Guillen v 100 Church Fee Owner, LLC.
2017 NY Slip Op 31426(U)
July 5, 2017
Supreme Court, New York County
Docket Number: 162612/14
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ **PART** 13
Justice

MERCEDES T. GUILLEN , as Administer of the Estate of JOSE ELIAS GUILLEN, Deceased, and MERCEDES T. GUILLEN, Individually,

Plaintiffs,

-against-

100 CHURCH FEE OWNER, LLC.,

Defendant.

INDEX NO. 162612/14
MOTION DATE 05-17-2017
MOTION SEQ. NO. 002
MOTION CAL. NO.

100 CHURCH FEE OWNER, LLC.,

Third-Party Plaintiff,

-against-

INTEGRATED BUILDING CONTROLS, INC., MAG ELECTRICAL CONTRACTING CORP., STAR WARS TECHNOLOGY SYSTEM, INC., and STAR WARS TECHNOLOGY SYSTEM CORP.,

Third-Party Defendants.

The following papers, numbered 1 to 12 were read on this motion pursuant to CPLR §3212 for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____cross motion _____	5 - 6, 7 - 8, 9 - 10
Replying Affidavits _____	11 - 12

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion pursuant to CPLR §3212 for summary judgment on liability, is denied. Defendant/third-party plaintiff 100 Church Fee Owner LLC.'s (hereinafter referred to individually as "100 Church") motion filed under Motion Sequence 004 pursuant to CPLR §3212 for summary judgment, is granted as stated herein. The remainder of the relief sought is denied. Third-party defendant Integrated Building Controls, Inc.'s (hereinafter referred to individually as "IBC") motion filed under Motion Sequence 005, pursuant to CPLR §3212 for summary judgment, is granted as stated herein. The remainder of the relief sought is denied. Third-Party defendant, MAG Electrical Contracting Corp.'s (hereinafter referred to individually as "MAG") motion filed under Motion Sequence 006 pursuant to CPLR §3212 for summary judgment, is granted as stated herein. The remainder of the relief sought is denied.

Plaintiffs allege that on February 8, 2012 the decedent, Jose Elias Guillen, was employed by third-party defendants Star Wars Technology System Inc. and Star Wars Technology System Corp. (hereinafter referred to jointly as "Star Wars"), to work on the installation of new HVAC control cabling on the 14th floor of 100 Church Street, New York, New York (hereinafter referred to as the "property"). It is alleged that on the date of the accident at approximately 9:00a.m., the decedent was on the top step of a six foot A-frame ladder with a co-worker, George Alejos, and was attempting to install cabling on a ceiling that was approximately eleven (11) feet high, at the property. Plaintiffs allege that Mr. Alejos was working on the top step of a different six foot A-frame ladder and fell off, knocking into the decedent's ladder, causing the decedent to fall off his ladder and strike his head on the concrete floor. The decedent was taken to Bellevue hospital where at approximately 4:30 p.m. he died of his head injuries.

Defendant/Third-party plaintiff 100 Church is the owner of the property and relies on inter-related entities, SL Green Realty Corp. and SLG Management LLC's employees to

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

oversee security and the general building operations. Third-party defendant IBC was retained as a contractor for the installation of fire and smoke dampers that were to tie into the property's automated system. Third-party defendant MAG was an electrical subcontractor retained by IBC to install wiring and conduits. Third-party defendants Star Wars were retained by MAG, as subcontractors for the installation of the control cabling and wiring.

On December 22, 2014 plaintiffs commenced this action asserting personal injury causes of action against 100 Church for general negligence under New York Labor Law §200, § 240[1] and §241[6] and for wrongful death (Mot. Seq. 004, Exh. A).

On February 3, 2015 100 Church answered the complaint (Mot. Seq. 004, Exh. B). On February 24, 2015 100 Church commenced a third-party action asserting causes of action against IBC, MAG and Star Wars for contractual indemnification and contribution, common law indemnification, and failure to procure insurance. The third-party complaint was subsequently amended (Mot. Seq. 004, Exh. C).

On April 17, 2015 IBC filed an Answer to the third-party complaint asserting cross-claims for common law indemnification, common law negligence, contractual indemnification, and failure to procure insurance against MAG and Star Wars. IBC also asserted counterclaims against 100 Church for common law indemnification, common law negligence and contractual indemnification. On May 5, 2015 MAG filed an Answer to the third-party complaint asserting a cross-claim for contribution, common law indemnification, and/or contractual indemnification. On May 6, 2016 100 Church obtained a default judgment against the Star Wars defendants (Mot. Seq. 004, Exh. E).

At the October 7, 2015 deposition of Mercedes T. Guillen, plaintiffs withdrew the claims for wrongful death (Mot. Seq. 004, Exh. H, page 9, lines 15-19). Plaintiffs also withdrew the cause of action for wrongful death at oral argument on this motion.

Plaintiffs, pursuant to CPLR §3212, seek summary judgment on the issue of liability on the ground that no triable issue of fact exists and plaintiffs are entitled to judgment as a matter of law.

100 Church's motion filed under Motion Sequence 004 for summary judgment pursuant to CPLR §3212, seeks: (1) to dismiss the plaintiff's cause of action under Labor Law §200 for common law negligence, and wrongful death, (2) obtain summary judgment on the third-party claims for contractual indemnification against IBC and MAG, (3) summary judgment on the common law indemnification claims asserted against Star Wars Technology System Corp., (4) summary judgment on the claim for breach of contractual obligation to procure liability insurance as against all of the third-party defendants, and dismissing any of the third-party counter-claims asserted against 100 Church.

IBC's motion filed under Motion Sequence 005, pursuant to CPLR §3212, seeks summary judgment dismissing the plaintiff's complaint and the cross-claims/counterclaims arising therefrom.

MAG's motion filed under Motion Sequence 006 pursuant to CPLR §3212, seeks summary judgment: (1) dismissing plaintiff's causes of action under Labor Law §240 [1], §200 and §241[6] and dismissing the cause of action for wrongful death as barred by the statute of limitations, (2) on the third-party causes of action based on contractual and common law indemnification and breach of the contractual obligation to procure liability insurance.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]). Conclusory assertions, speculation, surmise and conjecture without admissible evidence are

insufficient to raise any issues of fact (Smith v. Johnson Prods. Co., 95 A.D. 2d 675, 463 N.Y.S. 2d 464 [1st Dept., 1983]).

Plaintiffs argue that 100 Church failed to provide a safe work environment, provide adequate equipment, or reasonable and adequate protection from a height related risk, as required pursuant to Labor Law §240 [1], §241[6] and §200, and is the proximate cause of the decedent's fall from the ladder, warranting summary judgment on liability. It is argued that the decedent and his co-worker should have been provided with a ten foot A-frame ladder to reach the height required to install cables in the eleven foot high ceiling.

100 Church, IBC and MAG argue that plaintiff's papers rely on hearsay and there remain issues of fact warranting denial of summary judgment to plaintiffs on liability.

Liability arises under Labor Law §240[1], upon proof that, "plaintiff's injuries result from an elevation related risk and the inadequacy of safety devices" (Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y. 3d 90, 30 N.E. 3d 154, 7 N.Y.S. 3d 263 [2015]). Pursuant to Labor Law §240[1], liability attaches with proof that, "a ladder was defective, or that it slipped, tipped, was placed improperly or otherwise failed to provide support" (Scekic v. SL Green Realty Corp., 132 A.D. 3d 563, 19 N.Y.S. 3d 563 [1st Dept., 2015] citing to Nascimento v. Bridgehampton Const. Corp., 86 A.D. 3d 189, 924 N.Y.S. 2d 353 [1st Dept., 2011]). The burden is on the defendant to provide evidence establishing that the ladder used was a suitable safety device and that plaintiff was either a recalitrant worker or the sole proximate cause of the accident (Noor v. City of New York, 130 A.D. 3d 536, 15 N.Y.S. 3d 13 [1st Dept., 2015]).

Labor Law §241[6] establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Padilla v. Frances Schervier Housing Development Fund Corporation, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [1st Dept., 2003]). To establish liability the plaintiff is required to prove violations of Industrial Code regulations proximately caused the injuries (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263,841 N.Y.S. 2d 249 [1st Dept., 2007]). Comparative negligence applies to Labor Law §241[6] claims (Dwyer v. Central Park Studios, Inc., 98 A.D. 3d 882, 951 N.Y.S. 2d 16 [1st Dept., 2012]).

Plaintiffs motion relies on an attorney's affirmation and unsigned, uncertified and redacted OSHA report (Mot. Exh. A), the autopsy report (Mot. Exh. B), and an incident report prepared on behalf of SL Green Realty Corp. (Mot. Exh. C). Plaintiffs annex the pleadings for the first time to the reply papers.

Pursuant to CPLR §3212[b] the failure to annex pleadings to a motion for summary judgment renders it procedurally defective, however, the Court "has discretion to overlook the defect when the record is 'sufficiently complete,'" this includes when the pleadings were electronically filed (Washington Realty Owners, LLC v. 260 Washington Street, LLC, 105 A.D. 3d 675, 964 N.Y.S. 2d 137 [1st Dept., 2013] and Studio A Showroom, LLC v. Yoon, 99 A.D. 3d 632, 952 N.Y.S. 2d 879 [1st Dept., 2012]).

Plaintiffs electronically filed the pleadings, and the failure to annex the pleadings to the motion papers is an excusable defect. The affirmation of the attorney together with the pleadings cures any defects in the moving papers.

An autopsy report is generally admissible under the public records exception of hearsay. A portion of an autopsy report that contains a medical examiner's conclusory opinions about the cause of death and fails to rely on the professional opinion gleaned from examination of the body or medical knowledge, is inadmissible hearsay (Cheeks v. City of New York, 123 A.D. 3d 532, 998 N.Y.S. 2d 847 [1st Dept. 2014], Schelberger v. Eastern Sav. Bank, 93 A.D. 2d 188, 461 N.Y.S. 2d 785 [1st Dept., 1985], and Welz v. Commercial Travelers Mut. Acc. Ass'n of America, 266 A.D. 688, 40 N.Y.S. 128 [2nd Dept.,1943]).

The autopsy report under "Final Diagnoses" states that the decedent's cause of death was "Blunt impact injuries of the head." and the "Manner of Death: Accident (Struck by Ladder)" (Mot. Exh. A). The "Notice of Death" states under "Circumstances of Death:" that "Deceased arrived from work to hospital after a ladder fell and hit him directly in his

head"(Mot. Exh. A). The medical examiner's autopsy report relies on hearsay as to the manner of death, and contradicts evidence that the decedent fell off the ladder and hit his head on the concrete floor. The medical examiner's report does not make a prima facie showing of the manner of death to satisfy summary judgment.

An unsigned, uncertified and heavily redacted OSHA report is not admissible as hearsay, and fails to meet the evidentiary burden on a summary judgment motion (Hernandez v. Town of Hamburg, 83 A.D. 3d 1507, 922 N.Y.S. 2d 682 [4th Dept. 2011], rearg. denied 86 A.D. 3d 934, 926 N.Y.S. 2d 838 [4th Dept., 2011], lv. denied 17 N.Y. 3d 717, 958 N.E. 2d 1202, 935 N.Y.S. 2d 287 [2011]). The OSHA report relied on by plaintiffs is unsigned, uncertified and redacted. The OSHA cover letter dated July 23, 2012 that is attached to the report states "the remainder of the file is not available at this time for public disclosure because the case is still within the 15 working day contest period."(Mot. Exh. A). Plaintiffs do not provide a complete OSHA report. 100 Church has shown that plaintiffs' OSHA report does not meet the evidentiary requirements for summary judgment.

An incident report that is inconsistent with testimony or affidavits submitted as evidence raises issues of fact and does not make out a prima facie case for summary judgment (Buckley v. J.A. Jones/GMO, 38 A.D. 3d 461, 832 N.Y.S. 2d 560 [1st Dept., 2007]). An unauthenticated and unsigned incident report is hearsay and inadmissible (Taylor v. One Bryant Park, LLC, 94 A.D. 3d 415, 941 N.Y.S. 2d 142 [1st Dept. 2012]).

100 Church claims the unsigned and unsworn SL Green Realty Corp. incident report is not prepared by an eyewitness and is hearsay. 100 Church annexes the affidavit of William Gomes, stating he was employed by Classic Security as a security guard at the property on the date of the accident and did not write or prepare the report (100 Church Opp. Exh. B). The incident report is hearsay and plaintiffs use of the deposition testimony of Jose Nunez, Chief Engineer for SL Green Management, stating Mr. Gomes prepared the report does not render it admissible as evidence (Reply Exh. H, pgs. 26 lines 18-25, 27 lines 2-16).

Robert Casado, the owner of Star Wars, deposition testimony states that the decedent was only employed to deliver cable to the lobby of the building and not supposed to be on a ladder (IDC Opp. Exh. A, pgs. 44 lines 2-25, 45 lines 2-4, 52 lines 4-19, 53 lines 7-25, 54 lines 1-8). Mr. Casado also testified that ladders stored on a higher floor were available to George Alejos a Star Wars employee and included two 8-footers (IDC Opp. Exh. A, pgs. 63 lines 16-25, 64 lines 2-25, 65 lines 2-25). Mike Giannattasio, vice-president of MAG, testified that ladders were stored in the penthouse and locked, Star Wars was supposed to bring its own tools and equipment, but that Mr. Casado had a key to access the area (100 Church Mot. Seq. 004, Exh. N page 49 lines 2-13, 51 lines 23-25, 52 lines 2-5). Jose Nunez an engineer employed by SL Green Management testified on behalf of 100 Church and stated he saw "Juan," who he later identifies as the decedent, at the job site performing wiring work for Star Wars weeks before the date of the accident (Reply Exh. H, pgs 14 lines 17-25, 15 lines 2-22). Mr. Nunez testified the building and the contractors stored ladders of different sizes including six foot, eight foot and ten foot ladders in the same area in the penthouse that was locked, and multiple individuals had the key (Reply Exh. H, pgs 30 lines 4-25, 31 lines 2-19, 48 lines 7-25, 49 line 2, 58 lines 18).

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Conflicting testimony raises credibility issues whether an inadequate safety device was provided, or plaintiff was the proximate cause of his injuries, that cannot be resolved on papers and is a basis to deny summary judgment (Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004], Campos v. 68 East 86th Street Owners Corp., 117 A.D. 3d 593, 988 N.Y.S. 2d 1 [1st Dept., 2014] and Lopez v. Bovis Lend Lease LMB, Inc., 26 A.D. 3d 192, 807 N.Y.S. 2d 873 [1st Dept., 2006]).

Plaintiffs have not made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability through admissible evidence, warranting denial of that relief. The conflicting deposition testimony creates issues of fact of as to whether the

decedent was performing work at the property on behalf of Star Wars, whether the ladder he was standing on was defective or the decedent was the sole proximate cause of his injuries by choosing to stand on top of a six foot A-frame ladder when an eight or ten foot A-frame ladder was available, further warranting denial of plaintiffs' motion for summary judgment.

100 Church, under Motion Sequence 004, seeks summary judgment pursuant to CPLR §3212 dismissing the plaintiff's cause of action under Labor Law §200 for common law negligence, and wrongful death. 100 Church argues that it is not liable under the Labor Law §200 or general negligence causes of action because it and the employees of SL Green Management did not supervise, direct, or control the means or methods of the decedent's work.

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site and requires satisfaction of common-law negligence standards. A plaintiff must show that the owner or general contractor had authority or control over the dangerous condition, or had actual or constructive notice sufficient for corrective action to be taken (Mitchell v. New York University, 12 A.D. 3d 200, 784 N.Y.S. 2d 104 [1st Dept., 2004]). A precondition is that the party charged must have authority or exercise supervisory control over the activity that resulted in the injury, enabling the ability to avoid or correct it (McGarry v. CVP 1 LLC , 55 A.D. 3d 441, 866 N.Y.S. 2d 75 [1st Dept., 2008]). A plaintiff may recover against an owner or developer where it is shown that the party to be charged exercised "supervisory control" over the injury producing work. An owner is not liable for subcontractor employees over which there was no supervisory control or specific instructions on how to do the work (Cappabianca v. Skanska USA Bldg.,Inc., 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1st Dept., 2012] and Mutadir v. 80-90 Maiden Lane Del LLC, 110 A.D. 3d 641, 974 N.Y.S. 2d 364 [1st Dept., 2013]).

There remain issues of fact on whether 100 Church is liable under Labor Law §200 or for general negligence by exercising control over the alleged dangerous condition warranting denial of summary judgment. The conflicting deposition testimony of the entity that provided the ladder used by the decedent creates issues of fact as to liability. 100 Church, through SL Green Management, stored ladders of varying heights in the same penthouse area as the contractors and there is no specific identification of who brought the ladders to the worksite on the 14th floor, or of the entity that provided the ladder used by the decedent. Deposition testimony that the keys for access to the locked area where the ladders were stored was provided by SL Green Management to employees to give the contractors access, further creates an issue of fact.

100 Church, under Motion Sequence 004, also seeks summary judgment: on the third-party claims for contractual indemnification against IBC and MAG; on the common law indemnification claims asserted against Star Wars Technology System Corp.; on the claim for breach of contractual obligation to procure liability insurance as against all of the third-party defendants and dismissing any of the third-party counter-claims asserted against 100 Church.

100 Church has obtained a default judgment against Star Wars Technology Systems Inc., under Motion Sequence 001, with an assessment of damages directed at the time of trial. There was no opposition to the relief sought on the common law indemnification claims asserted against Star Wars Technology System Corp. on this motion and that relief is granted on default.

Common law Indemnification requires that the party seeking indemnity establish that (1) it has been held vicariously liable and was not negligent beyond any statutory liability, and (2) that the proposed indemnitor's negligence contributed to the causation of the accident or that it "exercised actual supervision and control over the injury-producing work" (Naughton v. City of New York, 94 A.D. 3d 1, 940 N.Y.S. 2d 21 [1st Dept., 2012] and Correia v. Professional Data Management, Inc., 259 A.D. 2d 60, 693 N.Y.S. 2d 596 [1st Dept 1999]). A party seeking common law indemnification cannot recover if it is negligent beyond strict statutory liability (Gulotta v. Bechtel Corporation, 245 A.D. 2d 75, 664 N.Y.S. 2d 801 [1st Dept.,1997] and Walker v. Trustees of the University of Pennsylvania, 275 A.D. 2d 266, 712 N.Y.S. 2d 117 [1st Dept., 2000]).

There remain issues of fact on whether 100 Church was negligent beyond strict liability warranting denial of summary judgment on the common law indemnification causes of action asserted in the third-party complaint against IBC and MAG and on the cross-claims for indemnification and contribution asserted against 100 Church.

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. The party seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (Mikelatos v. Theofilaktidis, 105 A.D.3d 822, 962 N.Y.S.2d 693 [1st. Dept. 2013]; Mak v. Silverstein Properties, Inc., 81 A.D.3d 520, 916 N.Y.S.2d 592 [1st. Dept. 2011]; DiFilipo v. Parkchester North Condominium, 65 A.D.3d 899, 885 N.Y.S.2d 81 [1st. Dept. 2009] ; Crespo v. City of New York, 303 A.D.2d 166, 756 N.Y.S.2d 183 [1st. Dept. 2003]).

There remain issues of fact on whether 100 Church was negligent beyond strict liability warranting denial of summary judgment on the contractual indemnification causes of action asserted in the third-party complaint against IBC and MAG and on the cross-claims for indemnification and contribution asserted against 100 Church.

100 Church claims that pursuant to the contract with IBC, general liability insurance was to be procured naming 100 Church as an additional insured at no less than $5,000,000.00 per occurrence and project general aggregate (Mot. Seq. 004, Exh. R, Schedule G pgs. 18-19). 100 Church claims that the contract between IBC and MAG at section 13 contains an indemnification clause requiring that MAG indemnify 100 Church and at section 11 that MAG name 100 Church as an additional insured with a general liability policy in the amount of $1,000,000.00 per occurrence and a general aggregate of $2,000,000.00 together with an excess/umbrella liability coverage of $10,000,000.00 per occurrence and in the aggregate (Mot. Seq. 004, Exh. S, pgs. 4-5 and 9). 100 Church relies on certificates of insurance and argues that neither IBC or MAG procured sufficient insurance under the provisions of their contracts and are liable (Mot. Seq. 004, Exhs. V and W).

The certificate of insurance for IBC with Travelers Indemnity has limits of $2,000,000.00 per occurrence and $4,000,000.00 general aggregate, and there is an umbrella policy with Mount Hawley with limits of $10,000,000.00 per occurrence and in the aggregate. It is alleged that the certificate does not name 100 Church as an additional insured (Mot. Seq. 004, Exh. V). The certificate of insurance for MAG is with Hartford Insurance Company and has limits of $1,000,000.00 and $2,000,000.00 but no excess coverage is stated and 100 Church is not named as an additional insured (Mot. Seq. 004, Exh. W).

A party claiming insurance coverage bears the burden of proof establishing entitlement. A certificate of insurance that includes a disclaimer that it is for information purposes only, does not confer or provide proof of coverage. Actual coverage as an insured or additional insured is identified "on the face of the policy" (Alib, Inc. v. Atlantic Cas. Ins. Co., 52 A.D. 3d 419, 861 N.Y.S. 2d 28 [1st Dept., 2008] and Moleon v. Kreisler Borg Florman Gen. Const. Co, 304 A.D. 2d 337, 758 N.Y.S. 2d 621 [1st Dept., 2003]).

The certificates of insurance annexed to the motion papers contain disclaimers and are not evidence of actual insurance coverage obtained by either IBC or MAG (Mot. Seq. 004, Exhs. V and W). 100 Church has not met the evidentiary requirements to make a prima facie case on claims asserted against IBC for failure to procure insurance. MAG in opposition to 100 Church's motion provides a copy of the actual policy provided by Hartford as proof that coverage was provided in accordance with the contract with IBC, except for the excess coverage that was not obtained (MAG Opp. to Mot. Seq. 004, Exh. B). 100 Church is entitled to summary judgment against MAG on the cause of action for failure to procure excess coverage.

IBC's motion filed under Motion Sequence 005, pursuant to CPLR §3212, seeks summary judgment dismissing the plaintiff's complaint and all the cross-claims

/counterclaims arising therefrom. IBC argues it was not negligent under Labor Law §200 because it did not control or supervise the work performed by MAG or Star Wars and their employees or provide any equipment including ladders.

There remain issues of fact of whether IBC supervised and controlled MAG and Star War's work warranting denial of summary judgment on the Labor Law §200 causes of action and on the third-party causes of action for indemnification. There is deposition testimony that IBC had previously employed Robert Casado, the owner of Star Wars, as a supervisor at the property. Deposition testimony that IBC had a representative at the job site to supervise while MAG and Star Wars were performing their work, and initially SL Green Management employees and Mercedes T. Guillen thought the decedent was employed by IBC, raise issues of fact.

IBC has made a prima facie case for summary judgment on the cross-claim for failure to procure insurance against MAG, the policy provided by MAG does not name IBC as an additional insured, or provide excess coverage. MAG fails to raise an issue of fact warranting denial of the summary judgment relief on failure to procure insurance.

MAG's motion filed under Motion Sequence 006, pursuant to CPLR §3212, seeks summary judgment: (1) dismissing plaintiff's causes of action under Labor Law §240 [1], §200 and §241[6] and dismissing the cause of action for wrongful death as barred by the statute of limitations, (2) on the third-party causes of action based on contractual and common law indemnification and breach of the contractual obligation to procure liability insurance.

MAG fails to make a prima facie case warranting denial of summary judgment under Labor Law §200, and the third-party causes of action for indemnification. There is conflicting deposition testimony over whether the ladder used by the decedent was owned by MAG and whether MAG supervised the work performed by Star Wars. There remain issues of fact on plaintiffs' causes of action for pain and suffering, the two page expert report of Michael Baden, M.D. provided by MAG does not provide a detailed analysis (Mot. Seq. 006, Exh. L). Plaintiffs' opposition also raises issues of fact on Dr. Baden's failure to obtain a complete medical record. MAG has not made a prima facie case warranting denial of summary judgment on the third-party claims and cross-claims for failure to procure insurance.

Accordingly, it is ORDERED that plaintiffs motion pursuant to CPLR §3212, for summary judgment on the issue of liability on the ground that no triable issue of fact exists and plaintiffs are entitled to judgment as a matter of law, is denied, and it is further,

ORDERED that, 100 Church Fee Owner LLC.'s motion filed under Motion Sequence 004 for summary judgment pursuant to CPLR §3212, seeking: (1) to dismiss the plaintiff's cause of action under Labor Law §200 for common law negligence, and wrongful death, (2) obtain summary judgment on the third-party claims for contractual indemnification against IBC and MAG, (3) summary judgment on the common law indemnification claims asserted against Star Wars Technology System Corp., (4) summary judgment on the claim for breach of contractual obligation to procure liability insurance as against all of the third-party defendants, and dismissing any of the third-party counter-claims asserted against 100 Church, is granted only as to dismissing the cause of action for wrongful death in plaintiff's complaint, and the third-party claims asserted against Star Wars Technology System Corp., and it is further,

ORDERED that the plaintiffs' cause of action for wrongful death asserted against 100 Church Fee Owner LLC is severed and dismissed, and it is further,

ORDERED that 100 Church Fee Owner LLC is granted summary judgment on the claims asserted against Star Wars Technology System Corp. in the third-party complaint, and it is further,

ORDERED that an assessment of damages against third-party defendant Star Wars Technology System Corp. is directed at the time of trial, and it is further,

ORDERED that 100 Church Fee Owner LLC is granted summary judgment on the claims asserted in the third-party complaint against MAG Electrical Contracting Corp. for failure to procure insurance, and it is further,

ORDERED that an assessment of damages against third-party defendant MAG Electrical Contracting Corp. is directed at the time of trial, and it is further,

ORDERED that the remainder of the relief sought in Motion Sequence 004, is denied, and it is further,

ORDERED that Integrated Building Controls, Inc., motion filed under Motion Sequence 005, pursuant to CPLR §3212, seeking summary judgment dismissing the plaintiff's complaint and all the cross-claims /counterclaims arising therefrom is granted only as to dismissing the cause of action for wrongful death in the plaintiffs' complaint and against MAG Electrical Contracting for failure to procure insurance, and it is further,

ORDERED that the plaintiffs' cause of action for wrongful death, is severed and dismissed, and it is further,

ORDERED, that Integrated Building Controls, Inc. granted summary judgment on the cross-claims against MAG Electrical Contracting for failure to procure insurance, and it is further,

ORDERED that an assessment of damages against third-party defendant MAG Electrical Contracting Corp. is directed at the time of trial, and it is further,

ORDERED that the remainder of the relief sought in Motion Sequence 005, is denied, and it is further,

ORDERED that MAG Electrical Contracting Corp.'s motion filed under Motion Sequence 006, pursuant to CPLR §3212, seeking summary judgment: (1) dismissing plaintiff's causes of action under Labor Law §240 [1], §200 and §241[6] and dismissing the cause of action for wrongful death as barred by the statute of limitations, (2) on the third-party causes of action based on contractual and common law indemnification and breach of the contractual obligation to procure liability insurance is granted only as to plaintiff's cause of action for wrongful death, and it is further,

ORDERED that the plaintiffs' cause of action for wrongful death, is severed and dismissed, and it is further,

ORDERED, that the remainder of the relief sought in Motion Sequence 006, is denied, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly.

ENTER :

Dated: July 5, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**