[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A Madden Justice PART 11

Index Number : 115700/2008
ROBBINS, DANIEL
VS.
GOLDMAN SACHS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/16/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision & Order.

FILED

SEP 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 13, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

DANIEL ROBBINS and LOIS ROBBINS,

Plaintiffs,

-against-

Index No. 115700/08

GOLDMAN SACHS HEADQUARTERS, LLC and TISHMAN CONSTRUCTION CORP.,

Defendants.

----------X

GOLDMAN SACHS HEADQUARTERS, LLC and TISHMAN CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 590944/09

ZWICKER ELECTRIC CO., INC.,

Third-Party Defendant.

----------X

JOAN A. MADDEN, J.:

This is an action to recover damages for personal injuries sustained by a journeyman ironworker at 200 West Street in Manhattan (the premises) on November 7, 2008. Plaintiffs Daniel Robbins (hereinafter, Robbins) and Lois Robbins (together, plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment as to liability under Labor Law §§ 240 (1) and 241 (6) as against defendants/third-party plaintiffs Goldman Sachs Headquarters, LLC (Goldman Sachs) and Tishman Construction Corp. (Tishman). Goldman Sachs and Tishman oppose the motion. Third-party defendant Zwicker Electric Co., Inc. (Zwicker) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint. Goldman Sachs and Tishman oppose the cross motion.

BACKGROUND

Goldman Sachs was the owner of the premises on the date of the accident. Pursuant to an agreement dated July 9, 2004, Goldman Sachs hired Tishman as a construction manager on a construction project to build a 45-story building on the premises. Robbins was an employee of DCM Erectors, Inc., a structural steel contractor on the project. Zwicker was an electrical subcontractor that was hired to install temporary lighting on the site.

Robbins testified at his deposition that, on the date of his accident, he was assigned to erect miscellaneous steel on the mezzanine level of the premises (Robbins EBT, at 45). Robbins was instructed by his foreman, James Dufficy, to gather up tools and bring them to the work area (*id.* at 51-52). At the time of his accident, the ironworkers were going to hang a chainfall to erect a steel beam; as a result, scaffolding needed to be set up in order to erect the beam (*id.* at 66-67).

When Robbins entered the mezzanine area, Dufficy told Robbins to move a construction form that was in the way of where the scaffolding was to be placed (*id.*). Robbins described the form as being about eight feet long by three feet wide, grayish in color, and rusty and dirty (*id.* at 66). The form was not secured to anything (*id.* at 70). When Robbins and his foreman picked up the form at the same time, Robbins took one step and fell into a hole (*id.* at 71). Robbins testified that his body fell into the hole, and that he was hanging onto the edge of the hole with his right hand and then his left hand (*id.* at 71-72). The hole extended several levels to the ground floor (*id.* at 74-75). Dufficy and a co-worker then grabbed Robbins and pulled him out of the hole (*id.*). Robbins did not notice any markings on the form (*id.* at 68). Robbins testified that it was "dark" and that there was "poor light" in the work area (*id.* at 32). According to Robbins, there was no natural light coming into the mezzanine area (*id.*). Robbins testified that there were

temporary light bulbs on the mezzanine level, but also stated that "[m]ost of the time they're not working" (*id.*).

Dufficy states in an affidavit that he "ordered [Robbins] to help [him] move the form as [he] was going to put it off to the side so [they] could do [their] work" (Dufficy Aff., at 1). According to Dufficy, Robbins took a step with the form and fell into a hole that was under the form (*id.*). Dufficy did not know that there was a hole under the form, and was not advised that there were any holes in the area (*id.*). Dufficy states that the form was not tied down or secured, and that the form looked like garbage or leftover wood because there was dirt and debris all over the form (*id.*).

Roger Cettina, a general superintendent employed by Tishman, testified that planks or three-quarter-inch plywood were generally used to cover openings on the site (Cettina EBT, at 36). Cettina stated that the covers would be tied down with wire, nailed down to the deck, or cleated (*id.*). When shown a photograph of the area of the accident, Cettina stated that the form should have been secured to the floor, and that hazardous openings should have been marked with "an orange, red [or] bright color" (*id.* at 37-38). Cettina also testified that the lighting on the mezzanine level consisted of head streamers with light bulbs every 10 to 15 feet (*id.* at 38-39). According to Cettina, Zwicker provided the lighting for the mezzanine area, and was responsible for maintaining the lighting in the mezzanine area (*id.* at 39).

Anthony Papandrea testified at his deposition that he is a foreman employed by Zwicker (Papandrea EBT, at 9). Zwicker was required to maintain temporary lighting until the space was turned over to the next contractor (*id.* at 26). Papandrea stated that he walked the job site on a daily basis (*id.* at 29). Zwicker had "dozens" of workers on site to change light bulbs (*id.*).

Plaintiffs commenced the instant action on November 21, 2008, seeking recovery for common-law negligence and violations of Labor Law §§ 240 (1), 241 (6), and 200. The complaint alleges violations of the following sections of the New York State Industrial Code: "23-1.5; 23-1.7; 23-1.8; 23-1.15; 23-1.16; 23-1.17; 23-2; 23-24; 23.25; and 23-26" (Complaint, ¶ 9). Plaintiff Lois Robbins asserts a derivative claim for loss of consortium. On October 9, 2009, Goldman Sachs and Tishman impleaded Zwicker, asserting the following claims: (1) common-law indemnification; (2) contribution; (3) contractual indemnification; and (4) breach of contract.

DISCUSSION

"[T]he 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010], citing *Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]).

A. Plaintiffs' Motion for Summary Judgment

1. Labor Law § 240 (1)

Plaintiffs move for summary judgment as to liability on their Labor Law § 240 (1) cause

of action. Plaintiffs contend that Robbins was within the class of persons that the statute was designed to protect, since he fell into a hole up to his shoulders and was clearly exposed to the risk of falling to the floor below, the form was not secured in any way, and there were no barricades around the opening at the time of the accident. Plaintiffs assert that Goldman Sachs and Tishman may be held liable as premises owner and construction manager, respectively. Additionally, plaintiffs contend that neither comparative negligence nor assumption of risk are valid defenses to a Labor Law § 240 (1) claim.

In opposition to plaintiffs' motion under Labor Law § 240 (1), defendants argue that Robbins was not exposed to an elevation-related hazard, and that there is no evidence that any of the enumerated safety devices could have been used in connection with Robbins' work, because Robbins was working on a permanent, concrete floor. Defendants submit photographs of the form which purportedly show that it was marked with the words "danger" and "hole" (Bernstock Affirm. in Opposition, Exh. B), and assert that Robbins created the gravity-related risk by moving the construction form which uncovered the opening. Defendants contend that the First Department's decision in *Carpio v Tishman Constr. Corp. of N.Y.* (240 AD2d 234 [1st Dept 1997]), a case relied on by plaintiffs, is distinguishable from this case, because the opening in the floor was covered by the construction form until Robbins moved the form.

In their reply, plaintiffs respond that falls into unguarded openings are within the purview of Labor Law § 240 (1), relying upon *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.* (56 AD3d 264 [1st Dept 2008]), *Valensisi v Greens at Half Hollow, LLC* (33 AD3d 693 [2d Dept 2006]), and *O'Connor v Lincoln Metrocenter Partners* (266 AD2d 60 [1st Dept 1999]). Plaintiffs maintain that Robbins cannot be deemed the sole proximate cause of his injuries,

because defendants were clearly at fault for failing to cover the opening or guard it with barricades or place adequate warning signs around the opening, and because Robbins was injured while following the directions of his foreman.

Labor Law § 240 (1) provides, in pertinent part, that:

> "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 purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Thus, Labor Law § 240 (1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which proximately causes an injury (*Jock v Fien*, 80 NY2d 965, 967-968 [1992]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The contemplated hazards are "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured" (*Rocovich*, 78 NY2d at 514). The statute has been liberally construed to achieve its objectives (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235-236 [1st Dept 2009]).

To establish a cause of action under Labor Law § 240 (1), the a plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]). A plaintiff's comparative negligence is not a defense to liability under Labor Law § 240 (1) (*Rocovich*, 78 NY2d at 513).

Initially, the court notes that defendants have not disputed that Goldman Sachs and Tishman may be liable under section 240 (1) as premises owner and construction manager, respectively (*see Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011] [construction manager may be liable under section 240 (1) where it has the ability to control the activity which brought about the injury]).

The court rejects defendants' argument that plaintiffs' motion should be denied because they have not shown that Robbins was subjected to an elevation-related risk. In *Carpio* (240 AD2d 234, *supra*), the plaintiff was injured while painting the ceiling of the third floor of a building. As plaintiff was looking up at the ceiling, his foot backed into a hole in the floor, causing his leg to fall three feet below the surface to his groin area (*id.*). The First Department majority held that section 240 (1) applied, noting that:

> "the risk of injury existed because of the difference between the elevation level of the required work (the third floor), and a lower level (the bottom of the piping shaft), and common sense alone tells us that this accident was gravity-related. Plaintiff's partial fall through a hole at a construction site can hardly be characterized as only tangentially related to the effects of gravity.
>
> "The dissent correctly notes that Labor Law § 240 (1) does not apply merely because work is performed at elevated heights, but rather, applies only where the work itself involves risks related to differences in elevation. However, it misapplies this

> principle in concluding that no elevation-related risk existed because the plaintiff was working on a permanent concrete floor, and that this accident was no different from a situation where the plaintiff tripped on a pothole on the ground floor. Indeed it is the risk posed by elevation differentials at a construction site, not the permanency of the structure, which is determinative of the statute's applicability" (*id.* at 235-236 [internal quotation marks and citations omitted]).

In *Salazar v Novalex Contr. Corp.* (72 AD3d 418 [1st Dept 2010]), the plaintiff was injured while spreading concrete on the floor. The plaintiff's right leg fell into an open trench that was two feet wide, four feet deep, and between 10 and 15 feet long (*id.* at 419). The First Department held that "the basement floor on which plaintiff was walking immediately before his accident was equivalent to the floor on which the plaintiff *Carpio* was standing before he fell. The bottom of the trench into which plaintiff fell is no different from the bottom of the shaft in *Carpio*. Because the risk in this case was elevation-related, as in *Carpio*, Labor Law § 240 applies, and it was error for the motion court to dismiss plaintiff's claim under that section" (*id.* at 420).

In *O'Connor* (266 AD2d at 61), the plaintiff was injured when he fell into a three-foot by four-foot hole in the floor. The hole was covered by a piece of plywood which shifted and gave way (*id.*). The First Department, relying upon *Carpio*, held that plaintiff was engaged in work involving a gravity-related risk at the time of his injury (*id.*).

Here, Robbins was performing work involving a gravity-related risk at the time of his injury. Robbins fell into a hole up to his shoulders while removing a construction form, and was exposed to the risk of falling to the floor below. There is no dispute that the construction form was not secured in any way, and thus contrary to defendants' position, it cannot be said that the reasoning in *Carpio* does not apply simply because the form was covering the hole before

Robbins was asked to move it. Accordingly, section 240 (1) applies to Robbins' accident (*see Angamarca*, 56 AD3d at 265 [section 240 (1) held applicable where Robbins was injured after fall through skylight and had not been provided with any safety device or equipment to afford him protection from elevation-related hazard]; *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363 [1st Dept 2007] [section 240 (1) applied where laborer fell when an unsecured piece of plywood shifted, and no safety devices had been provided to prevent the laborer's fall]; *Valensisi*, 33 AD3d at 695 [worker was exposed to elevation-related risk, where worker was performing work in close proximity to two openings covered only with unsecured plywood boards, which had been cut into grating in order to provide access to equalization tank more than 20 feet below ground]; *Serpe v Eyris Prods.*, 243 AD2d 375, 377 [1st Dept 1997] [section 240 (1) applied to accident in which painter fell into a large, unprotected hole in floor where staircase was being built]).

Defendants' assertion that Robbins was the sole proximate cause of his injuries is also unavailing. To show that the Robbins was the sole proximate cause of an injury, the defendant must demonstrate that the Robbins "'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured'" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). If "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

Defendants argue that Robbins created the opening and disregarded the warnings on the

construction form, relying upon photographs which purportedly show that the form was marked with the words "danger" and "hole" in white spray paint (Bernstock Affirm. in Opposition, Exh. B). However, defendants have not offered any evidence that the photographs represent the conditions at the time of Robbins' accident to authenticate the photographs (*Young v Ai Guo Chen*, 294 AD2d 430, 431 [2d Dept 2002]; *Cuevas v City of New York*, 32 AD3d 372, 373 [1st Dept 2006]). Robbins testified that he did not see the warnings on the construction form (Robbins EBT, at 68). Robbins' foreman states that he did not know that there was a hole under the form, and that the form was covered with dirt and debris (Dufficy Aff., at 1). In any event, defendants' failure to cover the opening with a secure covering was a proximate cause of Robbins' accident. Moreover, the uncontroverted evidence shows that Robbins was directed by his foreman to remove the construction form. Thus, Robbins cannot be found to be the sole proximate cause of his accident (*see Harris v City of New York*, 83 AD3d 104, 110 [1st Dept 2011] [plaintiff was not the sole proximate cause of his accident where his foreman directed him to stand on top of piece of wood to keep it in place]; *Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008] [worker who died after falling through tempered glass skylight was not the sole proximate cause of his injuries where he was following the directions of his foreman and could not use safety rope system]; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 881 [2d Dept 2006] [plaintiff was not the sole proximate cause of his injuries where he was performing his work consistent with his supervisor's instructions]).

Accordingly, plaintiffs' motion for partial summary judgment under Labor Law § 240 (1) is granted as against Goldman Sachs, the building owner, and Tishman, the construction manager on the project. The issue of plaintiffs' damages shall await the trial in this action.

of section 23-1.7 (b) (1) (i). They maintain that the opening was covered by the construction form, and that the opening did not pose any danger until Robbins moved the construction form. Defendants also point out that photographs of the form show that it was marked with the words "danger" and "hole" (Bernstock Affirm. in Opposition, Exh. B). Thus, according to defendants, there are issues of fact as to whether Robbins was comparatively negligent in disregarding or failing to see the warnings.

Section 23-1.7 (b) (1) has been held to be sufficiently concrete to support a Labor Law § 241 (6) cause of action (*Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]; *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]). Courts have also held that the safety measures in section 23-1.7 (b) "'bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit'" into (*Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007], quoting *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]; *see also Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 [1st Dept 2009] [section 23-1.7 (b) (1) applies to hazardous openings of "significant depth and size"]; *Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 492 [1st Dept 2009] [same]). In *Salazar*, (72 AD3d 418, *supra*), the First Department held that the regulation applied where a worker, who was spreading fresh concrete on a basement floor, fell into a trench approximately four feet deep, two feet wide, and 10 to 15 feet long (*Salazar*, 72 AD3d at 422). In that case, the Robbins' entire right leg went into the trench, but his torso remained at floor level (*id.* at 419, 422).

Here, Robbins testified that the construction form covering the hole was not secured to anything, and that he fell into the hole up to his shoulders (Robbins EBT, at 70, 71). Robbins also testified that the hole extended down to the ground floor (*id.* at 75). Robbins' foreman,

James Dufficy, also states that the form "was not tied in or secured" (Dufficy Aff., at 1). Thus, the hole at issue qualifies as a "hazardous opening." Although defendants assert that there are triable issues of fact as to whether there was a violation of section 23-1.7 (b) (1), there is no dispute that the construction form was not "fastened in place," as required by the regulation (12 NYCRR 23-1.7 [b] [1] [i]). Tishman's own general superintendent testified that the construction form should have been tied down, nailed down, or cleated (Cettina EBT, at 36). There is also no evidence that safety railings had been constructed around the hole. Therefore, section 23-1.7 (b) (1) was violated as a matter of law.

Having considered whether 23-1.7 (b) (1) is specific and applicable and whether there was a violation of the regulation, the court must next address whether plaintiffs are entitled to summary judgment based upon a violation of this regulation. The First and Second Departments award plaintiffs summary judgment under section 241 (6) where the defendant fails to raise a triable issue of fact as to any defenses, including proximate cause and the plaintiff's comparative negligence (*Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 810 [2d Dept 2010]; *Catarino v State of New York*, 55 AD3d 467, 468 [1st Dept 2008]; *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008]; *Hayden v 845 UN Ltd. Partnership*, 304 AD2d 499, 500 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 83 [1st Dept 2002]; *but see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 350 [1998]). Indeed, in prior cases, the First Department has found that plaintiffs were entitled to summary judgment based upon violations of section 23-1.7 (b) (1) (*Tounkara v Fernicola*, 80 AD3d 470, 471 [1st Dept 2011]; *Olshewitz v City of New York*, 59 AD3d 309 [1st Dept 2009]; *Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]).

While defendants argue that Robbins was negligent in moving the construction form, and in disregarding the warnings on the form, the court concludes that defendants have failed to raise an issue of fact as to Robbins's comparative negligence or whether the violation was a proximate cause of his injuries. In moving the construction form, Robbins was following the directions of his foreman (Robbins EBT, at 66; Dufficy Aff., at 1). Robbins testified that it was dark on the mezzanine level, and that he did not know the hole was there (Robbins EBT, at 32, 65). Robbins and his foreman also indicate that the form was covered with dirt and debris at the time of the accident (*id.* at 66; Dufficy Aff., at 1). Therefore, plaintiffs are entitled to partial summary judgment under Labor Law § 241 (6) based upon a violation of 12 NYCRR 23-1.7 (b) (1).

B. Zwicker's Cross Motion for Summary Judgment

Zwicker, the electrical subcontractor, moves for summary judgment dismissing the third-party claims for contractual indemnification, common-law indemnification, and contribution.[1]

Section 7 of the subcontract between Zwicker and Tishman provides, in relevant part, as follows:

> "To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager, . . . from and against all claims or causes of action, damages, losses and expenses of every nature, including but not limited to attorneys' fees and legal costs and expenses, . . . arising out of or resulting from the performance of Contractor's Work, or the Contractor's operations, or the condition of the Site . . . *by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly related to any breach of statutory duty or to any willful or negligent act or failure to act by the Contractor*, its representatives, employees, servants, agents, subcontractors, delegates, or suppliers

[1]The court notes that Zwicker has not addressed the third-party claim for failure to procure insurance (Third-Party Complaint, Fourth Cause of Action). It is well settled that an agreement to procure insurance is distinct from an indemnification agreement (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Accordingly, Zwicker is not entitled to dismissal of the insurance procurement claim.

> and whether or not it is alleged that the Owner, Construction Manager, other Indemnitees or Architects in any way contributed to the alleged wrongdoing . . ."

(Bernstock Affirm. in Opposition, Exh. A [emphasis supplied]).

Zwicker argues, based upon the above language, that it is only required to indemnify Goldman Sachs and Tishman based upon an actual finding of negligence against it. Zwicker contends that there is no evidence that its work was either defective or deficient, or that it created or had notice of any hazardous condition which was a proximate cause of Robbins's accident.

Goldman Sachs and Tishman contend that there are issues of fact as to whether the lighting provided by Zwicker in the mezzanine area contributed to Robbins's accident.

"'The right to contractual indemnification depends upon the specific language of the contract'" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]).

In this case, Zwicker is required to indemnify Goldman Sachs and Tishman for any "claim or dispute . . . directly or indirectly related to any breach of statutory duty or to any willful or negligent act or failure to act by the Contractor" (Bernstock Affirm. in Opposition, Exh. A). Pursuant to Zwicker's subcontract, Zwicker was required to "furnish, install, maintain, and remove temporary light and power which will conform to all [OSHA], local codes, and state labor law and union requirements" (*id.*, Exh. A, Rider D). Robbins testified that, at the time of his accident, it was "dark" and that there was "poor light" in the work area (Robbins EBT, at 32). Additionally, Robbins testified that "[m]ost of the time [the temporary lighting was] not working" (*id.*). Robbins's foreman states in his affidavit that "[t]he floor was dark and not lit well at the time of the accident" (Dufficy Aff., at 1). Tishman's superintendent also testified that

Zwicker provided the temporary lighting on the mezzanine level (Cettina EBT, at 39). Viewing the evidence in the light most favorable to Goldman Sachs and Tishman, the court concludes that there are triable issues of fact as to whether Zwicker was negligent in providing temporary lighting on the mezzanine level and whether its negligence caused or contributed to Robbins's accident (*see Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223, 224 [1st Dept 2008] [issue of fact as to whether inadequate lighting contributed to accident precluded summary judgment for lighting subcontractor on owner's claim for indemnification]).

Zwicker also seeks summary judgment on the third-party claims for common-law indemnification and contribution for the same reasons. Common-law indemnification "permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability" of the parties (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]).

As indicated above, there are issues of fact as to whether Zwicker was negligent in

providing temporary lighting on the mezzanine level and whether its negligence caused or contributed to Robbins's accident. Therefore, Zwicker is not entitled to summary judgment dismissing the common-law indemnification and contribution claims asserted against it.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) based upon a violation of 12 NYCRR 23-1.7 (b) (1) is granted against defendants Goldman Sachs Headquarters, LLC and Tishman Construction Corp., with the issue of plaintiffs' damages to await the trial in this action; and it is further

ORDERED that the cross motion by third-party defendant Zwicker Electric Co., Inc. for summary judgment is denied; and it is further

ORDERED that a pretrial conference shall be held in Part 11, room 351, on October 27, 2011 at 3:45 pm.

FILED

SEP 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: ~~August~~ September 13, 2011

ENTER:

J.S.C.