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

PRESENT: HON. MARTIN SHULMAN PART 1
Justice

Danny McAdam and Christine McAdam,

- v -

Consolidated Edison Company of New York, Inc., et al.

INDEX NO. 117205/08

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 12 were read on this motion for summary judgment

	PAPERS NUMBERED
Defendant's (Nelson) Notice of Motion — Affidavits — Exhibits	1
Notice of Cross Motion (Con Ed) — Affidavits — Exhibits	2
Nelson's Aff. in Opp. to Con Ed Cross-Motion	3
Plaintiffs' Aff. in Partial Opp. to Con Ed Cross-Motion	4
Plaintiffs' Notice of Cross Motion — Affidavits — Exhibits	5
Con Ed's Aff. in Opp. to Plaintiffs' Cross-Motion	6
Nelson's Aff. in Opp. to Plaintiffs' Cross-Motion	7
Peerless/Triangle's Notice of Cross Motion — Affidavits — Exhibits	8
Con Ed's Aff. in Opp. to Peerless/Triangle Cross-Motion	9
Nelson Reply Aff.	10
Con Ed's Reply Aff. - Exhibit A	11
Plaintiffs' Reply Aff.	12

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided in accordance with the attached decision and order.

Dated: July 30, 2012

Martin Shulman, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

DANNY McADAM and CHRISTINE McADAM,
Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TRIANGLE ELECTRIC, INC. and NELSON SERVICES SYSTEMS, INC.,
Defendants.

Index No.: 117205/06

DECISION/ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Third-Party Plaintiff,
- against -
TRIANGLE ELECTRIC, INC. and CORPORATE ELECTRIC GROUP, INC.,
Third-Party Defendants.

Index No. 590231/07

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Second Third-Party Plaintiff,
- against -
NELSON SERVICES SYSTEMS, INC.,
Second Third-Party Defendant.

Index No. 590176/08

TRIANGLE ELECTRIC, INC.,
Fourth Third-Party Plaintiff,
- against -
CORPORATE ELECTRIC GROUP, INC. and PEERLESS INSURANCE,
Fourth Third-Party Defendants.

Index No. 590983/08

HON. MARTIN SHULMAN, J.S.C.:

Before the court in this personal injury/negligence action are two motions and three cross motions for summary judgment pursuant to CPLR 3212 (motion seq. nos.

004 and 005, respectively). These motions are consolidated for disposition and decided as follows.

BACKGROUND

On May 4, 2006 at 6:45 p.m., plaintiff Danny McAdam (McAdam),[1] an electrician employed by third-party defendant Corporate Electric Group, Inc. (Corporate), was injured when he slipped and fell on a puddle of wet paint. *See* Notice of Motion (motion seq. no. 004), Axt Aff., ¶ 4. The paint had spilled on the floor of a basement room (referred to alternately as the water treatment room or the Belco room) in a building known as the 60th Street Station (the building) that is owned by the defendant Consolidated Edison Company of New York, Inc. (Con Ed), and is located at 514 East 60th St. in the County, City and State of New York. *Id.* Earlier, Con Ed had contracted with defendant Nelson Services Systems, Inc. (Nelson) to provide janitorial services at the building. *Id.*, ¶ 15. Con Ed had also contracted with defendant Triangle Electric, Inc. (Triangle) to perform electrical work in the building, however, Triangle claims that it subcontracted its obligations to Corporate. *See* Notice of Cross Motion (Triangle/Peerless), Gallin Aff., ¶ 3. Fourth third-party defendant Peerless Insurance (Peerless) is Corporate's insurer. *Id.*, ¶ 7.

At his deposition on January 25, 2010, McAdam stated that at the time of his accident, he was engaged in installing electrical conduit piping in the building, and that he was carrying a six-foot tall ladder through the Belco room on his right shoulder to where his partner was preparing to perform such installation, when he stepped on some

[1] Co-plaintiff Christine McAdam is McAdam's wife. *See* Notice of Motion (motion seq. no. 004), Exh. A.

gray paint that had been left on the floor, fell forward and injured his knees and right shoulder. *See* Notice of Cross Motion (McAdam), Exh. E, at 41-55.

Con Ed initially retained Nelson on April 23, 2001 via a purchase order agreement that the parties later modified on January 13, 2005 by annexing a rider that set forth Nelson's "janitorial services specifications" (collectively, the Nelson contract). The relevant portions of the Nelson contract provide as follows:

> Requirements:
>
> Provide janitorial services to include supervision, labor and equipment in accordance with the following:
>
> ***
>
> C) [Janitorial Services Specifications]
>
> ***
>
> Janitorial Services Specifications
>
> ***
>
> A. Description of Services
> Contractor [i.e., Nelson] agrees to perform the cleaning and maintenance services for Facilities Maintenance and Engineering locations as specified herein. These services shall be performed under the following terms and general conditions:
>
> ***
>
> 2) Contractor
> Con Edison hereby engages the Contractor to perform, as an independent contractor, the following services ... as described later in this agreement.
>
> 3) Staff and Backup Staff Requirements
> a. Normal Working Staff
> 1) Staffing shall be required to perform the necessary work to maintain the optimum level of cleanliness ...
>
> ***
>
> 6) The Contractor may be called on periodically by Con Edison to perform

work not herein specified. Such work will be classified as "contract extra." In no instance, however, is the janitorial staff to be used for such extra work during the time normally assigned for nightly maintenance.

4) Supervision on Site

a. The Contractor will provide an adequate supervisory staff assigned exclusively to buildings or locations as required to maintain the optimum level of cleanliness as previously defined herein.

***

5) Supervisory Management

a. In addition to the supervisory staff assigned to the direct supervision of the janitorial crews, the Contractor shall maintain and show evidence of an adequate management level supervisory staff that shall make periodic scheduled and unscheduled visits to the building.

***

B. Detail of Services

1) Janitorial and Cleaning Services

a. Daily

***

8) Damp mop all non-resilient floors such as concrete, terrazzo and ceramic tile.

***

14) Damp mop floors using detergent disinfectant.

***

b. Weekly

1) Wash and mop floors using detergent disinfectant.

See Notice of Motion (motion seq. no. 004), Exhs. D, E.

Nelson was first deposed on October 28, 2010 via its owner and president, Nelson Gisbert (Gisbert). *See* Notice of Motion (motion seq. no. 004), Exh. F. Gisbert stated that Nelson had assigned two workers to the building, Desiderio Erazo (Erazo) and Gilberto Escobar (Escobar), along with one supervisor, Francisco Vera (Vera), and that on May 4, 2006, Erazo and Escobar worked four hours of overtime each (after their normal shifts of 7:00 a.m. to 3:30 p.m.) during which time they were engaged in painting at the building. *Id.* at 14-18. Gisbert also stated that Nelson did not have a separate painting contract with Con Ed, although he admitted that he had agreed to have his employees perform "light painting duties" for Con Ed under the supervision of Con Ed representative John Settaro (Settaro). *Id.* at 18-19, 22, 24-25. Gisbert stated that Con Ed had supplied the paint and the brushes to Erazo and Escobar on May 4, 2006. *Id.* at 20-22.

Nelson was deposed again on April 27, 2011 via supervisor Vera, who confirmed that Con Ed had supplied the paint and brushes to Erazo and Escobar. *See* Notice of Motion (motion seq. no. 004), Exh. G, at 30. Vera stated, however, that Settaro's role was simply to approve proposed paint jobs on behalf of Con Ed, but that he himself (i.e., Vera) was the one responsible for supervising Erazo and Escobar. *Id.* at 9, 27-30, 57-58. Vera nonetheless also stated that he generally only went to the building two times a week and that he was not there on May 4, 2006. *Id.* at 9-10.

Con Ed was first deposed on October 22, 2010 via shift supervisor Patrick Langan (Langan). *See* Notice of Motion (motion seq. no. 004), Exh. I. Langan confirmed that Erazo and Escobar had performed the painting at the building on May 4,

2006 and stated that Settaro was the Con Ed employee that usually supervised them. *Id.* at 20, 113. Langan stated that he did not know whether Settaro was present at the time that McAdam was injured. *Id.* at 114-115.

Con Ed was deposed again on May 11, 2010 via Frank Radoslovic (Radoslovic), who was employed during the relevant time period as a construction inspector. *See* Notice of Cross Motion (McAdam), Exh. C. Radoslovic stated that all of the contractors employed at the building had a Con Ed employee assigned to them who directed their work. *Id.* at 31.

Con Ed was deposed a third time on October 25, 2010 via the building's facility manager, Patrick McHugh (McHugh). *See* Notice of Motion (motion seq. no. 004), Exh. H. McHugh confirmed that Erazo and Escobar had performed the painting at the building, that they had obtained their paint and brushes from a supply closet that Con Ed kept stocked there and stated that there were no Con Ed employees present in the building on the evening of May 4, 2006. *Id.* at 11-15, 20-21. McHugh explained that he had given Erazo and Escobar the order to paint the Belco room during the day, and then had left, and was informed of McAdam's accident while he was at home. *Id.* at 10-11.

Con Ed claims to have initially retained Triangle to perform electrical contracting work at some time "prior to May 2006." *See* Tonorezos Aff. in Opp. to Cross Motion (Triangle/Peerless), ¶ 8. Con Ed also claims to have executed a contract with Triangle at that time but has not produced a copy of it. Instead, Con Ed has produced a copy of a document that evidently is regularly added as an attachment to such contracts,

entitled "standard terms and conditions of construction contracts." *See* Notice of Motion (motion seq. no. 005), Exh. H. The provisions of that document will be discussed *infra*.[2]

Triangle was deposed on May 27, 2010 via its owner, Donato Sarrantonio (Sarrantonio). *See* Notice of Motion (motion seq. no. 005), Exh. J. Sarrantonio acknowledged that Con Ed had initially hired Triangle as its electrical contractor for work at the building, but stated that Triangle later had to transfer its responsibilities to Corporate. *Id.* at 10. Sarrantonio explained that Triangle was initially a "union shop" (i.e., it employed unionized electrical workers), but that it severed its affiliation with the union in question shortly before work at the building began and thereby became ineligible to perform work for Con Ed, which only contracts with "union shops." *Id.* at 11, 19-21. Sarrantonio also acknowledged having executed a subcontracting agreement with Corporate (the Corporate contract). *Id.* at 24; Exh. K. Sarrantonio stated that no Triangle employees ever worked at the building. *Id.* at 31-32.

The relevant portions of the Corporate contract are the two riders annexed to it, the first of which required Corporate to obtain a $2,000,000.00 comprehensive general liability insurance policy, and the second of which set forth an indemnity clause that provides as follows:

> 6. Indemnification To the fullest extent permitted by law, the Subcontractor [i.e., Corporate] agrees to indemnify, defend and hold harmless the Contractor [i.e., Triangle] ... from any and all claims, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements

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[2] At Triangle's deposition, Con Ed evidently produced a copy of a purchase order contract, dated April 25, 2006, that it claimed to have executed with Triangle. *See* Notice of Motion (motion seq. no. 005), Exh. J, at 31. However, Con Ed has not annexed a copy of that document to its moving papers.

> related to ... personal injuries ... brought or assumed against any of the indemnities [sic] by any person ... arising out of, or in connection with, or as a consequence of the performance of the Work of the Subcontractor under this agreement ... whether caused in whole or in part by the Subcontractor ... .

See Notice of Motion (motion seq. no. 005), Exh. K.

Corporate was deposed on November 3, 2010 by its president, Steve Serpico (Serpico). *See* Notice of Motion (motion seq. no. 005), Exh. I. Serpico acknowledged having executed the Corporate contract with Triangle and also acknowledged that no Triangle employees had ever performed any work at the building. *Id.* at 19-20. Corporate was deposed again on April 14, 2011 by one of its foremen, Scott Palisi (Palisi), who inspected the accident site and confirmed McAdam's version of events. *See* Notice of Cross Motion (McAdam), Exh. G.

McAdam originally commenced this action on November 13, 2006 by filing an initial summons and complaint that named Con Ed as the only defendant. *See* Notice of Cross Motion (McAdam), Exh. A. Con Ed then commenced the first third-party action herein against Triangle and Corporate on November 13, 2007 and later commenced the second third-party action against Nelson on March 10, 2008. *See* Notice of Motion (motion seq. no. 005), Exh. C; Notice of Cross Motion (Con Ed), Exh. D.

In response, McAdam first filed an amended complaint that named Con Ed and Triangle as co-defendants. Subsequently, on April 23, 2008 McAdam filed the current second amended complaint naming Con Ed, Triangle and Nelson as co-defendants and alleging causes of action for: 1) personal injury on behalf of McAdam based upon common law negligence and violations of Labor Law §§ 200, 241 (6) and 12 NYCRR

23-1.7 (d); and 2) loss of consortium for Christine McAdam. *See* Notice of Cross Motion (McAdam), Exh. A; Notice of Motion (motion seq. no. 004), Exh. A. Con Ed's answer to the second amended complaint includes cross claims against Nelson, Triangle and Corporate for common-law and contractual indemnification. *See* Notice of Motion (motion seq. no. 005), Exh. B.

Nelson's answer to the second amended complaint includes cross claims against Con Ed and Triangle for common-law indemnification and contribution. *See* Notice of Motion (motion seq. no. 004), Exh. B. Triangle's answer to the second amended complaint includes a cross claim against Con Ed and Nelson for common-law indemnification. *See* Notice of Cross Motion (Triangle/Peerless), Exh. A.

Con Ed's third-party complaint against Triangle and Corporate sets forth causes of action for: 1) common-law indemnification; 2) breach of contract; and 3) negligence (one claim each against Triangle and Corporate). *See* Notice of Motion (motion seq. no. 005), Exh. C. However, on April 16, 2006, Con Ed discontinued its third-party claims against Corporate via stipulation. *Id.* at Exh. E. Triangle's answer to Con Ed's third-party complaint sets forth a "cross claim" (actually a counterclaim) against Con Ed for common-law indemnification. *Id.* at Exh. D.

Con Ed's second third-party complaint against Nelson also sets forth causes of action for: 1) common-law indemnification; 2) breach of contract; and 3) negligence. *See* Notice of Cross Motion (Con Ed), Exh. D. The parties have not submitted a copy of Nelson's answer to Con Ed's second third-party action.

As regards Triangle's fourth third-party complaint,[3] court records reveal that it was served on October 29, 2008 and sets forth causes of action for: 1) breach of contract (against Corporate); 2) contractual indemnification (against Corporate); 3) breach of contract (against Corporate); and 4) breach of contract (against Peerless). The parties have not submitted a copy of Corporate's and Peerless's answer to this complaint.

What the parties have submitted are: 1) Nelson's motion for summary judgment against Con Ed on its cross claim for common-law indemnification (motion seq. no. 004); 2) Con Ed's cross motion for summary judgment on its cross-claim against Nelson for contractual indemnification (motion seq. no. 004); 3) Peerless's cross motion on behalf of Triangle[4] for summary judgment dismissing McAdam's complaint and any cross claims asserted against Triangle (motion seq. no. 004); 4) McAdam's cross motion for partial summary judgment on the complaint (motion seq. no. 004); and 5) Con Ed's motion for summary judgment on its cross claim against Triangle for contractual indemnification (motion seq. no. 005).

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept.), *aff'd* 62 NY2d 938 (1984); *Andre v. Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a

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[3] It appears that this third party action is actually the third third-party action rather than the fourth third-party action.

[4] Peerless has accepted Triangle's tender of its defense in this action and in doing so has effectively rendered the fourth third-party action moot. *See* Notice of Cross Motion (Triangle/Peerless), Gallin Aff., ¶ 7.

motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Freedman v. Chemical Const. Corp.*, 43 NY2d 260 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

Nelson's Motion

As previously mentioned, Nelson's motion seeks summary judgment on its cross claim for common-law indemnification against Con Ed. As the Court of Appeals explained in *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 (2011):

> [A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. But a party's (e.g., a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision. Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone [internal citations omitted].

Here, Nelson argues that it is entitled to common-law indemnification from Con Ed because its employees were under Con Ed's exclusive supervision and control pursuant to the Nelson contract's terms. *See* Notice of Motion (motion seq. no. 004), Axt Aff., ¶ 37. Con Ed responds that Nelson's common-law indemnification claim must fail as a matter of law because Nelson actually supervised the painting that allegedly caused McAdam's injury. *See* Notice of Cross Motion (Con Ed), Tonorezos Aff., ¶¶ 23-29. In its reply papers, Nelson disputes Con Ed's interpretation of the Nelson contract and Gisbert's and Vera's deposition testimony. *See* Axt Aff. in Reply, ¶¶ 6-26. After reviewing the evidence this court agrees with Con Ed.

It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, the "description of services" portion of the Nelson contract plainly states that, in addition to providing janitorial staff, Nelson is required to provide two levels of supervisory management personnel to oversee the work of that staff, and also plainly describes Nelson's position as that of an "independent contractor." Further, the fact that "painting" was not specifically included among the duties listed in the "janitorial services specifications" section of the Nelson contract is of no moment, because such activity is clearly considered "contract extra"

work as defined in the "description of services" portion of the contract. Therefore, the court concludes that Nelson had the contractual obligation and authority to supervise its employees' work, including the painting that gave rise to McAdam's injury. However, that finding is not sufficient to dispose of the instant issue.

Although it is clear that Nelson had the contractual authority to supervise its employees' work, it is unclear who actually exercised supervision over the instant work. Gisbert testified that Con Ed supplied Erazo and Escobar with their paint and brushes, and that Settaro supervised their painting work. Langan confirmed this. However, Vera testified that Settaro merely approved work orders, and that he himself supervised Erazo's and Escobar's work for Nelson, although he was not present on the day that McAdam was injured. Finally, McHugh testified that he had actually given Erazo and Escobar the order to paint and then had left.

These contradictions create an issue of fact as to who actually supervised Erazo's and Escobar's painting work. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218 (1st Dept 2002). Because the issue of actual supervision cannot be resolved at this juncture, it would be improper to grant Nelson summary judgment on its cross-claim against Con Ed for common-law indemnification. See *McCarthy v Turner Constr., Inc., supra*. Accordingly, Nelson's motion is denied.

Con Ed's Cross Motion

Con Ed's cross motion seeks summary judgment on its cross claim against Nelson for contractual indemnification. As the Appellate Division, First Department

recently noted, "[e]ntitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify." *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 (1st Dept 2010), citing *Drzewinski v Atlantic Scaffold & Ladder Co, Inc.*, 70 NY2d 774, 777 (1987).

Here, Con Ed argues that paragraph 20 of a document entitled "standard terms and conditions of service contracts" sets forth an enforceable indemnity provision that applies to Nelson, as an independent contractor. *See* Notice of Cross Motion (Con Edison), Tonorezos Aff., ¶¶ 35-44; Exh. C, at 9. Nelson responds that it never executed or acknowledged this document and thus it is not binding upon it. *See* Axt Aff. in Opp., ¶¶ 5-9.

However, as Con Ed notes in reply, the purchase order modification that Nelson admits to having executed contains a notation printed on the bottom of each page that reads "subject to the conditions on the reverse side hereof," and notes that the fifth condition recited on the reverse side of the purchase order modification states that "this purchase order is subject to the provisions of ... the Con Edison Standard Terms and Conditions." *See* Tonorezos Reply Aff., ¶ 4; Exh. A. Therefore, this court agrees that the standard terms and conditions are incorporated into the purchase order modification.

Paragraph 20 of the standard terms and conditions provides as follows:

> 20. Indemnification. To the fullest extent allowed by law, the Contractor [i.e., Nelson] agrees to defend, indemnify and save Con Edison ... harmless from all claims, damage, loss and liability, including costs and expenses, legal and otherwise, for injury to ... persons ...

> resulting, in whole or in part, from, or connected with, the performance of the Purchase Order by the Contractor ... and including claims, loss, damage and liability arising from the partial or sole negligence of Con Edison ... .

See Notice of Cross Motion (Con Edison), Exh. C, at 9. Citing *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 (1997), Nelson argues that this indemnity clause is unenforceable because it violates General Obligations Law § 5.322.1 by purporting to indemnify Con Edison against the consequences of its own negligence. *See* Axt Aff. in Opp., ¶¶ 10-15.

Con Ed replies that the more recent decision in *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 (2008), holds that indemnity clauses that include the language "to the fullest extent permitted by law" (as the instant clause does) will not be found to violate General Obligations Law § 5.322.1 because that language "limits rather than expands a promisor's indemnification obligation." This court agrees that the instant indemnity clause contains the "saving language" specified in *Brooks v Judlau Contr., Inc.*, and thus rejects Nelson's argument.

Thus, Con Ed has demonstrated that its standard terms and conditions includes a clause demonstrating "a clear expression ... of an intention to indemnify." *Martins v Little 40 Worth Assoc., Inc.*, *supra*. However, there has been no determination in this action as to the extent of either Nelson's or Con Ed's own negligence, if any. Until such a determination is made, summary judgment is premature. *See e.g. Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 (2d Dept 2009). Accordingly, Con Ed's cross motion is denied.

Triangle's Cross Motion

Triangle's cross motion, which Peerless brings on Triangle's behalf, seeks summary judgment dismissing McAdam's complaint and all of the cross claims asserted against Triangle. These include Con Ed's cross claims against Triangle for common-law and contractual indemnification and Nelson's cross claims against Triangle for common-law indemnification and contribution.

At the outset, the court notes that McAdam agrees that he has no common-law negligence or Labor Law § 200 claims against Triangle. *See* Werbel Reply Aff., ¶ 5. Accordingly, this court grants this cross motion to the extent of granting summary judgment in Triangle's favor dismissing the portions of the complaint alleging common law negligence and violation of Labor Law § 200 as to Triangle.

Triangle next cites *Musillo v Marist Coll.*, 306 AD2d 782 (3d Dept 2003), for the proposition that McAdam's Labor Law § 241 (6) claim should also be dismissed because they "had no involvement in the injury producing activity." *See* Notice of Cross Motion (Triangle/Peerless), Gallin Aff., ¶ 22. McAdam responds that *Musillo* is factually distinguishable because it involved a Labor Law § 241 (6) claim against a subcontractor rather than a general contractor. *See* Werbel Reply Aff., ¶ 6. The court agrees. Although, as previously stated, the parties have not produced a copy of the Triangle purchase order contract, they have produced a copy of the Corporate contract, which specifically recites that Triangle is the "contractor," and Corporate the "subcontractor." *See* Notice of Motion (motion seq. no. 005), Exh. K. Thus, summary judgment in Triangle's favor on McAdam's Labor Law § 241 (6) claim is denied.

Triangle also argues that the Industrial Code provision McAdam relies on, 12 NYCRR 23-1.7 (d), is insufficient to support a Labor Law § 241 (6) claim based upon *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 (1998), which held that violation of that provision merely affords "some evidence of negligence." *See* Notice of Cross Motion (Triangle/Peerless), Gallin Aff., ¶ 24. McAdam replies that this argument misstates the holding of *Rizzuto*, wherein the Court of Appeals actually found that 12 NYCRR 23-1.7 (d) was sufficient to support a Labor Law § 241 (6) claim. *See* Werbel Reply Aff., ¶ 8. A cursory review of that holding reveals that McAdam is correct. Therefore, the portion of the cross motion seeking summary judgment dismissing so much of McAdam's claim against Triangle based on the alleged violation of Labor Law § 241 (6) is denied.

With respect to the co-defendants' cross claims, Triangle first argues that no claim for common-law indemnification lies against it because it "did not have an active role to play in causing the negligence" that resulted in McAdam's injury. *See* Notice of Cross Motion (Triangle/Peerless), Gallin Aff., ¶ 18. Nelson, the party that raised the common-law indemnification cross claim against Triangle, does not submit any opposition to this argument. Further, as was noted earlier, the Court of Appeals has held that "[l]iability for [common-law] indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision." *McCarthy v Turner Const., Inc.*, 17 NY3d at 378. Here, Sarrantonio's and Serpico's uncontradicted deposition testimony indicates that no Triangle employees ever even entered the work site. Under this scenario, the court agrees that no claim for common-law indemnification will lie

against Triangle. Thus, the portion of Triangle's cross motion seeking summary judgment dismissing Nelson's cross claim for common law indemnification is granted.

With respect to Con Ed's cross claim for contractual indemnification, Triangle raises the same argument and cites the same case law as above. *See* Notice of Cross Motion (Triangle/Peerless), Gallin Aff., ¶ 18. However, as Con Ed correctly points out, *McCarthy v Turner Constr., Inc.* concerns a claim for common law indemnification rather than a claim for contractual indemnification. *See* Tonorezos Aff. in Opp., ¶ 12. As to the latter, it has already been noted that the governing law holds that "[e]ntitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify." *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d at 484.

Here, although the parties have not produced it, Sarrantonio has acknowledged the existence of Triangle's purchase order contract with Con Ed. *See* Notice of Motion (motion seq. no. 005), Exh. J, at 31. Presumably, as was the case with the Nelson contract, the Triangle contract incorporated Con Ed's standard terms and conditions of construction contracts by reference, including the indemnity clause set forth in paragraph 20 thereof. *See* Notice of Motion (motion seq. no. 005), Exh. H. As a result, Triangle has indeed exposed itself to Con Ed's contractual indemnification claim "to the fullest extent permitted by law." *Brooks v Judlau Contr., Inc.*, 11 NY3d at 210. It would therefore be improper to dismiss Con Ed's cross claim until that "extent" has been

determined. Accordingly, the portion of Triangle's cross motion for summary judgment granting such dismissal is denied.

Plaintiffs' Cross Motion

McAdam's cross-motion seeks partial summary judgment on his Labor Law § 200 claims against Con Ed and Nelson and his Labor Law § 241 (6) claims against Con Ed and Triangle. In *Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008), the Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 as follows:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...
>
> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, McAdam asserts that his Labor Law § 200 claim against Con Ed and Nelson is of the "dangerous condition" variety and argues that they should be held liable because

they both had the authority to "supervise and control" Erazo and Escobar, whose work produced the "dangerous condition." *See* Notice of Cross Motion (McAdam), Werbel Aff., at 23-28 (paragraphs not numbered).

Clearly, McAdam is mixing the two varieties of Labor Law § 200 claims. If, as he asserts, his claim is of the "dangerous condition" variety, then the question is whether or not the defendants had "actual or constructive notice" of the condition that caused his injury - i.e., the paint spill in the Belco room. However, if McAdam's claim is of the "means and manner" variety, then the question is whether the defendants had the authority to "supervise and control" his own work - *not* the work of Erazo and Escobar.

Here, because McAdam does not claim that he was inadequately supervised or deprived of safety devices, etc., the court presumes that his claim is, as he states, of the "dangerous condition" variety. However, as Con Ed correctly points out in its opposition papers, McAdam fails to proffer any evidence as to whether Con Ed or Nelson had actual or constructive notice of the paint spill in the Belco room. *See* Tonorezos Aff. in Opp., ¶¶ 15-26. Indeed, the only evidence currently before the court that bears on this issue is contained in the deposition testimony submitted with the instant motions and cross motions and, as was previously observed, issues of witness credibility are not appropriately resolved on a motion for summary judgment. *Santos v Temco Serv. Indus., Inc.*, 295 AD2d at 218-219. In any event, this court has already determined that there is a question of fact as to who actually supervised Erazo and Escobar. Accordingly, this portion of McAdam's motion is denied.

