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SHORT FORM ORDER

INDEX No. 06-674
CAL. No. 09-02749OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 4-23-10 (#002)
MOTION DATE 4-23-10 (#003)
ADJ. DATE 12-2-10
Mot. Seq. # 002 - Mot D
003 - Mot D

PETER CIOFFI and DAWN CIOFFI, Plaintiffs, - against - TARGET CORPORATION, TARGET STORES, INC., WESTBURY HOLDING COMPANY, BAILIWICK DATA SYSTEMS, INC., BAILIWICK ENTERPRISES, LLC., BAILIWICK, LLC., and THE WHITING-TURNER CONTRACTING COMPANY, Defendants.	RUBIN & LICATESI, P.C. Attorney for Plaintiffs Plaintiff591 Stewart Avenue, 4th Floor Garden City, New York 11530 CASCONE & KLUEPFEL, LLP Attorney for Defendants Target, Westbury and Bailiwick 1399 Franklin Avenue, Suite 302 Garden City, New York 11530 AHMUTY, DEMERS & MCMANUS, ESQS. Attorney for Defendant Whiting-Turner 200 I.U. Willets Road Albertson, New York 11507
TARGET CORPORATION, TARGET STORES, INC., WESTBURY HOLDING COMPANY, BAILIWICK DATA SYSTEMS, INC., Third-Party Plaintiffs, - against - COMMUNICATION TECHNOLOGY SERVICES, Third-Party Defendant.	LEWIS JOHS AVALLONE AVILES Attorney for Third-Party Defendants 425 Broad Hollow Road Melville, New York 11747

Upon the following papers numbered 1 to 63 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; 33 - 47 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 48 - 53; 54 - 55; 56 - 57 ; Replying Affidavits and supporting papers 58 - 59; 60 - 61; 62 - 63 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further,

ORDERED that the motion by third-party defendant Communication Technology Services for summary judgment dismissing the complaint, third-party complaint, and all cross claims asserted against it is granted to the extent that (1) it seeks dismissal of so much of the plaintiff's complaint as alleges causes of action for common law negligence and violation of Labor Law §§ 241(6) and 200, (2) it seeks dismissal of the third-party plaintiffs' causes of action for common law indemnification, and (3) it seeks dismissal of the third-party cause of action seeking contractual indemnification in favor of Target Corporation, Target Stores, Inc. and Westbury-Holding Company, and is otherwise denied; and it is further

ORDERED that the motion by defendants Target Corporation, Target Stores, Inc., Westbury-Holding Company, Bailiwick Data Systems, Inc., Bailiwick Enterprises, LLC, and Bailiwick, LLC for summary judgment dismissing the complaint and for summary judgment on the issue of the third-party defendant's liability for common law and contractual indemnification is granted to the extent that it (1) seeks dismissal of so much of the plaintiff's complaint as alleges causes of action for common law negligence and violation of Labor Law §§ 241(6) and 200, and (2) seeks summary judgment on the issue of the third-party defendant's liability on the third-party cause of action seeking contractual indemnification in favor of Bailiwick Data Systems, Inc., Bailiwick Enterprises, LLC, and Bailiwick, LLC, and is otherwise denied.

The plaintiff was purportedly injured on July 11, 2005 when he fell from a ladder while performing renovation work at a Target Store located in Westbury, New York. The store was owned and/or operated by defendants/third-party plaintiffs Target Corporation, Target Stores, Inc., and Westbury Holding Company (hereinafter referred to collectively as Target). Defendant The Whiting-Turner Contracting Company (hereinafter Whiting-Turner) was contracted by Target to serve as the general contractor for the renovation of the store. In conjunction with the renovation of the store, Target contracted directly with defendant/third-party plaintiffs Bailiwick Data Systems, Inc., Bailiwick Enterprises, LLC, Bailiwick, LLC (hereinafter referred to collectively as Bailiwick) for the installation of voice, data, and paging cable. Bailiwick subcontracted the voice, data, and paging cable installations to third-party defendant Communication Technology Services (hereinafter CTS). The plaintiff, an employee of CTS, alleges that, at the time of the accident, he was utilizing a ladder in order to install speakers for a paging system in the pharmacy stock room, and the ladder buckled causing him to fall approximately 20 feet to the ground below.

The plaintiff commenced this action for personal injuries against the defendants asserting causes of action to recover damages for, *inter alia*, violations of Labor Law §§ 200, 240 (1) and 241 (6), and common-law negligence. Specifically, he alleges that the defendants were negligent in, *inter alia*, permitting and allowing the premises to be dangerous; failing to provide the requisite protective appliances, devices and equipment; failing to provide adequate protection, personnel and equipment; failing to provide a safe place and means to perform his work; permitting and allowing the ladder to be, become and remain in a broken and dangerous condition; failing to use suitable safety measures and safeguards; and allowing the floor around where the plaintiff was working to become and remain in a hazardous condition.

Defendants Target and Bailiwick commenced a third-party action against CTS seeking common law indemnification and contribution, contractual indemnification, and damages for failure to procure insurance. Defendant Whiting-Turner asserts cross claims for common law and contractual indemnification against Target, Bailiwick and CTS.

CTS now moves for summary judgment dismissing the complaint, third-party complaint and cross-claims against it on the grounds that the plaintiff's own actions were the sole proximate cause of his accident. In the alternative, CTS seeks (1) dismissal of the common law indemnification claims asserted against it on the grounds that they are barred by Workers' Compensation Law § 11; (2) summary judgment dismissing Whiting-Turner's cross claim for contractual indemnification on the grounds that it did not have a contract with Whiting-Turner; (3) summary judgment dismissing the third-party claims for contractual indemnification brought by Target and Bailiwick on the grounds that the agreement entered between them is void under General Obligations Law § 5-322.1; and (4) summary judgment dismissing the third-party claims for breach of contract for failure to procure insurance since they procured the requisite insurance.

By separate motion, Target and Bailiwick move for summary judgment dismissing the complaint and all cross claims asserted against them. Specifically, they contend that they are entitled to summary judgment (1) dismissing the claims alleging a violation Labor Law § 240 (1) because the plaintiff's conduct in using the ladder in question was the sole proximate cause of his injuries, (2) dismissing the claims alleging a violation of Labor Law § 241(6) because the Industrial Code provisions relied on are either overly broad or inapplicable, (3) dismissing the claims alleging a violation of Labor Law § 200 and common law negligence because they did not supervise, direct or control the manner in which the plaintiff performed his work. In addition, Target and Bailiwick seek a declaration that CTS is obligated to indemnify and defend them.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of its motion for summary judgment, CTS submits, *inter alia*, the pleadings, the verified bill of particulars, a photograph of the purported scene of the accident, the plaintiff's deposition testimony, the deposition testimony of Lance Burger on behalf of Bailiwick, the deposition testimony of Jerome Rego on behalf of Target, the deposition testimony of former Target employee Sandeep Singh, the deposition testimony of Philip Brooks on behalf of Whiting-Turner, the deposition testimony of Tim Sheehan on behalf of CTS, the master agreement between Bailiwick and CTS, the master agreement between Target and Bailiwick, a certificate of insurance, records from CTS safety policy talks prepared by the plaintiff, and an affirmed neurologic examination report.

In support of their motion for summary judgment, Target and Bailiwick submit, *inter alia*, the pleadings, the verified bill of particulars, the master agreement between Target and Bailiwick, the second amendment to the master agreement between Target and Bailiwick, the master agreement between Baliwick and CTS, the deposition testimony of the plaintiff, the deposition testimony of Timothy Sheehan on behalf of CTS, the deposition testimony of Lance Berger on behalf of Bailiwick, the deposition testimony of Jerome Rego on behalf of Target, the deposition testimony of former Target employee Sandeep Singh, and a photograph of the purported scene of the accident.

During his deposition, the plaintiff testified that, on the date of the accident, he was employed by CTS as a foreman on the Target renovation project. CTS provided the materials and safety equipment, as well as the majority of the tools, to be used at the work site. The safety equipment provided by CTS included two fiberglass A-frame ladders and three lifts. On the date of the accident, he was performing installation work and supervising one other CTS worker. He was informed by his supervisor, Tim Sheehan, that the paging system needed to be operational by the following day. He told his supervisor that he needed another man, but no additional man was provided. Shortly prior to the accident, the plaintiff was installing speakers, approximately twenty feet above the ground, in the pharmacy stock room. He accessed the area with a lift. After he completed the installation and removed the lift from the room he realized that his tool pouch was hanging from a pipe approximately 20 to 25 feet above the ground. The plaintiff did not want to bring the lift back in the room because he did not want to waste time and he was worried about causing further damage to the door frame, which he had purportedly scratched bringing the lift into the room. Instead, the plaintiff used a wooden A-frame ladder, approximately 12 to 15 feet in height, that was leaning against a wall in the stock room. He had never used a ladder in the area prior. This ladder was not a CTS ladder, and he did not know to whom it belonged. He opened the ladder and locked it into place. The ladder was a little wobbly as he climbed it, but it did not cross his mind that the ladder was not safe because he was "too busy" trying to get his work done. He was 7 or 8 steps from the bottom of the ladder and reaching for his tool pouch with both hands when the ladder suddenly buckled and he fell. He had no knowledge of what caused the ladder to buckle and come out from under him.

Turning first to the plaintiff's cause of action seeking to recover damages pursuant to Labor Law § 240 (1), this provision imposes a nondelegable duty upon owners, contractors, and their agents to "furnish or erect or cause to be furnished or erected safety devices which shall be so constructed, placed and operated as to give proper protection" (*see*, ***Martinez v Ashley Apts Co.***, 80 AD3d 734, 915 NYS2d 620 [2d Dept 2011]). An owner, contractor or agent who breaches this duty may be held liable in damages regardless of whether it had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). To impose liability pursuant to Labor Law § 240 (1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries (*see*, ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Canosa v Holy Name of Mary R.C. Church***, __AD3d__, 920 NYS2d 390 [2d Dept 2011]; ***Bin Gu v Palm Beach Tan, Inc.***, 81 AD3d 867, 917 NYS2d 661 [2d Dept 2011]; ***Wnetrzak v V.C. Vitanza Sons, Inc.***, 79 AD3d 939, 913 NYS2d 736 [2d Dept 2010]; ***Andro v City of New York***, 62 AD3d 919, 880 NYS2d 111 [2d Dept 2009]; ***Gittleson v Cool Wind Ventilation Corp.***, 46 AD3d 855, 848 NYS2d 709 [2d Dept 2007]). It is not a defense to liability pursuant to Labor Law § 240(1) that the plaintiff's fault contributed to the accident, unless it can be said that the plaintiff's conduct was the sole proximate cause of the accident as a matter of law (*see*, ***Balzer v City of New York***, *supra*; *see also*, ***Gallagher v New***

York Post, 14 NY3d 83, 896 NYS2d 732 [2010]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

The evidence submitted here fails to establish, as a matter of law, that the plaintiff's conduct was the sole proximate cause of his accident. The failure to use available safety equipment will not be deemed the sole proximate cause of a worker's injuries unless there were adequate safety devices available, the worker knew both that they were available and that he was expected to use them, and he chose for no good reason not to do so (*see*, ***Gallagher v New York Post***, 14 NY3d 83, 896 NYS2d 732 [2010]; ***Auriemma v Biltmore Theatre, LLC***, *supra*; ***Ortiz v 164 Atl. Ave., LLC***, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; ***Ritzer v 6 E. 43rd St. Corp.***, 57 AD3d 412, 871 NYS2d 26 [1st Dept 2008]). Assuming, *arguendo*, that the evidence submitted established that adequate safety devices were available at the job site, it nonetheless fails to eliminate all triable issues of fact as to whether the plaintiff knew that he was expected to use such safety devices and that he chose, for no good reason, not to do so (*see*, ***Tounkara v Fernicola***, _ AD3d _, 914 NYS2d 161 [1st Dept 2011]; ***Murray v Arts Ctr. & Theater of Schenectady, Inc.***, 77 AD3d 1155, 910 NYS2d 187 [3d Dept 2010]; *see also*, ***Guaman v New Sprout Presbyt. Church of N. Y.***, 33 AD3d 758, 822 NYS2d 635 [2d Dept 2006]; ***Moniuszko v Chatham Green, Inc.***, 24 AD3d 638, 808 NYS2d 696 [2d Dept 2005]). Accordingly, the branches of the defendants' and third-party defendant's motions which seek summary judgment dismissing so much of the complaint as seeks to recover damages pursuant to Labor Law § 240 (1) are denied.

With respect to the plaintiff's cause of action to recover damages pursuant to Labor Law § 241 (6), such provision requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). In order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Ramos v Patchogue-Medford School Dist.***, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see*, ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, the plaintiff alleges that the defendants violated the regulations found at 12 NYCRR §§ 23-1.16, 23-1.21, 23-1.5, 23-1.7, 23-1.30 and 23-2.1. The plaintiff further alleges violations of various Occupational Safety and Health Administration regulations. At the outset, the plaintiff's reliance on alleged violations of regulations promulgated by the Occupational Safety and Health Administration is misplaced as it is well settled that these regulations do not provide a basis for liability under Labor Law § 241 (6) (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 351; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***Cun-En Lin v Holy Family Monuments***, *supra*; ***Fisher v WNY***

Bus Parts, 12 AD3d 1138, 1140, 785 NYS2d 229 [4th Dept 2004]). Similarly, 12 NYCRR § 23-1.5 sets forth only a general safety standard and is, thus, incapable of supporting a Labor Law § 241 (6) claim or cause of action (*see*, ***Timmons v Barrett Paving Materials, Inc.***, 83 AD3d 1473, 920 NYS2d 545 [4th Dept 2011]; ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]).

The remainder of the regulations identified by the plaintiff as a basis for defendants' liability under Labor Law § 241 (6) were not applicable to the facts of this case and/or were not a proximate cause of the plaintiff's injuries (*see*, ***Canosa v Holy Name of Mary R.C. Church***, *supra*; ***Gittleson v Cool Wind Ventilation Corp.***, *supra*; ***Egan v Monadnock Constr., Inc.***, 43 AD3d 692, 841 NYS2d 547 [1st Dept 2007]). The regulations set forth at 12 NYCRR §§ 23-1.16 and 23-1.21, which set standards for safety belts and ladders, respectively, are inapplicable here because the evidence establishes that the defendants did not provide the plaintiff with any such device (*see*, ***Clavijo v Universal Baptist Church***, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]; ***Forschner v Jucca Co.***, *supra*; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 870 NYS2d 111 [2d Dept 2008]; ***Ferluckaj v Goldman Sachs & Co.***, 53 AD3d 422, 862 NYS2d 473 [1st Dept 2008]; ***Smith v Cari, LLC***, 50 AD3d 879, 855 NYS2d 245 [2d Dept 2008]; ***Dzieran v 1800 Boston Rd., LLC***, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]; *see also*, ***Maloney v J.W. Pfeil & Co., Inc.***, *supra*). In this regard, the evidence submitted established, as a matter of law, that the subject ladder did not belong to any of the defendants or to the third-party defendant. 12 NYCRR § 23-1.30, which pertains to illumination of work areas, is not applicable to the facts of this case as the plaintiff's testimony does not indicate that his accident was caused by insufficient light or that the amount of lighting fell below the specific statutory standard (*see*, ***Tucker v Tishman Constr. Corp. of N. Y.***, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007]; ***Herman v St. John's Episcopal Hosp.***, 242 AD2d 316, 678 NYS2d 635 [2d Dept 1997]; ***Bennion v Goodyear Tire & Rubber Co.***, 229 AD2d 1003, 645 NYS2d 195 [4th Dept 1996]). 12 NYCRR § 23-1.7 is not applicable to the facts of this case (*see*, ***Rau v Bagels N Brunch, Inc.***, *supra*). The plaintiff did not testify at his deposition that his accident was caused by a slippery hazard or any other hazard specified in 12 NYCRR § 23-1.7 (*see*, ***Spence v Island Estates at Mt. Sinai II, LLC***, *supra*; *see also*, ***Forschner v Jucca Co.***, *supra*; ***Timmons v Barrett Paving Materials, Inc.***, *supra*). Lastly, 12 NYCRR § 23-2.1 is inapplicable, as the plaintiff's injury did not occur as a result of improperly stored building material or equipment, did not occur in a passageway, walkway, stairway or other thoroughfare, and was not related to the improper disposal of debris (*see*, ***Moisa v Atlantic Collaborative Constr. Co., Inc.***, 83 AD3d 675, 922 NYS2d 405 [2d Dept 2011]).

In opposition, the plaintiff failed to raise a triable issue of fact as to the defendants' liability under Labor Law § 241 (6) (*see*, ***Wnetrzak v V.C. Vitanza Sons, Inc.***, *supra*; ***Gittleson v Cool Wind Ventilation Corp.***, *supra*). Accordingly, those branches of the defendants' and third-party defendant's motions which seek summary judgment dismissing so much of the complaint as seeks to recover damages pursuant to Labor Law § 241 (6) are granted.

With respect to the Labor Law § 200 and common-law negligence causes of action, Labor Law § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 352; ***Gasques v State of New York***, 59 AD3d 666, 873 NYS2d 717 [2d Dept 2009]; ***Dooley v Peerless***

Importers, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). Here, the plaintiff alleges that his injuries resulted both from the manner and method of the work at issue as well as from the existence of a defective condition on the premises. However, this allegation is controverted by the facts of this case, which establish that the accident at issue arose solely from the plaintiff's use of an allegedly defective and dangerous ladder and not from a defective condition on the premises (*see*, ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]). In addition, as noted *supra*, the evidence submitted establishes, as a matter of law, that the subject ladder did not belong to any of the defendants' in this action.

To be held liable under Labor Law § 200 and for common-law negligence when a claim arises out of the use of allegedly dangerous or defective equipment at the job site, the party to be charged must have possessed the authority to supervise or control the means and methods of the work (*see*, ***Reyes v Arco Wentworth Mgt. Corp.***, *supra*; ***Mancuso v MTA N.Y. City Tr.***, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]; ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Orellana v Dutcher Ave. Bldrs.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see*, ***La Veglia v St. Francis Hosp.***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, *supra*; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see*, ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; ***McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.***, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; ***Garlow v Chappaqua Cent. School Dist.***, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; ***Perri v Gilbert Johnson Enters.***, *supra*; *compare*, ***Mancuso v MTA N.Y. City Tr.***, *supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work is performed (*see*, ***La Veglia v St. Francis Hosp.***, *supra*; *cf.*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Hughes v Tishman Constr. Corp.***, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007]).

Here, the evidence submitted establishes that none of the defendants directed or controlled the means or methods by which the plaintiff performed his work (*see*, ***Canosa v Holy Name of Mary R.C. Church***, *supra*; ***Wnetrzak v V.C. Vitanza Sons, Inc.***, *supra*; ***La Veglia v St. Francis Hosp.***, *supra*; ***Rivera v 15 Broad St.***, 76 AD3d 621, 906 NYS2d 333 [2d Dept 2010]; ***Ramos v Patchogue-Medford School Dist.***, *supra*; ***Gittleson v Cool Wind Ventilation Corp.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Blessinger v Estee Lauder Cos.***, 271 AD2d 343, 707 NYS2d 78 [1st Dept 2000]). Indeed, the evidence submitted indicates that, as CTS foreman, the plaintiff himself was responsible for directing, controlling and supervising the work to be performed by CTS employees at the work site (*see*, ***Wade v Atlantic Cooling Tower Servs.***, 56 AD3d 547, 867 NYS2d 489 [2d Dept 2008]; ***Capolino v Judlau Contr.***, *supra*; ***Hughes v Tishman Constr. Corp.***, *supra*; ***Mohammed v Islip Food Corp.***, 24 AD3d 634, 808 NYS2d 389 [2d Dept 2005]; *compare*, ***Fassett v Wegmans Food Mkts.***, 66 AD3d 1274, 888 NYS2d 635 [3d Dept 2009]). Thus, the defendants established a *prima facie* entitlement to summary judgment dismissing so much of the complaint as seeks to recover damages for a violation of Labor Law § 200

and common law negligence

In opposition, the plaintiff failed to raise a triable issue of fact as to the defendants' liability under Labor Law § 200 or common law negligence (*see*, ***Wnetrzak v V.C. Vitanza Sons, Inc.***, *supra*; ***Gittleson v Cool Wind Ventilation Corp.***, *supra*; *see also*, ***Maloney v J.W. Pfeil & Co., Inc.***, *supra*). Accordingly, those branches of the defendants' and third-party defendant's motions which seek summary judgment dismissing so much of the complaint as seeks to recover damages pursuant to Labor Law § 200 and common law negligence are granted.

Turning next to those branches of the motions which seek summary judgment on the issues of common law and contractual indemnification. At the outset, the Court's computerized records indicate that, by stipulation, dated August 12, 2009, the plaintiff discontinued this action as against defendant Whiting-Turner. Accordingly, Whiting-Turner's cross claims for common law and contractual indemnification against Target, Bailiwick and CTS must be dismissed, and those branches of the motion by CTS, which seek dismissal of Whiting-Turner's cross claims for common law and contractual indemnification, are rendered academic.

The Court further notes that, in the affirmation in partial opposition to Target and Bailiwick's motion for summary judgment, counsel for CTS indicates that an agreement is in place whereby the insurer for third-party defendant CTS agreed to assume the defense of third-party plaintiff Bailiwick and to indemnify Bailiwick up to the limits of the policy. Such agreement, which had not been fully executed as of that date, was purportedly conditioned on Bailiwick discontinuing its third-party action against CTS. Notwithstanding the foregoing, this Court has not received any notice indicating that this agreement has been fully executed, that the third-party action has been withdrawn, or that the branches of the instant motions addressing the third-party action have been withdrawn. Accordingly, the Court will proceed with the determination of the branches of the motions before addressing the third-party action.

CTS established a *prima facie* entitlement to summary judgment dismissing the third-party complaint against it insofar as it seeks common law indemnification on behalf of Target and Bailiwick. Employers such as CTS who provide workers' compensation coverage are immune from tort liability except in a narrow class of cases in which the plaintiff has sustained a "grave injury" (*see*, Workers' Compensation Law § 11; ***Rubeis v Aqua Club***, 3 NY3d 408, 788 NYS2d 292 [2004]; ***Spiegler v Gerken Bldg. Corp.***, 35 AD3d 715, 826 NYS2d 674 [2d Dept 2006]). By statute, "grave injury" is both narrowly and completely described as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11; *see*, ***Rubeis v Aqua Club***, *supra*; ***Spiegler v Gerken Bldg. Corp.***, *supra*). Because the plaintiff's injuries, as alleged in his bill of particulars and described in his deposition testimony, do not fall within any of the enumerated categories, the plaintiff has not sustained a "grave injury" and the third-party cause of action seeking common-law indemnification against CTS is barred by the exclusivity provisions of the Workers' Compensation Law (*see*, ***Castilla v K.A.B. Realty, Inc.***, 37 AD3d 510, 829 NYS2d 691 [2d Dept 2007]). Third-party plaintiffs Target and Bailiwick do not oppose this branch of CTS's motion. Accordingly,

the branch of the motion by third-party defendant CTS seeking summary judgment dismissing the third-party cause of action for common law indemnification is granted and the branch of the motion by defendants Bailiwick and Target for summary judgment on the issue of CTS's liability for common law indemnification is denied.

The Workers' Compensation Law does not preclude Target and Bailiwick from pursuing a contractual indemnification claim against CTS, provided that such claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (Workers' Compensation Law § 11; ***Spiegler v Gerken Bldg. Corp.***, *supra*; *see*, ***Tullino v Pyramid Cos.***, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; ***Mantovani v Whiting-Turner Contr. Co.***, 55 AD3d 799, 869 NYS2d 544 [2d Dept 2008]; ***Castilla v K.A.B. Realty, Inc.***, *supra*).

CTS established a *prima facie* entitlement to summary judgment dismissing the third-party complaint against it insofar as it seeks contractual indemnification on behalf of Target. A review of the contracts submitted reveals the absence of a contractual provision by which CTS expressly agreed to contribution to, or indemnification of, Target. The right to contractual indemnification depends upon the specific language of the contract between the parties (*see*, ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]). In the instant matter, CTS did not contract directly with Target. Indeed, the contractual provision cited by Target in support of its contractual indemnification claim is contained within the contract between Bailiwick and CTS and only addresses contribution and indemnification responsibilities between those parties (*compare*, ***Mantovani v Whiting-Turner Contr. Co.***, *supra*). Contrary to Target's contentions, the provision stating that CTS shall be bound by the terms of the contract documents negotiated and agreed to between Bailiwick and Target does not constitute an express agreement on behalf of CTS to indemnify Target (*compare*, ***Spiegler v Gerken Bldg. Corp.***, *supra*).

Accordingly, the branch of the motion by CTS seeking summary judgment dismissing the third-party cause of action for contractual indemnification of Target is granted, and the cross-motion by Target and Bailiwick is denied to the extent that it seeks summary judgment on the issue of Target's entitlement to contractual indemnification from CTS.

In contrast, CTS failed to establish a *prima facie* entitlement to summary judgment dismissing the third-party complaint against it insofar as it seeks contractual indemnification on behalf of Bailiwick. The contract between Bailiwick and CTS specifically provides for contribution and indemnification by CTS on behalf of Bailiwick under certain situations. As is relevant to this action, the contract provides, *inter alia*, CTS "agrees to indemnify and hold harmless Bailiwick against any claim, including, but not limited to, workers' compensation, unemployment insurance, discrimination, breach of contract or tort action brought by subcontractor or its personnel." As the plaintiff in this action is a CTS employee, this provision is applicable. Contrary to CTS's contention, under the facts of this case, the provision is not rendered unenforceable as void under the General Obligations Law § 5-322.1. General Obligations Law § 5-322.1 is inapplicable to the facts of this case because the evidence submitted establishes, as a matter of law, that Bailiwick was not negligent in the happening of the plaintiff's accident and is only vicariously liable to the plaintiff (*see*, ***Picchione v Sweet Constr. Corp.***,

60 AD3d 510, 875 NYS2d 42 [1st Dept 2009]; ***Castilla v K.A.B. Realty, Inc.***, *supra*; ***Linarello v City Univ. of N.Y.***, 6 AD3d 192, 774 NYS2d 517 [1st Dept 2004]; *see also*, ***Brown v Two Exchange Plaza Partners***, 76 NY2d 172, 556 NYS2d 991 [1990]; ***Quevedo v New York***, 56 NY2d 150, 451 NYS2d 651 [1982]; cf., ***Armentano v Broadway Mall Props., Inc.***, 70 AD3d 614, 897 NYS2d 113 [2d Dept 2010]). Accordingly, the branch of the motion by CTS seeking summary judgment dismissing the third-party cause of action for contractual indemnification of Bailiwick is denied, and the cross motion by Target and Bailiwick is granted to the extent that it seeks summary judgment on the issue of whether Bailiwick is entitled to contractual indemnification from CTS.

Lastly, CTS established a *prima facie* entitlement to summary judgment dismissing the third-party complaint insofar as it alleges a cause of action for breach of contract for failure to procure insurance. In support of its motion for summary judgment, CTS submitted sufficient evidence, including a certificate of liability insurance, establishing that the requisite insurance was procured (*compare*, ***Powell v CVS Jerusalem N. Bellmore, LLC***, 71 AD3d 655, 896 NYS2d 139 [2d Dept 2010]). Bailiwick and Target do not oppose this branch of CTS's motion. Accordingly, the branch of the motion by CTS seeking summary judgment dismissing the third-party cause of action for breach of contract for failure to procure insurance is granted.

Dated: 9/29/11

A.J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION