| **Ancona v Cardel Dev., LLC** |
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| 2016 NY Slip Op 31900(U) |
| July 21, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 10-45285 |
| Judge: Andrew G. Tarantino, Jr. |
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[* 1]

SHORT FORM ORDER

INDEX No. 10-45285
CAL. No. 14-02163OT

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

***PRESENT:***

HON. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 3-31-15 (004)
MOTION DATE 5-19-15 (005)
ADJ. DATE 7-28-15
Mot. Seq. #004-MD
#005- MG

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RAYMOND ANCONA,

Plaintiff,

- against -

CARDEL DEVELOPMENT, LLC,

Defendant.

CELLINO & BARNES, P.C.
Attorney for Plaintiff
600 Old Country Road, Suite 500
Garden City, New York 11530

MULHOLLAND, MINION, DAVEY, MCNIFF & BEYRER
Attorney for Defendant/Third-Party Plaintiff
374 Hillside Avenue
Williston Park, New York 11596

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CARDEL DEVELOPMENT, LLC,

Third-Party Plaintiff,

- against -

CEDAR DESIGN, INC.,

Third-Party Defendant.

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP
Attorney for Third-Party Defendant
17 West John Street, Suite 200
Hicksville, New York 11801

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Upon the following papers numbered 1 to 57 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18, 19 - 34 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 35 - 38, 39 - 51 ; Replying Affidavits and supporting papers 52- 55, 56 -57 ; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

***ORDERED*** that the motion (004) by third-party defendant Cedar Design, Inc. and the motion (005) by defendant/third-party plaintiff Cardel Development, LLC, are consolidated for the purposes of this determination; and it is

***ORDERED*** that the motion by third-party defendant Cedar Design, Inc. for, inter alia, summary judgment dismissing the third-party complaint against it is denied; and it is

***ORDERED*** that the motion by defendant/third-party plaintiff Cardel Development, LLC, for summary judgment dismissing the common law negligence and Labor Law §§ 241 (6) and 200 claims against it is granted.

Plaintiff Raymond Ancona commenced this action to recover damages for personal injuries he allegedly sustained on November10, 2010, while working on the construction of a new single family home located at 62 Seagate Lane in Sagaponack, New York. Plaintiff allegedly fell and injured himself while he was installing shingles on the new roof of the premises. Defendant/third-party plaintiff Cardel Development, LLC (" CDL"), was the general contractor for the project. CDL hired plaintiff's employer, third-party defendant Cedar Design, Inc. ("Cedar"), to perform roofing and siding services for the new construction. By way of his complaint, plaintiff alleges causes of action against CDL for common law negligence, and violations of Labor Law §§ 200, 240 (1), and 241(6). CDL joined issue denying plaintiff's claims and asserting affirmative defenses. Thereafter, CDL commenced a third-party action against Cedar seeking contribution, common law and contractual indemnification, and damages related to Cedar's alleged negligence.

Cedar now moves for summary judgment dismissing the third-party complaint against it on the grounds CDL's common law indemnification claim is barred by section 11 of the Workers' Compensation Law, and the indemnification clause purportedly entitling it to contractual indemnification is void under the General Obligations Law, as it impermissibly seeks to indemnify CDL against its own negligence. CDL opposes the motion, arguing, inter alia, that the General Obligations Law does not bar it from obtaining indemnification where, as in this case, it did not negligently cause or contribute to plaintiff's accident, and that it may obtain contractual indemnification, even in the absence of a grave injury, since Cedar expressly agreed to such indemnification. Additionally, CDL asserts that Cedar's motion for summary judgment must be denied, as triable issues exist as to whether plaintiff sustained a "grave injury" and, if so, whether CDL's negligence, if any, caused or contributed to such injury.

By way of a separate motion, CDL moves for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 241 (6) and 200 claims. CDL argues that it never possessed the authority to supervise the means or method of plaintiff's work, and that plaintiff failed to assert violations of specific or applicable provisions of the Industrial Code as predicates for his Labor Law §241 (6) claim. Noting that CDL failed to seek dismissal of his Labor Law § 240 (1) claim, plaintiff voluntarily withdraws his common law negligence and Labor Law § 200 claims. However, plaintiff opposes the branch of CDL's motion seeking dismissal of his cause of action under Labor Law § 241 (6) on the basis the alleged violations of 22 NYCRR 23-1.7 (b) and 22 NYCRR 23-1.24 (b) are sufficiently specific and applicable to support his claim.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

Initially, the court grants the branch of CDL's motion for summary judgment seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims, as plaintiff voluntarily withdrew those causes of action. Moreover, the branch of CDL's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim based on the alleged violations of 22 NYCRR 23-1.7 (b) and 22 NYCRR 23-2.6 is granted, as those provisions of the Industrial Code, which regulate the use of safety devices meant to guard against hazardous openings and the construction of exterior masonry walls, are not applicable under the circumstances of this case (*see* ***Scribner v State of New York***, 130 AD3d 1207, 13 NYS3d 637 [3d Dept 2015]; ***Parker v 205-209 E. 57th St. Assoc., LLC***, 100 AD3d 607, 953 NYS2d 635 [2d Dept 2012]; ***Maldonado v Townsend Ave. Enters., Ltd. P'ship***, 294 AD2d 207, 741 NYS2d 696 [1st Dept 2002]). As to the alleged violations of 22 NYCRR 23-1.5, 22 NYCRR 23-1.15, 22 NYCRR 23-1.16 and 22 NYCRR 23-1.17, such sections relate, respectively, to the general responsibilities of employers, and the requirements for the use and construction of safety railings, lifelines, tail lines, safety belts and harnesses, and either are too general or inapplicable under the circumstances of this case (*see* ***Trombley v DLC Elec., LLC***, 134 AD3d 1343, 21 NYS3d 498 [3d Dept 2015]; ***Mouta v Essex Mkt. Dev. LLC***, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Thompson v Sithe/Independence, LLC***, 107 AD3d 1385, 967 NYS2d 279 [4th Dept 2013]; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 870 NYS2d 111 [2d Dept 2008]). Moreover, CDL demonstrated that 22 NYCRR 23-1.24 (b), which governs the use of safety devices on roofs more than 20 feet above the ground and bearing a slope greater than 1:4, is inapplicable under the circumstances of this case, as its employees gave uncontradicted testimony that the roof on which plaintiff was working on the day of the accident measured only 18 feet from the ground and did not have a slope greater than 1:4 (*see* ***D'Acunti v N.Y. City Sch. Constr. Auth.***, 300 AD2d 107, 751 NYS2d 459 [1st Dept 2002]; ***Amirr v Calcagno Constr. Co.***, 257 AD2d 585, 684 NYS2d 280 [2d Dept 1998]). Accordingly, CDL's motion for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200 and 241 (6) claims against it is granted. The court notes, however, that plaintiff's remaining claim under Labor Law § 240 (1) is continued against CDL.

Turning to the branch of Cedar's summary judgment motion seeking dismissal of the third-party claims against it, claims for common law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury (*see* ***Fleming v Graham***, 10 NY3d 296, 857 NYS2d 8 [2008];

***Keita v City of New York***, 129 AD3d 409, 11 NYS3d 20 [1st Dept 2015]). Workers' Compensation Law § 11 describes a "grave injury" to the brain as "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." Parties seeking to establish or disprove the existence of a grave injury to the brain must submit, among other things, expert testimony confirming the degree to which, if any, the plaintiff's injuries have left him or her "no longer employable in any capacity" (***Rubeis v Aqua Club, Inc.***, 3 NY3d 408, 413, 788 NYS2d 292 [2004]; *see* ***Purcell v Visiting Nurses Found. Inc.***, 127 AD3d 572, 8 NYS3d 279 [1st Dept 2015]; ***Bush v Mechanicville Warehouse Corp.***, 79 AD3d 1327, 912 NYS2d 768 [3d Dept 2010]).

