SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 110275/2009
GIANNINI, WILLIAM
vs.
56 LEONARD
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/25/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion 001 and motion 002 are consolidated for joint disposition.

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. to dismiss plaintiffs' negligence, and Labor Law §§200 claims is granted solely to the extent that the Labor §200 and negligence claims against 56 Leonard, L.L.C. and New York Law School are severed and dismissed; and it is further

ORDERED that branch of the motions by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. and defendant A-Val Architectural Metal Corporation to dismiss plaintiffs' Labor Law §240(1) claim is denied; and it is further

ORDERED that branch of the motions by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. and defendant A-Val Architectural Metal Corporation to dismiss plaintiffs' Labor Law §241(6) claim is denied solely to extent of such claim is premised upon 12 NYCRR 23.1-7 (e) (1), 12 NYCRR 23.1-7 (e) (2), and 12 NYCRR 23-2.1(a)(1); and it is further

ORDERED that branch of the motion by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. for summary judgment on their contractual

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

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

indemnification and breach of contract claims against A-Val Architectural Metal Corporation is granted solely as to the contractual indemnification claim in favor of NYLS, and NYLS is entitled to reimbursement of the cost of defense incurred to date, to be determined by a Referree, and A-Val shall defend NYLS going forward; and it is further

ORDERED that branch of the motion by A-Val Architectural Metal Corporation for summary judgment dismissing the contractual indemnification and breach of contract claims asserted by 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. is denied; and it is further

ORDERED that the Clerk may enter judgment severing and dismissing the Labor §200 and negligence claims against 56 Leonard, L.L.C. and New York Law School; and it is further

ORDERED that a Special Referee shall be designated to determine the costs NYLS incurred to date for the defense of this action; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to determine as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401 -9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a proposed pre-hearing memorandum within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as ihev may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be

authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion;

ORDERED that defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 7/18/12 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

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 35

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WILLIAM GIANNINI AND EILEEN GIANNINI,

Plaintiffs,

-against-

56 LEONARD, L.L.C., NEW YORK LAW SCHOOL and PAVARINI MCGOVERN, L.L.C.,

Defendants.

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NEW YORK LAW SCHOOL and PAVARINI MCGOVERN, L.L.C.,

Third-party Plaintiffs,

-against-

A-VAL ARCHITECTURAL METAL CORPORATION,

Third-party Defendant.

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Index No. 110275/2009

DECISION/ORDER

Third-Party Index No. 590325/2010

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

Defendants, 56 Leonard, L.L.C. ("56 Leonard"), New York Law School ("NYLS") and Pavarini McGovern, L.L.C. ("Pavarini") (collectively, "defendants") move (motion seq. 001) pursuant to CPLR 3211 and 3212 to dismiss the negligence and Labor Law complaint of the plaintiffs, William Giannini ("plaintiff") and Eileen Giannini (collectively, "plaintiffs"), and for summary judgment on its defense, indemnification, and breach of insurance procurement claims against co-defendant A-Val Architectural Metal Corporation ("A-Val").

By separate motion (seq. 002), A-Val moves for summary judgment dismissing plaintiffs'

[1] Motion 001 and motion 002 are consolidated for joint disposition.

Labor Law §§ 240(1) and 241(6) causes of action, as well as the third-party complaint.

Factual Background

NYLS, as owner of the property, engaged Pavarini as construction manager to oversee a construction renovation project at the New York Law School building in lower Manhattan. Pavarini, acting as agent for NYLS retained A-Val, plaintiff's employer, as a subcontractor to perform the ornamental metal and glass work. The subcontract between Pavarini and A-Val included a provision for indemnification.

Plaintiff alleges that his accident occurred on January 30, 2009 while he was working on the construction of the building. According to the deposition of plaintiff, plaintiff directed other A-Val employees, *i.e.*, ironworkers and carpenters, to go and unload "finials" from an A-Val truck which had recently arrived at the building (near the West Broadway side of Leonard Street). Finials are L-shaped pieces of steel, "quarter inch thick, 15 inches by 12 inches by 10 or 12 feet" used like a "light pocket for [decorative] lighting" (Plaintiff EBT, pp. 30-31). Each finial weighed approximately 450-600 pounds. After deciding to place the finials "inside the lobby area" 60 feet away, plaintiff and three other co-workers took the first finial from the truck "onto [their] shoulders" while two workers on the truck guided the finial; plaintiff was the "third man" from the front (pp. 36-37, 44). No one told plaintiff to unload the truck in this manner (pp. 49-50). While "there was a forklift there" that belonged to another trade contractor, there "was no key" for them to use (p. 50).

Plaintiff and his co-workers proceeded to carry the finial to the lobby upon an "unlevel dirt" path, which had "a lot of debris, a lot of obstacles in the way" (pp. 38-39), such as rocks and "2 by 4's cut up pieces, some crates" (p. 40). Plaintiff noticed this dirt and debris and unlevel

nature of the path when deciding to bring the finial to the lobby area (p. 40). This area was "an active worksite" with "people working all over" (id.). Plaintiff testified that after carrying the finial approximately 50 feet, the

> "weight distribution on the piece was going from shoulder to shoulder so the piece was getting heavier for some people and lighter for others. As we were going, the grade of the floor kept moving that I kept telling the guys don't lose the piece hold onto it; and as we were walking they started to lose the piece and I kept telling them hold onto it and slowly but surely it worked its way down"
> (p. 43).
>
> *****
>
> The ground was up and down so when you're walking with a straight piece if the ground is not flat people are going to drop and some people are going to take the weight of more weight of the piece as the ground goes up and down.
> (p. 43).
>
> *****
>
> . . .it gradually came down altogether in one shot . . . we got to about, I want to say about a foot off the ground and then the two ends let go.
> (p. 47).

" . . .it fell because of the distribution of the weight between the men. . . ." (p. 58)

When asked if plaintiff slipped or tripped in any way before the steel fell, plaintiff replied, "No." (pp. 57-58).

When asked about safety meetings by Pavarini, plaintiff stated that the "front" of the building was discussed; "[w]e always complain about the . . . cleanliness of the job" (pp. 51-52, 54). People complained because "we had a tough time getting into the building . . . ." (p. 54) as there "was always stuff in the way . . . (p. 54).

Defendants' supervisor at the site, Michael McFadden ("McFadden") testified that plaintiff was the foreman in charge for A-Val at the site (Exh. G, EBT, p. 69). While the sidewalk was available for deliveries, plaintiff decided to take the shorter path through the active

worksite (pp. 60-61).

James Dergin, defendants' project Superintendent at the site, was responsible for supervising the subcontractors and ensuring that all work was done in accordance with the blueprints/plans (Exh. J, EBT, pp. 10, 19-20). He had the authority to stop work and would inspect the work to determine whether it was satisfactory (p. 14). Defendants had a small labor force which was responsible for clearing "debris generated from by the trades in the building" (pp. 41-42).

As a result of the accident, plaintiffs commenced this action against defendants alleging that they were negligent and violated Labor Law Sections 200, 240, 241(6). As to the Labor Law Section 241(6) claim, plaintiff alleges that defendants violated numeorus Industrial Code regulations, and OSHA, 29 CFR 1926.250. In turn, defendants commenced a third-party action against A-Val for indemnification, contribution and for failure to procure insurance pursuant to contract.[2]

Defendants now move to dismiss the complaint, arguing that plaintiffs' Labor Law §240(1) claim must be dismissed as plaintiff was not involved in a height related accident. There were no ladders, scaffolds or any other instrumentalities involved. Further, as plaintiffs have not established any negligence on behalf of defendants, and Labor Law §200 is a codification of the common law, the common law claims against these defendants should be dismissed as well. Plaintiff testified that it was the way in which he and his co-workers were attempting to carry the finial which caused his accident. Because defendants did not supervise or control such offloading, did not control the means or methods of the manner in which plaintiff chose to

[2] By stipulation, defendants discontinued their common law negligence claims against A-Val.

offload the finials, and did not have any notice of any alleged defective condition, they cannot be held liable under this statute. Neither Pavarini nor NYLS instructed any A-Val employee or plaintiff about how to perform their tasks. Defendants also contend that plaintiffs' Labor Law §241(6) claim should be dismissed, as all of the Industrial Code violations cited by plaintiffs were not violated or are inapplicable to the facts of this case. The record also shows that plaintiff was solely responsible for the delivery and removal of the finials at issue. Plaintiff admitted that he used an improper means to offload the steel, as he sent the A-Val truck back after his accident "so no one else got hurt."

As against A-Val, defendants argue that the contract between A-Val and defendants obligates A-Val to defend, indemnify and hold defendants harmless for claims such as those alleged by plaintiffs. Plaintiff was acting in the course of his employment with A-Val and defendants are free from any and all negligence in the happening of plaintiff's accident. Defendants contend they are entitled to a conditional judgment on the contractual indemnification claim, and an order reimbursing them the cost of defense incurred to date and directing that A-Val defend and indemnify defendants, going forward. Further, an inquest should be ordered to determine the amount of defense costs incurred by defendants, even if the Court dismisses plaintiffs' claims as there is an obligation to defend and indemnify based on the four corners of the complaint. And, unless A-Val establishes that it procured insurance covering defendants as required by the contract, defendants are entitled to summary judgment on its breach of contract claim against A-Val.

By separate motion, A-Val likewise argues that plaintiffs' Labor Law §240(1) claim should be dismissed because his injury was not caused by a gravity related risk. Also, that claim

and the Labor Law §241(6) claim should be dismissed because plaintiff was the sole proximate cause of his accident. The Labor Law §241(6) claim is also unsupported by a specific rule or regulation that was allegedly violated.

A-Val also argues that defendants' third-party claims asserted against it should be dismissed as lacking in merit, and opposes defendants' motion against it on the same grounds.[3] A-Val argues that defendants are not entitled to contractual indemnification because defendants were actively negligent. Defendants had a labor force that was responsible for clearing debris. And, the indemnification provision limiting indemnification to "the 'greatest' extent permitted by law," violates General Obligations Law ("GOL") §5-322.1 for failing to contain the phrase, "to the fullest extent permitted by law," as "greatest" and "fullest" are not synonymous. Even assuming the provision does not violate the GOL, defendants have not proven they are free of negligence as a matter of law, and therefore are not entitled to defense or indemnification from A-Val. And, issues of fact remain precluding a finding of contractual negligence against A-Val. Nor are defendants entitled to costs on their breach of contract claim against A-Val, as there has been no finding of negligence and issues of fact exist render such a finding premature. Defendant's failure to procure insurance claim also fails because they did not suffer any damages. Defendants, upon information and belief, purchased insurance equivalent to that which A-Val was allegedly contractually obligated to procure. Thus, the only possible damages incurred by defendants from A-Val's alleged breach are contract damages, equal to the costs of procuring the insurance policy.

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[3] In its opposition to defendants' motion, A-Val argues that issues of fact exist as to defendants' negligence such that even if the indemnification provision does not violate the GOL, indemnification and an award for costs for breach of contract are premature.

In opposition to A-Val's motion, defendants argue that A-Val acknowledges that plaintiff was injured in the course of his employment, which is fatal to the request to dismiss the contractual indemnification claim. There is no basis in caselaw to distinguish "greatest" and "fullest." And, defendants were free from negligence for plaintiff's accident. There is no testimony that defendants directed, supervised, and controlled A-Val's work. Nor was there any notice to Pavarini of the dirt and debris and the proximate cause of plaintiff's accident was plaintiff's improper moving of the finial at his own discretion.

And, A-Val's claim that defendants purchased insurance equivalent to that which A-Val was allegedly contractually obligated to procure, was based on information and belief, and thus unsubstantiated. Nor does A-Val provide proof that it procured any insurance.

Plaintiffs oppose both motions.[4] Plaintiffs argue that defendants failed to produce evidence showing that gravity did not cause the 600-pound steel finial resting on plaintiff's shoulder to fall to the ground and cause his injury. That plaintiff did not fall from a height is irrelevant, since defendants provided no hoisting or other device for moving the 600-pound finial 60 feet to the lobby, or proper protection for same pursuant to Labor Law §240(1).

Plaintiffs also argue that issues of fact exist as to whether defendants maintained the construction site in a reasonably safe condition pursuant to common law and Labor Law §200 principles. Defendants' Superintendent was present when A-Val began to unload the finials from the truck, and the Superintendent had the ability to stop the work at any time if he saw an unsafe situation. Defendants also scheduled the delivery to the construction site, monitored the manner in which the deliveries and work were performed, and thus, exercised sufficient control and

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[4] Plaintiffs do not take a position on defendants's motion for summary judgment against A-Val.

supervision over the subcontractors. Defendants hired laborers to remove the debris to ensure safe passage for the delivery of the finials, and complaints were made to defendants regarding the debris prior to the accident. The subject area was consistently used for deliveries, and McFadden acknowledged that the finials "wouldn't have even fit" through the building the other direction (EBT, p. 61). And, violations of 12 NYCRR §23-1.5, 29 CFR 1926.25 (a), and 29 CFR 1926.250 may also be considered for plaintiff's negligence and Labor Law §200 claims. Plaintiff also submits an affidavit of non-party witness Jose Armory ("Armory"), who states that one of the workers slipped on the debris on the ground, causing the distribution of the weight to shift. Therefore, they were unable to hold finial, and the finial dropped to about one foot from the ground, where they held it until they could hold it up no longer.

Further, as to the Labor Law §241(6) claim, plaintiffs argue that defendants' and A-Val's violation of 12 NYCRR §§ 23-1.7(e) (tripping hazards), 23-1.23(a) (earth ramps and runways), and/or 23-2.1 (storage or material and disposal of debris), in failing to keep the uneven passageway free from debris that should have properly stored or disposed, was the proximate cause of plaintiff's injuries.

