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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 103313/2007
CLAVIJO, JORGE
vs
ATLAS TERMINALS
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8/2/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5-6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed Memorandum Decision and Order.

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

FILED

FEB 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Feb. 08, 2012

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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JORGE CLAVIJO,

Plaintiff,

-against- Index No. 103313/07

ATLAS TERMINALS, LLC, ATLAS PARK, LLC, MOL-MON REALTY COMPANY, INC. and ATCO PROPERTIES MANAGEMENT, INC.,

Defendants.

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ATLAS TERMINALS, LLC, ATLAS PARK, LLC, and ATCO PROPERTIES & MANAGEMENT, INC., incorrectly sued herein as ATCO PROPERTIES MANAGEMENT, INC.,

Third-Party Plaintiff,

-against- Third-Party Index No. 590069/09

MARLITE CONSTRUCTION CORP. a/k/a MARLITE CONSTRUCTION COMPANY, INC.,

Third-Party Defendant.

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EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This is an action arising out of a work-related injury that occurred on March 19, 2004 at 80-00 Cooper Avenue, Glendale, New York (the premises). Plaintiff, Jorge Clavijo, alleges that while employed by third-party defendant Marlite Construction Corp. a/k/a Marlite Construction Company, Inc. (Marlite), he fell through temporary ceiling tile on the second floor to a bathroom on the floor below.

In motion sequence number 001, defendants move,

pursuant to CPLR 3212, for an order: (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against defendants Atlas Terminals, LLC (Atlas Terminals) and ATCO Properties & Management, Inc. (ATCO); (2) dismissing plaintiff's Labor Law §§ 200, 240, and 241 (6) and common-law negligence claims as against defendant Atlas Park, LLC (Atlas Park); and (3) granting Atlas Terminals, ATCO, and Atlas Park summary judgment on their claims for contractual and common-law indemnification and failure to provide insurance coverage as against third-party defendant Marlite.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment as to liability under Labor Law § 240 (1) as against Atlas Terminals and ATCO.

BACKGROUND

On the date of the accident, Atlas Terminals was the owner of the premises. ATCO is the managing agent of the premises. Marlite is a general contractor and the tenant of 2,400 square feet of a southern portion of Building 22, where plaintiff allegedly fell.

Plaintiff testified at his deposition that, on the date of his accident, he was employed by Marlite, and was hired by the company two days before (Plaintiff EBT, at 18). According to plaintiff, he worked at a job location in Sunnyside, Queens on

the day before his accident (id. at 24-25). Gene of Marlite told plaintiff to report to Building 22 on the premises on March 19 to assist the carpenter in putting down the floor (id. at 29). Plaintiff testified that he arrived at Building 22 around 7:30 A.M. (id. at 31). Plaintiff met Gene and his assistant, Bill, and was told that he was going to be working with Bill, putting down the second floor (id. at 32). Gene gave plaintiff a drill, screws, and a tool belt, and introduced him to Paul, the owner of Marlite (id. at 34). When plaintiff went up the staircase to the second floor, he noticed that there were pieces of plywood laid out on the floor over wooden beams (id. at 38). Plaintiff was instructed to secure the pieces of plywood to the beams with screws (id. at 40). Plaintiff was only supposed to walk within the white lines (id. at 50). At some point, plaintiff stepped on what he thought was a piece of plywood, but was in actuality a cardboard ceiling tile (id. at 60-64). Plaintiff fell through the ceiling tile, to a bathroom on the first floor (id. at 66-67). Plaintiff broke a sink with his foot and hit his head on concrete (id.).

Plaintiff states in an affidavit that:

> [j]ust before my accident, I had screwed down two sides of the sheet of plywood with the drill and was next going to screw down one of the other sides. I stepped backward to change positions and my foot went through some fragile material that was not very firm and then I fell all the way to the 1st floor, which was a distance of approximately 9-to-10 feet. I later learned . . . that

the fragile material . . . was ceiling tile (Plaintiff Aff., ¶ 7). Plaintiff also states that he was not given a hard hat to wear, nor was he given any safety harnesses, lifelines, ropes, safety equipment or netting to prevent or break any falls (id., ¶ 9). According to plaintiff, he was not told to obtain or use any such devices (id.).

