[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Brancaccio

INDEX NO. 114985-09

MOTION DATE

-v-

Arnold Bias Products, Inc., et al.

MOTION SEQ. NO. 01

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

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

RECEIVED
FEB 14 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
FEB 14 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/7/12

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------X

MICHAEL BRANCACCIO,

Plaintiff,

-against-

ARNOLD BIAS PRODUCTS, INC., and VICTORIA'S SECRET STORES, LLC.,

Defendants.

----------X

Index No. 114985/09

ARNOLD BIAS PRODUCTS, INC.,

Third-Party Plaintiff,

-against-

MAC BROADWAY, LLC.,

Third-Party Defendant.

----------X

Third-Party Index No. 590502/10

Louis B. York, J.:

Motions with sequence numbers 001, 002, 003 and 004 are consolidated for disposition.

In motion sequence number 001, third-party defendant Mac Broadway, LLC (Mac) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and any cross claims asserted against it.[1] In motion sequence number 002, defendant Victoria's Secret Stores, LLC. (Victoria's Secret) moves for summary judgment dismissing the complaint and cross claims asserted against it.

[1]There are no cross claims asserted against Mac.

Defendant/third-party plaintiff Arnold Bias Products, Inc. (Arnold Bias) moves, in motion sequence numbers 003 and 004, for summary judgment on its indemnification claims against Victoria's Secret and Mac.

Because resolution of the claims for indemnification depends on conclusions with respect to plaintiff's complaint, the motions shall be considered out of order.

BACKGROUND

Arnold Bias is the owner of property located at 591-593 Broadway, also known as 164-166 Mercer Street, in Manhattan. In July 2007, Arnold Bias entered into a lease with Mac, by which Mac leased

> a portion of each of the ground level containing approximately 9,938 square feet and basement level containing approximately 9,682 square feet of those certain buildings ... known by the street address 591 Broadway and 593 Broadway, New York, New York, referred to herein as the "Demised Premises" ..., the Demised Premises being depicted on the building plans attached hereto and made a part hereof as Exhibit "A"

(7/07 Lease, Section 1, "The Demised Premises and Lease Term"). In May 2008, Arnold Bias and Mac entered into an amended lease, by which Mac leased

> the entire ground floor, entire basement and approximately 4,000 square feet of subbasement at 593 Broadway, New York, New York and the entire ground floor, entire basement and approximately 500 square feet of the subbasement at 591 Broadway, New York, New York ... as approximately shown hatched

> on the floorplan annexed hereto and made a part hereof as Exhibit A

(5/08 Amended Lease, Article 2, [A] [i]). Three copies of the amended lease were submitted with these motion papers, none of which contains an Exhibit A showing a floorplan. The designation of the demised premises is further set forth in Article 1, "Recitals/Definitions," of the amended lease:

> "Premises" shall have the meaning set forth in Article 2, except that nothing contained therein or in this Rider shall be construed as a letting by Landlord to Tenant of ... (v) the common areas and facilities of the Buildings. ... [A]ll stairs ... adjacent to (and not located within) the Premises, all space in or adjacent to the Premises used for ... stairways ... are hereby reserved to Landlord

(5/08 Amended Lease, Article 1).

In August 2008, Mac and Victoria's Secret entered into a sublease, by which Victoria's Secret subleased the demised premises as set forth in the original lease. Mac and Victoria's Secret further entered into an amended sublease and a second amended sublease (January 15, 2009 and March 2, 2009, respectively), both of which refer to the subleased premises as "consisting of a portion of each of the ground level and basement level of ... 591 Broadway and 593 Broadway ..." (Amended and Second Amended Subleases, WITNESSETH Paragraph).

On July 20, 2009, plaintiff, a laborer employed by nonparty E.C. Provini (Provini), slipped and fell in a staircase

which ran from the ground floor to the basement (the stairs). He had used the stairs, and a further flight going from the basement to the subbasement, to get to the bathroom in the subbasement, and after he had gone back to the ground floor, he descended the stairs again, looking for the foreman. While he was descending the stairs, he slipped and fell on "[d]ebris ... like a mixture of dust, rock. Could have been sheetrock" (Plaintiff's Depo., at 26).

Article 4 of the amended lease allows Mac to make the following alterations to its demised premises: relocating a lobby and installing two new elevators (Article 4 [F]). Mac hired H&H Builders (H&H) to perform the renovations. Mac contends that H&H finished its work prior to the date of plaintiff's accident, and that Mac vacated the premises pursuant to a January 30, 2009 letter of possession, which states that, "Pursuant to the [Sublease], we hereby inform you that the [Sublease] Commencement Date is and shall be February 1st, 2009. You acknowledge delivery of possession of the Demised Premises on or before such date" (1/30/09 Letter from Mac to Victoria's Secret). As such, Mac argues that it was no longer in possession of the premises at the time of plaintiff's accident.

Victoria's Secret hired Provini as general contractor for the build-out of its space into a Victoria's Secret store. It is uncontested that, on the date of plaintiff's accident,

Provini, plaintiff's employer, was engaged in the performance of its work.

THE PLEADINGS

The complaint consists of one cause of action, asserting claims sounding in common-law negligence and violation of Labor Law §§ 200 and 241 (6). Arnold Bias's answer alleges four cross claims against Victoria's Secret, for contribution, common-law and contractual indemnification, and breach of contract by failure to procure insurance. The contract upon which the contractual claims are based is an alleged Arnold Bias/Victoria's Secret lease. There is no lease between Arnold Bias and Victoria's Secret. Arnold Bias's third-party complaint brings three causes of action against Mac, sounding in common-law indemnification or contribution, contractual indemnification and breach of contract to procure insurance. The contract upon which these contractual causes of action are based is the Arnold Bias/Mac lease.

DISCUSSION

Summary Judgment Standard

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Shapiro v 350 East 78th Street Tenants Corp.*, 85 AD3d 601, 608 [1st Dept 2011], quoting *Winegrad*

v New York University Medical Center, 64 NY2d 851, 853 [1985]). "If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Medical Services, PC*, 76 AD3d 927, 927 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

The Stairs

Although the parties strongly contest the issue of whether the stairs were part of the premises described in the lease, amended lease or sublease, no finding on that issue is now possible. While the lease and the sublease cover identical demised premises, and include an Exhibit A which shows a floor plan of those premises, this evidence alone does not demonstrate whether the stairs were part of the demised premises. In addition, no copy of the amended lease which is before the court includes as an Exhibit A floor plan, so the demised premises as shown as part of the lease and sublease cannot be compared with a

floor plan for the amended lease. One other factor precluding summary judgment is the fact that the amended lease includes a definition of "premises" which appears to be internally inconsistent, i.e., that stairs *not located within* the demised premises and *space used in the premises for stairways* are reserved to the landlord.

Accordingly, the issue of whether the stairs were part of the demised premises must await trial.

Nevertheless, certain determinations may be made even in the absence of a finding concerning the issue of the stairs.

Victoria's Secret's Motion for Summary Judgment Dismissing the Complaint and All Cross Claims Asserted Against It (motion sequence number 002)

Although plaintiff has submitted next to nothing in response to Victoria's Secret's motion, Victoria's Secret must still establish its entitlement to summary judgment before that relief may be granted.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons

> employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

The duty imposed on owners and contractors to provide workers with reasonable and adequate protection and safety is nondelegable, and no supervision or control is needed in order for liability to attach for statutory violations under Labor Law §§ 240 (1) and 241 (6) (*see e.g. Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1273 [3d Dept 2010]).

> To recover on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards. The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case [internal citations omitted]

(*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]).

Victoria's Secret's assertion that it cannot be held liable under Labor Law § 241 (6) because it was not an owner or contractor or agent during the renovations is without merit. It was the sublessee of the demised premises. "The meaning of 'owners' under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [citations omitted]" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47

AD3d 616, 618 [2d Dept 2008]; *see also Guclu v 900 Eighth Avenue Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011] ["Lessees who hire a contractor and have the right to control the work being done are considered 'owners' within the meaning of (Labor Law §§ 240 [1] and 241 [6])," citing *Kwang Ho Kim*, 47 AD3d at 618]; *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008] ["The applicability of Labor Law § 241 (6) encompasses lessees who fulfill the role of owner by contracting to have work performed"]).

It is uncontested that Victoria's Secret hired Provini to build out the demised premises into a Victoria's Secret store, for Victoria's Secret's benefit. Accordingly, Victoria's Secret is considered an "owner" under the statute and may be liable if the requirements of Labor Law § 241 (6) are met.

However, although plaintiff alleges violations of numerous provisions of the Industrial Code (12 NYCRR Part 23) in his bill of particulars, Victoria's Secret fails to argue that any one of them does not apply or is not specific enough to serve as a basis for a section 241 (6) claim. Thus, Victoria's Secret has not met its burden, and the part of its motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is denied.

Labor Law § 200/Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

It is well-established that

> Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work. Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition. To provide constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it [internal quotation marks and citations omitted]

(*Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 685-686 [2d Dept 2011]; *see also Reilly-Geiger v Dougherty*, 85 AD3d 1000, 1000 [2d Dept 2011] [owner liable if "had actual or constructive notice of (dangerous or defective condition) without remedying it within a reasonable time"]; *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47, 50-51 [2d Dept 2011]).

There is no evidence that Victoria's Secret either created or had actual or constructive notice of the dirt and

debris on the stairs. Therefore, the part of Victoria's Secret's motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is granted.

Because there was no lease between Arnold Bias and Victoria's Secret, summary judgment dismissing Arnold Bias's contractual cross claims against Victoria's Secret is granted.

Mac's Motion for Summary Judgment Dismissing the Third-Party Complaint (motion sequence number 001)

Common-Law Indemnification or Contribution

Arnold Bias's first cause of action against Mac sounds in common-law indemnification or contribution.

> The critical requirement of a valid third-party claim for contribution is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought. Thus, contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories. Similarly, the key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled ... to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him [internal quotation marks and citations omitted]"

(*Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840 [2d Dept 2005]). Said another way,

> It is well settled that the right of common-law indemnification belongs to parties determined to be vicariously liable without

> proof of any negligence or active fault on their part. [W]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent. ... Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy [interior quotation marks and citations omitted]

(*Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 [4th Dept 2011]).

Here, there has been no finding with respect to Arnold Bias's negligence or lack of negligence. Thus, no determination can be made concerning Arnold Bias's possible right to contribution or common-law indemnification, and the part of Mac's motion which seeks summary judgment dismissing Arnold Bias's first cause of action must be denied.

Contractual Indemnification

Arnold Bias's second cause of action against Mac is for contractual indemnification, based on the Arnold Bias/Mac lease.

> [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. [A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. Where a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as

> premature [internal quotation marks and citations omitted]

Baillargeon v Kings County Waterproofing Corp., ___ AD3d ___, 2012 NY Slip Op 00315, *2 [2d Dept 2012]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 907 [1st Dept 2011]).

As an initial issue, this part of Mac's motion must be denied because the lease only covers the demised premises, and it has not yet been determined whether the stairs were within those premises.

Article 34, Indemnity, is the same in both the lease and the amended lease. It provides, in pertinent part:

> Tenant [Mac] shall indemnify, defend and save harmless Indemnitees [as relevant, Arnold Bias] from and against (i) all claims of whatever nature against Indemnitees to the extent arising from any reckless or willful act or negligence of Tenant ..., except to the extent caused by the negligence or willful misconduct of any Indemnitee, (ii) all claims against Indemnitees for bodily injury ... occurring during the Term in the Premises, except to the extent caused by the negligence or willful misconduct of any Indemnitee, (iii) all claims against Indemnitees for bodily injury ... occurring outside of the Premises but anywhere within or about the Real Property to the extent arising from negligence or reckless, or willful act of Tenant ... .

As the language of the provision makes it clear that Mac need not indemnify Arnold Bias for Arnold Bias's own negligence or willful misconduct, and no finding concerning Arnold Bias's negligence, or lack thereof, has been made, that part of Mac's motion which seeks dismissal of Arnold Bias's contractual indemnification claim must be denied.

Arnold Bias's third cause of action sounds in breach of contract by failure to procure insurance. The part of Mac's motion which seeks summary judgment dismissing this claim is denied, as Mac has completely failed to tender evidence which would eliminate any material question of fact on this issue.

Arnold Bias's Motions for Summary Judgment on Its Indemnification Claims Against Mac and Victoria's Secret (motion sequence numbers 003 and 004)

This court's Compliance Conference Additional Directives attached to its April 6, 2011 Order provide that "Motions for summary judgment must be made within 60 days of the Note of Issue date or will be denied." It is uncontested that plaintiff's note of issue was filed on April 14, 2011. Thus, Arnold Bias's motions should have been made by June 13, 2011. They were not.

The court takes no notice and gives no consideration to Arnold Bias's "cross motions" buried within its opposition to Mac and Victoria's Secret's motions, as they were not properly before the court. Arnold Bias's arguments which focus on the law

concerning tardy cross motions will also not be considered, because no cross motions were made.

Arnold Bias's motions with sequence numbers 003 and 004 were brought on July 18, 2011, well after the time to make such motions had expired. Although Arnold Bias has had ample opportunity to proffer an explanation for its tardy submission of its motions, it has given none.

In 2004, the Court of Appeals decided the case of *Brill v City of New York* (2 NY3d 648 [2004]), which determined that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the [summary judgment] motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill*, 2 NY3d at 652; *see also Miceli v State Farm Mutual Automobile Insurance Co.*, 3 NY3d 725, 726 [2004] ["statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties" (citing *Brill*)]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652). Moreover, "'[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity'" (*ibid.*, quoting *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). "In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has

no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment [internal quotation marks and citations omitted]" (*Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796, 796 [2d Dept 2011]).

Therefore, Arnold Bias's motions are denied as untimely.

CONCLUSION

Accordingly, it is

ORDERED that Mac Broadway, LLC.'s motion (motion sequence number 001) is denied; and it is further

ORDERED that the part of Victoria's Secret Stores, LLC.'s motion (motion sequence number 002) which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it is denied; and it is further

ORDERED that the part of Victoria's Secret Stores, LLC.'s motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it is granted; and it is further

ORDERED that the part of Victoria's Secret Stores, LLC.'s motion which seeks summary judgment dismissing Arnold Bias Products, Inc.'s cross claims for common-law indemnification and contribution is denied; and it is further

ORDERED that the part of Victoria's Secret Stores, LLC.'s motion which seeks summary judgment dismissing Arnold Bias

Products, Inc.'s contractual cross claims is granted; and it is further

ORDERED that Arnold Bias Products, Inc.'s motions (motion sequence numbers 003 and 004) are denied.

Dated: 2/7/12

ENTER:

LBY J.S.C.