Farrugia v 1440 Broadway Assoc.
2016 NY Slip Op 31722(U)
September 12, 2016
Supreme Court, New York County
Docket Number: 151857/12
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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ANTHONY FARRUGIA,

Plaintiff,

-against-

Index No. 151857/12

1440 BROADWAY ASSOCIATES, 1440 BROADWAY OWNER, LLC, HARBOUR MECHANICAL CORP., 1440 BROADWAY MANAGEMENT, LLC, THE MARTIN GROUP, LLC, TIMBIL MECHANICAL, INC., and ARMA SCRAP METAL CO., INC.,

Motion Sequence Nos. 012, 013, 014, 015, & 016

Defendants.

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HARBOUR MECHANICAL CORP.,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590634/13

THE MARTIN GROUP, LLC, GENTLEMAN SHEET METAL LTD., JOHN GRANDO, INC., TIMBIL MECHANICAL, INC., TRIUMVIRATE ENVIRONMENTAL and ARMA SCRAP METAL CO., INC.,

Third-Party Defendants.

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ELLEN M. COIN, J.:

Motion sequence numbers 012, 013, 014, 015, and 016 are consolidated for disposition.

In this personal injury action, plaintiff Anthony Farrugia alleges that on February 4, 2012, he was injured when he stepped in an uncovered opening in a metal "diamond plate" on the floor of the sub-basement of 1440 Broadway, New York, New York (the premises).

Defendant/third-party plaintiff Harbour Mechanical Corp. (Harbour) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross-claims asserted

against it. Additionally, Harbour seeks an order precluding plaintiff from making any claim for lost wages (motion sequence no. 012).

Defendant/third-party defendant Arma Scrap Metal Co., Inc. (Arma) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims and counterclaims against it (motion sequence no. 013).

Defendant/third-party defendant The Martin Group, LLC (Martin Group) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross-claims asserted against it (motion sequence no. 014).

Defendants 1440 Broadway Associates, 1440 Broadway Owner, LLC, 1440 Broadway Management, LLC (collectively, the 1440 Broadway defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint with prejudice (motion sequence no. 015).

Defendant/third-party defendant Timbil Mechanical, Inc. (Timbil) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, the third-party complaint, and the cross-claims and counterclaims asserted against it (motion sequence no. 016).

BACKGROUND

Plaintiff alleges that the 1440 Broadway defendants owned the premises on the date of the accident. Nonparty Monday Property Services, LLC (Monday Properties) was the managing agent of the building. Plaintiff's amended verified bill of particulars alleges that the 1440 Broadway defendants were negligent "in failing to cover a hazardous opening in the floor of the sub-basement," and that Harbour, Arma, Martin Group, and Timbil were negligent "in [] remov[ing] certain equipment from the sub-basement [and] fail[ing] to cover and make safe a resultant uncovered opening in the floor of the sub-basement which created a danger to those

employed in the sub-basement or lawfully present in said sub-basement" (joint compendium,[1] exhibit 30, ¶ 8). Plaintiff claims that he has not been able to work as an operating engineer since the accident, and seeks $4.5 million in lost earnings (*id.*, exhibit 30, ¶ 13).

1440 Broadway Owner, LLC hired Harbour as a general contractor for the installation of a new steam station in the basement of the premises (*id.*, exhibit 32). In purchase orders dated February 17, 2011, and May 16, 2011, Harbour retained Arma to "provide demolition and removals of existing boilers, tanks, cws&r piping and miscellaneous items indicated on CSA mechanical drawings dated 7/22/10 include [sic] all scaffolding, permits and safety equipment required" and "[r]emove threaded rods and fishplates from exterior wall where risers were removed; point all holes where rods were removed; repair the openings where piping was removed from exterior wall between floors 10 and 11" (*id.*, exhibit 34). By purchase order dated May 2, 2011, Harbour hired Martin Group to "[f]urnish labor and material to provide G.C[.] work and Electrical work outlined in 'REQUIREMENTS FOR G.C. WORK' and in 'ELECTRICAL REQUIREMENTS', both dated 3/23/11" (*id.*, exhibit 35). In addition, Harbour hired Timbil in a purchase order dated January 5, 2011 to "[f]urnish labor and material to provide all piping work as outlined in 'PIPING REQUIREMENTS' dated 1/5/11" (*id.*, exhibit 33).

Plaintiff testified at his deposition that he was employed as an operating engineer by Monday Properties on the date of the accident (joint compendium, exhibit 36 at 14, 17).[2] Plaintiff's duties included maintenance of the air conditioning and heating, plumbing, and

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[1]The parties submitted a joint compendium of exhibits in support of their motions for summary judgment. The court cites to the joint compendium as joint compendium, exhibit __.

[2]Plaintiff was deposed on May 15, 2013, March 5, 2014, April 15, 2014, and April 2, 2015.

mechanical pumps (*id.*, exhibit 36 at 17-18).

On February 4, 2012, plaintiff was working with Bill Bovis, a handyman, changing a two-inch check valve on a pump in the sub-basement (*id.*, exhibit 36 at 145). Plaintiff and Bovis obtained their tools from the tool room in the basement, went down to the sub-basement and set up their tools, sprayed the joints, took off the old valve, put Teflon tape on the new joints, and put on the new valve (*id.*, exhibit 36 at 149-150). According to plaintiff, "[he] believe[s] [he] sent Bill up to get a tool" and "[plaintiff] was tightening one more thing up and when [plaintiff] went to go tighten it up, that's when the accident occurred" (*id.*, exhibit 36 at 153). He stated that as he was turning toward the check valve to grab a tool from the floor, "[his] foot went in the hole and that's when [he] fell back" (*id.*, exhibit 36 at 153-154). Plaintiff estimated the dimensions of the hole to be "almost two feet. Like two feet" (*id.*, exhibit 36 at 154). Plaintiff testified that he had seen the hole "[o]nce a couple of months before that," but that on the date of the accident he did not see it, because he "was paying attention to the job and everything else going on in that room" (*id.*, exhibit 36 at 155). Prior to the accident plaintiff had taken a photograph of the hole with his phone (*id.*, exhibit 50), which he showed to his supervisor, Wayne Kohlbrecher (Kohlbrecher) (*id.*, exhibit 36 at 11).

When asked what caused the hole, plaintiff stated that he "believe[s] there was a piece of machinery on top that a vendor came in and removed" (*id.*, exhibit 36 at 160). Plaintiff believed that Harbour was the vendor (*id.*, exhibit 36 at 160). Plaintiff stated that he did not observe Harbour remove the piece of equipment that was on top of the hole; however, Harbour was "doing a lot of extensive work within 2011" (*id.*, exhibit 36 at 161).

Kohlbrecher, the building manager and plaintiff's supervisor, testified that after

reviewing the photograph taken by plaintiff, "[t]here appears to be a pipe" projecting upward from the opening in the plate (*id.*, exhibit 42 at 25). Kohlbrecher testified that he recalled that there was a plate on the floor, but did not recall the condition of the plate (*id.*, exhibit 42 at 26). He further stated that "[t]here used to be the tank located in this general area," meaning a second tank (*id.*, exhibit 42 at 26). Harbour or one of its subcontractors removed the tank "because it was no longer needed for the new heating system" (*id.*, exhibit 42 at 27, 28).

Nick Barber (Barber), Harbour's project manager, described Harbour's role in the steam station project as follows: "what we did was, we demolished the boilers, the fuel oil tank and basically constructed a platform to install the piping and valving for the Con Edison steam" (*id.*, exhibit 40 at 13). After the work was completed, the tank room did not exist; the purpose of the job was to remove the tanks (*id.*, exhibit 40 at 45).

On June 19, 2015, the court directed plaintiff to produce certain financial records within 20 days of the parties' entering into a confidentiality agreement (*id.*, exhibit 26). In addition, the court ordered that "plaintiff's failure to produce subject financial records shall limit recovery of past and future lost earnings to an extent determined on motion in limine by the justice presiding over a trial" (*id.*).

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to

raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Whether the Opening in the Metal Plate Was Open and Obvious and Not Inherently Dangerous

The 1440 Broadway defendants argue that plaintiff's own testimony mandates dismissal of the complaint because the condition alleged was open, obvious, and readily observable. They note that: (1) plaintiff was aware of the two-foot hole where he tripped for no less than two months before the date of the accident; (2) plaintiff even took a color photograph of the hole the first time that he observed it (joint compendium, exhibit 50); and (3) the color photograph clearly depicts the hole where plaintiff allegedly tripped (*id.*). In addition, plaintiff admitted to working in the vicinity of the hole numerous times before the accident. Thus, the hole cannot qualify as a proximate cause of the accident.

Harbour argues that the opening in the diamond plate, which was a different color from that of the surrounding area, was an open and obvious condition that was not inherently dangerous as a matter of law.

The Court of Appeals has held that "landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *see also Basso v Miller*, 40 NY2d 233, 241 [1976] ["(a) landowner must act as a reasonable man in maintaining his property in a reasonably safe

condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk"] [internal quotation marks and citation omitted]). "Ordinarily, a landowner's duty to warn of a latent, dangerous condition on his property is a natural counterpart to his duty to maintain his property in a reasonably safe condition" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). However, "a landowner has no duty to warn of an open and obvious danger" (*Tagle*, 97 NY2d at 169).

In *Cupo v Karfunkel* (1 AD3d 48, 52 [2d Dept 2003]), the Second Department held that "proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence." Similarly, the First Department has ruled that "even if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70 [1st Dept 2004]). However, "a court is [not] precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious *and, as a matter of law, was not inherently dangerous*" (*Cupo*, 1 AD3d at 52; *see also Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009]; *Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475, 476 [1st Dept 2007]; *Jones v Presbyterian Hosp. in City of N.Y.*, 3 AD3d 225, 226 [1st Dept 2004]).

"To establish an open and obvious condition, a defendant must prove that the hazard 'could not reasonably be overlooked by anyone in the area whose eyes were open'" (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014], quoting *Westbrook*, 5 AD3d at 72). "Ordinarily,

this a question for the trier of fact unless 'the established facts compel that conclusion . . . on the basis of clear and undisputed evidence'" (*Garrido v City of New York*, 9 AD3d 267, 268 [1st Dept 2004], quoting *Tagle*, 97 NY2d at 169). "The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses" (*Powers*, 123 AD3d at 422).

Here, the 1440 Broadway defendants and Harbour have not established as a matter of law that the uncovered opening in the metal "diamond plate" was open and obvious. The photograph plaintiff took of the opening is not very clear (joint compendium, exhibit 50). Additionally, plaintiff testified that at the time of the accident, he "was paying attention to the job and everything else going on in that room" (*id.*, exhibit 36 at 155). "A condition that is ordinarily apparent to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1009 [2d Dept 2008]). The record is also unclear as to the size of the opening and of the pump room. Plaintiff testified that the size of the hole was "almost two feet" *(id.*, exhibit 36 at 154). However, Bovis stated that the hole was a "small opening," and that the metal plate in which the opening was located was about "20 inches" wide and "[t]hree to four feet" long (*id.*, exhibit 39 at 36, 51, 52-53). Kohlbrecher testified that there appeared to be a pipe projecting upwards from the opening (*id.*, exhibit 42 at 25). Moreover, even if the condition was open and obvious, this issue would go to plaintiff's comparative negligence.