Paola Shaddow, the Director of Leasing for ATCO, testified that Atlas Terminals owned Building 22 on the date of the accident, and that ATCO manages the premises (Shaddow EBT, at 11-13). Pursuant to a lease agreement dated March 5, 2003, a southern portion of Building 22 was leased to Marlite (id. at 23; Cardo Affirm. in Support, Exh. J). Shaddow states in an affidavit that, at the time of the accident, Marlite was in the process of constructing a mezzanine level, which was entirely contained within its leased space, and was to be exclusively used for Marlite's purposes (Shaddow Aff., at 2-3). According to Shaddow, Atlas Terminals, ATCO, and Atlas Park did not supervise the construction of the mezzanine level, and did not provide any tools, materials, or equipment for the construction work (id.).

Paul Faglione testified that he is the sole owner and president of Marlite (Faglione 10/16/06 EBT, at 6-7). Marlite is a general contractor (id.). Faglione testified that Marlite leased part of Building 22 (id. at 7-12). Faglione stated that plaintiff was repeatedly calling Eugene Coleman, the foreman on

the job, asking for employment (id. at 33). According to Faglione, plaintiff was not an employee of Marlite; the foreman told plaintiff to come in to possibly arrange employment for plaintiff (Faglione 10/16/06 EBT, at 33; Faglione 12/17/09 EBT, at 48-52, 62). Plaintiff was injured before Faglione had a chance to speak to plaintiff (Faglione 10/16/06 EBT, at 34). Faglione subsequently learned that, while plaintiff was waiting, "they had him do certain things, sweep and maintain the job. During the course of that is when he was hurt" (id. at 34-35). He also stated that he was directly in charge of hiring (id. at 50). Marlite had two employees on site performing demolition work: Billy Cruz and Eugene Coleman (Faglione 12/17/09 EBT, at 24-25). Faglione stated that he was unsure whether the area where plaintiff fell was part of the leased premises at the time of the accident (id. at 58). However, he stated that the work that was being done was work for Marlite's space (id. at 59).

On September 21, 2005, the Workers' Compensation Board (WCB) made the following determination:

> The claimant Jorge Clavijo had a work-related injury involving the back, neck, left lung, left ribs, right foot and right knee. The claimant's average weekly wage for the year before this work-related injury or occupational disease is determined to be $450.00 per C-3, without prejudice. Medical treatment and care, as necessary, for established sites of injury and/or conditions, is authorized. Orthopedic consultation authorized. Form C-8.1 issues relating to treatment and/or disputed medical bills are resolved in favor of the medical provider(s) for established sites. MRI is authorized to right knee and right foot. I find the

> correct employer to be Marlite Construction Corp. Insured by Special Trades Contracting & Construction Trust

(Edwards Affirm. in Support, Exh. 9).

On March 9, 2007, plaintiff commenced the instant action, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). On January 16, 2009, Atlas Terminals, Atlas Park, and ATCO impleaded Marlite, asserting the following claims: (1) contractual indemnification; (2) common-law indemnification and contribution; and (3) breach of contract for failure to procure and maintain insurance.

DISCUSSION

"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 evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers'" (Johnson v CAC Bus. Ventures, Inc., 52 AD3d 327, 328 [1st Dept 2008], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (Shapiro v Boulevard Hous. Corp., 70

AD3d 474, 475 [1st Dept 2010], citing Insurance Corp. of N.Y. v Central Mut. Ins. Co., 47 AD3d 469, 472 [1st Dept 2008]).

A. Plaintiff's Motion for Summary Judgment Under Labor Law § 240 (1)

Plaintiff moves for partial summary judgment on his Labor Law § 240 (1) claim as against Atlas Terminals, the owner, and ATCO, the managing agent. According to plaintiff, the WCB determination is dispositive of the issue of plaintiff's employment status with Marlite, and Marlite's owner admitted at his deposition that plaintiff was hired by a foreman (Faglione 11/16/06 EBT, at 16, 33-34). Plaintiff further contends that the statute was violated because he fell from the second floor to the first floor while putting plywood over beams.

