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

PRESENT: Hon. Doris Ling-Cohan PART 36

Justice

Index Number : 113503/2009

LOMBARDI, BENETTO

VS.

79 CROSBY STREET

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is consolidated for decision with motion seq. no. 002 and decided in accordance with the attached memorandum decision.

FILED

APR 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-16-2012

JUDGE DORIS LING-COHAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

BENEDETTO LOMBARDI,

Plaintiff,

- against -

79 CROSBY STREET LLC, 246 LAFAYETTE LLC, CROSBY STREET HOTEL LLC and MAGNETIC CONSTRUCTION GROUP CORP.,

Defendants.

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Index No. 113503/09

Motion Seq. 001 & 002

LING-COHAN, J.:

BACKGROUND

This case involves a workplace accident. Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence number 001, defendants 79 Crosby Street, LLC, Crosby Street Hotel, LLC, and 246 Lafayette LLC (Crosby defendants) move for an award of summary judgment dismissing the complaint and the cross claims, and on their contractual and common-law indemnity cross claims against defendant Magnetic Construction Group Corp. (Magnetic). In motion sequence number 002, Magnetic moves for summary judgment dismissing the complaint and the Crosby defendants' cross claims. Plaintiff Benedetto Lombardi cross-moves to amend his bill of particulars.

Plaintiff was injured on a construction site where a hotel was being built. Non-party Firmdale Hotels, PLC (Firmdale) retained Magnetic to act as construction manager. Firmdale and Magnetic entered into the AIA Document A131 CMC-2003 Standard Form Agreement

Between Owner and Construction Manager (Construction Contract). According to Paul Underhill (Underhill), the vice-president of Crosby Street Hotel, LLC, Firmdale is the parent company of non-party Firmdale Holdings USA, which, in turn, owns Crosby Street Hotel, LLC. Crosby Street Hotel, LLC leased the site from 79 Crosby Street, LLC. Crosby Street Hotel, LLC also leased 246 Lafayette Street, an adjacent property, from 246 Lafayette, LLC.

Magnetic subcontracted with Urban Foundation (Urban), plaintiff's employer, to excavate the site. The subcontract states Urban's trade to be "excavation and foundations" (Crosby Motion [Crosby], Ex. L). During his deposition, plaintiff testified that he was employed as a laborer on the job site. He assisted various trades, including carpenters, builders, and masons. On January 21, 2008, he was working with the carpenters removing forms. Plaintiff testified that a form "is what they use to build the wall in order to pour concrete in, so it's kind of like building a box" (Crosby, Ex. F, at 21). One of plaintiff's daily tasks was to fetch drinks and snacks for the coffee break, which started at 2:10 in the afternoon. On the day of his injury, plaintiff began to take orders from other workers, at the accustomed time at 1:45. The last person that plaintiff took an order from was the operator of the backhoe.

Plaintiff testified that, when he began taking the coffee break orders, the break itself had not yet started, so the backhoe was excavating. The backhoe was removing dirt and loading it into a truck. When plaintiff approached the backhoe, the operator brought it to a stationary position. Plaintiff took the order and stepped back to avoid the swing of the bucket. The bucket stopped and plaintiff began to walk out of the work site. His back was to the backhoe. He heard the backhoe begin to operate again. The bucket swung and the cabin moved in unison. Plaintiff tried to get out of the machine's way. He testified that he did not have "much room to

maneuver" since there was a pit to his right of 15 to 20 feet (Crosby, Ex. F, at 131). As the bucket and cabin moved, the rear of the backhoe, also called the counterweight, swivelled and hit plaintiff on the back, pushing him against a gate post and then to the ground. Plaintiff suffered broken ribs, a lacerated spleen, a collapsed lung, and a fractured scapula. Plaintiff attaches a photograph, which he says accurately depicts the kind of backhoe that struck him. It has a shovel on one end, a back that extends beyond the cabin where the operator sits, and continuous treads, that is, wheels like a tank (Cross motion, Ex. 2).