And, the sole proximate cause defense is unavailable in light of the facts of this case.

In A-Val's reply, A-Val adds that defendants' breach of contract claim should be dismissed, since defendants have previously indicated that they are covered for this matter under an Arch Insurance General Liability Policy. As defendants were actively negligent, they cannot sustain a breach of contract action which would insulate them from liability. And, damages are limited to the costs of maintaining the policy for the year that included the date of the accident.

In reply, defendants argue that plaintiff admits that as foreman, he was responsible for the

means and methods as to how the materials would be delivered and hauled. Plaintiff ordered the A-Val driver to take the steel back to the shop because he realized that he used the wrong methods to unload the delivery. Plaintiff did not fall; instead, the finial fell. The area plaintiff chose to traverse was not a passageway, but an active site. Also, plaintiff's injuries were not the result of an elevated related hazard. Further, the area when plaintiff was injured was not a "passageway," or "earth runway," as it was composed of dirt, and the maintenance and housekeeping requirements under section 23-2.1 are inapplicable to this active site area. And, plaintiffs failed to set forth a specific standard or conduct in regard to section 23-2.1(b).

Further, plaintiffs cannot rely on the affidavit of non-party witness Armory, who failed to answer the notice of deposition and subpoena served upon him. The affidavit consists of inconsistencies and should not be considered.

In response to A-Val, defendants argue that there is no evidence that NYLS, which simply hired Pavarini, was negligent in any way, and NYLS contracted with Pavarini to ensure that its subcontractors defended, indemnified and held NYLS harmless. Thus, A-Val must acknowledge its obligations. Pavarini's witness testified that there was an alternate means of egress and ingress, and some debris at an active work site does not amount to negligence.

Discussion

Where a defendant moves for summary judgment, said defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Defendant must make a

prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

" The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiffs' Negligence and Labor Law §200 Claims

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010]). "An implicit precondition to this duty [is] . . . that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'"(*Coyago,* at 665). "To support a finding of liability under Labor Law § 200 . . . a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition" (*Torkel v NYU Hospitals Ctr.*, 63 AD3d 587, 883 NYS2d 8 [1st Dept 2009]; *Makarius v Port Authority of New York and New Jersey,* 76 AD3d 805, 907 NYS2d 658 [1st Dept 2010] ("Under Labor Law § 200, in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises

supervision and/or control, liability can also arise when the accident is caused by a dangerous condition at the worksite, that was either created by the owner or general contractor or about which they had prior notice"); *see also Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009]).

It is noted that section 200 liability against defendant cannot "be based on alleged violations of the Occupational Safety and Health Act, which governs employee/employer relationships" *(Delaney v City of New York*, 78 AD3d 540, 911 NYS2d 57 [1st Dept 2010]).

Here, defendants established that they lacked any supervisory authority over the plaintiff's work that caused his injury. "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" *(Hughes v Tishman Const. Corp.*, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007] *citing O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 [2006], affg. 28 AD3d 225, 813 NYS2d 373 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 819 NYS2d 732 [2006]; *Dalanna v City of New York*, 308 AD2d 400, 764 NYS2d 429 [2003]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168, 631 NE2d 110 [1993]).

The record indicates that plaintiff was the sole person who controlled the manner in which he (and his co-workers) transported the finial. There is no indication that defendants had any role in the unloading of the deliveries that they may have scheduled, or directed or controlled the method by which each contractor, including A-Val and plaintiff, "[took] the stuff off." (McFadden EBT, pp. 50-51). Indeed, McFadden expressly denied, when asked at his deposition,

that Pavarani told the subcontractors how to unload their own trucks (id., pp. 104-105), and plaintiff's deposition fails to contradict this fact. McFadden also denied ever instructing A-Val where the finials should be stored (id. p. 82). Plaintiff testified that once the A-Val truck arrived at the site, he directed his co-workers to carry the finial to the lobby.

However, plaintiff testified that the finial fell due to the weight distribution from shoulder to shoulder because "the grade of the floor kept moving." According to plaintiff, "the ground was up and down so when you're walking with a straight piece if the ground is not flat people are going to drop and some people are going to take the weight of more weight of the piece as the ground goes up and down." The record indicates that defendants were responsible for maintaining the area of plaintiff's accident, and to keep it free from debris. Dergin, of Pavarini, testified that defendants' Superintendent was responsible for ensuring that there was a safe passageway for deliveries to be made, including clearing debris and construction material from the area of where deliveries were to be made and transported to the building. Therefore, arguably, plaintiff's testimony indicates that the debris-ridden condition of the area caused the workers to lose balance of the finial upon their shoulders. And, plaintiff's testimony indicates that Pavarini was put on notice about the alleged dangerous condition of this area/work site. The issue regarding the "front of the building" came up during site safety meetings run by Pavarini as "people [were] complaining because we had a hard time getting into the building"; "there was always stuff in the way" (Plaintiff EBT, pp. 51-54). McFadden acknowledged that at "the safety meeting . . . [p]eople [were] complaining this area needs to be cleaned. That's a day to day thing and that's how it worked" (McFadden EBT, pp. 57-58). While McFadden denied receiving any complaints about the condition of the worksite outside of West Broadway in relation to making

deliveries, complaints were made about the condition of the work site in general (McFadden EBT, p. 59).

However, although NYLS, the owner, had a representative at the site, Curt Epstein, who was on site everyday (McFadden EBT, p. 11), Epstein only attended some of safety meetings (Dergin EBT, p. 24). There is no indication that NYLS was put on notice of any condition related to plaintiff's accident.

Therefore, while the record fails to show that defendants exercised any control over the manner in which the plaintiff performed his work, dismissal of plaintiffs' negligence and Labor Law §200 claims asserted against is unwarranted against Pavarini, and warranted against NYLS.

Labor Law §240(1)

Labor Law §240(1) provides, in relevant part:
All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] [citations omitted]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]). Labor Law §240(1) applies to both falling worker and falling object cases (*Garzon v Metropolitan Transp. Auth.*, 70 AD3d 568, 895 NYS2d 83 [1st Dept 2010] ("Labor Law § 240(1) applies to falling object cases where the falling of an object is related to a significant risk

inherent in the relative elevation at which materials and/or loads must be positioned or secured"); *Simione v City of New York*, 16 Misc 3d 1111(A), 847 NYS2d 899 [Sup Ct New York County 2007]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Rocovich v Consolidated Edison Co.*,78 NY2d 509 [1991]).

In clarifying the statute's scope, the Court of Appeals explained that "we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 602, 922 NE2d 865 [2009]).

In *Runner*, a worker serving as a counterweight on a makeshift pulley was dragged into the pulley mechanism after a heavy object on the other side of the pulley rapidly descended a set of stairs, injuring the worker's hand. The Court continued: "[T]he governing rule is to be found in the language from Ross . . . . where we elaborated more generally that 'Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*id.* at 604, *quoting Ross* at 501). Holding that Labor Law §240(1) applied to the worker's injury, the Appeals Court explained:

> "Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the worker. The relevant inquiry-one which may be answered in the affirmative even in situations where the object does not fall on the worker-is rather *whether the harm flows directly from the application of the force of gravity to the object* . . . ."
> (*Runner*, at 604) (emphasis added).

Indeed, in *Runner*, the Court stated that "the single decisive question" in the case was "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential " (id. at 603, 895 NYS2d 279, 922 NE2d 865 [emphasis added]). *Runner* expanded the application of Labor Law § 240(1) with the holding that "the applicability of the statute in a falling object case ... does not ... depend upon whether the object has hit the worker," but "rather whether the harm flows directly from the application of the force of gravity to that object." (*See id.* at 604, 895 NYS2d 279, 922 NE2d 865).

The injured worker in *Runner* was engaged with several coworkers in moving "a large reel of wire, weighing some 800 pounds, *down a set of about four stairs*." (See id. at 602, 895 NYS2d 279, 922 NE2d 865). The plaintiff was holding the loose end of a rope that was part of a makeshift pulley while coworkers began to push the reel, to which the other end of the rope was attached, down the stairs. "The expedient of wrapping the rope around [a metal] bar proved ineffective to regulate the rate of the reel's descent and plaintiff was drawn horizontally into the bar, injuring his hands as they jammed against it." (*Id.*)

The Court explained that "the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell,

"While it is true that section 240(1) liability requires an elevation differential between the worker and the object being hoisted, the extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240(1)....

> it is of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where plaintiff was standing. The relevant facts are that a slab of granite measuring four by three feet and weighing 1,000 pounds *had to be hoisted*

> *three feet above grade in order to transport it, and that the accident occurred while it was hoisted in the air due to the effects of gravity* and the defective clamp." *McAllister v Phoenix Constructors, JV*, 33 Misc 3d 1227(A), 941 NYS2d 538 (Table) [Sup. Ct., Ne w York County 2011] citing (Brown, 50 AD3d at 376 [citation omitted]).

While there "is no bright-line minimum height differential that determines whether an elevation hazard exists" (*Auriemma*, 82 AD3d at 9), "liability may be imposed where an object or material that fell, causing injury, was 'a load that required securing for the purposes of the undertaking at the time it fell' (*Andresky v Wenger Const. Co., Inc.*, 95 AD3d 1247, 945 NYS2d 186 [2d Dept 2012] *citing Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268, 727 NYS2d 37, 750 NE2d 1085]). "The Court of Appeals has recognized that 'the applicability of the statute in a falling object case ... does not ... depend upon whether the object has hit the worker" (*Andresky, supra citing Runner, supra,* 1 NY2d at 604)). "'The relevant inquiry ... is rather whether the harm flows directly from the application of the force of gravity to the object'" (*Andresky, supra citing Runner, supra,* 1 NY2d at 604). The issue is whether "The harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path" (*Runner, supra* at 604).

Runner is sufficiently expansive to include the manner in which plaintiff's injury occurred. Plaintiff's injuries were not the result of the application of force as applied to an object being transported from one area to another, and the finial fell from the shoulders of plaintiff and his co-workers as they were carrying along the site to a different location. The object being transported fell due to the coupling effect of gravitational forces stemming from the object being transported at a raised level, albeit, upon the shoulders of the workers. And, plaintiff's testimony

indicates that his injury occurred as the finial was descending from the workers' shoulders to the ground (*Runner*, 13 NY3d at 603, 895 NYS2d at 281 ("the danger to be guarded against plainly arose from the force of the very heavy [slab's] unchecked, or insufficiently checked, *descent*," and the plaintiff's injury flowed directly from the effect of gravity on the slab *as it descended*); *Harris v City of New York*, 83 AD3d 104, 110, 923 NYS2d 2 [1st Dept 2011] (explaining *Runner*, that it is "the weight of the falling object 'and the amount of force it was capable of generating, even over the course of a relatively short *descent*' [that] must be taken into account") (emphasis added)). Therefore, based on the record, the branch of defendants' motion to dismiss plaintiffs' Labor Law §240(1) claim is denied.

Plaintiffs' Labor Law §241(6) Claim

Labor Law §241(6) "requires 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" (*Misicki v Caradonna*, 12 NY3d 511, 515, 909 NE2d 1213 [2009]). This section imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]; *Misick v Caradonna, supra*). In order to recover a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross,* 81 NY2d at 501-502; *Long v Forest-Fehlhaber,* 55 NY2d 154 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81

NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010] ["A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard"]). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long,* 55 NY2d at 160).

12 NYCRR 23.1-7(e)(1) requires all passageways to be 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." The record is unclear as to whether the area where plaintiff's accident occurred constituted a passageway for purposes of 12 NYCRR 23.1-7(e). While McFadden stated that the area outside of the West Broadway entrance of the building was not a designated walkway, and that there was no designated walkway to the lobby, "there was either a temporary sidewalk or something poured that people could get around the building." (EBT, pp. 60, 63-64). There was "between the barriers and the building . . .a section of land that people could walk." (EBT, p. 64). The concrete around the perimeter of the building leading to the West Broadway entrance was "all connected" and could have some debris on it (EBT, p. 65). Therefore, the record fails to establish, as a matter of law, that the subject area was not a passageway.

Further, that plaintiff did not trip, slip or fall on any dirt, debris or obstruction is not dispositive, in light of plaintiff's testimony that the unlevel, debris-filled area caused the workers to lose balance as they were walking, thereby causing the finial to fall from their shoulders.

Defendants and A-Val fail to establish that 12 NYCRR 23.1-7(e)(2) does not apply to this case, or that the material or debris was an integral part of the construction. 12 NYCRR

23.1-7(e)(2) (Working areas) provides that "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," and here, the 2 by 4 pieces, rocks and crates in the area where plaintiff fell were not integral to plaintiff's work (*see Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 786 NYS2d 149 [1st Dept 2004] ("pieces of wood, sheet rock and snow/ice that allegedly caused plaintiff to fall were 'debris,' 'scattered ... materials' and 'dirt' within the meaning of the latter regulation . . . and were not integral to plaintiff's work as a bricklayer")).

NYC RR § 23-1.23(a), provides:

> (a) Construction. Earth ramps and runways shall be constructed of suitable soil, gravel, stone or similar embankment material. Such material shall be placed in layers not exceeding three feet in depth and each such layer shall be properly compacted except where an earth ramp or runway consists of undisturbed material. Earth ramp and runway surfaces shall be maintained free from potholes, soft spots or excessive unevenness.

There is no indication that the area in which plaintiff's accident occurred constituted an earth ramp or runway. Plaintiff failed to submit any evidence that the area constituted an earth ramp or runway that failed to contain "suitable soil, gravel, stone" or similar material. Therefore, plaintiffs' Labor Law §241(6) claim cannot be predicated upon this section of the Industrial Code.

12 NYCRR 23-2.1 ("Maintenance and Housekeeping"), provides:

> (a) Storage of material or equipment.
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any

> edge of a floor, platform or scaffold as to endanger any person beneath such edge.
> (b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

Here, an issue of fact exists as to whether the area of plaintiff's accident constituted a passageway, and the record indicates that defendants failed to keep the construction debris and materials in a safe and orderly manner as required under 12 NYCRR 23-2.1(a)(1). An issue of fact remains as to whether the debris caused the workers carrying the finial to lose their balance and drop the finial.

However, 12 NYCRR 23-2.1 (a)(2), is inapplicable, given that plaintiff's accident was unrelated to the weight of the materials left in the subject area. Thus, this section cannot support plaintiffs' Labor Law §241(6) claim.

And, 12 NYCRR 23-2.1 (b), "which merely states that debris is not to be disposed of in a manner that would endanger anyone, lacks the specificity required to qualify as a predicate for section 241 (6) liability" (*Canning v Barneys N.Y*, 289 AD2d 32, 734 NYS2d 116 [1st Dept 2001]).

Sole Proximate Cause

To establish that plaintiff's actions were the sole proximate cause of his injury, defendants and A-Val must present evidence that "adequate safety devices [were] available; that [plaintiff] knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC, supra, citing Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 40, 790 NYS2d at 76 and *Gallagher v New York Post*, 14 NY3d 83,

88, 896 NYS2d 732, 734 [2010]).

Defendants and A-Val failed to demonstrate that plaintiff knew and was expected to use any adequate safety devices to transport the finial to the lobby and that he chose for no good reason not to do so (*Kosavick v Tishman Const. Corp. of New York*, 50 AD3d 287, 289 [1st Dept 2008], *quoting Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

With regard to the claims that plaintiff's "decision" to carry the finial upon the shoulders of the workers to the building along an active work site, the First Department case of *Collins v West 13th Street Owners Corp.* (63 AD3d 621 [1st Dept 2009]) is instructive. In *Collins*, the plaintiff was injured when he fell from a makeshift scaffold that he had constructed by resting one end of a piece of plywood on top of an A-frame ladder and resting the other end on top of a wall that was the same height as the ladder. In rejecting the defendants' argument that plaintiff was the sole proximate cause of his injuries, the First Department held: "The motion court properly recognized that defendants' argument, that the onus is on plaintiff to construct an adequate safety device, using assorted materials on-site which are not themselves adequate safety devices but which may be used to construct a safety device, *improperly shifted to the worker the responsibility for creating a proper safety device*" (*id.* at 622) (emphasis added). Here, the Court similarly rejects defendants' improper attempt to shift the burden of furnishing a proper safety device to plaintiff. Indeed, the record indicates that plaintiff used the subject area to transport the finial because it was "very, very heavy" and the area "was much shorter," underscoring the fact that proper devices necessary to transport this item from the truck to the lobby were lacking (McFadden EBT, p. 61).

Therefore, dismissal of plaintiffs' complaint based on the theory that plaintiff was the

sole proximate cause of his accident is unwarranted.

Defendants' Contractual Indemnification Claim Against A-Val

The indemnification clause in the parties' contract, Article 9, provides *inter alia* that:

> "To the greatest extent permitted by law, each trade contractor shall indemnify, defend, save and hold the owner, the construction manager ... harmless from and against all liability ... which arise out of or are connected with, or are claimed to arise out of or be connected with
> 1. the performance of work by the trade contractor, or any act or omission of trade contractor,
> 2. any accident or occurrence which happens ... in or about the place where such work is being performed or in the vicinity thereof while the trade contractor is performing the work, either directly or indirectly through a subcontractor ...

An indemnification agreement is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008 [1997]; *see also Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [1st Dept 2004] [snow removal contract]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210-211 [2008] [indemnification "to the fullest extent permitted by law" contemplated partial indemnification and was permissible under the statute]). Even if the clause does not contain the savings language "to the fullest extent permitted by law," it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown*, 76 NY2d at 179; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]).

The Court notes that notwithstanding A-Val's argument to the contrary, one definition of "to the full" in the Oxford English Dictionary is "to the greatest possible extent." (Concise

Oxford English Dictionary ©2008 Oxford University Press).

The indemnification provision does not violate the GOL. The language "To the greatest extent permitted by law," though different from the customary savings language "to the fullest extent permitted by law," does not change the nature of the provision's effect of indemnifying defendants for damages arising out of the work of A-Val, and it does not seek to indemnify defendants for their own negligence. Therefore, since the subject clause contemplates partial indemnification, it is not violative of the GOL.

However, while defendants established that NYLS was not negligent for plaintiff's injuries, the same cannot be said as to Pavarini. Contractual indemnification in favor of defendant Pavarini is premature, at this juncture, as there is a possibility that Pavarini may be held liable for plaintiff's injuries (*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 858 NYS2d 107 [1st Dept 2008] [as there was a possibility the out-of-possession owner "would be found at trial not to have acted negligently" in such event, "the broad language of the indemnification clause would have obligated [the commercial tenant] to indemnify [the out-of-possession owner]"]; *Cuevas v City of New York,* 32 AD3d 372, 821 NYS2d 37 [1st Dept 2006]["Cablevision cannot enforce the contractual indemnification provision against Trinity unless it demonstrates its own freedom from negligence]; *see also Rivera v Urban Health Plan, Inc.*, 9 AD3d 322, 781 NYS2d 316 [1st Dept 2004][given evidence that there was no negligence on the part of the property owner, said owner was entitled to summary judgment on its contractual indemnification claim, conditioned on a finding of negligence on the part of the contractor]).

Therefore, based on the terms of the contract, and the record evidence, Pavarini is not

entitled to summary judgment for contractual indemnification from A-Val at this juncture. However, given that NYLS has established its freedom from negligence, and the record indicates that plaintiff's injuries arose out of the work of A-Val under the subject contract, NYLS is entitled to contractual indemnification from A-Val.

And, in light of the above, A-Val's motion to dismiss this cause of action is denied.

Defendants' Breach of Insurance Procurement Obligation

It is undisputed that A-Val had a contractual obligation to procure insurance covering defendants for all liabilities arising out of A-Vals' work. However, A-Val failed to supply any proof that it procured any such insurance, and thus, is not entitled to dismissal of defendants' breach of contract claim (*Bachrow v Turner Const. Corp.*, 46 AD3d 388, 848 NYS2d 86 [1st Dept 2007] *citing Kinney v Lisk Co.*, 76 NY2d 215, 218–219, 557 NYS2d 283 [1990]). The "proper measure of damages is the full cost of insurance, *i.e.*, the premiums it paid for its own insurance, any out-of-pocket costs that may have been incurred incidental to the policy and any increase in future insurance premiums resulting from the present liability claim" (*Wong v. New York Times Co.*, 297 AD2d 544, 747 NYS2d 213 [1st Dept 2002]). That defendants may have procured its own insurance did not absolve A-Val's contractual obligation to procure insurance. Accordingly, defendants are entitled to recover any losses caused by this breach of contract, including its liability to plaintiffs and costs of defending this action (*Bachrow*, *citing Kinney*, at 219, 557 NYS2d 283).

However, the grant of summary judgment in favor of defendants is premature, "as it has yet to be determined that [A-Val's] failure to procure the agreed-upon insurance caused defendants any losses (*Bachrow*, *supra* at 388).

And, in light of the above, A-Val's motion to dismiss this cause of action is denied.

Conclusion

ORDERED that the branch of the motion by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. to dismiss plaintiffs' negligence, and Labor Law §§200 claims is granted solely to the extent that the Labor §200 and negligence claims against 56 Leonard, L.L.C. and New York Law School are severed and dismissed; and it is further

ORDERED that branch of the motions by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. and defendant A-Val Architectural Metal Corporation to dismiss plaintiffs' Labor Law §240(1) claim is denied; and it is further

ORDERED that branch of the motions by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. and defendant A-Val Architectural Metal Corporation to dismiss plaintiffs' Labor Law §241(6) claim is denied solely to extent of such claim is premised upon 12 NYCRR 23.1-7 (e) (1), 12 NYCRR 23.1-7 (e) (2), and 12 NYCRR 23-2.1(a)(1); and it is further

ORDERED that branch of the motion by defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. for summary judgment on their contractual indemnification and breach of contract claims against A-Val Architectural Metal Corporation is granted solely as to the contractual indemnification claim; and it is further

ORDERED that branch of the motion by A-Val Architectural Metal Corporation for summary judgment dismissing the contractual indemnification and breach of contract claims asserted by 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. is denied; and it is further

asserted by 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. is denied; and it is further

ORDERED that the Clerk may enter judgment severing and dismissing the Labor §200 and negligence claims against 56 Leonard, L.L.C. and New York Law School; and it is further

ORDERED that a Special Referee shall be designated to determine the costs NYLS incurred to date for the defense of this action; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to determine as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401 -9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a proposed pre-hearing

memorandum within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as ihev may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion;

ORDERED that defendants, 56 Leonard, L.L.C., New York Law School, and Pavarini McGovern, L.L.C. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 18, 2012

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD