[* 1]

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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 103434/2007

MACKEY, THOMAS

vs.

CONSOLIDATED EDISON

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. 103434/07

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

this motion to/for

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-D — PAPERS NUMBERED 1

Answering Affidavits — Exhibits Notice of Cross-Motion - Affs - exhibits — 2,3,4

Replying Affidavits - Exhibits — 5,6

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Dec. 15, 2011

MARTIN SHULMAN J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----------x

THOMAS MACKEY, CAROLYN MACKEY and STEVE A. SILVERSTEIN,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CASE CONTRACTING, LTD. and NELSON SERVICES SYSTEMS, INC.,

Defendants.

Index No. 103434/07

----------x

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

CASE CONTRACTING, LTD.,

Third-Party Defendant.

Third-Party Index No. 591111/07

----------x

CASE CONTRACTING, LTD.,

Second Third-Party Plaintiff,

-against-

PROVEN ELECTRICAL CONTRACTING, INC.,

Second Third-Party Defendant.

Second Third-Party Index No. 590292/08

----------x

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third Third-Party Plaintiff,

-against-

NELSON SERVICES SYSTEMS, INC.,

Third Third-Party Defendant.

Third Third-Party Index No. 590613/09

----------x

MARTIN SHULMAN, J.:

Motion sequence numbers 007 and 008 are consolidated for disposition.

In an action to recover monetary damages for alleged workplace injuries, defendant/third third-party defendant Nelson Services Systems Inc. ("Nelson") seeks summary judgment dismissing plaintiffs' second amended verified complaints, all cross claims/counterclaims against it and Consolidated Edison Company of New York, Inc.'s ("Con Ed") third third-party complaint (motion sequence 007). Defendant/third-party plaintiff/third third-party plaintiff Con Ed cross-moves for summary judgment on the third third-party complaint, including a declaration that Nelson is obligated to defend and indemnify Con Ed in the instant action.

In motion sequence 008, defendant/third-party defendant/second third-party plaintiff Case Contracting, Ltd. ("Case") moves for summary judgment: (1) dismissing plaintiffs' second amended verified complaints, any cross claims/counterclaims and the third-party complaint, and (2) on its second third-party complaint as against Proven Electrical Contracting Corp. ("Proven"). Con Ed cross-moves for summary judgment on its third-party complaint against Case, which seeks a declaration of entitlement to defense and indemnification from Case in the instant action.

For the reasons stated below, Nelson's motion is granted. Both of Con Ed's cross motions are denied. Case's motion is granted solely to the extent of dismissing plaintiff Steve A. Silverstein's ("Silverstein") Labor Law § 240 (1) claims as against it, and is otherwise denied.

Background

Plaintiffs seek to recover monetary damages for a November 8, 2006 accident that allegedly injured plaintiffs Thomas Mackey ("Mackey") and Silverstein while they were installing pipe for an emergency public address system at Con Ed's East River

Generating Station, at 14th Street and Avenue C, New York, New York (the "East River Generating Station"). Plaintiffs allege they were carrying a ladder together and were about to descend a staircase when Mackey slipped off the landing and fell down the stairs on water that had accumulated on the staircase. Silverstein, who was still holding the middle of the ladder at the time, fell down the flight of steps after Mackey.

Plaintiffs allege that it was raining heavily on the day of their accident and, because there was a missing window at the top of the steps, the rain had entered the staircase area and a puddle of water had accumulated on the top landing.[1] In their second amended verified complaints, plaintiffs allege that they suffered injuries as a result of their accident.

At the time of their accident, plaintiffs were employed by Proven, a subcontractor of Case.[2] Additionally, by Purchase Order (number 627933) dated September 25, 2006, Case contracted with Con Ed to "FURNISH THE NECESSARY SUPERVISION, LABOR, MATERIAL AND EQUIPMENT NECESSARY TO INSTALL THE NEW EMERGENCY NOTIFICATION PUBLIC ADDRESS SYSTEM . . . ALL WORK TO BE PERFORMED IN ACCORDANCE WITH THE STANDARD TERMS AND CONDITIONS TO CONSTRUCTION CONTRACTS ... AND THE CONSTRUCTION CONTRACT MANAGEMENT PROCEDURES."

---

[1] It is unclear from Mackey and Silverstein's deposition testimony whether the water had also accumulated on the steps and, if so, how many steps were affected. *See* Mackey EBT, at 29; Silverstein EBT, at 70.

[2] *See* June 20, 2000 Blanket Subcontract Agreement, Case's Notice of Motion, Exh. U.

Con Ed engaged Nelson, a cleaning service, pursuant to a February 18, 2005 Purchase Order (number 519705) to "PERFORM JANITORIAL SERVICE, CLEAN-UP WORK, LIGHT FURNITURE MOVING, RELOCATING OFFICE EQUIPMENT AND SUPPLIES, PAINTING ... RELATED TO THE EAST RIVER STATION'S SERVICE BUILDINGS, HIGH/LOW PRESSURE AREA AND THE SOUTH STEAM STATION. ALL SERVICE TO BE PROVIDED AT THE EAST RIVER STATION FACILITY INCLUDING THE TANK FARM AND DOCK FACILITY." The Purchase Order between Con Ed and Nelson was subsequently modified to further state that: "THIS CONTRACT IS SUBJECT TO APPENDIX A, REQUIRED CLAUSES AND CERTIFICATIONS, DATED JULY 2007."

Although Mackey and Silverstein individually commenced separate actions, this court consolidated those actions on March 10, 2010.[3] In their second amended verified complaints, the plaintiffs seek damages for common-law negligence, as well as for violations of Labor Law §§ 200 and 241 (6). To support their Labor Law § 241 (6) claim, the plaintiffs allege violations of Industrial Code §§ 23-1.7 (b) (1), (d), (e) (1) and (e) (2) and (f); 23-1.15 (a), (b), (c), (d) and (e); 23-1.30; 23-2.1 (a) and (b); and 23-2.7. Silverstein additionally alleges that defendants violated Labor Law § 240 (1).

Discussion

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68

---

[3] The actions were originally consolidated on March 18, 2008, however, that original order was vacated and superceded by the March 10, 2010 order. *See* Notice of Motion, Exh. A.

NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Common-Law Negligence and Labor Law § 200 Claims

Nelson

Nelson seeks dismissal of plaintiffs' claims for common-law negligence and violation of Labor Law §200. "To maintain a negligence cause of action, [a] plaintiff must be able to prove the existence of a duty, breach and proximate cause." *Kenney v City of New York*, 30 AD3d 261, 262 (1st Dept 2006). A plaintiff must establish that the alleged wrongdoer owed a duty to such plaintiff, and "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 (2002).

However, there are three exceptions where a party who contracts with an owner or general contractor fails to exercise reasonable care in the performance of its duties, the contractor "launche[s] a force or instrument of harm," or the injured worker has an expectation that the contractor will continue to perform its duties and does not. *Id.* at 141; *see also Church v Callanan Indus., Inc.*, 99 NY2d 104 (2002). As stated in *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 (1st Dept), *lv dismissed* 4 NY3d 739 (2004):

> [T]he court in *Church* identified those circumstances as: first, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk;" second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation;" and third, "where the contracting party has entirely displaced the other party's duty to maintain the premises safely." (internal citations omitted)

Because Nelson contracted only with Con Ed (*see* Nelson's Notice of Motion, Exh. J), under current law, Nelson had no duty to Mackey or Silverstein, unless it was affirmatively engaged in mopping the staircase and increased the risk of harm, or Nelson entirely displaced Con Ed in its duty to maintain the East River Generating Station. As Mackey and Silverstein both testified, John Rogers ("Rogers") of Con Ed was involved in remedying maintenance issues and complaints about housekeeping issues were brought to him. *See* Silverstein EBT, at 24-25; Mackey EBT, at 179.

Additionally, Silverstein testified he had never heard of Nelson and never saw anyone mopping the floors (*see* Silverstein EBT at 9-10). Mackey, who was aware of Nelson because of the uniforms their workers wore, testified that he only saw Nelson employees once or twice a week in another area of the plant and never saw them doing any work other than sweeping. *See* Mackey EBT at 196-97.