Plaintiff testified that he was supervised and directed by Urban personnel. Underhill testified that he visited the site once a month, that he attended monthly meetings held by the architect, and that no one from the Crosby defendants directed or supervised the work. Louis Guzman, Magnetic's project executive, testified that while Magnetic held safety meetings, it did not supervise the work by the subcontractors or instruct them. Magnetic was responsible for overseeing the construction to ensure that it was within budget and pursuant to plans. Guzman said that if Magnetic's onsite supervisor saw the work was not being done according to specifications, he would notify the subcontractor to remedy the defect. At and prior to the time of the accident, Magnetic's project superintendent (not Guzman) was the only Magnetic employee at the site on a daily basis.

DISCUSSION

Plaintiff asserts claims for violations of Labor Law §§ 200, 240 (1), 241 (6), and for common-law negligence. To obtain a grant of summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence that demonstrates that the case holds no issues of fact that can be tried (*Brandy B. v Eden Cent.*

School Dist., 15 NY3d 297, 302 [2010]). If the moving party succeeds in this, the other side can avert a grant of summary judgment by showing that there are material factual issues to be tried (*id.*).

The Crosby defendants present evidence that the accident took place on the site belonging to 79 Crosby Street, LLC and not on the adjacent property belonging to 246 Lafayette Street, LLC. According to Guzman, construction at 246 Lafayette Street began in 2009, after plaintiff's accident on January 21, 2008. Neither plaintiff, nor Magnetic, oppose the part of the motion seeking dismissal on behalf of defendant 246 Lafayette Street, LLC. Thus, the complaint and cross claims are dismissed as against defendant 246 Lafayette Street, LLC.

Plaintiff does not oppose defendants' arguments pertaining to Labor Law §§ 240 (1), 200, and common law negligence. Therefore, as explained further below, since defendants make a prima facie showing that those claims should be dismissed, such claims are dismissed against all defendants.

Defendants argue that Labor Law § 240 (1), known as the Scaffold Law, cannot be maintained, since plaintiff was not engaged in any height-related activity when he was injured. The Scaffold Law, along with Labor Law § 241 (6), permits property owners and contractors to be held vicariously liable for the negligence of a third party (*DiFilippo v Parkchester N. Condominium*, 65 AD3d 899, 899 [1st Dept 2009]; *Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 211 [1st Dept 2002]). The Scaffold Law applies to the danger of falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). Here, defendants establish, and it is not disputed, that plaintiff did not fall from a height and that he was not struck

by a falling object.

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or contractor to provide construction ... workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Claims made pursuant to Labor Law § 200 fall into two categories: those where the plaintiff's injury is caused by the manner or method of performing the work, and those where the injury is caused by a dangerous or defective condition at the job site (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, a defendant can be held liable if it directly supervised the worker, controlling the manner in which the injury-producing work was done (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Here, defendants show, and it is not disputed, that they did not control or supervise the work leading to the injury (*id.*; *see also Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]). General supervisory authority is not enough to constitute the kind of control needed to hold a party liable (*id.*). An owner or a general contractor's presence and encouragement, or the fact that it holds safety meetings, or that it has the power to stop the work for safety reasons does not amount to the requisite level of supervision (*Hughes*, 40 AD3d at 307; *Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]; *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468-469 [1st Dept 1998]).

Where the workplace is rendered unsafe by a dangerous condition, an owner or contractor is liable if it created the dangerous condition or if it had actual or constructive notice of the condition and failed to remedy it (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept

2011]; *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010]). In cases where the plaintiff is injured due to a dangerous condition, whether a defendant controlled or supervised the manner in which plaintiff worked is irrelevant (*Seda v Epstein,* 72 AD3d 455, 455 [1st Dept 2010]). Defendants establish, and it is not disputed, that they had no notice of any dangerous condition on the job site and that they created none.

The Crosby defendants point to the Construction Contract provision that the contractor "shall supervise and direct the Work" and "shall be solely responsible for and have control over construction means, methods, techniques ..." (Crosby, Ex. H, ¶ 3.3.1). Where, as here, the contractor does not direct and control the work, this provision does not render the contractor liable for accidents to workers (*see McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011], *affg* 72 AD3d 539 [1st Dept 2010], *affg* 24 Misc 3d 1245[A], 2009 NY Slip Op 51889[U], *1 [Sup Ct, NY County 2009] [containing the same contractual provision]; *Smith,* 22 AD3d at 371). Magnetic is, therefore, not liable pursuant to the contract.

Labor Law § 241 (6) imposes a nondelegable duty upon owners, contractors, and their agents to "provide reasonable and adequate protection and safety to construction workers" (*Comes,* 82 NY2d at 878). Recovery pursuant to Labor Law § 241 (6) does not require a showing that defendants exerted supervision or control over plaintiff's work (*Ross*, 81 NY2d at 502). To state a claim under this statute, the plaintiff must identify an Industrial Code regulation that the defendant violated (*id.*). Whether the plaintiff has alleged a sufficiently specific provision of the Industrial Code and whether the condition alleged is within the scope of the Industrial Code regulation are legal issues for the court to decide (*Messina v City of New York,* 300 AD2d 121, 123 [1st Dept 2002]).

Plaintiff alleges that defendants violated sections 23-9.4 (h) (4) and (5), and 23-9.5 (c) of part 23 (Protection in Construction, Demolition, and Excavation Operations) of the Industrial Code. In pertinent part, 12 NYCRR 23-9.4 provides the following.

> Power Shovels and Backhoes Used for Material Handling
> Where power shovels and backhoes are used for material handling, such equipment and the use thereof shall be in accordance with the following provisions:
> (h) General operation. ...
> (4) Unauthorized persons shall not be permitted in the cab or immediately adjacent to any such equipment in operation.
> (5) Carrying or swinging suspended loads over areas where persons are working or passing is prohibited.

Defendants contend that section (h) (4) does not apply to plaintiff, as he was not an "unauthorized person"; as an employee of a subcontractor, he was authorized to be at the site. The regulation does not apply to employees as they are not regarded as unauthorized persons (*Carroll v County of Erie,* 48 AD3d 1076, 1078 [4th Dept 2008]). Plaintiff contends that the regulation applies to employees who were not authorized to be next to the backhoe, such as himself. He also points to the fact that he was taking snack orders and not performing a laborer's work of construction, demolition, or excavation when the accident took place.

Section 23 does not define "unauthorized" or "authorized"; however, it frequently employs both terms, as follows: "[u]nauthorized persons" should be prevented from entering a construction site (12 NYCRR § 23-1.18 [c] [1]); someone must be stationed at an "opening to prevent unauthorized entrance" (12 NYCRR § 23-2.5 [b] [6]); where there is danger, "unauthorized entry ... or unauthorized use" of certain devices are not allowed (12 NYCRR § 23-1.32); "[n]o unthorized person" shall remove certain materials (*id.*); and "[n]o unauthorized person shall enter the cab" of a mobile crane (12 NYCRR § 23-8.2 [h] [i]).

A "Designated Person" is " [a] person selected and directed by an employer or his

authorized agent to perform a specific task or duty" (12 NYCRR § 23-1.4 [b] [17]). Some tasks, such as "[h]eat treating of chains ... shall be performed only by the manufacturer or his authorized agent" (12 NYCRR § 23-6.2 [e]). Cranes must be inspected by a "competent, designated employee or authorized agent of the owner" (12 NYCRR § 23-8.1 [b] [1]). "Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle ... " (12 NYCRR § 23-1.29 [b]).

