Dalley v ESS Group, Inc.
2014 NY Slip Op 33539(U)
December 8, 2014
Supreme Court, Queens County
Docket Number: 14719/09
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS Part 6**
Justice

RANNYLIN STEPHANIE DALLEY, as administratrix of the Estate of LUIS MORILLO, deceased and CARMEN LEON, individually, Plaintiffs,	Index Number 14719/09
-against-	Motion Date July 2, 2014 July 16, 2014
ESS GROUP, INC., et al., Defendants.	Motion Cal. Numbers 26 -31
	Motion Seq. Nos. 9 - 15

The following papers numbered 1 to 165 read on this motion by defendant/second third-party defendant/third third-party defendant ESS Group, Inc. (ESS) for summary judgment dismissing plaintiffs' Rannylin Stephanie Dalley, as Administratrix of the Estate of Luis Murillo, deceased, and Carmen Leon, individually (collectively referred to as plaintiffs) complaint, all cross claims and all third-party claims; by separate notice of motion by defendant/third third-party plaintiff SCS Energy, LLC (SCS) for summary judgment dismissing plaintiffs' complaint all cross claims; by separate notice of motion by defendant North American Energy Services Company (North American) for summary judgment dismissing plaintiff's complaint and all co-defendants' cross claims and counter claims, for summary judgment on its cross claims for breach of contract for failure to procure insurance, contractual indemnification and common-law indemnification against defendants/second third-party plaintiffs Astoria Energy, LLC, and Astoria Project Partners, LLC (the Astoria defendants), and for summary judgment on its cause of action for common-law indemnification against third-party defendant/second third-party defendant/third third-party defendant Allstar Welding & Demolition, LLC (Allstar); by separate notice of motion plaintiffs for partial summary judgment on their claims brought under Labor Law §§ 240 (1) and 241 (6) against the Astoria defendants, North American and SCS; by separate notice of motion by plaintiffs for partial summary judgment on their claims brought under Labor Law §§ 240 (1) and 241 (6) against the Astoria defendants,

North American, SCS and ESS; by separate notice of motion by Allstar for partial summary judgment dismissing the first cause of action, for contractual indemnification, asserted by the Astoria defendants in their third-party complaint and for summary judgment dismissing ESS's and North American's cross claims for contractual indemnification; by separate notice of motion by the Astoria defendants for summary judgment dismissing all plaintiffs' claims and all cross claims, except for North American's cross claim for contractual indemnification, and for summary judgment on their second third-party claims against Allstar; and by notice of cross motion by the Astoria defendants for summary judgment dismissing North American's cross claims for contractual indemnification and breach of contract for failure to procure insurance, or in the alternative, if the Court enforces said claims, to limit damages arising out of those cross claims.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-27
Notice of Cross Motion - Affidavits - Exhibits	28-33
Answering Affidavits - Exhibits	34-118
Reply Affidavits	119-165

Upon the foregoing papers it is ordered that the motions and cross motion are determined together as follows:

This is an action for wrongful death and to recover damages for personal injuries arising out of defendants' ESS, SCS, North American, and the Astoria defendants' alleged violation of Labor Law§§ 200, 240, 241, and common-law negligence. Plaintiffs have alleged that while the decedent was working at premises located at 17-10 Steinway Street, in the County of Queens, he was injured and died as a result of his injuries. Plaintiff Carmen Leon, wife of the decedent, Luis Murillo (the decedent), has alleged an individual, derivative claim for loss of services, society, consortium and companionship. Defendant Astoria Project, LLC, was the sole member of Astoria Energy, LLC (Astoria Energy), the owner of the subject premises, which purchased the premises in April 2004 for the purpose of turning it into an electrical power plant. It has been alleged that Astoria Energy entered into a contract with SCS, a power plant development company, to provide various services, including administrative services and construction management services. Astoria Energy also contracted with ESS to provide environmental consultant, monitoring and inspection services on the project at the premises. Astoria Energy retained North American to take care, custody and control of the power plant and to

operate, manage and maintain the facility at the completion of the project at the premises.

As part of the project at the premises, Allstar, the decedent's employer at the time of the subject accident, was tasked with demolishing and removing an old boiler room from the premises, which consisted, in part, of dismantling the boilers by removing the boiler doors. At the time of the accident, the decedent was working to cut certain metal bolts that connected a heavy boiler door to a boiler, weighing approximately 3,000 pounds, when the door fell on him, resulting in his injuries and death.

Labor Law § 240

Labor Law § 240 (1) provides that:

> "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

On a motion for summary judgment, the moving party has the initial burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]). In support of this branch of their motions, ESS and North American have argued that they are not liable under Labor Law because they were not owners, general contractors, or agents of the owner or general contractor within the contemplation of the statue. "[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and 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 [or her] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [1984]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the ability to control the activity which brought about the injury" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2011] [internal quotation omitted]; *see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951 [2011]).

The court will first address ESS's argument. The evidence in the record includes, among other things, the testimony of George Landman (Landman), an employee of ESS, Steve Laudano (Laudano), an employee of North American, Louis St. Maurice (St.

Maurice), an employee of Astoria Energy, and John Pasquence (Pasquence), an employee of Allstar. Landman testified that ESS did not have any duties at the premises other than those of environmental inspection, that it was not involved in the demolition of the boiler room and that ESS was not required to coordinate any safety issues at the premises. However, St. Maurice testified that ESS was involved in the construction process, Laudano testified that Landman, ESS's employee was in charge of the project and that he obtained quotes for the boiler removal from contractors which he gave to Landman. Pasquence testified that Landman was the plant engineer who was the contact person relating to coordinating the project, including safety issues. Based upon this conflicting evidence, an issue of fact remains, at least, as to whether ESS was acting as an agent of the owner or general contractor at the subject premises at the time of the accident.

The court will next turn to North American's argument that it was not an owner, general contractor or agent of the owner or general contractor. The record contains the testimony of Christopher Price (Price), an employee of North American, who testified that North American was only responsible for the safety of its own employees at the premises, that it did not manage the work relating to the boiler. St. Maurice also testified that North American was not supervising the work on the boiler. However, the record also contains a copy of North American's operating agreement with Astoria Energy, which provided, in relevant part, that North American was obligated to schedule, hire and supervise independent contractors working at the premises and to act on Astoria Energy's behalf to hire independent contractors. The record also contains Laudano's testimony that he hired Allstar to perform the work which led to the subject accident and Pasquence's testimony that North American's employee, Laudano, coordinated at least some of the boiler removal. Based upon this conflicting evidence, issues of fact remain as to whether North American was the general contractor or acted as an agent of the owner or general contractor relating to the work which led to the accident.

ESS, SCS North American, and the Astoria defendants have moved for summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action and have argued that this section is inapplicable to the facts of the instant case because the subject accident was not elevation-related and did not involve a falling object as contemplated in the statute. The Astoria defendants have argued that the decedent's work at the time of the accident was not covered by this section. Plaintiffs have also moved for partial summary judgment on this cause of action and have argued that this section applies because safety devices were required to be provided to the decedent under Labor Law § 240 and that ESS, SCS, North American, and the Astoria defendants failed to provide such.

The scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect

workers against elevation-related hazards (*see Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2009]). "The special hazards encompassed by the statute are limited to such gravity-related risks as falling from a height or being struck by a falling object"(*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006], *lv denied* 8 NY3d 807 [2007]).

While falling object liability under Labor Law § 240 (1) applies to objects that are in the process of being hoisted or secured, Labor Law may be extended to include objects that require securing for purposes of the undertaking (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-59 [2008]; *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004, 1006 [2009]). In order to prove a prima facie violation of Labor Law § 240 (1) because of a falling object, the evidence must demonstrate that an object fell "because of the absence or inadequacy of a safety device of the kind enumerated in" the statute (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). "Protection from falling objects is necessary when there is a "clearly foreseeable elevation-related risk of an object falling and causing injury to a worker regardless of the precise manner the object's fall" (*Maximin v 26-26 Jackson Ave., LLC*, 26 Misc3d 1231[A], *5 [2010] [internal quotes and citation omitted]).

A plaintiff is not precluded from recovery simply if an object that struck him was on the same level (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]). "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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). In fact, the Court of Appeals has found that an "elevation differential [] cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it [is] capable of generating, even over the course of a relatively short descent," and that "[t]he relevant inquiry ... is rather whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d at 604).

In the instant matter, the evidence in the record has demonstrated that the decedent was engaged in the demolition of a boiler by removing a boiler door at the time of the accident, work that is protected under Labor Law § 240 (1). The evidence, including photographs of the subject boilers, has also demonstrated that the boiler door that the decedent was tasked with removing weighed approximately 3,000 pounds and was situated approximately two (2) feet off the ground. Given the considerable weight and the positioning of the object, a height differential in this matter cannot be considered de

minimis because the boiler door was capable of generating an extreme amount of force, even though it traveled over a small distance (*see Runner v New York Stock Exch., Inc.*, 13 NY3d at 605; *Harris v City of New York*, 83 AD3d 104, 110 [2011]; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 409, 409 [2013]). Therefore, under these particular circumstances, since such an object "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]), it is the determination of this court that Labor Law § 240 (1) is applicable to the facts of the instant matter.

In further support of this branch of their motions, ESS, SCS, North American, and the Astoria defendants have argued that Labor Law § 240 (1) was not violated and that the decedent's own actions were the sole proximate cause of the accident. Plaintiffs have argued that a prima facie violation of Labor Law proximately caused the decedent's death because no required safety devices were provided to him and that his actions were not the sole proximate cause of the accident.

In order for a plaintiff to recover under Labor Law § 240 (1), a violation of that section must be shown to be a proximate cause of his or her injuries (*see Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2007]; *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 856 [2007]). The sole proximate cause defense is applicable only where plaintiff's actions are the sole cause of his alleged injuries and there has been no statutory violation by a defendant (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). "[R]egardless of the precise manner in which the accident occurred, a defendant is not absolved from liability where ... a plaintiff's injuries are at least partially attributable to the defendant's failure to provide proper protection as mandated by the statute" (*Cammon v City of New York*, 21 AD3d 196, 201 [2005]).

The record contains, among other things, Pasquence's testimony and the affidavit of Thomas Parisi (Parisi), a professional engineer. Pasquence testified that he instructed the decedent to cut the bolts connecting the boiler door to the boiler, not to cut the hinge pins and that this was the normal procedure from dismantling the boiler doors. Pasquence also testified that he checked the decedent's work each time he cut the bolts on one of the three boiler doors being demolished and that it was done properly. He further testified as to the usual process relating to the removal of the boiler doors, that the removal of the hinge pin at the top of the door was left until last for safety reasons, since it was that hinge that was used to secure the door and keep it from falling during the removal process.

Parisi stated in his affidavit that additional safety devices were required during the removal of the boiler doors and that the procedures used to remove the door were contrary to good and accepted safety practices. Plaintiffs themselves have raised issues regarding

how the accident happened by pointing to portions of Pasquence's deposition testimony in order to show that someone other than the decedent may have been responsible for cutting the hinge pin which led to the accident.

In light the conflicting evidence contained in the record, genuine issues of material fact exist, at the very least, as to how the accident happened, whether the risk of injury to the decedent was foreseeable under these particular circumstances, whether the decedent was provided adequate protection within the meaning of Labor Law § 240 (1) and, thus, whether a violation of that section proximately caused his injuries and death (Labor Law § 240 [1]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Ortega v City of New York*, 95 AD3d 125, 128 [2012]; *Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722 [2010]). As such, the court is unable to make a determination at this time regarding Labor Law § 240 (1). Therefore, the branches of the motions by ESS, SCS, North American, and the Astoria defendants, and by plaintiffs relating to this cause of action are denied.

Labor Law § 241

Plaintiffs have alleged a claim under Labor Law § 241 (6) and the court will now turn to that claim. ESS, SCS, North American, and the Astoria defendants have moved for summary judgment dismissing plaintiffs' claim brought under this section while plaintiffs have moved for partial summary judgment. "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that ... defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2007]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502).

In the bill of particulars, plaintiffs have predicated their section 241 (6) claim upon alleged violations of various sections of the Industrial Code, including 12 NYCRR 4-4.0, 4.1, 4.2, 4.3, 4.4, 4.5, 6.1, 6.2, 6.5, 6.6, 6.8, 7.4, and 23-3.3, as well as upon alleged violations of various sections of New York City Building Code and Occupational Safety and Health Administration (OSHA) standards. However, violation of Building Code and OSHA standards are insufficient to support a claim brought under Labor Law § 241 (6) (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1999]; *Dugandzic v New York City School Constr. Auth.*, 174 Misc2d 702, 707 [1997]). Therefore, the court will limit its discussion on this branch of the motion to the alleged violations of the Industrial Code.

12 NYCRR 4-4.0 to 4-4.5 are inapplicable to the facts of this case because they relate to inspection requirements and to functioning boilers and these sections are

dismissed.

12 NYCRR 4-6.5,4-6.6, and 4-6.8 are inapplicable to the facts of the instant case because they relate to the permissible clearance distances of a boiler to walls and other structures, working on boilers using ladders or platforms, and provisions for exits in rooms where boilers have been installed, none of which were involved in, or are relevant to the subject accident. Therefore, these sections are dismissed.

12 NYCRR 4-7.4 is entitled "Maintenance," and provides for general requirements of the proper maintenance of heating equipment, safety controls and guarding of such machinery. This section is too general a safety standard upon which plaintiffs can predicate their claim under Labor Law § 241 (6) (*see Eberl v FMC Corp.*, 872 F Supp 2d 250, 260 [2012]). Furthermore, since none of its subsections are relevant to the facts of the instant case, section 4-7.4 is inapplicable in this matter, this section is dismissed.

12 NYCRR 4-6.1, entitled "Responsibility of owner," provides that "[w]hen any work is to be done on a boiler or component by way of installation, repair, reassembly or replacement, which if improperly performed may create a defect, the owner shall use due care to have the work done by competent persons." While plaintiff has argued that this section was violated under the facts of the instant case, the Astoria defendants have argued that this section does not apply to these facts because the accident occurred during the course of demolition, which is not covered under this section.

Plaintiffs have failed to point to any reasonable interpretation of this section that has adequately demonstrated that, in crafting this section, the Commissioner of the Department of Labor intended it to include the demolition and removal of an old, non-functioning boiler. It is undisputed in the record that the boiler involved in the accident was being removed and not replaced. 12 NYCRR 4-1.5, regarding the construction of these sections of Industrial Code provides that "[n]o provision is intended to apply to any matter or thing to which the provision by its nature can have no reasonable application."

In this matter, it is the determination of this court that the statute, by its plain language, was intended to include "installation, repair, reassembly or replacement" of a boiler, and not demolition, which has been defined in the Industrial Code as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4 [b][16]). Thus, this section is not applicable to the instant case. Furthermore, ESS and North American have adequately demonstrated that they were not owners of the boiler involved in the accident, as the term is defined under 12 NYCRR 4-1.2 (n). Therefore, all of the moving defendants are entitled to dismissal of this section.

12 NYCRR 4-6.2, entitled "Responsibility of installers and repairers," provides that "[a]ll persons in charge of the work of installing, repairing, reassembling or replacing boilers or components shall use due care to have the work done in a neat, workmanlike and safe manner. Patch and welding repairs shall be performed in accordance with Subpart 14 -3 of Industrial Code Rule 14." Plaintiffs have argued that this section was violated, while ESS and the Astoria defendants have argued that it is not applicable since they were not installers or repairers. North American has failed to address this section in its papers. Since the plain language of this section applies to "installers and repairers," and it is undisputed in the record that the boiler involved in this matter was not being installed or repaired by any of the parties, this section is inapplicable to the facts of this case and all moving parties are entitled to its dismissal.

12 NYCRR 23-3.3 is entitled "Demolition by hand" and consists of subsections (a) to (m). While plaintiffs have alleged a violation of this entire section, they have failed to allege which particular subsections of 23-3.3 would be a predicate for their claim under section 241. As such, the court will limit its discussion to only those section which are disputed by the parties in the motion papers, namely, 23-3.3 (c) and 3.3 (h). In their papers, plaintiffs have failed to address 12 NYCRR 23-3.3 (a), (b), (d), (e), (f), (g), (i), (j), (k), (l), and (m), and, thus, have abandoned these claims.

12 NYCRR 23-3.3 (c), entitled "Inspection," provides that "[d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means." It has been found to be sufficiently specific to support a section 241 claim (*see Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138 [2005]). Plaintiff has argued that this section was violated, the Astoria defendants have argued that this section was not violated, while ESS and North American have argued that this section does not apply to the facts.

After a careful review of the facts and relevant case law, it is the determination of this court that this section is applicable to the facts of the instant case (*see e.g. Keane v Chelsea Piers, L.P.*, 16 Misc3d 1116[A] [2007] [plaintiff struck by beam he was in the process of demolishing]; *Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136 [2005] [plaintiff struck by piece of a partially demolished wall]). However, the evidence in the record, in particular, Pasquence's testimony that he inspected plaintiff's work regularly and the fact that the door of the boiler which was being demolished, nevertheless, fell on the decedent while he was working, has raised a genuine issue of material fact to whether

the statute was, in fact, violated and whether such a violation proximately caused the subject accident. Therefore, none of the moving parties are entitled to summary relief as to this section.

12 NYCRR 23-3.3 (h), entitled "Demolition of structural steel by hand," provides that:

> "Steel construction shall be demolished column length by column length and floor by floor. Every structural member which is being dismembered shall not be under any stress other than its own weight and such member shall be chained or lashed in place to prevent its uncontrolled swinging or dropping. Large structural members shall not be thrown or dropped from the building or other structure, but shall be carefully lowered. Where a derrick is used in the demolition of buildings or other structures of skeleton steel construction, the floor upon which the derrick rests shall be completely planked over with planking of adequate size. Where other methods are used, the persons engaged in the dismantling of structural steel members shall be protected by solidly planked flooring not less than two inches thick full size or sound floor arches not more than two stories or 30 feet, whichever is less, below and directly under that portion of any tier of beams where such persons are at work."

Upon a reading of this section, the court finds that it relates, as its plain language reflects, to "structural steel." Therefore, based upon the evidence in the record, this section is inapplicable to the facts of this case and it is dismissed.

SCS has moved for dismissal of plaintiffs' claim brought under Labor Law § 241 (6), and it is entitled to the dismissal of the sections of the Industrial Code that this court, in its above determination, has found to be inapplicable to this case. However, in its motion papers, SCS has failed to adequately address plaintiffs' allegations that it violated 12 NYCRR 23-3.3 (c). Based upon the court's determination as to that section and SCS's failure, SCS is not entitled to the dismissal of that section of the Industrial Code. As a result of the issues of fact discussed in the above determination, none of the moving parties are entitled to summary relief on plaintiffs' claim brought under Labor Law § 241 (6).

Labor Law § 200 and Common-law Negligence

Turning to the claims brought under Labor Law § 200 and for common-law negligence, ESS, SCS, North American and the Astoria defendants have all moved for summary judgment dismissing these claims and have argued that they did not direct, control, or supervise the decedent's work and that he was the sole proximate cause of the accident. Labor Law § 200 "is a codification of the common-law duty of an owner or

general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d at 60). Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Claims brought under § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.,* 67 AD3d 969, 972 [2009]*; Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]). Where a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is shown that he or she had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.,* 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63). Plaintiffs' claim under this section appears to be based on the method and manner of the work.

With regard to this branch of ESS's motion, the record contains, among other things, the deposition testimony of Laudano, Pasquence, and Landman. ESS contends, and Landman testified, that ESS was limited to environmental monitoring and reporting at the worksite. However, Laudano and Pasquence testified that ESS, through Landman, had the authority to direct, control or supervise the decedent's work and did, in fact, head up the project, was present at the worksite to coordinate and supervise Allstar's work and that Landman visited the boiler room demolition area to check on the boiler work. Therefore, based upon this conflicting evidence, a genuine issue of material fact exists, at least, as to wether ESS is liable to plaintiffs pursuant to Labor Law § 200 and for common-law negligence and ESS is not entitled to the relief sought (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

SCS has pointed to the affidavit and deposition testimony of Tim Bauer (Bauer), its employee, who stated that he did not know any work was occurring in the boiler room at the time of the accident and that he was not familiar with Allstar and had not interacted with anyone from Allstar. However, Bauer also testified that SCS was responsible for directing and controlling the work at the worksite and, in particular, the boiler house, and that SCS acted as a construction manager. Additionally, under SCS's agreement with North American, which is a part of the record, and purusnt to St. Maurice's deposition testimony, SCS was responsible for, and required to monitor, among other things, removal of the old boiler from the premises and compliance with safety at the worksite. Based upon the conflicting evidence in the record, an issue of fact remains, at least, as to whether SCS had the authority to direct, supervise or control Allstar's work and actually exercised that authority. Thus, an issue of fact remains as to whether SCS may be liable to plaintiffs under Labor Law § 200 and for common-law negligence (*see Card v Cornell Univ.*, 117 AD3d 1225, 1227-1228 [2014]). Therefore, summary relief is precluded at

this juncture on this branch of SCS's motion.

Turning next to the branch of North American's motion relating to section 200 and common-law negligence, the evidence in the record has demonstrated that an issue of fact exists, at least, as to whether North American had the authority to direct, supervise or control the decedent's work and whether it exercised that authority through the actions of its employees present at the worksite to the extent that it would be liable to plaintiffs under this section. The facts testified to by Laudano and George Lehner (Lehner), North American's employees, St. Maurice, the Astoria defendants' employee, and Bauer at their depositions, conflict in regards to what role North American and its employees played at the worksite, whether North American's employees were responsible for directing day-to-day safety at the worksite and in ensuring that safety protocols were followed on the date of the accident, and whether it was responsible for coordination and safety with regard to the demolition of the boiler in particular. As such, the court is unable to grant summary dismissal to North American on plaintiffs' claims brought under Labor Law § 200 and common-law negligence.

The Astoria defendants have pointed to Pasquence's testimony and the testimony of St. Maurice in order to show that no one from the Astoria defendants directed, supervised or controlled the decedent's work. Labor Law § 200 does not impose vicarious liability on owners (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 145-146 [2012]; *see generally Vasquez v CBS, Inc.,* 234 AD2d 153 [1996]). In light of the evidence in the record, the Astoria defendants have adequately demonstrated that they had no direct supervision and control over the methods and manner in which the decedent performed his work (*see O'Connor v Spencer [1997] Inv. Ltd. Partnership,* 2 AD3d 513, 515 [2003]; *Hoelle v New York Equities Co.,* 258 AD2d 253, 253-254 [1999]). No triable issue of fact has been raised in opposition to this branch of their motion. Therefore, the Astoria defendants are entitled to the dismissal of plaintiffs' claims brought under Labor Law § 200 and common-law negligence.

Branch of ESS's Motion Regarding Cross Claims and Third-Party Claims

Although ESS has also moved for summary judgment dismissing all cross claims and third-party claims against it, it has failed to adequately address any of those claims in its motion papers. Thus, it has failed to satisfy its prima facie burden on that branch of its motion and is not entitled to the dismissal of those claims (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Branch of SCS's Motion Regarding Cross Claims

SCS has moved for summary judgment dismissing all cross claims asserted against

it, it has failed to adequately address any of those claims in its motion and is not entitled to the relief sought on this branch of its motion (*id.*).

Branch of The Astoria Defendants' Motion for Summary Judgment Against Allstar

The Astoria defendants have also moved for summary judgment on their third-party claim against Allstar for common-law indemnification. "Summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to each party involved" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008]). Thus, in light of the above determination and the issues of fact that remain, at least, as to whether the Astoria defendants were liable in the happening of the accident, summary relief on their claim for common-law indemnification against Allstar would be premature at this juncture (*see Dautaj v Alliance El. Co.*, 110 AD3d 839, 841 [2013]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d at 620).

Branch of The Astoria Defendants' Motion Regarding Cross Claims

On their motion, the Astoria defendants have moved to dismiss all cross claims brought against them, except for North American's cross-claim for contractual indemnification, which has been addressed in their cross motion and discussed below. However, the Astoria defendants have failed to adequately address any cross claims asserted against them in their motion papers and are not entitled to relief on this branch of their motion (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Allstar's Motion

Allstar has moved for partial summary judgment dismissing the Astoria defendants' first cause of action in their second third-party complaint against Allstar, alleging a claim for contractual indemnification, ESS's cross claim for contractual indemnification, and North American's third-party claim for contractual indemnification. In support of its motion, Allstar has argued that no contract for indemnification exists between it and ESS, North American or the Astoria defendants.

ESS has conceded in its opposition papers that it was not in privity of contract with Allstar and thus, Allstar is entitled to the dismissal of ESS's cross claim for contractual indemnification.

While North American and the Astoria defendants have both opposed Allstar's motion, North American has moved to for summary judgment on its claim for contractual

indemnification against Allstar. The Astoria defendants have conceded that they could not locate proof that Allstar ever entered into an indemnification agreement with it. In opposition and in support of its motion, North American has annexed a copy of a Purchase Order Agreement to its papers as proof that Allstar entered into an indemnification agreement with it. However, the annexed copy of the alleged agreement was undated and unsigned by any party. Allstar has denied receiving this agreement and its employee, Pasquence, had no recollection of ever receiving the additional terms and conditions attached to the purchase order. None of the parties, neither the Astoria defendants, nor North American have annexed proof of delivery of this agreement to Allstar. No proof has accompanied the unsigned agreement to demonstrate that Allstar received the additional terms, including the indemnification agreement, or that Allstar indicated in any other manner that it intended to be bound by such terms in an indemnification agreement with either North American or the Astoria defendants (*see generally Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 133 [2014]). An undated, unsigned copy of an agreement is insufficient proof to demonstrate that an enforceable contract existed and, thus, insufficient to raise a triable issue of fact in opposition to this branch of Allstar's motion or to satisfy North American's prima facie burden on this branch of its motion (*see generally Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [2011]). Therefore, Allstar is entitled to the dismissal of North American's and the Astoria defendants' third-party claims for contractual indemnification.

Branch of North American's and the Astoria Defendants' Cross Motion Regarding Cross Claims and Counterclaims

North American has also moved for summary judgment dismissing all cross claims and counter claims against it and for summary judgment on its cross claims against the Astoria defendants for breach of contract for failure to procure insurance, contractual indemnification and common-law indemnification. The Astoria defendants have moved to dismiss North American's cross claims for contractual indemnification and breach of contract for failure to procure insurance, or to limit damages if those claims are not dismissed. While The Astoria defendants' cross motion is untimely as it has been made beyond the 120-day deadline set forth in CPLR 3212, it is on nearly identical issues already before the court on North American's timely motion, only with regard to North American's cross claims for breach of contract for failure to procure insurance and contractual indemnification, and the court will consider it (*see Ellman v Village of Rhinebeck*, 41 AD3d 635, 636 [2007]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]).

As to North American's cross claim for breach of contract for failure to procure insurance, North American has failed to adequately address that cross claim in its papers.

The Astoria defendants have moved to dismiss this cross claim and have annexed to their papers, copies of the general liability policy they obtained, that was in effect on the date of the accident, a copy of the declaration sheet for insurance coverage of $1 million, and a copy of the endorsement including North American as an additional insured. No triable issue of fact has been raised in opposition. As such, the Astoria defendants are entitled to the dismissal of North American's cross claim against it for breach of contract for failure to procure insurance.

The court will next turn to North American's cross claim for contractual indemnification. This court, in its above determination has concluded that it is unclear from the record before it whether North American or the Astoria defendants were liable in the happening of this accident. Therefore, it is unable to determine, at this juncture, whether North American is entitled to the dismissal of any of the cross claims against it for contractual indemnification, whether the contractual indemnification clause in the contract between North American and the Astoria defendants' making North American liable to the Astoria defendants was triggered in this matter, and it is also unable to make a determination as to whether North American is entitled to contractual indemnification from the Astoria defendants (*see Sheridan v Albion Cent. School Dist.*, 41 AD3d 1277, 1279 [2007]; *Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 705 [2007]). The Astoria defendants have argued that they never intended to indemnify North American's losses because North American breached the contract and any losses arise out of that breach, and that the Operation & Maintenance Agreement, at the very least, limits any indemnification to North American to out-of-pocket losses. It should be noted that there has been no determination regarding whether North American breached the contract in this manner. Therefore, under the circumstances and upon the record before it, this court is unable to make a determination whether North American's liability, if any, is limited.

Additionally, in light of the court's determination and the issues of fact remain as North American's alleged negligence, summary relief on North American's cross claim for common-law indemnification against the Astoria defendants, as well as summary dismissal of any cross claims or counterclaims against North American for common-law indemnification would be premature and impermissible at this juncture (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d at 620).

Accordingly, ESS's motion for summary judgment dismissing plaintiff's complaint, all cross claims and all third-party claims is denied in its entirety. The motion by SCS for summary judgment dismissing plaintiff's complaint and all cross claims is denied in its entirety. The motion by North American for summary judgment dismissing plaintiff's complaint, all co-defendants' cross claims and counter claims, for summary judgment on its cross claims for breach of contract for failure to procure insurance,

contractual indemnification and common-law indemnification against the Astoria defendants, and for summary judgment on its cause of action for common-law indemnification against Allstar is denied in its entirety. Plaintiffs' motions for partial summary judgment on their claims brought under Labor Law §§ 240 and 241 against ESS, SCS, North American and the Astoria defendants, is denied in its entirety. The motion by Allstar for partial summary judgment dismissing the Astoria defendants', ESS's and North American's cross claims for contractual indemnification is granted. The branches of the motion by the Astoria defendants for summary judgment dismissing plaintiffs' causes of action brought under Labor Law§ 200 and common-law negligence and to dismiss North American's cross claim for breach of contract for failure to procure insurance are granted and its motion is denied in all other respects. The branch of the cross motion by the Astoria defendants for summary judgment dismissing North American's cross claim for breach of contract for failure to procure insurance is granted and its cross motion is denied in all other respects.

Dated: December 8, 2014

Howard G. Lane, J.S.C.