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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C. PART 36
Justice

Index Number : 113386/2010
SCEKIC, ZORAN
vs.
SL GREEN REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Memo | No(s). 1, 2
Answering Affidavits — Exhibits | No(s). 3, 4
Replying Affidavits | No(s). 5

Upon the foregoing papers, it is ordered that this motion for summary judgment by third-party defendant FL Mechanical is decided in accordance with the attached memorandum decision.

(consolidated for disposition with motion sequence number 002, 005, 006+007)

FILED
JAN 24 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/21/14

DORIS LING-COHAN, J.S.C.
J.S.C.

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

ZORAN SCEKIC and VESNA SCEKIC,

Plaintiffs,

-against-

SL GREEN REALTY CORP., SITQ SYSTEMS INC., STRUCTURE TONE, INC., SL GREEN SITQ a joint venture and 1515 BROADWAY FEE OWNER LLC,

Defendants.

----------X

STRUCTURE TONE, INC.,

Third-Party Plaintiff,

-against-

REACT INDUSTRIES, INC., FL MECHANICAL LLC, and SCHINDLER ELEVATOR,

Third-Party Defendants.

----------X

STRUCTURE TONE, INC. and SL GREEN REALTY CORP.,

Second Third-Party Plaintiffs,

-against-

FRP SHEET METAL CONTRACTING CORP.,

Second Third-Party Defendant.

----------X

STRUCTURE TONE, INC., SL GREEN REALTY CORP. and 1515 BROADWAY FEE OWNER, LLC,

Third Third-Party Plaintiffs,

-against-

REACT INDUSTRIES, INC., FL MECHANICAL LLC, SCHINDLER ELEVATOR and FRP SHEET METAL CONTRACTING CORP.,

Third Third-Party Defendants.

----------X

JUSTICE DORIS LING-COHAN

Index No. 113386/10

Mot. Seq. Nos. 001, 002, 005, 006 & 007

Third-Party Index No. 590275/11

Second Third-Party Index No. 590815/11

Third Third-Party Index No. 590948/12

DORIS LING-COHAN, J.:

Motion sequence numbers 001, 002, 005, 006 and 007 are consolidated for disposition.

This action arises out of a construction site accident. Plaintiff Zoran Scekic, a steamfitter, was allegedly injured on September 30, 2010 when the ladder he was standing on split in two, causing him to fall 15 feet to the floor. Plaintiff and his wife, Vesna Scekic (together, plaintiffs), subsequently commenced this action seeking recovery for violations of Labor Law §§ 240 (1), 241 (6), 200 and for common-law negligence.

In motion sequence number 001, third-party defendant FL Mechanical LLC (FL Mechanical) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims against it. In motion sequence number 002, third-party defendant Schindler Elevator Corp. (Schindler) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and any and all claims and cross claims against it. In motion sequence number 005, third-party defendant React Industries, Inc. (React) moves, pursuant to CPLR 3211 (a) (1), (7) and 3212, for an order dismissing the third-party complaint and any and all cross claims against it. In motion sequence number 006, second third-party defendant FRP Sheet Metal Contracting Corp. (FRP) moves for an order: (1) pursuant to CPLR 3212, granting summary judgment dismissing the second third-party complaint and all other claims against it; and (2) pursuant to CPLR 3126, dismissing the second third-party complaint due to spoliation of evidence. In motion sequence number 007, defendants/third-party plaintiffs/second third-party plaintiffs SL Green Realty Corp. (SL Green), Structure Tone, Inc. (Structure Tone), and 1515 Broadway Fee Owner LLC (1515 Broadway) (collectively, the Structure Tone defendants) move, pursuant to CPLR 3211 and/or 3212, for an order: (1) granting summary judgment dismissing plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6) claims; and (2) granting them summary judgment on the third-party and second

third-party claims for contractual defense and indemnification and insurance procurement against second third-party defendant FRP, third-party defendant React, and second third-party defendant FL Mechanical.

Plaintiffs has cross-moved for an order: (1) pursuant to CPLR 3212, granting them partial summary judgment on the issue of liability under Labor Law § 240 (1) and setting this case down for an immediate assessment of damages; and (2) pursuant to CPLR 3126, striking Structure Tone's answer for spoliation of critical evidence.

BACKGROUND

The Parties

SL Green and 1515 Broadway are the owners of the premises. Structure Tone was hired as the general contractor on a construction project by Aeropostale, Inc. (Aeropostale), the leaseholder of commercial space in the premises. Structure Tone entered into change orders with FRP and React for certain heating, ventilation, and air conditioning (HVAC) work. It is undisputed that pursuant to an oral "gentleman's agreement" between Structure Tone, FRP, and React, React would actually perform the work called for in FRP's purchase orders. React subsequently subcontracted out a portion of the HVAC work to plaintiff's employer, FL Mechanical. Schindler was an elevator/escalator contractor which owned the subject ladder.

The Accident

Plaintiff testified at his deposition that he was working as a steamfitter for FL Mechanical on the date of his accident (Plaintiff EBT Transcript, at 27). According to plaintiff, FL Mechanical provided all of his tools and equipment except for hand tools (*id.* at 34). While he was looking through blueprints, a supervisor named Mike from Structure Tone called him and told him that a pipe needed to be raised that was too low (*id.* at 45-46). Plaintiff testified that the pipe needed to be raised because the contractors could not put the ceiling below that pipe (*id.* at 47). Plaintiff told Mike that he needed a ladder to reach that 15-foot height because FL

Mechanical had already sent back its ladder that would have been tall enough to reach that area a week or two earlier (*id.* at 47, 141). Mike then pointed to a ladder and told plaintiff to "use that ladder" (*id.* at 48). The ladder, which plaintiff described as an extension ladder, was located about 30 or 40 feet away (*id.* at 48, 49).

Plaintiff further testified that while he was on the ladder and tightening bolts, "the ladder broke up somehow," and "just split, you know, in two pieces," causing him to fall (*id.* at 52, 55, 59). Plaintiff was not wearing a harness at the time of his accident (*id.* at 59). Plaintiff testified that he only received instructions from Mike and his boss Silvio as to what to do on the job (*id.* at 128).

In an affidavit, Ellington Henry, plaintiff's partner, avers that, at about 8:00 A.M. on the date of the accident, Structure Tone's superintendent, Mike Sansone, asked him and plaintiff to adjust the height of a pipe in the ceiling on the first floor because it was interfering with ceiling installation (Levien Affirm. in Support, Exh. 22 [Henry Aff., ¶ 3]). Plaintiff informed Sansone that FL Mechanical no longer had ladders tall enough to reach the pipe or a manlift on the site (*id.*). Sansone pointed to an extension ladder and instructed them to use the ladder to do the work (*id.*). Henry also states that plaintiff set up the ladder, locked the ladder, and tested the ladder (*id.*, ¶ 4). According to Henry, the ladder had rubber feet so he did not have to hold the ladder (*id.*). Henry heard a loud crash and saw that the ladder had split in two pieces, and saw plaintiff fall 15 feet to the concrete floor, landing on his left side (*id.*).

Paul Keosayian testified at his deposition that he was Structure Tone's project manager at the premises on the date of the accident (Keosayian EBT Transcript, at 9-11). According to Keosayian, Structure Tone had been hired by Aeropostale to serve as a general contractor on a "retail fit-out" project (*id.* at 11, 12). Structure Tone's duties on the project entailed hiring and coordinating all the subcontractors, including mechanical, plumbing, and painting subcontractors (*id.* at 15, 16). Keosayian testified that FRP was hired by Structure Tone to complete all of the

mechanical systems for the build-out, including the installation of the duct work, necessary piping, and air conditioning and heating units for the space (*id.* at 30-31). Keosayian testified, however, that React was actually to serve as the mechanical subcontractor on the job (*id.* at 50). Structure Tone did not directly hire React because of an "existing problem with the building" (*id.*). According to Keosayian, React had a mechanic's lien on the building, so React had to enter into some arrangement with FRP (*id.*, at 50-51). "Structure Tone hired FRP and in turn [FRP] worked with React" (*id.* at 51). Keosayian testified that the ladder involved in plaintiff's accident was a fiberglass extension ladder used by Schindler, the escalator/elevator company hired by Aeropostale (*id.* at 38-39). Keosayian learned later that the ladder was destroyed after the accident, but he did not know who destroyed it (*id.* at 41, 54-55).

Michael Sansone testified that he was Structure Tone's project superintendent on the project (Sansone EBT, at 13). Sansone testified that Structure Tone coordinated all of the trades, scheduled specific trades to be in certain locations at specific times, and controlled manpower on the job (*id.* at 42-43). According to Sansone, he told subcontractors' employees to perform specific tasks, but did not tell them how to perform any of their work (*id.* at 72). Structure Tone did not provide any ladders or manlifts because they were provided by each trade (*id.* at 22). Sansone testified that, on the date of the accident, he asked plaintiff to raise the pipe so that the ceiling could be completed (*id.* at 25). Sansone stated that plaintiff did not ask him about which equipment to use (*id.* at 28). Sansone testified that the ladder belonged to Schindler because Schindler was the only contractor that was allowed to have an extension ladder on the premises (*id.* at 28). After Sansone told plaintiff to raise the pipe, he went upstairs and a few minutes later learned that plaintiff was involved in an accident (*id.* at 23-26). Sansone went downstairs and saw plaintiff lying on the floor with a fiberglass extension ladder split in two lying next to him (*id.* at 24, 36). Sansone stated that he heard that Schindler cut up the ladder and that "once an accident occurs with a ladder, it's common practice by an elevator erector to dispose of that

ladder, whether it's a superstition, but they will never use that ladder again" (*id.* at 39, 40).

Thomas Lupo testified that he was React's project manager on the job (Lupo EBT, at 15). React was hired by FRP (*id.*). React subcontracted out the HVAC work to FL Mechanical (*id.* at 16-18). Lupo visited the site three times a week to attend job site meetings, coordinated the HVAC work, and performed walkthroughs (*id.* at 21-22). Lupo had the authority to stop unsafe work (*id.* at 26). React did not provide any ladder, scaffolds or manlifts (*id.* at 22). Lupo testified that plaintiff was using Schindler's ladder when he was injured (*id.* at 29).

Jeffrey Thompson testified that he was the vice president of FRP, which is in the business of duct fabrication and installation (Thompson EBT, at 9). According to Thompson, FRP was hired by Structure Tone pursuant to two separate purchase orders to perform ductwork and mechanical work on the project (*id.* at 13, 14-15). Thompson testified that, although FRP was directly hired by Structure Tone, the mechanical work was actually performed by React pursuant to an oral "gentleman's agreement" (*id.* at 16, 17).

Silvije Ramljak testified that he was the owner of FL Mechanical, a company which installs air conditioning and heating units (Ramljak EBT, at 7). FL Mechanical was hired to work on the project pursuant to a contract with React (*id.* at 9). FL Mechanical had its own equipment, including power tools and ladders, on the site (*id.* at 15). Ramljak testified that he had instructed plaintiff to "finish all the work in the basement and clean up the job" (*id.* at 17). Ramljak was informed of plaintiff's accident by telephone (*id.* at 22). He observed that the ladder, which was broken in half, had the words "Schindler" written on it (*id.* at 24).

Frank Oliveri testified that he was employed by Schindler as a construction mechanic (Oliveri EBT, at 7). On the date of the accident, Oliveri was working at the premises installing an elevator (*id.*). Oliveri testified that he brought his own equipment to the job site, which

included gang boxes, one ladder, and a scaffold (*id.* at 11). He testified that he kept his equipment in front of the elevator that he was working on when he was at the job site (*id.* at 22). Oliveri described the ladder as an extension ladder with the name "Schindler" on it (*id.* at 20-21).

PROCEDURAL HISTORY

On October 8, 2010, plaintiffs commenced this action against SL Green, SITQ Systems, Inc., Structure Tone, and SL Green/SITQ, a joint venture, seeking recovery for violations of Labor Law §§ 240, 241 (6), 200 and for common-law negligence. In addition, plaintiff Vesna Scekic asserts a derivative cause of action for loss of services. On November 4, 2010, plaintiffs served an amended verified complaint. On July 25, 2011, plaintiffs served a second amended complaint naming 1515 Broadway as an additional defendant.

On March 19, 2011, Structure Tone commenced a third-party action against React, FL Mechanical, and Schindler, seeking: (1) contribution; (2) contractual indemnification; (3) damages for failure to procure insurance; and (4) attorney's fees.

In their answer to the amended verified complaint, SL Green and SITQ Placements Inc., incorrectly sued as SITQ Systems Inc. and SL Green/SITQ, a joint venture, asserted a cross claim against Structure Tone for common-law indemnification and/or contribution.

In its answer to the third-party complaint, FL Mechanical asserted cross claims against SL Green, SITQ Placements, React, and Schindler for: (1) contribution, (2) common-law indemnification, and (3) contractual indemnification. Additionally, FL Mechanical brought a counterclaim against Structure Tone for contribution and common-law indemnification.

In its answer to the verified third-party complaint, React asserted cross claims against FL Mechanical and Schindler for: (1) contribution; (2) common-law indemnification; (3) contractual

indemnification; and (4) breach of contract for failure to procure insurance.

Schindler asserted, in its answer to the third-party complaint, a cross claim against React and FL Mechanical for indemnification and contribution.

On or about July 2011, the court so-ordered a stipulation of discontinuance as to plaintiffs' claims and the cross claims against SITQ Placements, incorrectly sued as SITQ Systems Inc., SITQ Systems Inc., and SL Green/SITQ, a joint venture. On September 14, 2011, Structure Tone, and SL Green Realty commenced a second third-party action against FRP for: (1) contribution; (2) common-law indemnification; (3) contractual indemnification; and (4) damages for failure to procure insurance. On December 5, 2011, FRP served its answer to the second third-party complaint, asserting cross claims against all named defendants and third-party defendants. The note of issue and certificate of readiness were filed on or about July 16, 2012. On December 3, 2012, SL Green, Structure Tone, and 1515 Broadway commenced a third third-party action against React, FL Mechanical, Schindler, and FRP, asserting the following claims: (1) contribution/common-law negligence; (2) contractual defense and indemnification; (3) attorney's fees; and (4) breach of contract for failure to procure insurance.

DISCUSSION

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has made a prima facie showing, the burden shifts to the opposing party 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]). The court's function on summary judgment is "issue-finding rather than issue-determination" (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Plaintiffs' Claims

1. Labor Law § 240 (1)

Plaintiffs move for partial summary judgment on the issue of liability under Labor Law § 240 (1). According to plaintiffs, plaintiff is entitled to judgment because he was injured while standing on a ladder which split in two, causing him to fall 15 feet to the concrete floor.

In opposition, the Structure Tone defendants contend that: (1) plaintiffs have failed to set forth a prima facie case because plaintiff clearly testified that he did not know how his accident happened; (2) plaintiffs have failed to submit an expert affidavit as to the adequacy of the safety devices; (3) Structure Tone did not control plaintiff's work; and (4) plaintiff was the sole proximate cause of his accident because he could have used FL Mechanical's 14-foot ladder for his work, set up the ladder himself, and did not have his partner hold the ladder. React also maintains that there is an issue of fact as to whether plaintiff was the sole proximate cause of his injuries, since he should have used FL Mechanical's 14-foot ladder.

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

> "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*" (emphases added).

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison*

Co., 78 NY2d 509, 513 [1991]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). The duty imposed is "nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The purpose of the statute is to "protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054[1985] [internal quotation marks and citations omitted]).

The statute requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to construction workers (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "In cases involving ladders or scaffold that collapse or malfunction for no apparent reason," there is a presumption that the ladder or scaffolding device was "not good enough to afford proper protection" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). "'It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent'" (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334 [1st Dept 2008], *appeal dismissed* 71 AD3d 511 [1st Dept 2010], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show that the ladder was somehow defective (*Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013]).

As a preliminary matter, the court notes that it is undisputed that SL Green and 1515 Broadway are the owners of the premises. There is also no dispute that Aeropostale hired

Structure Tone to serve as the general contractor on the project (Levien Affirm. in Support, Exh. 25).

Here, plaintiff testified that, while he was standing on the ladder and tightening screws, the ladder "broke up somehow," "just split, you know, in two pieces," and "f[e]ll apart in two pieces," causing him to fall 15 feet to the concrete floor below (Plaintiff EBT, at 52, 55). Thus, plaintiff has demonstrated prima facie entitlement to judgment under the statute (*see Weber v Baccarat, Inc.*, 70 AD3d 487, 487-488 [1st Dept 2010] [worker's testimony that the ladder on which he was standing broke established prima facie violation of Labor Law § 240 (1) and that the violation was a proximate cause of plaintiff's injuries]; *Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 415 [1st Dept 2009], *affd* 14 NY3d 751 [2010] ["Plaintiff made a prima facie showing of proximate cause under section 240 (1) with his unrefuted testimony that the ladder collapsed beneath him causing him to fall"]).

The Structure Tone defendants' contention that Structure Tone is not a covered entity under Labor Law § 240 (1), because Structure Tone did not control plaintiff's work, is without merit. As previously noted, it is well settled that a "contractor who breaches [the nondelegable duty under Labor Law § 240 (1)] may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, 81 NY2d at 500).

The court also rejects the Structure Tone defendants' contention that plaintiff has failed to set forth a prima facie case, since he clearly testified that he did not know how his accident happened. Although plaintiff testified that he did not know how or why the ladder broke apart (Plaintiff EBT, at 52, 55), "[a] lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause" (*Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]).

The Structure Tone defendants also contend that plaintiffs' motion should be denied, given that plaintiff did not submit an expert affidavit indicating that the safety devices provided were inadequate or that there were more appropriate devices that were not made available to him. This argument is unpersuasive. An expert may not testify as to the meaning and applicability of a statute imposing a standard of care (*Rodriguez v New York City Hous. Auth.*, 209 AD2d 260, 260-261 [1st Dept 1994]).

In addition, the Structure Tone defendants and React argue that plaintiff was the sole proximate cause of his injuries, in view of the following: (1) plaintiff could have used FL Mechanical's 14-foot ladder for his work; (2) FL Mechanical also had a manlift and a scaffold that could have been brought to the site; and (3) plaintiff set up the ladder himself.

> "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury"

(*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). "The burden of providing a safety device is squarely on contractors and owners and their agents" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]).

Here, although the Structure Tone defendants and React maintain that plaintiff should have used a 14-foot ladder, manlift or scaffold for his work, there is no evidence that he knew that he was expected to use these safety devices for his work or that he chose not to use them for no good reason. FL Mechanical's owner, Silvije Ramljak, testified that FL Mechanical had a 14-foot ladder on site at the time of the accident (Ramljak EBT, at 19, 29). However, plaintiff testified that he told Structure Tone's superintendent that FL Mechanical did not have a tall enough ladder to reach the pipe in the ceiling on the date of his accident (Plaintiff EBT, at 47).

Plaintiff further testified that FL Mechanical had six-foot or eight-foot ladders on the site, and that FL Mechanical had already finished the work that required the use of the taller ladders (*id.* at 128-129, 141). Thus, plaintiff was not the sole proximate cause of his accident (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012] [plaintiff was not the sole proximate cause of his injuries, where there was no evidence that plaintiff was expected or instructed to use other ladders and for no good reason chose not to do so]; *Ervin v Consolidated Edison of N.Y.*, 93 AD3d 485, 485-486 [1st Dept 2012] [plaintiff was not the sole proximate cause of his accident where the defendants failed to submit any evidence showing that he knew or should have known that he was expected to employ some other device]). In addition, the Structure Tone defendants' argument that plaintiff was the sole cause of his accident because he set up the ladder himself ignores the evidence that the ladder collapsed and that no other safety devices were provided to plaintiff (*see Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 474 [1st Dept 2007]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004]).

The cases relied upon the Structure Tone defendants and React do not require a different result. In *Blake* (1 NY3d at 291), the Court of Appeals held that the plaintiff was the sole proximate cause of his injuries when he neglected to lock extension clips in place on an extension ladder. In *Montgomery v Federal Express Corp.* (4 NY3d 805, 806 [2005]), the plaintiff was found to be the sole proximate cause of his injuries when he used a bucket instead of a ladder to gain access to a motor room. In *Robinson v East Med. Ctr., LP* (6 NY3d 550, 555 [2006]), the plaintiff was also the sole proximate cause of his injuries; he was injured when he used a six-foot ladder for a job that he knew required an eight-foot ladder, and was aware that there were eight-foot ladders available at the job site. Here, however, there is no evidence that plaintiff misused an adequate safety device or failed to use an adequate ladder to perform his

work.

Accordingly, plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted as against SL Green and 1515 Broadway, the owners, and Structure Tone, the general contractor on the site.

2. Labor Law § 241 (6)

Plaintiffs withdrew their Labor Law § 241 (6) claim in opposition to the Structure Tone defendants' motion (Levien Affirm. in Opposition, at 2). Therefore, the court need not address this claim.

3. Labor Law § 200 and Common-Law Negligence

The Structure Tone defendants move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims, arguing that they did not exercise the necessary level of control over plaintiff's work to impose liability on them.

In opposition, plaintiffs contend that there are issues of fact which preclude summary judgment on these claims; this court agrees. Specifically, plaintiffs maintain that Structure Tone's superintendent directed plaintiff to meet him on the first floor and climb a specific ladder to raise a pipe in the ceiling so that the ceiling contractor could install the ceiling tiles. In addition, plaintiffs contend that the superintendent had, at the very least, constructive notice of the condition of the ladder by failing to inspect the ladder before directing plaintiff to use the ladder.

It is well settled that Labor Law § 200 is a codification of an owner's and general contractor's duty to provide employees with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). The duty is twofold: to make and keep the place of work safe (*Zucchelli v City Constr. Co.*, 4 NY2d 52, 56 [1958]). Generally, Labor Law

§ 200 claims fall into two categories: (1) those arising from defective or dangerous premises conditions, and (2) those arising from the manner in which the work is performed (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where a premises condition is at issue, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). Similarly, a general contractor may be held liable under section 200 and the common law if it had "control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury" (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

In contrast, where the worker is injured as the result of the manner in which the work is performed, including dangerous or defective equipment, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *see also Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013]; *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

Here, plaintiff's accident arose out of the means and methods of his work, not a dangerous condition on the premises (*cf. Cruz v Kowal Indus.*, 267 AD2d 271, 272 [2d Dept 1999] [owner's fault could be predicated upon actual or constructive notice of a defective ladder present on the site]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999] [issue of fact as to whether owners were liable for breach of common-law and statutory duties to keep

premises reasonably safe; "(a)s it was reasonably foreseeable that a worker might use the defective ladder and sustain injury, its presence in the building clearly constituted a dangerous condition"]). There is no dispute that the ladder was owned by Schindler, not SL Green or 1515 Broadway (Keosayian EBT, at 38-39; Sansone EBT, at 28, 38; Lupo EBT, at 29; Ramljak EBT, at 24; Oliveri EBT, at 20).

Plaintiff testified that Mike from Structure Tone told him what needed to be done on the job, but, generally, not how to do it (Plaintiff EBT, at 29-30). Plaintiff's boss, Silvio, came in every two or three days and gave him instructions as to what to do (*id.* at 30). According to plaintiff, on the date of the accident, however, Structure Tone's superintendent told him that a pipe needed to be raised (*id.* at 47). When plaintiff told the superintendent that he did not have a tall enough ladder to perform the work, the superintendent said to plaintiff to "use that ladder" (*id.* at 48). Paul Keosayian, Structure Tone's project manager, testified that he coordinated the work of the trades (Keosayian EBT, at 16). In addition, Michael Sansone, Structure Tone's superintendent, testified that his job duties included coordination of all the trades, scheduling specific trades to be in certain locations at specific times, and controlling manpower on the job (Sansone EBT, at 42-43). Sansone also told employees to perform specific tasks on a daily basis (*id.* at 72).

While there is evidence that, generally, Structure Tone's superintendent gave instructions as to what jobs needed to be done, and not how to do a specific job, there is conflicting testimony as to what transpired on the day of plaintiff's accident, which raises factual issues as to plaintiff's Labor Law § 200 and common-law negligence claims. Specifically, as stated above, plaintiff and his partner Henry both testified that Structure Tone's superintendent Michael Sasone instructed plaintiff to use the ladder involved in plaintiff's accident. (Plaintiff EBT Transcript, at 47;

Levien Affirmation in Support, Exhibit 22, Henry Affidavit, ¶3]. Structure Tone's superintendent denies that he instructed plaintiff to use such ladder. (Sansone EBT Transcript, at 28). Therefore, that portion of the Structure Tone defendants' motion which seeks summary judgment of dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is denied.

4. Spoliation Sanctions

Plaintiffs move to strike Structure Tone's answer based upon spoliation of evidence. In support, plaintiffs contend that Structure Tone's superintendent, Michael Sansone, observed plaintiff and the ladder lying on the ground in two pieces after the accident, but did nothing to preserve the ladder. Plaintiffs maintain that Sansone was on notice that plaintiff would commence a lawsuit as a direct result of the accident.

In opposition, the Structure Tone defendants contend that Structure Tone did not destroy the ladder; rather, Schindler destroyed the ladder on the date of the accident. The Structure Tone defendants argue that plaintiff never demanded production of the ladder, and that there is no need to preserve the ladder for a Labor Law § 240 (1) claim. In any event, the Structure Tone defendants contend that they produced copies of photographs of the ladder that were identified at the depositions (Levien Affirm. in Support, Exh. 20).

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). In determining the sanction to be imposed on a spoliator, the court must examine the extent that the non-spoliating party is prejudiced by the destruction of the evidence and whether dismissal is warranted as "a matter of elementary fairness" (*id.* at 175 [internal

quotation marks and citation omitted]). Striking a pleading is warranted only where the loss of the evidence leaves the affected party without the means to prosecute or defend the action (*see Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [1st Dept 2002]). However, where there is independent evidence that permits a party to adequately prepare its case, a less drastic sanction is appropriate (*see e.g. Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 333-334 [2d Dept 2004] [negative inference charge for destruction of truck and propane tanks]).

Here, plaintiffs' request to strike Structure Tone's answer is denied. It is undisputed that the ladder was destroyed after the accident. However, plaintiffs have not shown that Structure Tone destroyed the ladder. Structure Tone's project superintendent, Michael Sansone, testified that Structure Tone did not destroy the ladder, and that he heard that Schindler destroyed the ladder based upon superstition in the trade (Sansone EBT, at 38-40). In any case, plaintiffs have not demonstrated that they are without the means to prosecute any of their claims based upon the loss of this evidence.

Barber v Kennedy Gen. Contrs. (302 AD2d 718 [2d Dept 2003]) is instructive. In *Barber*, the plaintiff allegedly fell three-and-a-half feet from a dilapidated stepladder (*id.*). The plaintiff moved for partial summary judgment on the issue of liability under Labor Law § 240 (1), and the project's general contractor moved for summary judgment on the ground of spoliation (*id.* at 719). The Court held that the trial court did not abuse its discretion in denying the general contractor's motion, noting that, although the worker's supervisor disposed of the stepladder at the request of the worker immediately after the worker fell from it, there was no evidence that the worker made that request for any reason other than to assure that no one else would be injured by it, or that he ignored anyone's advice to retain the ladder (*id.* at 720).

Although plaintiffs rely on *Baglio v St. John's Queens Hosp.* (303 AD2d 341 [2d Dept

2003]) and *Cummings v Central Tractor Farm & Country* (281 AD2d 792 [3d Dept 2001], *lv dismissed* 96 NY2d 896 [2001]), these cases are distinguishable because the loss of evidence in those cases fatally compromised the plaintiffs' ability to prosecute their claims. In *Baglio*, the Court held that a hospital's loss of fetal monitoring strips warranted striking its answer in a medical malpractice action, where the fetal monitoring strips were the most critical evidence to determine fetal well-being at the time of treatment, and would give fairly conclusive evidence as to the presence or absence of fetal distress (*Baglio*, 303 AD2d at 342-343). In *Cummings*, a personal injury action arising from the plaintiff's fall from a chair in a store, the Third Department held that the store's negligent destruction of the chair required the ultimate sanction of striking the store's pleadings where access to the chair was essential to establish the cause of the failure and the culpable party (*Cummings*, 281 AD2d at 791-792).

B. FRP

1. Common-Law Indemnification and Contribution

FRP argues that it is entitled to dismissal of Structure Tone and SL Green's claims for contribution and common-law indemnification because it was not negligent as a matter of law. FRP contends that: (1) although Structure Tone issued a purchase order to FRP, it was understood and agreed by Structure Tone, FRP, and React that React would actually perform the work called for in FRP's purchase order; (2) it merely acted as a conduit for payment from Structure Tone to React; (3) it had no involvement with plaintiff's work at the time of the accident; (4) it had no input into the means and methods used by plaintiff; (5) it had no involvement in the selection of the ladder that plaintiff was using at the time of the accident; and (6) it did not own or provide the ladder plaintiff was using and which broke.

In opposition, the Structure Tone defendants argue that FRP failed to establish its

freedom from negligence. The Structure Tone defendants contend that FRP failed to provide plaintiff with the necessary equipment for him to perform his work, i.e., a manlift, scaffold or ladder of appropriate height.

Common-law indemnification is predicated on "vicarious liability without actual fault" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006] [internal quotation marks and citation omitted]). "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]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them . . . ." "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Here, there is no evidence that FRP was negligent or supervised, directed or controlled plaintiff's work. Jeffrey Thompson, FRP's vice president, testified that, although FRP was

directly hired by Structure Tone, the mechanical work was performed by React pursuant to the oral "gentleman's agreement" (Thompson EBT, at 16, 17, 40-41). Paul Keosayian, Structure Tone's project manager, also testified that React served as the mechanical subcontractor on the project (Keosayian EBT, at 50). Although plaintiffs contend that FRP failed to provide necessary equipment for his job, the record indicates that FL Mechanical was responsible for providing all tools and ladders on the site (Plaintiff EBT, at 34). Accordingly, the common-law indemnification and contribution claims against FRP are dismissed (*see Linares v United Mgt. Corp.*, 16 AD3d 382, 385 [2d Dept 2005] [common-law indemnification and contribution claims were dismissed where seller demonstrated that it merely hired plaintiff's employer, provided no instructions to plaintiff as to how to perform work, exercised no supervision or control over the work, and provided no materials or tools]).

2. Contractual Defense and Indemnification

The Structure Tone defendants move for contractual defense and indemnification from FRP pursuant to paragraph 11.2 of the terms and conditions of the purchase order between Structure Tone and FRP. FRP also moves for dismissal of Structure Tone and SL Green's contractual indemnification claims against it.

The terms and conditions attached to FRP's purchase order provide as follows:

> "11.1 The insurance and indemnification provisions are set forth in the separate Blanket Insurance/Indemnity Agreement signed by Subcontractor, the terms of which are incorporated herein. In the absence of said Agreement, the following indemnification and insurance provisions shall apply.
>
> "11.2 *To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc. ("STI") and Owner*, their officers, directors, agents and employees *from and against any and all claims*, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, *arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor*, its officers, directors, agents, employees *and subcontractors, in connection with the performance of any work by Subcontractor pursuant to this Purchase Order and/or*

> *a related Proceed Order*. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against STI and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(Joyce Affirm. in Support, Exh. J [emphasis added]).

The Structure Tone defendants argue that FRP agreed to defend and indemnify them for any accidents involving its subcontractors. In addition, the Structure Tone defendants maintain that FRP acted in a manner indicating its intent to be bound by the terms of the purchase order by procuring insurance mandated by the documents. As support, the Structure Tone defendants point out that a certificate of insurance names them as additional insureds (Joyce Affirm. in Support, Exh. K). The Structure Tone defendants further contend that they are entitled to, at a minimum, partial indemnification, if not total indemnification, due to FRP's actions and inactions at the job site.

In opposition, and in support of its own motion, FRP argues that SL Green is not entitled to contractual defense and indemnification from FRP because, unlike Structure Tone, it is not identified in the purchase orders. In addition, FRP contends that plaintiff's accident did not arise out of work performed by FRP, but rather, arose out of work that was being performed by plaintiff, an FL Mechanical employee, and Structure Tone, who instructed plaintiff to perform the work, directed the manner plaintiff was to perform his work, and directed plaintiff to use the defective ladder.

"'The right to contractual indemnification depends upon the specific language of the contract'" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the

proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

As indicated above, the purchase order requires FRP to indemnify "Structure Tone, Inc. ("STI") and Owner . . . from and against any and all claims . . . arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor . . . and subcontractors, in connection with the performance of any work by Subcontractor pursuant to this Purchase Order and/or a related Purchase Order" (Joyce Affirm. in Support, Exh. J, ¶ 11.2). Here, as indicated above, there are factual issues as to whether the Structure Tone defendants were negligent in causing plaintiff's accident, since there is conflicting testimony as to whether Structure Tone's superintendent directed plaintiff to use the ladder which was the cause of plaintiff's accident. Thus, as the Structure Tone defendants have failed to establish as a matter of law that they were free from negligence, their motion for summary judgment on their contractual indemnification claim against FRP is denied; as such, FRP's motion to dismiss the Structure Tone defendants' contractual indemnification claims is also denied.

3. Failure to Procure Insurance

The Structure Tone defendants move for summary judgment on their failure to procure insurance claims against FRP. FRP also moves for summary judgment in its favor on these claims. In opposition to FRP's motion, the Structure Tone defendants concede that FRP "purchased the required insurance naming SL Green, 1515 Broadway and Structure Tone as additional insureds indicating their acknowledgment of the terms of the purchase order" (Joyce Affirm. in Opposition, ¶ 21 [emphasis added]). Therefore, the breach of contract claims against FRP are dismissed.

4. Spoliation Sanctions

FRP also moves for dismissal of the second third-party complaint, arguing that Structure Tone destroyed evidence crucial to its defense. FRP has failed to demonstrate that Structure Tone destroyed the ladder, or that it is prejudicially bereft of the means of defending the third-party claims (*see Kirkland*, 236 AD2d at 175). As indicated above, Structure Tone's superintendent testified that Structure Tone did not destroy the ladder, and that he heard through word of mouth that Schindler cut up the ladder based upon superstition in the trade (Sansone EBT, at 39-40).

C. React

1. Common-Law Indemnification and Contribution

React moves for summary judgment dismissing the common-law indemnification and contribution claims against it. React maintains that it was not negligent as a matter of law because: (1) it did not provide any labor or equipment on the site; (2) it only acted as a broker; (3) it did not instruct plaintiff to use Schindler's ladder to raise the pipe; and (4) it only periodically inspected the progress of the work being done by FL Mechanical and coordinated issues with Structure Tone and the other subcontractors.

In response, the Structure Tone defendants contend that there are material issues of fact as to React's negligence on the job site. Specifically, the Structure Tone defendants argue that React acted as the de facto HVAC contractor on the job, and that React's failure to supervise the work of FL Mechanical led to its removal of necessary safety equipment for plaintiff's work.

FRP also opposes React's motion, arguing that plaintiff's accident clearly arose out of the work it was subcontracted to do, pursuant to the purchase order with Structure Tone.

As previously indicated, common-law indemnification requires: "(1) that the [indemnitee] 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*, 94 AD3d at 10). Contribution lies where the contributing party "had a part in causing or augmenting the injury for which contribution is sought" (*Raquet*, 90 NY2d at 183 [internal quotation marks and citation omitted]).

In this case, there is no evidence that React was negligent or exercised actual supervision or control over plaintiff's work. Thomas Lupo, React's project manager, testified that React subcontracted out the HVAC work to FL Mechanical (Lupo EBT, at 16-18). He visited the site three times a week to attend job site meetings, coordinated the HVAC work, and performed walkthroughs (*id.* at 21-22, 25-26). Lupo testified that he had the authority to stop unsafe work (*id.* at 26). However, React did not provide any equipment and there is no evidence of any negligence by React (*id.* at 22). Therefore, the common-law indemnification and contribution claims against React are dismissed.

2. Contractual Defense and Indemnification

The Structure Tone defendants move for contractual defense and indemnification over and against React pursuant to the blanket insurance/indemnity agreement dated February 8, 2010 between Structure Tone and React, which provides as follows:

> "1. In order to comply with our insurance coverage, we require you as one of our Subcontractors to sign a copy of this Blanket Insurance/Indemnity Agreement which will apply to all *work performed by you for Structure Tone, Inc., and/or its subsidiaries and other related entities*.
>
> "2. All Purchase Orders and Proceed Orders, etc., hereafter issued to you shall be deemed to include the provisions set forth below.
>
> ***
>
> "6. *To the fullest extent permitted by law*, and except to the extent of Structure Tone, Inc. and owner's negligence, *Subcontractor agrees to hold Structure Tone, Inc. and owner*, its trustees, officers, members, directors, agents, affiliates, and employees, *harmless against any claims*, suits, liens,

> judgments, damages, losses, liability, expenses, or costs including but not limited to all reasonable legal fees, defense costs, court costs, and the costs of all appellate proceedings incurred because of the injury to or death of any person, or on account of damage to property, including loss of use thereof and all consequential and non-consequential damages, or any other claim *arising out of or in connection with or as a consequence of the performance of the work under this agreement, the rental of any equipment, the acts, omissions, or breaches of this agreement, or default as to this agreement by the Subcontractor or any of Subcontractor's officers, directors, employees, agents, subcontractors, sub-subcontractors, lower tiered contractors, suppliers, or anyone directly or indirectly employed by or on behalf of the Subcontractor or any entity for whom the Subcontractor may be liable as it relates to the scope of this agreement.* Subcontractor will defend and bear all costs of defending any actions or proceedings brought against Structure Tone, Inc. or owner, their officers, trustees, directors, members, agents, affiliates, and employees arising in whole or in part out of any such acts, omissions, breaches or defaults. This indemnification agreement contemplates that Structure Tone, Inc. and owner are entitled to full indemnification from the Subcontractor to the fullest extent permitted by law"

(Joyce Affirm. in Support, Exh. E [emphases supplied]).

React also moves for dismissal of the contractual indemnification claims against it, arguing that the purchase order was cancelled and abandoned,[1] and that none of the other third-party defendants have an agreement requiring React to indemnify them. Additionally, React contends, in opposition to the Structure Tone defendants' motion, that the blanket

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[1]The purchase order between Structure Tone and React also contains the same indemnification provision as in the purchase order with FRP, which states in paragraph 11.2 that:

"*To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless Structure Tone, Inc. ("STI") and Owner*, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, *arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor*, its officers, directors, agents, employees and Subcontractors, *in connection with the performance of any work by Subcontractor pursuant to this Purchase Order and/or a related Proceed Order*, Subcontractor will defend and bear all costs of defending any actions or proceedings brought against STI and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(Joyce Affirm. in Support, Exh. D [emphases added]).

insurance/indemnity agreement does not apply because it expressly states that it applies to "work by you for Structure Tone, Inc. and/or its subsidiaries and other related entities" (*id.*).

React has failed to establish that the purchase order was abandoned as a matter of law, such that the indemnification provision in the purchase order does not apply. Generally, abandonment of a contract need not be express, but may be inferred from the conduct of the parties and the attendant circumstances (*Savitsky v Sukenik*, 240 AD2d 557, 559 [2d Dept 1997]). "To establish abandonment of a contract by conduct, it must be shown that the conduct is mutual, positive, unequivocal, and inconsistent with the intent to be bound" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 49 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 3 NY3d 607 [2004] [internal quotation marks and citation omitted]). The party asserting abandonment has the burden of establishing it since termination of a contract is not presumed (*Rosiny v Schmidt*, 185 AD2d 727, 732 [1st Dept 1992], *lv denied* 80 NY2d 762 [1992]). Whether both parties consented to abandon a contract is generally a question of fact to be resolved at trial (*Matter of Rothko*, 43 NY2d 305, 324 [1977]).

Here, Thomas Lupo, React's vice president, testified that React was working with FRP because React held a mechanic's lien on the building (Lupo EBT, 15-20). Structure Tone's project superintendent, Paul Keosayian, testified that React was subcontracted by FRP, and that it was not hired directly by Structure Tone because React had a lien on the building (Keosayian EBT, at 50-51). In addition, Jeffrey Thompson, FRP's vice president, testified that there was an oral gentleman's agreement between FRP and React to perform the mechanical work (Thompson EBT, at 16-17). According to Thompson, React needed to close the job using FRP as an intermediary because React had a lien on the building (*id.*). React asserts that Structure Tone entered into a subsequent purchase order with FRP, for the same work as in its purchase order.

However, Structure Tone's change orders reflect different scopes of work and contract amounts: FRP's change order indicates that it is for "overtime for sheetmetal sketching" in an amount of $4,800 (Joyce Affirm. in Support, Exh. J), while React's change order states that it is for "F/I temperature sensors at VAV box locations on the 1st and 2nd floors per engineers response to RFI # 23, item # 3" in an amount of $11,900 (Foglietta Affirm. in Support, Exh. N). In light of this evidence, there are issues of fact as to whether React's purchase order was abandoned.

However, the Structure Tone defendants are not entitled to contractual indemnification from React, pursuant to the blanket insurance/indemnity agreement. As noted above, the blanket insurance/indemnity agreement expressly states that it applies to "work performed by [React] for Structure Tone, Inc. and/or its subsidiaries and other related entities" (Joyce Affirm. in Support, Exh. E). It is undisputed that React was FRP's subcontractor (Lupo EBT, at 15-17; Keosayian EBT, at 50-51; Thompson EBT, at 16-17).

Finally, the Structure Tone defendants also argue that they are third-party beneficiaries of the oral agreement between FRP and React. A party asserting rights as a third-party beneficiary must establish: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). A party claiming to be a third-party beneficiary "has the burden of demonstrating an enforceable right" (*Alicea v City of New York*, 145 AD2d 315, 317 [1st Dept 1988]). Here, the Structure Tone defendants have not pointed to any evidence that the agreement between FRP and React was intended for its benefit such that they could enforce an indemnification obligation owed by React. Thus, the Structure Tone defendants are not entitled

to contractual indemnification from React based on a third-party beneficiary theory, as a matter of law.

3. Failure to Procure Insurance

React also moves for dismissal of the failure to procure insurance claims against it, asserting that the the purchase order was cancelled, and in any event, that it purchased an insurance policy with a blanket additional insured endorsement covering Structure Tone. As previously noted, React has failed to establish that its purchase order was abandoned as a matter of law.

Moreover, although it is well settled that an additional insured is an "entity enjoying the same protection as the named insured" (*Del Bello v General Acc. Ins. Co. of Am.*, 185 AD2d 691, 692 [4th Dept 1992] [internal quotation marks and citation omitted]), React has failed to establish that it procured the insurance required by the purchase order. Paragraph 11.3 of React's purchase order states that "Subcontractor shall obtain Workers Compensation as required by law; Comprehensive General Liability Insurance (including contractual liability) and automobile insurance in amounts of not less than $4,000,000 combined single limit, naming Structure Tone as additional insured, all policies to provide for 30 day notice to Structure Tone prior to cancellation or material modification" (Foglietta Affirm. in Support, Exh. N). React purchased a commercial general liability policy for the period March 26, 2010 through March 26, 2011 with a $1,000,000 each occurrence limit and a $2,000,000 general aggregate limit (*id.*, Exh. R). Thus, that portion of React's motion which seeks dismissal of the failure to procure insurance claims asserted against it is denied.

4. Attorney's Fees

React also moves for dismissal of Structure Tone's fourth cause of action for attorney's

fees. Under New York law, there is no independent cause of action for attorney's fees. However, given that the subject indemnification provision permits the award of reasonable attorney's fees, the court declines to dismiss this cause of action, at this juncture.

D. FL Mechanical

1. Common-Law Indemnification and Contribution

FL Mechanical, plaintiff's employer, moves for summary judgment dismissing the common-law indemnification and contribution claims against it.

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is '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"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]). The statute provides that a "grave injury" is 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"

(Workers' Compensation Law § 11).

Here, plaintiff alleges that he fractured his left distal radius and herniated several discs (Verified Bill of Particulars, ¶ 11). Under the law, these injuries do not constitute "grave injuries" (*see Angwin v SRF Partnership*, 285 AD2d 568, 569 [2d Dept 2001] [cerebral concussion and exacerbation of a herniated cervical disc]). None of the parties argues that plaintiff suffered a "grave injury." Accordingly, the common-law indemnification and

contribution claims against FL Mechanical are dismissed.

2. Contractual Indemnification

As previously noted, in the absence of a "grave injury," Workers' Compensation Law § 11 prohibits indemnification claims against employers, except where the claim is "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" (*Rodrigues*, 5 NY3d at 430).

The Structure Tone defendants move for contractual defense and indemnification over and against FL Mechanical, pursuant to the indemnification provision in FL Mechanical's purchase order with React.

Paragraph 6 of the purchase order between React and FL Mechanical states that FL Mechanical agrees as follows:

> "To indemnify, defend and hold harmless the owner, customer and REACT INDUSTRIES, INC. from all loss, damage, injury, or death, or claims theretofore, including attorney's fees and court costs, on the project or related thereto, *from its own negligence or that of its agents or subcontractors, or from its failure to comply with the terms of this purchase order*"

(Joyce Affirm. in Support, Exh. H [emphasis added]).

In moving for contractual indemnification from FL Mechanical, the Structure Tone defendants argue that it is clear that SL Green and 1515 Broadway are the "owner" and that Structure Tone is the "customer."

FL Mechanical moves for summary judgment in its favor, asserting that there is no evidence that it was negligent. FL Mechanical points out that: (1) Structure Tone's superintendent directed plaintiff to work on a floor that it was no longer working on; (2) FL

Mechanical had no reason to believe that it would perform any further work on the first floor or that it would be performing work at such a substantial height; and (3) FL Mechanical's remaining work was in the basement, which had low ceilings requiring the use of a 6-foot A-frame ladder. Alternatively, FL Mechanical argues that Structure Tone, Schindler, and FRP are not parties to its contract, are not named in the indemnification provision, and are not intended third-party beneficiaries of the indemnification provision. FL Mechanical further asserts that the "owner" is Aeropostale, as reflected in the contract between Aeropostale and Structure Tone. Moreover, according to FL Mechanical, because the purchase order does not define who the "customer" is, neither Structure Tone, Schindler, nor FRP qualifies as the "customer."

React opposes FL Mechanical's motion, asserting that it has failed to show that it was not negligent in failing to provide proper equipment to plaintiff.

Initially, the court denies the Structure Tone defendants' motion as to SL Green and 1515 Broadway. As pointed out by FL Mechanical in opposition, neither SL Green nor 1515 Broadway asserted contractual indemnification claims against FL Mechanical.[2] In addition, since FRP and Schindler did not oppose dismissal of their contractual indemnification claims against FL Mechanical, these claims are dismissed.

FL Mechanical is entitled to dismissal of Structure Tone's contractual indemnification claim against it. "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" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In

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[2]Subsequently, in response to FL Mechanical's opposition, the Structure Tone defendants brought a third third-party action seeking, among other things, contractual indemnification from FL Mechanical. FL Mechanical did not have an opportunity to respond to these claims.

Tonking v Port Auth. of N.Y. & N.J. (3 NY3d 486, 489 [2004]), a construction manager sought contractual indemnification from a contractor pursuant to an indemnification provision in a renovation contract between the owner and contractor. The indemnification provision applied to agents of the owner (*id.*). The construction manager argued that it qualified as the owner's agent within the meaning of the indemnification clause (*id.*). The indemnification clause did not define the term "agent" or refer to the construction manager as an agent of the owner, and the indemnification clause contained no reference to the construction manager by name (*id.*). The Court of Appeals held that "the language of the parties is not clear enough to enforce an obligation to indemnify, and we are unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out. If the parties intended to cover [the construction manager] as a potential indemnitee, they had only to say so unambiguously" (*id.* at 490).

Here, the term "customer" is not defined in FL Mechanical's purchase order. Structure Tone is not mentioned in the purchase order by name. As in *Tonking*, "the language of the parties is not clear enough to enforce an obligation to indemnify" (*id.*). "If the parties intended to cover [Structure Tone] as a potential indemnitee, they had only to say so unambiguously" (*id.*). Therefore, FL Mechanical is entitled to summary judgment of dismissal of Structure Tones' contractual indemnification claim asserted against it.

However, FL Mechanical is not entitled to dismissal of React's contractual indemnification claim against it. As set forth above, the indemnification requires FL Mechanical to defend and indemnify React for all claims arising "from its own negligence or that of its agents or subcontractors, or from its failure to comply with the terms of this purchase order"

(Joyce Affirm. in Support, Exh. H). In addition, there are issues of fact as to whether FL Mechanical was negligent in failing to provide plaintiff with adequate equipment such as a manlift or ladder to perform his work, which would trigger the indemnification provision (*see Gomez v Sharon Baptist Bd. of Directors, Inc.*, 55 AD3d 446, 447 [1st Dept 2008] [trial court correctly denied summary judgment to owner on its indemnification claim against plaintiff's employer, where there was no finding that plaintiff's employer or its agents were negligent or that such negligence proximately caused the plaintiff's injuries]).

Here, the Structure Tone defendants also argue that they are third-party beneficiaries of the agreement between React and FL Mechanical. As noted above, a third-party beneficiary must establish: (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for its benefit; and (3) that the benefit to it is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate it if the benefit is lost (*see Mandarin Trading Ltd.*, 16 NY3d at 182). A party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right (*Alicea*, 145 AD2d at 317).

The best evidence of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself (*id.* at 318). An intent to benefit a third party can also be found when "no one other than the third party can recover if the promisor breaches the contract . . . or . . . the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party" (*id.*, quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]).

The Structure Tone defendants have failed to establish that they are intended third-party

beneficiaries of FL Mechanical's purchase order. The Structure Tone defendants have not pointed to any provision which clearly evidences an intent to permit enforcement by them. Therefore, the Structure Tone defendants are not entitled to contractual indemnification based on a third-party beneficiary theory.

3. Failure to Procure Insurance

FL Mechanical moves for summary judgment dismissing the breach of contract claims against it. None of the parties has opposed this branch of its motion. FL Mechanical also has shown that it purchased the required insurance. FL Mechanical's purchase order with React required it to purchase a commercial general liability policy with limits of liability of $1,000,000 each occurrence and $2,000,000 general aggregate; "Policy must include React Industries, Inc. React Technical Inc. as Additional Insured ON A PRIMARY BASIS" (Darwick Affirm. in Support, Exh. R). FL Mechanical purchased a commercial general liability policy for the period August 1, 2010 through August 1, 2011 from The Burlington Insurance Company which contained a blanket additional insured endorsement, with limits of $1,000,000 each occurrence and $2,000,000 general aggregate (*id.*, Exh. S). Based upon this coverage, React's breach of contract claim against FL Mechanical is untenable (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). Accordingly, the breach of contract claims against FL Mechanical are dismissed.

4. Attorney's Fees

Finally, the branch of FL Mechanical's motion which seeks dismissal of Structure Tone's fourth cause of action for attorney's fees is granted. Since Structure Tone's indemnification claim against FL Mechanical has been dismissed, there is no basis for the award of attorney's

fees against FL Mechanical.

E. Schindler

Schindler moves for summary judgment dismissing the third-party claims against it. In support, Schindler contends that it did not supervise or direct plaintiff's work and that it did not provide the ladder to plaintiff. Schindler also argues that it owed no duty to plaintiff or Structure Tone, since it lacked control over Structure Tone's superintendent and plaintiff when he took its ladder without its knowledge or permission.

In response, the Structure Tone defendants and FRP argue that Schindler is obligated to indemnify it because it undisputedly provided a defective ladder. FRP submits an affidavit from its vice president, Jeffrey Thompson, in which he states that it is common for one trade/subcontractor to borrow a ladder from another trade/subcontractor (Thompson Aff., ¶ 5).

Schindler's motion is denied. It is well settled that "a subcontractor may be liable for common-law negligence in supplying defective equipment that is used by employees of another contractor" (*Santangelo v Fluor Constructors Intl.*, 266 AD2d 893, 894 [4th Dept 1999]; *see also Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]). It is undisputed that the ladder belonged to Schindler (Keosayian EBT, at 38-39; Sansone EBT, at 28, 38; Lupo EBT, at 29; Ramljak EBT, at 24; Oliveri EBT, at 20). Therefore, Schindler is not entitled to dismissal of the common-law indemnification and contribution claims against it (*see Greco v Archdiocese of N.Y.*, 268 AD2d 300, 301 [1st Dept 2000] [issue of fact as to whether subcontractor had notice of ladder's defective condition, and whether it was otherwise negligent in supplying a defective ladder]; *Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 1036 [4th Dept 1997] [subcontractor failed to establish that it owed no duty of care to another subcontractor's

employee, merely because it had not given permission to use the exterior scaffold]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of third-party defendant FL Mechanical LLC for summary judgment is granted to the extent of severing and dismissing (1) the common-law indemnification and contribution claims against it; (2) third-party plaintiff Structure Tone, Inc.'s third-party complaint as against it; (3) the contractual indemnification claims by third-party defendant Schindler Elevator Corp. and second third-party defendant FRP Sheet Metal Contracting Corp. against it; and (4) the failure to procure insurance claims against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 002) of third-party defendant Schindler Elevator Corp. for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 005) of third-party defendant React Industries, Inc. is granted to the extent of severing and dismissing the common-law indemnification and contribution claims as against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 006) of second third-party defendant FRP Sheet Metal Contracting Corp. is granted to the extent of severing and dismissing the common-law indemnification, contribution, and failure to procure insurance claims as against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 007) of defendants/third-party plaintiffs/second third-party plaintiffs SL Green Realty Corp., Structure Tone, Inc., and 1515 Broadway Fee Owner LLC for summary judgment is denied; and it is further

ORDERED that the cross motion of plaintiffs is granted only to the extent of granting them partial summary judgment under Labor Law § 240 (1) as against defendants SL Green Realty Corp., 1515 Broadway Fee Owner, LLC, and Structure Tone, Inc., with the issue of plaintiffs' damages to await the trial of this action, and is otherwise denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties, with notice of entry.

Dated: 1/21/14

Doris Ling-Cohan, J.S.C.

JUSTICE DORIS LING-COHAN

J:\Summary Judgment\ScekicvSLGreenRealtyCorp.robert gatto.wpd

FILED

JAN 24 2014

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NEW YORK