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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 109288/2005
LEON, SEGUNDO
vs.
SMC CONSTRUCTION
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). 2 3 4

Replying Affidavits _____ | No(s). 5 6 7

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

APR 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/29/13

HON. EILEEN A. RAKOWER, J.S.C.

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: PART 15

----------X

SEGUNDO LEON,

Plaintiff,

- against -

SMC CONSTRUCTION CORP., and COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

----------X

NEW YORK PRESBYTERIAN HOSPITAL,

Third-Party Plaintiff,

-against-

SMC CONSTRUCTION CORPORATION,

Third-Party Defendant.

----------X

NEW YORK PRESBYTERIAN HOSPITAL,

Second Third-Party Plaintiff,

-against-

SPECIALTY SERVICE CONTRACTING, INC.,

Second-Third Defendant.

----------X

SMC CONSTRUCTION CORPORATION,

Third Third-Party Plaintiff,

-against-

RIEHM PLUMBING CORP., and RIEHM CORPORATION,

Index No.
109288/05

DECISION and ORDER

Mot. Seq. 4, 5

Third Third-Party Defendant.
----------X
NEW YORK PRESBYTERIAN HOSPITAL,

Fourth Third-Party Plaintiff,

-against-

RIEHM PLUMBING CORP.,

Fourth Third-Party Defendant.
----------X

HON. EILEEN A. RAKOWER

Plaintiff Segundo Leon ("Plaintiff") asserts causes of actions for negligence and violations of New York State Labor Law §200 and 241(6) against defendants NY Presbyterian Hospital s/h/a Columbia Presbyterian Hospital Medical Center ("NY Presbyterian) and defendant SMC Construction Corporation ("SMC") for a back injury that he sustained while performing asbestos abatement for Speciality Service Contracting Inc. ("Specialty Services") at one of NY Presbyterian's buildings, known as the "Harkness Pavilion" on February 20, 2004.

NY Presbyterian asserts third-party claims and cross claims against SMC for contractual indemnification, common law indemnification, contribution, and breach of contract.

Both NY Presbyterian and SMC commenced third-party actions against Riehm Plumbing Group ("Riehm") for contractual indemnification, common law indemnification, contribution, and breach of contract. Plaintiff did not bring a direct action against Riehm.

NY Presbyterian now moves (Mot. Seq. #4) for an Order, pursuant to CPLR 3212, granting summary judgment in favor of, and dismissing all claims and cross claims against it, or alternatively, granting NY Presbyterian summary judgment on its cross claims against SMC and third party Riehm for contractual indemnification. Plaintiff opposes. SMC does not oppose the portion of NY Presbyterian which seeks dismissal of Plaintiff's Complaint, but opposes the portion that seeks summary judgment on its claims for contractual and common law indemnification, contribution

and breach of contract against SMC.

In support of its motion, NY Presbyterian submits the following: supporting affirmation of Kenneth J. Platzer, the pleadings, a copy of the contract entered into between SMC and NY Presbyterian on November 26, 2003 for the subject construction, a copy of the SMC/Riehm Purchaser Order and Indemnification, transcripts of Plaintiff's depositions on May 9, 2008 and January 20, 2010, transcript of deposition of Vincent Caropreso, Assistant Vice President of SMC, on June 26, 2009, transcript of deposition of Thomas Pepe, President of Riehm, on July 23, 2010, transcript of deposition of Christopher Johnson, project manager at NY Presbyterian, on June 26, 2009, transcript of deposition of Andrew Lettus, employee of Riehm, on October 15, 2010.

SMC also moves (Mot. Seq. #5) for an Order, pursuant to CPLR 3212, granting summary judgment SMC, dismissing Plaintiff's Complaint with prejudice, dismissing NY Presbyterian's third-party claims and cross claims with prejudice, and granting SMC summary judgment on its third-party claims against Riehm Plumbing and Riehm Corporation. Plaintiff opposes. NY Presbyterian opposes the portion of SMC's motion seeking to dismiss its third-party claims and cross claims.

Riehm cross moves for an Order pursuant to CPLR 3212: (I) dismissing Plaintiff's Complaint for failure to state an action under Labor Law §§241(6) and 200, and thus extinguishing any and all claims as against Riehm; (ii) dismissing SMC's third party complaint and NY Presbyterian's fourth party complaint against Riehm for contractual and/or common law indemnification and contribution and breach of contract for failure to procure insurance; and (iii) dismissing SMC's third party complaint in its entirety pursuant to CPLR 3126 and/or issuing spoliation sanctions against SMC. SMC and NY Presbyterian oppose the portion of which relates to dismissal of its third party action and claims. Plaintiff opposes Riehm's motion to the extent that it seeks to dismiss his Complaint, but takes no position on the branches of the instant motions concerning liability SMC, Presbyterian and Riehm, except that Plaintiff supports Riehm's argument that SMC is guilty of spoliation for its destruction of daily work logs.

At the time of Plaintiff's accident and pursuant to a Purchase Order and contract, NY Presbyterian had retained SMC as the contractor to perform the renovation of the Otolaryngology Department, which was located on the 7th floor of

the Harkness Pavilion. Pursuant to the contract, SMC was responsible for the removal of pipes and debris on Harkness 7.

SMC hired Riehm as a subcontractor to perform the plumbing work in connection with the Harkness 7 project.

After asbestos was discovered, NY Presbyterian retained Plaintiff's employer, defendant/third party defendant Speciality Services, to perform asbestos abatement work on the seventh floor in the Harkness Pavilion.

On February 20, 2004, Plaintiff was employed by Speciality Services as a union asbestos abatement worker and was Speciality Services' union shop steward. According to Plaintiff's testimony, Plaintiff was part of a crew that was performing asbestos abatement in connection with a renovation project. The abatement work was scheduled to begin on a Friday afternoon, after all the other trades had left the site for the day. The work involved the use of an air filter, which weighs approximated 100-120 pounds. On the date of Plaintiff's accident, because there were stacked pipes in the room where the work was to be done, Plaintiff and his supervisor decided to lift and carry the air filter over the stack of pipes. Plaintiff's supervisor slipped on a pipe, causing him to lose his grip. Plaintiff continued to hold the air filter up by himself, and injured his back as a result.

Vincent Caropreso, the project manager for SMC, testified that SMC had an office on the seventh floor at Harkness Pavilion and he was there daily.

At his deposition on March 18, 2010, Mr. Caropreso testified:

Q: Did New York Presbyterian give you any notice of when or where Speciality Services would be performing its abatement work?

A: I don't recall them specifically telling me that, you know when and where. I'm pretty sure they would have told us that we weren't allowed on the site at a certain time.

Caropreso testified that the renovation included the installation of plumbing lines and that Riehm was hired to perform the plumbing scope of the project. Caropreso testified that Riehm used 10-foot length pipes and observed Riehm using the pipes

on the seventh floor. Caropreso testified that a pyramid-stack of pipes is common, and is one way that pipes are kept on a job site, and that the stacking of the pipes in this way is not dangerous. Caropreso did not know specifically if Riehm had stacked pipes on this job.

Christopher Johnson, a project manager at NY Presbyterian until June 2004, testified to having overseen the renovation project in 2004. He testified that he would go to Harkness 7 "most days." Johnson testified that NY Presbyterian contracted directly with SSC for the removal of asbestos. He further testified to coordinating work being performed and setting up time schedules:

> Q: Was there someone who coordinated the work between SMC, the contractors and the asbestos removal company, Specialty Services Contracting, Inc.?
>
> A: I don't understand what you mean by coordinated.
>
> Q: Well, did you set up the time schedule? You know, who would work where, when they should work, things of that nature?
>
> A: Yes.
>
> Q: Who would that be?
>
> A: I would arrange the time schedules. I would coordinate the time schedules.

Johnson further testified that if he saw an unsafe condition at the job site, he would notify SMC. He testified that he did not recall getting any complaints about pipes being left on the job site of the subject project.

Thomas Pepe, president of Riehm, testified that Riehm was hired by SMC to conduct work as a subcontractor of the subject renovation project in 2003-2004. Riehm's work included disconnecting plumbing, cutting and capping plumbing pipes and installing new piping and radiators. Pepe testified that Riehm completed its radiator work on February 21, 2004, and started installing new plumbing in March 2004. Pepe testified that Riehm did not have water piping on the site of project in February 2004, and that water piping was delivered to the site in March or April

2004. Riehm has no records of when the water piping was ordered, paid for or delivered.

Andrew Letus, an employee of Riehm, testified that he worked on the renovation project on the seventh floor of NY Presbyterian. Letus did not recall where Riehm stored pipes that were installed on the seventh floor. He testified that Riehm would receive 10 foot long pipe for use on the seventh floor, which would be cut as needed. He did not recall if he observed those pipes being delivered to the seventh floor.

Plaintiff's Labor Law 200 and Common Law Negligence Claims

Labor Law §200 codifies the common law duty of the owner or employer to provide employees with a safe place to work. Labor Law §200 directs that the owner and general contractor owe a duty to assure that all workplaces be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to those working there. This includes the ways and approaches to the work area. (*Caspersen v. La Sala Bros.*, 253 NY 491 [1930]).

"Under Labor Law §200, in addition to liability arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control, liability can also arise when the accident is caused by a dangerous condition at the worksite, that was either created by the owner or general contractor or about which they had prior notice." *Makarius v. Port Authority*, 76 A.D. 3d 805, 808 [1st Dept 2010]). It is well settled that a plaintiff need not demonstrate a defendant's control or direction of his or her work to sustain a Labor Law §200/common law negligence claim where the injury arises from a defective condition in the workplace, rather than the plaintiff's method of performing his or her work (*see Urban v. No. 5 Times Square Development, LLC*, 2009 NY Slip Op 3997, *2 [1st Dept. 2009]) (citations omitted). However, "no liability lies absent proof that a defendant created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant has prior actual or constructive notice of the same." *Makarius v. Port Authority*, 76 A.D. 3d 805, 808 [1st Dept 2010].

NY Presbyterian, the owner of the subject premises, contends that it is not liable under Labor Law §200 because it did not supervise, direct or control the work of Plaintiff or his employer or SMC. It also alleges that it lacked notice of the

dangerous condition.

SMC contends that dismissal of Plaintiff's Labor Law §200 claim is warranted on the basis that the asbestos abatement work being performed by Plaintiff, an employee for Speciality Services, at the time of the accident was not within the scope of SMC's contract with the Hospital and SMC was not a general contractor or statutory agent with regard to the ongoing asbestos abatement work that Plaintiff was performing at the time of the accident. Alternatively, SMC argues that there is no evidence that SMC directed or controlled Plaintiff's work, the stacked pipes did not constitute a dangerous condition and even if they did, SMC had no notice of them.

NY Presbyterian and SMC both argue lack of control and supervision over Plaintiff's work. However, Plaintiff's claim is that the stack of pipes was a dangerous condition at the work site, not that his work was performed in an unsafe manner, and therefore Movants' arguments are not dispositive. (*See generally Keating v Nanuet Board of Education*, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; *Thomas v Claffee*, 24 AD3d 749, 751 [2d Dept 2005]; *Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, Defendants have failed to meet their initial burden of establishing that they did not have control over the work site and actual or constructive notice of the alleged dangerous condition given their presence and roles in connection with the ongoing renovation on the seventh floor of Harkness 7 where Plaintiff's work was being performed. Thus, SMC and NY Presbyterian have failed to establish as a matter of law that they are entitled to summary judgment on Plaintiff's Labor Law 200 Claim.

Plaintiff's Labor Law 240(6) Claim

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Labor Law §241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (see *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 N.Y.2d 343, 348 [1998]). Liability may be imposed under this section even where the owner or contractor did not supervise or control the worksite (see *id.)*. In order to establish a cause of action under § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a rule or regulation of the Commissioner of the Department of Labor ("Industrial Code") that applies given the specific facts and circumstances of the accident, and that sets forth a concrete standard of conduct (see *Long v Forest-Fehlhaber*, 55 N.Y.2d 154, 160 [1982]. "[O]nce it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury." (*Rizzuto*, 91 N.Y.2d at 350). If demonstrated, then the owner or contractor is vicariously liable without regard to his or her fault (see *id.)*. The owner or contractor "may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*id.*).

"In order to prevail on a claim that an owner or a contractor breached the nondelegable duty imposed by Labor Law §241(6), plaintiff must prove that a specific provision of the Industrial Code was violated" (*Yellen v. Rockaway Realty Assocs.*, 243 A.D.2d 338, 339 [1st Dept. 1997]) (citations omitted). Plaintiff's Bill of Particulars alleges violations of Industrial Code §§23-1.5, 23-1.7(e)(1) & (e)(2), and 23-1.30. In opposition, Plaintiff states that it has limited its claims to a violation of 23-1.7(e)(2).

Industrial Code §23-1.7(e), that section provides, in pertinent part,

> (e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from

> accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

See DeSimone v. Structure Tones, Inc., 306 A.D. 2d 90, 91 [1st Dept 2003] (holding "Liability for the harm sustained by plaintiff in the March 10, 1998 accident was properly assigned Structure Tone pursuant to Labor Law 241(6) based upon Structure Tone's demonstrated failure, in violation of Industrial Code (12 NYCRR) § 23-1.7 (e) (2), to discharge its nondelegable duty to keep plaintiff's work area free of scattered materials, such as the pipes upon which plaintiff tripped.").

Both SMC and NY Presbyterian contend that the stack of pipes is not covered by 12 NYCRR 23-1.7(e)(2) because it was an integral part of the construction.

However, the parties have failed to demonstrate that the stack of pipes was inherent to the asbestos abatement job that Plaintiff was performing. As Plaintiff points out in his opposition, "No evidence has been presented that the pipes were going to replace the pipes in the wall and ceiling that were the subjects of the asbestos removal, or that they had any other direct or indirect connection with the abatement work. Indeed, SMC has failed to demonstrate that the stack of pipes had any connection at all with the renovation project." Furthermore, an issue of fact is created by Riehm's evidence that it did not deliver or handle the 18-inch pipes and Presbyterian and SMC's failure to provide an explanation for why the pipes were on the premises if not being used by Riehm.

SMC and NY Presbyterian also argue that the alleged breach of Labor Law 241(6) was not the proximate cause of Plaintiff's injuries. They contend that Plaintiff's alleged negligence in attempting to carry the air filter over the pipes was the sole proximate cause. This, however, is a question of fact. *See Derdiarian v. Felix Contracting Corp.*, 51 N.Y. 2d 308, 312 (1980) ("As a general rule, the question of proximate cause is to be decided by the finder of fact.").

Contractual Indemnification Claims

SMC seeks dismissal of NY Presbyterian's claim against it for contractual indemnification on the basis that Plaintiff's accident was not caused by any negligence on the part of SMC, nor did they accident arise out of SMC's work under its contract

with The Hospital. NY Presbyterian opposes.

NY Presbyterian seeks summary judgment on its cross claims against SMC and third party Riehm for contractual indemnification.

NY Presbyterian alleges that it is entitled to contractual indemnification from SMC and/or Riehm for any liability as to Plaintiff.

The indemnification provision in the NY Presbyterian/SMC contract provides:

> "the Contractor shall indemnify and hold harmless the Owner ... from and against claims, damages, losses and expenses, including but not limited to attorneys; fees, arising out of or resulting from performance of the Work, provided that such claim is attributable to bodily injury ... but only to the extent caused by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim . . . is caused in part by a party indemnified here."

Here, both SMC's motion seeking dismissal of NY Presbyterian's contractual indemnification claim and NY Presbyterian's motion for summary judgment on this claim is premature, as issues of fact remain as to SMC's negligence, if any, and the extent to which it controlled the work site. Issues of fact therefore also preclude SMC's motion dismissing NY Presbyterian's claim for common law indemnification.(*Perri v. Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2nd Dept. 2005]) ("In the case of common-law indemnification . . . [w]here the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor "was either negligent or exclusively supervised and controlled plaintiff's work site.").

Breach of Contract Claims

SMC also seeks dismissal of NY Presbyterian's claim for breach of contract for failure to procure insurance naming NY Presbyterian as an additional insured as the contract contains no obligation to name NY Presbyterian as an additional insured. SMC states that, "Although not specifically set forth as a separate cause of action in

The Hospital's Third Party Complaint, the 'WHEREFORE' clause of the Hospital's Third-Party Complaint states that The Hospital seeks a judgment for breach of contract from SMC." NY Presbyterian does not address this issue. Thus, to the extent that NY Presbyterian asserts a claim of breach of contract against SMC for failure to procure insurance, such a claim is hereby dismissed.

Riehm's Cross Motion to SMC's motion

Both NY Presbyterian and SMC commenced third-party actions against Riehm, SMC's plumbing subcontractor on the job, seeking contractual and/or common law indemnification from Riehm, SMC's plumbing subcontractor on the job, claiming that the pipes that caused the accident must have been placed there by Riehm. Plaintiff has asserted no direct causes of actions as against Riehm.

Riehm cross moves, seeking to dismiss SMC's third-party Complaint and NY Presbyterian's fourth party Complaint, on the basis that there is no evidence that it supplied or handled the pipes in connection with the Project which allegedly caused Plaintiff's supervisor to fall and led to Plaintiff's injuries and thus no basis for contractual and/or common law indemnification.

Pursuant to the SMC/Riehm Purchase Orders, the relevant terms of the indemnification clause are set as follows:

> "[Riehm] covenant and agree to fully defend, protect, indemnify and hold harmless SMC [,] the owner of the building in which the work is performed . . . from and against each and every claim . . . (including any related to injury to people or property loss or damage is due or claimed to be do [sic] any negligent of yours or ours) **caused by arising from or in any way incidental to the performance of the work hereunder** . . ."

Pursuant to both Purchase Orders entered into between Riehm and SMC, SMC required to Riehm to indemnify SMC for "each and every claim . . . caused by, arising from or in any way incidental to the performance of the work hereunder."

Riehm alleges the evidence demonstrates that: (1) pipes involved in Plaintiff's accident, as described by Plaintiff on two occasions, are not the same pipes used by Riehm in connection with its plumbing work; (2) Riehm did not store any pipes on

Harkness 7 preceding Plaintiff's accident; (3) Riehm did not commence its radiator work on Harkness 7 during February 2004 until the day after Plaintiff's accident and such work did not involve the use of or storage of any pipes; (4) Riehm did not commence its plumbing work until almost one month after Plaintiff's accident occurred and no pipe deliveries were made to the site in connection with its plumbing work until March or April of 2004.

At his first deposition on May 9, 2008, Plaintiff testified that the subject pipes were approximately 30 inches in diameter. At his second deposition, he changed the dimensions to approximately 1 ½ to 2 feet in diameter. Plaintiff first testified that there were approximately 9 to 12 pipes stacked in a pyramid about three levels high, and then testified that there were 6 to 8 pipes stacked, rising to the level of the space between his waist and chest.

Thomas Pepe, president of Riehm, testified that Riehm was hired by SMC to conduct work as a subcontractor of the subject renovation project in 2003-2004. Riehm's work included disconnecting plumbing, cutting and capping plumbing pipes and installing new piping and radiators. Pepe testified that Riehm completed its radiator work on February 21, 2004, and started installing new plumbing in March 2004. Pepe testified that Riehm did not have water piping on the site of project in February 2004, and that water piping was delivered to the site in March or April 2004.

However, Pepe testified that the pipes to be installed by Riehm were copper pipes, approximately three quarters of an inch in diameter, which were cut subsequent to delivery. Pepe testified that Reihm's work at Harkness 7 did not involve in any way cutting, capping or supplying the pipes that were equivalent to any of the diameter measurements testified by Plaintiff to be the subject of his accident. Mr. Lettus, Riehm's project manager, testified that the only pipes that would have been delivered to the site included vent line pipes, all bearing a standard 10-foot length, and none could be mistaken for the pipes that allegedly caused Plaintiff's injuries.

In opposition, SMC and NY Presbyterian make many arguments; however, they fail to present any evidence in admissible form supporting their claims that questions of fact exist as to Riehm's alleged liability.

For example, SMC contends by their attorney affirmation that Plaintiff, who was born in Ecuador, did not understand his own testimony when he testified utilizing

the imperial system of measurement, rather than the metric system.

Furthermore, SMC cites to portions of Mr. Lettus testimony; however, a complete reading demonstrates that Mr. Lettus testified that Riehm did not store any pipes on Harkness 7 in January or February 2004. Morever, Mr. Pepe testified that the in January and February 2004, Riehm's designated area for storage of its equipment was in the Milstein Pavilion of The Hospital, not the Harkness Pavilion. Thus, SMC fails to present a question of fact concerning Riehm's storage of pipes in Harkness Pavilion prior to February 20, 2004.

In addition, SMC's other contentions, such as the fact that a permit was issued to Riehm on January 12, 2004 for the performance of additional plumbing work is not sufficient to raise a question of fact as to the whether such work was actually performed. Furthermore, while SMC argues that an issue of fact is raised because Riehm was the only contractor on site that used pipes in connection with its work, Mr. Caropeso, SMC's project manager, testified that SMC hired approximately 6-8 trade contractors to perform work at the site including plumbers and HVAC contractors, to perform HVAC duct modifications and installation of water, waste and vent lines on Harkness 7.

Similarly, NY Presbyterian fails to present any evidence in admissible form to create a question of fact concerning Riehm's alleged liability.

Accordingly, Riehm has established its entitlement to summary judgment dismissing SMC's third party complaint and NY Presbyterian's fourth party complaint against Riehm for contractual and/or common law indemnification and contribution.

Furthermore, Riehm seeks dismissal of NY Presbyterian's breach of contract claim on the basis that the evidence establishes that the Riehm did in fact obtain an insurance policy that would afford coverage to NY Presbyterian as an additional insured as long as its liability arose out of Riehm's ongoing operations, which NY Presbyterian has failed to establish. Given NY Presbyterian's failure to establish evidence to support a finding of liability on Riehm's part, Riehm is entitled to summary judgment on NY Presbyterian's breach of contract claim.

Wherefore, it is hereby

ORDERED that defendant/fourth third-party plaintiff New York-Presbyterian Hospital s/h/a Columbia Presbyterian Medical Center's motion for summary judgment is denied; and it is further

ORDERED that defendant/third third-party plaintiff SMC Construction Corp.'s motion for summary judgment is granted only to the extent that NY Presbyterian's claim for breach of contract for failure to procure insurance as against SMC is dismissed; and it is further

ORDERED that Riehm Plumbing Corp.'s motion for summary judgment is granted, and SMC's third party complaint and NY Presbyterian's fourth party complaint against Riehm Plumbing Corp. is dismissed, and the Clerk is directed to enter judgment in favor of Riehm Plumbing Corp. accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 29, 2013

EILEEN A. RAKOWER, J.S.C.