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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 8

Justice

Index Number : 112104/2008
DREHER, JOHN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

INDEX NO. 112104/08
MOTION DATE 2/22/12
MOTION SEQ. NO. 010

The following papers, numbered 1 to ek., were read on this motion to/for Sj motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-7

Answering Affidavits — Exhibits opposition in Seq. 011-014 | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 9/28/12

_____, J.S.C.
JOAN M. KENNEY

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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JOHN E. DREHER,

Plaintiff,

-against-

Index No. 112104/08

CITY OF NEW YORK, BROOKLYN NAVY YARD DEVELOPMENT CORPORATION and TDX CONSTRUCTION CORPORATION,

Defendants.

----------X

TDX CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590342/09

CALCEDO CONSTRUCTION CORPORATION and GLASSOLUTIONS UNLIMITED CORP.,

Third-Party Defendants.

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TDX CONSTRUCTION CORPORATION,

Fourth-Party Plaintiff,

-against-

Fourth-Party Index No. 590057/11

KURITZY GLASS CO., INC.,

Fourth-Party Defendant.

----------X

Joan M. Kenney, J.:

Motions with sequence numbers 010, 011, 012, 013 and 014 are consolidated for disposition.

This action arises out of a 2008 accident at the Brooklyn Navy Yard, while the Perry Avenue Building was being erected.

In motion sequence number 010, third-party defendant Glassolutions Unlimited Corp. (Glassolutions) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

In motion sequence number 011, defendant/third-party defendant Calcedo Construction Corporation (CCC) moves for summary judgment (1) dismissing plaintiff's Labor Law §§ 200, 241 (6) and common-law negligence claims, as well as all cross claims and counterclaims which Glassolutions and fourth-party defendant Kuritzy [*sic*][1] Glass Co., Inc. (Kuritzky) assert against it; (2) on CCC's contractual indemnification claim against Glassolutions;[2] and (3) on its common-law indemnification claim against Kuritzky.

Defendant/third-party plaintiff/fourth-party plaintiff TDX Construction Corporation (TDX) moves, in motion sequence number 012, for summary judgment (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and all cross claims and counterclaims asserted against it; (2) dismissing plaintiff's

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[1]The proper spelling of the name is Kuritzky, as evidenced by the affidavit of David Kuritzky, the company's owner.

[2]CCC has not brought a claim for contractual indemnification against Glassolutions. Rather, without any mention of any contract or agreement, CCC seeks "full indemnification and/or contribution" from Glassolutions (*see e.g.* CCC's First Cross-Complaint Against Co-Third-Party Defendant, Glassolutions Unlimited Corp., dated May 15, 2009). In the absence of any reference to any contract, the court concludes that the claim is, and was intended to be, one for common-law indemnification.

Labor Law § 241 (6) claim; (3) granting conditional common-law and contractual indemnification against CCC; and (4) granting conditional common-law indemnification against Kuritzky.

Defendants the City of New York (City) and Brooklyn Navy Yard Development Corporation (BNYDC) move, in motion sequence number 013: (1) pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims; (2) pursuant to CPLR 3025, for leave to amend their answer to assert (a) cross claims for contractual indemnification against CCC and Glassolutions; and (b) cross claims for common-law indemnification and contribution against CCC and Kuritzky; and (3) in the event that leave to amend their answer is given, for an order granting them summary judgment on their contractual and common-law indemnification claims against TDX, CCC, Glassolutions, and Kuritzky.

In motion sequence number 014, fourth-party defendant Kuritzky moves, pursuant to CPLR 3212, for summary judgment dismissing all claims, third-party claims and cross claims asserted against it.

Lastly, plaintiff brings an untimely cross motion seeking summary judgment on his complaint.

Because of the number of motions and the overlapping of some of the issues, the court will consider the motions by issue, rather than by numerical sequence.

BACKGROUND

At the time of the accident, on May 30, 2008, the Perry Avenue Building was owned by the City and managed by BNYDC pursuant to a lease agreement. On September 18, 2006, BNYDC entered into a Construction Management Contract with TDX whereby TDX became the construction manager for the project. On September 12, 2007, TDX as contractor, and CCC as subcontractor, with BNYDC as the "owner," entered into a subcontract wherein CCC's work under the subcontract is described as "General Construction work" (CCC Motion Papers, McLoughlin 11/21/11 Affirm., Ex. B, TDX/CCC Subcontract, ¶ 8.1), specifically, "once the structure was steel, it was erected and it was fireproofed, and expect [*sic*] for the electrical, the plumbing, and the heating work, the finishing of the interior of the building was Calcedo's work through its subcontractors" (TDX Motion Papers, Deveney 11/18/11 Affirm., Ex. L, LaRocca Depo., at 27; CCC Motion Papers, McLoughlin 11/21/11 Affirm., Ex. I, Shah Depo., at 112-113). CCC hired 12 subcontractors, one of which was Glassolutions (LaRocca Depo., at 16). On December 19, 2007, CCC entered into a sub-subcontract with Glassolutions whereby Glassolutions agreed to perform services in connection with "Aluminum windows, storefront & glazing" (CCC Motion Papers, McLoughlin 11/21/11 Affirm., Ex. D, CCC/Glassolutions Sub-subcontract, Article 1, at 2; CCC Motion Papers, McLoughlin

11/21/11 Affirm., Ex. G, DiStefano Depo., at 11). Glassolutions hired union ironworkers specifically for this job ("They were not my regular employees" [DiStefano Depo., at 20]; CCC Motion Papers, McLoughlin 11/21/11 Affirm., Ex. H, Blackburn Depo., at 10), tasking them to "accept the delivery of the windows and then once the windows were brought into the building they were installed into the openings by the ironworkers" (DiStefano Depo., at 20-21, 31). Lastly, Glassolutions phoned David Kuritzky, the owner of Kuritzky, and asked him to provide union glaziers "to install the glass into the frames that the ironworkers installed" (DiStefano Depo., at 30-31).

Plaintiff, an ironworker, was supervised and directed by, and reported to, Stenneth (Mark) Blackburn (Blackburn), the foreman for Glassolutions' ironworkers (CCC Motion Papers, McLoughlin 11/21/11 Affirm., Ex. E, Plaintiff's 5/26/10 Depo., at 61, 70; TDX Motion Papers, Deveney 11/18/11 Affirm., Ex. G, Plaintiff's 8/3/11 Depo., at 101; DiStefano Depo., at 22-25). On the morning of the accident, a shipment of windows in crates arrived at the site. The ironworkers' supervisor, Blackburn, approached the glaziers and asked them to help get the shipment of windows into the building because the ironworkers were behind schedule installing frames, and, if the glaziers could unload the windows for the ironworkers, the ironworkers could catch up, and the glaziers would have more work (TDX Moving Papers, Deveney

11/18/11 Affirm., Ex. P, Treverton 8/9/11 Depo., at 71; *see also* TDX Moving Papers, Deveney 11/18/11 Affirm., Ex. Q, Treverton 8/18/11 Depo., at 215-216 [ironworkers "were behind schedule and other ironworkers had to do other things"]). However, Blackburn also told Shane Treverton (Treverton), one of the glaziers, that they had to hurry getting the windows inside the building because "they were going to boom the windows in for us as a favor and we needed to unload them as quickly as possible" (*id.* at 122; *see also* Treverton 8/18/11 Depo., at 181 ["get rid of (the load) as quick as possible because we only have the lull operator for a limited amount of time"]).

A forklift called a lull[3] was used to unload the crates from the delivery truck, and to lift them through openings in the building where windows would eventually rest.

A composite crew of Glassolutions' ironworkers and three glaziers working that day went to the second floor to unload the windows from the crates, while plaintiff assisted Blackburn in loading the crates onto the lull on the ground (Blackburn Depo., at 81-82). One of the glaziers, Shane Treverton, gave the lull operator hand signals to guide the crates though the opening (Treverton 8/9/11 Depo., at 84-93). Treverton noticed that the crate was off center and that the

[3]A lull is a kind of forklift with a boom/extension, and, in this case, two forks.

forks on the lull were too close together, both of which would make the crate unstable.

> The problem was the load wasn't centered. The forks were too tight, so what happened was they took, like I said, one or two off of one side, the first two guys just got a little overambitious, one guy just grabbed one window and another guy grabbed another one ...

(Treverton 8/9/11 Depo., at 125-126).

Treverton called Blackburn and advised him of the problem, but Blackburn told him to go ahead and unload the windows anyway. The unloading had to be accomplished as quickly as possible because they had the use of the lull and its operator for only a limited time. Blackburn promised that he would open up the forks for the next crate. So Treverton and the other glaziers began to unload the windows from the crate (Treverton 8/9/11 Depo., at 126-127; Treverton 8/18/11 Depo., at 183-184).

Each crate contained approximately 10 to 20 windows (Plaintiff's 5/26/10 Depo., at 92; Treverton 8/18/11 Depo., at 193; DiStefano Depo., at 97). Blackburn did not give the glaziers instructions on how to unload the crates, but he instructed his Glassolutions workers to unload by alternating one side with the other (Blackburn Depo., at 58-63; *but see* Plaintiff's 5/26/10 Depo., at 99 [no one told him how to take the windows off the forks]; Plaintiff's 8/3/11 Depo., at 101 [plaintiff had never offloaded a crate from a lull before;

plaintiff figured that the method for unloading a crate was "maybe a little common sense"]).

Treverton told the glaziers to unload the windows "one window from the right side, take one window from the left side, take one window from the right side, take one window from the left side" (Treverton 8/9/11 Depo., at 49). He concluded that the alternating side method was correct because it was "[j]ust common sense" (Treverton 8/9/11 Depo., at 50) and the ironworkers and glaziers who were unloading the crates had come to this conclusion by "consensus" (*ibid.*).

Glassolutions' DiStefano attested that the ironworkers and glaziers did not need someone "right there" to direct them. They were trained in their field and "it's sort of more of a general knowledge of what you do when you unload a crate" (DiStefano Depo., at 99-100).

Blackburn did not supervise the unloading of the crates. No one supervised the unloading of the crates because the Glassolutions union ironworkers were journeymen, not apprentices, were trained in safety, and "they came with a certain amount of knowledge that I do not have to take them and retrain them for the trade" (DiStefano Depo., at 108-109). However, with respect to the glaziers, "it wasn't our job. We had never taken a delivery, so it was not our scope of work. That was the only time that we had ever taken a delivery and it

was because they had asked us to do it as a favor" (Treverton 8/18/11 Depo., at 178).

Once the crate was inside the building, where Treverton had directed the lull operator to place it, the forks were parallel to the floor, and they were as close to the floor as the workers and the lull could possibly get them (Treverton 8/18/11 Depo., at 256, 261). Before the accident, the lull forks were "[a]t least five feet [from the floor], pretty much eye level" (Plaintiff's 5/26/10 Depo., at 98; *but see* Plaintiff's 8/3/11 Depo., at 101 [plaintiff roughly estimated that the forks of the lull were about four feet off the ground]; Treverton 8/9/11 Depo., at 116 [forks were about three and a half feet above ground]; DiStefano Depo., at 93 [after the accident, crate on the forks was roughly a foot and a half above the floor]; Blackburn Depo., at 92, 135 [crate was a foot above the floor]).

As set forth above, the proper method for unloading windows from a crate is to alternate taking one window at a time from one side, and then another window from the other side. On the day of the accident, the workers took several windows from the right side without taking any from the left. By the time plaintiff was on the same floor, approaching the left fork of the lull to help unload the crate, the crate tipped on its left side and landed on his legs (Plaintiff's 5/26/10 Depo., at 101-103).

THE PLEADINGS

In his complaint and amended complaint, plaintiff asserts claims for common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6). Plaintiff amended his complaint in order to add CCC as a direct defendant. The answering defendants allege multiple claims against each other, including claims for contribution, common-law and contractual indemnification, and breach of contract by failure to procure insurance.

In its third-party complaint, TDX asserts claims for contribution and common-law and contractual indemnification against CCC and Glassolutions. The answering third-party defendants raise the same claims, plus Glassolutions adds one for breach of contract by failure to procure insurance.

In its fourth-party complaint, TDX brings causes of action against Kuritzky for contribution, common-law and contractual indemnification and breach of contract by failure to procure insurance. In its answer, Kuritzky alleges a cross claim and a counterclaim for contribution or common-law indemnification.

In support of his Labor Law § 241 (6) claim, plaintiff alleges the violation of more than 100 Industrial Code provisions (TDX Moving Papers, Deveney 11/18/11 Affirm., Ex. FF, Plaintiff's 3/11/09 Bill of Particulars, ¶ 17).[4]

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[4]The court advises counsel for plaintiff that its alleging the violation of over 100 sections and subsections of the Industrial Code, when even the briefest review would have shown

DISCUSSION

Summary Judgment Standard

"'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 AD3d 601, 608 [1st Dept 2011], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 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 AD3d 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 AD3d 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 AD3d 508, 510-511 [1st Dept 2010]).

Plaintiff's Untimely Cross Motion

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that only two of them have even the slightest chance of being applicable or specific enough to serve as a basis for a claim under Labor Law § 241 (6), is disfavored, and the court cautions counsel that further such unprofessional and wasteful conduct shall not be tolerated.

As an initial matter, it should be remembered that whether an untimely cross motion will be considered lies within the sound discretion of the court (*see e.g. Whitehead v City of New York*, 79 AD3d 858, 860-861 [2d Dept 2010] ["the Supreme Court providently exercised its discretion in denying, as untimely, that branch of the cross motion"]; *Gray v City of New York*, 58 AD3d 448, 449 [1st Dept 2009] ["The court was within its discretion in considering the cross motion ..."]).

In 2004, the Court of Appeals decided the case of *Brill v City of New York* (2 NY3d 648 [2004]), which determined that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the [summary judgment] motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill*, 2 NY3d at 652; *see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004] ["statutory time frames ... are not options, they are requirements, to be taken seriously by the parties" (quoting *Brill*)]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652).

Brill and *Miceli* did not deal with untimely cross motions. However, the Appellate Division has weighed in on the subject (*see e.g. Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d 737, 738 [2d Dept 2011] ["'an untimely

motion or cross motion for summary judgment may be considered by the court where ... a timely motion for summary judgment was made on nearly identical grounds' (citations omitted)"]; *Teitelbaum v Crown Hgts. Assn. for the Betterment*, 84 AD3d 935, 937 [2d Dept 2011] [late cross motion not considered; no demonstration of good cause for delay, and issues in motion and cross motion were not "nearly identical"]; *Snolis v Clare*, 81 AD3d 923, 925-926 [2d Dept 2011] ["the issues raised by the untimely cross motion are already properly before the court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the merits of the untimely cross motion"]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [Court refused to consider untimely cross motion because it did not seek relief "nearly identical" to that sought in the timely motion]).

Plaintiff claims that his cross motion is timely, but such is not the case. Plaintiff confuses a return date with the deadline for making a motion. A so-ordered stipulation, subscribed by counsel for plaintiff, as well as by all other counsel, extended "the deadline to serve motions for summary judgment ... to November 25, 2011." No party, including plaintiff, moved for an extension of time, and no further order of this court extended the deadline for making summary judgment motions. However, there were a couple of stipulations which

extended the return date on consent, finally setting the return date to February 22, 2012. According to plaintiff, these stipulations "extend[ed] the time frame for this motion. ... The second stipulation entered into between the parties adjourned the motions for summary judgment until February 22, 2012" (Diamond 3/12/12 Reply Affirm. in Opp., ¶ 4). Although plaintiff's cross motion papers are dated February 6, 2012, they were stamped filed in the Motion Support Office on February 14, 2012. February 14, rather than November 25, is most definitely untimely.

The excuses plaintiff gives for his delay in moving would not constitute "good cause" if this were an untimely motion rather than a cross motion, and the court is loath to even appear to approve or countenance plaintiff's counsel's procedural aberrations. However, this case is almost four years old, and it is time that its issues were decided on the merits. Moreover, this is a cross motion, and, as set forth above, if the issues in the untimely cross motion are "nearly identical" to those already before the court in the timely motions, the "nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the merits of the untimely cross motion" (*Snolis v Clare*, 81 AD3d at 925-926).

Plaintiff seeks summary judgment on his complaint, which alleges claims for common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6). The motions submitted by the

other parties seek relief on all of these claims except one, that of Labor Law § 240 (1). Normally, the court would consider all the issues in the motions and untimely cross motion, except plaintiff's claim under section 240 (1) (*see e.g. Paljevic v 998 Fifth Ave. Corp.*, 65 AD3d 896, 898 [1st Dept 2009] ["court properly declined to consider those portions of (the) untimely cross motion which did not relate to the foregoing motions"]; *Filannino*, 34 AD3d at 281 [cross motion for Labor Law § 240 (1) not considered; only Labor Law §§ 200 and 241 (6) claims were already before the court]). However, the court, sua sponte, has granted defendants the opportunity to oppose plaintiff's arguments with respect to the Labor Law § 240 (1) claim, in the interest of judicial economy and in the court's discretion (*see* Order dated August 6, 2012). Thus, the court will consider the untimely cross motion in its entirety.

THE COMPLAINT'S CAUSES OF ACTION:

Glassolutions

In accordance with Workers' Compensation Law § 11, and in the absence of a "grave injury," plaintiff has not alleged any claims as against Glassolutions, his employer.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide

> reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

"Labor Law § 200 codifies the common-law duty to maintain a safe work site" (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046 [2d Dept 2012]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: whether the injuries resulted from a dangerous condition, or from the means and methods by which the work was done (*see e.g. Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1195 [2d Dept 2012] [dangerous condition]; *Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48 [1st Dept 2012] [means and methods]). In this matter, the injuries resulted from the manner in which the work was done.

Supervision and control are preconditions to liability under Labor Law § 200 when the accident arises from the contractor's means and methods of performing the work. "In other words, the party against whom liability is sought must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [internal quotation marks and citation omitted]" (*Griffin v Clinton Green South, LLC*, 98 AD3d 41, 48 [1st Dept 2012]). "'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' [citation omitted]" (*Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012]).

The City and BNYDC

While there is ample evidence that employees of other parties worked at the Perry Avenue construction site, there is no evidence that any employee of the City or BNYDC was present and had the authority to supervise, control or direct plaintiff and his work. In fact, plaintiff attested that he had no conversations with anyone he believed was the owner, general contractor or construction manager (Plaintiff's 5/26/10 Depo., at 67). For the added reason that plaintiff did not direct any argument on these claims against the City and BNYDC in his cross motion, plaintiff's claims for common-law negligence and violation of Labor Law § 200 are dismissed as against the City and BNYDC.

CCC

CCC contends that it was not the general contractor on this project. It submits that the subcontract between TDX and CCC indicates that CCC was a subcontractor charged with "General Construction work" (TDX/CCC Subcontract, ¶ 8.1), and not with general contracting duties. Lawrence LaRocca, CCC's construction superintendent, described his duties as including keeping the job

moving, making sure there were no problems and no safety issues, making it so that the subcontractors could do their jobs, walking the site each day to make sure that things were being done safely, and hiring subcontractors.

Approximately two weeks before the accident, LaRocca was making his rounds when he observed two Glassolutions employees unloading a crate in an unsafe manner. LaRocca corrected them, showed them the proper way to unload the crate, and then "went about [his] business" (LaRocca Depo., at 29-30, 36-43). TDX claims that this shows that CCC exercised supervision and control sufficient to subject it to liability under common-law negligence and Labor Law § 200. However, it is well-settled that general supervision of a site and the authority to stop unsafe work are not enough to impose liability under Labor Law § 200 and common-law negligence (*see e.g. Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]).

Joseph Tomei, CCC's vice president, attested that the business of CCC is "General contractors" (Tomei Depo., at 10), but that, on this project, CCC was not the general contractor; TDX was the general contractor/construction manager (*id.* at 14-15).

Whether CCC was the general contractor or not, TDX contends that paragraph 3.3.1 of the TDX/CCC Subcontract provides that CCC has the sole responsibility for CCC's sub-

subcontractors' work, in particular, Glassolutions' and Kuritzky's. However, paragraph 3.3.1 deals with liquidated damages (*see* TDX/CCC Subcontract [AIA Document A401 - 1997], Claims by the Contractor, § 3.3.1, at 4). Perhaps TDX is referring to paragraph 3.3.2 in the General Conditions of the Contract for Construction (AIA Document A201 - 1997), which provides that the "Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors."

CCC agreed to supervise and direct its own work (TDX/CCC Subcontract § 4.1.1), and, according to section 3.3.2 of the General Conditions, agreed to be responsible for its subcontractors' and enumerated others' work.

However, it is not clear what being "responsible" for others' acts or omissions means. Does it mean that CCC assumed the supervision and control of Glassolutions' and Kuritzky's work to make sure that it was done properly? Does it mean that CCC would be considered negligent on the basis of Glassolutions or Kuritzky's negligence? Does it mean that CCC would be obligated to indemnify a party for Glassolutions or Kuritzky's negligence? Does it mean something else?

The evidence indicates that CCC did not supervise,

control or direct plaintiff and his work. Thus, under the usual analysis used in determining Labor Law § 200 and common-law negligence claims, CCC would not be found negligent. However, by the TDX/CCC Subcontract, CCC made itself "responsible" for the acts and omissions of Glassolutions, CCC's sub-subcontractor, and Kuritzky, an entity "performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors," and the usual analysis cannot be applied.

Because the meaning of the contractual term "responsible" is ambiguous and may have required CCC to supervise and direct plaintiff and his work, the part of CCC's motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims must be denied as to it.

TDX

TDX was the construction manager for the project. As such, it assigned a project manager (Prakash Shah), project superintendent (Patrick Lynch) and some laborers, held progress meetings with subcontractors, helped coordinate work done by subcontractors, acted as liaison between subcontractors, the owner and the architect, administratively handled subcontractor change orders and requests for payment, and provided general observation of the progress of the work.

TDX also rented the lull from May 27 to June 9, 2008, in order to remove construction debris from the building. Each

time that TDX wanted to use the lull, Lynch hired an operating engineer from Local 14, recorded the operator's name and job description ("operator") on TDX's Labor Weekly Time Card, and paid the operator by check. It is uncontested that there is no record of TDX hiring an operator for the lull on May 30, 2008, the date of plaintiff's accident. Rather, the Labor Weekly Time Card for May 30th indicates that TDX did not employ an operator on that day.

No one knows who the lull operator was on that day, and no one knows by whom he was hired or paid, except that Glassolutions' foreman, Blackburn, attests that he acquired the lull operator, one he knew from prior experience, for that day (Blackburn Depo., at 36). Unfortunately, there is no written record of this transaction. All that is known about the operator is that he assisted Glassolutions in getting Glassolutions' windows inside the building, and that he allowed the crate to be unbalanced, uncentered, and positioned on forks that were too close together to safely transport the crate.