With respect to Labor Law § 241 (6), the Court of Appeals held in *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 (1993), that the statute imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." In order to prevail on a Labor Law § 241(6) claim, it is incumbent on a plaintiff to demonstrate that the defendant violated a regulation containing "concrete specifications" applicable to the facts of the case. *Id.* at 505. Here, as previously stated, McAdam relies on 12 NYCRR 23-1.7 (d), an Industrial Code provision that has been held sufficient to support a Labor Law § 241 (6) claim. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350-351.

Con Ed cites *DeStefano v Amtad N.Y., Inc.,* 269 AD2d 229 (1st Dept 2000), for the proposition that a Labor Law § 241 (6) claim cannot be sustained in the absence of proof of actual or constructive notice. *See* Tonorezos Aff. in Opp., ¶¶ 13-14. However, this holding is an anomaly, since the very Court of Appeals decision that it cites as authority for the proposition, *Rizzuto v L.A. Wenger Contr. Co.* (91 NY2d at 352), specifically holds:

> Since an owner or general contractor's vicarious liability under section 241 (6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure must also be irrelevant to the imposition of Labor Law § 241 (6) liability.

Nonetheless, the court is also mindful of the portion of the *Rizzuto* holding stating that "[a]n owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence." *Id.* Here, all of the defendants have raised these defenses in

their respective answers to the second amended complaint. However, none of the defendants has presented any proof to support these defenses in any of the motions currently before the court.

Because these issues are presently unresolved, it would be improper to find the defendants fully or partially liable under Labor Law § 241 (6) at this juncture. Accordingly, the balance of McAdam's cross motion is also denied.

Con Ed's Motion

By separate motion (motion seq. no. 005), Con Ed seeks summary judgment against Triangle on its cross claim for contractual indemnification. In the portion of this decision that disposed of Triangle's and Peerless's cross motion, the court already determined that there is a valid indemnity clause appended to the Triangle contract that requires Triangle to indemnify Con Ed "to the fullest extent permitted by law." However, as Peerless points out in its opposition papers, there has been no determination as to the extent of Con Ed's own negligence, if any. *See* Gallin Aff. in Opp., ¶ 5. As previously observed, until such a determination is made, summary judgment is premature. *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, *supra.* Accordingly, Con Ed's motion is denied.

For all of the foregoing reasons, it is hereby

ORDERED that defendant/second third-party defendant Nelson Services Systems, Inc.'s motion (motion seq. no. 004) is denied; and it is further

ORDERED that defendant/third-party plaintiff/second third-party plaintiff Consolidated Edison Company of New York, Inc.'s cross motion (motion seq. no. 004) is denied; and it is further

ORDERED that the cross motion of fourth-party defendant Peerless Insurance on behalf of defendant/third-party defendant/fourth-party plaintiff Triangle Electric, Inc. (motion seq. no. 004) is granted solely to the extent of dismissing so much of the second amended complaint as sets forth claims against Triangle Electric, Inc. under Labor Law § 200 and principles of common-law negligence, and dismissing the cross claim of defendant/second third-party defendant Nelson Services Systems, Inc. against Triangle Electric, Inc. for common-law indemnification, and the cross motion is otherwise denied; and it is further

ORDERED that plaintiffs Danny McAdam's and Christine McAdam's cross motion (motion seq. no. 004) is denied; and it is further

ORDERED that defendant/third-party plaintiff/second third-party plaintiff Consolidated Edison Company of New York, Inc.'s motion (motion seq. no. 005) is denied; and it is further

ORDERED that the balance of these actions shall continue.

Plaintiffs' counsel is directed to file a copy of this decision and order with notice of entry upon the Trial Support Office, and upon such filing, the Clerk of the Trial Support Office is directed to place this action on the appropriate Mediation Part calendar.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
July 30, 2012

Hon. Martin Shulman, J.S.C.