Ochoa-Hoenes v Finkelstein
2016 NY Slip Op 32173(U)
August 1, 2016
Supreme Court, Suffolk County
Docket Number: 11-14471
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 11-14471
CAL. No. 14-01883OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-9-15 (002)
MOTION DATE 4-7-15 (003, 004 & 006)
MOTION DATE 4-14-15 (005)
ADJ. DATE 9-4-15
Mot. Seq. # 002 - MotD # 005 - MG
003 - MotD # 006 - MotD
004 - MotD

----------X
JOSUE OCHOA-HOENES,

Plaintiff,

- against -

ARNOLD FINKELSTEIN, RHONDA FINDELSTEIN, VESTA DEVELOPMENT GROUP, SIGNATURE BUILDERS, INC. and SIGNATURE BUILDING SYSTEMS OF PENNSYLVANIA,

Defendants.
----------X
VESTA DEVELOPMENT GROUP NY LLC,

Third-Party Plaintiff,

- against -

QUINLAN ELECTRIC, INC.,

Third-Party Defendant.
----------X
ARNOLD FINKELSTEIN and RHONDA FINKELSTEIN,

Second Third-Party Plaintiffs,

- against -

QUINLAN ELECTRIC, INC.,

Second Third-Party Defendant.
----------X
ARNOLD FINKELSTEIN and RHONDA FINKELSTEIN,

Third Third-Party Plaintiffs,

- against -

NICK SANDERS,

Third Third-Party Defendant.
----------X

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Upon the reading and filing of the following papers in this matter: (1) Notices of Motions by defendant/third-party plaintiff Vesta Development Group, dated Feburary 9, 2015, by defendants/third-party plaintiffs Arnold Finklestein and Rhonda Finklestein, dated Feburary 9, 2015, by third-party defendant Quinlan Electric Inc., dated March 6, 2015, by third-party defendant Nick Sanders, dated March 6, 2015, and by defendants Signature Builders, Inc. and Signature Building Systems of Pennsylvania, dated March 4, 2015, and supporting papers (including Memoranda of Law dated June 4, 2015, and March 6, 2015); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmations in Opposition by plaintiff dated July 14, 2015 through July 23, 2015, by defendants/third-party plaintiffs Arnold Finklestein and Rhonda Finklestein, dated July 16, 2015, through July 17, 2015, by third-party defendant Quinlan Electric Inc., June 3, 2015 through June 4, 2015, and by defendant/third-party plaintiff Vesta Development Group, dated August 25, 2015, and supporting papers; (4) Reply Affirmations by defendants/third-party plaintiffs Arnold Finklestein and Rhonda Finklestein, dated August 20, 2015 through August 26, 2015, by defendant/third-party plaintiff Vesta Development Group, dated August 28, 2015, by third-party defendant Quinlan Electric Inc., dated September 2, 2015, and by defendants Signature Builders, Inc. and Signature Building Systems of Pennsylvania, dated September 2, 2015, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (002) by defendant/third-party plaintiff Vesta Development Group, the motion (003) by defendants/third-party plaintiffs Arnold Finklestein and Rhonda Finklestein, the motion (004) by third-party defendant Quinlan Electric Inc., the motion (005) by third-party defendant Nick Sanders, and the motion (006) by defendants Signature Builders, Inc. and Signature Building Systems of Pennsylvania, are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant/third-party plaintiff Vesta Development Group for, inter alia, summary judgment dismissing the complaint against it is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by defendants/second third-party plaintiffs Arnold Finklestein and Rhonda Finklestein for, inter alia, summary judgment dismissing the complaint against them is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by third-party/second third-party defendant Quinlan Electric Inc. for summary judgment dismissing the third party complaint against it is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by third third-party defendant Nick Sanders for summary judgment dismissing the complaint against him is granted; and it is

ORDERED that the motion by defendants Signature Builders, Inc. and Signature Building Systems of Pennsylvania for summary judgment dismissing the complaint against them is granted.

Plaintiff Josue Ochoa-Hoenes commenced this action to recover damages for personal injuries he allegedly sustained on April 19, 2010, while working on the erection of new single-family modular home owned by defendants/second third-party plaintiffs Arnold Finkelstein and Rhonda Finkelstein. The accident occurred while plaintiff was preparing for the installation of lights at the entrance of the home's

basement. After noticing that a stack of plywood sheets that had been leaned against the basement wall was resting on some of the electrical wires, he attempted to move the pile himself, causing it to tip over and strike his right ankle and foot. At the time of the accident plaintiff was employed by third-party/second third-party defendant Quinlan Electric Inc. ("Quinlan Electric"), a prime electrical contractor hired by the Finklesteins. Defendant/third-party plaintiff Vesta Development Group ("Vesta"), an authorized representative of the manufacturer of the modular home, was hired by plaintiff to perform construction management services for the project. Defendant Signature Builders, Inc. is the manufacturer of the modular home in question. Its affiliate, Signature Building Systems of Pennsylvania, is also named as a defendant to the action (hereinafter collectively referred to as "SBS"). By way of his complaint, plaintiff alleges common law negligence claims against defendants based on their failure to maintain the premises in question, and to provide him with a safe place to work. Notably, plaintiff's complaints did not allege any Labor Law claims against defendants.

Defendants joined the action, denying plaintiff's claims and asserting affirmative defenses. The Finklesteins asserted cross claims against Vesta and SBS, and SBS asserted cross claims against the Finklesteins and Vesta. On April 22, 2011, plaintiff commenced a separate action against Vesta only, asserting common law negligence claims against it. By order of the court (Mayer, J) dated January 20, 2012, plaintiff's complaints were consolidated under index number 14471/11. Thereafter, Vesta and the Finklesteins commenced separate third-party actions against plaintiff's employer, Quinlan Electric, asserting claims for indemnification and breach of contract. The Finklesteins commenced a similar third-party action against Nick Sanders, whom they had retained to provide carpentry services for the project. The third-party actions were joined and the note of issue was filed on November 7, 2014.

Vesta now moves for summary judgment dismissing the complaint and cross claims against it on the basis it was neither the general contractor for the project nor a statutory agent of the Finklesteins. Vesta further argues that plaintiff failed to assert violations of specific applicable sections of the industrial code, and that it did not create or have actual or constructive notice of the alleged dangerous condition that caused his accident. Alternatively, Vesta asserts that it should be granted conditional summary judgment on its third-party contractual indemnification claim against Quinlan Electric, as no triable issues exist as to whether the parties executed an agreement entitling it to such relief. Vesta also seeks dismissal of the Finklesteins' cross claims for indemnification and/or contribution, arguing it did not have supervisory authority over plaintiff's work. Plaintiff opposes Vesta's motion on the basis triable issues exist as to whether Vesta was the general contractor or the owners' statutory agent for the duration of the project. The Finklesteins oppose Vesta's motion on a similar basis. Quinlan Electric opposes the branch of Vesta's motion which seeks conditional summary judgment on its third-party claims, arguing that the claims against it must be dismissed, as the work performed by plaintiff at the time of the accident was outside the scope of its initial service agreement containing the indemnification clause, that subsequent agreements it entered to perform additional work on the property contained no such clause, and that plaintiff, in any event, did not suffer a grave injury as a result of his accident.

The Finklesteins move for summary judgment dismissing the complaint on the grounds they are exempted from plaintiff's Labor Law claims as the owners of the subject single family home, and that they neither created nor had actual or constructive notice of the alleged dangerous condition. The Finklesteins also seek conditional summary judgment on their third-party contractual indemnification

claim against Quinlan Electric on the basis they are free from negligence and their liability, if any, is vicarious. Plaintiff opposes the Finklesteins' motion on the ground the Labor Law's "homeowners' exemption" does not exempt the Finklesteins from common law negligence and Labor Law §200 claims. Plaintiff further argues that the Finklesteins failed to eliminate triable issues as to whether they possessed the authority to control and supervise his work, and whether they had actual or constructive notice of the alleged dangerous condition which caused his accident. Quinlan Electric opposes the branch of the Finklesteins' motion seeking conditional summary judgment on its contractual indemnification claim on the basis the work performed by plaintiff at the time of the accident was outside the scope of its initial service agreement which contained the subject indemnification clause, and that the Finklesteins' contractual indemnification claim would, in any event, be barred by General Obligations Law §5-322.1, since it impermissibly attempts to indemnify the Finklesteins for their own negligence.

By way of a separate motion, Quinlan Electric moves for summary judgment in its favor on the third-party claims and cross claims against it, arguing that the common law claims for indemnification and contribution must be dismissed as plaintiff did not suffer a grave injury. Quinlan Electric further asserts that the contractual indemnification claims against it must be dismissed, as the work required by its service connection agreement with the Finklesteins had been completed nearly three months prior to the date of plaintiff's accident. Quinlan Electric also asserts that the Finklesteins and Vesta impermissibly attempt to indemnify themselves against their own negligence in violation of the General Obligations Law §5-322.1. Quinlan Electric's motion is opposed by Vesta and the Finklesteins, who argue, inter alia, that a triable issue exists as to whether plaintiff's work at the time of the accident should be considered mere extra work under the terms of Quinlan's initial service contract and, if so, within the scope of work covered by the parties' hold harmless agreement. Additionally, the Finklesteins and Vesta argue that Quinlan's procurement of an insurance policy which covered them as an additional insureds even beyond the date of the expiration of initial service agreement, evinces the parties' intent that extra work would be required for the project, and that such work would be covered under the terms of the initial service agreement.

Nick Sanders moves for summary judgment dismissing the third-party complaint against him, arguing that the alleged danger posed by the sheets of plywood which fell on plaintiff's foot was open and obvious and not inherently dangerous, and that plaintiff's attempt to move these sheets of wood by himself, rather than waiting for assistance from his co-workers or the carpentry subcontractors, was the sole proximate cause of his injuries. Sanders further argue that the cross claims and third-party claims against him by Vesta and the Finklesteins should be dismissed, as neither defendant should be found liable for plaintiff's injuries under the circumstances of this case. Plaintiff and the Finklesteins both oppose Sanders' motion on the basis a triable issue exists as whether Sanders, who procured plywood on behalf of the Finklesteins to cover their windows in compliance with certain hurricane protection codes, created the alleged dangerous condition by failing to secure the pile of plywood sheets he leaned against the wall of the basement. SBS moves for summary judgment dismissing the complaint against it, on the grounds it did not owe plaintiff any duty of care at the time of his accident, and that it neither created nor had actual or constructive notice of the alleged dangerous condition that caused his accident. Plaintiff opposes SBS' motion on the basis triable issues exist as to whether SBS had the authority to control or supervise his work, and whether it served as the owner's or general contractors' statutory agent for the

duration of the project.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

Initially, the court finds that plaintiff failed to assert viable causes of action under the Labor Law, as a review of the underlying complaints reveals no such allegations were included in his pleadings (*see* ***Fusca v A & S Constr., LLC***, 84 AD3d 1155, 924 NYS2d 463 [2d Dept 2011]; ***Webster v Supermarkets Gen. Corp.***, 209 AD2d 405, 619 NYS2d 577 [2d Dept 1994]). While a review of plaintiff's bills of particulars reveals that no Labor Law claims were asserted therein, the court notes that a bill of particulars is meant to amplify the pleadings and may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint (*see* ***Paterra v Arc Dev. LLC***, 136 AD3d 474, 24 NYS3d 631 [1st Dept 2016], *quoting* ***Alami v 215 E. 68th St., L.P.***, 88 AD3d 924, 926, 931 NYS2d 647 [2d Dept 2011]; *see also* ***Castleton v Broadway Mall Props., Inc.***, 41 AD3d 410, 837 NYS2d 732 [2d Dept 2007]). Therefore, the branches of defendants' motions seeking dismissal of such claims, are granted.

As to the branch of the Finklesteins' motion seeking dismissal of the common law negligence claims against them," a landowner must act as a reasonable [person] in maintaining his [or her] 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" (***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003], *quoting* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). However, "[a] property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous. . ., or where the allegedly dangerous condition can be recognized simply as a matter of common sense" (***Rivas-Chirino v Wildlife Conservation Socy.***, 64 AD3d 556, 557, 883 NYS2d 552; *see* ***Boland v 480 E. 21st St., LLC***, 133 AD3d 698, 19 NYS3d 188 [2d Dept 2015]). Indeed, "[w]hen a workman confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources (e.g., a co-worker) to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself" (*see* ***Abbadessa v Ulrik Holding***, 244 AD2d 517, 518, 664 NYS2d 620 [2d Dept 1997]). Moreover, "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'" (***Burke v Canyon Rd. Rest.***, 60 AD3d 558, 559, 876 NYS2d 25 [1st Dept 2009], *quoting* ***Cupo v Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]; *see e.g.* ***Hartnett v Chanel, Inc.***, 97 AD3d 416, 948 NYS2d 282 [1st Dept 2012][Store owner granted summary judgment because it had no duty to warn electrician of the danger of trying to open 146-pound glass panel using a screw driver, as the glass panel was not inherently dangerous, and the danger of using a screw driver to open it was obvious]).

Here, the Finklesteins established their prima facie entitlement to summary judgment dismissing the complaint against them by demonstrating that the alleged dangerous condition, comprised of a pile of plywood sheets leaning against their basement wall, was both open and obvious and not inherently dangerous, such that they had no duty to warn or protect plaintiff against it (*see* ***Sepulveda-Vega v Suffolk Bancorp.***, 119 AD3d 850, 989 NYS2d 371 [2d Dept 2014]; ***Piarino v Nouveau Elevator Industries, Inc.***, 116 AD3d 685, 983 NYS2d 288 [2d Dept 2014]; ***Haynie v New York City Hous. Auth.***, 95 AD3d 594, 944 NYS2d 104 [1st Dept 2012]; ***Hartnett v Chanel, Inc.***, *supra*; ***Abbadessa v Ulrik Holding***, *supra*; ***Stephen v Sico Inc.***, 237 AD2d 709, 654 NYS2d 449 [3d Dept 1997]; ***Bazerman v Gardall Safe Corp.***, 203 AD2d 56, 609 NYS2d 610 [1st Dept 1994]; ***Smith v Curtis Lbr. Co.***,183 AD2d 1018, 583 NYS2d 642 [3d Dept 1992]). Significantly, plaintiff testified that he noticed that there were as many as 10 to 15 sheets of plywood resting against the wall for sometime prior to the accident, and that he and a co-worker asked one of the carpenters to have them removed so they could loosen the electrical wires. Plaintiff testified that the carpenter informed him he would tell his superiors, but did nothing when he returned one hour later. Plaintiff testified that sometime thereafter, he decided to singlehandedly lift the pile of plywood sheets and grab the electrical wires from beneath it. However, when he could no longer sustain the weight of the pile of plywood sheets while attempting to grab the electrical wires beneath it, the plywood sheets fell and struck plaintiff's foot. Plaintiff testified that he did not ask for any further assistance from the carpenter, and that he decided to lift the plywood sheets on his own when a nearby co-worker failed to immediately respond to his request for help. Additionally, Arnold Finklestein testified that he was aware that the plywood sheets were leaning securely against the basement wall, and that he received no complaints about them until plaintiff informed him that the plywood sheets had fallen and struck him while he was attempting to pull them away from the wall.

Plaintiff did not raise a triable issue in opposition, as he failed to submit any evidence, expert or otherwise, to demonstrate that leaning the pile of plywood against the wall was inherently dangerous, or that the Finklesteins engaged in any conduct that rendered the otherwise open and obvious condition a trap (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *cf* ***Stoppeli v Yacenda***, 78 AD3d 815, 911 NYS2d 119 [2d Dept 2010]). Therefore, the branch of the Finklesteins' motion for summary judgment dismissing the complaint against them is granted. Further, inasmuch as the Finklesteins were not actively at fault and played no role in causing or augmenting plaintiff's injuries, they also are entitled to dismissal of the cross claims against them for contribution and/or common law indemnification (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]; ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]).

Having determined that plaintiff's common law negligence claim was without merit, because leaning the pile of plywood sheets against the basement wall of the subject premises was not inherently dangerous, and plaintiff's attempt to singlehandedly remove them posed an open and obvious danger, the

court grants the branches of the motions by Vesta and SBS seeking dismissal of the complaint and the cross claims against them for contribution and common law indemnification (*see* ***Sepulveda-Vega v Suffolk Bancorp.***, *supra*; ***Hartnett v Chanel, Inc.***, *supra*; ***LaPera v Montana***, 124 AD3d 844, 3 NYS3d 73 [2d Dept 2015]; ***Samantha R. v New York City Hous. Auth.***, 117 AD3d 600, 986 NYS2d 115 [1st Dept 2014]; ***Abbadessa v Ulrik Holding***, *supra*; *see also* ***McCarthy v Turner Constr., Inc.***, *supra*).

Turning to the branches of the motions by Vesta and the Finklesteins for conditional summary judgment on their third-party contractual indemnification claims against Quinlan Electric, the initial electrical service agreement with the Finklesteins contemplates that Quinlan would install a 300 amp underground electric service to the Finklesteins' home for the sum of $3,195. The agreement specifies the scope of the work, listing in detail the steps required for the installation of the underground electric service. The agreement includes a provision requiring the contractor to "work continuously each day to complete the project." The time provision further states that "[w]ith respect to all work specified in the scope and all extras that may be agreed upon time is of the essence." The agreement also includes a hold harmless provision which states, as follows:

> The contractor agrees to defend, indemnify and hold the Owner and Vesta Development NY LLC harmless from any liability or claim for damages because of bodily injury, death, property damage, sickness, disease or loss and expense, including but not limited to attorneys' fees, arising out of or resulting from the performance of Contractor's work under this contract. . . the Contractor further agrees to protect, defend and indemnify the Owner from any claims by laborers, subcontractors or material men for unpaid work or labor performed or materials supplied in connection with the Construction Contract.

Worker's Compensation Law §11 permits third-party indemnification claims against employers where such claims are based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see* ***Rodrigues v N&S Blg. Contrs. Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Furthermore, even indemnification agreements that purport to indemnify a party for its own negligence may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*see* ***Brown v Two Exch. Plaza Partners***, 76 NY2d 172, 556 NYS2d 991 [1990]; ***Cabrera v Board of Educ. of City of New York***, 33 AD3d 641, 823 NYS2d 419 [2d Dept 2006]; ***Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.***, 23 AD3d 508, 806 NYS2d 635 [2d Dept 2005]). However, "a contract assuming [an obligation 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, 549 NYS2d 365 [1989]). Where the existence and the terms of the parties' agreement are disputed, "it is necessary to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (***Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.***, 41 NY2d 397, 393 NYS2d 350 [1977]; *see also* ***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 795 NYS2d 491 [2005]). While it is the responsibility of the court to interpret written instruments, where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises (*see* ***Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.***, *supra*).

Although Vesta and the Finklesteins have established their prima facie entitlement to conditional summary judgment on their third-party contractual indemnification claims against Quinlan Electric by demonstrating their freedom from negligence for the happening of the subject accident, and that their liability is merely vicarious (*see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]; ***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]), in opposition, Quinlan Electric raised a significant triable issue as to whether the indemnification clause contained in the electrical service agreement contemplated indemnification only for the scope of the work described therein and did not incorporate claims for indemnification arising out of 'extra work' subsequently agreed upon by the parties (*see* ***Zuckerman v New York***, *supra*; ***Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.***, *supra*; ***Assevero v Hamilton & Church Props., LLC***, 131 AD3d 553, 15 NYS3d 399 [2d Dept 2015]). Significantly, consistent with its assertion that the terms of the initial service agreement were limited to the scope of the work described therein, Quinlan Electric submitted evidence that it completed the installation of the underground electrical service and received full payment for such work before it entered into separate agreements for additional work which were memorialized in subsequently executed invoices. In addition to submitting copies of these invoices, Quinlan Electric submitted an affidavit by it principal which states, inter alia, that he entered as many as seven subsequent agreements for extra at the Finklestein home, including the agreement which provided for the work plaintiff was doing at the time of the accident, and that it was his understanding that the hold harmless provision contained in the initial service agreement applied only to the scope of the work contained therein. Therefore, the branch of the motions by Vesta and the Finklesteins seeking summary judgment on their third-party contractual indemnification claims are denied.

Based on the foregoing, the branch of the cross motion by Quinlan Electric seeking dismissal of the cross claims and third-party claims against it for contractual indemnification is likewise denied (*see* ***Zuckerman v New York***, *supra*; ***Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.***, *supra*). Nevertheless, inasmuch as it is undisputed that plaintiff did not suffer a grave injury, the court grants the branch of Quinlan's motion seeking dismissal of the claim common law indemnification and contribution against it (*see* ***Masiello v 21 E. 79th St. Corp.***, 126 AD3d 596, 7 NYS3d 35 [1st Dept 2015]; ***Lue v Finkelstein & Partners, LLP***, 94 AD3d 1386, 943 NYS2d 636 [3d Dept 2012]).

Finally, inasmuch as it has already been determined that the alleged dangerous condition which caused plaintiff's accident was open and obvious, and not inherently dangerous, such that none of the parties, including Nick Sanders, were negligent or had a role in causing or augmenting plaintiff's injuries, the court grants the motion by Nick Sanders seeking dismissal of the third-party complaint against him for contribution and common law indemnification (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]; ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]).

Dated: August 1, 2016

PETER H. MAYER, J.S.C.