Defendants argue, in opposition to plaintiff's motion, that there is a question of fact as to whether plaintiff was employed at the premises on the date of the accident, and thus, whether he is entitled to the protection of section 240 (1). To support this argument, defendants point to the testimony of Marlite's president, Paul Faglione, that plaintiff was not an employee of Marlite (Faglione 12/17/09 EBT, at 48-52, 62-63). Defendants maintain that they are not collaterally estopped by the WCB determination from relitigating the issue of plaintiff's employment because they were not parties to that determination. Alternatively, defendants argue that plaintiff was the sole

proximate cause of his accident or a recalcitrant worker because plaintiff walked in an area that he knew was dangerous, against specific instructions given to him, and because there were safety harnesses available at the site.

Marlite also opposes plaintiff's motion, arguing that: (1) most of the deposition transcripts annexed to plaintiff's motion are unsigned and unsworn, and thus are inadmissible; (2) plaintiff's employment with Marlite is disputed because defendants were not parties to the WCB proceeding and did not participate in the WCB proceeding; (3) plaintiff was the sole proximate cause of his accident because he observed cardboard and stepped on it anyway; and (4) plaintiff was a recalcitrant worker by failing to utilize available safety harnesses and by walking in a known, dangerous area.[1]

Contrary to Marlite's contention, the deposition transcripts submitted by plaintiff are in admissible form. The First Department has determined that unsigned deposition transcripts may be submitted as proof in support of a motion for summary judgment, as long as they are certified by the court reporter as accurate (White Knight Ltd. v Shea, 10 AD3d 567 [1st Dept 2004]; Morchik v Trinity School, 257 AD2d 534, 536 [1st Dept

[1] In reply, plaintiff contends that Marlite's opposition papers are untimely. Assuming that Marlite's opposition is untimely, the court exercises its discretion to consider these papers because plaintiff has not shown any prejudice (Dinnocenzo v Jordache Enters., 213 AD2d 219 [1st Dept 1995]).

1999]; Zabari v City of New York, 242 AD2d 15, 17 [1st Dept 1998]). Here, the deposition transcripts submitted by plaintiff are certified by the court reporters as accurate. Moreover, Marlite does not challenge any specific portions of these transcripts.

Labor Law § 240 (1) provides, in relevant part, as follows:

> All owners and contractors and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240 (1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which proximately causes an injury (Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]; Haimes v New York Tel. Co., 46 NY2d 132, 136-137 [1978]). The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520, rearg denied 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]).

To prevail under Labor Law § 240 (1), the plaintiff need only prove: (1) that he or she is a member of the class of workers that the statute was designed to protect; (2) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (3) that the statutory violation proximately caused his or her injuries (Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 290 [2003]).

Under the Labor Law, an "employee" is defined as "a mechanic, workingman or laborer working for another for hire" (Labor Law § 2 [5]). An "employed" person is defined as one who is "permitted or suffered to work" (Labor Law § 2 [7]). In Whelen v Warwick Val. Civic & Social Club (47 NY2d 970, 971 [1979]), the Court of Appeals held that "[t]o come within the special class for whose benefit absolute liability is imposed upon contractors, owners, and their agents to furnish safe equipment for employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" (see also Strunk v Buckley, 251 AD2d 491, 491-492 [2d Dept 1998]). Thus, Labor Law § 240 (1) does not apply to a worker performing services gratuitously (Stringer v Musacchia, 11 NY3d 212, 215 [2008]).

Collateral estoppel[2] "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]). A two-part test must be satisfied in order for the collateral estoppel doctrine to apply (Sepulveda v Dayal, 70 AD3d 420, 421 [1st Dept 2010]). "'First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination'" (id., quoting Kaufman v Eli Lilly & Co., 65 NY2d 449, 455 [1985]). Collateral estoppel applies to quasi-judicial determinations of administrative agencies, including the WCB (see Ryan, 62 NY2d at 499; O'Gorman v Journal News Westchester, 2 AD3d 815, 816 [2d Dept 2003]; Rigopolous v American Museum of Natural History, 297 AD2d 728, 729 [2d Dept 2002]).