Glassolutions alleges that there is a question of fact concerning whether TDX hired and controlled the lull operator, and if so, whether TDX is vicariously liable for the operator's negligence in failing to ensure that the crate was positioned properly. CCC suggests that the operator of the leased lull was an ad hoc employee of TDX, the lessee.

The court disagrees. It is uncontested that TDX leased equipment, a lull, but not a person, the operator, and there is no evidence that TDX directed or controlled the operator. Nor are there any other indicia of special employment (*see infra*). As such, there is no reason to conclude that the operator was an ad hoc, or special, employee of TDX (*see Szarewicz v Alboro Crane Rental Corp.*, 50 AD2d 770 [1st Dept 1975], *affd* 40 NY2d 1076 [1976]).

Therefore, the part of TDX's motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it is granted.

Plaintiff

The Bellizzi Affidavit

Defendants complain that plaintiff failed to disclose his expert witness, Nicholas Bellizzi, until plaintiff filed his untimely cross motion. However, plaintiff has provided his Notice of Witness Exchange, dated October 24, 2011, which identifies Bellizzi, and what Bellizzi will testify to.

However, the court has read the Bellizzi affidavit, and finds that it is defective. Bellizzi several times purports to give an opinion on purely legal issues (*e.g.* "Industrial Code Rule 23 Sections 9.2 [g] and 9.8 [h] were violated. The violation of these Industrial Code Rule 23 sections was the proximate cause of this accident and the plaintiff's resulting

injuries" [Bellizzi 2/9/12 Aff., ¶ 14]; "The subject crate, the LULL apparatus, and the manner in which they were used, was improper, inadequate, unsafe, dangerous, and hazardous and was the proximate cause of Mr. Dreher's accident and his resulting injuries. The defendants' employees, specifically the crane [Lull] operator and Lawrence LaRoca [*sic*], were negligent in the manner in which they performed their work at the site and their actions contributed to the happening of the accident" [final two conclusions]).

"'Expert opinion as to a legal conclusion is impermissible' [citation omitted]" (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 69 [1st Dept 2002]). "Where the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected" (*Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351 [1st Dept 2001]); *see also Rondout Val. Cent. School Dist. v Coneco Corp.*, 321 F Supp 2d 469, 480 [ND NY 2004] ["(I)t is axiomatic that an expert is not permitted to provide legal opinions, legal conclusions, or interpret legal terms; those roles fall solely within the province of the court"]).

Therefore, the court will not consider plaintiff's expert's opinion.

Labor Law § 200 and Common-Law Negligence

TDX, the City, and BNYDC having established that they are not liable to plaintiff under common-law negligence and Labor Law § 200, the part of plaintiff's cross motion which seeks summary judgment on these claims as against them is denied.

Plaintiff contends that there is an issue of fact as to who was the employer of the lull operator. However, there is no evidence that CCC hired, supervised or controlled the operator. Nor is there sufficient evidence to establish that CCC exercised supervision and control over Glassolutions' employees. As set forth above, the incident approximately two weeks before the accident, when LaRocca corrected two Glassolutions employees who were unloading a crate in an unsafe manner, was simply an instance of general oversight, and is not sufficient to impose section 200 and common-law negligence on CCC.

The ambiguity of CCC's contractual language is another reason why the part of plaintiff's cross motion which seeks summary judgment on his Labor Law § 200 and common-law negligence claims as against CCC is denied.

Labor Law § 240 (1)

Because plaintiff raised the issue of his entitlement to damages under Labor Law § 240 (1) for the first time in his cross motion, which was filed long after the other parties had submitted their motions which did not raise the Labor Law § 240

(1) issue, the court granted defendants leave to submit opposition papers on this issue in response to plaintiff's cross motion. As such, the court will consider defendants' motions as having sought summary judgment dismissing plaintiff's Labor Law § 240 (1) claim.

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.

"Labor Law § 240 (1) provides exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal quotation marks and citation omitted]" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on 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 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]).

> However, not every hazard or danger encountered in a construction zone falls within the scope of Labor Law § 240 (1) as to render the owner or contractor liable for an injured worker's damages. We have expressly held that Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of ... [a] required safety device [internal quotation marks and citations omitted]

(*Misseritti*, 86 NY2d at 490). "[T]he single decisive question is whether plaintiff'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 NY3d 599, 603 [2009]).

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 AD3d 564, 564-565 [2d Dept 2011]). This plaintiff has failed to do. He has failed to establish that he was subjected to an elevation-related hazard, rather than to the usual and ordinary dangers of a construction site. He has failed to establish that his injuries were the result of his exposure to the "'extraordinary elevation risks envisioned by Labor Law § 240 (1)'" (*Whitehead v City of New York*, 79 AD3d 858, 859-860 [2d Dept 2010], quoting *Rodriguez v Margaret Tietz Ctr. for Nursing*

[* 28]

Care, 84 NY2d 841, 843 [1994]).

Plaintiff asserts that this is a case where plaintiff was struck by an improperly hoisted or secured crate. However, there was no elevation differential here that would justify the application of the statute.

> [I]t is not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident. Absent an elevation differential, "[t]he protections of Labor Law § 240 (1) are not implicated simply because the injury is caused by the effects of gravity upon an object" (*Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998])

(*Oakes v Wal-Mart Real Estate Business Trust*, ___ AD3d ___, ___, 2012 NY Slip Op 05694, *3 [3d Dept 2012]). Four deponents, including plaintiff, have testified to their observations of how high the forks of the lull were from the floor at the time of the accident. According to plaintiff, the forks were eye-level or about five feet above the floor (Plaintiff's 5/26/10 Depo., at 98; Plaintiff's 8/3/11 Depo., at 101 [forks were about four feet from the ground]); Kuritzky's Treverton considered them to be three and a half feet above the floor (Treverton 8/9/11 Depo., at 116; Treverton 8/18/11 Depo., at 169, 227); Glassolutions' DiStefano said the forks were a foot to a foot and a half above the floor (DiStefano Depo., at 93, 182); and Glassolutions' Blackburn thought that they were a foot above the floor

(Blackburn Depo., at 92, 135). Like the plaintiff in *Oakes*, plaintiff here cannot prevail because "[t]he [crate] and plaintiff were both at ground level, and they were either approximately the same height or plaintiff was ... taller than the [crate]" (*Oakes v Wal-Mart Real Estate Business Trust*, ___ AD3d ___, ___, 2012 NY Slip Op 05694, at *6; *see also Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d at 843-844 [Court found elevation differential to be de minimis where plaintiff was struck in knee by falling 120-pound beam that he was moving from seven inches above his head to ground level]).

Plaintiff has also failed to demonstrate that the fall of the crate was not a usual and ordinary risk of the workplace. "[W]here a plaintiff 'was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1),' the plaintiff cannot recover under the statute" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005], quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d at 843).

Accordingly, the parts of defendants' motions which seek summary judgment dismissing plaintiff's Labor Law § 240 (1) claim are granted. The part of plaintiff's cross motion which seeks summary judgment on his section 240 (1) claim is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> All contractors and owners and their agents, ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> 6. All 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23.

"Labor Law § 241 (6) imposes a *nondelegable duty* ... upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers] [internal quotation marks and citations omitted]" (*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]). The duty is imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]) because "the 'apparent intent [of the 1969 amendment to section 241 (6)] was to compel owners and general contractors to become more concerned with the safety practices of subcontractors, because *they would be exposed to liability without regard to control over the work*' [citation omitted]" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). A

finding that a party has violated Labor Law § 241 (6) is only some evidence of negligence, however; it does not result in absolute liability or a finding of negligence as a matter of law (*see e.g. Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *see also Mulhern v Manhasset Bay Yacht Club*, 22 AD3d 470, 471 [2d Dept 2005]).

"To recover under Labor Law § 241 (6), a plaintiff must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific, applicable safety standards" (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d at 1047).

Of the more than 100 Industrial Code provisions that plaintiff alleged that defendants violated, only two are actually argued, 12 NYCRR 23-9.2 (g) and 23-9.8 (h). The part of plaintiff's cross motion which seeks summary judgment on his section 241 (6) claim that is based on all the unargued provisions which were alleged is denied, and the part of defendants Glassolutions, CCC and TDX's motions which seeks summary judgment dismissing plaintiff's section 241 (6) claim as based on these sections is granted.

Industrial Code § 23-9.2 pertains to "General Requirements" for power-operated equipment. Subsection (g) provides:

> (g) Equipment at rest. The operators of material handling equipment shall not leave such equipment while loads, buckets or blades are suspended. Any such load, bucket or blade shall be brought to rest on blocks, shall be lowered to the ground, grade or equivalent surface or shall be brought to the lowest end of travel of the equipment.

Section 23-9.2 (g) has been found sufficiently specific as to serve as a basis for a Labor Law § 241 (6) claim (*see Padilla v Frances Schervier Hous. Dev. Fund Corp.*, 303 AD2d 194, 196-197 [1st Dept 2003] ["this section, *as a whole*, 'mandat(es) compliance with concrete specifications' (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]").

The first part of the provision ("The operators of material handling equipment shall not leave such equipment while loads, buckets or blades are suspended") is inapplicable. There is no evidence that the lull operator left the lull while the crate was suspended, and no evidence that, even if he did, such absence was a proximate cause of plaintiff's injury.

The second part of the provision poses a question of fact. Without the guidance of a proper expert's opinion, the court cannot divine what "brought to the lowest end of travel of the equipment" means, or if that particular circumstance was a proximate cause of the accident.

Thus, the part of defendants Glassolutions, CCC and TDX's motions which seeks dismissal of plaintiff's Labor Law § 241 (6) claim as based on Industrial Code § 23-9.2 (g) is

granted, except to the extent that the claim is based on the part of the provision which concerns "the lowest end of travel of the equipment," which part of the motion is denied. The part of plaintiff's cross motion which seeks summary judgment on his section 241 (6) claim, as based on Industrial Code § 23-9.2 (g), is denied.

Industrial Code § 23-9.8 pertains to "Lift and fork trucks." Subsection (h) provides:

> (h) Support of pallets. Loaded pallets shall be kept level at all times. Masonry units used as pallet supports shall be securely lashed to the pallet and shall be of proper quality and number to provide stable footing for the load. Loose material and other unstable supports for pallets shall not be used.

Although there is apparently no precedental case law with respect to whether this section is specific enough to support a section 241 (6) claim, the court finds that it is.

However, the only part of this provision that even arguably applies is the first sentence. There is no evidence that masonry units were used as pallet supports or that loose material was used as support for the pallet. However, the first sentence presents issues of fact. While there is evidence that the forks were kept level, there is also evidence that the load came inside the building at an angle. It is not clear whether the forks which were "parallel" to the floor were also "level." And, even if the forks were not kept level, there has been no

showing that a failure to keep the forks level was a proximate cause of the accident.

Therefore, the part of Glassolutions, CCC, and TDX's motions which seeks dismissal of plaintiff's section 241 (6) claim on the basis of Industrial Code § 23-9.8 (h) is denied. The part of plaintiff's cross motion which seeks summary judgment on his Labor Law § 241 (6) claim on the basis of Industrial Code § 23-9.8 (h) is denied.

THE CROSS CLAIMS

The court notes that Glassolutions did not move with respect to any cross claim.

The Part of The City and BNYDC's Motion Which Seeks Leave to Amend Their Answer, Pursuant to CPLR 3025

CPLR 3025 (b), as effective on and after January 1, 2012, provides:

> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

"Leave to amend a pleading should be freely given (*see* CPLR 3025 [b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party,

and is not patently devoid of merit. No evidentiary showing of merit is required under CPLR 3025 (b) [interior quotation marks and citations omitted]" (*Clark v Clark*, 93 AD3d 812, 816 [2d Dept 2012]). "Furthermore, mere lateness is not a barrier to the amendment [internal quotation marks and citation omitted]" (*Webber v Scarano-Osika*, 94 AD3d 1304, 1305 [3d Dept 2012]).

According to the City and BNYDC's notice of motion, they seek to amend their answer to bring cross claims for contractual indemnification against CCC and Glassolutions, and cross claims for common-law indemnification and contribution against CCC and Kuritzky. However, their proposed cross claims consist of: 1) cross claims for common-law indemnification and contribution against TDX, CCC and Kuritzky; and 2) cross claims for contractual indemnification and breach of contract to procure insurance against TDX, CCC and Glassolutions. There appears to be no prejudice to any party if the amendment, as shown in the proposed, rather than the noticed, cross claims, is granted, and therefore, this part of the City and BNYDC's motion is granted. As a result, the City and BNYDC's new cross claims, as set forth in the proposed, rather than merely noticed, cross claims will be considered with all the others.

Possible Negligence of Kuritzky - Special Employees or Subcontractor?

It is well-established that Glassolutions supervised the iron workers, and there is some evidence that it also

supervised Kuritzky's glaziers, although there is also some evidence that Kuritzky, in the persons of Treverton and Kuritzky, supervised their glaziers. Since Glassolutions, in the persons of Blackburn and plaintiff (before plaintiff entered the building to help unload the crate), loaded the crate onto the lull in a dangerous manner, so that it was off-center and unstable, and was resting on forks that were too close together, there is no doubt that Glassolutions was negligent, and that its negligence was a proximate cause of plaintiff's injuries.

However, Kuritzky contends that no claims lie against it because it was not negligent, did not owe a duty to anyone, and that its glaziers were present at the job site only as special employees of Glassolutions (*see e.g. Lotz v Aramark Services, Inc.*, 98 AD3d 602, 603 [2d Dept 2012] [question of fact whether members of housekeeping staff were defendant's special employees, and thus, that defendant was vicariously liable for their negligence]). Thus, the court must consider whether Kuritzky was a subcontractor of Glassolutions, and therefore liable for its own acts and omissions, or whether Kuritzky's glaziers were special employees of Glassolutions, whereby Glassolutions would be vicariously liable for Kuritzky's acts and omissions.

In the seminal case of *Thompson v Grumman Aerospace Corp.* (78 NY2d 553 [1991]), the Court of Appeals determined that

> [w]e have consistently found as a general proposition that a general employee of one employer may also be in the special employ of another ... . A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. We recognize that a person's categorization as a special employee is usually a question of fact ... [but] though recognized as an exception to the general approach and analysis, we have held that the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact [internal citations omitted]

(*id.* at 557-558). When considering the "surrender of control of the general employer and assumption of control by the special employer," the issue of whether such a complete transfer of control has occurred

> is ordinarily a fact-sensitive inquiry not amenable to resolution of summary judgment. Only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over "the manner, detail and ultimate result of the employee's work" is summary adjudication of special employment status and consequent dismissal of an action proper [internal citations omitted].

(*Bellamy v Columbia Univ.*, 50 AD3d 160, 162 [1st Dept 2008]; *Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 482 [1st Dept 2011] [court is most likely to find that transfer established special employment relationship "where the transferee

'controls and directs the manner, details and ultimate result of the employee's work'" (quoting *Thompson*, 78 NY2d at 558)]).