Section 21, which applies to window cleaners, has this definition. "*Authorized.* Specified by rule or resolution of the board for use in complying with the provisions of this Part" (12 NYCRR § 21.2 [c]). The dictionary defines authorize as "[T]o give legal authority; to empower" and "[T]o formally approve; to sanction" (Black's Law Dictionary [Westlaw 9th ed 2009]).

From the above, the court concludes that "authorized" means, as determined by a laborer's employer or supervisor. The word in the regulation is used in the same way as the word is used in everyday life. Part 23, in contrast to Part 21, leaves the question of who is authorized or unauthorized to the persons involved. Plaintiff was authorized by his supervisor to be where he was when the accident happened. He testified that his supervisor gave him the task of taking coffee break orders. Thus, plaintiff was not an "unauthorized person", to whom 12 NYCRR § 23-9.4 (h) (4) would apply.

The parties disagree over how to interpret the few cases citing subsection (h) (4). In one instance, the injured worker, described as a form setter, was unloading a flatbed truck parked near the backhoe, when it crushed him. As a member of the work crew, courts have held that a worker could not be unauthorized (*Ferreira v City of New York,* 2010 WL 2007566, 2010 NY Misc Lexis 1950, 2010 NY Slip Op 31037U, *16 [Sup Ct, Kings County 2010], *revd in part on*

other grounds 85 AD3d 1103, 1105 [2d Dept 2011]; *accord Carroll,* 48 AD3d at 1078 [worker struck by excavator while removing a measuring rod from a trench]; *Mingle v Barone Dev. Corp.*, 283 AD2d 1028, 1028-1029 [4th Dept 2001] [worker struck by a backhoe while cleaning a pipe that was to be placed in a trench]).

Plaintiff argues that these cases do not apply to him, since those workers were injured while performing work related to the work that the backhoe was performing, such as digging a trench. Whether the Labor Law protects a worker injured while performing a non-construction task is often raised. In most cases, the plaintiff argues that a particular regulation applies to him; here, plaintiff argues that it does not. Nonetheless, the case law is instructive. To determine whether the Labor Law protects a particular worker in a particular situation, the court examines the worker's role on the job site as a whole (*Gray v City of New York,* 28 Misc 3d 1093, 1100 [Sup Ct, Kings County 2010], *revd on other grounds* 87 AD3d 679 [2d Dept 2011]). In *Gray*, the plaintiff was hired to perform construction. Although at the time of the accident, he was not performing construction work but asking a truck driver for union identification, he was covered by the regulation asserted under Labor Law § 241 (6).

An employee need not be working on an assigned duty or actual construction work at the time of the injury to be entitled to the protection of section 241 (6) (*see Gowans v Otis Marshall Farms, Inc.,* 85 AD3d 1704, 1705 [4th Dept 2011] [plaintiff fell through hole while ascending to upper level of barn to speak to coworker]; *Roberts v Caldwell*, 23 AD3d 210, 210 [1st Dept 2005] [plaintiff was injured helping co-workers with their work]; *Lucas v KD Dev. Constr. Corp.,* 300 AD2d 634, 635 [2d Dept 2002] [plaintiff was struck by a car as he was walking on the street adjacent to the work site towards his work]; *Reinhart v Long Is. Light. Co.,* 91 AD2d 571, 571

[1st Dept 1982] [plaintiffs were not directly involved in their hired-for task of plumbing at the time of the accident; "However, they were employed, and they were not interlopers"]; *Dougherty v Queens Ballpark Co., LLC,* 927 NYS2d 815 [Sup Ct, NY County 2011] [plaintiff injured while walking back to the job site "through a passageway" after a coffee break]; *Howell v Bethune West Associates, LLC,* 33 Misc 3d 1215[A], 2011 NY Slip Op 51939[U], *4 [Sup Ct, NY County 2011] [materials fell on plaintiff during his morning break while he sat eating a snack]; *Fassett v Wegmans Food Mkts., Inc.,* 867 NYS2d 16 [Sup Ct, Broome County 2008], *affd as mod* 66 AD3d 1274 [3d Dept 2009] [plaintiff injured when he stepped out of backhoe to go on coffee break]).

Although, here, plaintiff was not actually doing a laborer's work when injured, he was an employee covered by the Labor Law, however, he is not covered by the particular regulation at issue, 12 NYCRR § 23-9.4 (h) (4), as he was not an "unauthorized person...not permitted...immediately adjacent to...equipment in operation", such as the backhoe.

Regarding 12 NYCRR § 23-9.4 (h) (5), defendants argue that it does not apply here, because the injury occurred when the back of the backhoe hit plaintiff, not when a suspended load fell on him. In *Vicari v Triangle Plaza II, LLC* (16 AD3d 672, 673 [2d Dept 2005]), plaintiff was struck by the backhoe. The opinion states that sections (h) (1) and (5) do not apply since the backhoe was not lifting or hoisting anything at the time of the accident. Here, however, plaintiff testified that the backhoe was lifting dirt at the time of the accident. When the shovel moved, the cabin and the back had to move also. The regulation does not state that the injured party must be under the lifting part of the machine when the accident happens. The regulation indicates that the backhoe is prohibited from carrying or swinging loads over areas where persons

are passing. Upon the within submissions, defendants have not established as a matter of law that such regulation does not apply; specifically, that the backhoe was not carrying a load over an area where persons pass when the accident happened. Thus, summary judgment of dismissal is denied as to plaintiff's Labor Law 241(6) claim, which is based upon 12 NYCRR §23-9.4(h)(5).

12 NYCRR § 23-9.5 is entitled Excavating Machines. 12 NYCRR § 23-9.5 (c) states that "No person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation." All agree that plaintiff was not the pitman. The parties disagree over whether plaintiff was part of the excavating crew and hence permitted to stand near the backhoe.

Defendants cite to *Mingle* (283 AD2d at 1029), where the court determined that 12 NYCRR 23-9.5 (c) was not violated, because the plaintiff was hurt cleaning a pipe that was to be placed in a trench, a task that was "an integral part of the excavation operation." The court determined that the plaintiff was a member of the "excavating crew" within the meaning of the regulation. In *Martinez v Hitachi Constr. Mach. Co., Ltd.* (15 Misc 3d 244, 256-257 [Sup Ct, Bronx County 2006]), the court found that the regulation was not violated since the plaintiff was working where the excavator was excavating pits and was part of the crew performing the work in which the excavator was engaged.

In *Ferreira* (2010 NY Slip Op 31037[U], *13-14), the plaintiff was a form setter. When the accident happened, he "was loading materials for the next day's work so that he could pour concrete when the excavation was completed" (*id.*). The court ruled that whether he was part of the excavating crew and whether his work was an integral part of the excavation operation were issues of fact. Here, defendants do not establish that plaintiff was part of the excavation crew;

plaintiff denies that he was. Thus, there is an issue of fact as to whether 12 NYCRR §23-9.5(c) applies.

Turning now to plaintiff's cross motion to add a claim for violation of 12 NYCRR § 23-4.2 (k), defendants raise two objections. They argue that it is too late in the day to amend his bill of particulars. However, a plaintiff may allege new regulations, even in response to summary judgment motions, provided no prejudice or unfair surprise accrues to the defendant (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]; *O'Connor v Lincoln Metrocenter Partners,* 266 AD2d 60, 61-62 [1st Dept 1999]). Here, plaintiff has not alleged new facts; his "allegations of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability" (*Noetzell,* 271 AD2d at 232).

The next objection is that 12 NYCRR § 23-4.2 (k) is too vague a predicate for Labor Law § 241 (6) liability. Subpart 23-4 is entitled Excavation Operations.

> 12 NYCRR § 23-4.2 Trench and Area Type Excavations
> (k) Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.

To prevail under Labor Law § 241 (6), the plaintiff is required to establish a violation of an implementing regulation that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles (*Ross,* 81 NY2d at 504-505). Where the Industrial Code regulation relied upon invokes "'[g]eneral descriptive terms'" defined with general safety standards rather than "concrete specifications," the plaintiff cannot benefit from the reduced burden of proof applicable to causes of action under Labor Law § 241 (6) (*id.* at 505, quoting 12 NYCRR 23-1.4 [a]).

The most recent First Department authority supports defendants' claim that the section is insufficiently specific and concrete (*see Sparendam v Lehr Constr. Corp.*, 24 AD3d 388, 389 [1st Dept 2005]). The Third and Fourth Departments concur (*Friot v Wal-Mart Stores,* 240 AD2d 890, 891 [3d Dept 1997] [also deciding that the regulation does not apply to ground-level accidents]; *Webber v City of Dunkirk*, 226 AD2d 1050, 1051 [4th Dept 1996]). While an earlier First Department case and, as noted by plaintiff, the Second Department came to the contrary conclusion, such decisions are not controlling. (*Elezaj v Carlin Constr. Co.,* 225 AD2d 441, 442 [1st Dept 1996], *affd* 89 NY2d 992 [1997] [the Court of Appeals did not decide whether the regulation was too general to support a cause of action under Labor Law § 241 (6), as the issue was not preserved for review]; *Ferreira*, 85 AD3d at 1105; *Garcia v Silver Oak USA, Ltd.,* 298 AD2d 555 [2d Dept 2002]).

Thus, 12 NYCRR § 23-4.2 (k) lacks the specificity required to qualify for predicate liability under Labor Law § 241 (6). *Sparendam v Lehr Constr. Corp.*, 24 AD3d 389. The regulation is overly broad as it applies to every worker at an excavation site and does not set forth concrete rules to promote safety, as required. It is a general statement that care should be taken for the safety of workers at such sites. For this reason, plaintiff's cross motion to amend his bill of particulars is denied.

As to defendants' cross claims, the Crosby defendants cross-claimed against Magnetic for common-law and contractual indemnification, contribution, and breach of promise to procure insurance; Magnetic cross-claimed against the Crosby defendants for common-law and contractual indemnification.

In regard to the Crosby defendants' cross claims for indemnification against Magnetic, a

party whose liability is purely vicarious or statutory is entitled to common-law indemnification from a party whose liability is due to its fault (*McCarthy,* 17 NY3d at 377). The evidence indicates that neither Magnetic, nor the Crosby defendants, contributed to plaintiff's accident, as they did not supervise and direct his work (*id.* at 377-78). As any liability would be statute-based, not fault-based, neither side is entitled to common-law indemnification from the other. In addition, as discussed above, the fact that Magnetic had the contractual authority to direct and supervise the work does not render it at fault. The evidence shows that Magnetic did not actually exercise that authority. Hence, a common-law indemnification claim will not lie against Magnetic on the basis of its contractual authority (*id.*).

The Crosby defendants base their claim of contractual indemnification on the provision in the Construction Agreement.

> To the fullest extent permitted by law and to the extent claims [are not covered by insurance purchased by the Contractor], the Contractor...shall indemnify and hold harmless the Owner [and its] agents and employees ... from and against claims ... including but not limited to attorneys' fees, arising out of or resulting from performance of the Work ... but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim ... is caused in part by a party indemnified hereunder.

(Ex. H, ¶ 3.18.1, at 18).

Magnetic thus promised to indemnify the Owner against claims brought about by the negligence of Magnetic or Urban, the subcontractor. Where the party seeking indemnity is free from fault, a conditional judgment that it is entitled to contractual indemnification is fitting (*Jamindar v Uniondale Union Free School Dist.,* 90 AD3d 612, 616 [2d Dept 2011]; *Narvaez v 2914 Third Ave. Bronx, LLC,* 88 AD3d 500, 501 [1st Dept 2011]). Here, the Crosby defendants are free from fault. In the context of contractual indemnification, whether the indemnitor is free

from fault is irrelevant (*Correia v Professional Data Mgt.*, 259 AD2d 60, 64 [1st Dept 1999]).

