placing a weight on one end of it. Albero and his coworker guided the steel with their hands as it moved up the shaft, so as to make sure that it did not hit any walls. Albero noted that there was no tagline attached to the beam that would have made sure that it did not swing back and forth.

Albero explained that it eventually became necessary for the two men to re-rig the beam, because it was not moving up through the elevator shaft as cleanly as it should have been. To this effect, the men planned to put the beam through an eye hook, rather than pinching it through

the center, so that the beam could be lifted vertically. Albero explained that, as the chain began to lower the beam, "[t]he steel must have caught something, and it slipped through the chain and went down" very quickly between the first floor and the lobby (Certified's Notice of Motion, Exhibit H, Albero Deposition, at 60).

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS (motion sequence number 001)

Labor Law § 240 (1) is referred to as the Scaffold Law (*Ryan v Morse Diesel, Inc.*, 98 AD2d 615, 615 [1st Dept 1983]). Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing 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) expresses a clear legislative intent to provide exceptional protection for workers against special hazards which arise on work sites which are either elevated or positioned below the level where materials or loads are hoisted or secured (*see Rocovich v Consolidated Edison Company*, 78 NY2d 509, 515 [1991]).

Labor Law § 240 (1) imposes absolute liability upon an owner or general contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 523 [1985]; *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 63 [1st Dept 1999]). The duty imposed by Labor Law § 240 (1) is nondelegable and an owner or contractor who breaches that duty may be held liable in damages regardless of whether they actually supervised or controlled the work (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 500 [1993]).

In order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997][worker injured by fall from elevated work site must generally prove that the absence of safety device was the proximate cause of his or her injuries to prevail on scaffolding law claim]).

In their opposition to plaintiff's motion, defendants maintain that plaintiff is not in the protected class intended to be covered by Labor Law § 240 (1), as she was not engaged in

construction or demolition at the time of her accident. "The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]).

While it has been held that "job titles are not dispositive" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 882 [2003]; *Joblon v Solow*, 91 NY2d at 465), the facts in this case support the conclusion that plaintiff, while working as an architect, undertook the kind of work the Legislature intended to protect under section 240 (1) (*id.* [Court held that the work being performed by plaintiff mechanic at the time of his accident, inspecting an air-conditioning return fan as part of his work on overhauling air-conditioning systems, fell within the purview of section 240 (1)]). "The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.* at 882).

Here, contrary to defendants' contention, plaintiff was within the class of persons that Labor Law 240 (1) was intended to protect as her duties were "integral to the progress of an ongoing construction project" (*see Melendez v Abanno Building Maintenance, Inc.*, 17 AD3d 147, 147 [1st Dept 2005] [at the time of his accident, plaintiff was acting in a capacity entitling him to the protection of Labor Law § 240 (1) where he was performing an inspection integral to the progress of an ongoing construction project]; *Aubrecht v Acme Electric Corporation*, 262 AD2d 994, 994 [4th Dept 1999] [plaintiff was in the class of persons for whom Labor Law §§ 240 (1) and 241 (6) liability is imposed because his work was essential to the construction of a building or structure and he was employed by an entity hired by the owner for such purpose]).

To that effect, Inglese described the renovation as a "total cosmetic, as well as mechanical

renovation" (Plaintiff's Notice of Motion, Exhibit 2, Inglese Deposition, at 14). Inglese stated that the BRB architects, such as plaintiff, performed work "necessary" to the completion of the project. This work included conducting visual inspections, answering questions, drawing up changes, keeping track of the progress and taking measurements (*id.* at 29-30). Specifically, the architects would "do measurements and inspections of the areas where the audio, visual work was being installed," which, according to Inglese, was "necessary, incidental to the proper and complete construction of the project" (*id.* at 56).

In her affidavit, dated November 28, 2008, plaintiff explained that she and her architectural team

> were called to the jobsite to give dimensions to the contractor so that they could locate audiovisual devices that had been dimensioned in the construction documents. These dimensions were essential to the ongoing construction to allow the contractor to install the back boxes for the devices before they could order the subcontractors to close off the ceilings

(Plaintiff's Notice of Motion, Plaintiff's Affidavit, dated November 28, 2008).

Plaintiff also explained that the process of giving dimensions involved, in pertinent part:

> measuring the existing field conditions (with a ladder in the case of the ceilings in question); discussing the ideal location with the audiovisual consultants at the jobsite; and coordinating devices to placement by other devices such as light fixtures. In order to do the same, we had to review the marked dimensions on the walls and ceilings to discuss the proposed dimensions with the contractor. Without this work being performed, the construction could not be completed and the contractor would not be able to close off the ceiling

(*id.*).

In support of their contention that plaintiff was not in the protected class covered by Labor Law § 240 (1), defendants rely on the case of *Adair v Bestek Lighting and Staging Corporation* (298 AD2d 153, 153 [1st Dept 2002]). In that case, the Court declined to follow

Aubrecht (262 AD2d 994, *supra*), and instead, relied on the case of *Martinez v City of New York* (93 NY2d 322, 326 [1999]), wherein the Court expressly rejected placing the focus on whether plaintiff's work was an "'integral and necessary part' of a larger project within the purview of section 240 (1)," as bringing within the statute nonconstruction activity incidental to the construction work would improperly enlarge the reach of the statute beyond its clear terms.

However, the facts of the instant case can be easily distinguished from those of *Martinez* and *Adair*. In *Martinez*, plaintiff's work as an environmental inspector was to terminate prior to the actual commencement of any subsequent asbestos removal work. In fact, none of the activities enumerated in the statute were underway at the time of the accident. Likewise, in *Adair*, plaintiff's job of focusing already installed stage lights in preparation for a performance on a fully-constructed stage could not be viewed as integral to the construction of the stage.

In contrast, here, plaintiff's duties did not fall into a "separate phase easily distinguishable from other parts of the larger construction project" and the work was "ongoing and contemporaneous with the other work" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d at 881] [plaintiff mechanic was inspecting air-conditioning return fan as part of his work overhauling air-conditioning system at time of his accident]; *compare Panek v County of Albany*, 99 NY2d at 457 [where plaintiff's removal of FAA air handlers was to be completed before the commencement of any work by the demolition contractor, plaintiff was not considered to be engaged in demolition work for the purposes of section 240 (1)]; *Campisi v Epos Contracting Corporation*, 299 AD2d 4, 7 [1st Dept 2002] [Court held that plaintiff's job did not entitled him to protection under section 240 (1), because the work he was doing was to terminate before the subsequent asbestos removal work actually commenced and not during "'the erection, demolition

... or pointing of a building or structure'"]).

In addition, plaintiff worked for a company that was carrying out a contract involved in the construction and alteration of the building -- activities covered by section 240 (1), unlike the inspector in *Martinez*, who did not work for the company that actually removed the asbestos (*see id.*; *Aubrecht v Acme Electric Corporation*, 262 AD2d at 994).

Moreover, subsequent to *Adair* and *Martinez*, in making their determination as to whether the plaintiff was within the class of persons covered by Labor Law §§ 240 (1) and 241 (6), both the Court of Appeals and the Appellate Division, First Department, have considered whether the plaintiff was performing a task integral to the progress of an ongoing construction project at the time of the accident (*see Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, [*supra*] [inspections performed by plaintiff were ongoing and contemporaneous with the other work that formed part of a single contract]; *Melendez v Abanno Building Maintenance, Inc.*, 17 AD3d 147 [*supra*] [plaintiff was entitled to the protection of Labor Law § 240 (1) where he was performing an inspection integral to the progress of an ongoing construction project at the time of his accident]; *Campisi v Epos Contracting Corporation*, 299 AD2d at 6 [Labor Law § 240 (1) was applicable in a situation where plaintiff was inspecting construction work in progress]).

"The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.* At 882 [where plaintiff was employed as a mechanic substantially to perform work that involved the alteration of a building, he enjoyed the protection of Labor Law § 240 (1) "even though he was inspecting, or more precisely, climbing a ladder, at the moment of the accident"]).

Thus, as the work to be performed by plaintiff was essential to the ongoing construction

project, plaintiff is deemed to be within the protected class intended to be covered by Labor Law § 240 (1).

Here, plaintiff has established, prima facie, that defendants are subject to liability under Labor Law § 240 (1) based upon her testimony that the beam fell on her while it was being hoisted within the elevator shaft (*see Gonzalez v Glenwood Mason Supply Company*, 41 AD3d 338, 339 [1st Dept 2007] [elevation risk fell within ambit of section 240 (1) where plaintiff was hit with a load of cinder blocks that became loose and fell on him as it was being hoisted from a flatbed truck by a fork boom]; *Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]). To this effect, Labor Law § 240 (1) is applicable because the beam "'was a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]).

In addition to the evidence that plaintiff was struck by an inadequately-secured beam, there was also evidence that defendants failed to provide safety devices as required by Labor Law § 240 (1), and that this breach was a proximate cause of plaintiff's injury (*see Zuluaga v P.P.C. Construction, LLC*, 45 AD3d 479, 479-480 [1st Dept 2007] [partial summary judgment properly granted where plaintiff, while performing asbestos removal work, was injured when he was struck by a pipe that fell from above, and the record established that no safety devices were provided]). It is well settled that "[a]bsolute liability for falling objects under Labor Law § 240 (1) arises only when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 268 [2001]; *Mendoza v Bayridge Parkway Associates, LLC*, 38 AD3d 505, 506-507 [2d Dept 2007]).

In opposition, defendants failed to raise a triable issue of fact (*Cruci v General Electric*

Company, 33 AD3d 838, 839 [2d Dept 2006]). Thus, plaintiff is entitled to summary judgment in her favor on her section 240 (1) claim against defendants.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIMS AGAINST DEFENDANTS (motion sequence number 001)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... 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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Here, contrary to defendants' contention, plaintiff was also within the class of persons that Labor Law § 241 (6) was intended to protect, as her duties were essential and integral to the progress of the project (*see McNeill v LaSalle Partners*, 52 AD3d 407, 409 [1st Dept 2008] [plaintiff's inspection of asbestos abatement work during the construction phase of the Grand

Central Terminal renovation project was essential and integral to the progress of the construction, since the abatement work could not continue unless he gave his approval]; *Aubrecht v Acme Electric Corporation*, 262 AD2d at 994).

Although plaintiff alleges multiple violations of the Industrial Code in her bill of particulars, with the exception of Industrial Code 12 NYCRR 23-6.1 (c), 23-6.1 (d), 23-6.1 (h) and 23-6.2 (d), plaintiff failed to address these Industrial Code violations in her moving papers. Thus, plaintiff is not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on those alleged violations.

Initially, it should be noted that Industrial Code 12 NYCRR 23-6.1 (c), which requires that only trained, designated persons operate hoisting equipment, is not sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Sharrow v Dick Corporation*, 233 AD2d 858, 861 [4th Dept 1996]).

In addition, Industrial Code 12 NYCRR 23-6.1 (h), which requires that loads which have a tendency to swing during hoisting be controlled by tag lines, is also not sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Morrison v City of New York*, 5 AD3d 642, 643 [2d Dept 2004]; *Smith v Homart Development Company*, 237 AD2d 77, 80 [3d Dept 1997]).

Industrial Code 12 NYCRR 23-6.1 (d) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*Hayden v 845 UN Limited Partnership*, 304 AD2d 499, 500 [1st Dept 2003]; *Rissel v Nornew Energy Supply, Inc.*, 281 AD2d 880, 880 [4th Dept 2001]).

Industrial Code 12 NYCRR 23-6.1 (d) states:

> (d) Loading. Material hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer. Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portions of such loads during transit. Suspended loads shall be securely slung and properly balanced before they are set in motion.

Here, plaintiff has submitted evidence that the suspended steel beam at issue was not securely slung and properly balanced before it was set in motion, proximately causing plaintiff's accident. No evidence has been proffered disputing that the load was not securely slung. Accordingly, plaintiff is entitled to summary judgment in her favor on that part of her Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-6.1 (d).

Initially, it should be noted that Industrial Code 12 NYCRR 23-6.2 (d) is also sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Puckett v County of Erie*, 262 AD2d 964, 965 [4th Dept 1999]).

Industrial Code 12 NYCRR 23-6.2 (d) states, in pertinent part:

> (d) Use of chains. (1) Chains shall not be used as slings in hoisting operations except for the raising and lowering of wooden piles, large timbers, large pieces of masonry or large stones.

Here, plaintiff has submitted evidence, and no party has refuted evidence that a chain, which slipped causing plaintiff's injury, was used as a sling in the hoisting of a steel beam. Accordingly, plaintiff is also entitled to summary judgment in her favor on that part of her Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-6.2 (d).

BIG A'S LIABILITY IN NEGLIGENCE FOR PLAINTIFF'S INJURIES (motion sequence number 001)

Although plaintiff's arguments as to negligence leave much to be desired (*see*

Preliminary Statement of Memorandum of Law In Support of Motion for Summary Judgment stating that "the unrefuted proof establishes that defendant, Big A Iron Works, Inc. is negligent, as a matter of law" and the conclusory arguments in ¶15 of the Affirmation in Support), Big A has not raised an issue of fact as to its non-negligence.[1] In its Affirmation in Opposition to Plaintiff's Motion for Summary Judgment, Big A only argues that plaintiff's activities did not bring her within the ambit of Labor Law statutes, and that issues of fact exist as to whether plaintiff's proximity to the elevator shaft constitutes comparative negligence on her part.

Further, although plaintiff does not argue for the application of res ipsa, that inference allows the court to make a finding of negligence. Res ipsa loquitur allows a court (or jury) to infer from circumstantial evidence that a defendant was negligent, albeit "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict" when "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

> The three requirements for the application of that doctrine are that:
>
> (1) the event [which caused the injury] must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

(*id*) [citation and internal quotation marks omitted].) Big A does not dispute that the first

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[1]Contrary to plaintiff's position in its letter dated April 9, 2010, the fact that Big A paid OSHA fines does not establish negligence as a matter of law, nor is it accurate to state that Big A's employee Albero admitted that he "improperly" rigged the steel, though the court may infer such a conclusion from the facts to which he testified.

requirement is satisfied, but argues that the second requirement is not satisfied, because Big A did not have exclusive control over the area where the incident occurred. However, this argument is not persuasive, as Big A had exclusive control over the instrumentality that caused plaintiff's injury (the beam). Further, the record does not support Big A's argument that the third element is not satisfied. There is no evidence that the beam fell on plaintiff due to any voluntary action or contribution on her part or that she contributed to the accident because she knowingly entered an area which she should not have entered.

Notably, Big A does not proffer a non-negligent reason for the accident (*see e.g., Tora v GVP Ag*, 31 AD3d 341 [1st Dept 2006] [summary judgment based on res ipsa was denied because the piece of sidewalk shed which hit pedestrians could have fallen as a result of strong winds and not as a result of a defect in the shed]). Accordingly, the court may conclude as a matter of law, that Big A was negligent in hoisting the beam, which proximately caused plaintiff's injuries and grant plaintiff summary judgment (*see O'Connor v 72 Street East Corp.*, 224 AD2d 246 [1st Dept 1996] ["[i]n view of the fact that there was no dispute that the valve manufactured by Sloan was defective, and that Sloan failed to submit any evidentiary proof in admissible form to rebut the permissible inference of negligence, summary judgment should have been granted based upon the doctrine of res ipsa loquitur"]).

DEFENDANT LIM'S COMMON-LAW INDEMNIFICATION CLAIMS AGAINST CERTIFIED AND BIG A (motion sequence number 002)

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to

the causation of the accident'" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493, 495 [1st Dept 2004]).

"[I]t is well settled that a party may settle and then seek indemnification from the party responsible for the wrongdoing as long as the settling party shows that it may not be held liable in any degree" (*Cunha v City of New York*, 12 NY3d 504, 509 [2009]); *see Kelly v Diesel Construction Division of Carl A. Morse, Inc.*, 35 NY2d 1, 5 [1974]).

To establish common-law indemnification against a party "actually responsible" for the plaintiff's work, the indemnitee must establish that the party "had direct control over the work giving rise to the injury" (*Mejia v Levenbaum*, 57 AD3d 216, 216 [1st Dept 2008]; *Tighe v Hennegan Construction Company*, 48 AD3d 201, 202 [1st Dept 2008]).

As "an owner without direction, control, or other supervisory authority over the work site at which plaintiff was injured," LIM's liability was purely vicarious, and thus, LIM is entitled to full common-law indemnification from an actively negligent contractor (*Tapia v 126 First Avenue, LLC*, 282 AD2d 220, 220 [1st Dept 2001]; *Parris v Shared Equities, Company*, 281 AD2d 174, 175 [1st Dept 2001]). To this effect, Michael Donahue (Donahue), director of LIM, testified that LIM employed Mario Abela (Abela) as the building's superintendent. Donahue maintained that Abela's only role with respect to the project was "opening and closing the building, securing it. That's it" (LIM's Notice of Motion, Exhibit F, Donahue Deposition, at 29).

In addition, Donahue explained that Abela only reported to him regarding the project

"[i]f there was a major issue" (*id.*). As the representative of LIM, Abela would attend weekly safety meetings just so that he would know what was going on at the site. Further, Abela was not responsible for filling out any daily logs or reports.

As discussed previously, Big A was the sole steel contractor on the job and was directly responsible for the rigging of the hoist mechanism which caused plaintiff's accident. In addition, testimonial evidence in the record indicates that Big A was also responsible for providing the barricades and flag men necessary for keeping other workers out of the subject area during unsafe times. To this effect, Inglese testified that he had discussions with Big A's project manager at the outset of the project about "barricading or closing off certain areas if hoisting work was being performed" (Plaintiff's Notice of Motion, Exhibit 2, Inglese Deposition, at 38). Specifically, Inglese told Big A's project manager, as well as Big A's foreman that it was necessary for Big A to "have the proper personnel there to lift," in addition to having the area "sectioned off from anybody walking through, as well as having some there ... a flag man or something, to let them know that steel was being hoisted into the stairway" (*id.* at 38-39). In fact, Inglese maintained that he even ordered Big A to set up barricades in the area and to make sure someone was in place to warn people passing through the area.

Thus, defendant LIM is entitled to summary judgment in its favor on its common-law indemnification claim against Big A.

As to defendant Certified, although there is no evidence in the record to indicate that it directed or controlled the means or methods of the hoisting work in any way, a question of fact does exist as to whether it was also responsible for making sure that the unsafe area surrounding the elevator shaft was properly barricaded off from people passing by the area,

and/or whether it was negligent in its supervision of the same. For example, it is unclear from the record how often Certified' project managers made rounds to check on safety in the area or whether they properly followed through to make sure that Big A's workers were carrying out Certified's instructions to protect the subject area.

Thus, in light of factual issues concerning whether or not any negligence on the part of Certified may have contributed to the accident, "the issue of common-law indemnification [as against Certified] is not yet ripe for adjudication" (*Murphy v WFP 245 Park Company*, 8 AD3d 161, 162 [1st Dept 2004]; *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]).

LIM'S CONTRACTUAL INDEMNIFICATION CLAIMS AGAINST CERTIFIED AND BIG A (motion sequence number 002)

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

Defendant LIM argues that it is entitled to a defense and indemnification, as well as reimbursement for attorney's fees, from both Certified and Big A, simply because there is evidence in the record that LIM and Big A added LIM as an additional insured to their liability insurance policies for the project. However, the alleged acts of adding LIM as an additional insured to said liability insurance policies did not create contractual agreements for LIM's

defense and indemnification on the part of these defendants. Thus, as it has not be demonstrated that any contractual agreements for LIM's defense and indemnification ever existed in the first place, LIM is not entitled to summary judgment in its favor on its contractual indemnification claim against defendants.

CERTIFIED'S COMMON-LAW INDEMNIFICATION CLAIM AGAINST BIG A

(motion sequence number 003)

As discussed previously, in light of factual issues concerning whether or not any negligence on the part of Certified may have contributed to the accident, "the issue of common-law indemnification [as against Certified] is not yet ripe for adjudication" (*Murphy v WFP 245 Park Company*, 8 AD3d at 162; *Correia v Professional Data Management*, 259 AD2d at 65).

CERTIFIED'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST BIG A

(motion sequence number 003)

Paragraph 12 of the subcontract between Certified and Big A (Certified/Big A subcontract) states, in pertinent part:

> Contractor or vendor shall hold the Construction Manager harmless from all liens, claims, suits, judgments, attachments or injunctions which may be either filed or brought against the Construction Manager by reason of Contractor's or Vendor's work on this contract

(Certified's Notice of Motion, Exhibit I, Certified/Big A Subcontract).

Here, as plaintiff's accident was caused as a result of Big A's work performed pursuant to the Certified/Big A subcontract, Certified would be entitled to summary judgment in its favor on its contractual indemnification claim against Big A.

Initially, it should be noted that, on its face, the indemnity provision relied upon runs

afoul of General Obligations Law § 5-322.1, as it purports to indemnify Certified for its own negligence. If, however, it is determined that plaintiff's injuries were not attributable to negligence on the part of Certified, Certified may nonetheless enforce it as "its liability will only be vicarious and purely statutory" (*Colozzo v National Center Foundation, Inc.*, 30 AD3d 251, 252 [1st Dept 2006]; *see Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 180 [1990]; *Williams v City of New York*, 67 AD3d 421, 422 [1st Dept 2009] [Court held that the third-party defendant was "not relieved of its contractual obligation to indemnify defendants by section 5-322.1, which prohibits contractual indemnification of a party that was actively negligent, but not of a party that merely had statutory vicarious liability for the negligence of another"]; *Giangarra v Pav-Lak Contracting, Inc.*, 55 AD3d 869, 871 [2d Dept 2008]).

Thus, as an issue of fact exists as to whether any negligence on the part of Certified proximately caused plaintiff's accident, the issue of whether Certified is entitled to summary judgment in its favor on its contractual indemnification as against Big A is not yet ripe for review.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Margaret Matz's motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment in her favor on her Labor Law § 240 (1) and that part of her § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-6.1 (d) and 23-6.1 (d) as against defendants Laboratory Institute of Merchandising (LIT) (hereinafter, LIM) and Certified of New York, Inc. (Certified), as well as summary judgment in her favor on the issue of liability as to whether Big A Iron Works, Inc. (Big A) is liable for her

injuries due to its negligence, is granted, and the motion is otherwise denied; and it is further

ORDERED that defendant LIM's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in its favor on its common-law indemnification claim as against defendant Big A is granted, and the motion is otherwise denied; and it is further

ORDERED that defendant Certified's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in its favor on its common-law and contractual indemnification claims as against Big A is denied; and it is further

ORDERED that the parties shall appear for trial on June 28, 2010.

DATED: April 13, 2010

This Constitutes the Decision and Order of the Court.

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE