Pena v New York Univ.
2018 NY Slip Op 33368(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 156045/2014
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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FRANCISCO JAVIER PENA and YAMELILDA BELLIARD, Index No. 156045/2014

Plaintiffs

- against -

NEW YORK UNIVERSITY and AWR GROUP,

Defendants

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NEW YORK UNIVERSITY and AWR GROUP,

Third Party Plaintiffs

- against -

ROCK GROUP NY CORP.,

Third Party Defendant

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ROCK GROUP NY CORP.,

Second Third Party Plaintiff

- against -

PJP INSTALLER, INC.,

Second Third Party Defendant

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NEW YORK UNIVERSITY and AWR GROUP,

Third Third Party Plaintiffs

- against -

PJP INSTALLER, INC.,

Third Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injury and lost services sustained June 10, 2014, when plaintiff Pena, an employee of second third party defendant PJP Installer, Inc., fell from a sidewalk bridge girt at a construction project on premises owned by defendant-third party plaintiff New York University (NYU). Defendant-third party plaintiff AWR Group was the general contractor there. Third party defendant-second third party plaintiff Rock Group NY Corp., a scaffolding contractor, hired PJP Installer to erect the sidewalk bridge. Rock Group has discontinued its second third party action against PJP Installer.

Plaintiffs move for summary judgment, C.P.L.R. § 3212(b) and (e), on defendants' liability under New York Labor Law § 240(1). Plaintiffs have discontinued their claims for negligence, under Labor Law §§ 200 and 240(2), and under Labor Law § 241(6) except their claims based on 12 N.Y.C.R.R. §§ 23-1.7(b), 23-1.15, 23-1.16, and 23-5. Rock Group cross-moves for summary judgment dismissing the third party complaint. C.P.L.R. § 3212(b). NYU and AWR, having withdrawn their cross-motion insofar as it sought summary judgment dismissing plaintiffs' claim under Labor Law § 241(6), cross-move for summary judgment dismissing the complaint's remaining claims and Rock Group's counterclaims. Id.

NYU and AWR also move for summary judgment on their cross-claim for contractual indemnification against PJP Installer and on their third party claim for implied indemnification against Rock Group. C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court grants plaintiffs' motion, grants Rock Group's cross-motion in part, and otherwise denies the cross-motions.

II. TIMELINESS AND PERMISSIBILITY OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

Since plaintiffs filed a note of issue October 16, 2017, the original deadline for summary judgment motions was February 13, 2018. C.P.L.R. § 3212(a). In an order October 18, 2017, however, the court (Mendez, J.) set the deadline for dispositive motions at 60 days after Pena's last physical examination by other parties, which was December 21, 2017, extending the deadline to February 19, 2018. Plaintiffs timely served their motion for partial summary judgment February 1, 2018. C.P.L.R. § 2211; Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706, 706 (1st Dep't 2013); Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't 2009); Ageel v. Tony Casale, Inc., 44 A.D.3d 572, 572 (1st Dep't 2007); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007). Rock Group served its cross-motion February 13, 2018, also within that deadline. The cross-motion served by NYU and AWR March 12, 2018, was untimely. C.P.L.R. § 3212(a).

The court may consider the cross-motion by NYU and AWR, however, insofar as it responds to and addresses claims "nearly identical" to plaintiffs' timely motion for summary judgment on their Labor Law § 240(1) claim. Jarama v. 902 Liberty Ave. Hous.

Dev. Fund Corp., 161 A.D.3d 691, 692 (1st Dep't 2018); Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 449 (1st Dep't 2013). Similarly, insofar as NYU and AWR seek summary judgment on their implied indemnification claim against Rock Group, their motion is nearly identical to Rock Group's timely cross-motion seeking dismissal of the third party complaint, permitting the court to consider the cross-motion by NYU and AWR on implied indemnification as well. The court may not, however, consider the untimely cross-motion by NYU and AWR insofar as it seeks summary judgment on their contractual indemnification claim against PJP Installer because it is not nearly identical to any motion or cross-motion by plaintiffs or Rock Group. Mugattash v. Choice One Pharm. Corp., 162 A.D.3d 499, 500 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Belgium v. Mateo Prods., Inc., 138 A.D.3d 479, 480 (1st Dep't 2016); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 628 (1st Dep't 2015).

While Rock Group's cross-motion for summary judgment was timely, the motion was impermissible as a cross-motion, because it sought relief against NYU and AWR when only plaintiffs had moved for summary judgment, before NYU and AWR cross-moved for summary judgment. Mugattash v. Choice One Pharm. Corp., 162 A.D.3d at 500; Rubino v. 330 Madison Co., LLC, 150 A.D.3d at 604; Puello v. Georges Units, LLC, 146 A.D.3d 561, 562 (1st Dep't 2017); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017). Similarly, the cross-motion by NYU and AWR

against PJP Installer is impermissible, because PJP Installer never moved for summary judgment. Although Rock Group erred in using a cross-motion to seek relief against a non-moving party, the court may overlook the erroneous use of a cross-motion instead of a motion since Rock Group's cross-motion was timely. Kershaw v. Hospital for Special Surgery, 114 A.D.3d 75, 88 (1st Dep't 2013). Then, given that NYU and AWR cross-moved, albeit late, for summary judgment on a claim that Rock Group timely sought to dismiss via summary judgment, and plaintiffs show no interest in the third party claims, no prejudice to any party prevents consideration of the cross-motions by Rock Group and by NYU and AWR relating to the third party claims as separate motions. Jordan v. City of New York, 38 A.D.3d 336, 338 (1st Dep't 2007); Sheehan v. Marshall, 9 A.D.3d 403, 404 (2d Dep't 2004). See Kershaw v. Hospital for Special Surgery, 114 A.D.3d at 88. None of these considerations, however, pertains to and thus permits the cross-motion by NYU and AWR insofar as it seeks relief against PJP Installer.

III. PLAINTIFFS' LABOR LAW § 240(1) CLAIM

A failure to provide adequate safety devices to protect against elevation related hazards involved in construction work, as required by Labor Law § 240(1), imposes absolute liability on the construction site's owner and general contractor, if that failure proximately caused Pena's injury. Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 338 (2008); Albanese v. City of New York, 5 N.Y.3d 217, 219 (2005); Abbatiello v.

Lancaster Studio Assoc., 3 N.Y.3d 46, 50-51 (2004); Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 287, 289 (2003). The owner and general contractor thus are liable under Labor Law § 240(1) even if they did not supervise or exercise control over the work site. Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 361 n.8 (2006); Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 560 (1993); Harris v. City of New York, 83 A.D.3d 104, 111 (1st Dep't 2011). The liability of the owner and general contractor depends only on an elevation related hazard and the absence or failure of an adequate safety device. Berg v. Albany Ladder Co., Inc., 10 N.Y.3d 902, 904 (2008); Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267-68 (2001).

The parties do not dispute that Pena was working at least eight feet above ground and lacked any place on the sidewalk bridge or in the vicinity to tie off a harness he was wearing. By presenting this evidence that Pena lacked an anchorage point to attach his harness safely, plaintiffs demonstrate a violation of Labor Law § 240(1). Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp., 161 A.D.3d at 692; Gomes v. Pearson Capital Partners LLC, 159 A.D.3d 480, 481 (1st Dep't 2018); Anderson v. MSG Holdings, L.P., 146 A.D.3d 401, 402 (1st Dep't 2017); Hoffman v. SJP TS, LLC, 111 A.D.3d 467, 467 (1st Dep't 2013). See Maman v. Marx Realty & Improvement Co., Inc., 161 A.D.3d 558, 559 (1st Dep't 2018); Giordano v. Tishman Constr. Corp., 152 A.D.3d 470, 471 (1st Dep't 2017); Garcia v. Church of St. Joseph of the Holy Family of the City of N.Y., 146 A.D.3d 524, 526 (1st Dep't 2017);

Albino v. 221-223 W. 82 Owners Corp., 142 A.D.3d 799, 800 (1st Dep't 2016).

NYU and AWR contend that PJP Installer foreman Romel Balbuena Martinez had directed Pena, along with the other workers at the site, to use a rolling tower to perform work on the sidewalk bridge and that his disobedience of this instruction was the sole proximate cause of his injury. To raise a factual issue that Pena's disregard of Martinez's instructions was the sole proximate cause of the injury, NYU and AWR must show the availability of an adequate safety device, Pena's knowledge of the availability and of the expectation that Pena was to use the safety device, and his unreasonable failure to use that equipment, resulting in injury. Gallagher v. New York Post, 14 N.Y.3d 83, 88 (2010); McCrea v. Arnlie Realty Co., 140 A.D.3d 427, 429 (1st Dep't 2016); Quinones v. Olmstead Props., Inc., 133 A.D.3d 87, 89 (1st Dep't 2015); Nacewicz v. Roman Catholic Church of the Holy Cross, 105 A.D.3d 402, 402-403 (1st Dep't 2013).

Martinez's inconsistent testimony, (1) that the rolling tower was in use when Pena was performing his work that led to his injury, (2) that Martinez did not recall whether the rolling was in use then, and (3) that he did not recall where it was when Pena fell, without any other evidence on the issue, fails to demonstrate the availability of the rolling tower. Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Messina v. City of New York, 148 A.D.3d 493, 494 (1st Dep't 2017); Keenan v. Simon Prop. Group, Inc., 106 A.D.3d 586,

589 (1st Dep't 2013); Rice v. West 37th Group, LLC, 78 A.D.3d 492, 497 (1st Dep't 2010). See Golubowski v. City of New York, 131 A.D.3d 900, 901 (1st Dep't 2015); DeRose v. Bloomingdale's Inc., 120 A.D.3d 41, 45-46 (1st Dep't 2014). This lack of any showing that a rolling tower was available when Pena fell, to rebut his testimony that he was unaware of a rolling tower in the vicinity, precludes any further showing that his failure to use the rolling tower was the sole proximate cause of his injury based on Martinez's testimony that the rolling tower was available as an anchorage point for a harness. Anderson v. MSG Holdings, L.P., 146 A.D.3d at 404. See Maman v. Marx Realty & Improvement Co., Inc., 161 A.D.3d at 559; Giordano v. Tishman Constr. Corp., 152 A.D.3d at 471.

Martinez also testified that he instructed the PJP Installer workers as a group that a rolling tower was available and when they were to use it. Although Pena denies that anyone directed him to use the rolling tower, Martinez's contrary testimony still raises a factual issue whether Pena received such an instruction. Nevertheless, Pena further denies that any rolling tower actually was in view at his work site, which Martinez's testimony never rebuts. Absent evidence regarding the actual availability of such equipment, in contrast to an instruction that the equipment was available, NYU and AWR fail to raise a factual issue whether Pena was aware of an available safety device that he was expected to use. Gallagher v. New York Post, 14 N.Y.3d at 89; DeFreitas v. Penta Painting & Decorating Corp., 146 A.D.3d 573, 574 (1st

Dep't 2017); Mutadir v. 80-90 Maiden Lane Del LLC, 110 A.D.3d 641, 642 (1st Dep't 2013). See Albino v. 221-223 W. 82 Owners Corp., 142 A.D.3d at 800. NYU and AWR also fail to present evidence that Pena was forbidden to stand on the sidewalk bridge girts, to establish that he was expected to use only the rolling tower. Kristo v. Board of Educ. of the City of N.Y., 134 A.D.3d 550, 550 (1st Dep't 2015); Nacewicz v. Roman Catholic Church of the Holy Cross, 105 A.D.3d at 403-404.

Finally, even if Pena's method of climbing the sidewalk bridge was negligent, the failure to provide protection against the sidewalk bridge's elevation related hazards eliminates his negligence as the sole proximate cause of his injury. Gallagher v. New York Post, 14 N.Y.3d at 89; Hagins v. State of New York, 81 N.Y.2d 921, 923 (1993); Messina v. City of New York, 148 A.D.3d at 494; McCrea v. Arnlie Realty Co., 140 A.D.3d at 429. Under these circumstances, where NYU and AWR fail to raise factual issues that Pena was a recalcitrant worker or otherwise the sole proximate cause of his injury, plaintiffs are entitled to summary judgment on their Labor Law § 240(1) claim. Gallagher v. New York Post, 14 N.Y.3d at 89; Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d at 568; Messina v. City of New York, 148 A.D.3d at 494; McCrea v. Arnlie Realty Co., 140 A.D.3d at 429.

IV. THIRD PARTY CLAIMS

Rock Group cross-moves for summary judgment dismissing the third party complaint by NYU and AWR, which claim contribution,

implied indemnification, contractual indemnification, and breach of a contract to procure insurance. NYU and AWR have discontinued their third party contractual indemnification claim, but cross-move for summary judgment on their implied indemnification claim against Rock Group.

A. Implied Indemnification and Contribution

NYU and AWR contend that, if they are liable for Pena's injury, Rock Group is liable to them for implied indemnification or at least contribution because Rock Group was responsible for providing safety equipment at the sidewalk bridge site, but failed to provide adequate equipment to Pena. Rock Group contends that, although it supplied materials, including safety equipment, to the site, because it was merely a supplier, it did not supervise the means or methods of Pena's work or engage in any negligent conduct that caused his injury as required to be liable for implied indemnification or for contribution.

Parties seeking implied indemnification absent a contract for that relief must demonstrate that they did not supervise or exercise control over the work that caused the injury and were not otherwise negligent in causing it and that the claimed indemnitor against which recovery is sought did actually supervise the work or was otherwise negligent in causing the injury. McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 378 (2011); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2013). Regarding the absence of supervision or negligence by NYU and AWR, they present the testimony of Warren Schinderman, AWR's

owner, that AWR was the exterior general contractor and masonry contractor for the construction project and hired Rock Group to install the sidewalk bridge. Although AWR retained a supervisor and another employee responsible for safety for the project, neither was at the work site until AWR's masonry work commenced, after Pena's injury. NYU and AWR also present the deposition testimony of Pena, Martinez, and Pablo Perrone, PJP Installer's president, that AWR did not direct or supervise PJP Installer's work. This evidence thus establishes the absence of actual supervision and of negligence by NYU and AWR. Gjeka v. Iron Horse Transp., Inc., 151 A.D.3d 463, 465 (1st Dep't 2017); Serowik v. Leardon Boiler Works Inc., 129 A.D.3d 471, 472 (1st Dep't 2015); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d at 10-11.

NYU and AWR point to Rock Group's provision of materials and equipment and procurement of the permit for the sidewalk bridge, but present no evidence of Rock Group's supervision of work or negligence. Provision of equipment and materials alone does not impose liability for the use of those materials or equipment. Naughton v. City of New York, 94 A.D.3d at 10. See Ahern v. NYU Langone Med. Ctr., 147 A.D.3d 537, 538 (1st Dep't 2017); DeSimone v. City of New York, 121 A.D.3d 420, 422 (1st Dep't 2014); Williams v. 7-31 Ltd. Partnership, 54 A.D.3d 586, 587 (1st Dep't 2008); Balbuena v. New York Stock Exch., Inc., 45 A.D.3d 279, 280 (1st Dep't 2007). Nor does Rock Group's procurement of the

permit for the sidewalk bridge, by itself, demonstrate that Rock Group supervised or controlled the work on or around the sidewalk bridge. See Kosovrasti v. Epic (217) LLC, 96 A.D.3d 695, 696 (1st Dep't 2012); Balthazar v. Full Circle Constr. Corp., 268 A.D.2d 96, 98-99 (1st Dep't 2000); Martinez v. 408-410 Greenwich St., LLC, 83 A.D.3d 674, 675 (2d Dep't 2011). While NYU and AWR contend that Rock Group provided safety equipment other than the sidewalk bridge itself, Pena, Martinez, and Perrone all testified that the workers provided their own personal protective equipment, and Perrone denied that Rock Group furnished either tools or personal protective equipment. The contention by NYU and AWR that Rock Group required PJP Installer to follow rules pertained only to New York City Department of Buildings codes and United States Occupational Safety and Health Administration regulations.

Further demonstrating Rock Group's lack of direction, supervision, or control, Pena testified that he interacted only with PJP Installer employees, and Martinez testified that only Perrone instructed him how to perform PJP Installer's job. NYU and AWR concede that Rock Group was uninvolved with erecting the sidewalk bridge other than supplying the equipment, but urge that Rock Group showed its supervision and control through subcontracting the sidewalk bridge construction to PJP Installer. The contractual requirements imposed on PJP Installer's construction of the sidewalk bridge, however, do not, without more, demonstrate Rock Group's exercise of actual supervision or

control over Pena's work on the sidewalk bridge. McCarthy v. Turner Constr., Inc., 17 N.Y.3d at 378; Naughton v. City of New York, 94 A.D.3d at 10-11. To demonstrate Rock Group's exercise of actual supervision or control, NYU and AWR must present evidence of its direct involvement with Pena's work or how it was performed, evidence that is nowhere in this record. Cahn v. Ward Trucking, Inc., 101 A.D.3d 458, 458-59 (1st Dep't 2012); Mitchell v. New York Univ., 12 A.D.3d 200, 200-201 (1st Dep't 2004).

The evidence that Rock Group only supplied materials for the sidewalk bridge and subcontracted its erection to PJP Installer and that the only Rock Group employee at the work site was a truck driver who delivered the sidewalk bridge components falls far short of establishing Rock Group's direction, supervision, or control of any work on the sidewalk bridge. Gjeka v. Iron Horse Transp., Inc., 151 A.D.3d at 465; Ahern v. NYU Langone Med. Ctr., 147 A.D.3d at 537-38; Naughton v. City of New York, 94 A.D.3d at 10-11. See Mora v. Sky Lift Distrib. Corp., 126 A.D.3d at 594. Since NYU and AWR have not met their burden to show Rock Group's negligence or actual supervision of Pena's work, the court denies their cross-motion for summary judgment on their implied indemnification claim. McCarthy v. Turner Constr., Inc., 17 N.Y.3d at 378; Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 479-80; Muriqi v. Charmer Indus. Inc., 96 A.D.3d 535, 536 (1st Dep't 2012); Landgraff v. 1579 Bronx Riv. Ave., LLC, 18 A.D.3d 385, 387 (1st Dep't 2005).

Since Rock Group, on the other hand, has shown the absence

of negligence or supervision by Rock Group, and NYU and AWR in turn have not even raised a factual issue regarding any such negligence or supervision, the court grants Rock Group's cross-motion for summary judgment insofar as its cross-motion seeks dismissal of the third party implied indemnification claim. Gjeka v. Iron Horse Transp., Inc., 151 A.D.3d at 465; 87 Chambers, LLC v. 77 Reade, LLC, 122 A.D.3d 540, 542 (1st Dep't 2014); Cahn v. Ward Trucking, Inc., 101 A.D.3d at 458-59; Naughton v. City of New York, 94 A.D.3d at 10. Finally, since Rock Group has shown its lack of negligence, the court also grants Rock Group summary judgment dismissing the third party contribution claim. Adagio v. New York State Urban Dev. Corp., 161 A.D.3d 624, 25 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d at 604; Wilk v. Columbia Univ., 150 A.D.3d 502, 503-504 (1st Dep't 2017); 87 Chambers, LLC v. 77 Reade, LLC, 122 A.D.3d at 542.

B. Breach of a Contract to Procure Insurance

Rock Group also seeks summary judgment dismissing the third party claim for breach of a contract to procure insurance because NYU was not a party to the contract between AWR and Rock Group and, since the contract required coverage only for Rock Group's exclusive negligence, because Rock Group was not negligent. The parties agree that the court may consider the contract presented as authenticated and admissible for purposes of the motion and cross-motions for summary judgment.

In ¶ 11 of the contract, Rock Group agreed to name in its

insurance policy AWR and any parties that AWR named in writing before the sidewalk bridge was installed:

> as additionally Insured as evidenced by a certificate of insurance that will be provided by Rock Group NY Corp upon request. Any coverage to additional Insured's [sic] shall apply only to occurrences that arise out of Rock Group NY Corps [sic] sole and exclusive negligence and which occur during the time period when Rock Group NY Corp or it's [sic] subcontractor are physically at the job site performing the "work" of assembling the equipment and/or disassembling the equipment at the end of the rental period.

Aff. of Eileen Fullerton Ex. N, at 6. The contract thus required Rock Group to name AWR as an additional insured for occurrences arising from Rock Group's "sole and exclusive negligence." The contract did not provide that negligence was a condition precedent to Rock Group's duty to insure.

While Rock Group has demonstrated its lack of negligence, Rock Group presents no admissible evidence that Rock Group complied with its contractual obligation to procure insurance covering AWR. Prevost v. One City Block LLC, 155 A.D.3d 531, 536 (1st Dep't 2017); Ortega v. Goldman Sachs Headquarters LLC, 150 A.D.3d 469, 470-71 (1st Dep't 2017). Rock Group also presents no evidence that AWR did not name NYU in writing to demonstrate that Rock Group owed no obligation to insure NYU. See Rodriguez v. Heritage Hills Socy., Ltd., 141 A.D.3d 482, 483 (1st Dep't 2016); Scekic v. SL Green Realty Corp., 132 A.D.3d 563, 566 (1st Dep't 2015).

Rock Group points out in reply that PJP Installer provided insurance coverage for NYU and AWR, but that fact, even if supported by admissible evidence, does not demonstrate Rock

Group's compliance with its contractual obligation. The contract between AWR and Rock Group does not suggest, let alone acknowledge, that such an arrangement would satisfy the obligation that Rock Group name as additional insureds in its insurance policy AWR and any parties that AWR named. See Pecker Iron Works of N.Y. v. Traveler's Ins. Co., 99 N.Y.3d 391, 393-94 (2003); Kwoksze Wong v. New York Times Co., 297 A.D.2d 544, 547 (1st Dep't 2002). Therefore the court denies Rock Group's cross-motion for summary judgment insofar as its motion seeks dismissal of the third party claim for breach of a contract to procure insurance.

V. CONCLUSION

For all the reasons explained above, the court grants plaintiffs' motion for summary judgment on the liability of defendants New York University and AWR Group under Labor Law § 240(1) and grants third party defendant Rock Group NY Corp.'s cross-motion for summary judgment to the extent of dismissing the third party claims for implied indemnification and contribution. C.P.L.R. § 3212(b) and (e). The court otherwise denies Rock Group NY Corp.'s cross-motion and denies the cross-motion by New York University and AWR Group in its entirety. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: December 21, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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