Giacola v Salt Constr. Corp.
2011 NY Slip Op 33559(U)
December 19, 2011
Supreme Court, Suffolk County
Docket Number: 08-13902
Judge: Daniel Martin
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SHORT FORM ORDER

INDEX No. 08-13902
CAL No. 11-00868OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 8-16-11 (#003)
MOTION DATE 9-13-11 (#004)
ADJ. DATE
Mot. Seq. # 002 - MD
003 - XMotD
004 - XMG

X

VINCENT GIACOLA, as administrator for the estate of JUAN CARLOS SALINAS,

Plaintiff,

- against -

SALT CONSTRUCTION CORP., and SILVERLINING WOODWORKING, INC.,

Defendant.

X

SALT CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

FRAME TO FINISH, INC.,

Third-Party Defendant.

X

SILVERLINING WOODWORKING, INC.,

Second Third-Party Plaintiff,

- against -

FRAME TO FINISH, INC.,

Second Third-Party Defendant.

---X

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X SALT CONSTRUCTION CORP.,

Third Third-Party Plaintiff,

- against -

G-1, INC.,

Third Third-Party Defendant.

X

G-1, INC.,

Fourth Third-Party Plaintiff,

- against -

ANIBAL MOTA,

Fourth Third-Party Defendant.

X

Upon the following papers numbered 1 to 68 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause (002)and supporting papers 1 - 19 ; Notice of Cross Motion (003) and supporting papers 20 - 28; Notice of Cross Motion (004) and supporting papers 29 - 43 ; Answering Affidavits and supporting papers 44 - 56 ; Replying Affidavits and supporting papers 57 - 68 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (002) of the defendant/third-party plaintiff/third third-party plaintiff Salt Construction Corp. is denied to the extent that it seeks summary judgment in its favor and against third third-party defendant G-1, Inc. on its claim for contractual indemnification; and it is further

ORDERED that the cross motion (003) of the plaintiff is granted to the extent that it seeks partial summary judgment on the issue of liability of the defendant Salt Construction Corp. pursuant to Labor Law §§ 240 and 241; is denied, at this time, on the issue of liability of the defendant Silverlining Woodworking, Inc. pursuant to Labor Law §§ 240 and 241; and, is denied on the issue of liability of defendant Silverlining Woodworking, Inc. pursuant to common law negligence and Labor Law §200; and, is denied, at this time, on the issue of liability of defendant Salt Construction Corp. pursuant to

common law negligence and Labor Law §200; and it is further

ORDERED that the cross motion (004) by defendant/second third-party plaintiff Silverlining Woodworking, Inc. is granted to the extent that it seeks summary judgment in its favor against third-party defendant/second third-party defendant Frame to Finish, Inc. for common-law indemnification.

The plaintiff's decedent fell approximately 13 feet to his death while he was working on the expansion and renovation of a home located on Shelter Island, New York on November 20, 2007. The non-party homeowner, Reiner Schoenbach, retained defendant Salt Construction Corp. ("Salt") to act as the general contractor/manager on the ten million dollar project ("the Schoenbach project"), pursuant to an oral agreement. Salt alleges that it contracted with defendant/second third-party plaintiff Silverlining Woodworking, Inc. ("Silverlining") to perform the general carpentry work on the project, although Silverlining disputes this allegation. Salt alleges that it orally contracted with third third-party defendant G-1, Inc. ("G-1") to act as a "job super", to keep the owner appraised of the developments on the Schoenbach project, and to monitor job site safety. Third-party defendant/second third-party defendant Frame to Finish, Inc. ("Frame to Finish") was a sub-contractor engaged in carpentry work at the Schoenbach project at the time of the decedent's fall. The decedent, an employee of Frame to Finish, had been on a scaffold "sistering" beams under the "floating" house at the time of the accident. It is undisputed that the decedent was not protected by any safety devices to prevent his fall.

