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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Shlomo Hagler J.S.C. PART 17
Justice

Index Number : 111633/2008
CHARLES, GREGORY
vs.
LADIES MILE
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 111633/08
MOTION DATE
MOTION SEQ. NO. 005

The following papers, numbered 1 to 9, were read on this motion to/for summary judgment

Notice of Motion/~~Order to Show Cause~~ — ~~Affidavits~~ AFFIRMATIONS — Exhibits A through J — No(s). 1, 2, 3,

~~Answering Affidavits~~ — ~~Exhibits~~ Affirmations in Opposition w/ Exhibits — No(s). 4, 5, 6,

Replying ~~Affidavits~~ Affirmations — No(s). 7, 8,

Transcript of Oral Argument of 10/15/13 — No(s). 9

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

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

Dated: 6/27/13

Shlomo Hagler, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

GREGORY CHARLES,

Plaintiff,

-against-

LADIES MILE, INC., VJB CONSTRUCTION CORP. and VJB CONSTRUCTION 655 6TH AVENUE, LLC,

Defendants,

----------X

LADIES MILE, INC., VJB CONSTRUCTION CORP. and VJB CONSTRUCTION 655 6th AVENUE, LLC,

Third-Party Plaintiffs,

-against-

ERIN ERECTORS, INC.,

Third-Party Defendant,

----------X

LADIES MILE, INC., VJB CONSTRUCTION CORP. and VJB CONSTRUCTION 655 6TH AVENUE, LLC,

Second Third-Party Plaintiffs,

-against-

FEINSTEIN IRON WORKS, INC.,

Second Third-Party Defendant,

----------X

FEINSTEIN IRON WORKS, INC.,

Third Third-Party Plaintiff,

-against-

ERIN ERECTORS, INC.,

Third Third-Party Defendant.

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Index No.: 111633/08

First Third-Party
Index No.: 590959/08
(Discontinued)

Second Third-Party
Index No.: 590916/09

Third Third-Party
Index No.: 590804/10

DECISION & ORDER

Motion Sequences: 004 & 005

HON. SHLOMO HAGLER, J.S.C.:

In this Labor Law action and the consolidated third-party insurance actions that follow it, second third-party defendant/third third party plaintiff Feinstein Iron Works, Inc. ("Feinstein") moves

under motion sequence number 004, for summary judgment pursuant to CPLR § 3212, to dismiss the second third-party complaint against it or, alternatively, for summary judgment on contractual indemnity over and against Erin Erectors, Inc. ("Erin") on its third third-party complaint ("Feinstein Motion"). Defendants/first and second third-party plaintiffs Ladies Mile, Inc. ("Ladies Mile"), VJB Construction Corp. ("VJB Construction") and VJB Construction 655 6th Avenue, LLC ("VJB 655") (or collectively "defendants/third-party plaintiffs") move, under motion sequence 005, for summary judgment pursuant to CPLR § 3212, to dismiss the complaint of plaintiff Gregory Charles ("Charles" or "plaintiff") or, in the alternative, for partial summary judgment on their own first and second third-party complaints against Feinstein and Erin for contractual indemnification ("Defendants/Third-Party Plaintiffs' Motion"). For the following reasons, the Feinstein Motion is granted in part and denied in part, and the Defendants/Third-Party Plaintiffs' Motion is denied.

BACKGROUND

On February 27, 2006, Charles injured his back during the course of his employment as a construction worker with third-party defendant/third third-party defendant Erin Erectors, Inc. ("Erin") at a worksite in a building located at 655 6th Avenue in the County, City and State of New York ("the building"). Ladies Mile, the building's owner, hired VJB Construction as the general contractor and construction manager to perform the work in the building. VJB Construction retained Feinstein as a contractor to fabricate and install structural steel construction materials in the building. Feinstein hired Erin as a subcontractor to perform the actual installation work, using products and materials that Feinstein supplied to Erin.

Charles testified at his June 2, 2009 deposition that at approximately one o'clock in the afternoon of February 27, 2006, he and fellow Erin employee Michael Mott ("Mott") were on the building's second floor and engaged in retrieving a steel I-beam which they were to going to install in the building's elevator shaft. (Exhibit "G" to Feinstein Motion, Examination Before Trial of Gregory Charles, dated June 2, 2009 ["Charles 1st EBT"] at 39-44.) Charles described the building as having been "gutted" as part of a total renovation job, with its original exterior walls and roof intact, but its interior walls consisting only of steel beams and studs to be sheetrocked, and its floor consisting of bare concrete and partially removed wood. (*Id.* at 41.)

Charles testified that he and Mott walked through a door frame into a room on the building's second floor where they located an I-beam, and were in the process of carrying it out to the elevator shaft. (*Id.* at 44-47.) Charles also testified that there was a debris pile on the floor of the room near the doorway entrance which he described as square, approximately three or four feet wide, 18 inches high and consisting of studs, two-by-fours, brick and aluminum, and with oil and grease on the concrete floor beneath it. (*Id.* at 47-49, 55-56.) Charles further testified that he and Mott had picked up the I-beam, with himself in front and Mott behind him, and were in the process of leaving the room through the same door frame by which they had entered. (*Id.* at 51.) Charles claimed that the accident occurred when he stepped onto the debris pile with his right foot, which slipped out from under him straight forward and caused him to twist and fall onto his left knee, while simultaneously dropping his end of the I-beam on the floor to his right. (*Id.* at 51-54.)

Charles testified that he had neither seen nor been informed about the specific debris pile that he slipped on the building's second floor prior to his accident. (*Id.* at 50.) However, Charles also claimed that he and other Erin employees had previously complained about the presence of such

debris piles to their foreman, Jeffrey Connelly ("Connelly") "every day," and alleged that Connelly passed these complaints on to VJB Construction's construction manager, Ralph Wicks ("Wicks"). (*Id.* at 74-76.)

At a second deposition held on July 14, 2010, Charles reiterated his original testimony and also stated that there was no possible way that he could have avoided the debris pile that he stepped on because it blocked "the whole doorway to the hallway" where he and Mott were taking the I-beam. (*See* Exhibit "H" to Feinstein Motion, Charles 2nd EBT at 74-75.) Charles stated that he continued to work at Erin after his accident, but eventually had surgery on his back in 2008. (*Id.* at 81-88.) He admitted to having "tweaked" his back "three, four, five times throughout [his] career" as a construction worker. (*Id.* at 54.)

Wicks, VJB Construction's construction manager, was deposed on August 5, 2009, and testified that VJB Construction had approximately 15 employees, including himself, working at the building during its renovation and that his job was to coordinate and supervise the work of the various foremen and their work crews. (*See* Examination Before Trial of Ralph Wicks, attached as Exhibit "I" to Feinstein Motion ["Wicks EBT"], at 20-25.) Wicks also stated that he had the authority to direct the foremen to stop their work if he observed them engaged in activity that he deemed to be dangerous. (*Id.* at 27.) Wicks further admitted that it was VJB Construction's responsibility to remove the debris that was generated at the building during the work. (*Id.* at 30.) Wicks stated that he was unaware of the presence of the specific debris pile on the building's second floor that Charles slipped on, and denied having received any complaints about it or similar debris piles from any workers. (*Id.* at 46-50.)

Connelly, Erin's foreman, was deposed on August 12, 2009, and testified that, although he had not seen the specific debris pile that Charles slipped on, he had noticed similar debris piles and had complained about them, among other things, to Wicks. (*See* Exhibit "J" to Feinstein Motion, Examination Before Trial of Jeffrey Connelly ["Connelly EBT"], at 29-30, 34-35, 42.) Connelly also stated that, in the event that he received a complaint about a debris pile, he would instruct fellow VJB Construction employee, labor foreman James Antretter ("Antretter") to assign laborers to remove it. (*Id.* at 52-54.)

Michael Feinstein ("Feinstein"), president of Feinstein Iron Works, Inc., was deposed on March 22, 2011 (Exhibit "L" to Feinstein Motion, Examination Before Trial of Michael Feinstein ["Feinstein EBT"]), who stated that, in May of 2005, his company had executed a contract with Ladies Mile (the "Feinstein Contract") (attached as Exhibit "M" to Feinstein Motion) to perform the structural steel work component of the building's renovation project. (Feinstein EBT at 10). Feinstein also stated that his company actually only fabricated and delivered the structural steel to the building, but executed a subcontract with Erin (the "Erin Sub-Contract") (Exhibit "E" to Defendants/Third-Party Plaintiffs' Motion) to install it there. (Feinstein EBT at 31-34.)

The relevant portion of the Feinstein Contract provides as follows:

> "Exhibit I - Trade General Conditions
>
> * * *
>
> Article 17 - Indemnity
>
> 17.1 To the fullest extent permitted by applicable law, the Contractor [i.e., Feinstein] shall assume entire responsibility and liability for all damages ... and injury of any nature ... to persons and property ... arising out of, or in any manner relating to, the execution of the Work, and the Contractor agrees, at its own expense, to defend (if requested by the Owner [i.e., Ladies Mile]), indemnify and hold harmless the Owner ... and [its] respective agents, servants and

> employees (collectively, the Indemnitees), from all demands, claims, causes of action . . . losses, costs and expenses, including reasonable counsel fees, arising out of, or in any manner relating to, the execution of the Work, or asserted against any of the Indemnitees by reason of the acts or omission of the Contractor, or of any entity directly or indirectly engaged by the Contractor in connection with the Work, regardless of whether the acts or omissions complained of were caused, in whole or in part, by a party or parties indemnified under this Article. . . . The Contractor shall maintain, at all times, insurance in the amount set by Article 22 for the umbrella policy limit, with the appropriate broad form endorsement, covering the Contractor's obligations assumed under this Article and all other obligations of indemnification and defense assumed under this contract."

(*See* Exhibit "M" to Feinstein Motion.)

The relevant portions of the Erin Sub-Contract provide as follows:

> "Prior to commencement of any work under this Contract and until completion and acceptance of the work, the Subcontractor [i.e., Erin] shall, at its sole expense, maintain the following insurance on its own behalf, and furnish the Owner [i.e., Ladies Mile] and General Contractor [i.e., VJB Construction] certificates of insurance evidencing same and reflecting the effective date of such coverage as follows:
>
> * * *
>
> B. Commercial General Liability with a combined Bodily Injury and Property Damage limit of not less than one million dollars ($1,000,000.00) per occurrence and in the aggregate.
>
> * * *
>
> Hold Harmless
>
> To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless [Feinstein] and Owner [i.e., Ladies Mile], their officers, directors, partners, representatives, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability (including statutory liability) arising in whole or in part and in any manner from injury and/or death of person . . . resulting from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by or for Subcontractor pursuant to any contract . . . except those claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of [Feinstein]. . . . The Subcontractor hereby

> expressly permits the General Contractor [i.e., VJB Construction] to pursue and assert claims against the Subcontractor for indemnity, contribution and common-law negligence arising out of claims for damages or death and personal injury."

(*See* Exhibit "E" to Defendants/Third-Party Plaintiffs' Motion.)

Charles commenced this action on August 22, 2008 by filing a summons and complaint that sets forth causes of action against Ladies Mile, VJB Construction and VJB 655 for common-law negligence and violations of Labor Law §§ 200 and 241(6). (*See* Exhibit "A" to Feinstein Motion.) Ladies Mile, VJB Construction and VJB 655 submitted a joint answer with affirmative defenses to Charles' complaint on October 6, 2008. (*Id.*)

Ladies Mile, VJB Construction and VJB 655 thereafter commenced the first third-party action herein against Erin via impleader on October 7, 2008 (*see* Exhibit "B" to Feinstein Motion), which they subsequently discontinued with prejudice via stipulation dated August 13, 2009 (Affirmation of Erin's Counsel, Melissa Manna, Esq., ["Manna Aff."] in Partial Opposition to Defendants/Third-Party Plaintiffs' Motion with Exhibit "A.") Ladies Mile, VJB Construction and VJB 655 then commenced the second third-party action herein against Feinstein via impleader on September 23, 2009 by filing a complaint that sets forth causes of action for: (1) common-law indemnity; (2) contractual indemnity; (3) contribution; and (4) breach of contract for failure to obtain insurance. (*See* Exhibit "C" to Feinstein Motion.) On October 15, 2009, Feinstein filed an answer to the second third-party complaint that includes cross claims against Ladies Mile, VJB Construction and VJB 655 and Erin for: (1) common-law indemnity; (2) contribution; (3) contractual indemnity; and (4) breach of contract for failure to obtain insurance. (*Id.*)

Feinstein also commenced the third third-party action herein against Erin on September 9, 2010 by filing a complaint that sets forth causes of action for contractual indemnification and breach of contract for failure to obtain insurance. (*See* Exhibit "D" to Feinstein Motion.) On November 16, 2010, Erin filed an answer to the third third-party complaint that includes cross claims for common-law indemnity against Ladies Mile, VJB Construction and VJB 655 and contractual indemnification from Feinstein. (*Id.*)

At a hearing before this Court on Feinstein's instant motion to dismiss the second third-party complaint, counsel for Ladies Mile, VJB Construction and VJB 655 agreed to withdraw their first and third causes of action for common-law indemnity and contribution. (*See* Transcript of Oral Argument of October 15, 2012 at 21.)

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (*See, e.g., Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*See, e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003].)

Feinstein Motion

As was previously noted, defendants/third-party plaintiffs Ladies Mile, VJB Construction and VJB 655 have already voluntarily withdrawn their third-party claims against Feinstein for common-law indemnity and contribution. Therefore, those claims will be severed and dismissed. What remains of the second third-party complaint are the causes of action against Feinstein for contractual indemnity and breach of contract for failure to obtain insurance.

With respect to defendants/second third-party plaintiff's complaint for breach of contract for failure to obtain insurance, Feinstein has presented a copy of the declaration page of a $1 million commercial general liability policy that it obtained from Illinois Union Insurance Company that was in effect from January 23, 2006 through January 23, 2007. (*See* Exhibit "P" to Feinstein Motion.) Ladies Mile, VJB Construction and VJB 655 respond that this two-page document is insufficient proof that the breach of contract claim should be dismissed as it does not include the schedule of endorsements that would indicate whether or not they had, in fact, been named as additional insureds under this policy. (*See* Affirmation of Defendants/Third-Party Plaintiffs' Counsel David Persky in Opposition to Feinstein Motion ["Persky Aff. in Opposition"], ¶¶ 15-20). Feinstein replies that Ladies Mile, VJB Construction and VJB 655 have "failed to oppose the motion with admissible evidence." (*See* Reply Affirmation of Feinstein's Counsel David P. Feehan, Esq., ["Feehan Reply Aff."], ¶ 5.)

The burden of proof on this motion lies with Feinstein which has clearly presented an incomplete contract. As Ladies Mile, VJB Construction and VJB 655 correctly point out, the Hon. Michael Stallman, J.S.C., held in *International Bus. Machs. v United States Fire Ins. Co.* (17 Misc 3d 1108[A] [Sup Ct, NY County 2007]), that a moving party's failure to present full copies of

endorsements precludes a finding that the opposing party was an additional insured and is fatal to a motion for summary judgment to dismiss a breach of contract claim based on failure to obtain insurance. The same holds true in our case. However, this does not preclude Feinstein from renewing its request at the time of trial by presenting a full copy of the policy. Therefore, Feinstein's motion must be denied with respect to the third-party breach of contract claim.

With respect to the remaining claim for contractual indemnity, Feinstein first argues that the subject claim must fail because the indemnity clause of the Feinstein Contract violates General Obligations Law § 5-322.1. (*See* Affirmation of David P. Feehan, Esq., ["Feehan Aff."], in Support of Feinstein Motion, ¶ 22.) That statute renders void, as against public policy, any construction contract that purports to indemnify a property owner against the consequences of its own negligence. Feinstein specifically refers to the first sentence of the Feinstein Contract's indemnity provision, which recites that:

> "To the fullest extent permitted by applicable law, the Contractor [i.e., Feinstein] shall assume entire responsibility and liability for all damages . . . and injury of any nature . . . to persons and property . . . arising out of, or in any manner relating to, the execution of the Work . . . regardless of whether the acts or omissions complained of were caused, in whole or in part, by a party or parties indemnified under this Article."

(*See* Exhibit "M" to Feinstein Motion.)

Feinstein cites the holding of the Court of Appeals in *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.* (89 NY2d 786, 793 [1997]), which found that the indemnity clause at issue there violated General Obligations Law § 5-322.1 because it provided for the contractor to hold the owner harmless "from all liability . . . from claims for injuries or death from any cause while on or near the

project . . . whether or not it is contended the [owner] contributed thereto in whole or in part," and thereby contemplated indemnifying the owner against its own negligence.

Feinstein contends that the instant indemnity clause violates General Obligations Law § 5-322.1 because, like the clause in *Itri Brick*, it contains the phrase "whether the acts or omissions complained of were caused, in whole or in part, by a party or parties indemnified under this Article," which should be read as an impermissible attempt to indemnify the building's owners against the consequences of their own negligence. (*See* Feehan Aff. in Support of Feinstein Motion, ¶ 29.) Ladies Mile, VJB Construction and VJB 655 respond that the Appellate Division, First Department, has long rejected Feinstein's proposed construction where an indemnity clause contains the saving language "to the fullest extent permitted by law." (*See* Persky Aff. in Opposition to Feinstein Motion, ¶¶ 6-13.)

Inasmuch as the instant indemnity clause contains the phrase "to the fullest extent permitted by law," it must be accorded a reading that renders it legal and gives it effect by limiting Feinstein's indemnity obligation to that which the law permits. In *Brooks v Judlau Contr., Inc.* (11 NY3d 204, 209-211 [2008]), the Court of Appeals found that the indemnity clause at issue did **not** violate General Obligations Law § 5-322.1, because it contained the saving phrase "to the fullest extent permitted by law," which the court reasoned "contemplates partial indemnification and is intended to limit [the contractor's] contractual indemnity obligation solely to [the contractor's] own negligence." (*See also Stallone v Plaza Constr. Corp.*, 95 AD3d 633 (1st Dept 2012); *Dutton v Pankow Bldrs.*, 296 AD2d 321, 321-322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003].) Therefore, since the subject indemnity clause in our case contains the saving phrase "to the fullest extent permitted by law," it does not violate General Obligations Law § 5-322.1.

Feinstein argues that the third-party contractual indemnity claim against it must be dismissed because "the owner is not free from negligence in this case." (Feehan Aff. in Support of Feinstein Motion, ¶ 31.) In order to sustain any claim for contractual indemnification, a plaintiff must first prove some quantum of negligence on defendant's part. (*See Knight v City of New York*, 225 AD2d 355 [1st Dept 1996].) Regarding this burden, the Appellate Division, First Department, has articulated the general rule as follows:

> "It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred. The plaintiff need not exclude every other possible cause of the accident, but must offer proof that causes other than defendant's negligence are sufficiently "remote" or "technical" to allow a jury to base its verdict on logical inferences to be drawn from the evidence, rather than speculation [internal citations omitted]."

(*Feder v Tower Air, Inc.*, 12 AD3d 190, 191 [1st Dept 2004].) Here, Feinstein argues that the evidence at hand shows that Ladies Mile, VJB Construction and VJB 655 are liable for negligence via a violation of Labor Law § 200 under a "defective premises condition" analysis. (Feehan Aff. in Support of Feinstein Motion, ¶ 34.) Ladies Mile, VJB Construction and VJB 655 respond that such an analysis requires proof of the owner's "actual or constructive notice" of the allegedly defective condition and argue that Feinstein "proffers no proof" of such notice. (Persky Aff. in Opposition, ¶ 14.) All discussion of Labor Law § 200 liability is premature at this juncture, since Charles has not yet had the opportunity to present his evidence in support of his claim at trial. (*See Mohammed v Silverstein Props., Inc.*, 74 AD3d 453, 454 [1st Dept 2010] ["The court also correctly denied Silverstein summary judgment on its contractual indemnification claim, since the contract between Silverstein and Otis provides that Otis will indemnify Silverstein against certain liability

to the extent that liability arises out of Otis's negligence in its performance of the contract, and there has been no finding that Otis was negligent"].) Accordingly, the first branch of Feinstein's motion is denied.

In the second branch of its motion, Feinstein seeks, as alternative relief, summary judgment on its third-party claim against Erin for contractual indemnity. Feinstein argues that it is entitled to summary judgment because the indemnity clause of the Erin Sub-Contract contains the saving language "to the fullest extent permitted by law," and, therefore, does not violate General Obligations Law § 5-322.1. (Feehan Aff. in Support of Feinstein Motion, ¶¶ 37-42.) Erin responds that Feinstein's motion is premature because "there has been no finding of negligence as against any party in this litigation to date." (Manna Aff. in Partial Opposition to Feinstein Motion, ¶ 4.) Erin is correct. While it is true that the indemnity clause of the Erin Sub-Contract is enforceable under General Obligations Law § 5-322.1, because it contains the legally proscribed saving language, this does not end the inquiry. As was previously discussed, the proponent of a contractual indemnity claim must demonstrate some quantum of negligence on defendant's part. *Knight v City of New York*, 225 AD2d at 355. Again, in the absence of any finding of negligence, a motion for summary judgment on a contractual indemnity claim will be denied as premature. (*Mohammed v Silverstein Props., Inc.*, 74 AD3d at 454.) Therefore, the second branch of Feinstein's motion for summary judgment on its third-party claim against Erin for contractual indemnity is denied.

Defendants/Third-Party Plaintiffs' Motion

In their motion, Ladies Mile, VJB Construction and VJB 655 seek summary judgment to dismiss Charles' complaint or, in the alternative, summary judgment on their third-party claims for

contractual indemnity against Feinstein and Erin. At the outset, the court notes that Ladies Mile, VJB Construction and VJB 655 have already voluntarily discontinued their third-party action against Erin with prejudice via a stipulation dated August 13, 2009. (Manna Aff. in Partial Opposition to Defendants/Third-Party Plaintiffs' Motion with Exhibit "A.") In their reply papers, Ladies Mile, VJB Construction and VJB 655 argue that the stipulation of discontinuance that they executed with Erin should be vacated pursuant to the doctrine of equitable estoppel. (Persky Reply Affirmation, ¶¶ 22-27.)

"Stipulations of settlement are favored by the courts and not lightly cast aside; . . . [o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." (*City of New York v 130/40 Essex St. Dev. Corp.*, 302 AD2d 292, 293 [1st Dept 2003], quoting *Hallock v State*, 64 NY2d 224, 230 [1984].) Ladies Mile, VJB Construction and VJB 655 have presented no evidence for any of these grounds. The e-mails annexed to the reply papers of Ladies Mile, VJB Construction and VJB 655 make it obvious that they were aware of the existence and terms of the Erin Sub-Contract before they executed the stipulation of discontinuance. Thus, contrary to the defendant/third-party plaintiffs' contentions, there was no "fraud, collusion, mistake or accident" to warrant vacating the stipulation of discontinuance.

The court also notes that it has already denied Ladies Mile, VJB Construction and VJB 655's request for summary judgment on its third-party contractual indemnity claim against Feinstein on the grounds that it is premature. Thus, Ladies Mile, VJB Construction and VJB 655's request for alternative relief, as set forth in the second branch of their motion, is denied.

With respect to Charles' complaint, Ladies Mile, VJB Construction and VJB 655 first argue that "his act of stepping on the pile of debris" was "the sole proximate cause of his accident." (Affirmation of David Persky, Esq., in Support of Defendants/Third-Party Plaintiffs' Motion ["Persky Aff. in Support"], ¶¶ 22-32.) However, they fail to mention whether their argument or defense is directed against any particular cause of action or claim alleged in the complaint.

Charles responds that the "sole proximate cause argument has evolved as a defense to [a] Labor Law § 240(1)" claim, which he does **not** assert in his complaint. (Affirmation of Plaintiff's Counsel John P. McGrath, Esq., in Opposition to Defendants/Third-Party Plaintiffs' Motion ["McGrath Aff. in Opposition"], ¶ 55.) While the "sole proximate cause" defense is better suited and generally asserted as a defense to Labor Law § 240(1), the underlying basis for the defense is one of causation. Inasmuch as causation is an element of both common-law negligence claims and Labor Law § 200 claims, both of which Charles does assert, this Court will consider this defense to be directed against those claims.

The issue of proximate cause generally involves a factual inquiry whose resolution is committed to a jury. (*See, e.g., Selja v American Home Prods. Corp.*, 307 AD2d 840, 841 [1st Dept 2003], citing *Derdiarian v. Felix Contr. Corp.*, 51 NY2d 308, 312 [1980].) However, "where evidence of the cause of [a plaintiff]'s accident is undisputed, the question [of] whether any act or omission [by] the defendant was the proximate cause [of that injury] is for the court [to determine], and not the jury." (*Dattilo v Best Transp. Inc.*, 79 AD3d 432, 432 [1st Dept 2010].) Here, to support their allegation that Charles' act of stepping on the debris pile was the "sole proximate cause" of his injuries, Ladies Mile, VJB Construction and VJB 655 argue that Charles implicitly "acknowledged that there was an alternative method of transporting the beam - by . . . walking through the wall studs

outside the room." (Persky Aff. in Support, ¶ 29.) Ladies Mile, VJB Construction and VJB 655 conclude that proximate cause existed, as a matter of law, because Charles "knew he had a viable alternative to carrying the beam and stepping on top of the pile and, for no apparent reason, failed to take the safe, alternative course of action." (*Id.*, ¶ 28.) This conclusion is not supported by the record. While it is true that the deposition testimony herein plainly states that Charles stepped on the debris pile, that testimony does not make it clear that Charles "had a viable alternative" route for leaving the room, as defendants/third-party plaintiffs contend. Charles stated that he and Mott had "squeezed" between the wall studs while they were looking for the I-beam, but that, after they had found the I-beam, they "had to" step over the debris pile and exit through the frame of the door in the room where the I-beam had been. (Charles 1st EBT at 47-49.) This testimony does not unequivocally support defendants/third-party plaintiffs' assumption that Charles willingly chose to commit an unsafe act, because it can equally be reasonably presumed that both men could not have "squeezed" back between the subject wall studs while carrying a heavy steel I-beam between them. Instead, the testimony presents an issue of fact regarding the proximate cause of Charles' injury, which a jury should properly decide. (*See Selja v American Home Prods. Corp.*, 307 AD2d at 841.) Therefore, this Court rejects Ladies Mile, VJB Construction and VJB 655's "sole proximate cause" argument.

Ladies Mile, VJB Construction and VJB 655 next argue that Charles' Labor Law § 200 claim should be dismissed because the deposition testimony herein indicates that "defendants did not create the condition and did not have notice of the condition." (Persky Aff. in Support, ¶¶ 33-40.) Charles responds that the deposition testimony actually shows the opposite – that the defendants/third-party

plaintiffs had actual and/or constructive notice of the debris pile on which Charles slipped. (McGrath Aff. in Opposition, ¶¶ 48, 53.)

In *Ortega v Puccia* (57 AD3d 54, 61 [2d Dept 2008]), the Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 as follows:

> "Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work . . .
>
> "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> "By contrast, when the manner of work is at issue, 'no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed.' Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted]."

"To constitute constructive notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' " (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 [1st Dept 2013], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Further, a property owner "may be charged with constructive notice of a hazardous condition if it is proven that the condition is one

that recurs and about which the owner has actual notice." (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010].)

Here, Charles testified that he had made numerous complaints about ubiquitous dangerous debris piles to his supervisor, Connelly. (Charles 1st EBT at 74-76.) Although Wicks, VJB Construction's construction manager, denied having received any complaints regarding accumulations of debris (Wicks EBT at 49-50), Wicks also testified that on his daily walk-throughs of the job site, he would often see piles of debris on the floors but that they [VJB Construction] would not take immediate steps to remove the debris but would just pile it up and considered it a part of the general clean-up that was done sometime during the day (Wicks EBT at 24-25, 26, 30-32, 47-48). From this conflicting testimony, this Court concludes that there is an issue of fact as to whether VJB Construction had constructive notice of the debris pile that Charles stepped on, and that resolution of this issue of fact will turn on the credibility of the respective witnesses. It is axiomatic that issues of "witness credibility are not appropriately resolved on a motion for summary judgment." (*Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218, 218 [1st Dept 2002].) Therefore, this Court rejects Ladies Mile, VJB Construction and VJB 655's notice arguments.

Finally, Ladies Mile, VJB Construction and VJB 655 argue that Charles' Labor Law § 241(6) claim should be dismissed because the Industrial Code provisions that Charles cites in support of that claim do not apply to the facts of this case. (Persky Aff. in Support, ¶¶ 41-49.) Labor Law § 241(6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993].) In order to prevail on a claim under Labor Law § 241(6), it is

incumbent on a plaintiff to demonstrate the that defendant violated a regulation containing "concrete specifications" applicable to the facts of the case. (*Id.* at 505.) Here, Charles cites 12 NYCRR §§ 23-1.7(d) and 23-1.7(e)(2) to support his Labor Law § 241(6) claim. Both of these provisions have been held to be sufficiently specific to support a Labor Law § 241(6) claim. (*See, e.g., Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259 [1st Dept 2005].) Therefore, the appropriate inquiry is whether these Code provisions apply to the facts of this case.

The relevant portions of 12 NYCRR §§ 23-1.7 provide as follows:

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

Regarding 12 NYCRR §§ 23-1.7(d), Ladies Mile, VJB Construction and VJB 655 argue that "there is no evidence that the floor where the accident occurred was in a slippery condition." (Persky Aff. in Support, ¶ 43.) However, Charles testified that he found "oil and grease" on the floor under the debris pile. (Charles 1st EBT at 55-56.) Thus, 12 NYCRR §§ 23-1.7(d) which specifically mentions "grease and any other foreign substance which may cause slippery footing" does apply to the facts of this case.

With respect to 12 NYCRR §§ 23-1.7(e), Ladies Mile, VJB Construction and VJB 655 argue that the area in which Charles' accident occurred was not a "passageway" as defined in subparagraph (e)(1). (Persky Aff. in Support, ¶¶ 44-47.) Charles does not dispute this point, and responds that his situation is governed instead by subparagraph (e)(2), because the area where he was injured was a "working area," which is defined as a "floor . . . [or] similar areas where persons work or pass." (McGrath Aff. in Opposition, ¶¶ 23-37.)

In *Canning v Barney's N.Y.* (289 AD2d 32 [1st Dept 2001]), the Appellate Division, First Department, upheld the plaintiff's Labor Law § 241(6) claim pursuant to 12 NYCRR §§ 23-1.7(e) because it found that:

> "It is uncontested that, at the time of the accident, the concrete floors of the subject building had been poured and that the surface on which plaintiff fell was a "floor" contained within the outer wall of the structure. It is also clear that the location where plaintiff fell was in constant use as a work site for the loading and unloading of construction material and debris. Although the accident did not occur in plaintiff's own work area, there can be no question that plaintiff was required to "pass" through the area in which he fell in order to reach his work area."

(289 AD2d at 34.)

In our instant action, the deposition testimony indicates that the same conditions existed at the building. The floor of the subject room consisted of bare concrete and partially removed wood, I-beams were stored there, and Charles had been directed to pass through it to obtain the I-beam. Therefore, the location of Charles' accident was indeed a "working area" governed by 12 NYCRR §§ 23-1.7(e)(2). Charles also notes that 12 NYCRR §§ 23-1.7(e)(2) has been held to apply to situations where a plaintiff's fall was due to debris that "shifted" because it was piled in an "unstable" manner. (*See, e.g., Morris v City of New York*, 87 AD3d 918, 919 [1st Dept 2011].)

Accordingly, the first branch of Ladies Mile, VJB Construction and VJB 655's motion seeking to dismiss plaintiff's Labor Law § 241(6) claim is denied.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion of second third-party defendant Feinstein Iron Works, Inc. (motion sequence number 004) is granted solely to the extent that the first and third causes of action of the second third-party complaint of defendants/second third-party plaintiffs Ladies Mile, Inc., VJB Construction Corp. and VJB Construction 655 6th Avenue, LLC (Index No. 590916/09), which alleges liability for common-law indemnity and contribution, respectively, are hereby severed and dismissed on consent of all parties, but remainder of the motion is otherwise denied; and it is further

ORDERED that the motion of defendants/second third-party plaintiffs Ladies Mile, Inc., VJB Construction Corp. and VJB Construction 655 6th Avenue, LLC (motion sequence number 005), pursuant to CPLR 3212, is denied in all respects; and it is further

ORDERED that the balance of these consolidated actions shall continue

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: New York, New York
June 27, 2013

Hon. Shlomo S. Hagler, J.S.C.