However, summary judgment is not appropriate because there is a question regarding who is indemnified by the Construction Contract. Magnetic contends that it did not agree to indemnify the Crosby defendants. Magnetic entered into the Construction Contract with Firmdale, identified in the contract as the Owner (Ex. H, ¶ 2.1.1, at 12). The contract provides that the Owner "shall designate in writing a representative who shall have express authority to bind the Owner ..." (*id.*). "The term 'Owner' means the Owner or the Owner's authorized representative" (*id.*). On the first page of the contract, Crosby Street Hotel is identified as the project name and 79 Crosby Street as the project address.

Magnetic's motion to dismiss the Crosby defendants' cross claim for contribution is granted. Persons whose liability is solely vicarious, such as the Crosby defendants, are not entitled to contribution (*Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646-647 [1988]). Persons whose liability is solely vicarious, such as Magnetic, are not liable to pay contribution (*Id. see also Conigliaro v Premier Poultry, Inc.* 67 AD3d 954, 955 [2d Dept 2009]).

Magnetic's motion to dismiss the Crosby defendants' cross claim for breach of promise to procure insurance is denied. The Construction Contract contains a provision that Magnetic will procure insurance applicable to its obligations under the provision that it will provide contractual indemnification (Crosby motion, Ex. H, ¶ 11.1, at 33). Magnetic alleges that the contract was not made to benefit the Crosby defendants. As stated above, that is an issue of fact.

Based upon the above, the Crosby defendants' motion for summary judgment on their common-law and contractual indemnification claims is denied. The Crosby defendants' motion

to dismiss the cross claims against them is not opposed by Magnetic and is granted. Magnetic's motion to dismiss the Crosby defendants' cross claims is granted in regard to the cross claims for common-law indemnification and contribution and is otherwise denied.

Accordingly, it is hereby

ORDERED that the motion of defendants 79 Crosby Street, LLC, 246 Lafayette LLC, and Crosby Street Hotel, LLC for summary judgment dismissing plaintiff's complaint and the cross claims by defendant Magnetic Construction Group Corp., and on their cross claims for indemnification against defendant Magnetic Construction Group Corp. (motion sequence number 001) is:

1) granted to the extent that the complaint and all cross claims are severed and dismissed as against defendant 246 Lafayette, LLC, with costs and disbursements as taxed by the Clerk of the Court;

2) granted to the extent that claims in the complaint for common-law negligence and Labor Law §§ 200 and 240 (1) are dismissed;

3) granted to the extent that the cross claims against them are dismissed; and

4) granted as to claim in the complaint under Labor Law § 241 (6) only to the extent that plaintiff relies upon 12 NYCRR §23-9.4(h)(4);

5) denied as to their cross claims; and it is further

ORDERED that the motion of Magnetic Construction Group Corp. for summary judgment dismissing plaintiff's complaint and the cross claims of defendants 79 Crosby Street, LLC, 246 Lafayette LLC, and Crosby Street Hotel, LLC (motion sequence number 002) is:

1) granted to the extent that claims in the complaint for common-law negligence

and Labor Law §§ 200 and 240 (1) are dismissed;

2) granted as to claim in the complaint under Labor Law § 241 (6), only to the extent that plaintiff relies upon 12 NYCRR §23-9.4(h)(4); and

3) granted to the extent that the cross claims for common-law indemnification and contribution are dismissed, and is denied as to the cross claims for contractual indemnification and breach of promise to procure insurance; and it is further

ORDERED that plaintiff's cross motion to amend his bill of particulars is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: 4/13/12

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Lombardi.79 Crosby - sj, indemnity, amend BP.wpd