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EA 12/18/13 JE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK J.S.C.

PRESENT: _____ Justice

PART 2

Quiroz,

-v-

Wells Reit II-220 East 41 Street, et al.

INDEX NO. 109944/11

MOTION DATE 5/23/13

MOTION SEQ. NO. 005

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 decided in accordance with the accompanying decision

FILED

DEC 18 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/13/13

Lew, J.S.C.

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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CARLOS QUIROZ,

Plaintiff,

-against-

Index No. 109944/11

WELLS REIT II-222 EAST 41st STREET, LLC, JONES DAY, HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C., DAL ELECTRICAL CORPORATION and ADCO ELECTRICAL CORP.,

Defendants.

----------X

Louis B. York, J.:

Motions with sequence numbers 002, 003, and 005 are consolidated for disposition.

This action arises out of injuries sustained by plaintiff Carlos Quiroz after he was shocked by a live wire at a construction site and fell from a six-foot wooden A-frame ladder.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims. Defendant Adco Electrical Corp. (Adco) moves, in motion sequence number 003, for summary judgment dismissing the complaint. In motion sequence number 005, defendants Wells Reit II-222 East 41st Street, LLC (Wells), Jones Day (Jones Day), and Hunter Roberts Construction Group, L.L.C.

(HR) (collectively, defendants)[1] move for summary judgment (1) dismissing the complaint, (2) on defendants' claims against Adco for contractual and common-law indemnity and breach of contract, and (3) dismissing Adco's "counter claims."[2]

BACKGROUND

On August 1, 2011, plaintiff, then a journeyman steamfitter employed by T. McGowan Fire Protection Inc. (TM), was working on the fourth floor of the building located at 222 East 41st Street in Manhattan. He was standing on the fifth rung of a six-foot A-frame ladder, working within the ceiling, when his wrench came in contact with a live wire. The shock knocked plaintiff off the ladder, plaintiff fell about five feet to the floor, and he suffered injuries as a result. According to HR's accident report, "The root cause of this accident was a live power feed in the ceiling that was not safed [off]" (Mayer 2/19/13 Affirm., exhibit 7).

Wells was the owner of the property. Tenant Jones Day retained HR as the construction manager and general contractor for the construction project (Construction Management and General Contractor's Agreement, dated as of May 1, 2010). HR in turn

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[1] By stipulation dated February 11, 2013, all claims as against defendant DAL Electrical Corporation were discontinued.

[2] Although defendants, in their moving papers, seek "dismissal of all counter claims asserted by Adco," "cross claim" is the proper term for claims brought by parties on the same side of the "v."

hired Adco as the electrical subcontractor (Subcontract Between HR and Adco, dated as of May 4, 2011) and TM as the HVAC subcontractor (Subcontract Between HR and TM, dated as of April 15, 2011).

THE PLEADINGS

In his complaint, plaintiff alleges claims sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). When their answers were first served, Wells and Jones Day had one answer, and HR had another. The answers bring cross claims against Adco for contribution, common-law and contractual indemnification, and breach of contract. HR and Adco answered, alleging cross claims against Wells and Jones Day for contribution and common-law indemnification.

DISCUSSION

Summary Judgment

> "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial [citations omitted]"

(*Ostrov v Rozbruch,* 91 AD3d 147, 152 [1st Dept 2012]). The court must determine whether that standard has been met based "on the

evidence before the court and drawing all reasonable inferences in plaintiff's favor" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]). "[S]ummary judgment is the equivalent of a trial" (*Ostrov v Rozbruch*, 91 AD3d at 152), but "[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

Plaintiff's Motion for Summary Judgment on His Labor Law §§ 240 (1) and 241 (6) Claims (motion sequence number 002)

Plaintiff contends that Adco was responsible for the safeing off of all electrical wires, but that it failed to do so.[3] Moreover, there was no caution tape, sign or other means of warning workers that a live wire was in the work area. Neither the individual defendants nor Adco provided plaintiff with shock-proof gloves or aprons. In addition, plaintiff maintains that defendants failed to provide proper protection in that the unsecured ladder failed to protect plaintiff from falling. Plaintiff also alleges that Adco was subject to Labor Law §§ 240 (1) and 241 (6) because it was an agent of HR, the construction manager and general contractor.

Adco asserts that, since the ladder was without defect,

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[3] Safeing off a wire entails attaching a wire nut and/or tape to the live end of a wire, so as to prevent anyone from getting shocked.

plaintiff was merely exposed to the usual and ordinary dangers of the work place. Moreover, no additional safety devices were required while plaintiff was standing on a six-foot A-frame ladder. Adco argues that it was not an agent of Jones Day or Wells.

Defendants maintain that section 240 (1) has not been violated, because plaintiff's injuries resulted from "a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place" (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008]). As Adco argues, defendants contend that no additional safety devices were necessary while plaintiff was on the ladder.

Labor Law § 240 (1)

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

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) provides "exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal

quotation marks and citation omitted]" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). Under Labor Law § 240 (1), "owners, general contractors and their agents have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites [internal quotation marks and citation omitted]" (*Naughton v City of New York*, 94 AD3d 1, 7 [1st Dept 2012]), and under both sections 240 (1) and 241 (6), the duty is imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]). To establish liability under the statute, "a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mech. of NY Corp.*, 80 AD3d 564, 565 [2d Dept 2011]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The Issues of Ownership and Agency

"All contractors and owners and their agents" may be held liable under Labor Law §§ 240 (1) and 241 (6). Wells was the owner of the premises. Jones Day was the lessee who hired HR as the construction manager and general contractor for the project.

"The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002] [same]). Under this standard, Jones Day is an owner, and, as such, may be held liable under the Labor Law.

As the general contractor, HR is also subject to the Labor Law.

HR subcontracted the electrical work at the premises to Adco. "To be treated as a statutory agent [under Labor Law §§ 240 (1) and 241 (6)], the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury [internal quotation marks and citation omitted]" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011];

see also Mathews v Bank of Am., 107 AD3d 495, 496 [1st Dept 2013] [subcontractor could not be considered statutory agent because there was "no evidence that it had the authority to supervise, direct, or control" the work that plaintiff had been performing]; *Gallagher v Resnick*, 107 AD3d 942, 945 [2d Dept 2013] [a subcontractor may be "liable under Labor Law § 240 (1) as a statutory agent of the owner or general contractor (if) it had the authority to supervise and control the particular work in which the injured plaintiff was engaged at the time of his injury"]; *Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569-570 [2d Dept 2010 [same]).

> "When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

In this matter, plaintiff was a steamfitter employed by TM, not an electrician employed by Adco. There is no evidence before the court that indicates that Adco in any way controlled, directed or supervised the work which plaintiff was performing at the time of his accident. Thus, Adco was not an agent of any defendant. As it was also not an owner or general contractor, it cannot be liable under Labor Law §§ 240 (1) and 241 (6), and the

part of Adco's motion which seeks summary judgment dismissing these claims as against it is granted.

The Issues of Whether The Accident Falls Within Section 240 (1) and Whether a Violation of the Section Caused Plaintiff's Injuries

Defendants argue that plaintiff's accident was the result of a separate hazard than those contemplated in the enactment of Labor Law §§ 240 (1).

> "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. The core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists [internal quotation marks and citations omitted]"

(*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999]). A separate hazard that causes an accident is only "one of the usual and ordinary dangers at a construction site to which the extraordinary protections of Labor Law § 240 (1) [do not] extend [internal quotation marks and citations omitted]" (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d at 825).

Plaintiff was a steamfitter engaged in repositioning a sprinkler that had been installed in the wrong spot. His job did not encompass anything having to do with electricity.

Nevertheless, there is an issue of fact concerning whether the faultless, but unsecured, wooden A-frame ladder on which he stood adequately protected him from the elevation-related hazards he encountered while working as a steamfitter. In addition, there is an issue of fact whether the live wire that shocked plaintiff was a separate hazard, unrelated to the height-related risk which required the use of the ladder in the first place. Because of these issues of fact, it cannot be determined at this time whether plaintiff's fall lies within the extraordinary protections of Labor Law § 240 (1).

With respect to the issue of whether a violation of the statute caused plaintiff's accident, the First and Second Appellate Divisions have treated the question of whether a fall from a ladder after receiving a shock constitutes a violation of Labor Law § 240 (1). The First Department has granted plaintiffs summary judgment when ladders were inadequate to shield plaintiffs from a fall after being shocked (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 515 [1st Dept 2013] [A-frame ladder was inadequate to the task of preventing the fall]; *Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [1st Dept 2009] [unsecured A-frame was inadequate to prevent the fall and "was a proximate cause of his injuries"]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290 [1st Dept 2002] [plaintiff fell from a ladder with "no apparent defects," but which also had "no

protective devices . . . that would have prevented plaintiff's fall"]). However, in *Weber v 1111 Park Ave. Realty Corp.* (253 AD2d 376, 377 [1st Dept 1998]), the First Department decided that "[w]here a plaintiff is injured in a fall from a ladder, which is not otherwise shown to be defective, the issue of whether the ladder provided the plaintiff with the 'proper protection' required under this statute is a question of fact for the jury."

The Second Department has denied summary judgment even when the ladders were without defect (*see Karapati v K.J. Rocchio, Inc.*, 12 AD3d 413, 415 [2d Dept 2004] [defendant movants failed to establish that plaintiff had been provided with additional safety devices, or that no such devices were necessary]; *Gange v Tilles Inv. Co.*, 220 AD2d 556, 558 [2d Dept 1995] [plaintiff denied summary judgment because of questions of fact, i.e., whether ladder without defects "failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices"]).

Because questions of fact have been raised concerning whether plaintiff's accident was caused by a separate hazard and whether the ladder provided proper protection to plaintiff, the part of plaintiff's motion which seeks summary judgment on his Labor Law § 240 (1) cause of action is denied; that part of defendants' motion which seeks dismissal of plaintiff's section 240 (1) claim is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

The Appellate Division, First Department, has stated that:

> "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under § 241 (6), a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications' [internal citations omitted]"

(*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept 2012]). "To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146

[1st Dept 2012]). In response, "[a]n owner or general contractor may . . . raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]; *see e.g. Once v Service Ctr. of N.Y.*, 96 AD3d 483, 483 [1st Dept 2012] ["In cases involving a claim pursuant to Labor Law § 241 (6), contributory and comparative negligence are viable defenses"]).

Although plaintiff alleges that defendants and Adco violated many provisions of the Industrial Code (12 NYCRR Part 23) in support of his section 241 (6) claim, on this motion, he only argues violation of 12 NYCRR 23-1.13 (b) (3) and (b) (4).[4] Thus, the part of defendants' motion which seeks dismissal of plaintiff's section 241 (6) claim is granted as to all sections of the Industrial Code which plaintiff cited, except 12 NYCRR 23-1.13 (b) (3) and (b) (4).

Section 23-1.13 governs electrical hazards. Subsections (b) (3) and (b) (4) follow:

> "(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so

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[4] Counsel for plaintiff would be well advised to desist from alleging multiple, completely irrelevant sections of the Industrial Code in his pleadings and bills of particulars. The allegation of such dross is disfavored.

> located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.
>
> "(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means . . . ."

These subsections have been found to be sufficiently specific so as to serve as a basis for a section 241 (6) claim (*see e.g. DelRosario v United Nations Fed. Credit Union*, 104 AD3d at 516 ["These code sections are clear and specific in their commands that before work is started, it is to be ascertained whether the work will bring a worker into contact with an electric power circuit, and, if so, that the worker not be permitted to come into contact with the circuit without it being de-energized," citing 12 NYCRR 23-1.13 (b) (4)]; *Hernandez v Ten Ten Co.*, 31 AD3d 333, 333-334 [1st Dept 2006] [section 23-1.13 "is sufficiently specific to support a Labor Law § 241 (6) claim"]). Although the provisions specifically refer to employers and employees,

> "[i]t has been recognized that provisions of the Industrial Code (*see*, 12 NYCRR part 23) . . . [e.g.], 12 NYCRR 23-1.13 – which refer

> only to the duty of employers, also impose a duty upon owners . . . . Indeed, the regulations themselves state that part 23 applies, *inter alia*, to owners . . . (*see*, 12 NYCRR 23-1.3; *see also*, 12 NYCRR 23-1.5 [a])"

(*Rice v City of Cortland*, 262 AD2d 770, 773-774 [3d Dept 1999]). Section 23-1.3 provides, in pertinent part, that "[t]his Part (rule) applies to persons employed in construction, demolition and excavation operations, to their employers and to the owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work." Thus, Wells and Jones Day, as owners, and HR, as the general contractor, are governed by these provisions. However, since Adco was neither an owner, general contractor, agent, or plaintiff's employer, Adco is not.

Plaintiff asserts that there were no warning signs, caution tape, or any other devices that could have warned plaintiff that there was a live wire in the area, and that there is no way to determine whether a wire is live by just looking at it (section 23-1.13 [b] [3]). HR's accident report states that there was

> "a whip for a light fixture not yet installed coiled in the ceiling. There were no wire nuts or tape on the live end of the wire. The live end touched the injured party who was holding his wrench to the sprinkler pipe. The injured party felt a shock . . . and fell from the ladder"

(Mayer 2/19/13 Affirm., exhibit 7; section 23-1.13 [b] [4]).

Defendants argue that plaintiff was comparatively negligent, in that he did not carefully examine where he would be working prior to beginning his work. They allege that plaintiff was an experienced steamfitter; therefore, he should have ensured that his work area was free from hazards before he began, and because he did not, any recovery by plaintiff should be reduced because of his negligence.

Defendants basically limit their opposition to plaintiff's section 241 (6) claim to the assertion of plaintiff's negligence. They do not deny that they violated Industrial Code §§ 23-1.13 (b) (3) and (b) (4).

Accordingly, the part of plaintiff's motion which seeks summary judgment on his Labor Law § 241 (6) claim as against defendants is granted. The part of defendants' motion which seeks dismissal of plaintiff's section 241 (6) claim is denied.

Adco's and Defendants' Motions For Summary Judgment Dismissing the Complaint (motion sequence numbers 003 and 005)

Plaintiff has withdrawn his Labor Law § 200 and common-law negligence claims as against Wells and Jones Day (Mayer 5/1/13 Reply and Opposition Affirm.).

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

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and

> devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . ."
>
> As is well settled,
>
> "Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed [internal citations omitted]"

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 143-144). "Where . . . the injury is caused not by the methods of [plaintiff's] work, but by a defective condition on the premises, liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 648 [1st Dept 2013]). "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" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). This "notice must be of the specific condition and of its specific location" (*Canning v Barneys N.Y.*, 289 AD2d 32, 33 [1st Dept 2001]; *see also Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004] ["The notice must call attention to the specific defect or hazardous

condition and its specific location, sufficient for corrective action to be taken"]).

Plaintiff asserts that Adco was the electrical contractor at the site and that it failed to make sure that the current was turned off, and failed to warn plaintiff that there was a live cable in the ceiling where he was working. Plaintiff and Adco allege that HR instructed Adco to turn the power on in the area of the accident because Jones Day wanted to finish the job quickly.

Adco claims that when the power was turned back on, the area had been safed off and wire nuts were on the BX cable. On the day before the accident, Adco's foreman, Dacey, inspected the BX cable and the wire nuts. Thereafter, no one from Adco removed the wire nuts before the accident.

Adco relates that plaintiff was supposed to be working in the area prior to when the area was finished, but that he had to go back to move a sprinkler that had been installed in the wrong place. Apparently, sprinklers are supposed to be installed before the electricians do their work, but in this case, that order was reversed, and the electricians preceded the steamfitters.

Defendants argue that the common-law negligence and Labor Law § 200 claims must be dismissed as against HR because HR did not supervise plaintiff, and did not cause or have notice of

the dangerous condition. They maintain that Adco was the only negligent party because it failed to safe off the wires, which created the dangerous condition. As construction manager, HR did not supervise Adco's work; Adco's foreman did.

Plaintiff asserts that HR had actual, or at least constructive, notice of the dangerous condition in that area. In addition, HR, as general contractor, was responsible for trades at the site.

The parts of Adco's and defendants' motions which seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims must be granted. While the evidence indicates that Adco safed off the wires in the ceiling where plaintiff would work the following day, and that no one from Adco removed those protections, there is no evidence that Adco either created the danger or had notice of the live wire. There is also no evidence that HR was at all responsible for creating the hazard, and no evidence that HR had notice. In fact, plaintiff himself asserts that there was no way to determine that there was a live wire just by looking at it.

Therefore, those parts of Adco's and defendants' motions which seek summary judgment dismissing plaintiff's section 200 and common-law negligence claims are granted.

The Parts of Defendants' Motion Which Seek Summary Judgment (1) On Defendants' Claims Against Adco for Contractual and Common-Law Indemnity and Breach of Contract, and (2) Dismissing Adco's Cross Claims

Contractual Indemnification

"'A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Blank Rome, LLP v Parrish*, 92 AD3d 444, 445 [1st Dept 2012], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 122 [1st Dept 2012]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 907 [1st Dept 2011] [same]).

In the third cross claim in the Wells/Jones Day answer to the complaint, Wells and Jones Day allege that HR and Adco owe them contractual indemnification, based on various contracts between Wells and Jones Day and HR and Adco. The contract between Wells and Jones Day is a lease. The contract between Jones Day and HR is a Construction Management and General Contractor's Agreement, and the subcontract between HR and Adco has the indemnification provision quoted below. Defendants' motion only seeks contractual indemnification under the HR/Adco subcontract.

The indemnification provision of the HR/Adco

subcontract, as pertinent, follows:

> "To the extent permitted by law, and to the extent not caused in whole or in part by an Indemnitee's own negligence, the Subcontractor [Adco] shall indemnify, defend, save and hold harmless Hunter Roberts, the Owner and . . . tenants . . . from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with or are claimed to arise out of or be connected with the performance of Work by the Subcontractor, or any act or omission of the Subcontractor. . . ."

(HR/Adco Subcontract, Art. 8, § 8.1, at 4-5). Such a provision is considered "a very broad indemnification and 'hold harmless' provision, which stated that [the subcontractor] would indemnify and hold [the manager] harmless for damages that 'arise out of or are connected with' . . . performance of [w]ork by the subcontractor'" (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 495 [1st Dept 2012, Catterson, J., dissenting]).

The indemnification provision in the subcontract at issue here is even broader than the one in *Sosa*. This indemnification clause requires Adco to indemnify HR, Wells, and its tenant, Jones Day, even if the claim is merely "*claimed* to arise out of or be connected with the performance of Work by the Subcontractor [emphasis added]." Thus, even though this court has found that Adco was not negligent, Adco must indemnify defendants except to the extent that defendants were themselves negligent, because defendants have claimed that the accident

arose out of Adco's work.

Accordingly, the part of defendants' motion which seeks contractual indemnification from Adco is granted, with the calculation of damages to await trial.

Common-Law Indemnification

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. . . . Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision"]).

Defendants cannot prevail on this claim because they have been found liable under Labor Law § 241 (6), violation of which is "*simply some evidence of negligence* which the jury could take into consideration with all the other evidence bearing on that subject [internal quotation marks and citation omitted]" (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d at 349). In addition, this court has found that Adco is not liable under

Labor Law § 241 (6), and that it did not supervise plaintiff or his work. Therefore, defendants' claim for common-law indemnification against Adco is denied.

Breach of Contract

The HR/Adco subcontract also includes a requirement that Adco purchase and maintain, among other things, a comprehensive general liability policy that names HR and the Owner (Wells) as additional insureds (HR/Adco Subcontract, Art. 8, § 8.4, at 5). The provision does not name the tenant, Jones Day, as a party that is required to be named as an additional insured.

Defendants have not appended a copy of any relevant policies. Instead, they submit various letters from the parties' counsel and insurers that deal with the issue of coverage. Without the policies, or an action for a declaratory judgment, the court cannot determine whether any of the parties is covered or not. Therefore, the part of defendants' motion which seeks summary judgment on their claim against Adco for breach of contract to procure insurance must be denied.

Adco's Cross Claims

When a complaint against a party is dismissed, "[t]he third-party action and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety" (*Turchioe v AT & T Communications*, 256 AD2d 245, 246

[1st Dept 1998]). Therefore, that part of defendants' motion which seeks summary judgment dismissing Adco's contribution and common-law indemnification cross claims is granted.

CONCLUSION

Accordingly, it is

ORDERED that the part of plaintiff Carlos Quiroz's motion (motion sequence number 002) which seeks summary judgment on his Labor Law § 240 (1) claim is denied; and it is further

ORDERED that the part of plaintiff Carlos Quiroz's motion which seeks summary judgment on his Labor Law § 241 (6) claim as against defendants is granted, with damages to be determined at trial; and it is further

ORDERED that Adco Electrical Corp.'s motion (motion sequence number 003) for summary judgment dismissing the complaint herein is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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

ORDERED that the part of Wells Reit II-222 East 41st Street, LLC, Jones Day, and Hunter Roberts Construction Group, L.L.C.'s motion (motion sequence number 005) which seeks summary

judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that the part of Wells Reit II-222 East 41st Street, LLC, Jones Day, and Hunter Roberts Construction Group, L.L.C.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted; and it is further

ORDERED that the part of Wells Reit II-222 East 41st Street, LLC, Jones Day, and Hunter Roberts Construction Group, L.L.C.'s motion which seeks contractual indemnification from Adco Electrical Corp. is granted, with the calculation of damages to await trial; and it is further

ORDERED that the part of Wells Reit II-222 East 41st Street, LLC, Jones Day, and Hunter Roberts Construction Group, L.L.C.'s motion which seeks summary judgment on their common-law indemnification claim is denied; and it is further

ORDERED that the part of Wells Reit II-222 East 41st Street, LLC, Jones Day, and Hunter Roberts Construction Group, L.L.C.'s motion which seeks summary judgment on their breach of contract claim against Adco Electrical Corp. is denied; and it is further

ORDERED that the part of Wells Reit II-222 East 41st Street, LLC, Jones Day, and Hunter Roberts Construction Group, L.L.C.'s motion which seeks summary judgment dismissing Adco

Electrical Corp.'s cross claims is granted.

Dated: 12/13/13

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
DEC 18 2013
NEW YORK
COUNTY CLERK'S OFFICE