The collateral estoppel doctrine applies to parties to

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[2]Although plaintiff argues that defendants are barred from relitigating plaintiff's employment under the res judicata doctrine, that doctrine does not apply here. Res judicata provides that "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481, 485 [1979]).

the prior action or proceeding and those in privity with parties (Buechel v Bain, 97 NY2d 295, 304 [2001], cert denied 535 US 1096 [2002]). "'Generally, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation'" (Chambers v City of New York, 309 AD2d 81, 86 [2d Dept 2003], quoting D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]).

Here, plaintiff has failed to show that the collateral estoppel doctrine applies. Defendants were not parties to the WCB proceeding, and there is no evidence that Marlite is in privity with defendants. Therefore, because defendants were "not afforded an opportunity to cross-examine witnesses or present evidence at the prior hearing, the outcome of the hearing cannot have preclusive effect" on them (Liss v Trans Auto Sys., 68 NY2d 15, 22 [1986]; see also Baten v Northfork Bancorporation, Inc., - AD3d - , 2011 NY Slip Op 05003, *2 [2d Dept 2011] [although the WCB determined that a codefendant was the plaintiff's employer, defendant's interests were not conditioned on or derivative of those interests]; Tounkara v Fernicola, 63 AD3d 648, 650 [1st Dept 2009] [owner and contractor did not have full and fair opportunity to litigate issue of purported employer's status in

workers' compensation proceeding, where owner and contractor were not parties to the proceeding and did not have a direct stake in its outcome other than potential collateral estoppel effect]).

Therefore, the court turns to whether plaintiff is entitled to prevail under section 240 (1). Although plaintiff states in his affidavit that he was an employee of Marlite on March 19, 2004 (Plaintiff Aff., ¶¶ 2, 5; see also Plaintiff EBT, at 18), Marlite's president, Paul Faglione, directly contradicts this claim. Faglione stated that plaintiff was not an employee of Marlite in 2004 (Faglione 10/16/06 EBT, at 16). Faglione testified that he was directly in charge of hiring (id. at 50), and that plaintiff repeatedly called Eugene Coleman, the foreman on the job, asking for employment (id. at 33). According to Faglione, Coleman told plaintiff to come in to possibly arrange employment for plaintiff (id.). Faglione testified that plaintiff was injured before Faglione had a chance to speak to him (id. at 34), but he subsequently learned that, while plaintiff was waiting, Coleman "had him do certain things, sweep and maintain the job. During the course of that is when he was hurt" (id. at 34-35).

"The primary purpose of Labor Law § 240 (1) is to extend special protections to 'employees' or 'workers .... Inclusion in this special class for whose benefit absolute liability is imposed requires a plaintiff to demonstrate that he

was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or their agent [citations and internal quotation marks omitted]" (Stringer v Musacchia, 11 NY3d 212, 215 [2008]; citing Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573, 577 [1990]).

Faglione's testimony establishes that Coleman, Marlite's foreman, permitted or suffered plaintiff to work at the job site. The sole question remaining is whether plaintiff was "hired." The Court of Appeals dealt with this issue in Stringer, supra, and explained:

> "When a person has been hired, at least three factors are usually present. First, there is the voluntary undertaking of a mutual obligation—the employee agrees to perform a service in return for compensation (usually monetary) from the employer, thereby revealing an economic motivation for completing the task ... Second, although not an essential factor, an employer may exercise authority in directing and supervising the manner and method of the work ... Third, the employer usually decides whether the task undertaken by the employee has been completed satisfactorily."

(id. at 215). While compensation is "usually monetary," it need not be so. Here, the compensation was not monetary; it was an opportunity--plaintiff undertook work at the direction of the foreman to secure employment, thereby "revealing an economic motivation for completing the task" (Stringer, supra). Moreover, while waiting for his interview, the foreman told plaintiff to "do certain things, sweep and maintain the job;" which he did. This is a clear direction of manner and method of work.

Marlite argues that plaintiff's work amounts to nothing more than mere volunteering, and the Labor Law does not does not apply to a volunteer who performs a service gratuitously (see Whelen v Warwick Val. Civic & Social Club, 47 NY2d 970 [1979]). Again, Stringer is informative. The court held that "an individual does not become an employee covered by Labor Law § 240 (1) by providing casual, uncompensated assistance to another person with a repair or construction project in an informal arrangement that does not give rise to mutual duties or obligations between them and bears none of the traditional hallmarks of an employment relationship" (Stringer v Musacchia, 11 NY3d at 216-7).

In Stringer, the plaintiff volunteered to build a shed in exchange for going on a recreational turkey hunt. He was injured while constructing the shed. He was found to be a casual volunteer and not protected by the Labor Law. Here, there was nothing "casual" about Clavijo's "assistance." He performed work at a commercial construction site at the direction of a company foreman. That the parties dispute what specific work was performed does not alter this determination. Accordingly, plaintiff has, as a matter of law, established indicia that he was not a mere volunteer, but, rather, an employee.[3]

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[3] Faglione never testified that he did not know that plaintiff was invited to the work site, and never testified that he was unaware that the foreman would "try out" plaintiff prior

Plaintiff has also established a violation of the Labor Law, and that the violation was a proximate cause of his injuries. In Mihelis v I. park Lake Success, LLC (56 AD3d 355 [1st Dept 2008]), the plaintiff and his coworker were standing on a roof panel which snapped in half and collapsed. The First Department held that the "evidence establishing that plaintiff was not provided with any safety devices demonstrates prima facie entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim. In opposition, defendants failed to raise a triable issue. That there may have been safety devices somewhere at the worksite does not establish proper protection" (id. at 356 [internal quotation marks and citations omitted]). Here, plaintiff fell nine or 10 feet to the floor below after stepping on a temporary ceiling tile, and was not given any safety devices (Plaintiff Aff., ¶¶ 7, 9).

Defendants have not demonstrated that plaintiff was the sole proximate cause of his injuries or a recalcitrant worker. To show that a plaintiff was the sole proximate cause of his injuries under the statute, the defendant must establish that the plaintiff "'had adequate safety devices available; that he knew both that they were available and that he was expected to use

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to hiring. Further, the argument that the foreman did not have the authority to hire Clavijo is unpersuasive when viewed in light of the events. By inviting Clavijo to the work site, and directing him to "do certain things," the foreman acted with the implied authority to hire.

them; that he chose for no good reason not to do so; and that had he made that choice he would not have been injured'" (Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288 [1st Dept 2008], quoting Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 [2004]). Defendants and Marlite have not pointed to any such evidence. Even if plaintiff was negligent in stepping on the ceiling tile, the "[n]egligence, if any, of the injured worker is of no consequence" (Rocovich, 78 NY2d at 513). Moreover, although defendants and Marlite argue that plaintiff did not use safety harnesses, he was not a recalcitrant worker because there is no evidence that "plaintiff . . . disobeyed any immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device" (Walls v Turner Constr. Co., 10 AD3d 261, 262 [1st Dept 2004], affd 4 NY3d 861 [2005]).

Accordingly, plaintiff's motion for summary judgment under Labor Law § 240 (1) is granted.

B. Defendants' Motion for Summary Judgment

Plaintiff has discontinued all of his causes of action as against Atlas Park (Edwards Affirm. in Opposition, ¶ 3). Therefore, defendants' motion is moot to the extent that it seeks summary judgment dismissing all claims asserted as against Atlas Park.

Plaintiff has also discontinued his Labor Law § 200 and

common-law negligence claims as against Atlas Terminals and ATCO (id., ¶ 5). Accordingly, defendants' motion seeking dismissal of these claims is also moot.

Atlas Terminals, Atlas Park, and ATCO move for contractual indemnification from Marlite, pursuant to the indemnification provision of the lease agreement. They maintain that they are entitled to indemnification because: (1) the accident occurred entirely within Marlite's leased space; (2) the project was supervised, directed, and controlled solely by Marlite; and (3) defendants were not negligent in connection with plaintiff's accident. Additionally, Atlas Terminals, Atlas Park, and ATCO seek common-law indemnification from Marlite for the same reasons.

In opposition, Marlite argues that the lease agreement relied upon by third-party plaintiffs is inadmissible because it is unsigned and undated. Marlite contends that, except for one transcript, third-party plaintiffs' deposition transcripts are also unsigned and are, therefore, not in admissible form. Finally, Marlite maintains that there is an issue of fact as to whether the space plaintiff fell from was leased by Marlite, pointing to Faglione's testimony that the area was eventually within Marlite's leased space (Faglione 12/17/09 EBT, at 17-20, 58).

As noted above, there is no merit to Marlite's

challenge to the competency of third-party plaintiffs' deposition transcripts. As for Marlite's contention that the lease is unsigned and undated, a review of the lease agreement shows that the lease agreement is dated March 5, 2003, and is signed by George Rozansky for Atlas Terminals and Paul Faglione on behalf of Marlite (Cardo Affirm. in Support, Exh. J [Lease Agreement, at 1, 8]).

Contractual Indemnification

It is well established that "[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 [1st Dept 2003] [internal quotation marks and citation omitted]; see also Uluturk v City of New York, 298 AD2d 233, 234 [1st Dept 2002]).

Paragraph 8 (A) of the lease states:

> Tenant shall indemnify and save harmless Landlord against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Landlord shall not be reimbursed by insurance, including reasonable attorneys' fees and disbursements, paid, suffered or incurred as a result of any breach by Tenant or Tenant's Entities of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of Tenant or Tenant's Entities. Tenant's liability under this lease extends to the acts and omissions of any assignee or subtenant and in case any action or proceeding is brought any action or proceeding

> is brought against Landlord by reason of any such claim, Tenant, upon written notification from Landlord, will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Landlord in writing, such approval not to be unreasonably withheld.

(emphasis added). In this case, there are issues of fact as to whether plaintiff's accident resulted from Marlite's breach of any covenant or condition of the lease, and whether plaintiff's accident resulted from the negligence of Marlite.[4] Marlite was constructing a mezzanine level within its leased space at the time of the accident (Faglione 12/17/09 EBT, at 33-34). Accordingly, third-party plaintiffs' motion for contractual indemnification is premature and must be denied (see Gomez v Sharon Baptist Bd. of Directors, Inc., 55 AD3d 446, 447 [1st Dept 2008] [contractual indemnification premature where there was no finding that proposed indemnitor was negligent or that its

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[4] Marlite has not shown that there is a question of fact as to whether plaintiff fell within its leased space. Pursuant to the lease, Marlite leased a southerly portion of Building 22, as more particularly shown on the attached drawing to the lease (Cardo Affirm. in Support, Exh. J [Lease Agreement]). Shaddow states that Marlite's "leasehold includes 2,400 square feet of space on the first floor of Building 22. Contained within that diagram, within Marlite's leasehold commencing as of December 1, 2003, and continuing to the date of the accident, is the bathroom into which plaintiff fell during his accident. That bathroom was part of Marlite's leased space as of the commencement of the lease and continuing through the date of the accident" (Shaddow Aff., at 3). Faglione stated that he did not know whether the area where plaintiff fell was within Marlite's leased space (Faglione 12/17/09 EBT, at 58). When Faglione was asked whether another part of the building was within Marlite's leased space, Faglione responded that it was not part of Marlite's space (id. at 20).

negligence proximately caused the plaintiff's accident]; Malecki v Wal-Mart Stores, 222 AD2d 1010, 1011 [4th Dept 1995] [same]).

Common-law Indemnification

Common-law indemnification is predicated on vicarious liability without actual fault on the part of the indemnitee (Edge Mgt. Consulting, Inc. v Blank, 25 AD3d 364, 367 [1st Dept], lv dismissed 7 NY3d 864 [2006]; Trump Vil. Section 3 v New York State Hous. Fin. Agency, 307 AD2d 891, 895 [1st Dept], lv denied 1 NY3d 504 [2003]). 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" (Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]). In the absence of negligence, the party seeking indemnity must show that the proposed indemnitor had direct supervision and control over plaintiff's work (McCarthy v Turner Constr., Inc., 72 AD3d 539 [1st Dept 2010], affd 2011 WL 2534070, 2011 NY LEXIS 1754 [2011]; Mejia v Levenbaum, 57 AD3d 216 [1st Dept 2008]; Tighe v Hennegan Constr. Co., Inc., 48 AD3d 201, 202 [1st Dept 2008]; Reilly v DiGiacomo & Son, 261 AD2d 318 [1st Dept 1999]). Here, Atlas Terminals, Atlas Park, and ATCO have not demonstrated that Marlite was guilty of some negligence

that contributed to the causation of plaintiff's accident.[5]

Failure to Procure Insurance

An agreement to procure insurance is distinct from an indemnification agreement (see Kinney v Lisk Co., 76 NY2d 215, 218 [1990]). Where a party fails to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (Kennelty v Darlind Constr., 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]).

In Crespo v Triad, Inc. (294 AD2d 145, 148 [1st Dept 2002]), the First Department held that "[t]he Owners were properly granted partial summary judgment on their cross claim against Bozell for breach of contract for failure to procure insurance where the lease between them required each to procure insurance naming the other as an additional insured, and, in response to the motion, Bozell failed to tender an insurance policy." Similarly, in Chaehee Jung v Kum Gang, Inc. (22 AD3d 441, 443 [2d Dept 2005], lv denied 7 NY3d 703 [2006]), the Second Department held that the trial court should have granted summary judgment on an owner's cross claim for failure to procure

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[5]Marlite does not assert that collateral estoppel applies to bar the third-party claims for common-law indemnification. Atlas Terminals, ATCO, and Atlas Park would be prohibited from seeking common-law indemnification from Marlite unless plaintiff sustained a grave injury (Workers' Compensation Law § 11).

insurance, noting that "[t]he lease between [the owner] and [tenant] clearly required the latter to procure . . . insurance . . . naming [the owner] as an insured. In opposition to [the owner's] prima facie showing of entitlement to judgment as a matter of law, [tenant] failed to produce any evidence establishing its compliance with this obligation."

Paragraph 8 (B) of the lease provides that:

> During the Term, Tenant shall pay for and keep in force general liability policies, including elevator liability, in standard form protecting against any and all liability occasioned by accident or occurrence, subject to customary exclusions, such policies to be written by recognized and well-rated insurance companies authorized to transact business in the State of New York, in the amount of $500,000 in respect to injuries to any one person, $1,000,000 in respect to two or more persons in any one accident or occurrence and $100,000 for property damage. If at any time during the Term it appears that public liability or property damage limits in the City of New York for premises similarly situated, due regard being given to the use and occupancy thereof, are higher than the foregoing limits, then Tenant shall increase the foregoing limits accordingly. Landlord shall be named as an additional insured in the aforesaid insurance policies and the policies shall provide that Landlord shall be afforded thirty (30) days prior notice of cancellation of such insurance.

(emphasis supplied).

As noted above, the lease required Marlite to purchase general liability insurance naming Atlas Terminals, the landlord, as an additional insured. Marlite does not address this issue or present any evidence of its compliance with the insurance procurement provision. In fact, Faglione admitted at his deposition that Marlite did not purchase the required insurance

(Faglione 12/17/09 EBT, at 31). However, Atlas Park and ATCO were not required to be named as additional insureds pursuant to the lease. The Rules and Regulations Governing Tenant Alterations, which are incorporated into the lease, only state that "[b]efore commencement of Work, Tenant's general contractor and/or subcontractor shall furnish to the Landlord Certificates of Workmen's Compensation Insurance and Certificates of Comprehensive Liability and Property Damage" and that "[a]ll insurance certificates are to name The Hemmerdinger Corporation and its managing agent, Atco Properties & Management, Inc. as co-additional insured" (Cardo Affirm. in Support, Exh. J). Accordingly, Atlas Terminals is entitled to partial summary judgment on its failure to procure insurance claim.

CONCLUSION

Accordingly, it is

ORDERED that motion (sequence number 001) of defendants/third-party plaintiffs Atlas Terminals, LLC, Atlas Park, LLC, and ATCO Properties & Management, Inc. for summary judgment is granted to the extent of granting third-party plaintiff Atlas Terminals, LLC judgment on the issue of liability on its third-party claim for failure to procure insurance against third-party defendant Marlite Construction Corp. a/k/a Marlite Construction Company, Inc., with the issue of damages to be determined at trial, and is otherwise denied; and it is further

ORDERED that plaintiff's motion (sequence number 002) for partial summary judgment under Labor Law § 240 (1) is granted; and it is further

ORDERED that counsel appear for a pre-trial conference in Part 17, 60 Centre Street, Room 422, on April 26, 2012, at 10:30 AM.

Dated: 2/8/12

FILED

FEB 14 2012

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.

EMILY JANE GOODMAN