Mauriello v Battery Park City Auth.
2021 NY Slip Op 30331(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 160687/14
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CARL T. MAURIELLO

INDEX NO. 160687/14

MOT. DATE

- v -

MOT. SEQ. NO. 010, 012 and 013

BATTERY PARK CITY AUTHORITY et al.

The following papers were read on this motion to/for summary judgment, dismiss, cross-motion etc

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____

Replying Affidavits ECFS Doc. No(s)._____

This action presents an interesting intersection of maritime workers' compensation law and the New York Labor Law governing construction site injuries. It is further complicated by the fact that plaintiff's complaint was voluntarily dismissed and the New York State Insurance Fund ("SIF") has intervened to prosecute plaintiff's claims in order to recover monies expended in connection with workers' compensation benefits paid to plaintiff. This action was commenced by plaintiff Carl Mauriello due to injuries he sustained on December 23, 2013 while walking on Pier A, a structure located on the Hudson River at 22 Battery Place, New York, New York. In an order dated August 14, 2018, Mauriello's attorney was relieved as counsel for plaintiff. Thereafter, plaintiff proceeded *pro se.*

In an order dated January 31, 2019, this court granted SIF's motion to intervene in this action and protect its workers compensation lien. In the 1/31/19 Order, the court stated that "there is no dispute that the plaintiff applied to the SIF and that the SIF paid workers compensation benefits totaling $330,386.38 to or on behalf of plaintiff for medical and wage benefits. As result of these payments, SIF is subrogated to the rights of plaintiff's employer under 33 Sec. 933 and [] SIF is entitled to intervene to protect its right of recovery, if any. Moreover, SIF is entitled to protect its statutory lien because plaintiff Mauriello continues to proceed *pro se* and it is unknown at this juncture if plaintiff will abandon the action regardless of whether he retains new counsel. SIF is merely seeking to intervene to protect its right from plaintiff of its lien for medical and wage payments it made to plaintiff or on his behalf."

On May 21, 2019, all parties appeared in court for a conference including plaintiff Mauriello, and on the record, Mauriello informed the court that he no longer wished to prosecute this action and consented to the dismissal of his complaint with prejudice.

Now, there are three motion sequences seeking summary judgment before the court, which are informed by a brief explanation of the parties in relation to plaintiff/SIF's claims.

Dated: 2/5/21

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☒ **REFERENCE**

Mauriello claimed that, while on the pier, a wooden plank failed beneath his feet, causing him to fall and sustain injuries. The accident occurred as Mauriello was attempting to board the Mobro 94 barge after it had been demobilized and mated to a tugboat from Miller's Tug & Barge, Inc. ("Miller").

The pier and surrounding property are leased by Battery Park City Authority ("BPCA") from the City of New York under a long-term ground lease that started in 2008. BPCA leased the building on the pier to Pier A Battery Park Associates (the "tenant") to operate as a restaurant. On the date of the accident, there were three different ongoing projects: [1] The Plaza reconstruction contract between BPCA and D'Onofrio General Contractors Corp. ("D'Onofrio"); [2] a contract to perform waterfront improvements at Pier A between D'Onofrio and D7 Construction Pier A, LLC ("D7"); and [3] an interior renovation of the building at Pier A by the tenant.

In connection with the interior building renovation, D'Onofrio was hired to renovate a boat landing, install timber piles fendering on the pier at the end, and rehabilitate a bow loader fender rack on the side of Pier A. At the time of his accident, plaintiff was working for Diego Construction, Inc. ("Diego") as a maintenance engineer and operator. Diego is a wholly owned subsidiary of D'Onofrio and Diego serves as D'Onofrio's "union shop".

The three pending motions are sequences numbers 10, 12 and 13. In motion sequence 10, BPCA moves for summary judgment: [1] dismissing all claims against it under Labor Law 240(1), 241(6) and 200 and common law negligence; [2] on the crossclaim for contractual indemnification against the tenant and D'Onofrio; and [3] on its crossclaim for common law indemnification against the tenant and D'Onofrio. The tenant, D'Onofrio and D7 (collectively the "Pier A defendants") oppose the motion, arguing that BPCA is not entitled to contractual indemnification and common law indemnification and cross-move for summary judgment: [1] dismissing plaintiff's complaint because SIF "has not satisfied the provisions of 33 USCS § 933"; and [2] dismissing all claims, counterclaims and crossclaims against them. SIF opposes BPCA's motion and the Pier A defendants' cross-motion and in turn also cross-moves for summary judgment in its favor, on the issue of liability, against BPCA and the Pier A defendants.

In motion sequence 12, defendant Liro Program and Construction Management, PE P.C. ("Liro") moves for summary judgment dismissing the complaint and all claims and crossclaims against it. The Pier A defendants, SIF and defendant DeBoccia Electrical Construction Corporation ("DeBoccia") oppose that motion.

Finally, in motion sequence 13, DeBoccia moves for summary judgment to dismiss plaintiff's complaint, to dismiss intervenor SIF's complaint and to dismiss all crossclaims and counterclaims against it. The Pier A defendants oppose the motion and request that the court deny the motion to the extent that DeBoccia seeks common law indemnification and contribution against them and to dismiss their crossclaims. SIF opposes the motion to dismiss its complaint against DeBoccia on only the Labor Law § 200 and common law negligence claims, but is not opposing that portion of the motion on the Labor law § 240(1) and 241(6) claims. Liro's papers filed under motion sequence 13, are labeled "Affirmation in Reply to Pier A defendants Affirmation in Partial Opposition to DeBoccia's motion" which was withdrawn per stipulation dated November 9, 2020.

There is no opposition from Entech Engineering, P.C to any motion or cross-motion and BPCA filed a stipulation of voluntary discontinuance of its second third-party action against Miller on or about September 6, 2018.

The motions are hereby consolidated for consideration and disposition in this single decision/order.

In BPCA's affirmation, counsel states that pursuant to the preliminary conference order, "motions for summary judgment in this matter are to be filed within 30 days of the filing of the Note of Issue which has not been filed in this matter. As such, this motion is timely as a matter of law". That is incorrect since note of issue was filed in this matter on March 13, 2020. All motions for summary judgment were therefore filed beyond the 30-day deadline as set forth in the preliminary conference order. However, in

light of the COVID-19 pandemic, NYSCEF was closed to filing for a significant period of time shortly after note of issue was filed. Given that fact as well as the exhaustive/tortured history of this case, the court finds good cause to consider all motions and cross-motions.

The accident

Mauriello testified that his duties for Diego included assisting the crane operator if the crane was running: "I would either be a relief engineer on the crane giving the primary engineer a break if necessary. I would run supporting equipment whether it Bobcats, fork lifts, backhoes, excavators. I did welding. I did repairs. I did inspections of equipment, and I did all the maintenance on the job."

At his deposition, Mauriello testified that he started work around 7am on the date of his accident. He claimed that the weather was very bad that day. That morning, Mauriello testified that he "was instructed to remove the rubber fenders from the wing walls. There were large concrete blocks that were set up on the pier that needed to be removed and put on the barge. And on the outside of the pier, on the corners, we were going to do some cluster-style piles". He testified that Steve Frka and Alex Rau, his supervisor, of D'Onofrio, instructed his work. Plaintiff testified that this work was performed on a large barge that was "[o]ver 100 feet." Further, there was a crane on the spud that was on the spudwell on the northeastern corner of the barge.

The barge was positioned parallel to the pier and Mauriello did not know who set up the barge on the date of the accident. Mauriello used a gangway which was located between the barge and the pier to access the barge and perform his morning work. The gangway was not a permanent structure but was placed and put into position by dock builders. Mauriello testified that he was unsuccessful in removing the rubber fenders out of the slots of the wing walls and went to speak with Frka around the building because the inclement weather interfered with the work he was performing. Plaintiff claimed that he spoke to Frka for approximately fifteen minutes during which time he was instructed to leave the pier and go to Pier 11 for the remainder of the day.

After his conversation with Frka, plaintiff returned to the barge, and saw "the gangway was already removed and stored". Members of his team were working on de-spudding the barge. Plaintiff testified as follows:

A The gangway was removed and stored, and they were getting ready to pull one of the piles up.

Q The piles meaning?

A The spuds. I'm sorry.

Q And could they have performed this work without you on the barge or?

A My place is to be on the barge.

Q Okay.

A And because of the situation we had beforehand, the first mate let me know that they weren't just pulling the spuds and the guys were getting off, that the tugboat wanted to mate up on the other side. Some barges need to go in a certain direction. Sometimes a tugboat captain wants to put that tugboat in a certain spot. In order to do that, we had to pull up the spuds, pin them. The tugboat was going to pull the barge away where they had room to work. We would've dropped the spuds back down so the barge wouldn't move. Now, the tugboat could untie from the barge, and then mate up in the spot of his choosing. Because it was leaving, and

those guys are staying on it, I absolutely had to be on the barge. It's my job to be there.

Q Okay.

A Especially for Andre -- especially -- he was nervous. God forbid something would've happened and I wasn't there. It's my job to be on the barge.

Q Gangway [w]as already removed at this point?

A Yes. It was.

Q Now, Andre removed the gangway with the crane I'm assuming?

A I have to assume. I doubt anybody's picking up that gangway.

Q And you weren't on the barge for that? You were talking to Steve Frka?

A I was talking to Steve, correct.

When he returned to the barge, he told the first mate who was on the barge: "Don't do anything. I got to get on the barge". Mike Karlick from Miller placed an OSHA type board approximately six feet in length between the barge and the pier for plaintiff to get back on the barge. Plaintiff decided to climb over a railing onto the fendering system to access the barge, when a loose plank on the fender system surrounding the pier which plaintiff had stepped on gave way. Plaintiff explained:

A So when I had gotten to that proximity of the barge, Mike said, okay, let's try to jump across. I was like I'm not jumping across that. So he got a board. It was, like, an OSHA board, and OSHA-style board, and he laid the board from the barge to the pier. And I'm a little heavier than Mike. I was like listen -- we were joking. I was like I don't think I'm going on that board, so he actually walked across it and, you know, to show me the board was very, very, very safe and that's when I tried to navigate the railing to get on the barge.

Q When you say navigate the railing, you mean go over?

A I had to go over the railing.

Q What was the distance approximately between the pier and the barge? About how far away.

A You know, at one time I guessed, but I was just told not to guess, so I'm going to say I don't know.

Q About how long was the board that was placed?

A Six feet.

Q So the gap between the pier and the barge would be less than 6 feet?

A Correct.

...

Q Do you recall when you got over the rail, did both your feet land at the same time? Did one foot land before the other?

A My recollection is when I came over the railing I put my feet down and went right through that trap door.

Q Both feet?

A One foot went right through.

Q Which foot?

A My left foot.

After plaintiff's left foot went downward into the decking/fendering system, plaintiff fell to his right. Plaintiff did not fall onto the barge or into the water but instead came to rest on the decking pier outside of the railing. Specifically, Mauriello testified as to his accident as follows:

Q Did you trip over anything, or did your accident happen as your left foot went down with the board?

A My left foot went down into the board. I guess we tripped over my foot being jammed in the board.

Q But you fell as a result of your foot going into the board, correct?

A Yes

Q It wasn't like you tripped over a nail [] or you tripped over a brick, or you tripped over debris, or anything like that, correct? []

A Correct.

Q There was no debris involved, correct?

A Correct.

Q And you didn't fall because the board was wet, correct?

A Correct.

Q Just so we're clear, you fell on your right side when your left foot down when the board moved when you stepped on it, correct?

A Correct.

Plaintiff further testified regarding his decision to climb over the railing rather than use the gangway:

Q That area where you were attempting to go over the railing on, did you go to that area as a means of getting onto the barge, or did Mike direct you to that area to go over the board that he had placed, or something else?

A Mike had said let's go down to the end which is where I would've known to go.

Q Mike was on the barge at that point, correct?

A He was.

Q And Mike was the one that put the board in the location where he wanted you to come across on, correct?

A Correct.

Q How far was that board from the area that you came over the railing? Was it right there?

A It was right there.

Q Within 5 feet?

A Oh, I think less. It was, like, right there.

…

Q Before going to the west end of the barge, could you have entered the pier on the other side of the railing and walked on the portion of the barge that you wanted to board on rather than attempting to climb over the railing? Could you have done that?

A Yes.

Q Is there any reason why you didn't?

A Yes.

Q What's the reason?

A Its very narrow as you can see in these pictures. You've for bollards and tie-up spots all along that end, and then you would have to navigate.

Q You felt it would have been easier just to climb over the railing?

A Correct.

…

Q Did anyone instruct you to do that or did you do that on your own?

A Nobody has to instruct. It's the way we all would have done it.

Q But ultimately, not what anyone else would've done, you decided –

A I did it.

Q -- to do it that way, correct?

A Correct.

If the accident had not happened, plaintiff would have gotten onto the barge and expected to assist Andre, the crane operator. Mauriello speculated that the gangway was removed without him on the

barge because his coworkers did not realize he was on the barge. Plaintiff was unsure how his coworkers knew the barge was leaving that day.

After the accident, Mauriello testified that Mike helped him remove his left foot at which time the board came up with his foot and Mike then went to inform plaintiff's co-workers. Plaintiff did not recall filling out an accident report but assumes that one was completed. Rau took plaintiff to the hospital.

Rau prepared the incident report dated December 23, 2013 which noted: "unsecured timber located outside typical work area – presence unknown". Rau wrote that plaintiff fell in an area of "open pockets, where there was conduit sticking out" that "appeared to be abandoned work from a previous contract". Rau further wrote that plaintiff was injured while "[g]oing to retrieve personal items from crane barge prior to barge's departure."

Rau appeared for a deposition. He testified that plaintiff's job included "[f]ueling, making sure that equipment is operating correctly" and that "typically his work [wa]s next to the crane." When asked about what Mauriello told him about the accident, Rau testified as follows:

> A He told me they were -- he and the crew were on the pier. They had finished work for the day. He realized that he had left something on the barge in the -- I don't know if in the crane or in the crew quarters -- and he went, was going back to retrieve it, climbed over the railing, stepped over on this piece of wood and his foot went through. And that's when he had hurt his back.
>
> Q And did you have any conversations with him, either at that moment or on your trip to the hospital with him, where you said, you know, why didn't you use the gate or why didn't you go through the opening?
>
> A It was mentioned. I don't recall the answer. I don't recall it being a good answer.

Shea Thorvaldsen, Director of Waterfront for defendant D'Onofrio, also appeared for a deposition. Thorvaldsen testified that the contract between D7 and D'Onofrio was "for the repairs, for the installation of some timber pile fendering at the end", meaning the river side of Pier A and a rehabilitation of a bow loader fender rack on the south side of Pier A. He testified that pursuant to the contract "some of the rubber elements that were on the face of the fendering had to be pulled, removed and repaired". Rau, the day-to-day assistant project manager, reported the incident involving plaintiff. Thorvaldsen further testified that the fendering system is not an OSHA compliant walking surface and that people generally should not be walking in that area. The fendering system absorbs the impact of boats that are attempting to dock against the pier. He testified that Mauriello was hired by Diego, which is a wholly owned subsidiary of D'Onofrio, and that all labor for D'Onofrio was provided by Diego. Thorvaldsen testified that "D'Onofrio subcontracted to DeBoccia for installing the lighting, electrical, D'Onofrio, sorry, Diego whose labor through D'Onofrio performed support and installation of support items, meaning if we had to weld something or drill something into the existing railing for DeBoccia or if we had to remove a section of railing to accommodate the light installations, we would have performed that work", meaning D'Onofrio and Diego labor.

Thorvaldsen claimed he prepared a portion of the subcontract between DeBoccia and D'Onofrio and that DeBoccia performed work but that "the base work that is defined in this contract was significantly altered in 2014 due to significant issues with the fabricated light fixtures" and that DeBoccia's work did not include "alterations to the fender system, because the new electrical system" was "100 percent contained within the railing system for the work. There would have been no work on the fender system, associated with the railings, with the electrical". Thorvaldsen could not recall when DeBoccia began its work, but testified that it was after December of 2013:

Q And, similarly, do you know when the lighting project at DeBoccia undertook, actually started? …

A I cannot specifically recall. It was after our remobilization in December of 2013.

Q. And do you happen to remember the exact date that you remobilized?

A. No, I'd have to look at our daily reports.

Frank Reichert, employed by DeBoccia for thirty years, testified that DeBoccia performed electrical work at Pier A in Manhattan in March of 2014 and that the scope of work included installing planter lights, meaning installing lights inside overlooking the plants they had on display, and lights in the railings, which he descried as "they had a railing going all the way around the dock and they had LED lights installed indie the railings themselves". Reichert testified that DeBoccia performed this work pursuant to a contract with D'Onofrio dated January 20, 2014. Reichert testified DeBoccia obtained the plans from D'Onofrio but that he was unsure if D'Onofrio provided the design for the plans. Reichert further testified that as per the design plans, the source of the lighting would come from a panel inside the Pier A building and that to supply electricity from the panel to the railing would require pulling up "cinder blocks off the floor, which D'Onofrio would trench". Reichert testified that the scope of work did not involve the area where plaintiff fell nor did the scope of work involve the installation of conduit on the wood plank portions of the pier.

Liro was the construction manager on the building rehabilitation at Pier A Plaza and envelope and heat exchanger rehabilitation. Non-party Stalco was the contractor that performed that work. Liro produced Frank Franco, its Vice President, for a deposition. Franco testified that Liro began its work in 2010 and completed its work in August 2013, at which point Entech came in as construction manager. Thorvaldsen explained that D'Onofrio did not occupy the job site until Liro/Stalco completed their work. Further, Thorvaldsen unequivocally testified:

Q Did LiRo perform any construction management duties to the work that was performed by D'Onofrio –

A. No.

Q. -- anywhere on Pier A?

A. No, they had no direct supervision over D'Onofrio for the contract.

Parties' claims

As the court previously noted, plaintiff's claims have already been dismissed. In its complaint, SIF asserts causes of action for common law negligence and violations of Labor Law §§ 200, 240[1] and 241[6] on behalf of plaintiff pursuant to 33 USC § 933[b] and [h].

Liro, the Pier A defendants, BPCA and DeBoccia have answered the complaint. Liro has asserted a crossclaim against BPCA, the Pier A Defendants, DeBoccia and Miller for contribution and indemnification. The Pier A defendants have asserted crossclaims against BPCA, Liro, Entech, and DeBoccia for common law and contractual indemnification and contribution as well as breach of contract for failure to procure insurance. The Pier A defendants have also asserted third-party claims against Miller for common law contribution and indemnification. Finally, BPCA has asserted crossclaims against the Pier A defendants, Liro, Entech and Miller for common law contribution, common law and contractual indemnification and breach of contract for failure to procure insurance.

Applicable law

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The parties' motions as to SIF's claims

BPCA and the Pier A defendants move for summary judgment dismissing SIF's complaint, while SIF moves for partial summary judgment on liability. In addition to arguing the merits of plaintiff/SIF's claims under the Labor Law and for common law negligence, the Pier A defendants argue that SIF cannot maintain this action since it "failed to satisfy the dictates of 33 U.S.C.S. §933 Longshore and Harbor Workers' Compensation Act" ("LHWCA") and plaintiff was the sole proximate cause of his accident. Liro and DeBoccia echo the Pier A defendants' arguments as well as BPCA's.

In opposition to the motion and cross-motion and in support of its own cross-motion, SIF argues "it is indisputable that said defendants failed to provide MAURIELLO with adequate safety devices in violation of Labor Law §240(1) and failed to keep passageways and working areas free of tripping hazards, debris and loose materials in violation of 12 NYCRR §23-1.7(e) and Labor Law §241(6). Thus, said defendants are strictly liable for MAURIELLO's injuries, and accordingly summary judgment is warranted against said defendants on the issue of liability."

Liro argues that it is entitled to summary judgment dismissing SIF's claims against it because it was no longer present on the job site at the time of the subject accident. Similarly, DeBoccia asserts that it did not commence work at the job site until well after plaintiff's accident. Further, Liro and DeBoccia assert that they cannot be held liable under the labor law because they did not provide any direction or control of the means and methods of plaintiff's work. Further, Liro points to Rider A of the contract between it and BPCA which provides in relevant part: "The Consultant shall not be liable or responsible for the means, methods, techniques, sequences or procedures, and/or for the safety plans and procedures utilized by the Owner's Construction Contractors." Otherwise, all of the defendants assert that plaintiff was the sole proximate cause of his accident.

The LHWCA

Generally, the LHWCA (33 USC § 901-950) provides an exclusive remedy to maritime employees against their employers who are injured on the job while on the navigable waters of the United States, or in adjoining areas customarily used in the loading, unloading, repairing, or building of vessels (*Pallas Shipping Agency, Ltd. v. Duris*, 461 US 529 [1983]). These benefits are typically paid by the self-insured employer or by a private insurance company on the employer's behalf (US Department of Labor, Office of Workers' Compensation Programs, www.dol.gov). 33 USC § 933, entitled Compensation for injuries where third persons are liable, provides in relevant part as follows:

(a) Election of remedies

> If on account of a disability or death for which compensation is payable under this Act, the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of compensation operating as assignment
>
> Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person within six months of acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.
>
> ...
>
> (h) Subrogation
>
> Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to the rights of the employer under this section

In connection with plaintiff's claim under the LHWCA, the US Department of Labor ("DOL") sent a letter dated May 12, 2014 to SIF requesting that it submit an LS-208 form showing the period of disability and that salary was paid. Thereafter, SIF submitted form LS-208, labeled "Notice of Final Payment or Suspension of Compensation Payments", to the DOL acknowledging that "D'Onofrio Gen Contract" and not SIF paid Mauriello's wages from December 23, 2013, to that present date.

Further, the DOL issued an order dated February 18, 2015 in the Matter of Mauriello v. D'Onofrio General Contractors Corp., Employer, and State Insurance Fund-New York, Carrier, which provides as follows:

> This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended 33 U.S.C. § 901, et seq. (the "Act") and the regulations promulgated thereunder. A calendar call is scheduled for Wednesday, March 4, 2015 at I 1:00 a.m. in New York City, New York.
>
> By facsimile letter dated February 12, 2015, Claimant's counsel writes the parties have been able to resolve the issues between them and request the matter be remanded to the Office of Workers Compensation Programs.
>
> Accordingly, IT IS HEREBY ORDERED that the hearing scheduled for Wednesday, March 4, 2015 at I 1:00 a.m. in New York City, New York is CANCELLED and the case is REMANDED to the District Director for appropriate action.

Defendants argue that SIF lacks standing to bring any claims on behalf of plaintiff because plaintiff did not accept compensation from SIF according to DOL records and further that plaintiff did not assign his rights to SIF since there was never an award in a compensation order from the DOL. Defendants also argue that even if any compensation award had been issued, SIF had ninety days after plaintiff's claims were assigned to it to commence an action against third-parties, and therefore, SIF's claims are time-barred.

In relation to 33 USC § 933[b], the US Supreme Court explained that "[t]he requirement of a formal award was designed to protect the longshoreman from the unexpected loss of his rights against a negligent third party and to permit him to make a considered choice among available remedies" (*Pallas Shipping Agency, Ltd. v. Duris*, *supra* at 536). In holding that a formal award was required to effect an assignment under Section 933[b], the Court reasoned: "Congress clearly did not contemplate that the mere acceptance of compensation benefits, in the absence of an award by the deputy commissioner, would trigger an immediate assignment of the longshoreman's claim against third persons" (*id.* at 537). The *Pallas* Court further noted that an employer (and the insurance carrier) does not need to contest an injured workers' claim for benefits in order to obtain a compensation order: "Department of Labor regulations permit an employer who makes voluntary payments to obtain a compensation order upon request if there is no disagreement among the parties. Moreover, even without a statutory assignment of the longshoreman's claims, an employer can seek indemnification from negligent third parties for payments it has made to the longshoreman." *Pallas* at 538.

Thus it is clear on this record, based on Section 933[b] and *Pallas*, that SIF lacks standing to maintain an action on behalf of the plaintiff. This court finds SIF's argument, that the Pier A defendants and DeBoccia waived the issue of SIF's standing by failing to assert lack of standing as a defense on a motion to dismiss or in opposition to SIF's motion to intervene, unavailing. SIF's standing to bring a cause of action on behalf of Mauriello is clearly an element of all of its claims in this action since the only basis for SIF to commence this action was expressly pursuant to 33 USC § 933, as SIF alleged in its complaint and asserted in its motion to intervene. It is therefore sufficient for defendants to assert general denials to SIF's claimed basis for standing as well as to assert a defense of failure to state a claim, since they have shown that no automatic assignment of plaintiff's claims against third parties occurred by operation of Section 933[b] (*see US Bank National Association v. Nelson*, 169 AD3d 110, 122 [2d Dept] [*Duffy, J.,* concurrence]). Therefore, SIF's claims must be dismissed.

It is of no moment that the court granted SIF leave to intervene or even stated in the 1/31/19 Order that "[a]s result of [its] payments, SIF is subrogated to the rights of plaintiff's employer under 33 [USC §] 933 and [] SIF is entitled to intervene to protect its right of recovery, if any." Intervention was warranted because SIF had an interest in the results of this action and as it turned out, plaintiff was unable to represent SIF's interests and right to recovery. However, the fact that SIF claimed to have been assigned plaintiff's right to commence/prosecute an action against third parties is not conclusive. Indeed, the court's 1/31/19 Order merely noted SIF made payments, was subrogated to the rights of plaintiff's employer (as compared to plaintiff himself) and was therefore entitled to intervene. Further, while the court rejected the Pier A defendants' argument that SIF's motion to intervene should be denied because SIF's motion was not supported by a formal order thereby satisfying 33 USC § 933, the court did not conclusively rule that SIF satisfied 33 USC § 933 or otherwise foreclose any of the defendants from making such an argument in opposition to the merits of SIF's claims.

Assuming *arguendo* that the defendants cannot now argue that SIF lacks standing, SIF's claims would nonetheless still be dismissed on the merits for the reasons that follow. The court will first consider the Labor Law § 240[1] claim.

Section 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, … in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

At the outset, the court rejects the defendants' arguments that plaintiff was not engaged in an enumerated activity at the time the accident occurred as a matter of law and therefore does not fall within the protections of Section 240[1] (as well as Section 241[6]). Indeed, defendants have certainly not established that plaintiff was no longer working and was merely retrieving personal items from the barge as Rau indicated in the incident report. At most, the incident report merely raises a triable issue of fact as to whether plaintiff was engaged in the type of work that would trigger the protections of the Section 240[1] (as well as Section 241[6]) in light of plaintiff's own sworn testimony that he was working, and that it was part of his job to be on the barge, assisting the crane operator with de-spudding the barge.

SIF argues that Mauriello was exposed to an elevation-related risk, namely, the risk of falling off or through the fender system and/or plank into the water below, and that the gangway was "the only acceptable safety device used to board a barge" and since the gangway was "already put away", BPCA and the Pier A defendants failed to provide adequate safety devices. Meanwhile, BPCA and the Pier A defendants contend that Mauriello was not injured as a result of falling from a height but was merely injured when he climbed over a railing and there was no need for an enumerated safety device.

The court agrees with the defendants as to their argument that Mauriello's accident does not fall-within the ambit of Section 240[1] because he did not fall from a height and his accident was not caused by a height differential. Not every accident at a construction site due to the effects of gravity triggers liability under Section 240[1] (see *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] citing *Narducci v. Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). Mauriello's accident occurred because he stepped on a plank on the deck of the fendering system that dislodged, thereby trapping his left foot, causing him to twist and fall to the ground. Further, while attempting to climb over a railing, Mauriello stepped onto a flat and level surface at the time he fell to the ground of the pier. SIF's attempt to transform plaintiff's accident into one that would give rise to liability under Section 240[1] is unavailing.

Accordingly, SIF's Section 240[1] claim must be dismissed on the merits. In light of this result, the court declines to consider the parties' arguments as to whether plaintiff was the sole proximate cause of the accident, whether plaintiff's accident was caused due to the failure to provide an enumerated safety device or whether Liro or DeBoccia can be held liable under Section 240[1]. The court now turns to Section 241[6].

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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 the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). SIF asserts that Industrial Code § 23-1.7[e] was violated as a matter of law.

Industrial Code § 23-1.7[e] states in pertinent part as follows:

> [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.

The court agrees with the defendants' argument that Section 23-1.7[e] is inapplicable to the facts. The area that plaintiff fell is not a "passageway" within the meaning of the industrial code. Plaintiff's accident occurred on an open and exposed area known as the fendering system and the testimony is clear that this area was not a means of egress or ingress to another area. Based on the facts presented, even viewed in the light most favorable to plaintiff, Mauriello on his own initiative climbed over a railing to gain access to the fendering system when he either should have used the gangplank or entered through a gate.

SIF's argument that Mauriello's only path to board the barge was to use the fendering system and plank as a passageway is rejected. While the record before the court shows that Mauriello's accident occurred on a fendering system, the plank on the fendering system was not an "integral part of the work being performed by plaintiff at the time of the accident (*Tighe v. Hennegan Constr. Co, Inc.* 48 AD3d 201 [1st Dept 2008]). Thorvaldsen testified that "an oiler that's responsible for the crane, there's no specific performance of his duties that would require him to walk on that, unless he had to walk on that in order to access some other part of the work, meaning unless he absolutely needs to get on that to get on the barge". Here, SIF has failed to raise a triable issue of fact sufficient to deny the defendants' motions. Therefore, the Labor Law § 241[6] claim premised upon Section 23-1.7[e][1] must be dismissed.

Further, Section 23-1.7[e][2] also does not apply as there is no evidence that plaintiff tripped over any hazard such as dirt, debris or scattered tools in the work area under Industrial Cde Sec. 23-1.7[e][2]. Indeed, plaintiff's own testimony was clear on this point.

Accordingly, SIF's Section 241[6] claim is also be dismissed on the merits. As a result, the court declines to consider the parties' remaining arguments as to this cause of action.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept

2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

However, where the dangerous or defective condition arises from the subcontractor's methods, and the owner exercised no supervisory control over the injury-producing work, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200 (*Comes v. New York State Elec. & Gas Corp.*, *supra*).

There is no testimony that any of these defendants, other than D'Onofrio, exercised supervision and control over plaintiff. Moreover, it was plaintiff and a Miller employee who decided to jury-rig the OSHA board access method to the barge so that plaintiff could embark. No D'Onofrio employee or any other defendant advised plaintiff to access the barge in the manner he attempted. Further, there is no testimony that plaintiff was directed to access the barge – rather, it was plaintiff's own misguided choice to do so.

The railing the plaintiff decided to climb over was a clear warning that he was not supposed to access the area where his injury occurred. Otherwise, there is no proof on this record that any of the defendants had notice of the condition which caused plaintiff's accident or that they caused it. Indeed, as to DeBoccia, its work did not involve the installation of conduit on the wood plank portions of the pier. The agreement between D'Onofrio and DeBoccia establishes that its electrical work did not commence until sometime in January 2014 subsequent to plaintiff Mauriello's accident. For at least these reasons, SIF's claim for common law negligence and under Section 200 also fails on the merits.

Accordingly, SIF's complaint is dismissed. The court now turns to the crossclaims.

The crossclaims

As for the crossclaims, BPCA and the Pier A defendants each move for relief against the other. Specifically, BPCA seeks contractual indemnification from the tenant and from D'Onofrio. "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 Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

Article 13(B) of the lease provides as follows:

> Tenant shall indemnify and save harmless Landlord, the City of New York, the New York City Economic Development Corporation, and their respective directors, officers, employees, agents and servants (collectively, the "Indemnitees") from and against (1) all claims of whatever nature against the Indemnitees arising from any act, omission or negligence of Tenant, its contractors, licensees, agents, servants, employees, invitees or visitors, (2) all claims against Landlord arising from any accident, injury or damage whatsoever caused to any person or to the property of any person and occurring during the Term in or about the Demised Premises, and (3) all claims against Landlord arising from any accident, injury or damage which results or is claimed to have resulted from an act or omission of Tenant or Tenants contractors, licensees, agents, servants, employees, invitees or visitors. This indemnity and hold harmless agreement shall include indemnity from and against any and all liabilities, fines, suits, demands, costs and

> expenses (including, without limitation, reasonable attorneys' fees and court costs) of any kind or nature incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof. The foregoing shall not exculpate Landlord from any negligent act or negligent omissions of Landlord, provided, however, Tenant agrees that Tenant shall provide defense of any action described in items (1) through (3) above in which Landlord shall be named as defendant. Tenant's liability hereunder extends to the acts and omissions of any subtenant, and any agent, contractor, employee, invitee or licensee of any subtenant.

There can be no dispute on this record that plaintiff's accident did not arise from the tenant's actions, omissions or negligence. The tenant's liability can only be triggered pursuant to the second and third subdivision of the indemnification clause in the lease. BPCA maintains that the tenant is required to defend and indemnify from and against any claims arising from any accident or injury occurring in or about the demised premises. The third provision broadly requires the tenant to indemnify BPCA against all claims arising from any accident, injury or damage which results or is claimed to have resulted from an act or omission of Tenant or Tenants contractors, licensees, agents, servants, employees, invitees or visitors. Since plaintiff's claims, and SIF's claims on behalf of plaintiff, fall within both subdivisions of the indemnification agreement, the tenant was required to defend BPCA.

The tenant argues, however, that such a contractual requirement runs afoul of GOL § 5-322.1. It maintains that plaintiff's accident must have been caused by BPCA's negligence and the acts or omissions of its contractors, Liro, DeBoccia and non-party Stalco. This argument is unavailing. The court has already found that BPCA was not negligent. To the extent that the Pier A defendants argue that "[w]ith proper inspection, [BPCA] could have detected the defect", the argument is based on mere speculation and is therefore insufficient to raise a triable issue of fact on this point. Therefore, BPCA is entitled to a reimbursement for its defense costs and indemnification from the tenant pursuant to the lease.

BPCA seeks contractual indemnity from D'Onofrio. The contract between BPCA and D'Onofrio provides as follows:

> Article 21 - INDEMNITY
>
> 21.1 To the fullest extent permitted by law, Contractor…shall indemnify and save Owner… harmless from and against any and all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses, including, without limitation, reasonable architects' and attorneys' fees and disbursements, that may be imposed upon or incurred by or asserted against any of the Indemnitees by reason of the following subparagraphs:
>
> > (a) injury to any person or persons, including death, or any damage to property of any nature in connection with or arising out of, in whole or in part, any negligent act(s) or omission(s) of Contractor;
> > …
> >
> > (d) the performance of the Work;
>
> …
>
> 21.3 If any claim, action or proceeding is made or brought against any of the indemnitees by reason of any event to which reference is made in this Article 21 that upon demand by Owner, Contractor shall either resist, defend or satisfy such claim, action or proceeding in such indemnities name, by the attorneys' for, or approved by, Owner's insurance carrier.

The court agrees with BPCA that D'Onofrio is required to defend and indemnify BPCA for plaintiff and SIF's claims in this action. Plaintiff claimed that he was injured during the course of his employment while working at the Pier A construction project for D'Onofrio's subsidiary. Therefore, plaintiff's accident occurred in connection with the performance of contract work at Pier A thereby triggering D'Onofrio's obligation to defend and indemnify BPCA for the claims asserted in this lawsuit. Accordingly, that branch of BPCA's motion for contractual indemnification is also granted.

BPCA also seeks common law indemnification from the tenant and D'Onofrio. "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 Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]).

Since the court has found that the tenant was not negligent in causing plaintiff's accident, this branch of BPCA's motion is denied. As for D'Onofrio, triable issues of fact preclude summary judgment on this point. While Mauriello worked for D'Onofrio's subsidiary, it is clear that D'Onofrio supervised plaintiff's work. Triable issues of fact, however, preclude a finding that BPCA is entitled to common law indemnification from D'Onofrio, to wit, whether plaintiff was the sole proximate cause of his accident thereby precluding a finding of liability against D'Onofrio. Accordingly, this branch of BPCA's motion is denied and in light of the court's rulings on BPCA's motion, the Pier A defendants' cross-motion as to BPCA's crossclaims is denied.

Liro and DeBoccia's motions as to the crossclaims against them are also granted. There is no basis to find that they the contributed to plaintiff's injuries or that they are otherwise contractually liable to any other defendant to defend or indemnify arising from Mauriello's accident.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequences 10, 12 and 13 are granted only to the extent that:

[1] SIF's complaint is dismissed;
[2] BPCA is entitled to contractual indemnification against the tenant and D'Onofrio;
[3] all cross-claims against Liro and Deboccia are severed and dismissed.

And it is further **ORDERED** that that the issue of the amount for which the tenant and D'Onofrio should reimburse BPCA for the defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee to hear and determine; and it is further

ORDERED that counsel for BPCA shall, within 60 days from the date of entry this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that motion sequences 10, 12 and 13 are otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 2/5/21
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.