Doxey v Freeport Union Free School Dist.
2012 NY Slip Op 30889(U)
April 2, 2012
Supreme Court, Nassau County
Docket Number: 001432/10
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

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TOWNSEND DOXEY AND TRACY DOXEY,

Plaintiffs,

-against-

Index No.: 001432/10
Motion Sequence...01, 02, 03, 04
Motion Date...02/01/12
XXX

FREEPORT UNION FREE SCHOOL DISTRICT, TRITON CONSTRUCTION COMPANY, LLC, and ULTIMATE POWER INC.,

Defendants.

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FREEPORT UNION FREE SCHOOL DISTRICT,

Third-Party Plaintiff,

-against-

STRIPER MECHANICAL SERVICE, INC.,

Third-Party Defendant.

---X

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Notice of Motion (Mot. Seq. 02).....x
Affirmation in Opposition (Mot. Seq. 01 & 02).....x
Reply Affirmation.....x
Reply Affirmation x
Affirmation in Opposition (Mot. Seq. 01, 02 & 04...x
Notice of Motion (Mot. Seq. 03).....x
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Memorandum of Law.....x
Affirmation in Reply.....x
Notice of Motion (Mot. Seq. 04).....x

Memorandum of Law.....x
Affirmation in Reply.....x
Memorandum of Law.....x

Upon the foregoing papers, the Motion by the Defendant, Triton Construction Company, LLC ("Triton") [Mot. Seq. 01] and the Cross-motion by the Defendant, Ultimate Power Inc. ("Ultimate") [Mot. Seq. 02], seeking an Order, pursuant to CPLR § 3212, granting them each summary judgment dismissing the Plaintiffs, Townsend Doxey and Tracy Doxey's (collectively referred to herein as "Doxey"), complaint together with any and all cross-claims asserted against them; the Defendant/Third-party Plaintiff, Freeport Union Free School District (referred to herein as the "School District"), Motion [Mot. Seq. 03], seeking an Order, pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiffs' complaint as well as any and all cross-claims asserted against it and seeking summary judgment in it's favor as against the Defendants, Triton, Ultimate and Third-Party Defendant, Striper Mechanical Service, Inc., (referred to herein as the "Striper") based on contractual and common law indemnification; and the Motion [Mot. Seq. 04] of the Third-Party Defendant, Striper Mechanical Service, Inc. ("Striper"), pursuant to CPLR 3212, seeking an Order granting it summary judgment dismissal of the claims for contractual and common law indemnification asserted by the Defendant, Third-Party Plaintiff, Freeport Union Free School District are determined as hereinafter provided.

This action arises out of an accident that occurred on June 25, 2009 at the Freeport Columbus Avenue School, a school located within the Defendant, Freeport

Union Free School District. Specifically, the accident occurred at the basement hatch door located at the school where the Plaintiff, Townsend Doxey, an employee of the Third-Party Defendant Striper, was working as a foreman/mechanic to perform HVAC and boiler installation work. As best as can be determined from the papers submitted herein, the Plaintiff's injuries were sustained while in the course of preparation for the installation of a new boiler unit at the school. On the date of the incident, the Plaintiff was standing on a metal ladder within the opening of the basement hatchway door, also referred to as a "Bilco" door, while he and his two co-workers unloaded supplies into the workspace below. At his oral Examination Before Trial, the Plaintiff testified that while he was standing on the ladder, he observed, what he describes as a "shock" protruding into the Bilco door opening. He attempted to move the shock into a standing position so as to remain flush against the door. After moving the shock by hand, the Plaintiff was allegedly struck in the face and eye by the spring mechanism that was encased within the shock's cylindrical housing. A spring from a list mechanism on the hatchway door came apart projecting a piece of the mechanism into his face.

The Defendant, Freeport Union Free School District, was the owner of the subject site. The Defendant, Triton Construction Company, LLC was hired by the School District, as the Construction Manager for the project. The Defendant, Ultimate Power Inc., was hired by the School District to replace the boiler unit at the school. Ultimate, in turn, retained Striper, for the installation of the boiler unit. The Plaintiff, Townsend Doxey, was employed by Striper as a foreman.

In bringing this action, the Plaintiff asserts causes of action grounded in common law negligence and violations of New York State Labor Law § 200 and Labor Law § 241 (6). His Labor Law § 241 (6) claim is predicated upon alleged violations of New York State Industrial Code provisions 12 NYCRR §§ 23-1.7 (e) (1), (e) (2) and 23-1.27. The Plaintiff also asserts a violation of the "doctrine of *res ipsa loquitor.*" The Plaintiff, Tracy Doxey's claims are derivative in nature.

Upon the instant motions, each defendant seeks summary judgment dismissal of the Plaintiffs' complaint in its entirety.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, to direct judgment in his favor, and that the proof tendered is in admissible form (*Menekou v. Crean*, 222 A.D.2d 418, 419-420 [2nd Dept. 1995]). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact (*Id.* at 420).

Here, the Plaintiff's reliance upon Industrial Code provisions 12 NYCRR §§ 23-1.7 (e) (1), (2) and 23-1.27 all fail to support his Labor Law § 241 (6) claim.

Specifically, Industrial Code 12 NYCRR §§ 23–1.7 (e) (1) and (2) read as follows:

(e) Tripping and other hazards.

(1)Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause

tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2)Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

While it is settled that these provisions are specific enough to sustain an action under Labor Law § 241 (6) for their violation (*Herman v. St. John's Episcopal Hosp.*, 242 A.D.2d 316 [2nd Dept. 1997]; *McDonagh v. Victoria's Secret, Inc.*, 9 A.D.3d 395 [2nd Dept. 2004]; *see generally, Rizzutto v. LA Wenger Contracting Co.*, 91 N.Y.2d 343, 349-350 [1998]; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494 [1993]), the Plaintiffs' claim predicated upon said sections are nonetheless unsubstantiated by the record herein.

That is, as to §23-1.7 (e) (1), even if this Court is persuaded that the accident site in this case was indeed a "passageway" (*Dand v. Columbus Centre, LLC*, 19 Misc.3d 1116[A] [Civil Ct. New York 2008]), there is no dispute and it is abundantly clear that the specific cause of the Plaintiff's injury – the spring – did not constitute debris or a tripping hazard. Nor is there any evidence on this record that it was a "sharp projection" which, had it not been for the Plaintiff's interference, would have otherwise "cut or puncture[d] any person" including the Plaintiff. Indeed the record confirms that the spring was also encased within a sealed two piece cylinder such that, from the outside, there was no way to tell how it was held together. That is, because of the way the spring mechanism was built, with the interior spring entirely hidden from view, no one looking at the exterior of the

mechanism would have reason to know of the danger posed. Indeed, the Plaintiff himself testified that he failed to recognize that a hazard existed as he used his hand to move the spring mechanism upright so that it would not be in the way. The law is clear that where a dangerous condition such as the encased spring in the instant action is not visible and discoverable upon reasonable inspection by a layman, it will be considered "latent" and a defendant cannot be charged with a constructive notice of that condition (*Rapino v. City of New York*, 299 A.D.2d 470 [2nd Dept. 2002]; *Monroe v. City of New York*, 67 A.D.2d 89 [2nd Dept. 1979]).

In opposition, the Plaintiff relies solely upon the affirmation of his attorney who is clearly without personal knowledge of the facts. Although this does not supply the evidentiary showing necessary to successfully resist the motion (CPLR § 3212 [b]; *Roche v. Hearst Corp.*, 53 N.Y.2d 767 [1981]; *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 229 [1978]), even if this Court considers the opposition papers, the Plaintiff's attorney's attempt to argue that the spring mechanism was a sharp projection "which was broken hanging and protruding from the doors, exploded and struck [plaintiff's] face" (*Aff in Opp to Freeport's Motion*, ¶ 28), is entirely unavailing.

For example, at his 50-h hearing, the Plaintiff testified that when he first saw the sidewalk door it was already opened (Doxey 50-h Transcript, pp. 36, 42), that he had been working in the area of the sidewalk door for half an hour before he was injured (p. 42), that in that time, he had gone up and down through that sidewalk door into the basement without any injury approximately six or ten times (pp. 42, 44), that at the time of

the injury, he was standing up on the ladder with his chest at ground level facing away from the building waiting for a co-worker to hand him something (pp. 50-52), when he was injured. Specifically he testified at his 50-h hearing as follows:

> Q: Can you describe how [the accident] happened?
> A: The shock on the front right corner of the opening was protruding. It was on an angle and it was protruding into the hole, and I thought it was going to be a potential hazard getting caught on something or somebody hitting it, so I tried to stand it straight up, like I imagined it would be if it was working properly, and it wouldn't stand straight up. There was so debris behind it, so I cleared out some rust and rock debris behind it and tried to stand it up again, and it was not staying. So I left it and all of a sudden it went off in my face.
> ***
> Q: Can you tell me, when you were working that day, how long the size of the shock was, Do you know the size of it?
> A: (Indicating.) It was about eight to ten inches.
> Q: What was its shape?
> A: Round, like a cylinder. Like a shock, like a car shock.
> (50 h Transcript, pp. 52-54).
> ***
> Q: Now, I mentioned before that your attorney and you have produced a cylinder tube with a spring, a good bit with the spring in the tube, but a lot larger than the tube. Is this item, that's on the table, part of the mechanism that was involved in your accident?
> A: Yes.
> (50 h Transcript, p. 56).

Thus, contrary to the Plaintiff's counsel's claim, the spring mechanism which injured the Plaintiff was not "broken," "hanging," or "protruding" from the Bilco door. Further, the Plaintiff's own testimony does not support the argument that the spring randomly "exploded" – rather, it is plain from the evidence submitted herein that the Plaintiff's injury was sustained as a consequence of his interference and manipulation of the "shock" which housed the spring mechanism.

In light of the foregoing, this Court finds that the Industrial Code provision 12 NYCRR §23-1.7 (e) (1) cannot form a basis for the Plaintiff's Labor Law §241 (6) violation claim.

Similarly, 12 NYCRR 23–1.7 (e) (2), which requires owners and general contractors to keep "[t]he parts of floors, platforms and similar areas where persons work ... free from accumulations of dirt and debris ... insofar as may be consistent with the work being performed," is also inapplicable to the facts at hand because the spring in the door which allegedly caused the Plaintiff's injuries was clearly neither debris nor a tripping hazard (*O'Sullivan v. IDI Constr. Co., Inc.*, 7 N.Y.3d 805, 806 [2006]; *Smith v. New York City Hous. Auth.*, 71 A.D.3d 985, 987 [2nd Dept. 2010]). Moreover, as stated above, the spring cannot be found to constitute a "sharp projection[]" which injured the Plaintiff within the meaning of §23-1.7 (e) (2) (*cf. Kerins v. Vassar Coll.*, 293 A.D.2d 514 [2nd Dept. 2002]; *McAndrew v. Tennessee Gas Pipeline Co.*, 216 A.D.2d 876 [4th Dept. 1995]).

The Plaintiff's reliance upon *Kerins v. Vassar College*, *supra*, in opposition to the School District's motion, to support his claim that there was a violation of §§ 23-1.7 (e) (1) and (e) (2) in this case is misplaced. In *Kerins*, the plaintiff was injured by a cracked pane of a glass door (an obvious passageway). The Second Department held in that case that there was an issue of fact as to whether the cracked pane constituted a sharp projection as contemplated under 12 NYCRR §§ 23-1.7 (e) (1) and (2). Here, the spring which purportedly injured the Plaintiff was simply a piece of the basement door and was not the door itself. Further, in this case, the Plaintiff was not injured until he interfered

with the spring mechanism in the door; in *Kerins* the plaintiff was injured with his use of the door and *because* of it.

Finally, based upon the papers submitted herein, this Court finds that the Plaintiff's allegation that his Labor Law §241 (6) claim can be supported by a violation of 12 NYCRR § 23-1.27 is also unsupported. Section 23–1.27, which applies to objects raised by means of a jack, plainly has no application to this case (*Wegner v. State St. Bank & Trust Co. of Conn. Natl. Assn.*, 298 A.D.2d 211, 212 [1st Dept. 2002]; *Smith v. LeFrois Dev., LLC*, 28 A.D.3d 1133 [4th Dept. 2006]).

For these reasons, each of the Defendant's motions, inasmuch as it seeks summary judgment dismissal of the Plaintiff's Labor Law §241 (6) claim is **GRANTED**.

The Plaintiff's allegations that each of the Defendants violated Labor Law § 200 and the common law are also unsubstantiated by the record herein.

Labor Law § 200 is a codification of the common law duty of an owner or general contractor to provide and maintain an safe construction site (*Rizzutto v. LA Wenger Contracting Co.*, supra at 352; *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 [1993]). Labor Law § 200 claims fall into two broad categories: those involving injuries arising from allegedly defective or dangerous premises conditions and those involving injuries arising from the manner in which the work is performed (*Chowdhury v. Rodriguez*, 57 A.D.3d 121 [2nd Dept. 2008]; *Ortega v. Puccia*, 57 A.D.3d 54 [2nd Dept. 2008]). It is plain that the Plaintiff's claims in this action fall under the former class of cases. Thus, to prevail on such a claim, the Plaintiff must show that the Defendant either

created the dangerous condition or had actual or constructive notice of the condition (*Ortega v. Puccia*, supra; *Slikas v. Cyclone Realty, LLC*, 78 A.D.3d 144 [2nd Dept. 2010]).

In that respect, each Defendant herein has sufficiently established that they did not create the dangerous condition of the rusted spring housed in the cylindrical "shock" which injured the Plaintiff. Indeed, the Plaintiff, in opposition to all three motions for summary judgment does not refute this fact or present any evidence raising an issue in this context.

Similarly, each Defendant has also demonstrated that they did not have notice – actual or constructive – of the specific condition that injured the Plaintiff.

In opposition, counsel for the Plaintiff baldly argues (without the benefit of a supporting affidavit by the Plaintiff, *supra*) that the Defendants, Triton and Ultimate, had a non-delegable duty to enforce safety on the job site by contract and law and that even though Triton was hired as the "construction manager," the title by which a party is known is not determinative on the issue of whether that party is considered an "agent" of an owner for purposes of potential liability under the Labor Law. These arguments fall short of presenting a triable issue of fact.

Clearly, Triton had no ownership interest in the subject property. Thus, any authority it had over the project could only come from and was necessarily governed by the terms of the written contract between it and the School District, which stated, in pertinent part, as follows:

> The Construction Manager is not responsible for contractor's safety means and methods...Construction Manager shall not have supervisory control or authority over the safety practices or procedures undertaken by any of the contractors...the Construction Manager shall not have control over or charge of the work and Construction Manager shall not be responsible for construction means, methods, techniques, sequences or procedures and/or safety precautions and programs in connection with the work of each of the Contractors, since these are only the Contractor's responsibility.
>
> (Motion Sequence 01, Exhibit L [School District-Triton Contract], Article 2, ¶ 4 [c]; Article 7, ¶ 7]).

In stark contrast to the unambiguous wording of the contract provision above, the Plaintiff fails, in opposition, to cite to a single contractual provision supporting his claim that Triton had any such authority (*Rodriguez v. JMB Architecture, LLC*, 82 A.D.3d 949 [2nd Dept. 2011]).

Further, the testimony of Samuel Carder, the project superintendent employed by Triton, confirms that Triton's duties did not extend to the contractors' "means and methods" or to the safety of workers who were working at the site. In fact, Carder specifically testified that he never supervised the workers from Striper at the site. While Carder does state at his sworn deposition that he would tell the foreman for Ultimate if he saw an employee of one of Ultimate's subcontractors working in an unsafe manner, Carder does not state that Triton had actually been conferred the authority to stop work.

In any event, as stated above, this action falls outside the series of Labor Law § 200 and common law negligence claims that involve injuries arising from the *manner* in which the work is performed; rather, in order to defeat the Defendants' *prima facie* showing of entitlement to judgment as a matter of law, the Plaintiff is required to present

evidence that the Defendants failed to provide and maintain a safe construction site and that the Plaintiff was injured from the allegedly defective or dangerous conditions at the premises.

Here, this Court finds that the Plaintiff has preliminarily failed to present any evidence on this record that Triton functioned as an agent of the owner of the premises or as a general contractor was with the requisite authority to control or supervise the work or the condition of the work site.

As to any Defendant's notice of the alleged dangerous condition which injured the Plaintiff, counsel for the Plaintiff argues in opposition that the frame of the subject door was visibly rusted and that Samuel Carder had previously recommended that the door be replaced. This, the Plaintiff submits, constitutes sufficient notice of the cause of his injuries. Indeed, counsel for the Plaintiff maintains that Mr. Carder's testimony to replace the rusted Bilco door in the upcoming bid is "clear" evidence that "Mr. Carder would not suggest replacing the doors if they did not pose a safety hazard." This argument is speculative at best and, as such, falls short of presenting a triable issue of fact.

First, this Court notes that a more complete and accurate review of Mr. Carder's testimony reveals that when he recommended the door be replaced it was because of the rusted frame and not because of any visible safety hazard posed by the subject spring mechanism. Further, the mere fact that the door frame may have been rusted does not impute notice that the *subject spring mechanism* which *actually* injured the Plaintiff posed a safety hazard of the type that allegedly caused the accident (*Rapino v. City of New York*,

supra; *Mingone v. Ardsley Union Free School Dist.*, 215 A.D.2d 463 [2nd Dept. 1995]). Indeed, as stated above, where a dangerous condition such as the encased spring in the instant action is not visible and discoverable upon reasonable inspection by a layman, it will be considered "latent" and a defendant cannot be charged with constructive notice of that condition (*Rapino v. City of New York*, supra; *Monroe v. City of New York*, supra).

Further, this Court cannot overlook the testimony of Taurin Robinson, the Head Custodian at the subject school, who testified that he routinely inspected the Bilco doors as part of his inspections but never noticed a problem or a defect in the door that would require a conclusion that the doors were hazardous. Mr. Robinson also testified that he never received any previous complaints regarding the Bilco doors prior to the subject accident, nor did he ever observe a spring looking metal device anywhere beneath the Bilco doors at any point prior to the subject accident.

It is well settled that in order for a defendant to have had constructive notice of a defect, that defect must be either visible or apparent or discoverable upon a reasonable inspection (*Curiale v. Sharrotts Woods, Inc.*, 9 A.D.3d 473 [2nd Dept. 2004] *citing Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]; *Lee v. Bethel First Pentecostal Church*, 304 A.D.2d 798 [2nd Dept. 2003]). A "general awareness" of some dangerous condition is legally insufficient to charge the defendant with constructive notice of the specific condition which allegedly caused plaintiff's injury (*Gordon v. American Museum of Natural History*, supra; *Piacquodio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). Here, while there is evidence that the door was in a rusted condition, this alone is

insufficient to give rise to constructive notice of the defective condition which injured the Plaintiff (*Mingone v. Ardsley Union Free School Dist.*, supra; *Monroe v. City of New York*, supra; *Ferris v. County of Suffolk*, 174 A.D.2d 70 [2nd Dept. 1992]).

Counsel for the Plaintiffs failure to differentiate between the shock component as a whole from the latent defect, i.e., the hidden and enclosed spring mechanism that actually caused the Plaintiff's injury, is fatal. There is no testimony or evidence on this record that the *spring mechanism* which injured the Plaintiff was visible within its casing. Indeed, the Plaintiff's own testimony confirms that he was not able to observe any perceived danger from the concealed spring mechanism that actually caused his injury.

The Plaintiff's counsel's argument that the construction contract Ultimate entered into with the School District obligated Ultimate to timely notify the School District of concealed or unknown conditions in the context of this litigation is also meritless. A plain reading of Article 18, Section D of the Ultimate-School District contract confirms that said Article specifically deals with "Claims and Disputes" between the parties to the contract and addresses the need to give notice of any possible hindrance to the completion of the work and project as contracted for by the respective parties.

Said clause, read in conjunction with Article 18, Section A which defines, *inter alia*, a "claim," does not obligate Ultimate to timely notify the School District of concealed or unknown conditions in the context of, for example, this litigation; rather the contract provisions deal instead with discovery and notice of potential conditions that may

hinder Ultimate's contract performance. It is plain that the encased spring did not, at any point, hinder any worker's performance, including the Plaintiff. Indeed the Plaintiff himself testified that he traversed the ladder and went in and out of the Bilco door several times until he was idly waiting on the ladder for his co-worker to hand him some materials. It was during this idle time that the Plaintiff noticed the "shock" which, after his handling and manipulation, caused him injury. Thus, the Plaintiff's reliance upon the contract provision in opposing Ultimate's motion is misplaced.

Accordingly, in the absence of any evidence by the Plaintiff that any named Defendant had either actual or constructive notice of the "condition" which allegedly caused the Plaintiff's accident, his Labor Law § 200 and common law negligence claims against them are also **DISMISSED**.

Finally, the Plaintiff's claim that the Defendants' "violated the doctrine of *res ipsa loquitor*" is also **DISMISSED**.

In order for the Plaintiffs to invoke the doctrine of *res ipsa loquitor*, they must establish that (1) the event is one which does not ordinarily occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the defendant's exclusive control; and (3) the event was not due to any voluntary action or contribution by the plaintiff' (*Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 228 [1986]). Here, the Plaintiff has failed to establish the second and third elements of this claim. There is no evidence that any of the named Defendants had exclusive control over the subject spring mechanism (*Miles v. Hicksville UFSD*, 56 A.D.3d 625 [2nd Dept. 2008];

Molina v. State of New York, 46 A.D.3d 642 [2nd Dept. 2007]). Nor is there any evidence that the Plaintiff, Townsend Doxey's voluntary action in manipulating the subject spring immediately prior to his injury, did not contribute to the accident.

For these reasons, the Defendants' motions for summary judgment dismissing the Plaintiffs' complaint are **GRANTED** in its entirety.

Having dismissed the Plaintiffs' complaint in its entirety against the Defendants, Triton, Ultimate and the School District, the Cross-claims for common law indemnification and contractual indemnification against each Defendant are also **DISMISSED**.

As to common law indemnification, the law is settled. As the Court of Appeals stated in *Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680 [1990], "[t]he purpose of all contribution and indemnity rules is the equitable distribution of the loss occasioned by multiple defendants. In furtherance of that purpose, the courts have granted relief in a variety of cases in favor of the party who, in fairness, ought not bear the loss, allowing it to recover from the party actually at fault" (*Id.* at 690). The "theory" behind the concept of "common law indemnification" is to shift the burden of liability from defendants that are only vicariously/statutorily liable to the defendants that are actively negligent (*Id*; *Correia v. Professional Data Mgt.*, 259 A.D.2d 60 [1st Dept. 1999]). For this reason, in the case of common law indemnification, the one seeking indemnity must prove not only that it was not guilty of any active negligence, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the

indemnitee was held liable by virtue of some obligation imposed by law (*Correia v. Professional Data Mgt.*, supra; *Priestly v. Montefiore Med. Center/Einstein Med. Ctr.*, 10 A.D.3d 493 [1st Dept. 2004]). Here, since there has been no demonstration of any of the Defendant's negligence in any respect, *supra*, there is no predicate for a common law indemnification claim against them.

Similarly, the contractual indemnification claims by the School District against the Defendants, Triton and Ultimate are also **DISMISSED**.

As against Triton, the School District relies upon Article 9, Paragraph 4 of it's construction agreement with it which states, in pertinent part, as follows:

> To the fullest extent permitted by law, the Construction Manager [Triton] shall indemnify and hold harmless the Owner [School District] and its board, officers and employees from and against all claims, damages, losses and expenses resulting in bodily injury and/or property damage, including but not limited to attorneys' fees *to the extent arising out of or resulting from the negligence of the Construction Manager, or any subcontractor/consultant of the Construction Manager*, excluding any claims, damages, losses and expenses arising from and limited to the extent of the Owner's own negligence.

Thus, based on the language of this provision, the indemnity obligation of Triton could only be triggered for claims and losses arising out of Triton's actual active negligence. However, as stated above, since there is no evidence that Triton could be charged with active negligence in that Triton could not be found have had actual or constructive notice of the latent "condition" which allegedly caused the Plaintiff's accident, Triton's motion for summary judgment dismissing the School District's Cross-claim predicated upon contractual indemnity is also **GRANTED**.

Further, indemnity clauses in contracts and agreements are to be strictly construed in order to avoid delegating a duty which was not intended to be assumed (*Weissman v. Sinorm Deli Inc.*, 88 N.Y.2d 437 [1996]), and the right to contractual indemnification depends upon the specific language of the contract (*Gillmore v. Duke/Fluor Daniel*, 221 A.D.2d 938 [4th Dept. 1995]). As to the contractual language contained within the written agreement entered into by Ultimate and the School District, indemnification is only owed if the underlying claims are based upon a negligent act or an omission by Ultimate. Ultimate is not required to contractually indemnify the co-defendants without a showing that the claim arises from a negligent act by Ultimate or one of its agents. Since there has been no demonstration of Ultimate's negligence in any respect, the indemnification clause has not been triggered (*Naclerio v. C.R. Klewin, Inc.*, 293 A.D.2d 588 [2nd Dept. 2002]).

Accordingly, the Defendant, Ultimate's motion seeking summary judgment is also **GRANTED** in its entirety.

For these reasons, the School District's motion seeking summary judgment against the Defendants, Triton and Ultimate, based on contractual and common law indemnification claims is **DENIED**.

Insofar as the School District seeks summary judgment against the Third-Party Defendant, Striper, based on contractual and common law indemnification, said application is also **DENIED**.

In the third party action, the School District seeks damages for breach of contract and indemnification for all or part of any damages that it may sustain in the main action as a result of Striper's alleged negligence. The School District claims that pursuant to the Insurance/Indemnity agreement between Striper and Ultimate, it, as a beneficiary, is entitled to full or partial indemnification from Striper. In addition, the School District also seeks common law indemnification from Striper, the Plaintiff's employer.

Having determined that the School District is entitled to summary judgment dismissing the complaint, however, the issue of indemnification from the Plaintiff's employer is academic (*Frisbee v. Cathedral Corp.*, 283 A.D.2d 806, 807–808 [3rd Dept. 2001]). Accordingly, this branch of the School District's motion is herewith **DENIED**.

Under these circumstances and for the reasons stated above, the Third-Party Defendant, Striper's motion seeking summary judgment dismissing the School District's Third-party complaint is also **DENIED** as moot and academic.

The parties remaining contentions have been considered and do not warrant discussion.

All applications not specifically addressed are herein **DENIED**.

This shall constitute the decision and order of this Court.

DATED: Mineola, New York
April 2, 2012

Hon. Randy Sue Marber, J.S.C.
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NASSAU COUNTY
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