SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 110416/2007
YORK, MICHAEL
vs.
311 WEST 11TH STREET, LLC
SEQUENCE NUMBER : 007
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). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

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

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing plaintiff Michael York's negligence, Labor Law §200, and Labor Law §240 (1) claims is granted and said claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing plaintiff Michael York's Labor Law §241(6) claim is granted as to defendant 305-307 West 11th Street, LLC based on the homeowners' exception and such claim against 305-307 West 11th Street, LLC is severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing plaintiff Michael York's Labor Law §241(6) claim is denied as to 311 West 11th Street, LLC solely to the extent such claim is premised on 12 NYCRR 23.1-7 (d) and 12 NYCRR 23.1-24 (a); and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street,

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

Dated: _____ _____, 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

LLC and 305-307 West 11th Street, LLC for summary judgment dismissing the defendant Thames Builders' cross-claims is granted solely to the extent of dismissing the common law indemnification cross-claim against said defendants, and dismissing the contribution claim as against defendant 305-307 West 11th Street LLC; and said cross-claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing the third-party defendant Sound Refrigeration and Air Conditioning, Inc.'s cross-claims is granted solely to the extent of dismissing the cross-claims for common law indemnification, contractual indemnification and breach of contract for failure to procure insurance against said defendants, and dismissing the contribution claim as against defendant 305-307 West 11th Street LLC; and said cross-claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment on their contractual indemnification claims against defendant Thames Builders and contractual indemnification cross-claim against third-party defendant Sound Refrigeration and Air Conditioning, Inc., is denied; and it is further

ORDERED that the branch of the motion (*008*) by the defendant Thames Builders for summary judgment dismissing plaintiff Michael York's negligence, Labor Law §200, and Labor Law §240 (1) claims is granted and said claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*008*) by the defendant Thames Builders to dismiss plaintiff Michael York's Labor Law §241 (6) claim is denied to the extent that such claim is premised on 12 NYCRR 23.1-7 (d) and 12 NYCRR 23.1-24 (a); and it is further

ORDERED that the branch of the motion (*007*) by the third-party defendant Sound Refrigeration and Air Conditioning, Inc. for summary judgment dismissing the third-party complaint of the defendant/third-party plaintiff Thames Builders for contractual indemnification is denied; and it is further

ORDERED that the branch of the motion (*007*) by the third-party defendant Sound Refrigeration and Air Conditioning, Inc. for summary judgment dismissing the cross-claims of the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC is granted solely to the extent of dismissing the cross-claims for common law indemnification and contribution; and said cross-claims are severed and dismissed; and it is further

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

ORDERED that counsel for defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 9/17/2013 **Page 2 ENTER:** HON. CAROL EDMEAD **, J.S.C.**

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

[ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL YORK,

Plaintiff,

-against-

311 WEST 11th STREET, LLC, THAMES BUILDERS, INC., and 305-307 WEST 11th STREET, LLC,

Defendants.

----------X

THAMES BUILDERS, INC.,

Third-Party Plaintiff,

-against-

SOUND REFRIGERATION AND AIR CONDITIONING, INC.,

Third-Party Defendant.

----------X

DECISION/ORDER

Motions ## 007, 008, 009
Index No.: 110416/2007

Third-Party
Index No.: 590653/2008

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

In this personal injury action, defendants building owners 311 West 11th Street, LLC ("311 West") and 305-307 West 11th Street, LLC ("305-307 West") (collectively, the "Owners"), and the general contractor Thames Builders ("Thames") separately move pursuant to CPLR 3212[2] to dismiss plaintiff's complaint against them.

The third-party defendant Sound Refrigeration and Air Conditioning, Inc. ("Sound")

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[1] Motions sequence 007, 008 and 009 are consolidated for a joint disposition and decided herein.

[2] Although Thames's notice of motion also cites CPLR 3211 as a basis for dismissal, its supporting papers do not address this section of the CPLR.

moves to dismiss the third-party complaint of Thames and all cross-claims asserted against it by the Owners.

The Owners also seek the dismissal of all cross-claims against them and summary judgment on their cross-claims against Thames and Sound for contractual indemnification.

Background Facts

On January 3, 2006, plaintiff, an employee of Sound, allegedly was injured while moving an air-conditioning condenser unit (the "condenser") on the roof of the building located at 311 West 11th Street, New York, New York (the "Building"), which is owned by 311 West, of which the well-known photographer Annie Leibovitz ("Leibovitz") is the sole principal. Plaintiff claims that while moving the condenser with two of his co-workers, the condenser shifted back causing the plaintiff to twist his back.

At that time, the adjoining building at 305-307 West 11th Street, a/k/a 755-757 Greenwich Street, owned by 305-307 West (of which Leibovitz is the sole principal), was being renovated to serve as a single-family residence for Leibovitz and her family (the "Project") (*see*, Leibovitz transcript, exhibit B, pp. 8-9, 35-36; Neumann transcript, exhibit C, pp. 8-11).

Sometime before 2005, Sound was hired to install the heating and air-conditioning systems in the Building.

In June 2005, Thames was hired as the General Contractor for the ongoing renovation of the 305-307 West 11th Street building pursuant to a contract (the "Construction Contract") (*see*, contract dated June 21, 2005, between *311 West* and Thames, exhibit E, to Affirmation of Gregory Walthall, Esq., in support of the Owners' motion, doc. No. 107). Thereafter, in September 2005, Thames entered into a contract with Sound to install the heating and

air-conditioning system at the 305-307 West building (*see*, Exhibit F [Thames's President, Mark Fox, transcript] at pp. 32-33, 36; the Sub-Contract, dated September 15, 2005, exhibit G).

At his deposition, plaintiff testified that on January 3, 2006, plaintiff and two of his co-workers, Patrick Judge and John Carlson, were instructed by Sound's Vice President Richard Stankiewicz to move the subject condenser unit from the roof of 311 West 11th Street onto the adjoining roof of 305-307 West 11th Street building (Stankiewicz transcript, exhibit D, pp. 41-42). The plan was to move the condenser, which was approximately four feet square, five to six feet tall and weighing 80 pounds, from one side of the roof to the other side (see, plaintiff transcript, exhibit H, pp. 83-85, 96). Plaintiff and his two co-workers lifted the unit and began walking up the slope to get to the other side of the roof (*id.*, pp. 94, 100, 103-104). According to plaintiff, there was snow and ice on the roof. At some point, the condenser shifted and began falling back onto plaintiff. Plaintiff was unable to "get his footing" to stabilize himself and violently twisted his back to prevent the condenser from falling (pp. 108-113). Plaintiff and his co-workers immediately regained control of the condenser and carried it to the adjoining roof. Neither plaintiff nor the condenser fell at the time of the accident.

As a result of the accident, plaintiff commenced this action against the Owners and Thames, alleging that they were negligent and violated Labor Law §§200, 240, 241(6). In turn, Thames commenced a third-party action against Sound for contractual indemnification and also asserted cross-claims against the Owners for contribution and common law indemnification.

The Owners cross-claimed against Thames for contractual and common law indemnification, contribution and for failure to procure insurance pursuant to contract, and against Sound for contribution and contractual and common law indemnification.

Sound filed a cross-complaint against the Owners for contractual and common law indemnification, contribution and breach of contract; and also asserted counterclaims against Thames for contribution and contractual and common law indemnification.

All defendants now move for summary judgment to dismiss plaintiff's complaint and the various cross-claims asserted against each other.

Motion Sequence 009

In support of their motion, the Owners argue that plaintiff's Labor Law §240 (1) claim must be dismissed as plaintiff was not involved in an elevation-related accident. Further, as plaintiff has not established any negligence on behalf of the Owners, and Labor Law §200 is a codification of the common law, the common law claims against these defendants should be dismissed as well. Plaintiff's injury arose out of the manner in which he carried the condenser. Because the Owners did not supervise or control such work and did not have any notice of any alleged dangerous condition on the roof, they cannot be held liable under this statute. Plaintiff testified at his deposition that at the time of the incident, there was no one at the job site other than his two co-workers, Sound's employees John Carson and Patrick Judge (plaintiff transcript, pp. 80; 121); that plaintiff was supervised by Judge (*id.*, at pp. 17, 45, 233-234); and that on the day of the incident, Sound's Stankiewicz instructed Judge to go to the 311 West 11th Street Building to move the condenser (plaintiff transcript, exhibit H to motion *sequence 009*, pp. 45-46). Judge testified that Leibovitz never directed him as to how to do the work and was not present at the job site at the time the condenser was being moved. Leibovitz likewise testified that she did not direct, control or supervise any of the subcontractors at the job site.

The Owners also contend that plaintiff's Labor Law §241 (6) claim should be dismissed,

as the Industrial Code violations cited by plaintiff do not set forth any specific standard of conduct or are inapplicable to the facts of this case.

And in any event, at least defendant 305-307 West is exempt from liability under the Homeowner's exception of Labor Law §§240 and 241, because it is an owner of a one-family dwelling, which was being renovated to serve as a single-family residence for Leibovitz, and did not directly control the work.

The Owners further contend that they are entitled to the dismissal of all cross-claims asserted against them for contribution and common-law indemnification because they are free from negligence. And, Sound's cross-claim for contractual indemnification against the Owners fails as there is no contractual provision requiring the Owners to indemnify Sound.

Alternatively, if the Court does not dismiss plaintiff's Complaint as against the Owners, the Court should grant summary judgment on their cross-claims against Thames and Sound for contractual indemnification pursuant to the contract between Thames and the Owners, *i.e.*, the "Construction Contract." As against Thames, the Owners argue that the Construction contract obligates Thames to defend, indemnify and hold defendants harmless for claims such as those alleged by plaintiff. As against Sound, the Owners argue that the sub-contract between Thames and Sound, entitled "The Subcontractor's Release and Waiver Upon Final Payment" (the "Release Agreement") obligates Sound to defend and indemnify the Owners from any liability, claim or action "arising out of or in connection with [Sound's] Work" (exhibit J). Sound was hired by Thames to perform the heating and air-conditioning work on the renovation project and plaintiff's injury arose "out of and in connection with" Sound's work.

Plaintiff opposes dismissal of his Labor Law §200 claim, arguing that the injury

producing conditions were not created by the contractor's means or methods, but by the snow and rain conditions on the roof at the time of the accident, of which the Owners were aware. Plaintiff testified that it was raining and snowing on the day of the incident, and when they entered the roof, which was pitched, it had a half inch accumulation of snow (plaintiff transcript, pp. 48; 55; 76; 91; 110-111). Plaintiff also contends that Alan Neumann, who was retained by Leibovitz to act as an "owners representative" to oversee the construction, attended the construction meetings approximately twice a week (Neumann transcript, pp. 8-13). Thus, issues of fact exist as to the issue of actual or constructive notice. Plaintiff also argues that liability for Labor Law §241 is sufficiently based on violations of sections 23-1.7 (d) and 23-1.24 (a) (*see infra*, pp. 9-10).

Thames opposes the dismissal of its cross-claims against the Owners for indemnification and contribution, arguing that it did not direct or control plaintiff's work. Plaintiff's testimony shows that no one from Thames was present at the project at the time of the incident. Furthermore, at the time of plaintiff's incident, Sound was working directly for the *Owners* and the testimony shows that Leibovitz personally requested that Sound move the condenser because of the noise it generated. Thames "took over whatever agreement" that Sound previously had with the Owners (Fox transcript, exhibit A, p. 33) to renovate "755, 757, 305, 307" and the project had "nothing" to do with 311, which was "totally separate"; however, because of non-payment issues, Thames worked "on and off" on the project; and he believed Thames was "off the project" at the time of plaintiff's incident on January 3, 2006 (Fox transcript, exhibit A, pp. 27-28; 72).

Thames further contends that there is no basis for the Owners' claim against Thames for

contractual indemnification. First, 305-307 West is not a party to the Contract between Thames and 311 West. Second, based on Fox's testimony, Thames may not have had contractual relationship with 311 West at the time of the incident. And in any event, plaintiff's work of moving the condenser from the roof of 311 West 11th Street building, was outside the scope of the Contract.

Sound opposes the portion of the Owners' motion which seeks summary judgment on its contractual indemnification claim against Sound, and incorporates the arguments set forth in its summary judgment motion (*seq. 007*) (*see infra*, pp. 11-12). Sound contends that the contract on which the Owners rely to impose contractual indemnification obligations is dated 11 months after plaintiff's accident, and that worker's compensation law bars contribution and indemnification claims against it since plaintiff did not suffer a "grave injury" (*see infra,* pp. 11-12).

Motion Sequence 008

In support of its motion, Thames likewise argues that plaintiff's Labor Law §240 (1) lacks merit because plaintiff did not fall from a scaffold or other elevated work site and was not injured by a falling object.

Further, plaintiff's negligence and Labor Law §200 claims should be dismissed because there was no breach of any duty owed by Thames as there was no dangerous condition on the site and Thames did not control or supervise plaintiff's work. As demonstrated by plaintiff's testimony and Fox's affidavit, no one from Thames was present at the site on the day of the incident (plaintiff transcript, pp. 65-66; 79-80; Fox Affidavit, at ¶¶7-8). Furthermore, plaintiff testified that he did not know what caused the condenser to shift; and, plaintiff's co-worker Judge was unaware that plaintiff was injured during the transporting of the condenser (exhibit S, pp. 62,

64).

Plaintiff's Labor Law §241 (6) is also unsupported by a specific rule or regulation that was allegedly violated or is applicable to the instant case. Particularly, 12 NYCRR 23-1.7 (d) is inapplicable because plaintiff does not allege that he slipped; and as to Section 23-1.24 (a), the slope of the roof on which plaintiff was walking was *within the threshold* established by Section 23-1.24 (a). Thames's engineering expert Anthony M. Dolhon, P.E. ("Dolhon") reviewed plaintiff's testimony, measured the roof in multiple locations and confirmed that the slope of the roof in the area where plaintiff was walking was not steeper than the threshold ratio of 1:4 specified by section 23-1.24 (*see*, Dolhon Affidavit, at 10-11). And in any event, plaintiff's injury is of the type for which remedy is provided through the New York's Workers' Compensation Law.

In opposition, plaintiff argues that the motions should be denied as to the negligence/Labor Law §200 claims. Neumann, Leibovitz's "owners representative," testified that Thames was the general contractor of the Project in 2005-2006, when the condenser units were installed (*id.*, at 66-67). Plaintiff contends that proof of supervision or control is only necessary if the injury arose from the manner of work, but not if it arose, as here, from a dangerous condition, *i.e.*, snow and ice in conjunction with the sloped roof. Thus, an issue of fact exists as to whether the Thames had actual or constructive notice of the dangerous condition.

Plaintiff also points out that Sound's Vice President Stankiewicz stated that Thames or its contractor was in the process of working on the roof, which was partially covered with tarp pieces in places where Thames was planning to install skylights; and that weekly meetings were held for the Project conducted by Alan Barr of Zeff Designs (the architect of the Project)

(Stankiewicz, pp. 14, 37-39), during which the permanent location of the condenser units was discussed (*id.*, pp. 38-40). Thames's representative (either Fox or "Martin") called Stankiewicz and instructed him that he "needed to move the condenser" immediately (Stankiewicz, p. 40, 44).

Further, as to the Labor Law §241(6) claim, plaintiff argues that Thames's liability is based on violations of sections 23-1.7 (d) and 23-1.24 (a).[3] Defendants violated section 23-1.7 (d) by failing to provide safe, non-slippery footing. As demonstrated by plaintiff's deposition testimony and affidavit, because of the accumulation of snow on the roof, plaintiff was unable to get traction with his feet, when the condenser started falling back on him and causing him to twist his back. Defendants also violated section 12 NYCRR 23-1.24 (a), which requires roofing brackets, walking boards or other safety devices whenever the slope of the roof is greater than one in four inches. The court should not consider the report of Thames's expert Dolhon because he inspected the roof six years after the date of the incident and only after the Note of Issue was filed in this case (which Thames moved to vacate). Dolhon's statement, that those sections of the roof where plaintiff and his co-workers walked were generally flatter than the "steep slope requirements of the Industrial Code," conflicts with the Affidavit of plaintiff's expert Andrew Yarmus (*see* Affidavit of Andrew Yarmus, P.E.), and creates a triable issue of fact. Plaintiff testified that he believed the roof was pitched at a slope of 45 degrees (plaintiff transcript, p. 109); and Yarmus, who examined the roof, found that the pitch of the roof varied from 9 to 20 degrees, such that it required brackets.

Plaintiff also argues that the court should search the record and grant partial summary

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[3] The court notes that plaintiff does not address the dismissal of the remaining sections of the Code, *i.e.*, 23-1.2 (e); 23-1.4; 23-1.5(a), (b), (c)(1), (c)(2) and (c)(3); 23-1.7 (b) and (e)(2); 23-1.15 and 23-1.24 (b), cited in his Bill of Particulars.

judgment to plaintiff as to liability on its negligence, and Labor Law §§200 and 241 (6) claims.

In reply to plaintiff, Thames argues that the court should dismiss the Labor Law 200 and negligence claims as it had no notice that there was any dangerous condition on the roof and Thames did not supervise or control plaintiff's work. The court should reject plaintiff's affidavit, stating that he slipped on the roof, as it is completely contrary to his sworn deposition testimony wherein he stated that he did not know what caused the condenser to shift (plaintiff transcript, pp. 109-110). Plaintiff's affidavit is tailored to avoid the consequences of his sworn deposition testimony and only creates a feigned issue of fact, as plaintiff claims for the first time in opposition that he slipped on the accumulation of snow on the roof (*see* plaintiff Affidavit).

Neither did Thames have control over plaintiff's work or the work site that day. Based on Stankiewicz's testimony, the request to move the condenser came directly from Leibovitz. And, since Thames representatives were not on the site on the day of the incident, Thames was not aware of conditions on the roof on the day of the incident.

Further, contrary to plaintiff's contention, there is no prohibition against a post-note of issue expert affidavit on a motion for summary judgment. Thus, the court has discretion to consider the affidavit of Thames's expert Dolhon as it assists the court in its determination; there is no prejudice to plaintiff; and Thames did not refuse to comply with a discovery demand.

Furthermore, there is no conflict between the two experts' reports. Thames's expert Dolhon confirmed the measurements of plaintiff's expert's Yarmus's and pointed out that the steeper slopes were located away from the area of the roof where plaintiff was walking. Notably, Yarmus did not state in his affidavit that the slope of the roof was greater than a 1:4 ratio in the location where plaintiff and his co-workers were carrying the condenser at the time of the

incident. Dolhon's affidavit, on the other hand, indicates that the roof area where the incident took place was on a slope that did not require the use of roofing brackets and crawling boards pursuant to the Industrial Code section 23-1.7 (d).

Finally, a question of fact exist as whether Thames was a general contractor so as to contractually indemnify the Owners, since Thames's President Fox "believes" that on the day of the incident Thames was "off the job."

Motion Sequence 007

Sound argues that it is entitled to summary dismissal of Thames's third-party complaint for contractual indemnification and the Owners' cross-claims against it for contractual and common law indemnification and contribution.

First, the Owners cannot maintain their cross-claims for common law indemnification and contribution because the Workers' Compensation Law precludes any claims for indemnification or contribution against an employer who fulfilled its statutory obligation to the employee, unless it is proved that the employee sustained a "grave injury." Plaintiff states in his Bill of Particulars that Sound was his employer and that his out-of-pocket expenses were paid by the workers' compensation carrier the State Insurance Fund (exhibit E to Sound's motion). And, plaintiff's "dropped foot" syndrom injury does not constitute a "grave injury" as defined by the statute.

Second, the Release Agreement which contains the indemnification clause, is dated December 15, 2006, 11 months *after* the plaintiff's incident of January 3, 2006 (exhibit C). Therefore, it is unenforceable as against Sound pursuant to the Workers' Compensation Law §11, which requires that any written contract for contribution or indemnification be entered into "prior to the occurrence."

Both Thames and the Owners oppose Sound's motion, arguing that the Release Agreement may be applied retroactively. Thames argues that Fox's deposition indicates that the parties intended that Sound indemnify Thames prior to the incident and that Thames and Sound executed two identical Release agreements *prior* to plaintiff's incident. Fox testified that, based on the Release Agreement indicating that Thames made at least two [partial] payments to Sound *prior* to the date of plaintiff's incident, on October 18, 2005 and December 14, 2005, Sound executed two identical Release Agreements (Fox transcript, exhibit B, pp. 84-87). And, like the previously executed agreements, the [third] Release Agreement, dated December 15, 2006, contains the same indemnification clause (*id.*, pp. 89-90); it also identifies the Project, the date of the subcontract, September 15, 2005, the amounts previously paid and credited, and the balance due, "0," as this was the last of the multiple payments. The Owners argue that at the time the Release Agreement was executed, Sound had long completed its work at the premises and thus, there were no future claims to indemnify (Fox transcript, at 45). The Owners contend that any contrary interpretation would render the subject indemnification provision meaningless. And, there is no evidence that Thames or the Owners were negligent.

Thames also adds that Sound is not entitled to common law indemnification and contribution as it failed to establish *prima facie* that plaintiff had not suffered "grave injury," *i.e.*, that he can walk with the help of the ankle foot orthosis is not dispositive on the issue of "grave injury."[4]

Sound responds that the Owners fail to present any evidence that the parties intended the

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[4] The court notes that Thames's third-party complaint contains no claims against Sound for common law indemnification and contribution; and thus, Thames's arguments appear to be directed against Sound's counterclaims asserted against Thames in its Answer to the Third-Party Complaint.

Release Agreement to have retroactive effect. The indemnification clause in the Release Agreement was intended to apply to the occurrences subsequent to the execution thereof, for example, where an air-conditioning unit installed by Sound falls and injures a worker on the roof. As to Thames, its third-party complaint is solely based on the contract dated December 15, 2006, and no other contract was produced during the discovery or attached to Thames's submissions.

And in any event, plaintiff's "dropped foot" is not a "grave injury," since based on the report of Dr. Robert Orlandi, M.D., plaintiff can walk without the orthotic device, even if with a "classic drop foot gait."

Discussion

A defendant moving for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Defendant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

"The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Motions Sequence 008 and 009

Plaintiff's Labor Law §240 (1) Claims

At the outset, the Court notes that plaintiff does not address the dismissal of his Labor Law §240 (1) claim. As such, plaintiff's Labor Law §240(1) claim is dismissed, as unopposed.[5]

Plaintiff's Negligence and Labor Law §200 Claims

Labor Law §200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010]). "An implicit precondition to this duty [is] . . . that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Coyago,* at 665). "To support a finding of liability under Labor Law § 200 . . . a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition" (*Torkel v NYU Hospitals Ctr.*, 63 AD3d 587, 883 NYS2d 8 [1st Dept 2009]). Thus, "in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control, liability [under Labor Law §200] 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

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[5] In any event, plaintiff's incident did not involve the type of elevation-related hazards protected by the statute. "Labor Law §240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 922 NE2d 865 [2009], *quoting Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). Plaintiff testified that he was carrying the condenser at waist level, and it shifted and "started falling backwards" either because "somebody slipped or it was just the natural repositioning"; plaintiff was injured when he was unable "to get his footing" (plaintiff transcript, exhibit H, pp. 108 -113).

which they had prior notice [and failed to remedy it]" (*Makarius v Port Authority of New York and New Jersey,* 76 AD3d 805, 907 NYS2d 658 [1st Dept 2010]); *Minorczyk v Dormitory Authority of State*, 74 AD3d 675, 904 NYS2d 383 [1st Dept 2010], *citing Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009][because the Labor Law §200 and common-law negligence claims were based not on the injured plaintiff's employer's methods or materials but on a dangerous condition on the site, it was not necessary to show that the construction manager or the City exercised supervisory control over the manner of performance of the injury-producing work; the only issue was whether they had notice of the icy condition on the roof]).[6]

Here, to the extent that plaintiff's common-law negligence and Labor Law 200 claims are based upon an allegedly dangerous condition of snow on the pitched roof, both Thames and the Owners established their entitlement to summary judgment as a matter of law. Specifically, Thames and the Owners established that they lacked actual or constructive notice of the alleged dangerous condition of the snow accumulation. And, even if arguably the roof was sloped in the area where plaintiff and his co-workers walked, the various deposition testimonies indicate that no one from the Owners (*i.e.*, Leibovitz) or Thames was present at the subject work site on the day of plaintiff's incident. And, there is no indication that anyone reported any snow or ice condition to either the Owners or the Thames.

In opposition, plaintiff failed to raise an issue of fact.

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[6] The court notes that section 200 liability against defendant cannot "be based on alleged violations of the Occupational Safety and Health Act, which governs employee/employer relationships" *(Delaney v City of New York*, 78 AD3d 540, 911 NYS2d 57 [1st Dept 2010]).

Plaintiff submitted no evidence indicating that defendants possessed actual knowledge of the dangerous condition of snow accumulation on the roof.

Further, plaintiff failed to demonstrate a triable issue as to whether defendants had constructive notice of the condition. "To constitute constructive notice, a [condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [defendants] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Plaintiff's testimony, that when he and his co-workers entered onto the roof, there was a half or a quarter of an inch "snow accumulation" and that it was raining and snowing "throughout the day" on the day of the incident (plaintiff transcript, pp. 48; 55; 91; 110-111), is insufficient to raise an issue of fact as to whether Thames or the Owners had any notice that snow was accumulating on the roof where plaintiff's incident occurred (*Guccione v West 44th Street Hotel LLC*, 2011 WL 1616839 [Sup Ct, New York County 2011](Trial Order); *cf. Raffa v City of New York*, 100 AD3d 558, 955 NYS2d 9 [1st Dept 2012][during the two days immediately before the accident, plaintiff had lodged multiple complaints to the foreman and superintendents about snow and/or ice covering the work site area; and, two of his co-workers also testified that the area had been covered in a slippery sheet of ice four to six inches thick for about three days prior to plaintiff's accident]; *see also Minorczyk v Dormitory Authority of State*, 74 AD3d 675, 904 NYS2d 383, *supra* [the finding that the construction manager Liro and the City had notice of the icy condition on the roof of the building where the injured plaintiff slipped and fell was based on sufficient evidence consisting of meteorological records of a heavy snowfall ending three days before the fall, Liro's records, and the testimony of the Dormitory Authority's on-site project manager]).

In the instant case, plaintiff submitted no evidence that the alleged condition existed for a sufficient length of time prior to the accident. While he testified that it was raining and snowing "throughout the day" of the incident, which as the record indicates, happened in the afternoon, plaintiff also indicated that it was snowing for short periods of time and then raining for half hour (plaintiff transcript, pp. 48; 55; 76; 91; 110-111). This inability of plaintiff to make the required showing "creates the possibility that the condition may have emanated only moments before the accident, through no fault or with no knowledge of the defendant, any other conclusion being pure speculation" (*Deegan v 336 E. 50th St. Tenants Corp.*, 216 AD2d 59, 627 NYS2d 383 [1st Dept 1995], *citing Grier v Macy & Co.*, 173 AD2d 238, 569 NYS2d 447 [1st Dept 1991]). Accordingly, since plaintiff failed to raise any issue of fact as to whether defendant had notice of the condition which allegedly caused plaintiff's injury, the portion motion by the Owners and Thames for summary judgment dismissing plaintiff's Labor Law §200 and common-law negligence claims against them is granted.

The cases on which plaintiff relies are distinguishable or inapplicable to the present facts. For example, in *Roppolo v Mitsubishi Motor Sales of Am.* (278 AD2d 149, 718 NYS2d 322 [1st Dept 2000]), where plaintiff worker slipped on the patch of ice on the roof, an issue of fact as to notice was raised by the fact that the lessee, a car dealership, was making use of a portion of the roof to park its cars, and plaintiff's testimony that he saw the ice patch the day before he fell. Unlike in *Roppolo*, plaintiff here submitted no evidence that the Owners or Thames had any presence on the roof or performed any work on the day of the incident so as to show knowledge of the snow accumulation, which, according to plaintiff, formed from raining and snowing "on and off" throughout that day.

To the extent plaintiff's negligence and Labor Law §200 claims are predicated on the allegedly dangerous condition, plaintiff need not show defendants' supervision and control over his work *(see Urban v No. 5 Times Square Dev, LLC*, 62 AD3d 553, 879 NYS2d 122, *supra)*. However, in any event, the record establishes that neither Thames nor the Owners had any supervisory authority over the plaintiff's work that caused his injury or, that they directed or controlled the method by which Sound's employees, including plaintiff, moved the condenser. Indeed, there is no indication that either Thames or the Owners had any role in the transporting the condenser, that Leibovitz may have requested.

Thus, viewing the evidence in a light most favorable to plaintiff, and drawing all reasonable inferences in his favor, as is required (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503, 942 NYS2d 13, 965 NE2d 240 [2012]), summary judgment is warranted as to the Owners and Thames, and the Labor Law §200 and common law negligence claims as against them are dismissed.

Plaintiff's Labor Law §241 (6) Claims

Labor Law §241 (6) "requires owners and contractors, *except owners of one or two-family dwellings who contract for but do not direct or control the work*, 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" (*Misicki v Caradonna*, 12 NY3d 511, 515, 909 NE2d 1213 [2009] (emphasis added)).

This section imposes a nondelegable 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 Ross v Curtis-Palmer Hydro-Electric Co.*, 81

NY2d 494, 501-502 [1993]; *Misick v Caradonna, supra*). In order to recover, a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross,* 81 NY2d at 501-502; *Long v Forest-Fehlhaber,* 55 NY2d 154 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81 NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010] ["A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard"]); and that such violation was a proximate cause of the injury (*see Padilla v Frances Schervier Housing Dev Fund Corp.,* 303 AD2d 194, 758 NYS2d 3 [1st Dept 2003], *citing Brown v New York City Economic Development Corp.*, 234 AD2d 33, 650 NYS2d 213 [1st Dept 1996]). And, the violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long,* 55 NY2d at 160).

As to defendant 305-307 West, summary dismissal of plaintiff's Labor Law §241(6) claims against it based on the homeowners' exception is warranted. In 1980, the Legislature amended Labor Law §241 to exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from the absolute liability imposed by these statutory provisions (*Bartoo v Buell*, 87 NY2d 362, 662 NE2d 1068 [1996]; *Cannon v Putnam,* 76 NY2d 644, 563 NYS2d 16 [1990], *citing* L 1980, ch 670, §§1-4).

Here, it is undisputed that 305-307 West's building was being renovated as a single-family dwelling for Leibovitz and her family (*see*, Leibovitz transcript, exhibit B pp. 8-9,

35-36; Neumann transcript, exhibit C pp. 8-11). The record also establishes that 305-307 West, as the owner of that building, did not direct or control the work being performed on the renovation project (see, exhibit B pp. 11, 16; Fox transcript, exhibit F, pp. 60; 92; Judge transcript, exhibit I, pp. 79-80). And, 305-307 West was not the owner of the 311 West Building (where the accident occurred). Moreover, plaintiff does not address the applicability of the homeowners' exemption to 305-307 West. Accordingly, 305-307 West is shielded by the homeowner exemption from the absolute liability of Labor Law §241 (*Bartoo v Buell*, 87 NY2d 362, 662 NE2d 1068 [1996]; *Cannon v Putnam,* 76 NY2d 644, 563 NYS2d 16, *supra*) and dismissal of this claim as asserted against 305-307 West is warranted.[7]

Turning to 311 West's and Thames's alleged liability under Labor Law §241(6), as relevant herein, 12 NYCRR 23.1-7(d)(1) of the Industrial Code provides as follows:

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

Contrary to the defendants' contention, 12 NYCRR 23–1.7(d) contains specific directives that are sufficient to sustain a cause of action under Labor Law §241(6) *(see Velasquez v 795 Columbus LLC,* 103 AD3d 541, 959 NYS2d 491 [1st Dept 2013]; *Conklin v Triborough Bridge & Tunnel Auth.,* 49 AD3d 320, 855 NYS2d 54 [1st Dept 2008]; *Carty v Port Auth. of NY & N.J.,* 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]).

And, defendants failed to establish that 12 NYCRR 23.1-7 (d)(1) does not apply to this case on the ground that his incident was not caused by a slipping hazard. The roof where the

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[7] This analysis applies equally to plaintiff's Labor Law §240(1), which is dismissed as unopposed.

incident occurred served as a floor, walkway, scaffold or platform within the meaning of this provision (*see Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 718 NYS2d 322, *supra*). That plaintiff did not fall is not dispositive, as there is no such requirement under the statute. This section prohibits the "use" of walking surfaces in a slippery condition, "which may cause slippery footing" (12 NYCRR 23.1-7(d)(1)). Furthermore, the evidence in the record indicates that the combination of snow and rain resulted in the slippery condition of the sloped roof, such that plaintiff was unable to get traction to secure his footing (*see*, exhibit H, pp. 108 - 113).

In this regard, contrary to Thames's contentions, plaintiff's affidavit that he slipped does not "completely contradict" his deposition testimony, wherein he stated that the roof was covered with half an inch of snow and the conditions were slippery (plaintiff transcript, pp. 48; 55; 91; 110-111). Thus, it cannot be said that plaintiff's affidavit has been tailored to avoid the consequences of his sworn deposition testimony. An issue of fact exists as to whether defendants failed to provide plaintiff with safe, non-slippery footing, in violation of section 23-1.7 (d), and whether such violation caused or contributed to plaintiff's injury. Thus, dismissal of the plaintiff's Labor Law §241(6) claim predicated on the alleged violation of section 23-1.7 (d) is unwarranted as against Thames and 311 West.

Thames and 311 West 11 likewise failed to establish as a matter of law that they did not violate section 12 NYCRR 23-1.24 (a), which requires that "[r]oofing brackets shall be used whenever work is to be performed on any roof having a slope steeper than one in four inches

unless crawling boards or approved safety belts are used in compliance with this Part (rule)."[8]

The conflicting expert affidavits raise an issue of fact as to whether the slope of the roof in the area where plaintiff walked was steeper than the threshold established by Section 23-1.24 (a), so as to require defendants to install roofing brackets (*see Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 922 NYS2d 313 [1st Dept 2011, *citing Kumar v Stahlunt Assoc.*, 3 AD3d 330 [1st Dept 2004]). The affidavit of plaintiff's expert Yarmus states that the pitch of the roof varied from 9 to 20 degrees (corresponding ratios of 1:6 to 1:3), and thus, required roofing brackets. However, Thames's expert Dolhon's affidavit indicates that the sections of the roof where plaintiff and his co-workers walked measured from 9 to 11 degrees (corresponding ratios of 1:6 to 1:5), being "generally flatter than the steep slope requirements of the Industrial Code," and therefore, did not require roofing brackets.

Therefore, since defendants failed to demonstrate the absence of a material issue of fact with respect to the compliance with the roofing brackets requirement, dismissal of the plaintiff's Labor Law §241(6) claim against 311 West and Thames, predicated on the alleged violations of section 23-1.24 (a) is unwarranted.[9]

And, the court cannot, as urged by plaintiff, search the records and grant summary judgment in his favor, as plaintiff failed to eliminate all material issues of fact to warrant such relief (*see* CPLR 3212 [b]; *Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425, 429-430 [1996];

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[8] Plaintiff's contention that the court should not consider Thames's expert Dolhon's report, is now moot in light of this court's August 6, 2013 Order which granted Thames's application to vacate the Note of Issue, "to the extent of deeming timely [Thames]'s expert disclosure." The Court also noted that "the battle of the experts on the issue for which the movants' expert disclosure was submitted on the pending motions for summary judgment is likely to be deemed an issue for the jury."

[9] Since plaintiff did not raise the applicability of the remaining sections of the Industrial Code in his opposition, the court dismisses the portions of his Labor Law claim §241 (6) predicated on those remaining sections.

Filannino v Triborough Bridge and Tunnel Authority, 34 AD 3d 280 [1st Dept 2006][the court, upon consideration of a motion for summary judgment, has the inherent power to search the record where appropriate and grant summary judgment in favor of a nonmoving party]).

Thames's and Sound's Cross-Claims against the Owners[10] for Contribution and Common Law Indemnification (009)

It is well settled that common-law indemnification is available to a party that has been held vicariously liable, from the party who was at fault in causing plaintiff's injuries *(Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 929 NYS2d 242 [1st Dept 2011], *citing Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 576 NYS2d 203 [1991]). To be entitled to common-law indemnification, Thames and Sound must each 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, 940 NYS2d 21 [1st Dept 2012], *citing McCarthy v Turner Constr., Inc.*, 17 NY3d at 377–378, 929 NYS2d 556, 953 NE2d 794 [2011]; *Reilly v DiGiacomo & Son*, 261 AD2d 318, 690 NYS2d 424 [1999]). Thus, "[c]ommon-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010], *citing Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999]).

In this case, there is no basis for Thames's common law indemnification claim because

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[10] In light of the court's dismissal of plaintiff's claims against 306-307 West for common law negligence and Labor Law 200; 240(1); and 241 (6), the foregoing analysis refers solely to 311 West.

plaintiff brought direct personal injury claims against Thames and does not seek to hold Thames vicariously liable for the Owners' breach of duty of care to plaintiff. Furthermore, since an issue of fact exists as to whether Thames violated Labor Law §241 (6) predicated on the alleged violations of §23-1.7 (d) and §23-1.24 (a), which may have contributed to plaintiff's incident (see *Long v Forest-Fehlhaber,* 55 NY2d 154, *supra*), Thames cannot seek common law indemnification from 311 West (*see Gap, Inc. v Fisher Dev, Inc., supra*). Thus, the Owners' motion to dismiss Thames's cross-claim against it for common law indemnification is granted.

Likewise, Sound's cross-claim for common law indemnification against the Owners lacks merit. The Owners established that Sound exclusively "exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 940 NYS2d 21, *supra*). On the day of the accident, the moving of the condenser was supervised and directed by Sound's employee Judge, who was instructed to do so by Sound's Vice President Stankiewicz (*see* plaintiff transcript, exhibit H to motion *009*, pp. 17, 45-46, 233-234). In response, Sound fails to raise an issue of fact. Although the record indicates that Leibovitz, through Thames's President Fox, requested that the condenser be moved because of the noise, Sound points to no evidence showing that anyone from the Owners or Thames was present when plaintiff's accident occurred or directed plaintiff or his co-workers how to move the condenser. Thus, Sound is not entitled to common law indemnification from the Owners, and the branch of the Owners' motion to dismiss Sound's cross-claim against them for common law indemnification is granted.

Therefore, the branch of the Owners' motion (009) to dismiss Thames's and Sound's cross-claims for common law indemnification is granted, and said cross-claims are severed and dismissed.

However, the dismissal of Thames's and Sound's claims for common law contribution is unwarranted at this time. While 305-307 West 11 has been found not liable, there has been no finding as to 311 West's liability. Therefore, it cannot be said that Thames's common law contribution claim against 311 West 11 lacks merit (*see Jehle v Adams Hotel Associates*, 264 AD2d 354, 695 NYS2d 22 [1st Dept 1999][a party seeking contribution has to show that the other party contributed to plaintiff's alleged injuries by breaching a duty either to plaintiff or to the party seeking contribution).

Further, if 311 West is found to be liable at trial, Sound would be entitled to contribution, in the event it is also found liable (*see Shea v Putnam Golf, Inc.*, 79 AD3d 1013, 915 NYS2d 576 [2d Dept 2010][in light of triable issues of fact as to whether the County was negligent in maintaining the fence, the County was not entitled to summary judgment dismissing the cross-claim for contribution]). Therefore, the branch of the Owners' motion to dismiss Thames's and Sound's claims for common law contribution is denied as to 311 West, but granted as to 305-307 West, based on the absence of 305-307 West's liability.

Sound's Cross-Claims against the Owners for Contractual Indemnification

A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances *(Drzewinski v Atlantic Scaffold & Ladder Co. Inc.*, 70 NY2d 774,777 521 NYS 2d 216 [1987]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]).

Here, the Owners established as a matter of law that Sound cannot maintain a contractual indemnification claim against them because there is no contractual provision requiring the

Owners to indemnify Sound. In response, Sound fails to submit any contract or other evidence demonstrating that the Owners agreed to indemnify Sound.[11] Therefore, this portion of the Owners' motion is granted and Sound's contractual indemnification claim as against the Owners is dismissed.

The Owners' Cross-Claim against Thames for Contractual Indemnification

The contract between Thames and 311 West provides in relevant part:

> "To the fullest extent permitted by law, the Contractor [Thames] shall be liable for and hereby agrees to indemnify, defend and hold harmless the Owner[s] [and their] agents ("Indemnitees") against any and all liabilities, damages, losses, expenses, demands, claims, suits or judgments (including reasonable attorneys' fees) for [. . .] injury to any person, [. . .] , arising out of, relating to, or resulting from performance of the Work, *except that the Contractor shall not be required to indemnify or hold harmless an Indemnitee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such Indemnitee*." (The Contract, exhibit E, §3.18)(emphasis added).

The Owners failed to establish their entitlement to summary judgment on this claim. First, the contract is between Thames and 311 West. Thus, since 305-307 West is not a party to the Contract, it is not entitled to contractual indemnification from Thames. Second, while it is undisputed that plaintiff's injury "arose out of" performance of the work which his employer was hired by Thames to do on the renovation Project, issues of fact as to 311 West's liability under the Labor Law §241 (6) claim preclude summary judgment on its contractual indemnification claim against Thames at this time (*see Cuevas v City of New York*, 32 AD3d

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[11] The court notes that, while the Owners did not assert arguments in support of the dismissal of Sound's cross-claim for breach of contract by failing to procure a liability insurance, in their Notice of Motion, the Owners move to dismiss "any and all cross-claims" asserted against them. Therefore, based on the Owners' argument that no contract between the Owners and Sound exists and Sound's failure to submit any evidence of a contract containing an insurance procurement provision, this cross-claim is likewise dismissed.

372, 374, 821 NYS2d 37 [1st Dept 2006][emphasis added][holding that conditional grant of summary judgment on claims for contractual indemnification was premature where there were triable issues of fact regarding whether parties to be indemnified either improperly maintained or installed the vault on which plaintiff fell]; *Brennan v 42nd Street Development Project, Inc.*, 10 AD3d 302, 781 NYS2d 335 [1st Dept 2004][upholding the trial court's denial of Bovis's motion for summary judgment on its claim for contractual indemnification against third-party defendant M. O'Connor upon the court's determination that Bovis did not establish as a matter of law that it was free from negligence]).

Thus, the branch of the Owners' motion for summary judgment on their cross-claim against Thames for contractual indemnification is denied.

Motion Sequence 007

The Owners' Cross-Claims Against Sound for Common Law Indemnification and Contribution

Sound established its *prima facie* entitlement to summary judgment dismissing the contribution and common law indemnification cross-claims against it on the ground that plaintiff does not have a "grave injury" as defined under the Workers' Compensation Law.

Workers' Compensation Law §11 provides:

> "An employer shall not be liable for contribution or indemnity to *any third person* based upon liability for injury s sustained by an employee acting within the scope of his or her employment for such employer *unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'* which shall mean only one or more of the following: death, *permanent and total loss of use or amputation of an arm, leg, hand or foot*, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Here, it is undisputed that Sound was plaintiff's employer; that plaintiff acted within the scope of his employment during the incident; and, plaintiff's Bill of Particulars indicates that his out-of pocket expenses were paid by the workers' compensation carrier State Insurance Fund (exhibit E to Sound's motion, ¶¶ 24; 26).

Further, Sound demonstrates that plaintiff has not suffered a "grave injury" as defined under the Workers' Compensation Law as an injury resulting in total permanent disability, rendering him "unemployable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004][adopting the test for permanent total disability under section 11 as one of "unemployability in any capacity, [which] is a more objectively ascertainable than equivalent, or competitive, employment"]; *Guaman v 419 Park Ave. South Associates, LLC*, 2012 WL 5363540 (Trial Order)[holding that based on the evidence, the plaintiff construction worker's traumatic brain injury was not a grave injury as defined under the Workers' Compensation Law, rendering him unemployable "in any capacity"]).

Here, Plaintiff's Verified Bill of Particulars alleges that he suffered, *inter alia*, a "[c]omplete left foot drop" (exhibit E, ¶17). A report, dated July 28, 2009, from Dr. Robert J. Orlandi, an orthopedist who examined plaintiff on behalf of Thames, indicates that plaintiff has "a barely perceptible limp when he walks in his an ankle-foot orthosis which is placed inside the shoe" (*see* exhibit F to Sound's motion, p. 5).

In light of this evidence, and given that the Owners have not opposed this part of Sound's motion seeking dismissal due to a lack of "grave injury," this portion of Sound's motion is granted and the Owners' cross-claims for common-law indemnification and contribution are

dismissed.[12]

The Owners' Cross-Claims and Thames's Third-Party Complaint Against Sound for Contractual Indemnification

Sound argues that it is not required to indemnify Thames or the Owners because the Workers' Compensation Law §11 requires that a written contract for contribution or indemnification must be entered into "prior to the occurrence"; however, the Release Agreement containing the indemnification clause was executed 11 months after plaintiff's incident.

Workers' Compensation Law §11 provides that

> "[f]or the purpose of this section the terms 'indemnity' and contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into *prior to the accident or occurrence* by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."
> (emphasis added).

Thus, the issue is whether the parties' agreement satisfied the statutory requirements for a viable indemnification claim *(Majewski v Broadalbin–Perth Cent. School Dist.*, 91 NY2d 577, 582, 673 NYS2d 966, 696 NE2d 978 [1998]). New York courts, in construing an indemnity agreement, look at the "purpose of the entire agreement and the surrounding facts and circumstances" (*Podhaskie v Seventh Chelsea Associates*, 3 AD3d 361, 770 NYS2d 332 [1st Dept 2004]). Thus, an indemnification clause in a contract executed after an accident may be applied retroactively where the evidence establishes as a matter of law that the agreement pertaining to the contractor's work "was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date" (*Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 759

[12] The court notes that, while Thames raises arguments in opposition as to whether plaintiff suffered a "grave injury," Thames's third-party complaint contains no claims against Sound for common law indemnification or contribution, to which these arguments purport to apply.

NYS2d 451 [1st Dept 2003], *citing Stabile v Viener*, 291 AD2d 395, 396, 737 NYS2d 381 [2d Dept 2002], *lv dismissed* 98 NY2d 727, 749 NYS2d 477 [2002]; *Temmel v 1515 Broadway Associates, L.P.*, 18 AD3d 364, 365 [1st Dept 2005]; *cf. Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410, 731 NYS2d 724 ["Since there is nothing about these contracts to suggest that they were intended to have retroactive effect, summary judgment dismissing the third-party complaint was properly granted"]).

Here, Sound met its initial burden of establishing *prima facie* that the Release Agreement containing the indemnification clause was not in effect on the date of plaintiff's incident of January 3, 2006. The agreement is dated December 15, 2006, and thus, was executed 11 months after plaintiff's incident. And, it contains no express provision that it applies retroactively.

However, the Owners' and Thames's oppositions raise an issue of fact as to whether the subject clause was intended by the parties to apply retroactively. The Release Agreement identifies the Project, the date of the subcontract pursuant to which Sound performed its work (September 15, 2005), the amounts previously paid by Thames to Sound and provides in the relevant part:

> "The Subcontractor warrants that it will defend, indemnify and save harmless the Project Owner and the General Contractor from any and all liability, cost or expense (including reasonable attorney's fees) in connection with any liens, claims, lawsuits or actions *arising out of or in connection with Subcontractor's Work*."
> (Release Agreement, exhibit J)(emphasis added).

Thus, the indemnification clause applied to the performance of the "Subcontractor's [Sound's] Work" on the Project; and, plaintiff's injury arose "out of and in connection with" Sound's work. Notably, the Agreement did not specify any particular duration or the time frame of such work, other than indicating the date of the underlying subcontract.

In addition to the language of the Agreement, the testimony of Thames's CEO Fox that Sound and Thames, upon making partial payments to Sound prior to plaintiff's incident, on October 18, 2005 and December 14, 2005, executed two identical Release Agreements (Fox transcript, exhibit B, pp. 84-87), raises an issue of fact as to whether the parties intended that Sound indemnify Thames and 311 West 11 for losses arising *prior* to the incident (*Podhaskie v Seventh Chelsea Associates*; *Temmel v 1515 Broadway Assocs., L.P.*; *Pena v Chateau Woodmere Corp.*, *supra*).

In light of this issue of fact, Sound's motion (*007*) to dismiss Thames's third-party complaint and the Owners' cross-claim for contractual indemnification is denied. For the same reasons, the portion of the Owners' motion (*009*) for summary judgment on their cross-claim for contractual indemnification against Sound is likewise denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing plaintiff Michael York's negligence, Labor Law §200, and Labor Law §240 (1) claims is granted and said claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing plaintiff Michael York's Labor Law §241(6) claim is granted as to defendant 305-307 West 11th Street, LLC based on the homeowners' exception and such claim against 305-307 West 11th Street, LLC is severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing plaintiff Michael York's Labor Law §241(6) claim is denied as to 311 West 11th Street, LLC solely to the extent such claim is premised on 12 NYCRR 23.1-7 (d) and 12 NYCRR 23.1-24 (a); and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing the defendant Thames Builders' cross-claims is granted solely to the extent of dismissing the common law indemnification cross-claim against said defendants, and dismissing the contribution claim as against defendant 305-307 West 11th Street LLC; and said cross-claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment dismissing the third-party defendant Sound Refrigeration and Air Conditioning, Inc.'s cross-claims is granted solely to the extent of dismissing the cross-claims for common law indemnification, contractual indemnification and breach of contract for failure to procure insurance against said defendants, and dismissing the contribution claim as against defendant 305-307 West 11th Street LLC; and said cross-claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*009*) by the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC for summary judgment on their contractual indemnification claims against defendant Thames Builders and contractual indemnification cross-claim against third-party defendant Sound Refrigeration and Air Conditioning, Inc., is denied; and it is further

ORDERED that the branch of the motion (*008*) by the defendant Thames Builders for summary judgment dismissing plaintiff Michael York's negligence, Labor Law §200, and Labor Law §240 (1) claims is granted and said claims are severed and dismissed; and it is further

ORDERED that the branch of the motion (*008*) by the defendant Thames Builders to dismiss plaintiff Michael York's Labor Law §241 (6) claim is denied to the extent that such claim is premised on 12 NYCRR 23.1-7 (d) and 12 NYCRR 23.1-24 (a); and it is further

ORDERED that the branch of the motion (*007*) by the third-party defendant Sound Refrigeration and Air Conditioning, Inc. for summary judgment dismissing the third-party complaint of the defendant/third-party plaintiff Thames Builders for contractual indemnification is denied; and it is further

ORDERED that the branch of the motion (*007*) by the third-party defendant Sound Refrigeration and Air Conditioning, Inc. for summary judgment dismissing the cross-claims of the defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC is granted solely to the extent of dismissing the cross-claims for common law indemnification and contribution; and said cross-claims are severed and dismissed; and it is further

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

ORDERED that counsel for defendants 311 West 11th Street, LLC and 305-307 West 11th Street, LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 17, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD