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

PRESENT: DORIS LING-COHAN PART 36

Justice

Index Number : 115545/2008

MAYO, MANUEL

VS.

METROPOLITAN OPERA ASSOCIATION

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion ~~to~~/for ~~summary judgment~~

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5
Replying Affidavits	6, 7

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiffs Manuel Mayo and Isabel Mayo is decided in accordance with the attached memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

(consolidated for disposition with motion sequence numbers 7, 8, 9, 10, 11 & 13)

Dated: 10-13-2011

DORIS LING-COHAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

MANUEL MAYO and ISABEL MAYO,

Plaintiffs,

Index No.: 115545/08
DECISION/ORDER

-against-

Motion Seq. No.: 006, 007, 008, 009, 010, 011 & 013

METROPOLITAN OPERA ASSOCIATION, INC. and LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,

Defendants.

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METROPOLITAN OPERA ASSOCIATION, INC.,

Third-Party Plaintiff,

Index No.: 590119/09

-against-

STRAUSS PAINTING, INC., CREATIVE FINISHES LIMITED and NOVA CASUALTY COMPANY,

Third-Party Defendants.

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HON. DORIS LING-COHAN, J.S.C.:

This decision disposes nine motions (seven motions and two cross motions) for, *inter alia*, summary judgment that were submitted by various parties in the instant underlying action for personal injury/negligence and the third-party indemnity/contribution action that follows it (motion sequence numbers 006, 007, 008, 009, 010, 011 and 013).

BACKGROUND

Although the court briefly discussed the facts of this case in its prior decision, dated October 8, 2009 (motion sequence number 001), the instant motions require a more lengthy review. With respect to the parties, on September 16, 2008, plaintiff Manuel Mayo (Mayo) was injured after falling from a 15 foot ladder in the Metropolitan Opera House building (the

building), which is located at Lincoln Center in the County, City and State of New York. *See* Notice of Motion (motion sequence number 006), Faegenburg Affirmation, ¶ 2. The building is owned and operated, respectively, by defendants Lincoln Center for the Performing Arts, Inc. (Lincoln Center) and the Metropolitan Opera Association, Inc. (the Met). *Id.*, ¶ 3. At the time of his injury, Mayo was employed as a laborer by third-party defendant Creative Finishes Limited (Creative). *Id.*, ¶ 2. On September 3, 2008, the Met had executed a contract (the general contract) that engaged both Creative and third-party co-defendant Strauss Painting, Inc. (Strauss), as "contractors" to perform work at the building consisting of scraping and repainting the steel carriage rails that run along the building's roof, and that support the carriage that is used by the building's mechanical window washing system. *Id.*, ¶ 4; Exhibit B. On the same day, Strauss executed a subcontract (the subcontract) with Creative to actually perform this work. *Id.*; Mitchell Affirmation in Opposition to Motion (motion sequence number 007), Exhibit C.

Regarding the circumstances of his accident, Mayo stated that the 15-foot-tall ladder that he fell from was affixed to a wall on the building's sixth floor, and that the ceiling above it led out to building's roof where the afore-mentioned carriage rails were located. *See* Notice of Motion (motion sequence number 006), Exhibit E, at 22, 29-30. Mayo also stated that the hatch above the ladder, which opened onto the building's roof, would not close properly. *Id.* at 33-35. Mayo specifically stated that, in order to close the hatch at the end of his painting shift on September 16, 2008, he had to climb to the top of the ladder and pull on the hatch with both hands. *Id.* at 42-48. Mayo further stated that, as a result of his having to use both hands to close the roof hatch, he slipped from the ladder's third to the top rung and fell approximately 15 feet to the floor below. *Id.* at 48-49. Mayo finally stated that he had discussed the problem with closing

the hatch with his co-workers on several occasions, starting from the first day that they began work at the building. *Id.* at 30-38.

Mayo's co-worker, Angel Rodriguez (Rodriguez), was present at the time of Mayo's injury. *See* Notice of Motion (motion sequence number 006), Exhibit H, at 13. Rodriguez stated that the roof hatch was "broken," and that it required two hands to close. *Id.* at 13, 23-28, 33-34. Rodriguez also stated that the ladder's top rung was a mere 1 ¼ inches from the ceiling, and that there was a wooden plank affixed to the wall behind the top and second to the top rungs, and that this lack of clearance made it very difficult to grip either of those rungs. *Id.* at 30-31. Rodriguez further stated that Creative gave its workers safety harnesses to use on the building's roof after a scaffold had been erected there, but that the scaffold had not been erected, and the safety harnesses had not been supplied, at the time of Mayo's injury. *Id.* at 35-37. Rodriguez noted that he and the other workers had not been supplied with safety belts to use on the ladder to the roof, and that the ladder itself was not equipped with safety features. *Id.* at 35, 37. Finally, Rodriguez stated that he had informed supervisors for both Creative and the Met that the hatch door was broken and difficult to close while standing on the ladder. *Id.* at 25-29.

Another of Mayo's co-workers, Toshi Cole (Cole), was also present when Mayo was injured. *See* Notice of Motion (motion sequence number 006), Exhibit I, at 33-34, 72. Cole confirmed that the ladder's top two rungs were difficult to grip, and stated that he himself had tried unsuccessfully to close the roof hatch immediately before Mayo made his attempt to do so. *Id.* at 34-37. Cole also stated that, although Creative had supplied its workers with safety harnesses to use while working on the building's roof, they had left these harnesses on the roof, that the ladder itself was not equipped with either a harness or a safety cage, and that no one

supplied him with a safety harness to use on the ladder. *Id.* at 17-19, 48-50, 61. Finally, Cole stated that he had discussed the difficulty in closing the hatch while standing on the ladder with both his co-workers and with Creative's foreman. *Id.* at 28.

Finally, Mayo has presented an expert's report by engineer Richard Berkenfield (Berkenfield). *See* Notice of Motion (motion sequence number 006), Exhibit N. Berkenfield concludes that the ladder was unsafe because there was insufficient clearance between the top two rungs and the wall to allow a person ascending the ladder to get a solid grip on those rungs, and because there was no cage or other safety features on the ladder. *Id.* at 3-5. Berkenfield also concludes that the foregoing conditions constitute a violation of the applicable safety requirements promulgated by the American National Standard Institute (ANSI). *Id.*

Lincoln Center was deposed on March 3, 2010 by its chief engineer, Ronald Busch (Busch). *See* Notice of Motion (motion sequence number 006), Exhibit D. Busch stated that the building in which Mayo was injured, the ladder and the roof hatch, all belonged to the Met rather than to Lincoln Center. *Id.* at 11-12. Busch also stated, however, that Lincoln Center paid a portion of the cost of the scraping and repainting of the window washing system's steel carriage rails, because those rails ran along the roof to a portion of the building that is under Lincoln Center's control. *Id.* at 11. Busch acknowledged that the ladder that Mayo fell from was not equipped with any safety features. *Id.* at 102-103. He also acknowledged that the roof hatch was of a type that required two hands to close. *Id.* at 100-101. Finally, Busch noted that the particular roof hatch that Mayo was gripping at the time of his fall was replaced on November 13, 2008, shortly after Mayo's September 16, 2008 accident. *Id.* at 62-64. Busch stated that he himself did not recall having had any difficulty in closing the hatch. *Id.* at 51-53.

The Met was deposed on December 23, 2009 via its house manager, James Naples (Naples). *See* Notice of Motion (motion sequence number 006), Exhibit C. Naples acknowledged that the Met had retained Strauss and Creative to perform the work that is the subject of this action. *Id.* at 12-14. Naples also acknowledged that the ladder that Mayo fell from did not have a safety cage or any other safety features and that no maintenance had ever been performed on it. *Id.* at 34, 41-44. Naples stated, however, that the building in which Mayo was injured was owned by Lincoln Center, and that the Met was merely a tenant therein. *Id.* at 90-91, 127-128. To Naples knowledge, the Met had not provided either Mayo or any of his co-workers with any safety equipment to use on the building's roof. *Id.* at 46-48. Naples also stated that he didn't inspect the accident site after Mayo's injury, or recall anything about the condition of the subject ladder or hatch. *Id.* at 71-73.

Strauss and Creative were both deposed on February 19, 2010 via Ralph Drewes (Drewes), who alternately described himself as a "vice president" of both companies, and denied that he was an officer or employee of either of them. *See* Notice of Motion (motion sequence number 006), Exhibit G. Regarding the relationship between Strauss and Creative, Drewes stated that Victor Strauss is the president of the former company, and that Hillary Klein (Klein) is the president of the latter, but that he himself was responsible for "running the day-to-day operations of" both companies. *Id.* at 8-10. Drewes admitted that he had executed the general contract with Naples of the Met on behalf of Strauss,[1] and that Victor Strauss thereafter executed the subcontract (on behalf of Strauss) with Klein (on behalf of Creative), although his own [i.e.,

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[1] As will be discussed, however, the general contract that Drewes executed actually names *both* Strauss and Creative as "contractors." *See* Notice of Motion (motion sequence number 006), Exhibit B.

Drewes's] initials also appear next to Klein's signature. *Id.* at 13; Mitchell Affirmation in Opposition to Motion (motion sequence number 007), Exhibit E, at 13. Drewes also admitted that he had executed contracts on behalf of both Strauss and Creative on other occasions. *Id.* at 31-32; 35. Drewes further stated that Creative did not supply any safety equipment at the work site, but acknowledged that Strauss did supply some equipment, consisting of "hard hats, safety belts, line yards [*sic*], respirators [and] goggles," which it kept locked in a gang box on the building's roof. *Id.*; Notice of Motion (motion sequence number 006), Exhibit G, at 17, 19. Drewes stated, however, that none of that safety equipment was either designed for use in ascending the ladder to the roof, and that it was kept on the roof because it was intended to be used only there. *Id.* at 27-31. Drewes stated that no one had ever complained to him about the condition of either the subject ladder or the roof hatch. *Id.* at 21. Drewes also stated that, subsequent to Mayo's injury, he inspected the accident site and found that the hatch opened and closed freely. *Id.* at 22.

The general contract that the Met executed on September 3, 2008 named both Strauss and Creative as "contractors." *See* Notice of Motion (motion sequence number 006), Exhibit B. However the final page was signed by Naples, on behalf of the Met, and Drewes, on behalf of Strauss. *Id.* The relevant portions of the general contract provide as follows:

ARTICLE 10 - CONTRACTOR

> 10.11 To the fullest extent permitted by law, the Contractor [i.e., Strauss/Creative] shall indemnify and hold harmless the Owner [i.e., the Met] ... from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense: (1) is attributable to bodily injury ..., and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly

employed by any of them ..., regardless of whether or not it is caused in part by a party indemnified hereunder. ... In any and all claims against the Owner ... by the employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them ... the indemnification obligation under this Paragraph 10.11 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workers' or workmen's compensation acts, disability benefits acts or other employee benefits acts. ...

ARTICLE 11 - SUBCONTRACTS ...

11.2 Contracts between the Contractor [i.e., Strauss/Creative] and the Subcontractors [i.e., Creative] shall (1) require each Subcontractor, to the extent of the work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner ... and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by the Contract Documents.

ARTICLE 17 - INSURANCE

17.1 Contractor's liability insurance shall be purchased and maintained by the Contractor to protect him from claims under workers' or workmen's compensation acts and other employee benefits acts, claims for damages because of bodily injury ... which may arise out of or result from the Contractor's operations under this Contract, whether such operations be by himself or by any Subcontractor or anyone directly or indirectly employed by any of them. This insurance ... shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 10.11. ...

17.2 The Owner shall be responsible for purchasing and maintaining his own liability insurance and, at his option, may maintain such insurance as will protect him against claims which may arise from operations under the Contract.

EXHIBIT "D" - INSURANCE REQUIREMENTS

a. Workman's Compensation Insurance covering contractor's employees meeting all statutory requirements prescribed in New York State.

b. Owners and contractors protective liability Insurance with a combined single limit of $5,000,000.00. Liability should add [the Met] as an additional insured and should include contractual liability and completed operations coverage.

c. Comprehensive General Liability. Combined coverage for property and

bodily injury with a minimum single limit of $5,000,000.00 (Limits may be met with an "Umbrella Policy.").
d. Contractor will supply [the Met] with a Hold Harmless and indemnify them against any and all claims arising from their work relative to this agreement.

Id.; Exhibit B.

As previously mentioned, the subcontract was also executed on September 3, 2008 by Victor Strauss on behalf of Strauss as the "contractor," and Klein, on behalf of Creative as the "subcontractor."[2] *See* Mitchell Affirmation in Opposition to Motion (motion sequence number 007), Exhibit C. The relevant portions of the subcontract provide as follows:

Article 1 - The Subcontract Documents

1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract [i.e., the general contract]...between the Owner and Contractor and the other Contract Documents enumerated therein ...; (3) other documents listed in Article 16 of this Agreement; and (4) Modifications to this Subcontract issued after execution of this Agreement.

Article 4 - Subcontractor ...

4.6 - Indemnification
4.6.1 To the fullest extent permitted by law, the Subcontractor [i.e., Creative] shall indemnify and hold harmless the Owner [i.e., the Met] and/or the Contractor [i.e., Strauss] and employees of either of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [Creative's] Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... caused in whole or in part by negligent acts or omissions of [Creative] ... anyone directly or indirectly employed by them ... regardless of whether or not such claim, damage, or loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6.
4.6.2 In claims against any person or entity indemnified under this Paragraph 4.6 by an employee of [Creative] ... the indemnification obligation under this

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[2] The subcontract also designates the Met as "the owner." *See* Mitchell Affirmation in Opposition to Motion (motion sequence number 007), Exhibit C.

paragraph 4.6 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for [Creative] under Workers' or Workmen's Compensation acts or other employee benefit acts. ...
4.6.4 [Creative] waives all rights against [Strauss], [the Met] ... and their agents, officers, directors and employees for the recovery of damages to the extent that these damages are covered by Commercial General Liability Umbrella Liability, business auto liability or workers compensation and employer's liability maintained per insurance requirements stated above.

Rider A - General Requirements and Checklist

Your scope of work is all work of your trade ("Work") called for to be performed in accordance with all Contract Documents, including but not limited to the following: ...

5. Provide all specified insurance coverage. Provide all additional insureds as required. Provide all "hold harmless" clauses as required.

Attachment - Subcontractors Safety Requirement

[Creative] acknowledges that it understands the safety requirements set forth herein, and shall implement and enforce the following safety requirements throughout its stay on this project: ...

B) [Creative] shall submit to [Strauss] prior to the start of work a Job Specific Safety Program which outlines the scope of work involved with their operation, any special equipment that will be utilized, potential safety exposures to the workers ... that may be encountered during the course of the operation and an outline and description of controls that [Creative] will implement and enforce to control these exposures to ensure the safety of the workers and public.

C) [Creative] in addition to adhering to their own Job Specific Safety Program shall also adhere to the [Strauss] Job Specific Safety Program and the safety direction of the Strauss Safety Director, Project Manager and Project Superintendent.

D) [Creative] shall be solely responsible for the safety of its employees. Nothing in this document or the contract shall be construed to reduce in any way that responsibility of [Creative] or to create any duty or responsibility of [Strauss] to provide or enforce safety requirements for [Creative] ...

M) [Creative] shall agree to hold harmless and to indemnify [the Met], Engineer/architect and [Strauss] from and on account of any lawsuits, damages and out-of-pocket loss, including costs and reasonable attorney fees in relation to any safety violation by reason of any acts or omissions by

> [Creative], or any acts or omissions of [Creative's] officers, directors, employees, agents or consultants.

Id.

On November 5, 2008, Creative obtained a general commercial liability insurance policy (the GCL policy) from third-party defendant Nova Casualty Company (Nova). *See* Notice of Motion (motion sequence number 006), Exhibit D. The "additional insured endorsement" to the GCL policy named both the Met and Strauss as "additional insureds" for purposes of policy coverage. *Id.*; Exhibit E. That endorsement specifically provides that:

> A. Section II - Who Is An Insured is amended to include as an insured any ... organization for whom you are performing operations when you and such ... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured on your policy. Such ... organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A[n] ... organization's status as an insured under this endorsement ends when your operations for that insured are completed.

Id. The "commercial general liability coverage form" portion of the GCL policy provides, in pertinent part, as follows:

> Section I - Exclusions
>
> 1. Insuring Agreement ...
>
> d. "Bodily injury"... will be deemed to have been known to have occurred at the earliest time when any insured [i.e., the Met] ... or any employee authorized by you to give or receive notice of an "occurrence" or claim:
>
> (1) reports all, or any part, of the "bodily injury" ... to us or any other insurer;
>
> (2) receives a written or verbal demand or claim for damages because of the "bodily injury" ...; or
>
> (3) becomes aware by any other means that "bodily injury" has occurred ... .
>
> Section IV - Commercial General Liability Conditions ...

2. Duties in the Event of an Occurrence, Offense, Claim or Suit.
   a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
      (1) How, when and where the "occurrence" or offense took place;
      (2) The names and addresses of any injured persons and witnesses; and
      (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

Id. Creative sent the Met a certificate of insurance that plainly states that "certificate holder [the Met] and Strauss Painting are included as additional insureds." *See* Mitchell Affirmation in Reply, Exhibit F. After Mayo commenced the instant action, the Met alleges that it received copies of the summons and complaint from the New York Secretary of State on November 26, 2008, and from Mayo's counsel on December 4, 2008. *See* Notice of Motion (motion sequence number 010), Exhibits G, H. The Met further alleges that, on December 5, 2008, its general counsel sent a letter to Strauss and Creative at their shared office demanding indemnification from those parties, and that the general counsel sent a second letter containing the same demand on December 11, 2008. *Id.*; Exhibits I, J. The Met next alleges that its general counsel forwarded copies of that correspondence to the Met's insurance broker, who, in turn, forwarded it to the Met's own insurance carrier, Travelers Insurance Company (Travelers). *Id.*; Mitchell Affirmation, ¶ 21. The Met alleges that its insurance carrier sent a third demand letter to Strauss, Creative and Nova on December 29, 2008. *Id.*; Exhibit L. Finally, the Met presents a copy of a letter from Nova to the Met's insurance carrier (Travelers), dated January 28, 2009, that stated that Nova disclaimed coverage on the ground that the Met breached the notice provision of the GCL policy by failing to report the occurrence of Mayo's accident in a timely fashion. *Id.*; Exhibit M. The

Met also notes that Nova never directly sent *it* a disclaimer letter (disclaimer was sent only to the Met's insurance carrier, Travelers). *Id.*; Mitchell Affirmation, ¶ 24.

Mayo commenced this action on November 19, 2008 by serving a summons and complaint that sets forth causes of action for: 1) common-law negligence; 2) violation of Labor Law § 200; 3) violation of Labor Law § 240 (1); 4) violation of Labor Law § 241 (6); 5) violation of Industrial Code §§ 23-1.5, 23-1.7 and 23-1.21; and 6) loss of consortium (on behalf of co-plaintiff Isabel Mayo). *See* Notice of Motion (motion sequence number 006) Exhibit N. Defendants filed timely answers. *Id.* Thereafter, the Met commenced its third-party action on February 6, 2009, by serving a summons and complaint that set forth causes of action for: 1) common-law indemnification (against Strauss and Creative); 2) contractual indemnification (against Strauss and Creative); 3) breach of contract (against Strauss and Creative); and 4) breach of contract (against Nova). *Id.* The third-party defendants served their respective answers and, thereafter, Strauss served an amended answer that included a cross-complaint against Creative that sets forth claims for: 1) contractual indemnification; 2) common-law indemnification; and 3) court costs and attorney's fees. *See* Notice of Motion (motion sequence number 009), Exhibit F. In a decision dated October 8, 2009, this court granted the third-party defendants' motion for partial summary judgment to the extent of dismissing the Met's first cause of action for common-law indemnification as against Creative only (motion sequence number 001). *See* Notice of Motion (motion sequence number 007), Exhibit D.

Now before the court is Mayo's motion for partial summary judgment on the issue of liability on his third cause of action (violation of Labor Law 240[1]), the Met and Lincoln's cross-motion for summary judgment dismissing the complaint, as well as five other motions and a

cross-motion for summary judgment with respect to the third-party complaint, and a motion to amend Creative's third-party answer; nine (9) motions in total.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion 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 e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Now, after careful consideration, the court disposes of the instant motions and cross motions as follows.

I. Plaintiff's Motion for Partial Summary Judgment on the Complaint (motion sequence number 006)

In his motion, Mayo requests partial summary judgment on the issue of liability on his third cause of action for violation of Labor Law § 240 (1). In response, the Met and Lincoln

Center cross-move for summary judgment to dismiss the entire complaint. For purposes of clarity, the court will dispose of Mayo's motion first and defendants' cross-motion second.

With respect to Mayo's third cause of action, 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 Court of Appeals holds that the hazards contemplated by the statute "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 the materials or load being hoisted or secured." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991). This statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 342 (2008). A plaintiff is required "to show that the statute was violated and that the violation proximately caused his injury." *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 (2004).

Here, Mayo argues that his accident falls squarely within the purview of Labor Law § 240 (1) because there is sufficient evidence of both a violation and causation. *See* Notice of Motion (motion sequence number 006), Faegenburg Affirmation, ¶¶ 22-35. With respect to the former element, Mayo notes that the Appellate Division, First Department, has long recognized that fixed-wall ladders are "specifically included within the statute's coverage." *Spiteri v Chatwal*

Hotels, 247 AD2d 297, 299 (1st Dept 1998), citing *Oprea v New York City Hous. Auth.*, 226 AD2d 310, 311 (1st Dept 1996). Here, there is no doubt that Mayo had to ascend a fixed-wall ladder at the building in order to perform his scraping and painting work on the roof above it. Nevertheless, in their cross-motion, defendants raise three arguments in support of their contention that Mayo has failed to establish that the condition of the ladder violated Labor Law § 240 (1).

Defendants first cite to the decision of the Appellate Division, Second Department, in *O'Donoghue v New York City School Constr. Auth.* (1 AD3d 333 [2d Dept 2003]), in which the plaintiff, while ascending a ladder affixed to the wall, fell after being struck in the head by a hatch that fell and closed on him while he was attempting to pass through it. The Second Department overturned the trial court's ruling and dismissed the plaintiff's Labor Law § 240 (1) claim on the ground that the hatch did not constitute a "falling object" against which the statute was designed to afford protection. *Id.* at 335. Defendants argue that the *O'Donoghue* holding mandates the dismissal of Mayo's claim because the hatch at issue in this action is, similarly, not a "safety device" within the meaning of Labor Law § 240 (1). *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶ 23.

Mayo replies that this holding is both factually inapposite and bad law. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 26-27. The court agrees that the within case is distinguishable. Mayo does not contend that the instant hatch fell on him, but only that he fell while trying to close it. Also, although Mayo's moving papers occasionally describe the hatch as "defective," he has never advanced an argument that the hatch's purported defects (such as the hatch fell on him) caused his injuries, but has, instead, maintained that the condition of the *ladder*

violated the statute because it lacked safety features, and that this was the proximate cause of his injuries. Thus, the court agrees that *O'Donoghue* is inapposite, since it applies to both a different factual scenario - i.e., a falling hatch - and a different elevation-related risk - i.e., a worker positioned below a load being hoisted above him. Mayo also argues that *O'Donoghue* is no longer good law because it has been "overruled" by the Court of Appeals' decision in *Runner v New York Stock Exchange, Inc.* (13 NY3d 599 [2009]). *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 26. This does not appear to be entirely accurate; however, the court need not address Mayo's contention since *O'Donoghue* is not controlling under the within facts.

Defendants next cite the Second Department's recent decision in *Walker v City of New York* (72 AD3d 936 [2d Dept 2010]), in which the plaintiff, while ascending a fixed-wall ladder from a subterranean sewer, fell after an inflatable support device that he had placed in the sewer burst and caused him to lose his grip. The court upheld the trial court's dismissal of the plaintiff's Labor Law § 240 (1) claim on the ground that the ladder itself was a "proper safety device[] ... entirely sound and in place." *Id.* at 937. Defendants argue that the instant ladder is, similarly, "not defective." *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶ 24.

Mayo replies that the ladder that he fell from *did* violate the statute because its top two rungs were unusable (due to inadequate clearance between those rungs and the wall to which the ladder was affixed), and because the ladder lacked a safety cage or other safety device. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶¶ 25, 27-28. Mayo cites to Berkenfield's engineer's report to support his argument. *Id.* at 27. Mayo also cites to the

Appellate Division, First Department's, decision in *Mennis v Commet 380, Inc.* (54 AD3d 641 [1st Dept 2008]), in which the Court upheld the trial court's finding of liability pursuant to Labor Law § 240 (1) where the fixed-wall ladder that the plaintiff fell from had water regularly sprayed onto it from cooling towers located above a roof hatch, and thus rendering it periodically slippery.

Mayo further cites the First Department's decision in *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.* (10 AD3d 493, 494 [1st Dept 2004]) in which the Court reversed the trial court's dismissal of the plaintiff's Labor Law § 240 (1) claim because the ladder that he fell from while ascending a rooftop water cooling tower "wobbled and swayed, ... was only two feet wide and lacked side rails for gripping, and ... there was a slippery substance on the very narrow, round rungs." The Court concluded that the condition of the ladder "establishes that his injuries were "at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential, and thus that grounds for the imposition of liability pursuant to Labor Law § 240 (1) were established [internal citation omitted]." *Id.* at 494. Mayo concludes that, like these two ladders, the ladder that he fell from violated Labor Law § 240 (1) because the lack of clearance on its top two rungs rendered it permanently hazardous, and because it lacked a safety device to protect against that hazard. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 28. Defendants' reply papers object - improperly - to the timeliness of Mayo's submission of Berkenfield's report, but otherwise merely restate their original argument.[3] *See* Mot. Seq. No. 006, Berkowitz Affirmation

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[3] Creative also submitted opposition papers to Mayo's motion, in which Strauss joined, wherein they argued that the subject ladder was not a "device" within the meaning of Labor Law § 240 (1). *See* Mot. Seq. No. 006, Dachs Affirmation in Opposition, ¶¶ 13-14; Mot. Seq. No. 006, Janowitz Affirmation in Opposition, ¶ 2. However, the court has already rejected this contention on the strength of the First Department's holding in *Spiteri v Chatwal Hotels* (247

in Reply, ¶¶ 5-16.

After consideration, the court discounts defendants' reliance on the Second Department's decision in *Walker v City of New York* (72 AD3d 936, *supra*). That decision is clearly factually inapposite, since the plaintiff therein fell from the ladder in question when he was startled by an exploding rubber support device. No similar situation is alleged to exist here. Moreover, defendants are incorrect to assert that the statute imposes on Mayo the burden of proving that the subject ladder was "defective." Labor Law § 240 (1) requires a claimant to establish that a ladder was not "so constructed, placed and operated as to give proper protection to a person so employed." In *Montalvo v J. Petrocelli Const., Inc.* (8 AD3d 173, 175 [1st Dept 2004]), the Appellate Division, First Department, flatly held that:

> [Plaintiff was] not required to show that the ladder on which he was standing was defective (*Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 290-291, [1st Dept 2002]) ...
>
> "It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d at 291; see also *Dasilva v A.J. Contr. Co.*, 262 AD2d 214 [1st Dept 1999]; *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]).

Thus, the court rejects defendants' argument regarding the alleged non-"defectiveness" of the ladder. The law allows Mayo to establish a violation of Labor Law § 240 (1) if he can demonstrate that he was exposed to an elevation-related hazard because the subject ladder was not properly "placed" (i.e., affixed to the wall in such a way that its top rungs were unusable), and no adequate safety devices were provided to him.

Here, Mayo's factual evidence regarding the purportedly hazardous condition of the ladder

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AD2d at 299) that fixed-wall ladders *are* devices within the statute's coverage.

that he fell from (i.e., the deposition testimony regarding the inability to use the top rungs of the ladder closest to the roof hatch, and the expert's report that such constitutes a violation of the ANSI safety requirements) is compelling. The court notes that defendants have not presented any similar factual evidence to refute Mayo's contention that the ladder was hazardous and/or not properly "placed". The court further notes that in *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.* (10 AD3d 493, *supra*), the First Department did indeed reinstate the plaintiff's Labor Law § 240 (1) claim based on evidence of the subject ladder's condition that "establishes that [plaintiff's] injuries were 'at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential.'" *Id.* at 494-95. Similarly, here, Mayo's injuries were at least partially attributable to defendants' failure to provide him with a ladder or other safety device "so constructed, placed [or] operated as to give proper protection to a person" employed at a job that involved a risk caused by an elevation differential. Labor Law § 240 (1). Had all of the ladder's rungs been usable, or had the ladder been equipped with a safety cage, it may have been "constructed" to provide against such a risk; had it been provided with a "tie off," it may have been "operated" to provide against said risk; however, it is not disputed that it was not. Therefore, the court concludes that Mayo has indeed established that the construction/placement, or inadequacy of safety devices of the subject ladder, violated Labor Law § 240 (1).

Defendants' final argument is that "any purported defects in the hatch and/or ladder were not a proximate cause of this accident." *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶¶ 25-29. Defendants cite the Court of Appeals' ruling in *Cahill v Triborough Bridge and Tunnel Authority* (4 NY3d 35, *supra*) that "where a plaintiff's own actions

are the sole proximate cause of the accident, there can be no liability" under Labor Law § 240 (1). *Id.* at 39. Defendants refer to Drewes's deposition testimony that Strauss had supplied safety equipment at the building, that Mayo chose not to use that equipment, and assert that, therefore, "the sole proximate cause of this accident was the actions of the plaintiff." Mot. Seq. No. 008, Berkowitz Affirmation, ¶ 27. Creative joins in this argument.[4] *See* Mot. Seq. No. 006, Dachs Affirmation in Opposition, ¶¶ 7-10. Mayo responds that it was "the absence of necessary safety features such as a safety cage ... or other safety device [that was] the proximate cause of [his] fall." *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 29. Mayo cites a quantity of Appellate Division, First Department, precedent that evidence of a defendant contractor's failure to provide safety devices warrants a finding of absolute liability under Labor Law § 240 (1). *See e.g. Romanczuk v Metropolitan Ins. and Annuity Co.*, 72 AD3d 592 (1st Dept 2010); *Ritzer v 6 East 43rd Street Corp.*, 57 AD3d 412 (1st Dept 2008); *Ranieri v Holt Constr. Corp.*, 33 AD3d 425 (1st Dept 2006); *Peralta v American Tel. and Tel. Co.*, 29 AD3d 493 (1st Dept 2006); *Ben Gui Zhu v Great River Holding, LLC*, 16 AD3d 185 (1st Dept 2005).

Defendants' reply papers restate their original argument, and reassert the contention that "for whatever reason, as [Mayo] came down the ladder ... he did not use any of the safety equipment that was available to him." *See* Mot. Seq. No. 006, Berkowitz Affirmation in Reply, ¶ 20. After reviewing the record, defendants' proximate causation argument is rejected.

Drewes's deposition testimony did *not* indicate that there was safety equipment available for Mayo to use while ascending the ladder to the building's roof. It stated that the extant safety

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[4] As previously mentioned, Strauss joins in Creative's arguments without submitting any of its own. *See* Mot. Seq. No. 006, Janowitz Affirmation in Opposition, ¶ 2.

equipment was kept in a locked gang box on the roof and was intended to be used only while performing work on the roof. *See* Notice of Motion (motion sequence number 006), Exhibit G, at 17, 19, 27-31. Indeed, Drewes specifically stated that he did not know of any safety equipment that was capable of being used on the subject ladder, and opined that such equipment was unnecessary. *Id.* This is, of course, mere speculation, as is defendants' implication that, had he been truly concerned, Mayo could have returned to the roof, somehow obtain a key, open the gang box, taken a safety harness out, and used it, while closing the hatch when he descended the ladder at the end of his shift. Such speculation cannot substitute for defendants' statutory duty to provide Mayo with a ladder "so constructed, placed and operated as to give proper protection" while he was entering and exiting his work place. Labor Law § 240 (1). Further, even if it were factually supported, defendants' characterization would at best describe an act of comparative negligence, which is not a defense under Labor Law § 240 (1). *See e.g. Picano v Rockefeller Center North, Inc.*, 68 AD3d 425 (1st Dept 2009); *Aponte v City of New York*, 55 AD3d 485 (1st Dept 2008); *Ernish v City of New York*, 2 AD3d 256 (1st Dept 2003). Accordingly, having established both a statutory violation and proximate causation, Mayo is entitled to partial summary judgment on his third cause of action on the issue of liability, with the issue of damages being reserved for trial, and that the branch of defendants' cross motion that seeks summary judgment to dismiss said cause of action is denied.

II. Defendants' Cross Motion for Summary Judgment on the Complaint

As previously mentioned, the balance of defendants' cross motion requests summary judgment to dismiss the entire complaint. The court notes that defendants' cross motion makes no mention of Mayo's sixth cause of action (for loss of consortium), and that Mayo's opposition

papers are devoid of any argument to support his fourth and fifth causes of action (which allege violation of Labor Law § 241 (6) and various provisions of the Industrial Code, respectively). The loss of consortium claim is entirely dependent on Mayo's success in establishing any of his other claims. Since the court has already granted partial summary judgment on Mayo's third cause of action, the loss of consortium claim remains viable, and there are no grounds upon which to dismiss it. With respect to Mayo's fourth and fifth causes of action, it appears that his opposition papers are devoid of any argument against defendants' request that they be dismissed. Therefore, the court deems that Mayo has abandoned these claims. Accordingly, defendants' cross-motion is denied with respect to Mayo's sixth cause of action, and granted with respect to Mayo's fourth and fifth causes of action.

The court now turns its attention to Mayo's first and second causes of action which respectively allege common-law negligence and violation of Labor Law § 200. In *Ortega v Puccia* (57 AD3d 54, 61 [2d Dept 2008]), the Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 as follows:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...
>
> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged

> defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, defendants argue that Mayo's first and second causes of action should be dismissed because they did not supervise or control his work. *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶¶ 42-51. Mayo concedes this point, but responds that defendants' entire argument is misplaced, because his claims rest on a theory of "hazardous premises conditions" rather than on the "means and manner" of his work. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶¶ 38-47. Mayo argues that, pursuant to this theory, he need only demonstrate that defendants caused, or had actual or constructive notice of, the allegedly hazardous condition of the ladder that he fell from. *Id.* Mayo's legal analysis of this point is correct. *See Ortega v Puccia*, 57 AD3d at 61, *supra*. Therefore, the court rejects defendants' contentions, as Mayo's causes of action should be analyzed as "dangerous condition" claims.

As it is a "dangerous condition" claim, Mayo next appropriately argues that there are factual issues as to whether defendants had actual or constructive notice of the allegedly hazardous condition which precludes that granting of summary judgment in defendants' favor. As to actual notice, Mayo claims that he and his co-workers Rodriguez and Cole, testified at their depositions that they had complained to Creative's supervisor and/or Met employees about the difficulty in closing the hatch while standing on top of the ladder. *See* Mot. Seq. No. 006 Faegenburg, Affirmation in Opposition and Reply, ¶ 47; Notice of Motion (motion sequence number 006), Exhibit E, at 30-38; Exhibit H, at 25-29; Exhibit I, at 28. Mayo notes that he and his co-workers began making these complaints on the day they started work - three days before

corrective action to be taken." Mayo argues that defendants had at least three days' notice of the problem with the specific ladder and hatch at issue herein as a result of his, Rodriguez's and Cole's complaints on the day that they started work. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 47.

The condition complained of - i.e., a ladder whose top two rungs were unusable due to insufficient space between them and the wall, and which lacked a safety cage or other device - is not evanescent, and would appear to have existed for a period of much longer than three days. It is also evident that the closing mechanism of the hatch remained unrepaired for a period of longer than three days, since Busch's deposition testimony refers on several occasions to photographs taken of the hatch before and after it was replaced on November 13, 2008, that demonstrate that it was, in fact, damaged at the time of Mayo's injury.[5] *See* Notice of Motion (motion sequence number 006), Exhibit D. Contrary to defendants' arguments, there is no evidence to contradict this. Both Busch and Naples simply stated that they "did not know" when they were asked if they had any knowledge of the conditions complained of, although both also admit to having been at the accident site at one time or another. This evidence is some proof that the subject ladder remained in a potentially dangerous condition, and the hatch in an unrepaired condition, for a sufficient period of time, to raise a question of fact as to whether defendants either did in fact notice that the ladder needed to be replaced or equipped with a safety feature, or were negligent in failing to notice it . *See Santiago v New York City Health and Hospitals Corp.*, 66 AD3d 435,

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[5] The court here notes that, unlike Mayo's Labor Law § 240 (1) claim, which is based solely on the adequacy of the ladder, the statutory language of Labor Law § 200 does not restrict claims thereunder to certain enumerated "devices" (and much less to concepts of common-law negligence). Therefore, the condition of the hatch is not irrelevant to Mayo's first and second causes of action.

435 (1st Dept 2009) (existence of hazardous condition was presumed where ice had remained on the subject premises "so long that [defendant] is presumed to have seen it, or to have been negligent in failing to see it"), quoting *Wallace v Goodstein Management, LLC*, 48 AD3d 319, 319 (1st Dept 2008).

Defendants nonetheless contend that "there is no proof that anyone from the Met or Lincoln Center closed the hatch during the days leading up to this accident, and thus, there was no opportunity to discover the alleged unsafe condition." *See* Mot. Seq. No. 006, Berkowitz Affirmation in Reply, ¶ 30. However, the alleged absence of evidence that defendants' employees actually inspected the subject work site prior to Mayo's fall, does not dispel the issue of fact regarding whether or not they were negligent in failing to do so. There is also no credible evidence before the court to suggest that defendants did not have an opportunity to discover the existence of any potentially dangerous conditions in the part of their premises where Mayo was injured. Under these circumstances, the court agrees with plaintiffs' argument that there is an issue of fact exists as to whether defendants had actual and/or constructive notice of the allegedly dangerous conditions at the subject worksite. Therefore, the court rejects defendants' arguments that Mayo has failed to establish necessary elements of his claims under Labor Law § 200 and principles of common-law negligence. Accordingly, defendants' cross-motion is denied with respect to Mayo's first and second causes of action.

III. Creative's Motion for Summary Judgment to Dismiss the Third-Party Complaint (motion sequence number 007)

As previously mentioned, the Met's third-party complaint sets forth causes of action for

contractual indemnification and breach of contract against Strauss and Creative,[6] and for breach of contract against Nova. *See* Notice of Motion (motion sequence number 007), Exhibit A. In its motion, Creative raises several arguments to support its request for summary judgment to dismiss the claims as against itself.[7]

First, with respect to the contractual indemnification claim, Creative argues that, because "no negligence on Creative's part caused or contributed to [Mayo's] injuries," there is "no basis ... for the imposition of liability against Creative based upon the ... indemnity agreement in [the contract]." *See* Notice of Motion (motion sequence number 007), Dachs Affirmation, ¶ 2. Creative cites the portion of the contract's indemnity clause that provides that the signatories will indemnify the Met against any claims for injuries that are:

> caused in whole or in part by any negligent act of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them ..., regardless of whether or not it is caused in part by a party indemnified hereunder.

See Notice of Motion (motion sequence number 007), Exhibit C, at 5. Creative then argues that "plaintiff's action is based wholly and solely on [the Met's] negligence in maintaining its property, particularly the overhead roof hatch," and that "Mayo's accident did not involve any equipment furnished to him by Creative." *See* Notice of Motion (motion sequence number 007), Klein Affidavit, ¶ 5. In response, the Met argues that there is a question of fact as to whether or not Creative was negligent, "both because Creative had safety responsibility, and because Mayo

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[6] The Met's first cause of action against Strauss and Creative for common-law indemnification was dismissed in the court's earlier decision, dated October 8, 2009. *See* Notice of Motion (motion sequence number 007), Exhibit D.

[7] As will be discussed, Strauss submitted its own, separate motion to dismiss the third-party complaint (motion sequence number 008).

had removed his safety equipment immediately prior to his accident." *See* Mot. Seq. No. 007, Mitchell Affirmation in Opposition, ¶ 19.[8] The Met notes that, pursuant to the "Subcontractor Safety Requirement" attachment to the subcontract, Creative was required to furnish Strauss with a "job specific safety program," and to be "solely responsible for the safety of its employees." *Id.*, ¶¶ 20-24. The Met further notes that, despite these requirements, Mayo had removed his safety harness before the accident. *Id.*, ¶ 25. The Met then argues that "it can be reasonably inferred that Creative...or its employees were negligent in some degree." *Id.*, ¶ 26. Creative responds only that "the Met has not submitted one scintilla of evidence that Creative was in any way negligent." *See* Dachs Affirmation in Opposition to Cross Motion (motion sequence number 007), ¶ 9. The Met's reply papers restate its original argument. *See* Mot. Seq. No. 007, Mitchell Affirmation in Reply, ¶¶ 29-31. The court notes that neither party has cited any case law to support its respective arguments.

In order to sustain any claim for contractual indemnification against Creative, the Met would first have to prove some quantum of negligence on Creative's part. *See e.g. Knight v City of New York*, 225 AD2d 355 (1st Dept 1996). Regarding this burden, the Appellate Division, First Department, has articulated the general rule as follows:

> It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred. The plaintiff need not exclude every other possible cause

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[8] The Met's opposition papers to Creative's motion also include a cross motion for partial summary judgment on the third-party complaint as against Strauss and Creative. The court notes that the Met submitted a separate motion for summary judgment on the third-party complaint as against Nova (motion sequence number 010). While it would have been preferable to dispose of all of the Met's claims together, reasons of continuity make it best to merely dispose of these motions within their respective motion sequences.

> of the accident, but must offer proof that causes other than defendant's negligence are sufficiently "remote" or "technical" to allow a jury to base its verdict on logical inferences to be drawn from the evidence, rather than speculation [internal citations omitted].

Feder v Tower Air, Inc., 12 AD3d 190, 191 (1st Dept 2004). However, here, on the within motion for summary judgment by Creative, Creative has the burden to establish that it was free from negligence, *as a matter of law*.

In opposition, the Met has presented the subcontract, whose "Subcontractor Safety Requirement" attachment required Creative to be "solely responsible for the safety of its employees." *See* Mitchell Affirmation in Opposition, Exhibit C. This contractual language speaks for itself in that it creates a duty of care. Also before the court is Drewes's deposition testimony that Creative kept the work site safety equipment in a locked gang box on the building's roof and instructed its employees to use it only while on the roof. *Id.*; Exhibits D, E. It is reasonable that a jury may infer negligence from this as such safety equipment might have prevented Mayo's fall, which Mayo claims he had no access to at the time of his injuries. Thus, the Met's circumstantial evidence may also be sufficient to establish the proximate causation element of its negligence allegation against Creative. Therefore, the court rejects Creative's argument that there is "no evidence that Creative was in any way negligent"; upon the within submissions, Creative failed to establish that it was not negligent, *as a matter of law*.

The court now turns its attention to the two contractual provisions upon which the Met's contractual indemnity claim against Creative is based. With respect to the general contract, Creative argues that the Met's contractual indemnification claim should be dismissed because Creative was not a party to the general contract, as it was only between the Met and Strauss. *See* Notice of Motion (motion sequence number 007), Dachs Affirmation, ¶ 2. Creative specifically

argues that "although Creative's name appears as a 'contractor' on the first page of the [general contract, it] ... was signed only by ... Drewes, who executed the [general contract] on behalf of Strauss only." *Id.*; Klein Affidavit, ¶ 3. Creative then cites the Appellate Division, First Department's decision in *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.* (27 AD3d 323, 323 [1st Dept 2006]) which reiterated "the general rule that nonparties to an agreement are not bound thereby." *See* Dachs Affirmation in Opposition to Cross Motion (motion sequence number 007), ¶ 7.

The Met replies by citing the Court of Appeals' decision in *Flores v Lower East Side Service Center, Inc.* (4 NY3d 363, 368 [2005], *reargument denied* 5 NY3d 746 [2005]) that stated another general rule that "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound." *See* Mitchell Affirmation in Reply, ¶ 16. Creative argues that there is no such evidence. *See* Dachs Affirmation in Opposition to Cross Motion (motion sequence number 007), ¶ 7. After review, however, the court disagrees in that, based upon *Flores*, as explained below, there are factual issues as to whether Creative should be bound to the general contract.

In *Flores*, the defendant/property owner engaged a general contractor, which thereafter engaged the plaintiff's employer as a subcontractor. Following a dispute, the general contractor quit, and the plaintiff's employer assumed the role of general contractor, although it never executed a separate formal contract with the defendant/owner. After the plaintiff was injured, he commenced a negligence suit against the defendant/owner, which, in turn, commenced a contractual indemnification suit against the plaintiff's employer. The plaintiff's employer moved to dismiss the third-party suit, claiming that there was no signed contract between it and the

defendant/owner. The Court of Appeals rejected this argument, based upon evidence including: 1) that the plaintiff's employer conceded that it had entered into an agreement with the defendant/owner; 2) that the plaintiff's employer did not assert that there was no "meeting of the minds" between the two parties; 3) that the plaintiff's employer did not claim that it declined to sign the contract because there were ongoing negotiations; and 4) that the plaintiff's employer performed the work and accepted the payment that were specified in the contract.

Here, the Met first points out that, in her affidavit, Creative's president Klein acknowledges "a contract in effect at the time of [Mayo's] accident," which she describes as an "agreement between [the Met] and Strauss/Creative." *See* Mitchell Affirmation in Reply, ¶ 10; Exhibit B. The Met next points out that Drewes testified that he was a "vice president" of Creative, and had the authority to "run the day-to-day operations" of Creative, including executing contracts on Creative's behalf. *Id.*, ¶ 13. The Met also points out that Drewes submitted certificates of insurance to it from Creative in accordance with the terms of the general contract, but did not submit any insurance on behalf of Strauss. *Id.*, ¶¶ 19-25; Exhibit C. Finally, the Met points out that Creative performed all of the obligations set forth in the general contract. *Id.*, ¶ 26. The court notes that Creative has never argued that there was no "meeting of the minds" or any unresolved negotiations between it and the Met. Thus, it appears that all of the criteria that swayed the Court of Appeals in *Flores* are also present in this case. The one point of departure is that, here, Creative executed a contemporaneous subcontract on the same day that Drewes signed the general contract naming Creative as a contractor. However, this may or may not be a meaningful distinction. It appears that the motivation here may have been merely for convenience. Drewes executed the general contract with Naples of the Met and then, having

secured it, returned with it to the offices that Strauss and Creative shared so that Victor Strauss and Klein could execute the subcontract.[9] This is insufficient to overcome the evidence that the Met has presented that Creative, via Drewes, intended to be bound by the terms of the general contract, and thereafter acted to perform that contract. There is certainly no argument before the court that Drewes lacked either actual or apparent authority to bind Creative. Therefore, the court rejects Creative's dismissal argument with respect to the Met's contractual indemnification claim as is based on the general contract, as there are factual issues as to whether Creative is bound under such contract.

With respect to the subcontract, the Met argues against dismissal of its claim because the subcontract contains an indemnification provision and because Creative was a party to said subcontract. *See* Mitchell Affirmation in Opposition to Motion (motion sequence number 007), ¶ 10. Creative's papers do not contest either point. It is clear that, although the Met itself was not a party to the subcontract, that such contract's indemnification provision plainly requires Creative to indemnify "the Owner" [i.e., the Met] against employee accidents such as Mayo's. *Id.*; Exhibit C. Therefore, the court rejects Creative's dismissal argument with respect to the Met's contractual indemnification claim, based upon the subcontract.

Next, Creative argues that the Met's contractual indemnity claim should be dismissed because the third-party plaintiff is not the same entity as the party that signed the general contract, and that the Met, therefore, has no right to seek to enforce the terms of that contract. *See* Notice of Motion (motion sequence number 007), Dachs Affirmation, ¶ 2. Creative specifically argues

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[9] Drewes could not recall whether Klein had, in fact, executed the subcontract on September 3, 2008, or whether he had initialed it on her behalf and then delivered it to her to sign at home at a later date.

that, although the general contract denominates an entity known as "Metropolitan Opera Lincoln Center" as the owner, Creative's own search of the records of the New York State Department of State, Division of Corporations, indicates that no such corporate entity exists. *See* Notice of Motion (motion sequence number 007), Klein Affidavit, ¶ 6. This is a specious argument as Creative's counsel acknowledged the existence of a "prime contract between Strauss and the Met." *See* Dachs Affirmation in Opposition, ¶ 9.

The words "Metropolitan Opera" and "Lincoln Center," which appear on *separate* lines on the cover page of the general contract, cannot reasonably be read to indicate the existence of a single corporate entity, but should merely be read to indicate the obvious: that the corporation named on the first line (i.e., "Metropolitan Opera") has its address at the location specified on the second line (i.e., "Lincoln Center"), with the city, state and zip code specified on the third line. Therefore, the court rejects Creative's third dismissal argument as meritless. Accordingly, the court concludes that Creative has failed to bear its burden of proving that it is entitled to summary judgment dismissing the Met's contractual indemnity claim against it.

Next, Creative argues that the Met's breach of contract claim should be dismissed because Creative did, in fact, obtain the insurance specified in the subcontract. *See* Notice of Motion (motion sequence number 007), Klein Affidavit, ¶ 8. Creative has presented a copy of a general commercial liability "additional insured endorsement" that, it claims, added the Met to the coverage of the policy that Creative obtained from Nova. *Id.*; Exhibit F. The Met responds that this is insufficient, because the general contract and the subcontract each required Creative to obtain three separate types of insurance: 1) a workman's compensation insurance policy; 2) an owners and contractors protective liability insurance policy; and 3) a comprehensive general

liability insurance policy. *See* Mitchell Affirmation in Opposition, ¶ 28. The Met asserts that Creative failed to obtain an owners and contractors protective liability insurance policy, and that the endorsement that Creative presented with its motion merely modified the comprehensive general liability insurance policy that it did obtain. *Id.*, ¶¶ 31-35. Creative responds that "the Met has provided no information to demonstrate that such a policy would have provided any different, additional or ... applicable coverage than that which was provided by the liability policies" that Creative did obtain. *See* Mot. Seq. No. 007, Dachs Affirmation in Opposition, ¶ 6. The Met replies that Creative's argument, that the coverage provided by an owners and contractors protective liability insurance policy would have been unnecessarily duplicative, is belied by the facts of this case, because Nova is attempting to decline coverage to the Met under the comprehensive general liability insurance policy. *See* Mot. Seq. No. 007, Mitchell Affirmation in Reply, ¶ 27. The court agrees with the Met on this issue.

The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, Exhibit D to the general contract and Rider A to the subcontract both plainly contain provisions that required the signing party to obtain an owners and contractors

protective liability insurance policy. Creative admits that it failed to do so. Further, Creative fails to support its contention that it was not required to obtain the specified insurance with any legal argument whatsoever. Thus, the Met has demonstrated both the existence of a valid contract and Creative's breach thereof. Although the Met has not presented any evidence on the element of damages, it is not yet required to do so. Therefore, at this juncture, the Met has sufficiently supported its breach of contract claim. Accordingly,Creative has failed to bear its burden of proving that it is entitled to summary judgment dismissing the Met's breach of contract claim. As a result, the portion of Creative's motion which seeks summary judgment to dismiss the remaining causes of action in the third-party complaint as against is denied.

IV. The Met's Cross-Motion for Partial Summary Judgment on the Third-Party Complaint

The Met's cross-motion seeks partial summary judgment on its third-party claims against Strauss and Creative. The first of these is the Met's cause of action for common-law indemnification against Strauss. The court's October 8, 2009 decision granted summary judgment dismissing this claim against Creative, but allowed it to stand as against Strauss on the ground that, in the absence of any subcontracting agreement between Strauss and Creative, further exploration of Strauss's duties and responsibilities vis-á-vis Mayo was necessary before determining whether the Met's claim against Strauss could survive summary judgment. *See* Notice of Motion (motion sequence number 007), Exhibit D. Now, the parties have produced the missing subcontract. *See* Notice of Cross Motion (motion sequence number 007), Exhibit D.

As the Appellate Division, First Department, explained in *Edge Management Consulting, Inc. v Blank* (25 AD3d 364, 367 [1st Dept 2006]), "[c]ommon-law indemnification is predicated

on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal citations omitted].'" Here, the Met argues that "the record is clear that [the Met] did not create the alleged condition that caused the accident, and that [the Met] did not have actual or constructive notice of said alleged condition." *See* Notice of Motion (motion sequence number 007), Mitchell Affirmation, ¶¶ 35-48. Strauss responds that "the sole and only allegation of negligence in this case is that the accident occurred by reason of the defective condition of the Met's premises." *See* Janowitz Affirmation in Opposition, ¶ 4. Strauss also alleges that it "took no part in the work being performed by plaintiff, ... [had] ... no Strauss employee ... present at the work site, ... did not supervise, direct or control Creative's employees, ... [that] none of Strauss' equipment was being used at the time of the accident." *Id.*, ¶ 3. In its reply papers, the Met merely alleges that "[c]learly, the accident arises out of the work of both Creative and Strauss." *See* Mitchell Affirmation in Reply, ¶ 35.

The court, however, does not believe that things are nearly as clear as either party would have it. Of particular relevance, the deposition testimony herein indicates that the ladder and roof hatch may have been in the condition that Mayo found them on the day of his injury for some time beforehand. Thus, as previously discussed, that evidence is sufficient to raise an issue of fact as to whether the Met had actual and/or constructive knowledge of that purportedly hazardous condition so as to render it negligent. Should the triers of fact find the Met negligent, then the Met would, indeed, be barred from seeking common-law indemnification from Strauss, as a matter of law. *Edge Management Consulting, Inc. v Blank*, 25 AD3d at 367. However, since no such finding has yet been made, it would be premature to either grant or dismiss the Met's claim

for common-law indemnification against Strauss at this juncture. Therefore, the Met's cross motion is denied with respect to its first third-party cause of action.

The Met next seeks summary judgment on its claims for contractual indemnification against Strauss and Creative. The Met correctly notes that the court's October 8, 2009 decision indicated that the indemnity clause of the general contract did not violate General Obligations Law § 5-322.1 (1), and therefore, such is now law of the case. *See* Notice of Cross Motion (motion sequence number 007), Mitchell Affirmation, ¶ 7. Because the subcontract's indemnity clause is identically worded, such indemnity clause also does not violate General Obligations Law § 5-322.1 (1). However, this does not end the inquiry. Pursuant to well settled New York State law, an indemnitor cannot enforce an indemnification provision against an indemnitee "unless it demonstrate[s] its own freedom from negligence." *See Cuevas v City of New York*, 32 AD3d 372, 374 (1st Dept 2006). Here, the Met alleges that "Strauss and Creative are responsible for any negligence on the part of the plaintiff." *See* Notice of Cross Motion (motion sequence number 007), Mitchell Affirmation, ¶ 50. As noted earlier, however, Strauss responds that "the sole and only allegation of negligence in this case is that the accident occurred by reason of the defective condition of the Met's premises." *See* Janowitz Affirmation in Opposition, ¶ 43. Creative amplifies this argument by alleging that "the sole and only allegation of negligence in this case is directed to the Met for its failure to maintain the roof hatch in a reasonable (*sic*) safe condition." *See* Dachs Affirmation in Opposition, ¶ 9 (motion sequence number 007). In its reply papers, the Met merely reasserts that "the accident arises out of the work of both Creative and Strauss." *See* Mitchell Affirmation in Reply, ¶ 35, (motion sequence number 007). The court has already noted that there are issues of fact as to whether the Met and/or Lincoln Center were negligent in their

maintenance of the portion of the building where Mayo was injured. Thus, the court must reject the Met's allegation that it is free of negligence as a matter of law, and therefore, the Met's request for summary judgment on its second third-party cause of action for contractual indemnification claims against Strauss and Creative is denied.

Finally, the Met seeks summary judgment on its claims for breach of contract against Strauss and Creative, alleging that neither third-party defendant obtained an owners and contractors protective liability insurance policy, as was required by the terms of both Exhibit D to the general contract and Rider A to the subcontract. *See* Notice of Cross Motion (motion sequence number 007), Mitchell Affirmation, ¶¶ 56-58. In response, Strauss joins in the argument initially set forth in Creative's opposition papers that denies the Met's claim on the ground that adding the Met and Lincoln Center as "additional insureds" on the commercial general liability insurance policy rendered it unnecessary to also obtain an owners and contractors protective liability insurance policy, since the coverage afforded by such a policy would be duplicative. *See* Janowitz Affirmation in Opposition, ¶ 4; Dachs Affirmation in Opposition, ¶ 6. As previously noted, the Met replies that the third-party defendants' argument is belied by the facts of this case, because Nova is attempting to decline coverage to the Met under the comprehensive general liability insurance policy. *See* Mitchell Affirmation in Reply, ¶ 27. The court has already rejected, as unsupported at law, the argument advanced by both Strauss and Creative, and has determined that the Met has established every element of its breach of contract claim apart from the element of damages. Therefore, the court now also determines that the Met should have partial summary judgment against Strauss and Creative on its third third-party cause of action for breach of contract on the issue of liability only, with the issue of damages - if any - to be

determined at trial. Accordingly, the court grants the Met's cross motion, in part, with respect to the Met's third third-party cause of action for breach of contract on the issue of liability only, but is otherwise denied.

V. Strauss's Motion for Summary Judgment to Dismiss the Third-Party Complaint (motion sequence number 008)

Like Creative, Strauss moves for summary judgment to dismiss the third-party complaint as against it (motion sequence number 008). At this juncture, what remains of the third-party complaint vis-á-vis Strauss are the Met's claims for contractual indemnification and breach of contract. With respect to the contractual indemnification claim, Strauss argues for dismissal on the ground that the evidence shows "the absence of negligence on the part of either Creative or Strauss." *See* Notice of Motion (motion sequence number 008), Strauss Affidavit, ¶ 5. However, the court has already rejected this contention, as the evidence is unclear as to *any* party's negligence at this juncture. Therefore, Strauss' motion is denied with respect to the second cause of action (contractual indemnification) in the Met's third-party complaint.

As to the Met's claim against Strauss for breach of the general contract by failing to obtain an owners and contractors protective liability insurance policy, the court has already rejected Strauss's argument that naming the Met as an "additional insured"on the general commercial liability policy discharged it from this responsibility. The court has also already determined that the Met is entitled to partial summary judgment on this claim. Therefore, Strauss's motion is denied with respect to the third cause of action (breach of contract) in the Met's third-party

complaint. Accordingly, Strauss's motion is denied in its entirety.

VI. Strauss's Motion for the Entry of a Default Judgment on its Cross Complaint (motion sequence number 009)

Strauss also moves separately for the entry of a default judgment against Creative on the cross claims set forth in Strauss's cross complaint (motion sequence number 009). CPLR 3215 entitles Strauss to this relief. However, Strauss specifically requests a "conditional summary judgment" on its contractual and common-law indemnification claims against Creative on the ground that "the only theory upon which [the Met] may recover against Strauss is that Strauss is vicariously liable for Creative's negligence." *See* Notice of Motion (motion sequence number 009), Janowitz Affirmation, ¶ 3. Creative did not submit any opposition to this motion. The Met however, did oppose, indicating that it "takes no position on the issues between Strauss and Creative, but ... opposes any argument ... reflecting on Strauss and Creative's obligations to the Met, because those arguments are improperly raised here." *See* Mitchell Affirmation in Opposition, ¶ 7. The court agrees. In *George v Marshalls of MA, Inc.* (61 AD3d 931, 932 [2d Dept 2009]), the Appellate Division, Second Department, observed that:

> A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active negligence.

Here, however, the court has already observed at several junctures that there are open and unresolved issues of fact as to the negligence - if any - of all of the parties to these actions. Under these circumstances, while Strauss is certainly entitled to the entry of a default judgment on its cross complaint against Creative, Strauss is not entitled to the conditional summary judgment that

it requests in its motion. Accordingly, Strauss' motion is granted solely to the extent of granting a judgment of default in Strauss' favor against Creative as to liability on Strauss' cross complaint, but the issue of damages - if any - should be determined at the trial of this action.

VII and VIII. The Met's Motion for Partial Summary Judgment on the Third-Party Complaint as to Nova (motion sequence number 010), and Nova's Motion for Summary Judgment to Dismiss the Third-Party Complaint (motion sequence number 011)

The Met has submitted a second motion for partial summary judgment on its last third-party cause of action, which alleges breach of contract by Nova. *See* Notice of Motion (motion sequence number 010), Exhibit O, ¶¶ 36-44. Nova moves separately for summary judgment to dismiss this cause of action (motion sequence number 011). Both parties request a "declaratory judgment" in their motions, although the third-party complaint fails to assert such a cause of action. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of New York, Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). The Court of Appeals has long recognized that it is an appropriate remedy in matters that "relate to the construction of insurance policies or whether an insurance company is obligated to defend a pending negligence action in which the assured is a party." *Prashker v U.S. Guarantee Co.*, 1 NY2d 584, 592 (1956). However, New York law also holds that declaratory relief is inappropriate where an adequate remedy is provided by a cause of action for breach of contract. *See e.g. James v Alderton Dock Yards*, 256 NY 298

(1931); *Apple Records, Inc. v Capitol Records*, 137 AD2d 50 (1st Dept 1988); *Arthur Young & Co. v Fleischman*, 85 AD2d 571 (1st Dept 1981). This is clearly not such a case. Rather, it merely appears that the Met mis-pled its fourth cause of action as one for breach of contract, when its intention was to obtain a declaration of the terms of that contract. Since no party objects and, significantly, as Nova also requests a declaration, rather than asserting that there was no breach, in the interest of justice and judicial economy, the court will overlook the defect in the third-party pleadings and assess the parties' respective requests for declaratory relief.

The Met first asserts that Nova must defend it in, and indemnify it against, Mayo's negligence action because the GCL policy "covers all damages incurred by an insured due to allegations of bodily injury." *See* Notice of Motion (motion sequence number 010), Mitchell Affirmation, ¶¶ 28-34. The Met specifically refers to the definitions of the terms "bodily injury" and "occurrence" that are set forth in the GCL policy, and to the portion of the additional insured endorsement that extends coverage to liability for injuries to third parties with respect to "liability arising out of [Creativ's] ongoing operations performed for [the Met]." *Id.* The Met then argues that Mayo suffered an "occurrence" of "bodily injury" as a result of Creative's "ongoing operations performed for" the Met. *Id.* The Met concludes that Nova is obliged to defend and indemnify it in Mayo's suit by the foregoing terms of the GCL policy. The court agrees that the contractual language is clear and speaks for itself. Indeed, Nova does not contest any of the Met's assertions, but, instead, raises three arguments as to why the Met is not entitled to the declaration it seeks.

First, Nova argues that the Met did not contract directly with Creative, and therefore does not qualify as an additional insured under the GCL policy. *See* Gill Affirmation in Opposition, ¶¶

7-22 (motion seq. no. 010). Nova cites the portion of the GCL policy's additional insured endorsement that provides that:

> Who Is An Insured is amended to include as an insured any ... organization for whom you [i.e., Creative] are performing operations when you and such ... organization have *agreed in writing in a contract or agreement* that such ... organization be added as an additional insured on your policy [emphasis added].

See Notice of Motion (motion sequence number 010), Exhibit E. Nova then asserts that the Met did not execute any contract with Creative, but only with Strauss (i.e., the general contract), which then later contracted with Creative (i.e., the subcontract). *See* Gill Affirmation in Opposition, ¶ 14. Nova concludes that the Met's failure to contract with Creative means that it cannot be deemed an additional insured under the terms of the GCL policy. *Id.*, ¶ 16. Nova cites the Appellate Division, First Department's, decision in *Linarello v City University of New York* (6 AD3d 192 [1st Dept 2004]) to support its contention that the absence of a written contract is fatal to the Met's assertion of status as an additional insured. A number of other First Department cases have, indeed, reached such a conclusion. *See e.g. Illinois Natl. Ins. Co. v American Alternative Ins. Corp.*, 58 AD3d 537 (1st Dept 2009); *Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253 (1st Dept 2008); *Rodless Properties, L.P. v Westchester Fire Ins. Co.*, 40 AD3d 253 (1st Dept 2007), *appeal denied* 9 NY3d 815 (2007). However, the court has already determined that there is sufficiently strong evidence of a direct contractual relationship between the Met and Creative, pursuant to the Court of Appeals' holding in *Flores v Lower East Side Service Center, Inc.* (4 NY3d 363, *supra*). Therefore, the court rejects Nova's first opposition argument, as it has already indicated above that the Met is an additional insured of Creative.

Nova next contends that the Met's three-month delay in reporting Mayo's accident to it and demanding coverage rendered the Met's notice untimely under Section IV (2) (a) of the GCL

policy's "commercial general liability coverage form," which required the Met to furnish such notice "as soon as practicable." *See* Gill Affirmation in Opposition, ¶¶ 36-48. Nova has presented certain documentary evidence (in the form of accident reports filled out contemporaneously by the Met's employees) and deposition testimony (by Naples and by claims administrator Vanessa Scrudato) that indicate that the Met was, in fact, aware of Mayo's accident on the day that it happened (i.e., on September 16, 2008). *Id.*, ¶¶ 23-35; Exhibits A-D.

The Met does not dispute such evidence/testimony, but instead responds that Section I (1) (d) of the GCL policy's "commercial general liability coverage form" provides that the Met "or any employee authorized by [the Met] to give or receive notice" will only be deemed to know of the existence of an "occurrence" of "bodily injury" in three circumstances:

> (1) on the date when the Met or any of its "authorized employees" reports such information to Nova or any other insurer;
> (2) on the date when the Met or any of its "authorized employees" receives a written or verbal demand or claim for damages because of said "bodily injury; or
> (3) on the date when the Met or any of its "authorized employees" becomes aware by any other means that "bodily injury" has occurred.

See Mitchell Reply Affirmation, ¶¶ 4-12 (motion seq. no. 010); Exhibit A. The Met then avers that its only employees that are "authorized to give or receive notice" are the members of its legal department, and that they did not learn of Mayo's accident until December of 2008, when they received a copy of the summons and complaint from Mayo's counsel. *Id.*, ¶¶ 13-14. Nova takes the position that this is a "self serving interpretation of the policy," and irrelevant, because the law imputes any contemporaneous knowledge of the accident by an agent (i.e., any Met employee) to the principal (i.e., the Met). The court agrees.

In *Paramount Ins. Co. v Rosedale Gardens, Inc.* (293 AD2d 235, 239 [1st Dept 2002]), the Appellate Division, First Department, observed that:

> The obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness. It has generally been held that a failure to give notice may be excused when an insured, acting as a reasonable and prudent person, believes that he is not liable for the accident. It is clear from this principle that, in assessing the timeliness of the notice given, the courts have not turned over to the insured, or its agents, the exclusive responsibility for determinating when an accident is likely to give rise to a liability claim.

Here, Nova is correct to note that, if the court were to accept the Met's position that only certain "authorized employees" were capable of receiving or giving notice of an accident such as Mayo's, then the Met would be able to evade compliance with any insurance policy's notice provisions by shielding such employees from receiving such notice except at a time of the Met's choosing. *See* Gill Affirmation in Opposition, ¶¶ 34-35 (motion seq. no. 010). This would contravene the logic expressed by the Appellate Division, in *Paramount Ins. Co.* (*supra*). *See also Tower Ins. Co. of New York v. Classon Heights, LLC*, 82 AD3d 632 (1st Dept 2011)(knowledge of occurrence obtained by an agent imputed to principal). Thus, the court rejects the Met's argument regarding "authorized employees". Consequently, the court also rejects Mayo's reading of the GCL policy's notice provision.

As indicated, New York law holds that, where an insurance policy specifies that an insured must give notice of a potentially covered claim "as soon as practicable," a court assessing the timeliness of such notice must determine whether the interval between the occurrence and the notice was reasonable in light of the facts and circumstances of the case. *See e.g. Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 (2005). "Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating circumstances are absent, the issue may be disposed of as a matter of law in advance of trial". *Power Authority . Westinghouse Elec. Corp,*, 117 AD2d 336, 339-40 (1st Dept 1986); *see also*

Tower Ins. Co. of New York v. Classon Heights, LLC, 82 AD3d at 634. Courts have found even relatively short periods to be unreasonable as a matter of law. *Hartford Acc. & Indem. Co. v. CNA Ins. Cos.*, 99 AD2d 310, 313 (1st Dept 1984).

Here, as previously mentioned, Nova has presented undisputed documentary evidence and testimony that show that the Met was aware of Mayo's accident immediately after it happened - i.e., on September 16, 2008. *See* Gill Affirmation in Opposition, Exhibits A-D (motion seq. no. 010). The Met's own evidence shows that its insurance carrier sent demand letters to Strauss and Creative on December 5 and 11, 2008, and thereafter to Strauss, Creative and Nova on December 29, 2008. *See* Notice of Motion (motion sequence number 011), Exhibits I, J, L. The Met's only explanation for this three-month delay is the rejected contention that its legal department was not aware of Mayo's accident until December of 2008. This statement appears to be erroneous, however, since the Met's own submissions include a copy of Mayo's summons and complaint that it claims to have received from the New York State Secretary of State in November of 2008. See Notice of Motion (motion sequence number 011), Exhibit G.

Since the Met has not argued that its delay was excused because it had a reasonable belief that no claim would be asserted against it as a result of Mayo's accident, in the absence of such argument, the court is justified in determining that the Met's three-month delay in notifying Nova about Mayo's accident was unreasonable as a matter of law. *See e.g. 2130 Williamsbridge Corp. v Interstate Indem. Co.*, 55 AD3d 371, 372 (1st Dept 2008) ("Even relatively short periods of unexcused delay are unreasonable as a matter of law."). As such, the court determines that the Met's three (3) month delay in notifying Nova of Mayo's accident, was untimely, as a matter of law. *See Juvenex Ltd v. Burlington Ins. Co.*, 63 AD3d 554 (1st Dept 2009)(two month delay

unreasonable as a matter of law); *Young Israel Co-Op City v. Guideone Mutual Ins. Co.*, 52 AD2d 245 (1st Dept 2008 (unexcused 40 day delay unreasonable as a matter of law).

The Met argues, however, that Nova's late notice disclaimer was invalid and untimely and therefore, Nova may not deny it coverage. The Met argues that Nova never sent it a disclaimer, but only sent the disclaimer to its insurance carrier. *See* Mitchell Reply Affirmation, ¶¶ 19-47. The Met then argues that such service violates Insurance Law § 3420 (d)[10]. *Id.*

Nova replies its late notice disclaimer was valid and timely since case law indicates that service of a disclaimer on an insurance carrier is valid. *See* Gill Affirmation in Opposition, ¶¶ 49-54. Relying on the case *of Excelsior Ins. Co. v. Antretter Contracting Corp.*, 262 AD2d 124 (1st Dept 1999), Nova maintains that where the insured's (the Met's) own liability insurance carrier (here, Travelers) tenders the claim on the insured's behalf, New York has allowed an insurer to validly disclaim coverage by sending the disclaimer to the liability insurance company representing the insured's interest (here, Travelers). According to the court in *Excelsior*, the "[f]ailure to serve a formal notice on the nominal party in interest, does not render ineffective the denial of coverage, where the party who received the notice had undertaken to protect the nominal party's rights and was expected to forward it to the nominal party". *Id.* at 128. "The purpose of [Insurance Law §] 3420(d) was to protect the insured, the injured person, and any other interested

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[10] The reasonableness of the length of this delay is governed by Insurance Law § 3420 (d), which provides that:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

party who has a real stake in the outcome, from being prejudiced by a belated denial of coverage[,] [i]t was not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy. *Id.* at 127. Here, Travelers, the Met's insurer, tendered the claim on behalf of its insured and undertook to protect the Met's rights with respect to the Mayo action, and in essence, shift coverage away from the Travelers policy to the Nova policy. Thus, consistent with the above, the disclaimer notice sent to Travelers is valid. Moreover, the court notes that the Met does not argue that by sending the late notice disclaimer to its insurance carrier, Travelers, the Met was prejudiced. Thus, the court rejects the Met's argument that Nova's late notice disclaimer was invalid because it was sent to the Met's insurance carrier.

The court further rejects the Met's argument that the late notice disclaimer was untimely. The evidence indicates that Nova served a disclaimer notice on Travelers on January 28, 2009, after Travelers tendered a claim on December 29, 2008. *See* Notice of Motion (Seq 10), Exhs. I, K, L, M. Nova maintains that it did not actually receive the claim until January 6, 2009. In New York, courts have generally accepted disclaimers issued within 30 days, when insurers make prompt, good faith efforts to investigate claims before disclaiming. *See Public Serv. Mut. Ins. Co. v. Harlen Hous. Assoc.*, 7 AD3d 421 (1st Dept 2004)(holding an insurer's 27-37 day delay in disclaiming after completion of its investigation was reasonable as a matter of law); *Structure Tone v. Burgess Steel Prods. Corp.*, 249 AD2d 144 (1st Dept 1998)(holding that a disclaimer of duty to defend or indemnify given 38 days after insured's late notice was not unreasonable); Silk v. City of New York, 203 AD2d 103 (1st Dept 1994)(a delay of 1month was reasonable). Thus, here, Nova's disclaimer which was sent within 22-30 days, was reasonable, as a matter of law.

Thus, based upon the above, although the court has indicated that the Met is, indeed, an additional insured of Nova under the terms of the GCL policy, that portion of the Met's motion which seeks a declaration that Nova is obligated to defend and indemnify it in the Mayo's suit is denied; that portion of Nova's motion which seeks a declaration that it is *not* obligated to defend or indemnify the Met in Mayo's personal injury/negligence action is granted.

The second branch of Nova's motion seeks a declaratory judgment that it is not obligated to defend or indemnify Creative in Mayo's personal injury/negligence action. *Id.* at 23-28. Nova argues that, like the Met, Creative violated the GCL policy's notice provision by waiting over three months to serve Nova with notice of Mayo's accident and/or claim. *Id.* at 23-24. Creative responds that Drewes notified Creative's own insurance broker contemporaneously with the occurrence of Mayo's accident, and argues that this act satisfies the subject notice provision. *See* Dachs Affirmation in Opposition, ¶ 6. Nova replies that this is incorrect as a matter of law. *See* Gill Reply Affirmation, ¶¶ 56-48. Nova is correct.

The Appellate Division, First Department, plainly holds that notice to a party's insurance broker does *not* constitute notice to a party's insurer. *See e.g. Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 (1st Dept 2009). Therefore, the court rejects Creative's argument, as, like the Met, Creative violated the GCL policy's notice provision.

Creative nonetheless argues that despite admittedly learning of Mayo's accident on the day it occurred, it had a reasonable belief that it would not be held liable for such accident. *See* Dachs Affirmation in Opposition, ¶ 10-18. Nova vigorously contests this point. *See* Gill Reply Affirmation, ¶¶ 59-79.

While Creative argues that it had a reasonable belief that it would not be held liable for Mayo's accident since Mayo was Creative's employee receiving Workers' Compensation therefore precluding any additional liability on Creative's part, this argument has been consistently rejected by the Appellate Division, First Department. *See National Union Fire Ins. Co. of Pittsburgh, Pa*, 86 AD3d 425 (1st Dept 2011)(insured's belief that Workers' Compensation was the injured's exclusive remedy was not reasonable as a matter of law); *Macro Enterprises, Ltd. v. ABE Ins. Corp.*, 43 AD3d 728 (1st Dept 2007). Further, the Drewes Affidavit that it relies upon in further support is not relevant to the issues between Nova and Creative. Thus, as Creative failed to raise an issue of fact as to the reasonableness of its belief in liability, this Court determines, as a matter of law, that Creative's delay in reporting Mayo's accident to Nova for over three months, violated the terms of the Nova policy. *See e.g. 2130 Williamsbridge Corp. v Interstate Indem. Co.*, 55 AD3d at 372 (1st Dept 2008); *Juvenex Ltd v. Burlington Ins. Co.*, 63 AD3d 554 (1st Dept 2009)(two month delay unreasonable as a matter of law); *Young Israel Co-Op City v. Guideone Mutual Ins. Co.*, 52 AD2d 245 (1st Dept 2008 (unexcused 40 day delay unreasonable as a matter of law). Nova's motion for a declaration that it is not obligated to defend or indemnify Creative in Mayo's personal injury action is therefore granted.

IX. Creative's Motion for Leave to Amend (motion sequence number 013)

The final motion currently before the court is Creative's request for leave, pursuant CPLR 3025, to amend its third-party answer to assert a cross complaint against Nova with causes of action for contractual and common-law indemnification. *See* Notice of Motion (motion sequence number 013).

"It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action ... or is palpably insufficient as a matter of law." *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dept 2001). Here, however, as Creative's proposed indemnity claims lack merit, since, as explained above they are vitiated, as a matter of law, by Creative's failure to abide by the notice provision of the GCL policy, Creative's motion to amend is denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Manuel Mayo (motion sequence number 006) is granted solely to the extent of awarding said plaintiff partial summary judgment on the issue of liability on the third cause of action in the amended complaint (for violation of Labor Law § 240 [1]), with the issue of the calculation of damages reserved for the trial of this action; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Creative Finishes Limited (motion sequence number 007) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of the defendant/third-party plaintiff Metropolitan Opera Association, Inc. (motion sequence number 007) is granted solely to the extent of awarding said defendant/third-party plaintiff summary judgment dismissing the fourth and fifth causes of action in plaintiff Manuel Mayo's amended complaint (in the action bearing Index Number 115545/08), as well as partial summary judgment against third-party defendants Strauss Painting, Inc. and Creative Finishes Limited on the issue of liability only on

the third cause of action set forth in the third-party complaint (in the action bearing Index Number 590119/09), with the issue of damages to be determined at the trial of said action, but is otherwise denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Strauss Painting, Inc. (motion sequence number 008) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Lincoln Center for the Performing Arts, Inc. and the Metropolitan Opera Association, Inc. (motion sequence number 008) is granted solely to the extent of granting said defendants partial summary judgment to sever and dismiss the fourth and fifth causes of action of the complaint in the action bearing Index Number 115545/08, but is otherwise denied; and it is further

ORDERED that the motion, pursuant to CPLR 3215, of third-party defendant Strauss Painting, Inc. for the entry of a default judgment on its cross complaint against third-party defendant Creative Finishes Limited (motion sequence number 009) is granted solely to the extent that said third-party defendant is found liable to movant on the causes of action set forth in said cross complaint, with the issue of damages to be determined at the trial of the third-party action bearing Index Number 590119/09; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the third-party plaintiff Metropolitan Opera Association, Inc. (motion sequence number 010) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Nova Casualty Company (motion sequence number 011) is granted to the extent that it is

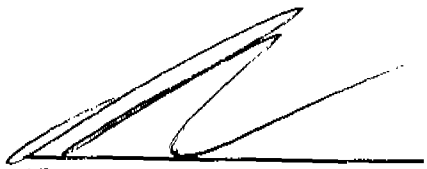
ORDERED ADJUDGED and DECLARED that Nova is not obligated to defend or indemnify the Met or Creative in Mayo's personal injury action; and it is further

ORDERED that the motion, pursuant to CPLR 3025 to amend, of third-party defendant Creative Finishes Limited (motion sequence number 013) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties with notice of entry.

ORDERED that the balance of these actions shall continue.

Dated: New York, New York
October 13, 2011



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Mayo\seven motions 2 cross motions.rewrite.wpd