[* 1]

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

PRESENT: _____ PART 19

Justice

Index Number : 108417/2007

DEJESUS, ANTHONY

VS.

888 SEVENTH AVENUE

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 6/8/12
which disposes of motion sequence(s) no. (001), 002 and 003.

FILED

JUN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/8/12

SALIANN SCARPULLA 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 19

----------X

ANTHONY DEJESUS and JEANETTE DEJESUS,

Plaintiffs,

-against-

888 SEVENTH AVENUE, LLC, R&R SCAFFOLDING, LTD. and KBI, INC.,

Defendants.

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888 SEVENTH AVENUE, LLC,

Third-Party Plaintiff,

-against-

SMB WINDOWS LLC,

Third-Party Defendant.

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Index No. 108417/07
Submission Date: 1/11/12

Third-Party Index No.
590327/08

DECISION AND ORDER

For the Plaintiffs:
Sacks & Sacks
150 Broadway, 4th Floor
New York, NY 10038

For Defendant/Third Party Plaintiff 888 Seventh Avenue, LLC:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
150 East 42nd Street
New York, NY 10017-5639

For Defendant R&R Scaffolding, LTD:
Law Offices of Edward Garfinkel
12 Metrotech Center
Brooklyn, NY 11201

For Third-Party Defendant SMB Windows, LLC:
Hardin, Kundla, Mckeon & Poletto, P.A.
110 William Street
New York, NY 10038

HON. SALIANN SCARPULLA, J.:

In this action which arises from a roof-top accident, third-party defendant SMB Windows LLC ("SMB") moves, pursuant to CPLR 3212, for summary judgment

dismissing the third-party complaint and all cross claims asserted against it (motion sequence number 001).[1] Defendant R&R Scaffolding, Ltd. ("R&R") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it (motion sequence number 002). Defendant/third-party plaintiff 888 Seventh Avenue, LLC ("888"), moves for summary judgment: (1) dismissing the complaint and all cross claims asserted as against it; (2) on its contractual and common-law indemnification claims against R&R; and (3) on its contractual and common-law indemnification claims against SMB (motion sequence number 003). Plaintiffs cross-move for summary judgment on their Labor Law § 240 (1) claim as against 888. Motion sequence numbers 001, 002, and 003 are consolidated for disposition.[2]

Background

On Saturday, March 10, 2007, plaintiff Anthony DeJesus ("DeJesus" or "plaintiff") and his co-worker, Edwin Velez ("Velez"), were working on the roof of the building located at 888 Seventh Avenue in Manhattan. Velez and Dejesus, normally employed by nonparty Building Maintenance Services ("BMS") as window washers, were instead working overtime and operating the electrically powered scaffold rig from which KBI's workers were re-caulking leaky windows. DeJesus's and Velez's job was to

[1]There are no cross claims asserted against SMB.

[2] Defendant KBI, Inc. ("KBI") has not appeared in this action.

position the scaffold where KBI's workers needed it, and then go downstairs inside the building to wait until KBI's workers were ready to have the scaffold moved again.

The scaffold operated by DeJesus and Velez was used for window washing, but was also available to other contractors, such as KBI. Dejesus and Velez were the only window washers in the building who were trained and authorized to operate the scaffold, so they were the ones called in on a weekend if a contractor needed to use it.

The scaffolding system itself consists of an enclosed "lifting device" or "gondola" which operates a crane, from which the scaffold basket hangs. The rig is propelled along a set of tracks that runs along the perimeter of the roof. The operator of the system stands in the gondola and moves the rig along the tracks to a position where the window washers, or other workers, can be lowered in the basket over the side of the building. After the rig is repositioned, the second window washer disconnects the power cord from the prior outlet and takes it to an outlet that is closer to the present position of the rig.

This particular system was only about two years old, but ran along the same tracks used by the prior system. The positions and number of electrical outlets remained the same from the prior system to the rig operated by DeJesus and Velez. The new system was tested after its installation, and on a monthly basis thereafter. It is uncontested that plaintiff's accident was not caused by any malfunction of the scaffolding system.

R&R installed and maintained the rig, and instructed plaintiff on its operation, giving him hands-on training. It performed monthly inspections of the rig, and submitted

its reports to "Vornado" or "Vornado Realty." At the time of his accident, plaintiff had operated this particular scaffold more than 20 times over the course of a year.

On the date of the accident, Velez was in the gondola, which was plugged into an electrical outlet on the roof. After the gondola was moved approximately 25 feet from the outlet it was plugged into, plaintiff removed the electrical cord and walked toward the parapet wall, intending to toss the cord over, to an outlet approximately three stories below. Plaintiff was wearing his harness and lanyard, but had not yet tied off on a rope on the system when he stepped onto the track, slipped and fell to the roof below, sustaining injuries.

888 owns the building. In March 2007, Ken Fidje ("Fidje") was employed by nonparty Vornado Office Management as a property manager at 888 Seventh Avenue, and Sean Horgan ("Horgan") was employed by nonparty Vornado Realty Trust[3] as the chief engineer at the building.

Nonparty BMS was a contractor charged with building maintenance, including window washing, at 888 Seventh Avenue. BMS's supervisor, Edwin Fabre ("Fabre"), was DeJesus's immediate supervisor. As stated by Michael Silvestro, BMS's vice president ("Silvestro"), in his affidavit, in March 2007, SMB had a contract with 888 to

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[3] No explanation or clarification has been given concerning the relationship, if any, between these two apparently distinct entities, or the role either or both played at the building at the time of plaintiff's accident.

provide window washing services at the building, and BMS "managed the work of SMB Windows," which is no longer in operation.

Plaintiffs DeJesus and his wife commenced this action by filing the summons and complaint, dated June 13, 2007, which alleges four causes of action by DeJesus, sounding in negligence, violations of Labor Law §§ 200, 240 and 241, and his wife's derivative claim for loss of consortium. Plaintiffs' bill of particulars also alleges violation of Labor Law § 202. In their answers, defendants 888 and R&R deny the allegations contained in the complaint and assert cross claims against each other for contribution or common-law indemnification.

888 also brought a third-party action against SMB, asserting claims for contribution, contractual and common-law indemnification and breach of contract by failure to procure insurance. In its third-party answer, SMB asserts cross claims against defendants 888, R&R and KBI for contribution and common-law indemnification.

Discussion

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Shapiro v. 350 E. 78th St. Tenants Corp.*, 85 A.D.3d 601, 608 (1st Dept 2011), quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). "If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers." *O'Halloran v. City of New York*,

78 A.D.3d 536, 537 (1st Dept 2010). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact." *Melendez v. Parkchester Med. Servs., P.C.*, 76 A.D.3d 927, 927 (1st Dept 2010). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues." *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510-511 (1st Dept 2010).

Labor Law and Common-Law Negligence Claims

Labor Law § 240 (1)

Labor Law § 240 (1)[4] is intended to provide "exceptional protection" to workers against the "special hazards" encountered when the work site "either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured.'" *Harris v. City of New York*, 83 A.D.3d 104, 108 (1st Dept 2011), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500-501 (1993). *See also La Veglia v. St. Francis Hosp.*, 78 A.D.3d 1123, 1126 (2d Dept 2010). "The statute imposes absolute liability on

[4] Labor Law § 240 (1) provides, in pertinent part:

> 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.

building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker." *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 7 (2011), quoting *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 490 (1995).

Notably, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001). *See also Gutman v. City of New York*, 78 A.D.3d 886, 887 (2d Dept 2010). "Thus, injuries arising from 'routine workplace risks' rather than from elevation differentials will not fall within the statute's protection." *Harrison v. State of New York*, 88 A.D.3d 951, 952 (2d Dept 2011), citing *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 (2009).

"The single decisive question is whether the [claimant's] injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 (2009). *See also Gasques v. State of New York*, 59 A.D.3d 666, 667 (2d Dept 2009), *affd* 15 N.Y.3d 869 (2010). Therefore, in order "[t]o establish liability on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that the statute was

violated and that the violation was a proximate cause of his or her injuries." *Herrera v. Union Mech. of NY Corp.*, 80 A.D.3d 564, 564-565 (2d Dept 2011).

The first determination is whether plaintiff and his work fall within the scope of the statute. "[T]he question whether a particular [activity] falls within section 240 (1) must be determined on a case-by-case basis, depending on the context of the work." *Prats v. Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 883 (2003). *See also Torkel v. NYU Hosps. Ctr.*, 63 A.D.3d 587, 599 (1st Dept 2009), quoting *Prats*. The court must consider "a confluence of factors" in making the determination. (*Ibid.*)

The statute requires that "proper protection [be provided] to a person *so employed*" in one of the enumerated activities. Labor Law §240(1) (emphasis added). Such workers make up the "special class for whose benefit liability is imposed upon contractors, owners and their agents." *Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573, 576 (1990).