There are many factors to consider when determining whether a special employment relationship exists, including:

> "1) the right to and degree of control by the alleged employer over the manner, details, and ultimate result of the work of the special employee; 2) the method of payment; 3) the right to discharge; 4) the furnishing of equipment; and 5) the nature and purpose of the work" [citation omitted]. Although no one factor is determinative of special employee status, the first factor, control of an employee in the performance of a task and in its result, is considered "significant and weighty" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 558)

(*Giordano v Freeman Decorating Co.*, 2000 WL 323256, *3-4, 2000 US Dist LEXIS 5374, *9-10 [SD NY 2000]; *see also Hofweber v Soros*, 57 AD3d 848, 849 [2d Dept 2008] [other "principal factors include 'who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business' (citation omitted)"]; *Ugijanin v 2 W. 45th St. Joint Venture*, 43 AD3d 911, 913 [2d Dept 2007] [factors also include "whether the work being performed was in furtherance of the special employer's or the general employer's business"]).

The conflicting evidence in this matter makes it impossible at this time to determine whether a special employment

[* 39]

relationship existed between Glassolutions and Kuritzky. Examples of the conflicting testimony include:

- Kuritzky's Treverton was a Glassolutions employee involved in removing windows from crates (DiStefano Depo., at 105-106, 131-132)
- nobody but Glassolutions workers, except the lull operator, was involved in loading and unloading the crate (DiStefano Depo., at 113); ironworkers and glaziers were Glassolutions employees (DiStefano Depo., at 37-38)
- Glassolutions ironworkers and Kuritzky glaziers were under Glassolutions foreman Blackburn's charge (Blackburn Depo, at 91); *see also* Blackburn Depo., at 172-173 (Blackburn was mainly responsible for ironworkers, carpenter and glaziers)
- the Glassolutions timesheet included glaziers, but not the lull operator (Blackburn Depo., at 143)
- Kuritzky provided its own certified payrolls (DiStefano Depo., at 75); Kuritzky paid the glaziers, and Glassolutions paid Kuritzky's invoices (DiStefano Depo., at 88)
- Glassolutions foreman Blackburn gave assignments about where and what to do (Schaeffer Depo., at 11-12), and the composite crew made up of Glassolutions ironworkers and Kuritzky glaziers reported to Glassolutions' foreman (Schaeffer Depo., at 12-13, 73-74); Blackburn was in charge of the composite crew (Treverton 8/9/11 Depo., at 22-23);

but in the composite crew, Glassolutions' Blackburn directed the ironworkers and Kuritzky's Treverton directed the glaziers (Treverton 8/9/11 Depo., at 25)

- Glassolutions' DiStefano contacted Kuritzky to provide union glaziers to install glass in frames that Glassolutions' ironworkers installed (DiStefano Depo., at 30-31)
- once the glaziers arrived, they had their own crew and discussed their own work because they were a subcontractor of Glassolutions (DiStefano Depo., at 207); glaziers determined where to install glass (DiStefano Depo., at 41); glaziers provided their own hand tools (Treverton 8/9/11 Depo., at 28)
- as a Glassolutions subcontractor, Kuritzky had to provide a certificate of insurance and comply with other requirements for the specific job (DiStefano Depo., at 72).

One of the issues concerning Glassolutions' alleged control over Kuritzky's glaziers is the role played by Kuritzky's Treverton, i.e., whether he was or acted as Kuritzky's foreman on the job.

- Treverton worked as part of the composite crew under Blackburn (Treverton 8/9/12 Depo., at 22-23), and followed Blackburn's directions and instructions concerning unloading windows (Treverton 8/18/11 Depo., at 215); Blackburn was Treverton's superior (Treverton 8/18/11 Depo., at 115); he

was Treverton's supervisor (Treverton 8/18/11 Depo., at 205)

- Treverton and/or Joe Ortiz were Kuritzky supervisors for the glaziers (DiStefano Depo., at 24)
- as acting foreman, Treverton directed and dictated work to the glaziers (Treverton 8/9/11 Depo., 13); Treverton explained to glaziers how a crate should be unloaded (Treverton 8/9/11 Depo., at 49); he told workers that they had to keep the load centered on the forks (Treverton 8/9/11 Depo., 124)
- no worker inside the building was in charge; they worked together (Blackburn Depo., at 114-115)
- "I wasn't really a foreman for [Kuritzky]" (Treverton 8/18/11 Depo., at 266); he was "[o]nly acting, I wasn't actually being paid as a foreman. I was just more of a go-to guy" (Treverton 8/9/11 Depo., at 12); *but* Treverton was the "company man" for the glaziers (Treverton 8/18/11 Depo., at 202); Treverton was an acting foreman (Treverton 8/9/11 Depo., at 12); Treverton directed the lull operator because he was a Kuritzky foreman (Treverton 8/18/11 Depo., at 193); Treverton was the senior Kuritzky person on the job; but "I was not, I was not a paid foreman" (Treverton 8/18/11 Depo., at 174)
- Blackburn told Treverton that Blackburn needed his help to unload the windows because they were behind schedule and

other ironworkers had to do other things (Treverton 8/18/11 Depo., at 215-216); Treverton told the glaziers that they had been asked to unload the windows as fast as they could (Treverton 8/9/11 Depo., at 123)

- Treverton told Blackburn about safety concerns, but Blackburn told him to go ahead and unload the crate anyway (Treverton 8/18/11 Depo., at 268)
- Treverton gave hand signals to the lull operator, directing him in lowering the crate through the window opening (Treverton 8/9/11 Depo., at 84-85; Treverton 8/18/11 Depo., at 193).

Because it is impossible at this time to determine whether Kuritzky glaziers were special employees of Glassolutions, such that Glassolutions would be liable for the glaziers' negligence, rather than Kuritzky standing alone and being responsible for its own possible negligence, the issue of Kuritzky's responsibility for its workers' actions and omissions is a question of fact that cannot be settled at this time.

Contribution

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *see also Mas v Two Bridges Assoc.*, 75 NY2d 680,

689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]). "[W]here a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy [interior quotation marks and citation omitted]" (*Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 [4th Dept 2011]).

It has been found that no claim in common-law negligence or Labor Law § 200 lies as against TDX, the City and BNYDC. Therefore, (1) the part of TDX's motion which seeks summary judgment dismissing the City and BNYDC, CCC, Glassolutions and Kuritzky's contribution claims is granted; (2) the part of Kuritzky's motion for summary judgment dismissing TDX, the City and BNYDC's contribution claim is granted; (3) the part of Kuritzky's motion which seeks summary judgment dismissing Glassolutions and CCC's contribution claims is denied; (4) the part of the City and BNYDC's motion which seeks contribution against CCC and Kuritzky is denied; (5) the part of CCC's motion which seeks summary judgment dismissing Glassolutions and Kuritzky's contribution claim is denied; and (6) the part of Kuritzky's motion which seeks summary judgment dismissing CCC and Glassolutions' contribution claims is denied.

Common-Law Indemnification

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011] ["Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision"]). "[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" (*Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d at 1703).

No party here has been found vicariously liable for the negligence of another, although the issues of whether Glassolutions is liable for Kuritzky's possible negligence, and whether CCC is "responsible" for Glassolutions and Kuritzky's acts and omissions remain open. In addition, it is settled that only Glassolutions, and possibly Kuritzky, supervised the iron workers and glaziers' work that day.

Therefore, the parts of TDX, the City, BNYDC, CCC and Kuritzky's motions which seek summary judgment on their common-

law indemnification claims, or for the dismissal of others' common-law indemnification claims are denied.

Contractual Indemnification

> [A] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. [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 [internal quotation marks and citations omitted]

(*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]), and "indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed" (*Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

The City and BNYDC allege claims for contractual indemnification against TDX, CCC, Glassolutions and Kuritzky, relying on the fact that BNYDC contracted with TDX, TDX contracted with CCC, CCC contracted with Glassolutions, and Glassolutions called Kuritzky for glaziers, all for work on the same project.

TDX brings claims for contractual indemnification against CCC, Glassolutions and Kuritzky. Kuritzky moves to dismiss TDX and the City and BNYDC's claims for contractual indemnification.

The pertinent provisions of the three contracts follow.[5]

BNYDC and TDX entered into a Construction Management Contract dated September 18, 2006. The indemnification provision states:

> 23.20.1 Indemnification
> To the fullest extent permitted by law, CM [TDX] agrees to indemnify, keep indemnified, and hold harmless BNYDC, the City ... (hereinafter referred to as "Indemnities") from and against any and all liability, civil money penalties, fines, claims, losses, suits, damages, demands, judgments, actions, causes of action, settlements, expenses including but not limited to attorney's fees and disbursements, costs and charges of every nature and kind, both legal and otherwise, whether direct or indirect, arising out of (i) the acts or omissions of the CM [TDX], its Subcontractors [CCC], agents, employees or material suppliers, and any and all Persons on the Project(s) Site(s) or in connected [*sic*] to the Work [Glassolutions and Kuritzky] or (ii) any negligence, fault or default of the Contractor [undefined], its Subcontractors [CCC?], agents, employees or material suppliers.

The court notes that this language does not provide that the City and BNYDC may not be indemnified for their own

[5]The agreement between Glassolutions and Kuritzky was oral.

negligence. However, because the provision contains the limiting language, "to the fullest extent permitted by law," it does not run afoul of General Obligations Law § 5-322.1 (*see e.g. Charney v LeChase Constr.*, 90 AD3d 1477, 1479 [4th Dept 2011]).

About a year thereafter, TDX entered into a Standard Form of Agreement Between Contractor and Subcontractor with CCC, dated as of September 12, 2007. The indemnification provision is found in section 4.6.1:

> **4.6 INDEMNIFICATION**
> **4.6.1** To the fullest extent permitted by law, the Subcontractor [CCC] shall indemnify and hold harmless the Owner [identified as BNYDC], Contractor [TDX] ... from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damages, loss or expense is attributable to bodily injury ..., but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors [CCC, Glassolutions], anyone directly or indirectly employed by them [Kuritzky] or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Not long after, on December 19, 2007, CCC entered into a Standard Form of Agreement Between Contractor and Subcontractor with Glassolutions. Section 9.1.1, as amended by Exhibit 6, of that agreement provides:

> **9.1 INDEMNITY**
> **9.1.1 INDEMNITY** To the fullest extent permitted by law, Subcontractor

> [Glassolutions] shall indemnify, hold harmless and defend Owner [identified as BNYDC], Contractor [CCC] ... from all claims, damages, losses and expenses including but not limited to attorneys' fees arising out of or in any way connected with the performance or lack of performance of this contract, provided any such claim, damage, loss or expense is: (a) attributable to bodily injury ... and (b) caused in whole or in part of any actual or alleged:
>
> - Act or omission of the Subcontractor [Glassolutions] or anyone directly or indirectly retained or engaged by it [Kuritzky] or anyone for whose acts it may be liable pursuant to the performance or [*sic*] this contract, or
> - Violation of any statutory duty or regulation or obligation arising out of the Subcontractor's performance or lack of performance of this contract or arising out of performance or lack of performance by anyone directly or indirectly retained or engaged by the Subcontractor [Glassolutions] or anyone for whose acts it may be liable pursuant to the performance of this contract.
>
> Notwithstanding the foregoing, Subcontractor's [Glassolutions'] obligation to indemnify Owner [BNYDC], Contractor [CCC] ... for any judgment, settlement, mediation or arbitration award or settlement shall extend only to the percentage of negligence of Subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable in connection to such claim, damage, loss and expense.

The City and BNYDC

The BNYDC/TDX Contract

TDX contends that the City and BNYDC's claims against it for contractual indemnification cannot lie because of the antisubrogation rule. According to TDX, the City, BNYDC and itself are all named insureds on the Travelers policies that TDX

procured for this project (*see* Candela 2/2/12 Aff., at 2 ["On 5/30/08, therefore, the City, BNYDC and TDX were all 'named insureds' of Travelers"]). In fact, the City, BNYDC and TDX are already being defended and indemnified by Travelers through separate counsel in this action (*ibid.*).

> The antisubrogation rule provides that an insurer ... has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. Public policy requires this exception to the general rule [of subrogation] both to prevent the insurer from passing the incidence of loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer's incentive to provide a vigorous defense for its insured [interior quotation marks and citations omitted]

(*Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d at 739).

In the Construction Management Contract between BNYDC and TDX, TDX agreed to indemnify the City and BNYDC for damages arising out of its and CCC's acts and omissions, and those of Glassolutions and Kuritzky, in the performance of the work. Even though TDX has been found free of negligence, Glassolutions has been found negligent, and there are questions of liability with respect to CCC and Kuritzky's actions and omissions. Thus, TDX's obligation to indemnify the City and BNYDC has been triggered.

However, while the City and BNYDC concede that the antisubrogation rule

> may bar direct claims by the City and BNYDC against TDX, that bar extends only up to the limits of coverage. Thus, in the event that the plaintiff obtains a judgment against the City or BNYDC that is in excess of the coverage being made available to them under the Travelers policy, then the City and BNYDC would face no antisubrogation bar to pursue TDX for the shortfall

(Lugara 2/21/12 Reply Affirm., ¶ 14). This is correct (*see e.g. New York State Superintendent of Ins. v New York Cent. Mut. Fire Ins. Co.*, ___ AD3d ___, 2012 NY Slip Op 06111, *1 [1st Dept 2012]; *Karcz v Klewin Bldg. Co., Inc.*, 85 AD3d 1649, 1652 [4th Dept 2011]).

The only claim upon which plaintiff may possibly succeed against the City and BNYDC is the part of his Labor Law § 241 (6) claim that is based on Industrial Code § 23-9.2 (g), to the extent that the claim is based on the part of the provision which concerns "the lowest end of travel of the equipment." Thus, the part of the City and BNYDC's motion which seeks contractual indemnification as against TDX is granted only to the extent that the City and BNYDC's damages exceed the limits of coverage of the Travelers policies that TDX procured for this project.

The TDX/CCC Subcontract

In the TDX/CCC Subcontract, CCC agreed to indemnify the City and BNYDC for damages arising out of the performance of CCC's work on the project, but only to the extent caused by CCC,

Glassolutions or Kuritzky's negligent acts or omissions. As set forth above, Glassolutions has been found negligent in its performance of its duties under the subcontract, and there are questions with respect to whether CCC and Kuritzky may also be found negligent. Therefore, the part of the City and BNYDC's motion which seeks summary judgment on their contractual indemnification claim as against Glassolutions is granted, but as against CCC and Kuritzky is denied.

TDX

TDX seeks summary judgment dismissing the City and BNYDC and Glassolutions' contractual indemnification claims as against it, and summary judgment on its own contractual indemnification claim as against CCC.

As set forth above, there is a chance that TDX may be obliged to indemnify the City and BNYDC. Therefore, summary judgment dismissing the City and BNYDC's contractual indemnification claim as against TDX is denied.

There is no provision in any of the contracts that requires TDX to indemnify Glassolutions. Therefore, the part of TDX's motion which seeks summary judgment dismissing Glassolutions' contractual indemnification claim is granted.

In the TDX/CCC Subcontract, CCC pledged to indemnify TDX for damages arising out of or resulting from CCC's work under the subcontract, but only to the extent of CCC, Glassolutions or Kuritzky's negligent acts or omissions. Glassolutions has been

found negligent, but there are questions concerning CCC and Kuritzky's possible negligence. Therefore, the part of TDX's motion which seeks summary judgment on its contractual indemnification claim against CCC is granted with respect to Glassolutions' actions and omissions, but is denied as to CCC or Kuritzky's acts and omissions.

Kuritzky

Kuritzky seeks summary judgment dismissing TDX, the City and BNYDC's contractual indemnification claims.

The agreement which Glassolutions made with Kuritzky for Kuritzky to supply glaziers for the project was an oral one. Therefore, Kuritzky did not agree to indemnify anybody, and the part of Kuritzky's motion which seeks summary judgment dismissing TDX, the City and BNYDC's contractual indemnification claims is granted.

Declaratory Judgment

In paragraph 50 of their moving affirmation, the City and BNYDC urge the court, pursuant to CPLR 3001, to issue a declaratory judgment that TDX, CCC and Glassolutions are obligated to defend and indemnify them in this action, including reimbursement of their costs and attorneys' fees. The request is not properly before the court. Should the City and BNYDC so choose, they can bring a plenary action for a declaratory judgment.

Breach of Contract to Procure Insurance

TDX moves to dismiss the City, BNYDC and Glassolutions' cross claims for breach of contract to procure insurance, and Kuritzky seeks to dismiss TDX, the City and BNYDC's breach of contract claims as against it. However, neither party has argued this claim, and thus, this part of both motions is denied.

CONCLUSION

Accordingly, it is

ORDERED that the part of Glassolutions Unlimited Corp.'s motion (motion sequence number 010) which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted; and it is further

ORDERED that the part of Glassolutions Unlimited Corp.'s motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim, as based on all of his unargued Industrial Code sections, is granted; and it is further

ORDERED that the part of Glassolutions Unlimited Corp.'s motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim, as based on Industrial Code § 23-9.2 (g), is granted except to the extent that the claim is based on the part of the provision which concerns "the lowest end of travel of the equipment," which part of the motion is denied; and it is further

ORDERED that the part of Glassolutions Unlimited Corp.'s motion which seeks dismissal of plaintiff's section 241 (6) claim on the basis of Industrial Code § 23-9.8 (h) is denied; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion (motion sequence number 011) which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it is denied; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim, as based on all of his unargued Industrial Code sections, is granted; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim, as based on Industrial Code § 23-9.2 (g), is granted except to the extent that the claim is based on the part of the provision which concerns "the lowest end of travel of the equipment," which part of the motion is denied; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks dismissal of plaintiff's section 241 (6) claim on the basis of Industrial Code § 23-9.8 (h) is denied; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks summary judgment dismissing Glassolutions Unlimited Corp. and Kuritzky Glass Co., Inc.'s

contribution claims is denied; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks summary judgment dismissing Glassolutions Unlimited Corp.'s common-law indemnification claim is denied; and it is further

ORDERED that the part of Calcedo Construction Corporation's motion which seeks summary judgment on its common-law indemnification claims against Glassolutions Unlimited Corp. and Kuritzky Glass Co., Inc. is denied; and it is further

ORDERED that the part of TDX Construction Corporation's motion (motion sequence number 012) which seeks summary judgment dismissing plaintiff's common-law negligence, Labor Law §§ 200 and 240 (1) claims as against it is granted; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim, as based on all of his unargued Industrial Code sections, is granted; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim, as based on Industrial Code § 23-9.2 (g), is granted except to the extent that the claim is based on the part of the provision which concerns "the lowest end of travel of the equipment," which part of the motion is denied; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks dismissal of plaintiff's section 241 (6) claim

on the basis of Industrial Code § 23-9.8 (h) is denied; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks summary judgment dismissing Calcedo Construction Corporation, Glassolutions Unlimited Corp., Kuritzky Glass Co., Inc., the City of New York and the Brooklyn Navy Yard Development Corporation's contribution claim is granted; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks summary judgment on its common-law indemnification claims against Calcedo Construction Corporation and Kuritzky Glass Co., Inc. is denied; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks to dismiss the City of New York, the Brooklyn Navy Yard Development Corporation, Calcedo Construction Corporation, Glassolutions Unlimited Corp. and Kuritzky Glass Co., Inc.'s common-law indemnification claims is denied; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks summary judgment dismissing Glassolutions Unlimited Corp.'s contractual indemnification claim is granted; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks summary judgment on its contractual indemnification claim against Calcedo Construction Corporation is

granted with respect to Glassolutions Unlimited Corp.'s actions and omissions, but is denied as to Calcedo Construction Corporation or Kuritzky Glass Co., Inc.'s acts and omissions; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks summary judgment dismissing the City of New York and the Brooklyn Navy Yard Development Corporation's contractual indemnification claim is denied; and it is further

ORDERED that the part of TDX Construction Corporation's motion which seeks summary judgment dismissing the City of New York, the Brooklyn Navy Yard Development Corporation and Glassolutions Unlimited Corp.'s cross claims for breach of contract to procure insurance is denied; and it is further

ORDERED that the part of the City of New York and the Brooklyn Navy Yard Development Corporation's motion (motion sequence number 013) that seeks summary judgment dismissing plaintiff's common-law negligence, Labor Law §§ 200 and 240 (1) claims as against them is granted; and it is further

ORDERED that the part of the City of New York and the Brooklyn Navy Yard Development Corporation's motion which seeks leave to amend their answer to assert new cross claims is granted; and it is further

ORDERED that the part of the City of New York and the Brooklyn Navy Yard Development Corporation's motion which seeks contribution against Calcedo Construction Corporation and

Kuritzky Glass Co., Inc. is denied; and it is further

ORDERED that the part of the City of New York and the Brooklyn Navy Yard Development Corporation's motion which seeks common-law indemnification against TDX Construction Corporation, Calcedo Construction Corporation, Glassolutions Unlimited Corp. and Kuritzky Glass Co., Inc. is denied; and it is further

ORDERED that the part of the City of New York and the Brooklyn Navy Yard Development Corporation's motion which seeks contractual indemnification as against TDX Construction Corporation is granted only to the extent that the City of New York and the Brooklyn Navy Yard Development Corporation's damages exceed the limits of coverage of the Travelers policies that TDX Construction Corporation procured for this project; and it is further

ORDERED that the part of the City of New York and the Brooklyn Navy Yard Development Corporation's motion which seeks summary judgment on their contractual indemnification claim as against Glassolutions Unlimited Corp. is granted, but as against Calcedo Construction Corporation and Kuritzky Glass Co., Inc. is denied; and it is further

ORDERED that the part of Kuritzky Glass Co., Inc.'s motion (motion sequence number 014) that seeks summary judgment dismissing TDX Construction Corporation, the City of New York and the Brooklyn Navy Yard Development Corporation's claims for contribution is granted, but dismissal of Calcedo Construction

Corporation and Glassolutions Unlimited Corp.'s contribution claims is denied; and it is further

ORDERED that the part of Kuritzky Glass Co., Inc.'s motion which seeks summary judgment dismissing TDX Construction Corporation, Calcedo Construction Corporation, Glassolutions Unlimited Corp., the City of New York and the Brooklyn Navy Yard Development Corporation's claims for common-law indemnification is denied; and it is further

ORDERED that the part of Kuritzky Glass Co., Inc.'s motion which seeks summary judgment dismissing TDX Construction Corporation, the City of New York and the Brooklyn Navy Yard Development Corporation's contractual indemnification claims is granted; and it is further

ORDERED that the part of Kuritzky Glass Co., Inc.'s motion which seeks summary judgment dismissing TDX Construction Corporation, the City of New York and the Brooklyn Navy Yard Development Corporation's breach of contract claims is denied; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: September 28, 2012

ENTER:

Joan M. Kenney, J.S.C.