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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY Justice

PART 8

Index Number : 101621/2011
JOHNSON, GRAYSON
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 101621/11
MOTION DATE 4/10/13
MOTION SEQ. NO. 002

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 IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

AUG 06 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/2/13

_____, J.S.C.
JOAN M. KENNEY

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----------X

GRAYSON JOHNSON,

Plaintiff,

-against-

Index No. 101621/11

THE CITY OF NEW YORK, TULLY CONSTRUCTION CO., INC. and BOVIS LEND LEASE, LMB, INC.,

Defendants.

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Joan M. Kenney, J.:

Motions with sequence numbers 002, 003, 004, and 005 are consolidated for disposition.

In motion sequence number 002, plaintiff moves for summary judgment on the issue of defendant the City of New York (City)'s liability under Labor Law § 240 (1). In motion sequence number 003, the City seeks summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence number 004, defendant Bovis Lend Lease, LMB, Inc. (Bovis) moves for summary judgment dismissing the complaint and all cross claims brought against it. Lastly, the City moves, in motion sequence number 005, for summary judgment on its indemnification claims against Bovis and defendant Tully Construction Co., Inc. (Tully).

BACKGROUND

On June 21, 2010, plaintiff, a steam fitter then employed by nonparty Almar Plumbing and Heating (Almar), was inside the ground floor oil waste tank room, welding from the fourth rung of

a wooden eight-foot, A-frame ladder, when the ladder shifted and kicked out, and plaintiff fell, injuring his right foot. At the time, he was part of a project by which a new facility for the City's Department of Sanitation (DOS) was being built at the location of 78A-786 12th Avenue, 56th Street, Manhattan.[1] Plaintiff believes that the ladder kicked out because of debris on the floor that he had not seen because of the poor lighting conditions in the room.

The City was the owner of the premises. The City hired Bovis as the construction manager for the project, to monitor and supervise contractors, to be the eyes and ears of DOS at the site. There were four prime contractors at the job: Tully, the prime contractor for general construction; Almar, the prime contractor for plumbing; Dart Mechanical; and JH Electrical. Bovis was responsible for overseeing construction and administration of construction contracts, and had overall responsibility for debris and for supervising prime contractors and their disposal of debris.

Tully supplied laborers to clean the site, employing three to 10 laborers at a time. However, there were many complaints by the various contractors that there were not enough laborers to do the job, and that entire areas were left uncleaned, including the tank room where plaintiff was injured. Specifically, several weeks before the accident, plaintiff and his father, one of

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[1]The address has also been given as 650 West 57th Street.

[* 4]

Almar's foremen, told Bovis's mechanical, electrical and plumbing superintendent, Michael Tuohy, that they would be working in the tank room, and that it had to be cleaned before they could begin to work there. Bovis failed to get the room cleaned before plaintiff's accident.

The chain of command with respect to reporting a debris problem was that the workers complained to their foremen, the foremen went to Bovis, and Bovis would tell Tully to clean. It appears from the evidence that at times this protocol was not adhered to (at times, workers complained directly to Bovis), but it also appears that Bovis often failed to get Tully to clean, whether the protocol was adhered to or not. Nevertheless, however complaints about debris reached its ears, complaints about debris were to be resolved by Bovis.

Bovis's Michael Batta (Batta) was the foreman in charge of supervising Tully, but both Tuohy and Batta walked the site with respect to cleanliness.

Plaintiff contends that another cause of his accident was the allegedly poor illumination in the tank room. If Bovis's Tuohy noticed a lighting deficiency, he would contact the electricians to remedy it. JH Electrical walked the site regularly to see if light bulbs needed to be changed. However, on the day of the accident, there was temporary lighting in the tank room, but only two working bulbs, about 15 to 20 feet from plaintiff. Plaintiff and his

father had complained to Tuohy about poor lighting in the room about five times before the accident.

Before he placed his ladder, plaintiff swept debris away with his feet. The poor lighting impaired his ability to see the area clearly. Plaintiff believes that the reason the ladder kicked out was because of debris on the floor, and that he was unable to see the debris because of the poor lighting. The suggestion that plaintiff could not see the debris because he was wearing a welder's mask and could only see directly in front of him through the small eyehole of the mask is completely conclusory and speculative.

Almar supervised and controlled the work of its employees, and it provided all their tools and equipment, including the ladder that plaintiff used. Plaintiff's foreman was his father, Garyvan Johnson. His father told plaintiff how to work and where. Plaintiff's work required him to use a welding stinger about an arm's length above his head. No one told plaintiff that he should wear a harness or tie off.

THE PLEADINGS

Plaintiff's complaint consists of one cause of action, alleging claims sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). The City's answer brings four cross claims against Tully and Bovis, for common-law and contractual indemnification, contribution, and breach of contract

to procure insurance. Tully's answer alleges one cross claim against the City and Bovis, for indemnification. Bovis's answer includes one cross claim against the City and Tully, for common-law indemnity or contribution.

Plaintiff's bill of particulars alleges one Industrial Code violation, that of section 23-1.30.

Summary Judgment

"Summary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the opponent fails to rebut that showing [internal quotation marks and citation omitted]" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, ___ AD3d ___, 2013 NY Slip Op 04298, *7 [1st Dept 2013]). "[S]ummary judgment is the equivalent of a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]), but "[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

Plaintiff's Motion for Summary Judgment on His Labor Law § 240 (1) Claim Against the City (motion sequence number 002)

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in pertinent 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."

Labor Law § 240 (1) provides "exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal quotation marks and citation omitted]" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). Under Labor Law § 240 (1), "owners, general contractors and their agents have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites [internal quotation marks and citation omitted]" (*Naughton v City of New York*, 94 AD3d 1, 7 [1st Dept 2012]), and under both sections 240 (1) and 241 (6), the duty is imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S*

Simcha, 39 AD3d 838, 839 [2d Dept 2007]). In addition, "[l]iability under Labor Law § 240 (1) depends on whether the injured worker's 'task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011], quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). To establish liability under the statute, "a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mech. of NY Corp.*, 80 AD3d 564, 565 [2d Dept 2011]). "[T]he single decisive question is 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

As the owner, the City will be absolutely liable under Labor Law § 240 (1) if liability is established.

Plaintiff alleges that the City did not ensure the proper placement of the ladder, and that the ladder was unsecured while plaintiff was working on it. The City counters that plaintiff was well versed in ladder safety, that plaintiff made sure that nothing was under the feet of the ladder before ascending, and that there was nothing wrong with the ladder. The City also maintains that plaintiff was not wearing a safety harness and was not tied off, and that Almar had safety harnesses and ties available on site, but

plaintiff did not think that he should use one because he was only going to be standing on the fourth step from the floor. In short, the City claims that plaintiff was the sole proximate cause of his injuries.

Plaintiff has established his entitlement to summary judgment under Labor Law § 240 (1). The evidence shows that the City hired Bovis to be its "eyes and ears" at the site, but, as the City's statutory duty is nondelegable, the City is still vicariously liable under the statute for Bovis's failure to ensure that the conditions in the tank room provided a safe working area.

The City's contention that plaintiff was the sole proximate cause of his injuries is unsubstantiated and unpersuasive.

> "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"

(*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Therefore, plaintiff's motion for summary judgment on the issue of the City's liability under Labor Law § 240 (1) is granted.

The City's Motion for Summary Judgment Dismissing the Complaint and All Cross Claims Brought Against It (motion sequence number 003)

The City's motion for summary judgment dismissing plaintiff's complaint and any cross claims asserted against it (motion sequence number 003) must be denied. Although this relief is requested in the City's Notice of Motion, at no point in its motion papers does the City argue in favor of its entitlement to summary judgment dismissing the complaint and the cross claims brought against it. Instead, the City sets forth a recital of the facts based on the parties' testimonial evidence. At the end, the WHEREFORE clause of the City's affirmation in support of its motion reads:

> "WHEREFORE, it is respectfully requested that the within motion for summary judgment be granted and that the City of New York Department of Sanitation be granted summary judgment on the issue of indemnity over and against defendants Bovis Lend Lease and Tully Construction and that this court shall grant such other and further relief as it may deem fit and proper."

The Conclusion of the City's Memo of Law reads as follows: "In conclusion, based on the facts as recited in the affirmation in support of this motion, the City of New York is entitled to summary judgment on its claims for indemnification against Bovis Lend Lease and Tully Construction."

Given the complete absence of argument in support of this motion, it must be denied.

Bovis's Motion for Summary Judgment Dismissing Plaintiff's

Complaint and All Cross Claims Against It (motion sequence number 004)

Bovis contends that it cannot be liable under the Labor Law because it was the site's construction manager, and not a statutory agent of the owner (the City).

> "Although a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site ... it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises. A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured [internal quotation marks and citations omitted]"

(*McLaren v Turner Constr. Co.*, 105 AD3d 1016, 1017 [2d Dept 2013]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005] [agency "where the manager had the ability to control the activity which brought about the injury"]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 293 [agency "arises only when work is delegated to a third party who obtains the authority to supervise and control the job"]; *Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011] ["a construction manager ... may be vicariously liable as an agent of the property owner ... where the manager had the ability to control the activity which brought about the injury (internal quotation marks and citation omitted)"]).

The evidence demonstrates that Bovis was responsible for the management and control of the contractors at the site,

including the contractors who were responsible for the cleanliness and temporary lighting at the site. Bovis was responsible for the overall construction management of the project, overseeing the four prime contractors, including Tully and JH Electrical. Bovis directed Tully to rectify the conditions in the tank room. The fact that Tully's laborers and the electricians chose to work in places other than the tank room, setting the stage for plaintiff's accident, does not absolve Bovis of its obligations or suggest that Bovis did not manage or control their performance. The court concludes that Bovis was a statutory agent of the City.

Labor Law § 200 and Common-Law Negligence

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

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

It is well settled that:

> "Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the

> work was performed [internal citations omitted]"

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

This case involves a dangerous condition, i.e., the poorly-lit and debris-strewn situation in the tank room. "Where ... the injury is caused not by the methods of decedent's work, but by a defective condition on the premises, liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 648 [1st Dept 2013]).

As the evidence makes clear, Bovis had actual notice of the conditions in the tank room. Plaintiff and his father complained numerous times that the condition of the room was unacceptable and dangerous, and Bovis's Tuohy told them that he would get right on it. Whatever action Tuohy took, it failed to remedy the situation in the tank room, and plaintiff was injured there.

Therefore, the part of Bovis's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Labor Law § 240 (1)

Under Labor Law § 240 (1), Bovis, as agent for the City, is liable to plaintiff for his injuries. Numerous complaints about debris and poor lighting were made to Bovis, and it was Bovis that was supposed to direct Tully to clean and dispose of debris, and to

direct JH Electrical's electricians to remedy poor lighting conditions. No one contests that the floor of the tank room where plaintiff fell was covered with debris and garbage, and no one contests that the room was poorly lit. As both of these conditions may have been instrumental in causing plaintiff's accident, Bovis is absolutely liable, along with the City, under section 240 (1).

The part of Bovis's motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

Labor Law § 241 (6)

> "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under section 241 (6) a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications' [internal citations omitted]"

(*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept 2012]). The Industrial Code provision relied upon must be applicable, as well as specific and concrete (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047 [2d Dept 2012]).

The Industrial Code (12 NYCRR Part 23) provision allegedly violated by Bovis is section 23-1.30 (Illumination), which provides:

> "Illumination sufficient for safe working conditions shall be provided wherever persons

> are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass"

(12 NYCRR 23-1.30). This section of the Industrial Code is sufficiently specific as to be able to support a section 241 (6) claim (*see e.g. Capuano v Tishman Constr. Corp.*, 98 AD3d 848). However, as the evidence is silent as to how many foot candles of illumination may have been present at the time of plaintiff's accident, summary judgment may not be obtained, as any estimation of how much lighting was present would only be based on speculation and guesswork.

Thus, the part of Bovis's motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is denied.

The Cross Claims Against Bovis

Bovis moves for summary judgment dismissing the City and Tully's cross claims. The City alleges four cross claims against Bovis: common-law and contractual indemnification, contribution, and breach of contract to procure insurance. Tully also cross-claims against Bovis for indemnification.

Common-Law Indemnification

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without

proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d at 10; *see also 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. ... Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision"]).

As has been seen, the City is statutorily liable under Labor Law § 240 (1). However, liability under section 240 (1)

> "is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence. A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence [internal citations omitted]"

(*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). It has also been seen that Bovis was at fault for failing to have the tank room cleaned and well-lit. Thus, summary judgment dismissing the City's common-law indemnification cross claim against Bovis must be denied.

Summary judgment dismissing Tully's cross claim for common-law indemnification must be denied because neither Bovis nor Tully has been held vicariously liable without negligence or actual

supervision. Rather, Bovis supervised Tully, and Tully exercised actual supervision or control over its laborers' work of cleaning and disposing of debris and garbage. As neither Bovis nor Tully have been found vicariously liable without fault, summary judgment dismissing Tully's cross claim for common-law indemnification is denied.

Contribution

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *see also Mas v Two Bridges Assoc.*, 75 NY2d 680, 689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]).

Since the City has been found statutorily liable, but not negligent, and Bovis has been found at fault under Labor Law § 200 and common-law negligence, this part of Bovis's motion which seeks summary judgment dismissing the City's cross claim for contribution is denied.

Contractual Indemnification

> "A party's right to contractual indemnification depends upon the specific language of the contract. Where there is no legal duty to indemnify, a contractual

> indemnification provision must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]"

(*Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 807-808 [2d Dept 2012]). "[A] contractual indemnification clause is not enforceable where there is active negligence by the indemnitee" (*Lue v Finkelstein & Partners, LLP*, 94 AD3d 1386, 1389 [3d Dept 2012]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003], quoting *Correia*; *Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002], quoting *Correia*.

The indemnification provision of the City/Bovis contract provides, in relevant part:

> ARTICLE XX - INDEMNITY
> The Consultant [Bovis] shall be liable to and hereby agrees to indemnify and hold harmless ... the City ... from any and all claims and judgements against any of them, for damages and from costs and expenses to which the City ... may be subjected, or which they may suffer or incur by reason of any ... bodily injury ... to the extent resulting from the negligence of the Consultant ... in the

> performance of the Contract, or from the failure to comply with any of the provisions of this Contract or of law.

The City, the one seeking indemnity, is liable only because of the statutory liability of Labor Law § 240 (1). Thus, the part of Bovis's motion which seeks dismissal of the City's cross claim for contractual indemnification is denied.

There is no contract between Bovis and Tully, because Tully was a prime contractor hired by the City. Therefore, the part of Bovis's motion which seeks summary judgment dismissing Tully's cross claim for contractual indemnification against it is granted.

Breach of Contract by Failure to Procure Insurance

The City/Bovis contract requires Bovis to:

> "procure a commercial general liability insurance policy in [Bovis's] name and naming the City of New York and NYCDOS [the City's Department of Sanitation] as additional insureds and endorsed to cover liability assumed by [Bovis] under the indemnity provisions of this agreement. This insurance policy must be maintained during the life of the contract and shall protect the City, NYCDOS, and [Bovis] ... from claims for ... bodily injury which may arise from operations under this contract ... "

(City/Bovis Contract, General Conditions, [3] Commercial General Liability). No evidence is before the court with respect to whether or not Bovis procured the required insurance coverage. Therefore, the part of Bovis's motion which seeks summary judgment dismissing the City's breach of contract cross claim is denied.

The City's Motion for Summary Judgment on Its Claims for Indemnification from Bovis and Tully (motion sequence number 005)

Common-Law Indemnification

As has already been determined, the City has been found vicariously liable without proof of negligence or actual supervision on its part, and Bovis was negligent or exercised actual supervision or control over the injury-producing work (*see Naughton v City of New York*, 94 AD3d at 10). Thus, summary judgment in the City's favor is granted against Bovis on the City's common-law indemnification cross claim.

Summary judgment against Tully must be denied, however. The evidence indicates that each contractor was responsible for cleaning its own debris, and to take the debris and garbage to designated areas where Tully's laborers, using brooms and shovels, would put the debris in containers and dispose of it. If the originators of the garbage could not be determined, Bovis would notify Tully that it was responsible for cleaning the area and disposing of the garbage. Tully was the only contractor that employed laborers to police the work site.

Summary judgment must be denied because the evidence does not indicate whether the contractor that left the debris and garbage in the tank room could be identified, and if not, whether Bovis directed Tully to clean the area and Tully failed to do so.

Accordingly, the part of the City's motion which seeks summary judgment on the City's cross claim for common-law

indemnification against Tully is denied.

Contractual Indemnification

The indemnification provision in the City/Bovis contract requires Bovis to indemnify the City for damages and other costs the City might incur as a result of Bovis's negligence. Bovis has been found negligent under Labor Law § 200 and common-law negligence. Therefore, the part of the City's motion which seeks summary judgment on its cross claim for contractual indemnification as against Bovis is granted.

With respect to the City's contractual indemnification cross claim as against Tully, the motion must be denied. Tully's assertion that the City/Tully contract does not contain an indemnification obligation is uncontested. Thus, the part of the City's motion which seeks summary judgment on its contractual indemnification cross claim as against Tully is denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (motion sequence number 002) is granted; and it is further

ORDERED that the City of New York's motion (motion sequence number 003) is denied; and it is further

ORDERED that the motion (motion sequence number 004) of Bovis Lend Lease, LMB, Inc. is denied, except with respect to dismissing Tully's cross claim for contractual indemnification,

which is granted; and it is further

ORDERED that the part of the City of New York's motion (motion sequence number 005) which seeks summary judgment on its cross claim for common-law indemnification as against Bovis Lend Lease, LMB, Inc. is granted; as against Tully it is denied; and it is further

ORDERED that the part of the City of New York's motion which seeks summary judgment on its cross claim for contractual indemnification as against Bovis Lend Lease, LMB, Inc. is granted; as against Tully is denied;

ORDERED that the parties proceed to mediation/trial, forthwith.

Dated: 8/2/13

ENTER:

JOAN M. KENNEY J.S.C.