The plaintiff commenced this action for personal injuries and wrongful death against the defendants asserting causes of action to recover damages for, *inter alia*, violations of Labor Law §§ 200, 240, and 241, and common-law negligence. Salt asserted cross claims against Silverlining for common-law indemnification, contractual indemnification, and failure to procure insurance. Silverlining asserted cross claims against Salt for common-law indemnification, contractual indemnification, and failure to procure insurance. Salt commenced a third-party action against Frame to Finish for common-law and contractual indemnification and contribution, and for failure to procure insurance. Silverlining then commenced a second third-party action against Frame to Finish for contribution, common-law and contractual indemnification, and for failure to procure insurance. Frame to Finish asserted cross claims against Salt and Silverlining for contribution and indemnification. Salt then commenced a third third-party proceeding against G-1 for common-law and contractual contribution and indemnification and for failure to procure insurance. G-1 asserted cross claims against Salt, Silverlining, and Frame to Finish for common-law and contractual contribution and indemnification and for failure to procure insurance. Finally, G-1 commenced a fourth third-party action against fourth third-party defendant Anibal Mota for common-law and contractual contribution and indemnification. (Issue was not joined in the fourth third-party action.)

Salt now moves for summary judgment directing G-1 to defend and indemnify it pursuant to its contract dated December 20, 2006. Plaintiff cross-moves for partial summary judgment on all issues of liability against defendants Salt and Silverlining. Silverlining cross-moves for summary judgment for full and complete indemnification or, in the alternative, a conditional order of indemnification against Frame to Finish.

In support of its motion Salt provides, *inter alia*, copies of the pleadings, a hold harmless agreement between Salt and G-1 dated December 20, 2006, unsigned certified copies of examination

before trial transcripts of Salt by Robert Plumb and G-1 by Donald Grandone, and a copy of an affidavit of Donald Grandone (President of G-1) dated December 15, 2009. In support of its cross-motion plaintiff submits, *inter alia*, unsigned certified copies of examination before trial transcripts of non-party Oswaldo Salina and Frame to Finish by Guy Sarubbi, and police photographs. Finally, in support of its cross motion Silverlining submits, *inter alia,* signed copies of examination before trial transcripts of Frame to Finish by Guy Sarubbi, Silverlining by Edward Renner, and G-1 by Donald Grandone, as well as the unsigned copy of the Salt examination before trial transcript by Robert Plumb with a letter indicating a failure to sign and return same could result in its use "as is". Accordingly, with the exception of the Salina transcript, all of the transcripts submitted are in admissible form.

Robert Plumb, the president and sole shareholder of Salt, testified during his examination before trial that he had entered into a ten million dollar oral contract with Reiner Schoenbach in or about May 2007 to renovate a house on Shelter Island. The renovation involved tearing out the existing foundation, jacking up the existing house, creating a new foundation, and rebuilding a new house around the old one. Plumb stated that Salt contracted with other contractors and that Silverlining was "going to be doing the carpentry, the general carpentry" and that Salt did not have a contract with Frame to Finish. He maintains that Ed Renner of Silverlining signed a contract and returned it to him in connection with the carpentry work it was to do (although a copy of same has not been supplied in connection with any of the motions). Plumb stated, and Renner, who testified on behalf of Silverlining agreed, that Salt received invoices for carpentry work performed at the Schoenbach project from Silverlining which stated the names of workers, the hours worked, the work performed, and the amount due. Plumb avered that he "understood [that he] was dealing with Silverlining Woodworking, who had engaged Frame to Finish" to work at the Shcoenbach project. He testified that neither he nor Salt provided ladders, scaffolding, or fall prevention devices at the work site, but that they did provide materials from which railings could be constructed. Although he maintained that Salt was the construction manager, as opposed to the general contractor on the job, Salt was referenced as the contractor on the various building permits required for the Schoenbach project and Salt indicated to Reiner Schoenbach that it would be overseeing the work and be responsible for the work. Plumb dealt directly with Sarubbi, of Frame to Finish, from time to time at the job site. He would discuss structural issues with him and indicate "how we're going to do this or that."

Plumb averred that Salt hired G-1 to oversee safety at the job site. He stated that Salt and G-1 entered into an oral contract for same in or about May 2007, and that Salt and G-1 had entered into a written hold harmless agreement for their ongoing projects on December 20, 2006. Plumb asserted that G-1 was to be a liaison for Salt and the various trades and suppliers, was to take pictures and to keep the homeowner, who lived in Germany, apprised of the renovations and construction, and was to monitor job site safety. There was no written contract memorializing these duties or responsibilities, except to the extent that they may have appeared on an invoice. Plumb did state that on occasion he would personally direct Mota, an employee of G-1, if he observed what he believed to be an unsafe condition at the job site.

Edward Renner, the sole shareholder and president of Silverlining, testified that Silverlining was not hired to perform work on the Schoenbach project at any time, and that neither it nor its employees ever performed any work thereat prior to plaintiff's decedent's accidental fall. Renner contended that he generated invoices for Frame to Finish as "a way of getting a commission as sort of like a finder's fee

type thing." Silverlining did not provide scaffolding, ladders, manlifts, hoists, fall-protection devices, framing, or platforms at the Schoenbach project. However, Renner admitted that he was present at the Schoenbach project before the carpentry work started and after the building was "in the air" for a meeting with Plumb and Sarubbi (from Frame to Finish). Renner insists that Silverlining received a ten percent commission for the billing work it did for Frame to Finish and that it wasn't until after the accident that Silverlining billed Salt for work it had done in connection with time spent downloading safety material. Renner admitted drawing up a proposal and hand delivering it to Salt in connection with the carpentry work, but didn't recall his signing it or receiving it back from Salt. He considered the job Silverlining did to be "secretarial work, not contracting work."

Guy Sarubbi, the president of Frame to Finish, testified at an examination before trial that Frame to Finish performed carpentry work at the Schoenbach project. He admitted that he personally performed work and labor at the site and that Frame to Finish supplied ninety percent of the scaffolding equipment at the site, as well as the tools used by the carpenters (when they weren't using their own tools.) Sarubbi indicated that Frame to Finish started on the project with Ed Renner from Silverlining, that basically Silverlining got Frame to Finish the job (which was the reason Frame to Finish billed Silverlining which in turn billed Salt for the work performed). Frame to Finish never received instructions from Ed Renner or Silverlining regarding the Schoenbach job, Bob Plumb from Salt would advise Sarubbi as to what was to be done, although Ed Renner did come by the job from time to time and talk about things, but not on a routine basis. Sarubbi testified that Silverlining did not give out work assignments, tell Frame to Finish what or how to do things at the Schoenbach project or provide tools, equipment, or materials. Sarubbi considered Mota (from G-1) to be a go between, "the guy, the trailer boy, that's who he is, the guy who does nothing, but watches over everything, I guess."

Finally, the testimony of Donald Grandone, the president of G-1, revealed that Grandone had signed a hold harmless agreement with Salt in December of 2006. Grandone understood this to be for carpentry work relating to G-1. Grandone indicated that G-1 hired Mota to work at the Schoenbach project and that he did not engage him to do carpentry work or to perform site safety activities. Mota was the only person engaged by G-1 to work at the Schoenbach project. Grandone stated that he did not go to the job site while Mota was there, and that he instructed Mota to do whatever "Plumb told him to do." Grandone alleges that his handwritten worksheet describes Mota's work as "job super" and that the typewritten invoice for the same dates says "job super and safety" because "Bob Plumb asked me to add 'safety' to the invoice for the reasons I said earlier, for the insurance company and for the homeowner." Grandone maintains that G-1 did not provide safety services or a job supervisor for the Schoenbach project. Instead, Grandone contends that its presence was "to document hourly workers, mind the gate and be Plumb's watchdog, eyes and ears on the job site." The affidavit of Grandone indicated that G-1 had been retained by Salt to provide site safety and supervision, that it retained Mota as an independent contractor to perform those services, and that G-1 did not maintain any presence on the job site.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see*, ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a

denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Turning first to the plaintiff's cause of action seeking to recover damages pursuant to Labor Law § 240 (1), this provision imposes a nondelegable duty upon owners, contractors, and their agents to "furnish or erect or cause to be furnished or erected safety devices which shall be so constructed, placed and operated as to give proper protection" (*see*, ***Auriemma v Biltmore Theatre, LLC.***, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]; ***Martinez v Ashley Apts Co. LLC***, 80 AD3d 734, 915 NYS2d 620 [2d Dept 2011]). An owner, contractor or agent who breaches this duty may be held liable in damages regardless of whether it had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see*, ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]; *see also*, ***Martinez v Ashley Apts Co.***, *supra*; ***Ramsey v Leon D. DeMatteis Constr. Corp.***, 79 AD3d 720, 912 NYS2d 654 [2d Dept 2010]; ***Balzer v City of New York***, 61 AD3d 796, 877 NYS2d 435 [2d Dept 2009]). It is not a defense to liability pursuant to Labor Law § 240 (1) that the plaintiff's fault contributed to the accident, unless it can be said that the plaintiff's conduct was the sole proximate cause of the accident as a matter of law (*see*, ***Balzer v City of New York***, *supra*; *see also*, ***Gallagher v New York Post***, 14 NY3d 83, 896 NYS2d 732 [2010]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

The evidence submitted by the plaintiff on the motion established a *prima facie* entitlement to summary judgment on the issue of defendant Salt's liability pursuant to Labor Law § 240 (1). At the outset, and contrary to the defendant Salt's contentions, the evidence submitted demonstrates that Salt was a party responsible for compliance with the statutory mandate of Labor Law § 240 (1). In this regard, it is undisputed that Labor Law § 240 (1) is applicable to Salt by virtue of its role as "general contractor" at the subject work site. The evidence submitted did not conclusively establish that the statute is applicable to Silverlining by virtue of its position as an "agent" of the general contractor. "A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (***Nasuro v PI Assoc.***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; *see*, ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; *cf.*, ***Pino v Irvington Union Free School Dist.***, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]).

In this case, although Salt contends that it had a contract with Silverlining, and Silverlining

admits that it may have executed a proposal, no contract has been provided in support of the within motion which would show that Salt expressly delegated the performance of the carpentry work (specifically the "sistering of beams") and the responsibility "to supervise and direct" such work to Silverlining. Silverlining maintains that it was not hired to work, nor did it actually work, on the Schoenbach project at any point, and that any work performed in connection with the Schoenbach project was in the line of "secretarial" work and not "contract" work. It is clear that Silverlining received bills from Frame to Finish for its carpentry work done at the Schoenbach project and paid Frame to Finish, while billing Salt on Silverlining stationary for such work (after increasing the amount due by approximately ten per cent). There is a question of fact as to whether Silverlining was the prime contractor for the carpentry work on the project. If a factual finding is made that Silverlining was the general carpentry contractor which delegated the authority to supervise and control the particular work in which the decedent was engaged at the time of the incident, it will be liable under Labor Law § 240 (1) as a statutory agent of the general contractor (*see*, ***Weber v Baccarat, Inc.***, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]; ***Inga v EBS N. Hills***, 69 AD3d 568, 893 NYS2d 562 [2d Dept 2010]; ***Pacheco v Kew Garden Hills Apt. Owners***, 73 AD3d 578, 906 NYS2d 3 [1st Dept 2010]; ***Tomyuk v Junefield Assoc.***, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; *see also*, ***Kilmetis v Creative Pool & Spa***, 74 AD3d 1289, 904 NYS2d 495 [2d Dept 2010]; ***Domino v Professional Consulting, Inc.***, 57 AD3d 713, 869 NYS2d 224 [2d Dept 2008]). Moreover, "[o]nce an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity" (***McGlynn v Brooklyn Hosp.-Caledonian Hosp.***, 209 AD2d 486, 619 NYS2d 54 [2d Dept 1994]; *see*, ***Tomyuk v Junefield Assoc.***, *supra*; ***Nasuro v PI Assoc.***, *supra*). Thus, if Silverlining is found to be the general carpentry contractor, it will remain statutorily liable despite the fact that it had contracted the carpentry work in which the decedent was engaged at the time of the incident to Frame to Finish.

The evidence submitted further establishes that the decedent was subjected to an elevation-related risk while working, and that the failure to provide him with adequate safety devices was a proximate cause of his injuries and death (*see*, ***Balzer v City of New York***, *supra*; ***Dzieran v 1800 Boston Rd.***, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]). In this regard, it is undisputed that at the time of his fall the decedent was working at a height of approximately 13 feet without the protection of any safety device. Contrary to the defendants' contentions, the evidence submitted does not raise an issue of fact as to whether the decedent's own negligence was the sole proximate cause of his injuries and death. The failure to use available safety equipment will not be deemed the sole proximate cause of a worker's injuries unless there were adequate safety devices available, the worker knew both that they were available and that he was expected to use them, and that he chose for no good reason not to do so (*see*, ***Gallagher v New York Post***, *supra*; ***Auriemma v Biltmore Theatre***, *supra*; ***Ortiz v 164 Atl. Ave.***, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; ***Ritzer v 6 E. 43rd St. Corp.***, 57 AD3d 412, 871 NYS2d 26 [1st Dept 2008]). Assuming *arguendo* that the evidence submitted established that adequate safety devices were available at the job site, the record is nonetheless devoid of any evidence that the decedent knew that he was expected to use such safety devices and that he chose for no good reason not to do so (*see*, ***Tounkara v Fernicola***, 80 AD3d 470, 914 NYS2d 161 [1st Dept 2011]; ***Murray v Arts Ctr. & Theater of Schenectady***, 77 AD3d 1155, 910 NYS2d 187 [3d Dept 2010]; *see also*, ***Guaman v New Sprout Presbyt. Church of N. Y.***, 33 AD3d 758, 822 NYS2d 635 [2d Dept 2006]; ***Moniuszko v Chatham Green***, 24 AD3d 638, 808 NYS2d 696 [2d Dept 2005]).

Based on the foregoing, the motion by the plaintiff is granted to the extent that it seeks partial

summary judgment on the issue of the defendant Salt's liability under Labor Law § 240 (1) and is denied, at this time as to the defendant Silverlining.

With respect to the plaintiff's cause of action to recover damages pursuant to Labor Law § 241, such provision requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). In order to recover damages on a cause of action alleging a violation of Labor Law § 241, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see*, ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, the plaintiff alleges that the defendants violated the regulations found at 12 NYCRR § 23. The regulations set forth at 12 NYCRR 23-5.1(c)(2), (e)(1), (h), and (j), at 23-1.15, and at 23-1.16 set standards for scaffolds, safety railings, and safety belts, harnesses, tail lines and lifelines. It is clear that the scaffold from which plaintiff's decedent fell was not braced or placed in accordance with sections (c)(2) and (e)(1) of 12 NYCRR 23-5.1. Salt or its subcontractors neither installed the safety railings required by 12 NYCRR 23-1.15 nor provided enough nor instructed employees in the use of the safety belts required by 23 NYCRR 23-1.16.

Accordingly, the branch of the plaintiff's motion which seeks summary judgment on the issue of defendant Salt's liability pursuant to Labor Law § 241 (6) is granted, and is denied, at this time, on the issue of defendant Silverlining's liability since there is a question of fact as to whether Silverlining was an agent or prime contractor of Salt.

With respect to the Labor Law § 200 and common-law negligence causes of action, Labor Law §200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 352; ***Gasques v State of New York***, 59 AD3d 666, 873 NYS2d 717 [2d Dept 2009]; ***Dooley v Peerless Importers***, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). The accident here stems not from a dangerous condition on the premises, but from the manner in which the work was being performed. To be held liable under Labor Law § 200 and for common-law negligence when the method and manner of the work is at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see*, ***Mancuso v MTA N.Y. City Tr.***, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]; ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Gasques v State of New York***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Dooley v Peerless Importers***, *supra*). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see*, ***La Veglia v St.***

Francis Hosp., *supra*; ***Orellana v Dutcher Ave. Bldrs.***, *supra*; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see*, ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; ***McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.***, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; ***Garlow v Chappaqua Cent. School Dist.***, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; ***Perri v Gilbert Johnson Enters.***, *supra*; *compare*, ***Mancuso v MTA N.Y. City Tr.***, *supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work was performed (*see*, ***La Veglia v St. Francis Hosp.***, *supra*; *cf.*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Hughes v Tishman Constr. Corp.***, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007])

G-1, and Silverlining, both established a *prima facie* entitlement to summary judgment dismissing the plaintiff's causes of action to recover damages for common-law negligence and violation of Labor Law § 200. They established *prima facie* that they did not control the means or methods by which the decedent performed his work (*see*, ***Gurung v Arnav Retirement Trust***, 79 AD3d 969, 915 NYS2d 97 [2d Dept 2010]; ***La Veglia v St. Francis Hosp.***, *supra*; ***Rivera v 15 Broad St.***, 76 AD3d 621, 906 NYS2d 333 [2d Dept 2010]; ***Ramos v Patchogue-Medford School Dist.***, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; ***Dooley v Peerless Importers***, *supra*; ***Blessinger v Estee Lauder Cos.***, 271 AD2d 343, 707 NYS2d 78 [1st Dept 2000]). In this regard, the evidence established that the only personnel who supervised the decedent's work were employed by the decedent's employer Frame to Finish (and possibly by Salt), and not G-1 or Silverlining (*see*, ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]; ***Wade v Atlantic Cooling Tower Servs.***, 56 AD3d 547, 867 NYS2d 489 [2d Dept 2008]; ***Capolino v Judlau Contr.***, *supra*; ***Hughes v Tishman Constr. Corp.***, *supra*; ***Mohammed v Islip Food Corp.***, 24 AD3d 634, 808 NYS2d 389 [2d Dept 2005]; *compare*, ***Fassett v Wegmans Food Mkts.***, 66 AD3d 1274, 888 NYS2d 635 [3d Dept 2009]).

Accordingly, the plaintiff's cross motion is denied to the extent that it seeks summary judgment against Silverlining on the issue of liability for violations of Labor Law § 200 and negligence, and it is denied, at this time, on the issue of liability against Salt for violations of Labor Law §200 and negligence since there are questions of fact as to whether Salt or its employees supervised decedent's work .

In light of the determination that Silverlining was not negligent, did not have the authority to control the injury-producing work, and that its only liability to the plaintiff is or may be statutory in nature, the cross claims against Silverlining seeking common-law indemnification must be dismissed (*see*, ***Torres v LPE Land Dev. & Constr.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Mid-Valley Oil Co. v Hughes Network Sys.***, 54 AD3d 394, 863 NYS2d 244 [2d Dept 2008]; ***Markey v C.F.M.M. Owners***, *supra*; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; ***Mohammed v Islip Food Corp.***, *supra*).

Additionally, in the event Silverlining is found to be an agent or subcontractor of Salt and liable under Labor Law 240 and or 241, it established its entitlement to summary judgment imposing liability

over Frame to Finish on its third-party complaint for common-law indemnification (*see*, ***Cunha v City of New York***, 45 AD3d 624, 850 NYS2d 119 [2d Dept 2007]). In order to establish a claim for common-law indemnification, a party is required to prove not only that it was not negligent (*see*, ***Coque v Wildflower Estates Devs.***, *supra*), but also that the proposed indemnitor was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury (*see*, ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]; ***Mid-Valley Oil Co. v Hughes Network Sys.***, *supra*; *see also*, ***Nelson v Chelsea GCA Realty***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). Here, the evidence demonstrates that Frame to Finish controlled and directed the performance of the decedent's work and failed to protect him from the foreseeable risks of the accident which occurred (*see*, ***Kirkby v Chautauqua Inst.***, 178 AD2d 929, 578 NYS2d 797 [4th Dept 1991]). In opposition, Frame to Finish failed to submit proof from which it could be determined that Silverlining's liability to plaintiff was anything but vicarious.

Salt has not established a *prima facie* entitlement to summary judgment on its third-party complaint against G-1 for contractual indemnification. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (*see*, ***Torres v LPE Land Dev. & Constr.***, *supra* ; ***Canela v TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2008]). The contractual indemnification provision at issue here is contained in a contract between Salt and G-1 dated December 20, 2006. It provides, in pertinent part that "[t]o the fullest extent permitted by law, [G-1] shall defend, indemnify and hold harmless Salt Construction Corp., its affiliates, subsidiaries, directors, officers, employees, agents, and their representatives from and against all claims, damages, losses and expenses attributable to, resulting from, or arising out of [G-1's] operations performed for Salt Construction Corp., caused in whole or in part by any act or omission of [G-1], or anyone directly or indirectly employed by them, or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by Salt Construction Corp., its affiliates, subsidiaries, directors, officers, employees, agents, and their representatives." Here, it is clear that the contract requires a predicate finding that G-1's negligent operations caused the harm in order for indemnification to run from G-1 to Salt. The second portion of the provision, which provides for indemnification for injuries which may have been caused by Salt's negligence, is void and unenforceable pursuant to General Obligations Law §5-322.1 (*see* ***Itri Brick & Concrete Corp. v Aetna Casualty & Surety Co.***, 89 NY2d 786, 658 NYS2d 903 [1997]; ***Kinney v G. W. Lisk Co. Inc.***, 76 NY2d 215, 557 NYS2d 283 [1990]). As there has been a finding that G-1 did not control the means or methods by which the decedent performed his work and thus was not liable to plaintiff in negligence or for violating Labor Law §200, the predicate requirement for indemnification from G-1 to Salt has not been proven. Therefore, Salt's motion for summary judgment against G-1 seeking contractual indemnification is denied.

Dated: December 19, 2011

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION