D'Amico v 56 Leonard LLC
2016 NY Slip Op 32407(U)
December 5, 2016
Supreme Court, New York County
Docket Number: 155565/14
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

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BENEDICT D'AMICO,

Plaintiff,

-against-

Index No. 155565/14

56 LEONARD LLC and LEND LEASE (US) CONSTRUCTION INC.,

Defendants.

----------X

56 LEONARD LLC and LEND LEASE (US) CONSTRUCTION LMB INC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 595297/14

LIVINGSTON ELECTRICAL ASSOCIATES, INC.,

Third-Party Defendant.

----------X

Geoffrey D. Wright, J.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

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UPON THE FOREGOING CITED PAPERS, THIS DECISION ON THE MOTIONS IS AS FOLLOWS:

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

This action arises out of a construction site accident that occurred on March 27, 2014 at 56 Leonard Street in Manhattan, where a new 56- or 57-story residential building was being erected.

In motion sequence number 002, plaintiff Benedict D'Amico moves, pursuant to CPLR 3212, for summary judgment in his favor on his complaint. Defendants 56 Leonard LLC (56) and Lend Lease (US) Construction LMB Inc. s/h/a Lend Lease (US) Construction Inc. (LL) (together, defendants) move, in motion sequence number 003, for summary judgment dismissing the

complaint, and for summary judgment in their favor on their third-party complaint. In motion sequence number 004, third-party defendant Livingston Electrical Associates, Inc. (LEA) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and third-party complaint.

As an initial matter, because plaintiff has not alleged any claim as against his employer, LEA, the part of LEA's motion which seeks summary judgment dismissing plaintiff's complaint as against it is denied.

Because the motions may be determined more concisely by considering the issues, rather than dealing with the motions one by one, the court will not focus on the motions seriatim.

BACKGROUND

On March 27, 2014, plaintiff, then a journeyman electrician employed by LEA, was working on the second floor of the building while two coworkers, Anthony Natale (Natale) and Dennis Divone (Divone), were working directly above him on the third floor. When workers on one floor perform their duties directly above other workers on the floor below, it is called "stacking." The third floor was made up of solid concrete, with the exception of four-inch-diameter holes, called sleeves. The sleeves penetrated the concrete and were provided so that conduit could be passed through them from one floor to another. Initially, the sleeves contained concrete which had to be removed before the sleeve could be used. Once the concrete was removed, the sleeves were covered by orange protective caps which could be removed in order to accommodate the conduit.

Plaintiff's task that day was to install a distribution board on the second floor, while Natale and Divone installed a pull box on the third floor. The pull box had to be mounted on pieces of metal called kindorf, and after the pull box was mounted, plaintiff's coworkers were to run two conduits from

underneath the box, through the sleeve, and into the distribution box on the second floor below. According to Natale, the cap for the sleeve was removed before the pull box was installed.

The kindorf at issue was placed vertically against a perpendicular kindorf which had already been installed horizontally. A bolt was placed though a hole in the kindorf and into a spring nut (also known as a compression coupling). Natale loosened the bolt so that the kindorf could be moved out of the way while he and Divone drilled mounting holes. However, when Natale loosened the bolt, the spring nut could not hold the kindorf, and a seven-foot piece of kindorf slipped off and fell through the sleeve, hitting D'Amico on the head. At the time, D'Amico was bent over, tightening a bolt. Plaintiff suffered a broken skull and has required surgery. The accident was unwitnessed.

56 was the owner of the site. LL was the construction manager. Christopher Corbo (Corbo) was LL's MEP (Mechanical, Electrical, Plumbing) superintendent and project manager. He coordinated these trades, and met with the foremen of each of his trades daily. Robert Powell was LL's health and safety supervisor. He attested that the area under an open sleeve was considered an "exclusion zone" where no one should have been working. LL hired LEA as the electrical contractor for the project. The scope of its responsibilities included electrical, fire alarm, security and telecommunications work. Plaintiff's supervisor was foreman Brandon Navarro (Navarro).

THE PLEADINGS

The complaint alleges four causes of action, sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Defendants' answer poses only affirmative defenses, without addressing any particular allegations. LEA's answer to the complaint asserts one cross claim against

defendants for full common-law indemnification.

Defendants/third-party plaintiffs' third-party complaint brings five causes of action, sounding in contribution, common-law and contractual indemnification and breach of contract. LEA's third-party answer asserts a counterclaim for full common-law indemnification.

Plaintiff's Third Supplemental Bill of Particulars (8/21/15) alleges that defendants violated Industrial Code (22 NYCRR Part 23) § 23-1.7 (a) (1).

DISCUSSION

Summary Judgment Standard

"Since summary judgment is the equivalent of a trial . . ." (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]), and is a "drastic remedy" (*Rebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014]), the proponent of a summary judgment motion

> "is required to demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law. Only when this burden is met, is the opposing party required to submit proof in admissible form sufficient to create a question of fact requiring a trial [internal citations omitted]"

(*Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014]). "In deciding the motion, the court will draw all reasonable inferences in favor of the nonmoving party. If the moving party fails to make a prima facie showing of entitlement to summary judgment, [however,] its motion must be denied [internal citations omitted]" (*Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476, 478-479 [1st Dept 2013]). However, "[o]nce this showing is made, the burden shifts to the opposing party to

produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]). "The 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]).

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."

The statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). 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, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]). "To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of injury; the mere

occurrence of an accident does not establish a statutory violation" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 659 [1st Dept 2012]). Moreover, even if it is found that a plaintiff's negligence contributed to his injuries, "contributory negligence will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Dias v City of New York*, 110 AD3d 577, 578 [1st Dept 2013] ["comparative negligence . . . is not a defense under § 240 (1)"]).

"[T]he single decisive question [in determining Labor Law § 240 (1) liability] 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]).

Plaintiff posits that he is entitled to summary judgment on his section 240 (1) claim because the kindorf fell through an unprotected sleeve and the risk of something falling through an unprotected opening was foreseeable.

Initially, the court notes that 56 is the owner of the property. As such, it has the nondelegable duty to provide workers with a safe place to work. If it fails in this duty, it may be held vicariously liable under Labor Law §§ 240 (1) and 241 (6) "notwithstanding the absence of actual supervision or control over the work" (*Hickey v Perry & Sons*, 223 AD2d 799, 800 [3d Dept 1996]).

In addition, LL, as construction manager, may be held liable as a general contractor or statutory agent of 56 under sections 240 (1) and 241 (6) if it had been delegated "the authority to supervise and control the work" (*Bennett v Hucke*, 131 AD3d 993, 994 [2d Dept 2015], *affd* 28 NY3d 964 [2016]). "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]" (*id.* at 995; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005] [construction manager held liable as a statutory agent "where the manager had the ability to control the activity which brought about the injury"]).

The Construction Management Agreement between 56 and LL (56/LL Agreement) specifically identifies 56 as the owner and LL as the construction manager, not as the general contractor. Article 3, section 3.1 of the 56/LL Agreement ("Construction Management and General Contracting Services") provides:

> "The Construction Manager shall provide all administration, management, accounting, purchasing, scheduling, budgeting, cost and quantity estimating, coordination, document archival, reporting, and other services necessary to fulfil its obligations under this Agreement . . . .
>
> * * *
>
> "The Construction Manager shall directly retain all Subcontractors and shall ensure that the Work is fully, properly, and completely performed in accordance with the Construction Documents . . . . Construction Manager shall provide all services, business administration and supervision, necessary for, or incidental to, the prosecution and Final Completion of the Work in the most

expeditious and economical manner . . ."

(56/LL Agreement, §§ 3.1.1 and 3.1.3 at 22-23).

Section 3.2, "Construction Means and Methods," provides, in relevant part:

> "The Construction Manager and its Subcontractors and their suppliers and materialmen shall be solely responsible for: (a) their construction means, methods, and techniques; (b) the establishment and management of the Safety Program for the Work; (c) all procedures and precautions necessary to comply with the Safety Program, OSHA and all other Applicable Laws; and (d) carrying out the Work in accordance with the Contract Documents.
>
> * * *
>
> "Nothing herein is intended to preclude the Construction Manager from delegating responsibility and control over construction means, methods, techniques, sequences and procedures ('Means and Methods') to Subcontractors performing portions of the Work but, in all events, remain [sic] fully responsible to Owner for all Means and Methods including safety implementation and safety functions"

(*id.*, § 3.2.1 at 24).

While the 56/LL Agreement sets out LL's supervisory

authority over the project as a whole, there is nothing in the Agreement or in the evidence before the court that indicates that LL had supervision or control over plaintiff or his work. Rather, it is uncontested that plaintiff was directed solely by his LEA supervisor, foreman Navarro. Thus, it cannot be said that LL acted either as a general contractor or as an agent of 56 at the site, and is, therefore, not liable to the plaintiff under Labor Law §§ 240 (1) and 241 (6).

Defendants maintain that LEA, not defendants, caused the accident by stacking its workers and by failing to replace the protective cap over the sleeve. According to defendants, plaintiff's coworkers were the sole proximate cause of the accident. As such, defendants claim that there was no statutory violation or liability on their part.

"It does not avail [defendants] that the accident may have been caused by the negligence of a co-worker any more than it would avail them had the action been caused by the negligence of plaintiff himself" (*Rosa v Macy Co.*, 272 AD2d 87, 87 [1st Dept 2000]). The "[a]lleged negligence of a co-worker . . . is no defense to liability" (*Salzler v New York Tel. Co.*, 192 AD2d 1104, 1105 [4th Dept 1993]; *but see Bernal v City of New York*, 217 AD2d 568, 568-69 [2d Dept 1995] [when a plaintiff fell because a coworker attempted to lower him by means of a Hi-Lo, "a reasonable fact-finder might conclude that the coworker's conduct was the sole proximate cause of the plaintiff's injuries or that the coworker's conduct constituted an unforeseeable superseding, intervening act"]).

As the First Department has spoken on the issue of whether a coworker's negligence can provide a defense against a plaintiff's section 240 (1) claim, this court must conclude that the actions of LEA's other employees provide no defense to 56 or LEA's possible statutory liability.

The parties disagree on whether plaintiff was wearing his hard hat when he was struck by the kindorf. Defendants assert that D'Amico was not wearing his hat because, after the accident, the exterior of the hat showed no dent or scratch. According to defendants' neurological expert, the kindorf's point of impact on D'Amico's cranium was plaintiff's right parietal bone. Defendants, not their expert, maintain that had plaintiff been wearing his hard hat, the right parietal bone would have been covered. Alternatively, defendants contend that, if, indeed, plaintiff was wearing his hard hat, he was wearing it backwards. Plaintiff attests that he was wearing his hard hat and that the proof that he was is the blood on the inside of it.

Whether D'Amico wore his hard hat or not is of no moment. Even if plaintiff was not wearing a hard hat at the time of the accident, that could not have been the sole proximate cause of the accident, because he was struck by a piece of kindorf that fell through an unprotected sleeve (*see e.g. Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012]). Moreover, "'[a] hard hat is not the type of safety device enumerated in Labor Law § 240 (1) to be constructed, placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker' [citation omitted]" (*Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013]; *see also Singh v 49 E. 96 Realty Corp.*, 291 AD2d 216, 216 [1st Dept 2002] [same]). Thus, even if plaintiff failed to wear a hard hat, he was not neglecting to take advantage of a required safety device. In any event, a plaintiff's "contributory negligence . . . is not a defense to a Labor Law § 240 (1) claim" (*Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015]), and defendants' reliance on plaintiff's alleged failure to wear his hard hat is unavailing.

"In order to prevail on summary judgment in a

> section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking [internal quotation marks and citations omitted]"

(*Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]). "In addition, the plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute [internal quotation marks and citation omitted]" (*Pazmino v 41-50 78th St. Corp.*, 139 AD3d 1029, 1030 [2d Dept 2016]).

> LEA is quite correct in asserting that "not every object that falls on a worker[] gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

LEA is also correct in maintaining that the failure of the spring nut/compression coupling does not support a section 240 (1) claim because a "compression coupling . . . is not a safety device 'constructed, placed and operated as to give proper

protection' from the falling" kindorf (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014]). In addition, the kindorf "was [not] being hoisted or secured, or required securing for the purposes of the undertaking [internal quotation marks and citations omitted]" (*id.* at 662-663), so its fall was not the type of hazard envisioned by the Legislature in framing the protections of section 240 (1) (*see e.g. Shaheen v Hueber-Breuer Constr. Co.*, 4 AD3d 761, 762 [4th Dept 2004] ["The rope that fell on decedent was not an object being hoisted or a load that required securing at the time it fell, and thus section 240 (1) does not apply"]).

The part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted, and the part of plaintiff's motion which seeks summary judgment in his favor on this claim is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this

> subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith."

"Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors, and their agents . . . . Pursuant to that duty, owners, contractors, and their agents must comply with those provisions of the Industrial Code that set forth specific requirements or standards [internal quotation marks and citation omitted]" (*Torres v City of New York*, 127 AD3d 1163, 1166 [2d Dept 2015]). Liability under this statute may be imposed "regardless of the absence of control, supervision or direction of the work [citation omitted]" (*Morton v State of New York*, 15 NY3d 50, 54 [2010]). However, "[t]he owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241 (6), including contributory and comparative negligence" (*Catarino v State of New York*, 55 AD3d 467, 468 [1st Dept 2008]).

New York's Industrial Code is found at 12 NYCRR Part 23. 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]). "To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska US Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]).

D'Amico's sole basis for his section 241 (6) claim is an alleged violation of Industrial Code § 23-1.7 (a) (1). Section 23-1.7 (a) (1) provides:

> "**Section 23-1.7. Protection from general hazards**

> "(a) Overhead hazards.
>
> "(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

"As plainly expressed, this regulation only applies to places normally exposed to falling material or objects. Thus, where an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]). Section 23-1.7 (a) (1) sets forth "specific standards for planking required for overhead protection at work places, sufficient to sustain a cause of action under Labor Law § 241 (6)" (*Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]). However, the cited provision "requir[es] protective measures to guard against falling objects associated with overhead activity and hazards arising in connection with the use of concrete forms and shoring" (*Favia v Weatherby Constr. Corp.*, 26 AD3d 165, 166 [1st Dept 2006]).

Although plaintiff vigorously argues that section 23-1.7 (a) (1) applies, because the area under open sleeves is

considered an "exclusion zone" where no one is supposed to work, and that the whole reason for covering exposed sleeves is that things might fall through them, his assertions are unavailing. The section does not apply here because the protection required to prevent injury in an area "normally exposed to falling material or objects" is "tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot" (12 NYCRR 23-1.7 [a] [1]). Such protection would certainly be overkill for the danger that might be posed by an exposed four-inch-wide hole, and would have made the task of running cable through the sleeve impossible.

The portion of plaintiff's motion which seeks summary judgment in his favor on his section 241 (6) claim is denied, and the portion of defendants' motion which seeks summary judgment dismissing this claim is granted.

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."

"Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016]). "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" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). This particular matter involves an injury that arose out of the means and methods used to accomplish the work.

"'Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work' [citation omitted]" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1025 [2d Dept 2016]). Liability under section 200 and common-law negligence will not attach unless a defendant "'bears the responsibility for the manner in which the work is performed' [citation omitted]" (*Marquez*, 141 AD3d at 698). "General supervision" does not suffice to impose liability under section 200 or common-law negligence (*see e.g. Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 594 [1st Dept 2015] [no liability without "'the authority to control the activity bringing about the injury' (citation omitted)"]; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796, 797 [2d Dept 2014] [checking the progress of the work is "general supervision"]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009] [walking the site to monitor compliance with specifications is general supervision]).

It is uncontested that 56 provided no supervision or

control over plaintiff or his work. In addition, LL was neither the general contractor nor an agent of 56, and, therefore, is also not liable under section 200 and common-law negligence (*see e.g. Doxey v Freeport Union Free School Dist.*, 115 AD3d 907, 909 [2d Dept 2014] ["as a construction manager, which had not been delegated the authority and duties of a general contractor and which did not function as an agent of the owner, it was not a contractor responsible for the plaintiff's safety"]).

Thus, the part of defendants' motion which seeks summary judgment dismissing plaintiff's section 200 and common-law negligence claims is granted, and the part of plaintiff's motion which seeks summary judgment in his favor on these claims is denied.

The Timeliness of LEA's Opposition to Defendants' Motion

Defendants urge the court to disregard LEA's opposition to defendants' motion on the ground that LEA's opposition was untimely. According to the May 19, 2016 so-ordered stipulation of the parties, opposition papers to the three summary judgment motions were to be served by June 10, 2016. LEA's opposition to defendants' motion was served on June 28, 2016. In their reply, defendants noted that LEA had filed opposition papers only as to plaintiff's motion and had not addressed the arguments in defendants' motion. As such, defendants urge the court to deem defendants' motion submitted as unopposed.

In the exercise of its discretion, the court denies defendants' request. In its opposition to defendants' motion, and in its own motion, LEA contends that defendants' motion must be denied because of the antisubrogation rule and the applicability of General Obligations Law § 5-322.1. Defendants were able to address these arguments both in their reply to LEA's opposition to their motion and in their opposition to LEA's motion. Thus, all parties were able to add their voices to the

discussion, and no one has been surprised or prejudiced.

The Third-Party Complaint

In their third-party complaint, defendants bring causes of action against LEA for contribution, common-law and contractual indemnification and breach of contract. LEA contends that defendants' motion for summary judgment in their favor on these claims must be denied because of the doctrine of antisubrogation.

Subrogation/Antisubrogation

> "Subrogation, generally, may arise either contractually or under the doctrine of equitable subrogation. The purpose of subrogation is to allocate[ ] responsibility for the loss to the person who in equity and good conscience ought to pay it, in the interest of avoiding absolution of a wrongdoer from liability simply because the insured had the foresight to procure insurance coverage. Equitable subrogation entitles an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse [internal quotation marks and citations omi[illegible]ted]"

(*Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 414-415 [2016]).

> "[T]he antisubrogation rule is an exception to the right of subrogation. Under that rule, an insurer has no right of subrogation against its own insured for a claim arising

> from the very risk for which the insured was covered . . . even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. In effect, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor — if that third party also qualifies as an insured under the same policy — for damages arising from the same risk covered by the policy, even where there is an express subrogation agreement. The two primary purposes of the antisubrogation rule are to avoid a conflict of interest that would undercut the insurer's incentive to provide an insured with a vigorous defense and to prohibit an insurer from passing its loss to its own insured [internal quotation marks and citations omitted]"

(*id.* at 415). "The antisubrogation rule, therefore, requires a showing that the party the insurer is seeking to enforce its right of subrogation against is its insured, an additional insured, or a party who is intended to be covered by the insurance policy in some other way" (*id.* at 416). However,

> "where the monetary limit of the insurance provided by the . . . policy is for a lesser sum than that sought by the plaintiff as damages, the motion [for summary judgment dismissing] the third-party complaint [may be] granted only up to the applicable limits of that policy, because [i]t is black letter law that New York law does not bar insurance

> companies from seeking indemnification for settlements or judgments that exceed the limits of an insurance policy [internal quotation marks and citations omitted]"

(*Mitchell v NRG Energy, Inc.*, 142 AD3d 1366, 1367 [4th Dept 2016]).

Here, there is no disagreement that LEA procured a primary policy for the benefit of defendants from Scottsdale Insurance Company (Scottsdale), which is presently defending and indemnifying defendants in this matter. The contract also required LEA to procure excess liability coverage with limits of $5 million. It obtained an excess policy with limits of $9 million from Mt. Hawley Insurance Company (Mt. Hawley). However, Mt. Hawley has disclaimed coverage for defendants on the basis of two policy exclusions: the injury arose out of "ground up construction over 2 stories" (CUP 344 [05/02]) and Mt. Hawley has not yet received evidence that all Scottsdale coverage has been exhausted.

Because defendants are receiving the benefits of the primary policy LEA obtained for them, the subrogation/antisubrogation argument applies only to the excess coverage that defendants maintain LEA did not obtain for them.

In defendants' eyes, excess coverage that is denied is no excess coverage at all. LEA responds that defendants' breach of contract claim is baseless because nothing in the contract addresses the exclusions which Mt. Hawley has raised. What defendants seek is a money judgment, under LEA's excess insurance policy, for any liability that they may incur over and above LEA's primary coverage.

The antisubrogation rule does not apply to defendants' claims in the third-party complaint. It is well settled that the

antisubrogation rule applies "to the extent that any verdict in favor of the plaintiffs does not exceed the limits" of the insurance policy (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 [2d Dept 2000] *see also Storms v Dominican Coll. of Blauvelt*, 308 AD2d 575, 577 [2d Dept 2003] ["the anti-subrogation rule applies, and indemnification is barred to the extent that any verdict in favor of the plaintiffs is within the limits of the policy purchased" by the subcontractor], citing *Yong Ju Kim*, 275 AD2d 709]; *Bailey v Disney Worldwide Shared Servs.*, 35 Misc 3d 1201[A], 2012 NY Slip Op 50524[U], *20 [Sup Ct, NY County 2012] ["the antisubrogation rule bars (cross claims for indemnification) only to the extent that any verdict in plaintiff's favor does not exceed the limits of the Hartford policy"]).

Moreover, "because exclusions in the [General Commercial Liability policy] rendered that policy inapplicable to the loss, the antisubrogation rule does not apply in that case" (*North Star Reins. Corp v Continental Ins. Co.*, 82 NY2d 281, 296 [1993]; *see also ELRAC, Inc. v Ward*, 96 NY2d 58, 78 [2001] [antisubrogation rule did not apply where exclusions rendered policy inapplicable to the loss], citing *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d at 296).

Thus, defendants' third-party claims are not barred by the antisubrogation rule.

General Obligations Law § 5-322.1

General Obligations Law § 5-322.1 (1) provides, in relevant part:

> "1. A covenant, promise, agreement or understanding in, or in connection with . . . a contract or agreement relative to the construction . . . of a building . . ., purporting to indemnify or hold harmless the

> promisee against liability for damage arising out of bodily injury to persons . . . contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract . . . issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons . . . caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent."

LEA asserts that the contractual indemnification/hold harmless clause in the LL/LEA subcontract is overly broad and violates General Obligations Law § 5-322.1.

Article 11, Indemnification, of the LL/LEA subcontract provides, as relevant:

> "11.1 To the fullest extent permitted by law, Contractor [LEA] agrees to defend, indemnify and hold harmless Construction Manager [LL] and Owner [56] . . . from and against any claim, cost, expense, or liability (including attorneys' fees and including costs and attorneys' fees incurred in enforcing this indemnity), attributable to bodily injury . . . caused by, arising out of, resulting from, or occurring in

> connection with the performance of the Work by Contractor . . . whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder, provided, however, Contractor's duty hereunder shall not arise if such injury . . . is caused by the sole negligence of a party indemnified hereunder."

The Appellate Division, First Department, has ruled on language such as that found in this subcontract, holding that "phrases limiting the subcontractor's obligation to that permitted by law and excluding liability created by the general contractor's sole and exclusive negligence" call for partial, not full, indemnification, and thus, do not run afoul of General Obligations Law § 5-322.1 (*Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002]). The *Dutton* Court also "construe[d] the [whether or not] phrase as requiring indemnification even where the general contractor is partially negligent, but excluding that portion of the joint liability attributable to its negligence" (*ibid.*; *see also Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543 [1st Dept 2015], citing *Dutton*; *Moyano v Gertz Plaza Acquisition, LLC*, 110 AD3d 612, 613 [1st Dept 2013]).

Accordingly, the indemnification/hold harmless provision of the LL/LEA subcontract is enforceable.

Having concluded that defendants' third-party claims are not barred by the antisubrogation rule and the contractual indemnification language does not run afoul of General Obligations Law § 5-322.1, the court will now consider the third-party causes of action.

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' [citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *see also Fox v County of Nassau*, 183 AD2d 746, 747 [2nd Dept 1992] ["where a party is held liable at least partially because of its own negligence, contribution against other culpable tortfeasors is the only available remedy" (internal quotation marks and citations omitted)]).

The court has dismissed all of plaintiff's claims as against defendants. Thus, the court has found that defendants were not at fault in the causation of plaintiff's injuries. As such, the part of defendants' motion which seeks summary judgment in their favor on this claim is denied, and the part of LEA's motion which seeks summary judgment dismissing the contribution claim is granted.

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 1, 10 [1st Dept 2012]). "Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]).

Defendants have not been found vicariously liable for plaintiff's injuries and the court has established that they also did not supervise plaintiff or his work. Therefore, the part of defendants' motion which seeks summary judgment in their favor on their common-law indemnification claim is denied, and the part of LEA's motion which seeks summary judgment dismissing this claim

is granted.

Contractual Indemnification

"A party's right to contractual indemnification depends upon the specific language of the relevant contract. 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 circumstances [internal citations omitted]" (*Staron v Decker Assoc., LLC*, 135 AD3d 846, 848 [2d Dept 2016]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty that the parties did not intend to be assumed" (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 595 [1st Dept 2014]). "'[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor' [citation omitted]" (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078 [2d Dept 2015]).

> "'Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies.' '[W]ell-established principles governing the interpretation of insurance contracts . . . provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court' [citations omitted]"

(*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins.*

Co., ___ AD3d ___, 2016 NY Slip Op 06052, *2 [1st Dept 2016]; *see also Svensson v Foundation for Long Term Care, Inc.*, 140 AD3d 1385, 1385 [3d Dept 2016] ["'if the contract is not ambiguous, it must be enforced according to the plain meaning of its terms' (citation omitted)"]).

As the indemnification provision of the LL/LEA subcontract quoted above makes clear, LEA agreed to defend and indemnify defendants from any claims for bodily injury arising out of LEA's work. The agreement is clear and unambiguous. LEA owes defendants defense and indemnity for plaintiff's claims for bodily injury arising out of his work for LEA. The part of defendants' motion which seeks summary judgment in their favor on their contractual indemnification claim is granted, and the part of LEA's motion which seeks summary judgment dismissing this claim is denied.

Breach of Contract by Failure to Procure Insurance in Accordance With the Terms of the LL/LEA Subcontract

Article 12, exhibit C, Insurance Requirements, mandates that LEA obtain, among other things, Employers Liability Insurance with a $1 million limit for bodily injury by accident; a Commercial General Liability policy with a limit of at least $2 million for bodily injury; and a Commercial Umbrella Liability policy with a limit of at least $5 million "coverage in excess of required limits specified above for Employers Liability [and] General Liability," all of which had to name defendants as additional insureds.

LEA obtained a primary liability policy from Scottsdale with a limit of $2 million, under which Scottsdale is defending and indemnifying defendants in this action. It also procured an Excess Liability policy from Mt. Hawley with a limit of $9 million for the policy period March 1, 2014 to March 1, 2015.

D'Amico's accident occurred on March 27, 2014.

Thus, on the face of it, LEA procured the required insurance policies. However, the exclusions by which Mt. Hawley has denied coverage have nullified any excess coverage which LL could receive under the policy which LEA procured. The LL/LEA subcontract required LEA to obtain excess liability coverage for LL. Mt. Hawley has denied that coverage, so LL has not received the coverage for which it contracted.

"The court's fundamental objective in interpreting a contract is to determine the parties' intent from the language they have employed, and to fulfill their reasonable expectations" (*U.S. Bank N.A. v Mask*, 139 AD3d 1043, 1045 [2d Dept 2016]). Both LL and LEA reasonably intended that the excess coverage LEA obtained would do what it was purchased for, i.e., provide excess coverage for LL should its damages exceed the coverage provided by Scottsdale.

As set forth above, Mt. Hawley denied coverage, in part, based upon the exception that "the injury arose out of 'ground up construction over 2 stories'" (CUP 344 [05/02]). LL retained LEA as the electrical contractor for the construction of a 56- or 57-story residential building. It is inconceivable that LEA did not comprehend that its work would involve heights "over 2 stories." No one has alleged that LEA had no knowledge of the excess policy's height exclusion, and any such assertion would be unavailing, anyway. "[A] signatory to [a] contract . . . is presumed to know the contents of the instrument [it] signed and to have assented to such terms" (*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]). Since LEA failed to procure the required excess liability policy, it is "responsible for all 'resulting damages, including the liability [of LL] to [the] plaintiff'" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999]).

Therefore, the court grants the part of defendants' motion which seeks summary judgment in their favor on their claim that LEA breached the part of the contract that required LEA to procure insurance in accordance with the terms of the LL/LEA contract, and denies the part of LEA's motion which seeks summary judgment dismissing this claim.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Benedict D'Amico's motion (motion sequence number 002) which seeks summary judgment in his favor on his complaint is denied; and it is further

ORDERED that the part of defendants 56 Leonard LLC and Lend Lease (US) Construction LMB Inc. s/h/a Lend Lease (US) Construction Inc.'s motion (motion sequence number 003) that seeks summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the part of defendants 56 Leonard LLC and Lend Lease (US) Construction LMB Inc. s/h/a Lend Lease (US) Construction Inc.'s motion which seeks summary judgment in their favor on their contribution and common-law indemnification claims against Livingston Electrical Associates, Inc. is denied; and it is further

ORDERED that the part of defendants 56 Leonard LLC and Lend Lease (US) Construction LMB Inc. s/h/a Lend Lease (US) Construction Inc.'s motion which seeks summary judgment in their favor on their contractual indemnification and breach of contract claims against Livingston Electrical Associates, Inc. is granted; and it is further

ORDERED that the part of third-party defendant Livingston Electrical Associates, Inc.'s motion (motion sequence number 004) that seeks summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the part of third-party defendant Livingston Electrical Associates, Inc.'s motion which seeks summary judgment dismissing the third-party complaint's contribution and common-law indemnification claims is granted; and it is further

ORDERED that the part of third-party defendant Livingston Electrical Associates, Inc.'s motion which seeks summary judgment dismissing the third-party complaint's contractual indemnification and breach of contract claims is denied.

This constitutes the Decision and Order of the Court.

Dated: December 5, 2016

GEOFFREY D. WRIGHT
A.J.S.C.

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court