Fitzgerald v Toll Bros. Real Estate, Inc.
2014 NY Slip Op 30274(U)
January 21, 2014
Supreme Court, New York County
Docket Number: 113160/08
Judge: Paul Wooten
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SCANNED ON 1/31/2014

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JAMES FITZGERALD and MARY FITZGERALD,

Plaintiffs,

- against-

INDEX NO. 113160/08

MOTION SEQ. NO. 007

TOLL BROTHERS REAL ESTATE, INC., CASINO DEVELOPMENT GROUP, INC., KTL 303 LLC, HKAL 33RD STREET, LLC., HKAL 34TH STREET, LP, HKAL GP 34 LLC, KL 33 LLC., THE KIBEL COMPANIES, LLC, INTERCITY CONCRETE STRUCTURES, INC., and 303 CONSTRUCTION, INC.,

Defendants.

INTERCITY CONCRETE STRUCTURES, INC,

Third-Party Plaintiff,

- against-

3RD PARTY INDEX NO. 590348/10

NEW YORK REBAR INSTALLATION INC.,

Third-Party Defendant.

FILED
JAN 31 2014
NEW YORK
COUNTY CLERK'S OFFICE

The following papers were read on this motion by defendant 303 Construction Inc. for summary judgment on its cross-claims for contractual indemnification.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 007, 008 and 009 are hereby consolidated for disposition.

This is an action to recover damages for injuries sustained by plaintiff James Fitzgerald (plaintiff), a non-union ironworker foreman, when he fell through an opening in a floor while working at a construction site located at 303 East 33rd Street, New York, New York (the premises) on September 15, 2008. Plaintiff's wife Mary Fitzgerald asserts a derivative claim for

loss of services.

In motion sequence number 007, defendant 303 Construction, Inc. (303 Construction) moves, pursuant to CPLR 3212, for conditional summary judgment in its favor on its cross-claims for contractual indemnification against defendant/third-party plaintiff Intercity Concrete Structures, Inc. (Intercity) and defendant KTL 303, LLC (KTL 303).

In motion sequence number 008, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment in their favor on their Labor Law § 240(1) claim against KTL 303, KL 33 LLC (KL 33), Intercity and 303 Construction.

In motion sequence number 009, defendants Toll Brothers Real Estate, Inc., HKAL 33rd Street, LLC, HKAL 34th Street, LP, The Kibel Companies, LLC (collectively, the Toll Brothers defendants), KTL 303 and KL 33 (all together, the ownership defendants) move, pursuant to CPLR 3212, for summary judgment (1) dismissing plaintiffs' complaint in its entirety, as well as all cross-claims and counterclaims, as against the Toll Brothers defendants; (2) dismissing plaintiffs' common-law negligence and Labor Law §§ 200 and 241(6) claims, as well as all cross- claims and counterclaims, as against KTL 303 and KL 33; (3) granting the ownership defendants summary judgment in their favor on their claims for common-law indemnification and contractual indemnification as against Intercity and 303 Construction; and (4) granting the ownership defendants summary judgment in their favor on their claim for conditional summary judgment on their claim for common-law indemnification against third-party defendant New York Rebar Installations, Inc. (Rebar).

Rebar cross-moves, pursuant to CPLR 3212, for summary judgment dismissing Intercity's third-party complaint against it for contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance.

BACKGROUND

On the day of the accident, September 15, 2008, KTL 303 was the owner of the premises where the accident occurred. Prior to the day of the accident, on March, 6, 2008, ownership of the premises was conveyed via a deed by KL 33 to KTL 303.

On March 19, 2008, KTL 303 entered into a contract with nonparty Pavlak Industries, Inc. (Pavlak), whereby Pavlak agreed to provide construction management services for a non-union construction project (the project) going on at the premises (the Pavlak/KTL 303 contract). The project entailed the construction of a 14-story mixed commercial and residential building. In order to shield himself from union exposure, Peter Pavlakis, the sole owner of Pavlak, formed 303 Construction for the purpose of performing the actual construction management services on the project.

Pursuant to a contract, also dated March 19, 2008, Pavlak, as construction manager, and 303 Construction, as trade contractor, agreed that 303 Construction would carry out the duties of construction manager on the project, including coordinating the work of the various trades on the project, walking the site daily to make sure that subcontractors were complying with safety requirements and stopping work for any safety issues (the Pavlak/303 Construction contract).

In addition, pursuant to a contract dated June 25, 2008, KL 33, as developer, acting by and through 303 Construction, as construction manager, hired Intercity to serve as the contractor in charge of the concrete superstructure for the project (the KL 33/Intercity contract). Intercity also installed and inspected the decking system at the premises, which allowed workers to travel from floor to floor by accessing ladders from openings in the floors. Intercity hired Rebar, plaintiff's employer, to supply and install rebar for the superstructure of the project.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Rebar as a

foreman. At the time of the accident, Rebar was performing work on the fifth floor of the premises, which included installing prefabricated columns and shear walls. Plaintiff's duties as foreman included reading blueprints, advising workers where to install steel and installing steel.

Plaintiff testified that the accident occurred as he was getting ready to leave the fifth floor of the work site for home. Plaintiff explained that, as the stairs to the fifth floor were not yet installed, there was a temporary ladder propped up against an opening (the opening) in the floor on the fifth floor leading down to the fourth floor. In order to access the ladder, the workers had to step down onto a temporary landing made of pieces of plywood nailed to scaffolding (the plywood landing). The base of the scaffold was on the fourth floor. There were no railings or other devices to hold onto while walking across the plywood landing. The accident occurred as plaintiff was stepping onto the plywood landing as he made his way to the ladder to exit the premises.

Specifically, plaintiff described his accident, as follows:

> "I was leaving the deck and I was stepping on temporary scaffolding to get the ladder to get down. And when I stepped on it I got one foot and I stepped on it. I had my both feet on, I felt something shift, and as I went to reach for the ladder, all I remember is it went down and I went down, and that's the last thing I remember"(The ownership defendants' Notice of Motion, exhibit X, plaintiffs' tr at 29).

Plaintiff further explained that, at the time of the accident, he had not yet reached the ladder to descend it, and that he was still standing on the plywood landing which led to the ladder. Plaintiff testified that the last thing he remembered before losing consciousness was "[s]tepping onto that plywood" (*id.* at 43). Plaintiff also testified that, on the day of the accident, he had taken narcotic pain medication, and that side effects of the medication may include fainting.

Affidavit of Paul Shields, Plaintiff's Rebar Coworker and Witness to the Accident

In his affidavit, Paul Shields stated that the accident happened near the end of the work

day, as he and plaintiff were leaving the fifth floor of the premises and heading down to the street. He explained that the only way to exit the fifth floor of the premises was by utilizing a makeshift scaffold and temporary ladder located within a large floor opening. Shields explained that "there was a several foot space between the edge of the concrete pour and the shaft opening," so, in order "[t]o access the ladder going down to the lower floors one had to step onto a temporary wooden deck" (plaintiffs' opposition, exhibit A, Shields affidavit). The deck was made from wood gathered from the work site and nailed to the top of the scaffold. Shields also explained that "there were no railings leading from the concrete pour to the ladder" and "nothing to hold onto as you stepped off of the concrete pour and onto the temporary deck, or as you stepped onto the ladder from the deck" (*id.*).

At the time of the accident, Shields was standing "several feet behind [plaintiff] as he waiting his turn to step onto the platform" (*id.*). Shields observed that as plaintiff "stepped onto the scaffold, the board he stepped onto moved, causing him to lose his balance and fall into the opening" (*id.*). Shields stated that no safety devices were provided "that would have aided in traveling from the concrete pour across the temporary deck onto the ladder" (*id.*).

Deposition Testimony of William Cheron (Intercity's President)

William Cheron testified that Intercity served as concrete superstructure subcontractor on the project. Cheron maintained that there was no general contractor on the project, only a construction manager. As concrete subcontractor, Intercity was responsible for designing and installing the decking system which surrounded the concrete pours, allowing workers access to the ladders leading to the floors below. Intercity constructed the wooden ladders specifically for the job. Intercity used an entity named PERI Formwork System to design the engineered decking system for the project. However, Cheron testified that it was his decision to utilize the three-quarter inch high-density plywood which allegedly failed in this case.

Cheron testified that Intercity had a crew chief that inspected the decking system

throughout the day. He explained that 303 Construction's superintendent inspected the process of erecting the system of going from floor to floor, but "only as it would pertain to safe egress in and out of the deck" (the ownership defendants' notice of motion, exhibit EE, Cheron tr at 19). When asked if 303 Construction ever weighed in on how to build the system, he explained, "[t]hey would only have comments, not on the system itself, but on the way we put the system together, just to ensure it was put together safely" (*id.*). Cheron also stated that a site safety manager, also an employee of 303 Construction, would inspect the ladders to make sure that they were fastened correctly to the deck. If the ladders were not fastened safely, the site safety manager would make sure the deficiencies were corrected. Cheron testified that there were no complaints regarding the decking system or the ladders prior to the date of the accident.

Cheron testified that, minutes after the accident, he went to the accident's location, at which point he believed he "did a quick inspection and everything looked to be okay" (the ownership defendants' notice of motion, exhibit EE, Cheron tr at 29). He asserted that the plywood was secure and that no parts seemed to be missing.

Deposition Testimony of Peter Pavlakis, Owner and President of 303 Construction

Peter Pavlakis testified that 303 Construction served as the construction manager on the project. He explained that 303 Construction had a project manager, a superintendent and two to five employees stationed at the site on a full-time daily basis who would walk the job site to make sure the trades were on schedule. 303 Construction also participated in overseeing the coordination of the trades, obtaining payments and filing requisitions. 303 Construction did not hire a site safety manager for the project. However, if 303 Construction observed a safety issue on site, it "probably" had the ability to stop work (plaintiff's notice of motion, exhibit J, Pavlakis tr at 17).

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for

summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Motion Sequence 007

A. 303 Construction's Motion

303 Construction moves for conditional summary judgment on its cross-claim for contractual indemnification as against KTL 303. 303 Construction argues that, in the absence of proof of its negligence, 303 Construction is entitled to indemnification from KTL 303 based on the indemnification provision contained in the Pavlak/KTL 303 contract.

The Pavlak/KTL 303 Contract

Pursuant to the Pavlak/KTL 303 contract, Pavlak was to serve as construction manager for the project. The Pavlak/KTL 303 contract contained an indemnification provision which provided, in pertinent part, as follows:

> "To the extent permitted by law, the developer [KTL 303] will indemnify, defend and hold the construction manager [Pavlak] harmless from and against all claims, damages, judgments, fines, penalties and costs of any nature (including, but not limited to, counsel fees and expenses) separate (collectively, "Claims") arising out of, or in connection with, the services, except to the extent that the Claim is caused, in whole or part, by the Construction Manager['s] [Pavlak] breach of this Agreement, fraud or bad faith or assuming or incurring liability for the developer [KTL 303] contrary to the terms, conditions or limitations set forth in this Agreement. Similarly, to the extent permitted by law, the Construction Manager [Pavlak] will indemnify, defend and hold the Developer [KTL 303] and the Lenders harmless from and against all Claims arising out of, or in connection with, in whole or part, the Construction Manager's [Pavlak] fraud, bad faith or assuming or incurring liability for the Developer [KTL 303] contrary to the terms, conditions or limitations set forth in this Agreement (303 Construction's notice of motion, exhibit H, Pavlak/KTL 303 contract at 30).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and

the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Here, a plain reading of the indemnification provision contained in the Pavlak/KTL 303 contract reveals no intention on the part of KTL 303 to indemnify 303 Construction for all claims arising in connection with Pavlak's services. Rather, the indemnification provision clearly provides that KTL 303 will indemnify Pavlak for claims arising out of said claims.

To that effect, the Pavlak/KTL 303 contract defines only Pavlak as "construction manager" (*id.* at 2). In addition, the subject indemnification provision does not provide that, in addition to indemnifying Pavlka, KTL 303 must also indemnify 303 Construction, or any other affiliates or related companies of Pavlak. "The best evidence of the contracting parties' intent is the language of the agreement itself" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 369 [1st Dept 2006]). Thus, 303 Construction is not entitled to conditional summary judgment in its favor on its cross-claim for contractual indemnification as against KTL 303.

Defendant 303 Construction also moves for conditional summary judgment on its cross-claim for contractual indemnification as against Intercity. 303 Construction argues that it is entitled to contractual indemnification from Intercity based upon the indemnification provision contained in the KL 33/Intercity contract.

The KL 33/Intercity Contract

Pursuant to the KL 33/Intercity contract, Intercity was to serve as the contractor in

charge of the concrete superstructure for the project. The indemnification provision contained in the KL 33/Intercity contract provides, in pertinent part, as follows:

> "The Contractor [Intercity] agrees to perform its Work so as to comply with all laws . . . and will indemnify and save the Indemnitees harmless . . . against any penalties, costs and damages incurred by Indemnitees, arising directly out of the Contractor's [Intercity] negligence in performing its Work, except where such penalties, costs and/or damages are caused, in whole or in part, by way of the negligence of one or more of the Indemnitees" (the ownership defend

In addition, the KL 33/Intercity contract provides that:

> "The Contractor [Intercity] agrees to indemnify and save harmless the Indemnitees from and against all liability, damage, loss, claims, demands, actions and expenses, including but not limited to attorney's fees which arise or are claimed to arise out of or are connected with any accident or occurrence which happens, or is alleged to have happened in or about the place where the Contractor [Intercity] is performing its Work, whether at the Site or other place . . . or as a result of the Contractor's [Intercity] performance of its Work, including . . . all liability, damages, loss, claims, demands, and actions on account of personal injury" (*id.*).

Importantly, the term "[i]ndemnitees" is defined in the KL 33/Intercity contract as to include KL 33 and the "developer, construction manager, lenders and their respective parent companies . . . and their owned, controlled, affiliated, associates and subsidiary companies, corporations . . . and employees of each" (*id.*).

303 Construction, as construction manager, is entitled to conditional summary judgment on its cross-claim for contractual indemnification as against Intercity. Initially, "construction manager" is included in the definition of indemnitee under the KL 33/Intercity contract (*id.*). In addition, as plaintiff was injured when he fell from a decking system designed, installed and inspected by Intercity, the accident arose out of Intercity's work on the project.

It should be noted that, in opposition, Intercity argues that 303 Construction's motion must be denied, because a question of fact exists as to whether 303 Construction's negligence proximately caused the accident. In support of this argument, Intercity puts forth that, pursuant

to the KL 33/Intercity contract, 303 Construction had the authority to supervise and inspect Intercity's work at the site. However, as argued by 303 Construction, 303 Construction's "'general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that [303 Construction] would be liable for the negligence of the contractor who performs the day-to-day operations'" (*Cabrera v Board Of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2d Dept 2006], quoting *Warnitz v Liro Group*, 254 AD2d 411, 411 [2d Dept 1998]). Here, there is no evidence in the record to sufficiently establish that 303 Construction actually supervised or controlled Intercity's work regarding the design and installation of the subject decking system, or that any negligence on the part of 303 Construction proximately caused plaintiff's accident.

Intercity also argues that 303 Construction's motion must be denied, because, as 303 Construction had the obligation to assist with the policing of safety requirements and stop work, coordinate the trades and to supervise and control the site, it was a de facto general contractor. Intercity argues that, as a de facto general contractor, 303 Construction had a statutory obligation to ensure that plaintiff was afforded a safe place to work. However, a party who has been held liable to an injured worker solely on the basis of statutory liability, without fault on its part, is entitled to recover under a contract of indemnity (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Finally, Intercity argues that 303 Construction is not entitled to conditional summary judgment in its favor on its cross-claim for contractual indemnification against it because the indemnity agreement in the KL 33/Intercity contract is invalid, because it does not comply with General Obligations Law § 5-322.1. Under General Obligations Law § 5-322.1, a contract or agreement, relative to the construction or repair of a building, purporting to "indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons" caused by the negligence of the promisee, his agents or employees, "whether such negligence

be in whole or in part, is against public policy and is void and unenforceable" (General Obligations Law § 5-322.1; *see Carriere v Whiting Turner Contr.*, 299 AD2d 509, 511 [2d Dept 2002]; *Castrogiovanni v Corporate Prop. Invs.*, 276 AD2d 660, 661 [2d Dept 2000] ["General Obligations Law prohibits the enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent"]).

Intercity argues that the subject indemnification agreement requires Intercity to indemnify 303 Construction for all liability, and thus, it requires Intercity to indemnify 303 Construction for 303 Construction's own negligence. However, even in the event that there were an issue as to whether the indemnity clause violates General Obligations Law § 5-322.1, where there is no negligence on the part of the proposed indemnitee, as in the instant case, that statute does not apply (*see Brown v Two Exch. Plaza Partners*, 76 NY2d at 177).

Thus, 303 Construction is entitled to conditional summary judgment on its cross claim for contractual indemnification as against Intercity.

B. Rebar's Cross-Motion

Initially, Rebar argues that it is entitled to summary judgment dismissing Intercity's claims for contribution and common-law indemnification against it, because the third-party complaint is barred by Workers' Compensation Law § 11. In addition, Rebar argues that it is entitled to summary judgment dismissing Intercity's claim for contractual indemnification against it, because, contrary to the assertions of Intercity, there was no agreement in place on the date of the accident requiring Rebar to defend and indemnify Intercity. Rebar further argues that, even if a contract between Rebar and Intercity had been executed and in place, which required Rebar to procure insurance coverage for Intercity, it is entitled to dismissal of Intercity's claim for breach of contract for failure to procure insurance, because, in fact, Rebar procured said insurance coverage.

Initially the Court notes that Intercity makes the argument that, pursuant to CPLR 2215,

[* 13]

a cross-motion may only be brought against a moving party. Intercity argues that, as Intercity has not filed a motion in this case, it is improper for Rebar to file a cross-motion for relief against it (CPLR 2215; *see Gaines v Shel-Mar Foods, Inc.*, 21 AD3d 986, 987 [2d Dept 2005). However, in light of the fact that Intercity only opposes that part of Rebar's cross-motion seeking to dismiss Intercity's contractual indemnification claim, in the interest of judicial economy, this Court will entertain Rebar's cross-motion.

"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] [internal quotation marks and citations omitted]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

In its cross-motion, Rebar argues that, although plaintiffs allege that plaintiff sustained serious personal injuries and a loss of enjoyment of life, his injuries do not rise to the level of "grave injury" within the meaning of the Workers' Compensation Law. Therefore, Rebar is entitled to dismissal of Intercity's third-party claims for contribution and common-law indemnification as against it. Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

> "For purposes of this section, the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written

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

To that effect, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (*Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001]).

Initially, it should be noted that, in its opposition, Intercity does not oppose that part of Rebar's motion seeking to dismiss Intercity's third-party claims for contribution and common-law indemnification against it. Thus, these claims are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion to dismiss the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n [3d Dept 2003]). Accordingly, Rebar is entitled to dismissal of Intercity's third-party claims for contribution and common-law indemnification against it.

In any event, the evidence put forth in this case demonstrates that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11. In plaintiffs'

bill of particulars, plaintiffs allege that, as a result of falling several stories due to defendants' failure, among other things, to provide safe passage on and between the floors of the premises, plaintiff was caused to suffer injury to his shoulders, as well as various fractures of the spine and ribs. In addition, plaintiffs allege that plaintiff suffered "traumatic brain injury" (Rebar's notice of cross-motion, exhibit N, plaintiffs' bill of particulars). Plaintiffs further allege that "plaintiff was caused to and still does suffer from persistent headaches of extreme intensity, nervousness, apprehension, visual problems, irritability, anxiety and difficulty sleeping and concentration" (*id.*). In addition, "[c]oncentrated mental or physical effort on the part of the plaintiff was and still is restricted and limited, since those functions result in cephalgia, strain, general weakness and unsteadiness" (*id.*). Plaintiffs note that the aforesaid injuries "are of a chronic and protracted nature, which has resulted in permanent residuals and/or sequelae, and that his prognosis is guarded" (*id.*).

In arguing that an issue of fact exists as to whether plaintiff suffered a grave injury, Intercity focuses on plaintiffs' allegation that plaintiff suffered a traumatic brain injury. However, at the request of Intercity, plaintiff was examined by neuro-psychological expert Rose Sherr, Ph.D., who concluded that the medical evidence in this case did not support a finding that plaintiff sustained a traumatic brain injury. In addition, it should be noted that the Court in *Rubeis v Aqua Club, Inc.(supra)* considered that, as the Workers' Compensation Law deals with employment benefits, and the term "disability" generally refers to inability to work, "a brain injury results in 'permanent total disability' under section 11 when the evidence establishes that the injured worker is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d at 413; *Chelli v Banle Assoc., LLC*, 22 AD3d 781, 783 [2d Dept 2005] [Court considered that "permanent total disability" envisioned by Legislature relates to the injured party's employability and not to his or her ability to otherwise care for himself or herself and function in a modern society]; *Way v Grantling*, 289 AD2d at 792). That said, plaintiff's medical records contain no

evidence to support a finding that plaintiff is no longer employable in any capacity.

Thus, pursuant to Workers' Compensation Law § 11, Rebar is entitled to dismissal of Intercity's third-party claims for contribution and common-law indemnification against it.

In its cross-motion, Rebar asserts that Rebar does not owe contractual indemnity to Intercity, because the only agreement in place at the time of the accident was the proposal, which did not contain any indemnification or insurance procurement language. Rebar argues that the Rebar/Intercity contract, allegedly signed on July 15, 2008, was not actually signed by Frank Esposito of Rebar and Charon of Intercity until September 15, 2008, two days after the accident. Rebar maintains that, after being told that Intercity needed the Rebar/Intercity contract backdated for insurance purposes, at Intercity's request, only then did Esposito sign another copy of the Rebar/Intercity contract, this time backdating it to July 15, 2008. Rebar argues that Esposito only agreed to sign and backdate the second contract so that Rebar could get paid, as outstanding funds were owed to Rebar. Rebar then puts forth case law for the proposition that "an indemnification agreement, executed after the accident occurred will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the contract to apply as of that date" (*see Lafleur v MLB Indus., Inc.*, 52 AD3d 1087, 1088 [3d Dept 2008]; *Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 366 [1st Dept 2005]).

In opposition to Rebar's cross-motion, Intercity puts forth the affidavit of Cheron, dated June 28, 2013, whereby Cheron states that the Rebar/Intercity contract was signed before September 15, 2008, and that it was in effect before that date. Cheron also maintains that he never instructed Esposito to backdate the second Rebar/Intercity contract. In addition, Intercity puts forth the affidavit of Intercity's vice president, Armindo Rodriguez, dated June 28, 2013, whereby he also maintained that the Rebar/Intercity contract was signed and in effect before the date of the accident.

Here, due to the conflicting testimony in this case regarding whether or not there was a signed agreement requiring Rebar to defend and indemnify Intercity in place on the date of the accident, a question of fact exists as to this issue. Thus, Rebar's cross-motion to dismiss Intercity's cause of action for contractual indemnity is denied.

Initially, it should be noted that, in its opposition, Intercity does not oppose that part of Rebar's cross-motion seeking dismissal of Intercity's breach of contract for failure to procure insurance claim. As this claim is deemed abandoned, Rebar is entitled to dismissal of this third-party claim.

In any event, it should be noted that Rebar puts forth a copy of its insurance policy with Endurance American Specialty, with coverage covering April 1, 2008 through April 1, 2009, which included an additional insured endorsement covering owners, lessees or contractors when required to in an construction agreement between the parties, as is required in the Intercity/Rebar contract. Thus, Rebar is entitled to summary judgment dismissing Intercity's third-party claim for breach of contract for failure to procure insurance against it.

Motion Sequence 008

Plaintiffs move for partial summary judgment in their favor on their Labor Law § 240(1) claim against KTL 303, KL 33, Intercity and 303 Construction. Labor Law § 240(1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the

scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, it should be noted that, prior to the day of the accident, on March, 6, 2008, ownership of the premises was conveyed via a deed by defendant KL 33 to KTL 303. As KTL 303 was the owner of the premises on the day of the accident, it may be liable for plaintiff's injuries under Labor Law §§ 240(1) and 241(6). However, it must be determined as to whether KL 33, as developer, 303 Construction, as construction manager, and Intercity, as contractor in charge of building the concrete superstructure for the project, can be held liable as agents of the owner, so as to be statutorily liable under the Labor Law.

"'When the work giving rise to [the duty to conform to the requirements of Labor Law §

240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

As to KL 33, all parties concede that, after KL 33's conveyance of the deed to the premises to KTL 303, KL 33 had no further role in regard to the premises. Thus, KL 33 is not an agent for the purposes of the Labor Law, and it is entitled to dismissal of plaintiffs' Labor Law §§ 240(1) and 241(6) claims as against it.

As to 303 Construction, while a construction manager of a work site is generally not responsible for injuries under Labor Law §§ 240(1) and 241(6), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury (*Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

Here, a review of the evidence in this case indicates that, while 303 Construction may have had some general authority over the worksite, it did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., the installation and inspection of the decking system, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law § 241(6) (*see Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005] [Labor Law § 241(6) claim dismissed as against defendant subcontractor because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]). Although Intercity and plaintiffs argue that 303 Construction was charged with inspecting the plywood decking system at the premises, Cheron testified that 303 Construction's inspection duties focused solely on safe egress "in and out of the deck" and whether the ladders were fastened properly to the decks (the ownership defendants' notice of motion, exhibit EE, Cheron tr at 19). He did not mention that 303 Construction had any role in

installing or inspecting the plywood landing, which provided access to the opening.

However, the evidence clearly demonstrates that Intercity supervised and controlled the injury-producing work at issue in this case, i.e., the installation and inspection of the plywood decking system. Therefore, Intercity may be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law § 240(1). Intercity's own witness, Cheron, testified that Intercity was in charge of designing, installing and inspecting the decking system that allowed workers to travel from floor to floor. He also testified that he personally made the decision to utilize the three-quarter inch, high-density plywood which allegedly failed in this case.

Here, plaintiffs have sustained their prima facie burden on the Labor Law § 240(1) claim, through admissible evidence, that plaintiff was not provided with sufficient safety devices, so as to prevent him from falling while subjected to an elevation-related risk. Plaintiffs have put forth the testimony of plaintiff and plaintiff's coworker, Shields, to establish that the accident occurred when the plywood landing that plaintiff stepped on shifted, causing him to fall through the unprotected opening in the floor and become injured (*see Gambale v 400 Fifth Realty, LLC*, 101 AD3d 943, 943 [2d Dept 2012] [Court granted the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1), where plaintiff's accident was caused "when the floor, which then consisted of plywood decking, collapsed underneath [him] as [he was] standing on it"]; *Figueiredo v New Palace Painters Supply Co.*, 39 AD3d 363, 363 [1st Dept 2007] [the plaintiff sustained her prima facie burden on her Labor Law § 240(1) claim through "admissible evidence that her decedent . . . fell through an open hole from an unsecured piece of plywood that had been laid over the beams when the platform shifted, and that no safety device was provided to prevent his fall"]; *Becerra v City of New York*, 261 AD2d 188, 190 [1st Dept 1999] [Court held that the collapse of unsecured plywood platform which supported a construction worker four stories above ground level

constituted a prima facie violation of scaffolding statute]; *Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994] [collapse of a scaffold is prima facie evidence of a violation of Labor Law § 240(1) which shifts the burden to defendants to raise a factual issue on liability]).

In opposition to plaintiffs' prima facie showing, defendants failed to raise an issue of fact as to how the accident occurred or whether plaintiff was provided with safety devices to protect him from falling (*Figueiredo v New Palace Painters Supply Co.*, 39 AD3d at 363; *Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]).

It should be noted that the ownership defendants opine that plaintiff's fall may have been caused due to a mis-step, or because he was dizzy from pain medication that he took on the day of the accident. However, "[t]he precise manner in which plaintiff's fall occurred is immaterial, there being no question that plaintiff's injuries are at least partially attributable to defendants' failure to provide guardrails, safety netting or other proper protection" (*Laquidara v HRH Constr. Corp.*, 283 AD2d 169, 169 [1st Dept 2001]). Labor Law § 240(1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). "As has been often stated, the purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500). Thus, plaintiffs are entitled to partial summary judgment in their favor on their Labor Law § 240(1) claim as against defendant KTL 303 and defendant/third-party plaintiff Intercity.

Motion Sequence 009

In their opposition, plaintiffs concede that all claims asserted against the Toll Brothers defendants should be dismissed. Thus, the ownership defendants are entitled to dismissal of the complaint in its entirety as against these defendants. In addition, as there is nothing in the record to demonstrate that the Toll Brothers defendants were involved in the project, they are also entitled to dismissal of all cross-claims and counterclaims asserted against them.

In their opposition, plaintiffs also concede that the common-law negligence and Labor Law § 200 claims against defendants KTL 303 and KL 33 should be dismissed. Thus, these defendants are entitled to dismissal of these claims as against them.

As noted previously, as KL 33 is not a proper Labor Law defendant, this defendant is entitled to dismissal of plaintiffs' Labor Law § 241(6) claim as against it. Therefore, it must only be determined as to whether the Labor Law § 241 (6) should be dismissed as to KTL 303.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.7(b)(1) [protection from general hazards - hazardous openings], 23-1.17 [life nets], 23-1.22 [structural runways, ramps and platforms], 23-2.4 [flooring requirements in building construction] and 23-2.5 [protection of persons in shafts], plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d at 833). As such, the ownership defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241(6) claim predicated on those provisions as against KTL 303.

Industrial Code 12 NYCRR 23-1.7(b)(1)

Industrial Code section 23-1.7(b)(1) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 [1st Dept 1999]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]). Section 23-1.7(b)(1) requires that every hazardous opening be guarded by a substantial cover fastened in place or by a safety railing installed in compliance with the Industrial Code.

The ownership defendants argue that section 23-1.7(b)(1) is not applicable to the facts of this case because it was necessary for the opening to be uncovered so that plaintiff could utilize the ladder from the fifth floor to the fourth floor. However, in this case, plaintiff testified that he had not yet reached the opening when the accident occurred. In fact, plaintiff specifically testified that he "was leaving the deck and I was stepping on temporary scaffolding to get the ladder to get down" (the ownership defendants' Notice of Motion, exhibit X, plaintiffs' tr at 29). As such, a safety device such as a guardrail for plaintiff to hold on to while stepping onto the plywood landing might have been valuable in helping plaintiff steady himself and prevent him from falling into the opening. In addition, a gate with a swing door might also have prevented plaintiff from falling into the opening when the plywood he stepped on shifted.

Thus, as this Industrial Code provision applies to the facts of this case, the ownership defendants are not entitled to dismissal of that part of the Labor Law § 241(6) claim predicated upon an alleged violation of section 23-1.7 (b)(1) as against defendant KTL 303.

Industrial Code 12 NYCRR 23-1.17

Industrial Code 12 NYCRR 23-1.17 is sufficiently specific to support a Labor Law § 241(6) claim (*Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 337 [1st Dept 2006]). However, section 23-1.17, which prescribes standards for life nets, is inapplicable to the facts of this case, because plaintiff was not provided with such equipment (*see Forschner v Jucca Co.*, 63 AD3d 996, 998-999 [2d Dept 2009]). Thus, the ownership defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated upon an alleged violation of section 23-1.17 as against KTL 303.

Industrial Code 12 NYCRR 23-1.22(b)(2)

Industrial Code section 23-1.22 applies to structural runways, ramps and platforms. Initially, as the plywood landing was not constructed as a ramp or runway for use by motor vehicles, carts or hand trucks, nor was it a platform being used as a working area at the time of the accident, only section 23-1.22(b)(2), which pertains to runways and ramps constructed for the use of persons, potentially applies to the facts of this case.

Section 23-1.22(b)(2) has been found to be sufficiently specific so as to support a Labor Law § 241(6) claim (*O'Hare v City of New York*, 280 AD2d 458, 458 [2d Dept 2001]). Section 23-1.22(b)(2) requires that ramps and runways

> "shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed."

The plaintiff testified that his accident occurred as he was "stepping on temporary scaffolding to get the ladder to get down" (The ownership defendants' Notice of Motion, exhibit

X, plaintiffs' tr at 29). Therefore, at the time of the accident, plaintiff was not utilizing the plywood landing as a runway or even a ramp to reach the ladder.

Thus, as section 23-1.22(b)(2) does not apply to the facts of this case, the ownership defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on an alleged violation of section 23-1.22(b)(2) as against KTL 303.

Industrial Code 12 NYCRR 23-2.4(b)

Industrial Code section 23-2.4(b)(1)(i) is sufficiently specific to support a Labor Law § 241(6) claim (*O'Connor v Lincoln Metrocenter Partners,* 266 AD2d 60, 61 [1st Dept 1999]). Section 23-2.4(b)(1)(i) states:

> (b) Temporary flooring - skeleton steel construction in tiered buildings.
>
> (1) Erection by tower crane or derrick.
>
> (i) The erection floor shall be covered over the entire surface except for access openings. Such flooring shall be of the proper strength to support the working load intended to be imposed thereon. Such temporary flooring shall be laid tight and secured against movement.

Here, as argued by the ownership defendants, there is no evidence that the building under construction was being erected by tower crane or derrick. Moreover, the opening that plaintiff fell through was an access opening. Thus, as section 23-2.4(b)(1)(i) does not apply to the facts of this case, the ownership defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated upon an alleged violation of this section.

Industrial Code 12 NYCRR 23-2.5(a)(2)(i)

Industrial Code section 23-2.5(a)(2)(i), which prescribes safety standards for shafts other than elevator shafts, is sufficiently specific to support a Labor Law § 241(6) claim (*Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2d Dept 2008]).

Section 23-2.5(a)(2)(i), which deals with protection from falling in shafts, states, in pertinent part, that, "[t]o minimize injuries from falls in shafts [in lieu of a platform below the level

where persons are working] . . . [an] approved life net shall be installed in the shaft not more than one story or 15 feet, whichever is less, below the level where persons are working."

At the time of the accident, plaintiff was in the process of making his way to the opening in order to descend the ladder which would lead him from the fifth floor of the building to the fourth floor of the building. Although plaintiffs argue that section 23-2.5(a)(2)(i) applies to the facts of this case, because a life net should have been provided as a safety device, as the ownership defendants argue, even in the event that the opening were to be considered a shaft, it would not make sense for plaintiff to descend the ladder through a life net. Thus, as this section does not apply to the facts of this case, the ownership defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on an alleged violation of section 23-2.5(a)(2)(i).

The ownership defendants also request that the Court dismiss any remaining cross-claims and counterclaims asserted against them. As none of the parties have opposed this request, the ownership defendants are entitled to dismissal of any remaining cross claims and counterclaims asserted against them.

Moreover, here, there is no indication in the record to establish that any defendant other than Intercity was guilty of any negligence that contributed to the causation of the accident. In addition, as discussed previously, the record establishes that Intercity's negligence proximately caused the accident. Thus, the ownership defendants are entitled to summary judgment in their favor on their common-law indemnification claim as against Intercity (*see Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d at 495).

As noted previously, it has not been sufficiently established that any negligence on the part of 303 Construction proximately caused the accident. Thus, the ownership defendants are not entitled to summary judgment in their favor on their common-law indemnification claim as against 303 Construction.

As set forth previously, the term "[i]ndemnitees" is defined in the KL 33/Intercity contract as to include KL 33 and the "developer, construction manager, lenders and their respective parent companies . . . and their owned, controlled, affiliated, associates and subsidiary companies, corporations . . . and employees of each" (the ownership defendants' notice of motion, exhibit TT, KL 33/Intercity contract).

The ownership defendants argue that, pursuant to the KL 33/Intercity contract, as the accident arose out of Intercity's work, Intercity owes defendant KTL 303, as an affiliated company of KL 33, indemnification. In opposition, Intercity argues that KTL 303 is not an affiliated company of KL 33, and that, as such, it cannot be owed contractual indemnification. Specifically, Interstate argues that, once the ownership of the premises was conveyed via a deed by KL 33 on March 6, 2008, KL 33 had no further association with the project.

Regardless, KTL 303 is entitled to indemnification under the KL 33/Intercity contract, because a review of the record indicates that KTL 303 served as a developer for the project, and "developer" is defined as an indemnitee under the KL 33/Intercity contract.

The ownership defendants also argue that, pursuant to Pavlak/KTL 303 contract, 303 Construction must defend, indemnify and save harmless KTL 303 from any and all claims arising out of 303 Construction's breach of its contractual duties, including the duty to inspect the conditions at the project.

As set forth above, the indemnification provision of the Pavlak/303 Construction contract sets forth, in pertinent part, as follows:

> "[T]o the extent permitted by law, the Construction Manager [Pavlak] will indemnify, defend and hold the Developer [KTL 303] and the Lenders harmless from and against all Claims arising out of, or in connection with, in whole or part, the Construction Manager's [Pavlak] fraud, bad faith or assuming or incurring liability for the Developer [KTL 303] contrary to the terms, conditions or limitations set forth in this Agreement" (303 Construction's notice of motion, exhibit H, Pavlak/KTL 303

contract at 30).

As argued by 303 Construction, the clear language of the indemnification provision contained in the Pavlak/KTL 303 contract dictates that KTL 303, as developer, is entitled to contractual indemnification from Pavlak, and Pavlak only, in the event of Pavlak's fraud, bad faith or incurring liability for KTL 303. Thus, the ownership defendants are not entitled to summary judgment in their favor on their claim for contractual indemnification as against 303 Construction.

As discussed previously, plaintiff did not suffer a"grave injury" within the meaning of Workers' Compensation Law§ 11. Thus, the ownership defendants are not entitled to summary judgment in their favor on their claim for common-law indemnification against third-party defendant Rebar.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant 303 Construction, Inc.'s (303 Construction) motion (motion sequence number 007), pursuant to CPLR 3212, for conditional summary judgment in its favor on its cross-claims for contractual indemnification against defendant/third-party plaintiff Intercity Concrete Structures, Inc. (Intercity) is granted, and the motion is otherwise denied; and it is further,

ORDERED that plaintiffs James Fitzgerald (plaintiff) and Mary Fitzgerald's motion (motion sequence number 008), pursuant to CPLR 3212, for partial summary judgment in their favor on their Labor Law § 240(1) claim against defendants KTL 303 and Intercity is granted, and the motion is otherwise denied; and it is further,

ORDERED that the part of defendants Toll Brothers Real Estate, Inc., HKAL 33rd Street, LLC, HKAL 34th Street, LP, The Kibel Companies, LLC (collectively, the Toll Brothers defendants), KTL 303 and KL 33's (all together, the ownership defendants) motion (motion

sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint in its entirety, as well as all cross-claims and counterclaims, as against the Toll Brothers defendants, is granted, and the complaint is severed and dismissed as against the Toll Brothers defendants, and the Clerk is directed to enter judgment in favor of these defendants with costs and disbursements as taxed by the Clerk upon the submission of a bill of costs; and it is further,

ORDERED that the part of the ownership defendants' motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims, as well as all cross-claims and counterclaims, as against defendants KTL 303 and KL 33 is granted, and these claims are severed and dismissed as against these defendants; and it is further,

ORDERED that the part of the ownership defendants' motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim is denied, with the exception of those parts of plaintiffs' Labor Law § 241(6) claim predicated on alleged violations of Industrial Code sections 23-1.17, 23-1.22(b)(2), 23-2.4(b)(1)(i) and 23-2.5 (a)(2)(i), as well as those Industrial Code sections deemed abandoned; and it is further,

ORDERED that the part of the ownership defendants' motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment granting the ownership defendants summary judgment in their favor on their claims for common-law indemnification and contractual indemnification as against defendant/third-party plaintiff Intercity is granted, and the motion is otherwise denied; and it is further,

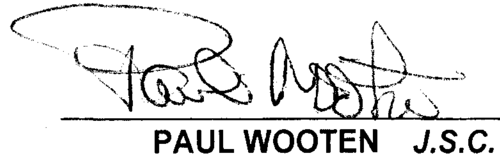
ORDERED that third-party defendant New York Rebar Installations, Inc.'s cross-motion, pursuant to CPLR 3212, for summary judgment dismissing Intercity's third-party complaint against it for contribution, common-law indemnification and breach of contract for failure to

procure insurance is granted, and the cross-motion is otherwise denied; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

Dated: 1/21/14 (PW) JSC



PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

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