"'[W]hether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case'" (*Powers*, 123 AD3d at

422, quoting *Russo v Home Goods, Inc.*, 119 AD3d 924, 925-926 [2d Dept 2014]). While Harbour argues that the opening was not inherently dangerous based upon its color, the length of time that it existed, and the lack of complaints about the opening, it has failed to demonstrate that the uncovered opening was not inherently dangerous as a matter of law. It is undisputed that plaintiff and Bovis were working in the sub-basement at the time of the accident. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the particular circumstances of each case and is generally a question of fact for the jury" (*Shalamayeva v Park 83rd St. Corp.*, 32 AD3d 387, 388 [2d Dept 2006]).

In reply, the 1440 Broadway defendants argue that the opening was not inherently dangerous because it contained drain piping for an HVAC tank that was removed, and existed in a pump in the sub-basement of the building which was not open to the public. Nevertheless, the court does not consider the 1440 Broadway defendants' argument because "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Even if the court were to consider the 1440 Broadway defendants' argument, the court would find questions of fact as to whether the opening was inherently dangerous (*see Shalamayeva*, 32 AD3d at 388).

Contrary to the 1440 Broadway defendants' contention, this is not a case where proximate cause may be decided as a matter of law.

In a negligence case, "'the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury'" (*Maniscalco v New York City Tr. Auth.*, 95 AD3d 510, 512 [1st Dept 2012], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d

308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). "Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable" (*Derdiarian*, 51 NY2d at 315). "There may be one, or more than one, substantial factor" in causing a plaintiff's injury (*Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept], *lv denied* 95 NY2d 769 [2000]). "As a general rule, the question of proximate cause is to be decided by the finder of fact . . ." (*Derdiarian*, 51 NY2d at 312). "There are certain instances, [however], where only one conclusion may be drawn from the established facts and the question of legal cause may be decided as a matter of law" (*id.* at 315).

Here, plaintiff testified that he "turned around that's when [his] foot went into the hole and that's when [he] fell back" (joint compendium, exhibit 36 at 153-154). "Should the jury conclude that an unreasonably dangerous condition existed, the facts that the condition was readily observable, and that it was actually observed by plaintiff...are factors to be considered by the jury in determining the issue of comparative fault." (*Cohen v Shopwell, Inc.*, 309 AD2d 560, 561 [1st Dept 2003]; *Mizell v Bright Services, Inc.*, 38 AD3d 267 [1st Dept 2007][garbage bags left in vestibule]; *Juoniene v H.R.H. Const. Corp.*, 6 AD3d 199 [1st Dept 2004][standpipe protruding over public sidewalk]). "[T]he open and obvious nature of a hazard merely negates the duty to warn of the hazard, not necessarily all duty to maintain premises in a reasonably safe condition." (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 73 [1st Dept 2004]). Thus, it is for the jury to determine whether the hole was a proximate cause of the accident.

Pepic v Joco Realty (216 AD2d 95 [1st Dept 1995]), on which the 1440 Broadway defendants rely, is inapposite. There a cleaning person was cleaning a picture hanging on the wall when she tripped over a nearby planter. She alleged that by creating a tight space between

the planter and the wall, defendants had interfered with the safe performance of her duties. The First Department held that the complaint was "properly dismissed upon the finding that the planter was in plain view and did not constitute a hazardous condition presenting a foreseeable danger" (*id.* at 96). Here, in contrast, given the unclear photograph of the hole, it cannot be said as a matter of law that it was obvious, or that plaintiff's focus on his task did not distract him so as to render the hole a non-hazardous condition.

Therefore, the 1440 Broadway defendants and Harbour are not entitled to dismissal of the complaint, on the ground that the alleged condition was open and obvious and not inherently dangerous and did not cause plaintiff's accident.

Whether Harbour, Arma, Martin Group, and Timbil May Be Liable to Plaintiff

1. Harbour

Harbour argues that it is entitled to summary judgment because the accident did not arise out of its work on the steam station project. Harbour maintains that the opening in the metal plate existed before the project began. In addition, Harbour contends that it did not owe a duty of care to plaintiff. Specifically, Harbour maintains that it fulfilled all of its obligations under its contract, and had no obligation to maintain, repair, cover or otherwise alter the diamond plate.

In opposition, plaintiff contends that Harbour removed a tank above the diamond plate, which exposed the opening, and created the dangerous condition. Therefore, according to plaintiff, Harbour's work caused the accident.

Generally, a contractor does not owe a duty of care to a noncontracting third party (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). However, the Court of Appeals has identified three exceptions to the general rule: (1) "where the promisor, while engaged

affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk"; (2) "'where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation'"; and (3) "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 111-112 [citation omitted]).

With respect to the first exception, a contractor owes a duty to a third party where it "creates an unreasonable risk of harm to others, or increases that risk" (*id.* at 111; *see also Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002] ["a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury"]). The Court of Appeals held in the landmark case *Moch Co. v Rensselaer Water Co.* (247 NY 160, 168 [1928]), "The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." Other cases have emphasized whether the contractor made the subject area "less safe than before the construction project began" (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67 [1st Dept], *lv dismissed* 4 NY3d 739 [2004], *rearg denied* 4 NY3d 795 [2005]; *see also Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548 [4th Dept 2012]; *Moran v City of Schenectady*, 47 AD3d 1001, 1002-1003 [3d Dept 2008]).

In *Church* (99 NY2d 104, *supra*), the infant plaintiff was injured when the vehicle in which he was a passenger veered off a highway and careened down an embankment. The plaintiff sued, among other defendants, a subcontractor hired to install a guiderail system on the highway (*id.* at 109). The Court of Appeals held that the subcontractor did not owe a duty of care

to the plaintiff, noting, among other things, that the subcontractor's "failure to install the additional length of guiderail did nothing more than neglect to make the highway at Thruway milepost marker 132.7 *safer* – as opposed to less safe – than it was before the repaving and safety improvement project began" (*id.* at 112).

Here, there is evidence that a tank above the metal plate was removed during the steam station project. Plaintiff testified that there was a piece of machinery on top of the metal plate that a vendor came in and removed, and that he believed that the vendor was Harbour (joint compendium, exhibit 36 at 160-162). Kohlbrecher also testified, when shown the photograph of the area of the accident, that "[t]here used to be a tank located in this general area" (*id.*, exhibit 42 at 26).[3] Kohlbrecher clarified that he was not referring to the tank that was painted orange in the photograph; it was a second tank (*id.*). He further stated that Harbour or one of its subcontractors removed the tank (*id.*, exhibit 42 at 27). The tank was removed "because it was no longer needed for the new heating system" (*id.*, exhibit 42 at 28). In addition, Barber testified that the purpose of the steam station project was to remove the tanks (*id.*, exhibit 40 at 45).[4] Barber stated that he was on the site three to four times per week, and acted as a liaison with the owners (*id.*, exhibit 40 at 85-86). Thus, there are issues of fact as to whether Harbour created or

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[3]In reply, Harbour claims that Kohlbrecher testified that the diamond plate was in front of the tank that was removed. However, Kohlbrecher testified that "[t]he plate as [he] recall[s] was *towards the front of the tank*" (joint compendium, exhibit 42 at 94 [emphasis added]).

[4]Harbour, Arma, and Martin Group point out that the 1440 Broadway defendants hired another contractor to close all openings in the sub-basement floor. However, "[i]t is well settled that evidence concerning post-accident repairs is generally inadmissible absent certain exceptions and is never admissible as proof of admission of negligence. The only exceptions to the general rule arise (1) when there is an issue of control or (2) when plaintiff has alleged a defect in the manufacture" (*Fernandez v Higdon El. Co.*, 220 AD2d 293, 293 [1st Dept 1995] [citation omitted]), none of which pertain here.

exacerbated a dangerous condition by removing a tank above the metal plate or by failing to ensure that the opening was covered after the tank was removed (*see Paro v Piedmont Land & Cattle, LLC*, 111 AD3d 1425, 1427 [4th Dept 2013] [issues of fact as to whether contractor "negligently filled in the vault only partially, and concealed its existence, thereby creating a force or instrument of harm or otherwise making the area less safe than before the demolition project began"]; *Hahn*, 94 AD3d at 1548 [issue of fact as to whether general contractor hired by supermarket to perform renovations launched a force or instrument of harm by "failing to ensure that the hole was covered or that the dangerous condition was cured"]; *Golisano v Keeler Constr. Co., Inc.*, 74 AD3d 1915, 1916 [4th Dept 2010] [issue of fact as to whether two-inch crusher stone, left in street, constituted force or instrument of harm or otherwise made area less safe than before construction project began]; *but see Oefelein v CFI Constr., Inc.*, 45 AD3d 1002, 1004 [3d Dept 2007] [prime contractor and independent gas vendor were not liable to plaintiff where neither entity made area where gas line was replaced less safe than before construction project began]). Accordingly, the court denies the branch of Harbour's motion seeking dismissal of plaintiff's negligence claim.

2. Arma

Arma similarly argues that there is no evidence that it created the alleged dangerous condition that caused plaintiff's accident. According to Arma, the condition existed before Harbour's work on the steam station project began at the premises. Arma, therefore, contends that it did not cause the accident. Additionally, Arma asserts that whether it had notice of the condition is irrelevant.

In response, plaintiff contends that Arma was charged under its contract with demolition

work, which most likely cut the pipe and removed the tank.

Plaintiff testified that Arma removed equipment in the sub-basement (joint compendium, exhibit 38 at 111-112). Kohlbrecher stated that Arma performed removal of the tank (*id.*, exhibit 42 at 119). According to Kohlbrecher, Arma removed the original boilers and ancillary piping and other vessels that were no longer required for the heating system (*id.*, exhibit 42 at 140). Arma used acetyline torches and cutting devices to chop the tanks and piping into small pieces so that they could be removed from the room (*id.*, exhibit 42 at 141). In view of this evidence, there are questions of fact as to whether Arma created or exacerbated a dangerous condition which caused plaintiff's accident (*see Matter v Grande Stone Quarry, LLC*, 26 Misc 3d 1220 [A], 2010 NY Slip Op 50189 [U], *5 [Sup Ct, Greene County 2010] ["As Plaintiff claims that his fall was caused by the loose materials on top of the bridge giving way, and Troy acknowledged placing such material there, Troy failed to demonstrate that it did not make 'the ['bridge'] less safe than before the construction project began'" [citation omitted]). Therefore, the branch of Arma's motion seeking dismissal of plaintiff's negligence claim is denied.

3. Martin Group

Martin Group argues that there is no evidence of its negligence, since the hole pre-existed its work and remained after its work was completed.

Plaintiff counters that Martin Group took an active role in coordinating the trades and had a duty to report the exposed opening in the metal plate.

Martin Group's superintendent, Jeffrey Meyers, testified that it was not its responsibility or that of its subcontractors to "[r]emove existing tank and associated piping" on the demolition plans (joint compendium, exhibit 43 at 41). Although plaintiff notes that Martin Group

coordinated the trades and performed electrical and clean-up work on the job (*id.*, exhibit 40 at 89), there is no evidence that these tasks caused plaintiff's accident (*see Quiroz v Wells Reit-222 E. 41st St., LLC*, 128 AD3d 442, 442 [1st Dept][no evidence that coordination of trades proximately caused plaintiff's accident]). Accordingly, Martin Group is entitled to dismissal of plaintiff's negligence claim.

4. Timbil

Timbil argues that it agreed to install new piping in the sub-basement, but did not agree to do any demolition work during the steam station project. Timbil maintains that its work did not involve the opening into which plaintiff stepped. Timbil relies on meeting minutes, which purportedly establish that it did not perform any activities concerning removal of tanks and other items from the sub-basement (Giard affirmation in support, exhibit G), and an affidavit of its president, William Ross, which alleges that Timbil did not perform any demolition on the project or oversee others who were hired to perform demolition work (Ross aff, ¶¶ 14-16).

Plaintiff argues, in opposition, that the opening in the diamond plate existed at the time that Timbil was on the job, and that there is evidence that the dangerous condition was created by one of the subcontractors on the project.

Contrary to Timbil's contention, there is evidence in the record that it was responsible for demolition of the boiler. Indeed, the kickoff meeting agenda indicates that Timbil was responsible for "[c]oordination of the demolition of the boiler and PRV installation" (Mazzei affirmation in opposition, exhibit B). Harbour's project manager also states that pursuant to its subcontract with Timbil, Timbil was to perform or supervise demolition of certain tanks, boilers, and associated piping; it was Timbil's responsibility to ensure that the welds and resulting

remaining attachments were properly prepared for the installation that Timbil was supposed to perform (Barber aff, ¶ 8). Arma's president, Peter Guardino, also testified that Arma did not perform any demolition above the metal plate (joint compendium, exhibit 46 at 22). He stated that the piping coming out of the tank was cut and capped before Arma arrived on site and removed the tank (*id.*, exhibit 46 at 38-39). Thus, there are issues of fact as to whether Timbil created or exacerbated the condition that caused plaintiff's accident. As a result, the branch of Timbil's motion seeking dismissal of the complaint is denied.

1440 Broadway Defendants' Cross-Claim for Contractual Indemnification Against Harbour

Harbour moves for summary judgment dismissing the 1440 Broadway defendants' contractual indemnification claim against it.

Paragraph 11 of Harbour's contract provides as follows:

> **"11. INDEMNIFICATION, INSURANCE AND BONDS.**
>
> **(a) TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CONTRACTOR AGREES TO INDEMNIFY, PROTECT, DEFEND AND HOLD HARMLESS OWNER, OWNER'S LENDER, IF ANY, 1440 BROADWAY OWNER, LLC, 1440 JV PARTNERS, LLC, 1440 MONDAY PROPERTIES SERVICES, LLC, 1440 BROADWAY MANAGEMENT, LLC, GREENWICH CAPITAL PARTNERS, AND EACH OF THE AFOREMENTIONED PARTIES' RESPECTIVE AFFILIATED COMPANIES, PARTNERS, MEMBERS, SUCCESSORS, ASSIGNS, HEIRS, LEGAL REPRESENTATIVES, DEVISEES, OFFICERS, DIRECTORS, TRUSTEES, SHAREHOLDERS, EMPLOYEES AND AGENTS (COLLECTIVELY, 'INDEMNITEES') FOR, FROM AND AGAINST ALL LIABILITIES, CLAIMS, DAMAGES, LOSSES, LIENS, COSTS, FINES, PENALTIES, CAUSES OF ACTION, SUITS, JUDGMENTS AND EXPENSES (INCLUDING COURT COSTS, ATTORNEYS' FEES, AND COSTS OF INVESTIGATION), OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, DIRECTLY OR INDIRECTLY ARISING OUT OF, CAUSED BY, OR RESULTING FROM (IN WHOLE OR IN PART), (1) THE WORK PERFORMED HEREUNDER, OR ANY PART THEREOF,**

> **INCLUDING, WITHOUT LIMITATION, THE SELECTION AND USE OF A TRANSPORTER OR WASTE DISPOSAL FACILITY, (2) THIS AGREEMENT, OR (3) ANY ACT OR OMISSION OF CONTRACTOR, ANY SUBCONTRACTOR (OF ANY TIER), ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM, OR ANYONE THAT THEY CONTROL OR EXERCISE CONTROL OVER (COLLECTIVELY, 'LIABILITIES'), EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTED TO THE CONCURRENT NEGLIGENCE OF ANY INDEMNITEE. THE ONLY LIABILITIES WITH RESPECT TO WHICH CONTRACTOR'S OBLIGATION TO INDEMNIFY THE INDEMNITEES DOES NOT APPLY IS WITH RESPECT TO LIABILITIES RESULTING FROM THE SOLE NEGLIGENCE OR WILLFUL MISCONDUCT OF INDEMNITEE. THIS INDEMNIFICATION SHALL NOT BE LIMITED TO DAMAGES, COMPENSATION OR BENEFITS PAYABLE UNDER INSURANCE POLICIES, WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEES' BENEFIT ACTS"**

(joint compendium, exhibit 32 at 4).

Harbour argues that: (1) even though the indemnification provision contains the language "to the fullest extent permitted by applicable law," the provision violates General Obligations Law § 5-322.1 because the contract limits the liability of Harbour only if the indemnitees are solely negligent; and (2) plaintiff's injuries did not arise out of its work, since the steam station project did not include any alteration, repair or replacement of the diamond plate or the opening in the diamond plate.

In opposition, the 1440 Broadway defendants contend that the indemnification provision is enforceable. The 1440 Broadway defendants also argue that there are triable issues of fact (1) as to whether the accident "arose out of, was caused by, or resulted from" Harbour's work or that of one of its subcontractors; and (2) as to Harbour's negligence in failing to correct the hazard.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the

surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]). However, an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this limiting language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

While the indemnification clause here would required Harbour to indemnify the 1440 Broadway defendants in instances of partial negligence, the clause does not violate General Obligations Law § 5-322.1, since it contains the savings language "to the fullest extent permitted by law" (*see Brooks*, 11 NY3d at 210; *Johnson v Chelsea Grand East, LLC*, 124 AD3d 542, 543 [1st Dept 2015]).

In view of the above, Harbour's request for dismissal of the 1440 Broadway defendants' contractual indemnification claim is denied.

Common Law Indemnification and Contribution Claims Against Harbour

Harbour also argues that the common law indemnification and contribution claims against it must be dismissed, because plaintiff's accident did not arise out of its work, and it was

not negligent.

"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 1, 10 [1st Dept 2012]; *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"]).

"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" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citation omitted]). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

As noted, there are issues of fact as to whether Harbour was negligent and caused or contributed to plaintiff's accident. Therefore, Harbour is not entitled to dismissal of the common law indemnification and contribution claims against it.

Contractual Indemnification Claims Against Arma

Arma moves for summary judgment dismissing Harbour's contractual indemnification claim, which is based upon the following provision in Harbour's Blanket Purchase Order with

Arma:

> "6. INDEMNIFICATION
>
> To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor (insert any additional parties), their officers, directors, agents, employees and partners (hereafter collectively 'indemnities') from any and all claims, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought or assumed against any of the indemnities by any person or firm, *arising out of or in connection with or as a consequence of the performance of the Work of the Subcontractor under this agreement (contract)*, as well as any additional work, extra work, or add-on work, whether caused in whole [or] part by the Subcontractor including any subcontractors therefore and their employees. The parties expressly agree that this indemnification agreement contemplates: 1) full indemnity in the event liability is imposed against the Indemnities without negligence and solely by reason of statute, operation of law or otherwise; and 2) partial indemnity in the event of any actual negligence on the part of the indemnities either causing or contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above the percentage attributable to actual fault whether by statute by operation of law, or otherwise. Where partial indemnity is provided under this agreement, costs, professional fees, attorney's fees, expenses, disbursements, etc. shall be indemnified on a pro rata basis. Indemnification under this paragraph shall operate whether or not subcontractor has placed and maintained the insurance specified. Recovery of attorney's fees, costs, court costs, expenses and disbursements incurred in the defense of the underlying claim, in the enforcement of this agreement, in the prosecution of any claim for indemnification hereunder, and in pursuit of any claim of insurance coverage required"

(Marchick affirmation in support, exhibit 34 [emphasis supplied]).

As discussed, there are issues of fact as to whether Arma, in removing a tank, exposed the opening in the metal plate. Accordingly, Arma's request for dismissal of Harbour's contractual indemnification claim is denied.

Arma argues that the contractual indemnification claims asserted by the 1440 Broadway defendants, Martin Group, and Timbil are without merit, since Arma did not enter into any contracts with these entities, and Arma's contractual indemnification provision does not require

Arma to indemnify the 1440 Broadway defendants, Martin Group, or Timbil.

The 1440 Broadway defendants argue that they are intended third-party beneficiaries of the Harbour/Arma contract, since there is no dispute that the work was to be done within the premises. Martin Group and Timbil do not oppose dismissal of their contractual indemnification claims against Arma.

Initially, the court notes that "a contract assuming [the duty to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). An owner is not entitled to contractual indemnification based on indemnification clauses contained in contracts to which it is not a signatory and in which it is not named as an indemnitee (*see Nazario v 222 Broadway, LLC*, 135 AD3d 506, 510 [1st Dept 2016]; *Sicilia v City of New York*, 127 AD3d 628, 628 [1st Dept 2015]).

The 1440 Broadway defendants are neither parties to the Blanket Purchase Order, nor named as indemnitees. Nor is there any basis for any finding that Harbour and Arma intended the 1440 Broadway defendants to be third-party beneficiaries of their subcontract, in view of the fact the 1440 Broadway defendants are not mentioned as owners in Arma's purchase orders (*see Nazario*, 135 AD3d at 510). Therefore, Arma is entitled to dismissal of the 1440 Broadway defendants' contractual indemnification claim against Arma.

Since Martin Group and Timbil did not oppose dismissal of their contractual indemnification claims against Arma, these claims are also dismissed.

Common-Law Indemnification and Contribution Claims Against Arma

Arma also seeks summary judgment dismissing the common law indemnification and

contribution claims against it, arguing that it was not negligent, that the condition pre-existed Arma's work, and that there were no complaints about its work. Given the issues of fact as to whether Arma created or exacerbated a dangerous condition, Arma is not entitled to dismissal of the common law indemnification and contribution claims asserted against it. Accordingly, Arma's request for dismissal of these claims is denied.

Breach of Contract Claims Against Arma

Arma also moves for summary judgment dismissing Harbour's breach of contract claim against it. Arma contends that: (1) even though it was required to purchase insurance naming Harbour as an additional insured in an amount of $2,000,000, and Arma purchased a policy with a limit of $1,000,000 (Marchick affirmation in support, exhibit 63), plaintiff's claim for bodily injuries does not arise out of Arma's work under the purchase orders; and (2) plaintiff's response to Harbour's discovery demands dated November 18, 2013 indicates that plaintiff is seeking $850,000, which is within the procured policy limits.

Harbour only notes, in opposition, that Arma has an insurance procurement obligation which precludes dismissal of Harbour's cross-claims and third-party claims.

Arma's blanket purchase order with Harbour states that Arma was required to purchase the following insurance:

> "Comprehensive General Liability (occurrence form) with a combined single limit for bodily injury, personal injury, and property damage of at least $2,000,000 per occurrence and $2,000,000 aggregate. This limit may be satisfied through a combination of primary and Umbrella Liability policies.
>
> Such General Liability coverage to include:
>
> A. Premises/Operation coverage.
> B. Independent Contractors coverage.
> C. Products/Completed Operations coverage for a period of at least 2 years after

completion of the work.
D. Blanket Contractual Liability coverage.
E. Broad Form Property Damage coverage.
F. Personal Injury Coverage.
G. General Liability policy to be endorsed to name **Harbour Technical Services, Inc & Harbour Mechanical Corp.** as an additional insured's [sic] on a primary basis.
H. Per Project Aggregate Endorsement"

(*id.*, exhibit 34, ¶ 1 at 1).

It is well established that "[a]n agreement to procure insurance is *not* an agreement to indemnify or hold harmless" (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Where there is a breach of an agreement to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citations omitted]). However, where the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]).

Arma procured a commercial general liability policy from First Mercury Insurance Company for the policy period from March 18, 2011 through March 18, 2012, with a limit of $1,000,000 per occurrence and a general aggregate limit of $2,000,000 (Marchick affirmation in support, exhibit 63).

Arma contends that plaintiff's accident does not arise out of its work under its purchase orders. "[T]he focus of a policy clause . . . is not on the precise cause of the accident but [rather

the focus is on] the general nature of the operation in the course of which the injury was sustained" (*Moll v Wegmans Food Mkts.*, 300 AD2d 1041, 1043 [4th Dept 2002]). In *Moll*, a waste management company was required to purchase insurance naming a store as an additional insured. The company argued that the store was not entitled to damages for failure to procure insurance because the store offered no evidence that its solid waste management agreement covered the underlying accident, and that the fact that the plaintiff slipped on a "slimy smelly fluid" in proximity to a dumpster was insufficient to establish its liability under the agreement (*id.* at 1042). However, the Court noted that the company agreed to "maintain and make available to [the store], at all reasonable times, reasonably sufficient equipment and personnel to enable it to remove such solid waste" (*id.* at 1043). The Court, therefore, held that "[t]he evidence that plaintiff slipped on a substance that allegedly came from the dumpster [was] sufficient to establish that the injury was covered by the agreement" (*id.*).

Here, Arma agreed to "provide demolition and removals of existing boilers, tanks, cws&r piping and miscellaneous items" (Marchick affirmation in support, exhibit 34). The evidence that Arma's demolition and removal of a tank in the sub-basement, which exposed the opening in the metal plate, allegedly caused plaintiff's accident is sufficient to establish that the accident is within the scope of Arma's purchase order (joint compendium, exhibits 38 at 112; 42 at 119, 140-141).

Furthermore, as Arma apparently concedes, it procured insufficient coverage, as it purchased a policy with a limit per occurrence of $1,000,000, contrary to its contractual obligation to purchase a policy with a limit per occurrence of $2,000,000 (*see Lima v NAB Constr. Corp.*, 59 AD3d 395, 397 [2d Dept 2009]; *Nrecaj v Fisher Liberty Co.*, 282 AD2d 213,

214 [1st Dept 2001]). "Because insurance procurement clauses are entirely independent of indemnification provisions, the determination with respect to liability for the contract breach need not await a final determination as to the underlying liability for personal injury" (*Spencer v B.A. Painting Co., B & F Abramowitz*, 224 AD2d 307, 307 [1st Dept 1996] [citation omitted]). Upon a search of the record (*see* CPLR 3212 [b]), the court grants summary judgment to Harbour on the issue of liability on Harbour's claim against Arma for failure to procure insurance.

Arma argues that the claims of the 1440 Broadway defendants, Martin Group, and Timbil for failure to procure insurance are without merit, since Arma did not enter into any contracts with these entities, and Arma was not required to purchase insurance naming these entities as additional insureds under its blanket purchase order. In opposition, the 1440 Broadway defendants note that Arma agreed in its purchase orders to "provide, maintain and pay for all insurance in connection with your work, necessary or customary for usual protection of the Owner" (Marchick affirmation in support, exhibit 34). The Martin Group and Timbil do not oppose dismissal of their claims against Arma for failure to procure insurance.

Arma's purchase orders state:

> "You shall provide, maintain and pay for all insurance in connection with your work, necessary or customary for usual protection of the Owner and us and also as required by the Principal Contract and any appropriate Governmental authorities, all as specified herein or by us in writing to you, and furnish evidence acceptable to us as evidence as to such insurance"

(*id.*). The principal contract, Harbour's Construction Contract Agreement with 1440 Broadway Owners, LLC, required Harbour to maintain a commercial general liability policy in effect at all times during the full term of the project, and that "[t]his policy shall be on a form acceptable to Owner, be endorsed to include the Indemnitees as additional insured, contain cross-liability and

severability of interest endorsements, state that this insurance is primary insurance as regards any other insurance carried by any Indemnitee . . . " (joint compendium, exhibit 32; Ex. C [Schedule of Insurance Requirements]). Thus, Arma was required to purchase insurance naming the 1440 Broadway defendants as additional insureds.

As third-party beneficiaries of Arma's insurance procurement provision, the 1440 Broadway defendants are entitled to enforce the provision (*see Nitis v City of New York*, 242 AD2d 287, 288 [2d Dept 1997]). Searching the record pursuant to CPLR 3212 (b), the court grants summary judgment to the 1440 Broadway defendants on their breach of contract claim against Arma.

In light of the fact that Timbil and Martin Group did not oppose dismissal of their breach of contract claims against Arma, these claims are dismissed.

Common-Law Indemnification and Contribution Claims Against Martin Group

Martin Group contends that all cross-claims against it should be dismissed because there is absolutely no evidence of its negligence (*see* Rice affirmation in support, ¶ 2). As discussed above, Martin Group has demonstrated that it was not responsible for removal of the tank, and that its coordination of the trades and work on the job did not cause plaintiff's accident. Consequently, Martin Group is entitled to dismissal of the common law indemnification and contribution claims against it, and these claims are dismissed.

Contractual Indemnification and Breach of Contract Against Martin Group

As noted, Martin Group contends that all cross-claims against it should be dismissed solely on the ground that there is no evidence of its negligence (*see* Rice affirmation in support, ¶ 2). Martin Group has not addressed the contractual indemnification and breach of contract

claims against it. Harbour notes that Martin Group was required to purchase insurance naming Harbour as an additional insured and is required to indemnify it. The 1440 Broadway defendants also oppose dismissal of their contractual indemnification and breach of contract claims, arguing that they are intended third-party beneficiaries of the Harbour/Martin Group contract. In light of Martin Group's failure to articulate any basis for its motion to dismiss the cross-claims for contractual indemnification and failure to procure insurance, so much of its motion as seeks summary judgment as to these is denied.

Common-Law Indemnification and Contribution Claims Against Timbil

Timbil's sole argument in support of its motion for summary judgment dismissing these claims is predicated on its contention that it owed no duty of care to plaintiff. Since there are issues of fact as to Timbil's negligence, Timbil has not demonstrated entitlement to dismissal of the common law indemnification and contribution claims against it.

Contractual Indemnification and Breach of Contract Claims Against Timbil

Timbil has not addressed the contractual indemnification and breach of contract claims against it. In opposition to Timbil's summary judgment motion, Harbour notes that Timbil is required to indemnify Harbour under its purchase order and procure insurance naming Harbour as an additional insured. Therefore, Timbil is not entitled to summary judgment dismissing the contractual indemnification and breach of contract claims against it.

Harbour's Request that the Court Dismiss Plaintiff's Claim for Lost Earnings

On June 19, 2015, the court directed plaintiff to produce certain financial records requested by defendants within 20 days of the parties' entry into a confidentiality agreement, and further ordered that plaintiff's failure to produce the records would limit plaintiff's recovery of

past and future lost earnings to the extent determined on a motion in limine to the trial judge (joint compendium, exhibit 26).

Even though the court directed that this issue be resolved on a motion in limine by the trial judge, the court shall consider Harbour's request. A court may, inter alia, issue an order "prohibiting the disobedient party . . . from producing in evidence . . . items of testimony" as a sanction against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126 [2]). "Preclusion is a drastic remedy and [should be] denied absent any demonstration that plaintiff's conduct was willful and contumacious" (*Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d 177, 177 [1st Dept 2001]).

In its moving papers, Harbour asserts that "[i]t has been over two months since [the June 19, 2015] Order was entered and plaintiff has not exchanged either a confidentiality agreement or the records ordered by the Court on multiple occasions" (Bell affirmation in support, ¶ 98). However, Harbour has not shown that plaintiff failed to produce the financial records within 20 days after the parties entered into a confidentiality agreement, as directed by the court's June 19, 2015 order. Therefore, Harbour has not shown that plaintiff's failure to produce the financial records was willful and contumacious (*cf. Morris-Crawley v Rapoport*, 224 AD2d 208, 208 [1st Dept 1996]).

In reply, Harbour claims that plaintiff has still not complied with the June 19, 2015 order – plaintiff has only circulated a confidentiality agreement and some bank records for the month of February 2014, along with a HIPAA authorization for the release of medical records, not a release for financial records (Bell reply affirmation, exhibit HMG). Nevertheless, "t]he function

of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch*, 184 AD2d at 417). Harbour may renew its request to preclude plaintiff's recovery of lost earnings on a motion in limine to the trial judge.

Plaintiff's Request that the Court Search the Record and Grant Summary Judgment in His Favor

At oral argument, plaintiff requested that the court search the record and grant summary judgment in his favor. Triable issues of fact exist as to whether the alleged condition was open and obvious, inherently dangerous, and was created or exacerbated by Harbour, Arma, and Timbil. Thus, the request is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 012) of defendant/third-party plaintiff Harbour Mechanical Corp. for summary judgment and precluding plaintiff from offering evidence as to lost earnings is denied; and it is further

ORDERED that defendant/third-party plaintiff Harbour Mechanical Corp. is granted summary judgment on the issue of liability on its claim for failure to procure insurance against defendant/third-party defendant Arma Scrap Metal Co., Inc., with the issue of damages to await the trial of this action; and it is further

ORDERED that the motion (sequence number 013) of defendant/third-party defendant Arma Scrap Metal Co., Inc. for summary judgment is granted to the extent of dismissing the contractual indemnification claims of defendants 1440 Broadway Associates, 1440 Broadway Owner, LLC, and 1440 Broadway Management, LLC against it, and the contractual

indemnification and failure to procure insurance claims of defendant/third-party defendant Timbil Mechanical, Inc. and defendant/third-party defendant The Martin Group, LLC against it, and is otherwise denied; and it is further

ORDERED that defendants 1440 Broadway Associates, 1440 Broadway Owner, LLC and 1440 Broadway Management, LLC are granted judgment on the issue of liability on their claim for failure to procure insurance against defendant/third-party defendant Arma Scrap Metal Co., Inc., with the issue of damages to await the trial of this action, and the balance of the motion is denied; and it is further

ORDERED that the motion (sequence number 014) of defendant/third-party defendant The Martin Group, LLC for summary judgment is granted to the extent of dismissing the complaint and the common law indemnification and contribution claims against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 015) of defendants 1440 Broadway Associates, 1440 Broadway Owner, LLC, and 1440 Broadway Management, LLC for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion (sequence number 016) of defendant/third-party defendant Timbil Mechanical, Inc. for summary judgment is denied.

Dated: September 12, 2016

ENTER:

Ellen M. Coin, A.J.S.C.