Andeliz v Hanac Corona Hous. Dev. Fund Corp.
2024 NY Slip Op 33901(U)
October 23, 2024
Supreme Court, Kings County
Docket Number: Index No. 510764/2018
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of October, 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

NICIO ANDELIZ,

Plaintiff,

-against-

HANAC CORONA HOUSING DEVELOPMENT FUND CORPORATION, HANAC, INC., BRUNO FRUSTACI, INC., and J.W. ELECTRIC, CORP.,

Defendants.

Index No.: 510764/2018

DECISION AND ORDER

The following papers numbered 1 to read herein	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	136-152; 152-169
Cross Motion and Affidavits (Affirmation) Annexed	175-189
Answers/Opposing Affidavits (Affirmations)	190-191; 192-209; 212-215
Reply Affidavits (Affirmations)	210; 216; 219
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this Labor Law action to recover damages for personal injuries, defendants Hanac Corona Housing Development Fund Corporation (HCHDFC), Hanac, Inc. (H-Inc.) and Bruno Frustaci, Inc. (Bruno) (collectively the "moving defendants") move (Seq. 09), for an order, pursuant to CPLR § 3212, granting summary judgment: dismissing plaintiff's complaint and the Labor Law §§ 240(1), 241(6), 200 and

common law negligence claims; dismissing the contractual and common law indemnification crossclaims asserted against them by co-defendant J.W. Electric, Corp. (JW Elec.), and granting their common law and contractual indemnification claims asserted against JW Elec. Defendant JW Elec. moves (Seq. 10), for an order, pursuant to CPLR § 3212 granting summary judgment dismissing plaintiff's complaint as to claims predicated on the Labor Law §§ 200, 240(1) and 241(6) claims asserted therein as it is not a valid Labor Law defendant. Finally, plaintiff cross-moves (Seq. 11), for an order, pursuant to CPLR § 3212 granting summary judgment, as to liability against defendants HCHDFC and Bruno on the Labor Law § 241(6) claims.

BACKGROUND

According to the complaint, plaintiff was injured on May 10, 2018, while working on the roof of a new residential construction site located at 101 Street, Corona, Queens, NY (the "premises" or "project"). HCHDFC (as legal owner) and H-Inc. (as beneficial owner), together owned the premises (the "defendant owners").[1] The defendant owners entered into a contract with Bruno to serve as the general contractor. Bruno entered into a contract with non-party Admiral Air Conditioning ("Admiral"), plaintiff's employer, as the heating, ventilation, and air conditioning ("HVAC") subcontractor and with JW Elec. as the electrical subcontractor. On the date of the accident, plaintiff was installing ductwork around a Swegon air conditioning ("AC") unit (the "AC unit") located on the roof of the premises. Plaintiff was assisted by his co-worker and immediate supervisor Nelson Farardo

[1] *See* NYSCEF Doc. No. 137 at par. 18 regarding the stated "ownership" type.

("Mr. Farardo"), who was attempting to connect a metal "elbow" to the AC unit, when he received an electrical shock, purportedly from the "adjacent air handling equipment". In an attempt to free Mr. Farardo from the unit, plaintiff alleges he threw the "elbow" aside but as he turned away, his left side touched the unit whereupon he too was shocked. The shock caused him to fall backward. The only two individuals present at the time of the accident were plaintiff and Mr. Farardo.

Plaintiff commenced this action by filing a summons and verified complaint on May 24, 2018 (NYSCEF Doc. No. 1) alleging violations of Labor Law §§ 200, 240 (1), and 241 (6), as well as claims for common law negligence, as amplified in the Verified and Amended Bill of Particulars.[2] Issue was joined when defendants filed their answer on November 12, 2019, and asserted 18 affirmative defenses (NYSCEF Doc No. 6).[3]

PROCEDURAL STATEMENT AND PRELIMINARY DISCUSSION

A. Plaintiff's Concession

As a preliminary matter, plaintiff does not oppose defendants' motion (Seq. 9) insofar as it requests dismissal of plaintiff's causes of actions based on common law negligence, Labor Law §§ 200, 240(1), and 241(6) predicated on Industrial Code §§ 23-1.15; 23-1.7; 2-1.15; 23-1.16; 23-1.7; 23-1.21; 23-5; and 23-9.6 (*see, e.g.*, NYSCEF Doc. No. 176 at par. 5; NYSCEF Doc. No. 190 at par. 4; NYSCEF Doc. No. 212 at par. 4). Plaintiff continues to assert a claim under Labor Law § 241(6), predicated on Industrial

[2] Plaintiff also filed a Supplemental Summons and Amended Verified Complaint on November 5, 2018 (NYSCEF Doc. No. 19).
[3] By stipulation dated May 22, 2019, defendant owners discontinued all crossclaims asserted against defendant Bruno (NYSCEF Doc. No. 35).

Code § 23-1.13(b)(4) "Electrical Hazards". Accordingly, that part of moving defendants' motion (Seq. 09) for an order dismissing plaintiff's common law negligence, Labor Law §§ 200 and 240(1) claims is granted, and said claims are dismissed. JW Elec.'s motion (Seq. 10) for the same relief is granted, except the claims premised on common law negligence since JW Elec. did not move in this regard. Plaintiff's motion (Seq. 11) as to liability, is now reduced to the claim asserted under Labor Law § 241(6) insofar as it is predicated on a violation of Industrial Code § 23-1.13(b)(4), "Electrical Hazards".

B. Plaintiff's Cross-Motion

Moving defendants and JW Elec. assert, that plaintiff's cross-motion as to liability (Seq. 11), filed on March 27, 2024, is untimely. This argument is without merit. An untimely cross-motion for summary judgment may nevertheless be considered by the court "where a timely motion was made on nearly identical grounds" (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept. 2019]; *Sheng Hai Tong v K & K 7619, Inc.,* 144 AD3d 887, 890 [2d Dept. 2016]). Here, although plaintiff's cross-motion was submitted beyond the summary judgment filing deadline of November 27, 2023 (the date defendants filed their motions), it involved no new factual allegations or new theories of liability, and caused no prejudice to moving defendants or JW Elec. Moreover, moving defendants and JW Elec. were put on sufficient notice that the cause of action alleging violations of Industrial Code § 23-1.13(b)(4), "Electrical Hazards", related to the AC unit through the plaintiff's bill of particulars and deposition testimony. "Thus, they cannot reasonably claim prejudice or surprise" (*Klimowicz v Powell Cove Assoc.,* LLC, 111 AD3d 605, 607 [2d Dept. 2013]).

THE PARTIES' CONTENTIONS

Motion Seq. 09

In light of plaintiff's concession, the Court now considers those parts of moving defendant's motion (Seq. 09) seeking dismissal of plaintiff's remaining Labor Law § 241(6) claim and all crossclaims asserted against them by JW Elec. for contractual and common law indemnification. Moving defendants also seek an order granting them summary judgment as to their contractual and common law indemnification claims asserted against JW Elec., or in the alternative, a conditional award of each.

The moving defendants concede that plaintiff's claims under § 241(6) premised on Industrial Code § 23-1.13(b)(4), are viable in this action (*see, e.g.,* NYSCEF Doc. No. 210 at pars. 4-7), but argue, as set forth in their opposition to plaintiff's cross-motion on liability (Seq. 11) and in reply to plaintiff's opposition to Motion Seq. 09 (see NYSCEF Doc. No. 212), that plaintiff's credibility is at issue regarding the happening of the accident and that plaintiff's injuries were not caused as a result of the alleged shock, as the AC unit was designed to prevent its metal exterior from gathering an electrical charge.

In opposition, plaintiff contends that the moving defendants are liable under § 241(6) irrespective of any supervision and control of the roof area where the accident occurred; and that JW Elec. is directly liable. Plaintiff contends all defendants violated Industrial Code § 23-1.13(b)(4) regarding "Electrical Hazards" in failing to provide plaintiff with proper protection against electric shock by de-energizing the applicable circuits, grounding the circuits or guarding the circuits with effective insulation. Plaintiff

emphasizes that the AC unit was installed on the roof of the premises the day before the accident and energized/powered-on by a worker from JW Elec.

JW Elec. takes no position on moving defendants' motion vis-à-vis plaintiff (see NYSCEF Doc. No. 192 at par. 2). JW Elec. however opposes that part of moving defendants' motion which seeks summary judgment on their claims for contractual indemnity and/or contribution. As to these claims, JW Elec. contends the moving defendants failed to establish that plaintiff's accident resulted from or arose out of the work it performed at the premises and that as a result, moving defendants have failed to demonstrate their entitlement to judgment as a matter of law on their claims of contractual indemnity and/or contribution. As a factual matter, JW Elec. contends that the accident was caused by a pre-existing, pre-wired, and pre-grounded electrical unit, on which JW Elec. never performed any work (NYSCEF Doc. No. 192 at par. 4).

Moving defendants reply to JW Elec.'s opposition contending it is clear that plaintiff's accident arose from the work performed by JW Elec. as it related to the improper installation, insulation and wiring of the AC unit. On this basis, they argue the indemnification provision of the contract between defendants and JW Elec. "kicks in" and is controlling. Additionally, moving defendants argue they had no actual authority over the manner and means by which plaintiff performed his work, which might subject them to liability. As to plaintiff's opposition, moving defendants argue it is physically impossible for plaintiff to have been injured in the manner claimed, as the AC unit was specifically designed to prevent the type of accident and resulting injuries sustained by plaintiff. Accordingly, they maintain their motion must also be granted for this reason.

Motion Seq. 10

As with Motion Seq. 09, the Court only considers that part of JW Elec.'s motion (Seq. 10) seeking dismissal of plaintiff's Labor Law § 241(6) claim. In this context, JW Elec. argues that as the electrical subcontractor having nothing to do with ductwork installation performed by plaintiff, and since it is not the owner or general contractor or an agent thereof, it lacked the authority to supervise or control the work performed by plaintiff at the time of the accident. Thus, it argues, it cannot be subject to statutory liability under Labor Law § 241(6).

Plaintiff opposes contending that as the electrical contractor, JW Elec. agreed to be bound by all federal, state and local rules. Further, plaintiff argues, JW Elec. was responsible for and was required to take all safety precautions, but breached these obligations, when in the course of its work, it improperly insulated and energized the AC unit, and inadequately grounded certain equipment related to the AC Unit.

In reply, JW Elec. argues, it did not have supervisory control or authority for the work being performed by plaintiff, as it relates to the assembly, installation, testing or maintenance of the AC unit.[4] JW Elec. also asserts it had no authority to implement any safety practices or measures related to plaintiff's work. JW Elec. also points to plaintiff's own negligence in failing to check whether the AC unit was powered on (or off) before starting his work. Finally, JW Elec. contends it was not an "agent" for moving defendants which might subject it to liability, as a subcontractor is not deemed a statutory agent under

[4] See NYSCEF Doc. No. 210. JW Elec. also contends defendants did not timely oppose its motion and that the time to do so has expired (as of the April 2, 2024 filing).

the Labor Law unless it had control over the work causing the injury – which JW Elec. asserts it did not.

Moving defendants oppose[5] contending plaintiff did not timely file the cross motion, as same was due on or before January 2, 2024 and the within motion wasn't filed until March 27, 2024. Defendants also contend the motion does not relate back to any of the other motions filed since the other motions did not address plaintiff's Labor Law § 241(6) claim. For these reasons, defendants argue plaintiff's motion should be denied. Defendants also contend plaintiff is not credible as to the happening of the accident; whether his injuries occurred as a result of the electric shock and whether the AC unit involved could have even generated such a shock, given the bonding applied to the unit.

Motion Seq. 11

At issue is that part of plaintiff's cross motion (Seq. 11) seeking an order granting summary judgment as to liability on the Labor Law § 241(6) claim based on a violation of Industrial Code § 23-1.13(b)(4), as asserted against moving defendants. Plaintiff argues that the defendant owners and general contractor are liable under Labor Law § 241(6) irrespective of any supervision and control of the roof area where the accident occurred. Plaintiff argues they violated Industrial Code § 23-1.13(b)(4) regarding "Electrical Hazards" by failing to provide plaintiff proper protection against electric shock by de-energizing the applicable AC unit circuits, grounding them, or guarding the circuits by effective insulation. The moving defendants oppose for the same reasons asserted in

[5] See moving defendants' opposition to plaintiff's cross motion (Seq. 11) and to JW Elec.'s motion (Seq. 10) at NYSCEF Doc. No. 212.

opposition to Motion Seq. 10. Finally, plaintiff argues the motion is based on identical grounds as those argued by defendants in their motion Seq. 9, and is therefore permitted, even if untimely, as both motions address whether plaintiff's Labor Law claims are valid or not.

DISCUSSION

Summary Judgment Standard

"To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept. 2015], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*). If there are triable issues of fact as to how the alleged accident occurred, then the motion should be denied (*Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dept. 2022]). "Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Murray v Community House Development Fund Company, Inc.*, 223 AD3d 675, 677 [2d Dept. 2024]).

Additionally, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, and where conflicting inferences may be drawn, the court must draw those most favorable to the nonmoving

party" (*Murray*, 223 AD3d at 676-677; *Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002, 1005 [2d Dept. 2016]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Khutoryanskaya v Laser & Microsurgery, P.C.*, 222 AD3d 633, 635 [2d Dept. 2023]).

The Motions (Seqs. 9, 10 & 11) relating to Labor Law § 241(6)

The defendant owners HCHDFC and H-Inc., general contractor Bruno and electrical subcontractor JW Elec., all move for summary judgment dismissing plaintiff's surviving Labor Law § 241(6) claim. Labor Law § 241 (6) provides, in pertinent part, that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

This statute imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc.*, 226 AD3d 960, 962 [2d Dept. 2024]; *Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 773 [2d Dept. 2024]). "In order to establish liability under Labor Law § 241 (6), a plaintiff must 'establish the violation of an Industrial Code provision which sets forth specific safety standards,' and which 'is applicable [to the facts] of the case'" (*Chuqui,* 226 AD3d at 962). "Liability under this statute is limited to accidents where the work being performed involves construction, excavation or demolition work" (*Peluso v 69 Tiemann Owners Corp.*, 301 AD2d 360, 360 [1st Dept. 2003]).

In support of his claim under Labor Law § 241(6), and as amplified in the Amended Bill of Particulars,[6] plaintiff relies on Industrial Code § 23-1.13(b)(4), "Electrical Hazards", which provides in relevant part that:

> "No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means . . . " (*see e.g., Snowden v New York City Tr. Auth.*, 248 AD2d 235, 236 [1st Dept. 1998]).

Industrial Code § 23-1.13(b)(4) is not limited to incidents concerning actual contact with energized circuits (*Bardouille v Structure-Tone, Inc.,* 282 AD2d 635, 636 [2d Dept. 2001] or where a plaintiff suffered burns and not an electrical shock (*Snowden,* 248 AD2d at 236). Here, the defendant owners concede that Industrial Code § 23-1.13 (b)(4) is applicable to the facts of this case but contend the alleged violation of this section was not a proximate cause of plaintiff's accident, as the accident could not have occurred as plaintiff suggests.

Moving defendants' proof consisted of the deposition testimony of plaintiff (given February 10th, July 21st, August 25th and December 31st of 2021); Steven Fursa of Bruno (given October 25, 2022; "Mr. Fursa"); Joseph Williams, owner of JW Elec., (given March 23, 2023; "Mr. Williams") and Dennison Celestine (given September 15, 2023; "Mr. Celestine"), both of JW Elec.; non-party Mr. Farardo (given October 23, 2023); plaintiff's

[6] Plaintiff's Amended Verified Complaint (NYSCEF Doc. No. 19) alleges generally claims based on violations of the Labor Law and Rule 23 of the Industrial Code of the State of New York, among others. As demanded by defendants, plaintiff amplified these claims in the Verified and Amended Bill of Particulars (*see* NYSCEF Doc. Nos. 107 and 108, respectively).

Bill of Particulars and supplements thereto; and the contracts between Bruno and Admiral and those between Bruno and JW Elec., among other things.

At his deposition (NYSCEF Doc. No. 145), plaintiff testified he was employed as a helper by non-party Admiral and was in charge of working on the duct system. During the nine months that he was on the jobsite, only someone from Admiral told him how to do his job and only Admiral provided his tools or equipment. He and Mr. Farardo did not have access to the control box for the AC unit on the day of the accident and they both were wearing work gloves at the time of the accident with rubber on the palm-side of the glove. When describing the installation process to attach the duct to the AC unit, plaintiff stated he held the duct in place as Mr. Farardo screwed the duct to the AC unit using his hand-held battery-powered impact drill.

According to plaintiff, immediately prior to the accident, he was standing on the righthand side of the AC unit holding the piece of duct that was going to be installed and Mr. Farardo was standing on the lefthand side of the AC unit. As he held the piece of duct up against the AC unit, Mr. Farardo received an electrical shock when he attempted to screw the duct to the AC unit. After Mr. Farardo received the electrical shock, plaintiff dropped the piece of ductwork and as he was attempting to move away, his body came into contact with the AC unit and he received an electrical shock as well; causing him to fall to the ground. Plaintiff stated Admiral did not have any extension cords on the jobsite the day of the accident; that he had never heard of JW Elec. and that there were no electricians on the site on the date of his alleged accident.

Mr. Farardo testified at his deposition (NYSCEF Doc. No. 148) that he and plaintiff were installing the final connection that went from the AC unit to the main ductwork and that plaintiff had been standing on his right side in between the ductwork and the AC unit. He was shocked when trying to hold the elbow to the unit, he tried to talk but could not. He estimated the shock lasted eight to ten seconds. When plaintiff grabbed the elbow and when he let go, plaintiff said he felt the shock. He saw plaintiff drop to the ground and fall to his knees and that it was at this point plaintiff told him he had been shocked.

Mr. Fursa, the project superintendent for Bruno, testified at his deposition (NYSCEF Doc. No. 146) that Bruno was the general contractor hired, he believed, by owner HCHDFC and that Admiral was hired to perform the HVAC work in the project. He did not know for certain whether Admiral connected the AC unit to the power. He also stated that Bruno was hired to perform all aspects of the construction of the project, in addition to hiring all subcontractors. Mr. Fursa believed that Admiral made the actual connections to the unit.

While Mr. Fursa did not know how plaintiff got hurt, he did not believe plaintiff was shocked by the AC unit; based upon his investigation the day after the accident in which he came across a "fried" outlet located on the bulkhead some distance away from where plaintiff and Mr. Farardo had been working. According to Mr. Fursa, the outlook looked like it "blew up" and, it appeared someone had plugged something into it which caused an overload and a fire. He further testified that the outlet was a GFCI outlet (ground faulted) outlet and that when something is plugged into it, there's a surge of electrical current causing it to overload and "pop", thereby tripping the outlet. Mr. Fursa stated that

based on the height of the outlet and the injuries sustained to plaintiff, he believed plaintiff bent over, plugged a bad tool or a cord into the outlet, causing an arch flash (i.e., a strong burst of energy), causing the injuries to plaintiff.

Mr. Williams, on behalf of JW Elec., testified at his deposition (NYSCEF Doc. No. 147) that JW Elec. was hired by Bruno as the electrical contractor at the premises and that pursuant to that engagement, JW Elec. "performed" the wiring to the AC unit. While he was not physically present at the premises on the date of the accident, JW Elec.'s employees, Dennison Celestine and Steve Harris, were present, and he first learned of the accident around 5pm that same afternoon. The superintendent at the job told him what happened. When he arrived at the premises later that evening, he inspected the roof area where the accident occurred but found no signs that someone had been shocked, as the AC unit was not powered on and he saw no burn marks or evidence of arcing. Further, he touched the AC unit, in the rain, and was not shocked as he found no errant electricity at the location of the AC unit. On the following day, Mr. Williams found a burnt GFCI outlet about 10-25 feet away from the AC unit which was an indication there had been arcing, but he did not know what could have caused the condition. He later theorized that the burnt outlet could have been caused by something that shorted out, like an extension cord or tool, but he really didn't know how plaintiff and Mr. Farardo were shocked.

Mr. Celestine, also testified for JW Elec. At his deposition (NYSCEF Doc. No. 149), he stated the company was hired to get the electrical work done for "every aspect of the building that required electrical power." This included setting up electrical power for any HVAC or air conditioning units on the roof. He stated that JW Elec. did not install the

unit in question; rather, Admiral performed the entire installation. He was working in the cellar the day of the accident when he got a call that someone had been electrocuted and when he went to the roof, he observed that the switches were turned off. He didn't know how plaintiff and Mr. Farardo got electrocuted but stated "they were using the grinder with an extension cord plugged into one of our outlets on the bulkhead". Mr. Celestine observed that the extension cord was in "shoddy" condition, that the switch to the ductwork was in the off position and that he was not shocked when he touched the AC unit or the ductwork. He surmised that the puddles of water on the roof combined with the shoddy extension cord "probably send [sic] little surge current somewhere." (id., pg. 76, ln. 17-23)

The conflicting version of the accident presented by the deposition testimony of plaintiff and Mr. Farardo, juxtaposed against that of Mr. Fursa, Mr. Williams, and Mr. Celestine, present credibility issues which cannot be resolved on a motion for summary judgment (*Mermelstein v Campbell Fitness NC, LLC*, 201 AD3d 923, 924 [2d Dept. 2022]). Further, Bruno failed to establish, prima facie, that it was not acting as a general contractor or agent of the owner of the premises when the accident occurred (*Londono v Dalen, LLC*, 204 AD3d 658, 659 [2d Dept. 2022]). Based on the foregoing record, the defendant owners, Bruno and JW Elec. failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241 (6), predicated on Industrial Code § 23-1.13(b)(4).

Since moving defendants failed to make a prima facie showing, that branch of their motion (Seq. 09) for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241(6) premised on Industrial Code § 23-1.13(b)(4) is denied, without

regard to the sufficiency of the plaintiff's opposition papers (*Winegrad,* 64 NY2d at 853). That branch of JW Elec.'s motion (Seq. 10) seeking the same relief is similarly denied. Finally, that branch of plaintiff's motion (Seq. 11) as to liability under Labor Law § 241(6) premised on the same Industrial Code section is denied, as there are material facts in dispute regarding how the accident occurred.

The Contractual and Common-Law Indemnification Claims

HCHDFC, H-Inc. and Bruno seek contractual indemnification against JW Elec. based on the subcontract agreement (NYSCEF Doc. No. 144) between Bruno and JW Elec., alleging they were not at fault for plaintiff's accident, did not control plaintiff's work and did not create or have notice of any alleged dangerous condition. "The right to contractual indemnification depends upon the specific language of the contract" (*Crutch v 421 Kent Development, LLC*, 192 AD3d 982, 983 [2d Dept. 2021]). "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 circumstances" (*Selis v Town of North Hempstead*, 213 AD3d 878, 880 [2d Dept. 2023]). "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'" (*Reisman v Bay Shore Union Free School Dist.,* 74 AD3d 772, 773 [2d Dept. 2010], *quoting Cava Constr. Co., Inc. v Gealtec Remodeling Corp.,* 58 AD3d 660, 662 [2d Dept. 2009]).

Here, the relevant indemnity provision set forth in Article 10(a)(b) of the subcontract agreement provides that JW Elec. is obligated to indemnify the moving defendants from:

> "Any actual or alleged injury or death to any person or damage to or destruction of any property (including loss of use thereof) or any other damage or loss by whomsoever suffered resulting from or arising out of or in connection with or as a consequence of, the provision of the Work, as well as any additional, extra or add-on work, which were caused, in whole or in part, by Subcontractor, or any person or entity employed, either directly or indirectly, by the Subcontractor, including any Sub-subcontractors and their employees . . . ." (NYSCEF Doc. No. 144 at p. 6).

Under the facts of this matter, moving defendants failed to establish their prima facie entitlement to judgment as a matter of law on their contractual indemnification claim, as triable issues of fact are raised regarding whether they are free from negligence and whether the accident arose out of JW Elec.'s work. Moreover, there are questions whether Bruno exercised some degree of control over the work surrounding the AC unit installation as indicated by the weekly meetings, referred to as "Toolbox Talks", conducted by Bruno's site-safety officer, Mr. Fursa, with the foremen of all the subcontractors, including those of Admiral and JW Elec. (NYSCEF Doc. No. 146, p. 20-21). The part of moving defendant's motion for contractual indemnification is therefore denied.

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*De Heras v Avant Gardner, LLC*, 224 AD3d 883, 883-884 [2d Dept. 2024] [citations omitted]). "The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, that is, the defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" (*id.*). However, "where a party is held liable at least partially because of its own

negligence, contribution against other culpable tort-feasors is the only available remedy" (*id.*).

Here, there remains a question of fact as to whether the moving defendants are not at least partially liable for plaintiff's accident, which forecloses their common-law indemnification claim. Accordingly, that part of their motion (Seq. 09) for common law indemnification is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that that part of defendants HCHDFC, H-Inc. and Bruno's motion (Seq. 09) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing: (1) plaintiff's Labor Law §§ 240(1), 241(6) and 200 and common law negligence claims, (2) all crossclaims asserted against them by co-defendant JW Elec., and (3) the common law and contractual indemnification claims asserted against JW Elec., is granted; except as to that part of the motion seeking dismissal of plaintiff's Labor Law § 241(6) claim, predicated on Industrial Code § 23-1.13(b)(4) "Electrical Hazards"; and it is further

ORDERED that defendant JW Elec.'s motion (Seq. 10) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims, is granted except as to the § 241(6) claim, predicated on Industrial Code § 23-1.13(b)(4) "Electrical Hazards"; and it is further

ORDERED that plaintiff's motion (Seq. 11) for an order, pursuant to CPLR § 3212, granting summary judgment as to liability on the Labor Law § 241 (6) claim, predicated on Industrial Code § 23-1.13(b)(4) "Electrical Hazards", is denied.

All remaining arguments raised on the motions, and evidence submitted by the parties in connection thereto, have been considered by this Court, and are denied.

This constitutes the decision and order of the Court.

E N T E R

J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
FILED
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