For the foregoing reasons, this court finds that, as a matter of law, Nelson had no duty to Mackey and Silverstein. Accordingly, that portion of Nelson's motion seeking dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims as against it is granted.

Case

Case also seeks summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims. Case's September 25, 2006 contract with Con Ed provided that Case would provide the labor for the installation of the emergency public address system. At least a portion of that job was sub-contracted to Proven.

Labor Law § 200 "codifies the common-law duty of an owner or employer to provide employees with a safe place to work." *See Jock v Fien*, 80 NY2d 965, 967 (1992). The statute applies to owners, contractors and agents who either controlled or supervised the injured worker or created an allegedly dangerous condition or had actual or constructive notice of it. *See Lombardi v Stout*, 80 NY2d 290 (1992).

Supervision and control of the injured worker's methods by an owner or general contractor or the creation of or knowledge of a dangerous condition are thus prerequisites to such liability. *See Candela v City of New York*, 8 AD3d 45 (1st Dept 2004); *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993); *Mitchell v New York Univ.*, 12 AD3d 200 (1st Dept 2004). If supervision or control are at issue, to establish liability, the control exercised must be more than a "general duty to supervise the work and ensure compliance with safety regulations." *De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 192 (1st Dept 2003); *see also Vasiliades v Lehrer McGovern & Bovis, Inc.*, 3 AD3d 400 (1st Dept 2004); *Reilly v Newireen Assocs.*, 303 AD2d 214 (1st Dept), *lv denied* 100 NY2d 508 (2003). "[M]onitoring and oversight of the timing and quality of the work [are] not enough to impose liability under section 200 . . . [n]or is a general duty to ensure compliance with safety regulations or

the authority to stop work for safety reasons." *Dalanna v City of New York*, 308 AD2d 400, 400 (1st Dept 2003) (citations omitted); *see also Geonie v OD & P NY Ltd.*, 50 AD3d 444 (1st Dept 2008); *Gonzalez v United Parcel Serv.*, 249 AD2d 210 (1st Dept 1998).

However, supervision and control of the injured worker are not required in order to claim liability based on a defective condition. *See Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 (1st Dept 2009); *see also Murphy v Columbia Univ.*, 4 AD3d 200 (1st Dept 2004). When an accident arises from a dangerous condition, the owner or general contractor is liable under Labor Law § 200 when either the owner or contractor created the dangerous condition or failed to remedy it after having actual or constructive notice. *See Mendoza v Highpoint Assocs., IX, LLC*, 83 AD3d 1 (1st Dept 2011).

Here, Case asserts that it did not supervise Mackey or Silverstein, control their work, nor create or have notice of any dangerous condition. In fact, Case maintains that it had only one employee at the time of plaintiffs' accident – i.e., Anthony Provenzano ("Provenzano")--and he was not working on the Con Ed job at the time of the accident. *See* Provenzano EBT, at 16-21, 31.

Case further contends that, by filing a "Health and Safety Plan" ("HASP") with Con Ed setting forth a plan for employees that worked in the East River Generating Station, Case was not exercising supervision over Mackey and Silverstein within the meaning of Labor Law § 200.[4] A safety plan for an entire job indicates no more than

---

[4] It should be noted that in the Emergency Phone Number list attached to the HASP, Russell Randazza is listed as Case's "Project Manager" and Salvatore Testa as the "Job Site Supervisor."

general oversight of a job and does not meet the supervision requirement "that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). As such, this is a defective condition case and not one where liability under Labor Law § 200 liability will rest upon supervision and control.

However, in reviewing all the proffered evidence, it appears that Russell Randazza ("Randazza") signed the sub-contract on Case's behalf and Provenzano testified that, at some point, Randazza was a Case employee. *See* Provenzano EBT, at 11, 15. Evidence was also proffered that Randazza was on the project a few times per week (*see* EBT of Salvatore Testa ["Testa"], at 15) and it is uncontested that Testa, who was both Mackey and Silverstein's foreman, reported to Randazza.

Given that Silverstein, Mackey, two other Proven employees and allegedly Con Ed employees were aware that the window at issue at the top of the staircase had been broken for some time and that the rain regularly came onto the landing and the stairs (*see* Affidavits of Proven employees Paul Pronko and Daniel Dunn), there are material questions of fact as to whether Case had notice of the alleged defective condition. Because there are material questions of fact as to whether or not Randazza was a Case employee and whether or not through him, Case had notice of the allegedly dangerous condition, that portion of Case's motion seeking dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims is denied.

Labor Law § 240 (1) Claims

Under Labor Law § 240 (1), owners, general contractors and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. *See Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *see also Rizzo v Hellman Elec. Corp.*, 281 AD2d 258 (1st Dept 2001). Silverstein does not oppose that portion of the motions to dismiss his Labor Law § 240 (1) claims. Accordingly, Silverstein's Labor Law § 240 (1) claims against Case and Nelson are dismissed.

Labor Law § 241 (6) Claims

Nelson and Case seek summary judgment dismissing plaintiffs' Labor Law § 241 (6) claims. Labor Law § 241 (6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

This section requires owners and contractors at a construction site to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502

(1993). The regulations contained within the Industrial Code apply to owners and general contractors. *Id.*

However, "[a]s a general rule, a separate prime contractor is not liable under Labor Law ... § 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker." *Barrios v City of New York*, 75 AD3d 517, 518 (2d Dept 2010); *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311 (1981). There is no evidence that Con Ed delegated to Nelson any authority to supervise Mackey or Silverstein or to oversee any of their on-site safety matters. Therefore, the Labor Law § 241 (6) claims that plaintiffs allege against Nelson are dismissed.

"To assert a sustainable cause of action under section 241 (6), a plaintiff must allege a violation of a concrete specification of the Commissioner's regulations in the Industrial Code." *Messina v City of New York*, 300 AD2d 121, 122 (1st Dept 2002) (internal quotation marks and citation omitted). In their complaints, plaintiffs seek to recover monetary damages for violations of Industrial Code §§ §§ 23-1.7 (b) (1), (d), (e) (1) and (e) (2) and (f); 23-1.15 (a), (b), (c), (d) and (e); 23-1.30; 23-2.1 (a) and (b); and 23-2.7.

12 NYCRR §23-1.7 is entitled "Protection from General Hazards." Subsections (b), (d), (e) and (f), which are alleged to be violated, are entitled "falling hazards," "slipping hazards," "tripping and other hazards" and "vertical passage," respectively. The regulations contained in Industrial Code §23-1.7 (b) (1) pertain to "hazardous

openings." Although not defined therein, this term does not include the landing of a permanent staircase. *See Rookwood v Hyde Park Owners Corp.*, 48 AD3d 779, 781 (2d Dept 2008). This can be immediately gleaned from the safety measures required in the regulations, including planking, safety nets, harnesses and guard rails. Therefore, this subsection of 12 NYCRR §23-1.7 is factually inapplicable to the case at hand and may not be used to support plaintiffs' Labor Law § 241 (6) claims.

Subsection 23-1.7 (d) states as follows:

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

The staircase herein is a "passageway" within the meaning of the regulation (*see Ryan v Morse Diesel, Inc.*, 98 AD2d 615 [1st Dept 1983]) and the regulation is sufficiently specific to support a Labor Law § 241 (6) claim. See *Farina v Plaza Constr. Co., Inc.*, 238 AD2d 158 (1st Dept 1997). This regulation is applicable to the facts plaintiffs allege in the instant action and may be used to support plaintiff's Labor Law § 241 (6) claims against Case.

Subsections 23-1.7 (e) and (f), which concern accumulations of dirt and debris, as well as the installation of stairways and ladders, are not applicable to the facts of this action and may not be employed to support plaintiffs' Labor Law § 241 (6) claims. Similarly, section 23-1.15 (a), (b), (c), (d) and (e), which concerns "safety railings," is inapplicable to the facts at issue in this action, as plaintiffs admit that there was a railing

along the stairs. *See* Mackey EBT, at 177; Silverstein EBT, at 113-14. Therefore, this section may not be employed to support plaintiffs' Labor Law § 241 (6) claims.

Section 23-1.30 is entitled "Illumination," and states as follows:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

Both Mackey and Silverstein testified that the illumination in the staircase was "poor" and that "no bulbs were illuminated." *See* Mackey EBT, at 49; Silverstein EBT, at 100. The regulation requires specificity (*see Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732 [1st Dept 2006], *lv denied* 8 NY3d 814 (2007); *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347 [1st Dept 2006]), which plaintiffs have supplied in their testimony. Therefore, plaintiffs may employ allegations of violations of 12 NYCRR §23-1.30 to support their Labor Law § 241 (6) claims.

Plaintiffs additionally seek to employ 12 NYCRR §23-2.1 (a) and (b), "Maintenance and Housekeeping," to support their claims. However, this section of the regulations, which concerns storage of material and equipment and the disposal of debris, is not applicable to the facts at issue in this action. Therefore, this section of the Industrial Code cannot be employed to support plaintiffs' Labor Law § 241 (6) claims.

Finally, plaintiffs seek to use section 23-2.7 to support their Labor Law §241 (6) claims. However, this section of the regulations contains the requirements for the erection of temporary stairways during construction. There is no evidence that the staircase on which Mackey and Silverstein fell was one that was temporary. Therefore,

this section of the Industrial Code may not be used to support plaintiffs' Labor Law § 241 (6) claims.

Plaintiffs have provided sufficient support for their Labor Law § 241 (6) claims against Case. Thus, that portion of Case's motion seeking dismissal of plaintiffs' Labor Law § 241 (6) claims is denied.

Con Ed's Claims Against Nelson

Nelson moves to dismiss all of Con Ed's claims against it and Con Ed seeks summary judgment on its claims in its third third-party complaint for contractual and common-law indemnification, contribution and defense in the instant action. The third third-party complaint also seeks monetary damages for Nelson's breach of contract for the failure to procure insurance.

"The right to contractual indemnification depends upon the specific language of the contract." *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 (2d Dept 2008). The operative paragraph of the contract between Nelson and Con Ed states as follows:

> To the fullest extent allowed by law, [Nelson] agrees to defend, indemnify and save Con Edison ... harmless from all claims, damage, loss and liability, *including costs and expenses*, legal and otherwise, for injury to or the death of persons, ... in whole or in part, from, or connected with, the performance of the Purchase Order by [Nelson], ... and including claims, loss, damage and liability arising from the partial or sole negligence of Con Edison or non-parties to this Purchase Order.

See Nelson's Notice of Motion, Exh. J, paragraph 20.

Nelson asserts that this indemnification clause violates General Obligations Law § 5-322.1 by providing indemnification for Con Ed's own negligence, and further, that

Mackey and Silverstein's accident did not result from Nelson's contractual duties.

General Obligations Law § 5-322.1 provides in pertinent part:

> 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

Despite the fact that General Obligations Law §5-322.1 prohibits a contractor from recovering for its own negligence, this provision contains the saving verbiage, "to the fullest extent allowed by law," and thus is enforceable against Nelson. *See Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 (2008); *Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641 (2d Dept 2006); *Barros v Arthur Kill, LLC*, 2011 WL 5295029, 2011 NY Misc LEXIS 5168 (Sup Ct, NY County 2011). Thus, this indemnification paragraph meets the requirements of General Obligations Law §5-322.1.

However, Nelson correctly argues that the accident at issue herein did not fall "in whole or in part, from, or connected with, the performance of the Purchase Order." For a claim to "arise out" of a contractor's work, there must be a showing that "a particular act or omission in the performance of such work was causally related to the accident." *Urbina v 26 Ct. St. Assocs., LLC*, 46 AD3d 268, 273 (1st Dept 2007). This court has

already held above that Nelson was not negligent in Mackey and Silverstein's accident. Therefore, that portion of Con Ed's cross motion that seeks an order of entitlement to contractual indemnification is denied.

Although it is generally premature for a court to determine whether an owner is entitled to common-law indemnification and/or contribution prior to trial, where it has been held that a contractor is not liable in an action, common-law indemnification and contribution will be denied. *See Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872 (1st Dept 2009).

Although a duty to defend "'arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim'" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] [quoting *Frontier Insulation Contrs., Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 (1997)]), plaintiffs' claims against Nelson have been dismissed. Therefore, Con Ed is not entitled to defense from Nelson in this action.

Finally, Nelson seeks dismissal of the portion of Con Ed's third third-party complaint seeking monetary damages for breach of contract for failure to procure insurance. Nelson asserts that it obtained insurance under which Con Ed was named as an additional insured under the policy, but that Con Ed failed to (1) give timely notice of its claim, and (2) show how Con Ed qualified as an additional insured with respect to the instant action because Mackey and Silverstein's accident did not arise out of the performance of Nelson's operations for Con Ed. *See* Nelson's Affirmation in Reply, Exh. A.

A party's "contractual obligation is separate and distinct from the insurer's obligations under the policy." *Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 (1st Dept 2010). All the proffered evidence indicates that Nelson procured the required insurance. *See* Nelson's Notice of Motion, Exh. Q. Whether or not Nelson's insurer violated the terms of the insurance policy by denying Con Ed's claim is not relevant to Con Ed's allegation that Nelson failed to obtain the required insurance. Therefore, that portion of Con Ed's third third-party complaint that seeks monetary damages for breach of contract for failure to procure insurance is dismissed.

Consequently, Con Ed's third third-party action against Nelson is dismissed. Additionally, because this court holds, as a matter of law, that Nelson was not negligent in Mackey and Silverstein's accident, all cross claims against Nelson are dismissed.

Case's Claims Against Proven

Case seeks summary judgment on its second third-party complaint for common-law indemnification, contribution and contractual indemnification. There are material questions of fact as to whether Proven or Case was negligent in Mackey and Silverstein's accident. Therefore, any determination of entitlement to common-law indemnification or contribution is premature. *See Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d at 875.

As to contractual indemnification, the Blanket Subcontract Agreement between Case and Proven requires Proven to "indemnify and hold harmless Case ... for all claims, damages, losses, and expense, including attorney's fees, arising and resulting

from the performance of the Work, provided that any such claim, damage, loss or expense is: attributable to ... injury ... and caused in whole or in part by any negligent act or omission of [Proven]." Importantly, the clause excludes "the sole negligence of the parties indemnified hereunder."

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 (2d Dept 2009); *see also Klewinowski v City of New York*, 2011 WL 4443508, 2011 NY Misc LEXIS 44481 (Sup Ct, NY County 2011). There are questions of fact as to whether Case was negligent in this action. Therefore, any finding of entitlement to contractual indemnification is premature. Additionally, that portion of Case's motion seeking dismissal of all cross-claims, which are based upon Case's negligence, is denied as premature.

Con Ed's Claims Against Case

Con Ed cross-moves for summary judgment on its third-party complaint against Case seeking a declaration of entitlement to defense and indemnification. Because there are material questions of fact as to whether or not Con Ed, which owned and controlled the East River Generating Station, was negligent with respect to the occurrence of Mackey and Silverstein's accident, an order of entitlement to common-law indemnification and contribution is premature.

As to the September 25, 2006 contract between Con Ed and Case, the indemnification provision mirrors that in the contract between Con Ed and Nelson, as

stated above. For the reasons stated in the discussion above, because negligence has not been determined in the instant action as to Con Ed, any conditional judgment of entitlement to an order of contractual indemnification or defense is premature and is therefore denied. Accordingly, it is hereby

ORDERED that Nelson Services Systems Inc.'s motion is granted; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that Consolidated Edison Company of New York, Inc.'s cross motions are denied; and it is further

ORDERED that Case Contracting Ltd.'s motion is granted solely to the extent of dismissing plaintiff Steve A. Silverstein's Labor Law § 240 (1) claim as against it, and is otherwise denied.

The Clerk is directed to enter judgment dismissing the complaints as against defendant Nelson Services Systems Inc. and dismissing the third third-party action.

The parties are directed to proceed to Mediation as scheduled.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
December 15, 2011

Martin Shulman, J.S.C.