Here, plaintiff was not employed by KBI, the contractor performing the caulking, neither did he perform the caulking. He was employed as a window washer, and it is uncontested that no window washing was done that day. Plaintiff's sole task on the day of his accident was to help operate the scaffolding system in between the times that KBI's workers used the rig to do their caulking. At all other times, DeJesus and Velez were downstairs, inside the building. They only went to the roof when KBI's people told them that KBI was ready to have the rig repositioned. Plaintiff had previously performed this same service of moving the scaffolding rig for other contractors at other times.

Thus, when he fell, plaintiff was injured before any activity enumerated in the statute was underway, and he himself was not engaged or "so employed" in an enumerated activity. *Panek v. County of Albany*, 99 N.Y.2d 452, 457 (2003) (section 240 (1) "afford[s] no protection to a plaintiff injured before any activity listed in the statute was underway"); *Martinez v. City of New York*, 93 N.Y.2d 322, 326 (1999) (where an environmental inspector's "investigatory" work was to end before the start of the actual asbestos removal and the eventual repair work was to be conducted by another entity, the worker was not employed to carry out repairs). DeJesus was not part of the "special class" for whom the protections of the statute were enacted.[5] Thus, plaintiffs' claim under Labor Law § 240 (1) must be dismissed.

Plaintiff's claim under Labor Law § 241 (6) must also be dismissed. By its very terms, section 241 (6) applies only "when [workers are] constructing or demolishing buildings or doing any excavating in connection therewith." It is uncontested that no such activity was being conducted at the time of plaintiff's accident.

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[5] *See also Gibson v. Worthington Div. of McGraw-Edison Co.*, 78 N.Y.2d 1108, 1109 (1991) (design engineer who was sent to a roof to make a repair estimate "was not a person 'employed' to carry out the repairs"); *Martinez v. City of New York*, 73 A.D.3d 993, 996 (2d Dept 2010) (worker injured while closing a gas valve prior to another entity's renovation work was not employed in an enumerated activity, as he had closed similar valves in the past; his work was completed before the subcontractor's repair work began; his employer was not engaged to perform the renovation work; and the worker was not permitted to perform the renovations); *Spaulding v. S.H.S. Bay Ridge*, 305 A.D.2d 400, 401 (2d Dept 2003) (general contractor's security guard was "neither 'permitted or suffered to work on a building or structure') (citation omitted).

Plaintiff's contention that his work was necessary and incidental to KBI's work is unpersuasive, especially in light of my finding above that his work operating the scaffold does not fall within the protections of Labor Law §§ 240 (1) and 241 (6). In addition, the Court of Appeals in *Martinez v. City of New York,* 93 N.Y.2d 322 (1999), "reject[ed] the analysis . . . which focused on whether plaintiff's work was an 'integral and necessary part' of a larger project within the purview of section 240 (1). Such a test improperly enlarges the reach of the statute beyond its clear terms." *Martinez*, 93 N.Y.2d at 326. *See also Adair v. Bestek Lighting & Staging Corp.*, 298 A.D.2d 153 (1st Dept 2002).

Accordingly, the portions of R&R's and 888's motions which seek summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action are granted. Plaintiffs' cross motion for summary judgment on their Labor Law §240(1) claim as against 888 is denied.

Labor Law § 200 and Common-Law Negligence

"It is settled that section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Singh v. Black Diamonds LLC*, 24 A.D.3d 138, 139 (1st Dep't 2005). Liability may arise out of two distinct factual situations: "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." *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep't 2008).

> [W]hen 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. A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed.

Schwind v. Mel Lany Constr. Mgt. Corp., ___ A.D.3d ___, 2012 NY Slip Op 03994, *2 (2d Dept 2012) (internal quotation marks and citations omitted).

R&R contends that the proximate causes of the accident were that 888 and/or plaintiff's employer, SMB,[6] failed to operate the rig with a three-person crew, and that plaintiff failed to use his harness and lanyard. Savinovich states in his affidavit that, although plaintiff had received training on how to safely operate the rig, including the need for a three-person crew, on the day of the accident only DeJesus and Velez were operating the scaffolding system. R&R's Christer Hogne ("Hogne") testified at his deposition that it was his understanding that working on this particular rig was a three-person job. However, Fabre, BMS's supervisor, testified that he was never told that three people were needed to move the power from one location to another. Fabre also testified that he told DeJesus that the operation of the rig for window washing was a three-person

[6]Only R&R states that plaintiff's employer was SMB rather than BMS.

job because the state requires it and because the other two workers might need help pushing the scaffolding off or getting it unstuck, and that the third person could be anyone in the building who was qualified to operate the system, including the building's engineers. In addition, the New York State Department of Labor's May 8, 2006 Resolution of Special Approval mandates that three persons operate the rig.

888 contends that the absence of a three-person crew could not have been a proximate cause of the accident because having a third person on the lower roof would not have prevented plaintiff from stepping on the track to lower the cord to the lower roof. However, R&R contends that a third person would have prevented plaintiff from climbing out onto the rail without his lanyard being tied off.

It is uncontested that Fabre was DeJesus's immediate supervisor at BMS, and that plaintiff was a BMS employee. However, Fabre testified at his deposition that DeJesus worked for both the building and BMS, but BMS paid his salary. Fabre also testified that building management, specifically Fidji, could directly contact DeJesus to tell him what to do. Fabre also testified that he would go to the job site "[a]s often as" he could to ensure that the window washers were following safety practices, including wearing safety harnesses at all times.

None of the evidence before the court indicates that either R&R or 888 had "the responsibility for the manner in which the work [was] performed." *Schwind v. Mel Lany*

Constr. Mgt. Corp., ___ A.D.3d at ___ (2012 NY Slip Op 03994, at *2). Therefore, no liability for a failure to supervise or control plaintiff's work lies against R&R and 888.

The contention that plaintiff was the sole proximate cause of his injuries because of his failure to keep his lanyard tied off to the system at all times need not be addressed, because of my finding that R&R and 888 are not liable for a failure to supervise the means and methods of plaintiff's work.

DeJesus asserts that the allegedly inadequate number and improper placement of the power outlets on the roof constituted a dangerous condition which proximately caused his accident. "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition." *Schick v. 200 Blydenburgh, LLC*, 88 A.D.3d at 685-686 (internal quotation marks and citations omitted).

Although the track on which the rig ran and the placement and number of power outlets on the roof had been in place for a number of years, the record is clear that the rig which DeJesus and Velez were running was approximately two years old, and that plaintiff had operated it at least 20 times over the course of the previous year, without incident. Hogne testified at his deposition that the new system was inspected when first installed, and at least once every month thereafter, by operating it around the entire

perimeter of the building, without any indication that the number and placement of the power outlets might be problematic. Hogne further testified that if any need for a change, amendment or addition of outlets was discovered, it would be communicated by R&R to the building owner.

Plaintiff's assertion that 888 created the allegedly hazardous condition by placing the outlets on the roof is unpersuasive. The evidence does not reveal how long the outlets were present on the roof while the former scaffolding system was operating, or whether any problems caused by the outlets manifested themselves during that time. However, at the time of the installation of the new system, the rig was inspected and no fault or failure with respect to the outlets was discovered. If the placement and number of outlets on the roof were indeed a dangerous condition, there is no evidence that 888 created it.

R&R asserts that it did not receive complaints concerning the power cord or the outlets prior to plaintiff's accident. However, plaintiff testified that he "may have mentioned to [R&R] about having a longer wire, but I think there was a weight issue with the wire that it would become heavier, something, something, and again me and my partner told them about the situation."

888 has established that it neither created nor had notice of any hazardous condition on the roof that related to the power outlets. Therefore, the part of 888's motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

As for R&R, there are issues of fact whether R&R had notice concerning the allegedly dangerous number and placement of the outlets. It is unclear whether plaintiff himself notified R&R about the deficiencies. In addition, there is a question of whether R&R performed its initial and monthly inspections in a nonnegligent manner, such that "something [that] needed to be changed, amended or added" would have been revealed. Therefore, the part of R&R's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Labor Law § 202

Labor Law § 202 pertains to the "Protection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings." As window cleaning was not being performed, and caulking areas of the exterior of the building are not "cleaning," this statute is not applicable to this matter. Accordingly, summary judgment dismissing this claim is granted.

The Third-Party Action

When a complaint against a party is dismissed, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety." *Turchioe v. AT & T Communications, Inc.*, 256 A.D.2d 245, 246 (1st Dept 1998). Therefore, 888's third-party complaint and R&R and SMB's cross claims against 888 are dismissed.

The Contribution and Indemnification Claims

> It is well settled that the right of common-law indemnification belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their part. [W]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent . . . . Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy.

Siegl v. New Plan Excel Realty Trust, Inc., 84 A.D.3d 1702, 1703 (4th Dept 2011) (interior quotation marks and citations omitted).

As the complaint is being dismissed in its entirety as against 888, there is no finding of liability, vicarious or otherwise, against it. Accordingly, 888's cross claim against R&R for contribution or common-law indemnification is dismissed.

Although part of 888's motion seeks summary judgment on its contractual indemnification claim against R&R, 888 has brought no such claim. However, "a party may raise even a completely unpleaded issue on summary judgment so long as the other party is not taken by surprise and does not suffer prejudice." *Valenti v Camins*, ___ A.D.3d ___, 2012 NY Slip Op 03549, *3 (1st Dept 2012). *See also Fofana v. 41 W. 34th St., LLC*, 62 A.D.3d 522, 522 (1st Dept 2009) ("Summary judgment can only be awarded on an unpleaded claim if the proof supports such a claim and the opposing party has not been prejudiced"). R&R specifically addressed 888's claim for contractual indemnification in its Reply Affirmation in Support of R&R Scaffolding's Motion for Summary Judgment and Affirmation in Opposition to 888 Seventh Avenue's Motion for

Summary Judgment. Thus, there is no evidence of surprise or prejudice, and the court will consider this part of 888's motion.

888 maintains that it is entitled to contractual indemnification from R&R based on the July 26, 2006 Interior/Exterior Scaffold Maintenance Agreement between BMS and R&R (the "BMS/R&R Contract"). The indemnification clause of the agreement provides:

> R&R Scaffolding, Ltd. agrees to indemnify and hold harmless the Owners ... against any and all claims, suits, losses, or expenses by reason of any tort liability . . . arising out of or in consequence of the performance of [R&R's] work and/or imposed by law upon any and all of them because of bodily injuries . . . sustained by any person or persons . . . , whether such injuries to persons ... are claimed to be due to negligence of [R&R], the Owners ... or any other person, for any other reason, throughout the duration of contract . . . .

888 contends that R&R must indemnify it because 888 "is indicated as the "Owner/Agent" in the maintenance agreement."

A review of the BMS/R&R Contract shows that 888 is mistaken. The first page of the agreement, indicates that BMS is, "Hereinafter called the Owner/Agent." 888 does not indicate where in the BMS/R&R Contract it is identified as the Owner/Agent, and no other basis for the assertion is provided. This being the case, the other arguments concerning 888's claim for contractual indemnification which are propounded by the parties need not be addressed, and the portion of 888's motion which seeks summary judgment on its contractual indemnification claim as against R&R is denied. For the

same reason, the portion of R&R's motion which seeks summary judgment dismissing this claim is granted.

SMB asserts two cross claims as against R&R, sounding in contribution and common-law indemnification. Because a finding of R&R's negligence, or lack thereof, has not yet been made, summary judgment in R&R's favor dismissing these two cross claims must be denied.

In accordance with the forgoing it is

ORDERED that third-party defendant SMB Windows LLC's motion (motion sequence no. 001) for summary judgment dismissing the third-party complaint is granted, and the third-party complaint is dismissed with costs and disbursements to third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portions of R&R Scaffolding, Ltd.'s motion (motion sequence no. 002) seeking summary judgment dismissing plaintiff's Labor Law §§ 202, 240 (1) and 241 (6) claims, and 888 Seventh Avenue, LLC's contribution, common-law and contractual indemnification claims are granted; and it is further

ORDERED that the parts of R&R Scaffolding, Ltd.'s motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims,

and SMB Windows LLC's cross claims for contribution and common-law indemnification are denied; and it is further

ORDERED that the part of 888 Seventh Avenue, LLC's motion (motion sequence no. 003) seeking summary judgment dismissing plaintiff's complaint is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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

ORDERED that the third-party complaint and R&R Scaffolding, Ltd.'s and SMB Windows LLC's cross claims against 888 Seventh Avenue, LLC are dismissed; and it is further

ORDERED that the part of 888 Seventh Avenue, LLC's motion seeking summary judgment on its claim for contractual indemnification against R&R Scaffolding, Ltd. is denied; and it is further

ORDERED that plaintiff's cross motion (motion sequence no. 003) is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 7, 2012

ENTER:

Saliann Scarpulla, J.S.C.