Although Cedar met its prima facie burden on the motion by submitting, among other things, the affidavit of a neurologist stating that plaintiff did not sustain injuries that would render him permanently unemployable in any capacity (*see* ***Purcell v Visiting Nurses Found. Inc.***, 127 AD3d 572, 8 NYS3d 279 [1st Dept 2015]; ***Barreiros v JJR Assocs.***, 302 AD2d 544,755 NYS2d 297 [2d Dept 2003]; ***Dunn v Smithtown Bancorp***, 286 AD2d 701, 730 NYS2d 150 [2d Dept 2001]), in opposition, plaintiff raised a triable issue warranting denial of the motion (*see* ***Bush v Mechanicville Warehouse Corp.***, 79 AD3d 1327, 912 NYS2d 768; ***Eddine v Federated Dep't Stores, Inc.***, 72 AD3d 487, 899 NYS2d 164 [1st Dept 2009]; ***Mendez v Union Theol. Seminary in City of N.Y.***, 26 AD3d 260, 809 NYS2d 77 [1st Dept 2006]). Specifically, plaintiff submitted the results of a neurological evaluation conducted by Jerid Fisher, Ph. D., which concludes that due to neurobehavioral, cognitive, and physical deficits caused by plaintiff's brain injury, plaintiff "has [sustained] a permanent disability that will prevent him from ever working in gainful competitive employment." Since a triable issue exists as to whether plaintiff did sustain a "grave injury" to his brain, summary judgment in Cedar's favor dismissing the contribution and common law indemnification claims against it, is denied (*see* ***Bush v Mechanicville Warehouse Corp.***, *supra*; *compare* ***Purcell v Visiting Nurses Found. Inc.***, *supra*).

As for the branch of Cedar's motion seeking summary judgment dismissing the third-party contractual indemnification claim against it, the indemnification agreement between Cedar and CDL provides, in pertinent part, as follows:

> The Subcontractor hereby agrees to defend, indemnify and hold harmless Cardel and the Owner from and against any and all liability, loss, damage, costs and/or expenses of any kind (including reasonable attorney's fee) that Cardel or the Owner may suffer as a result of any demands made, claims brought or actions filed against Cardel or the Owner arising out of the performance of its work. . . Subcontractor shall indemnify and defend Contractor and Owner against any and all claims and costs, including attorney's fees and court costs, arising from or as a result of Subcontractor's performance of the Work, including but not limited to those claims alleging a failure to maintain a safe work environment, failure to perform the Work in a safe manner, or failure to comply with OSHA standards....The Subcontractors agree to pay Cardel and the Owner's reasonable costs and attorney's fees in the event Cardel and/or the Owner retain the services of an attorney to enforce this agreement, or any portion hereof.

Although the abovementioned agreement impermissibly fails to include the necessary savings language to prevent a party from indemnifying itself against its own negligence (*see* General Obligations Law § 5-322.1; *see also* ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 786, 795, 658 NYS2d 903 [1997]), even indemnification agreements which fail to include such language may be enforced where the party to be indemnified is found to be free of any negligence (*see* ***Brown v Two Exch. Plaza Partners***, 76 NY2d 172, 179, 556 NYS2d 991 [1990]; ***Collins v Switzer Constr. Group, Inc.***, 69 AD3d 407, 408, 892 NYS2d 94 [1st Dept 2010]). "[T]he one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of … statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Therefore, as the common law negligence and Labor Law §§ 241 (6) and 200 claims have been dismissed against CDL, and its liability for plaintiff's injuries, if any, would be statutory under Labor Law § 240 (1), the branch of Cedar's motion seeking dismissal of the third-party contractual indemnification claim against it is denied.

Dated: JUL 21 2016

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION