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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Koerner

-v-

281 Broadway Holdings LLC

INDEX NO. 104688/11

MOTION DATE

MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 2/10/14

JOAN M. KENNEY, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------X

KENNETH KOERNER,

Plaintiff,

-against-

Index No. 104688/11

281 BROADWAY HOLDINGS, LLC, PAVARINI McGOVERN, LLC, S.J. ELECTRIC, INC., and ALL SAFE, LLC,

Defendants.

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281 BROADWAY HOLDINGS, LLC, and PAVARINI McGOVERN, LLC,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590843/11

GENETECH BUILDING SYSTEMS, INC.,

Third-Party Defendant.

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Joan M. Kenney, J.:

Motions with sequence numbers 001 through 005 are consolidated for disposition.

This action for money damages arises out of injuries sustained by plaintiff as he was working at a construction site.

In motion sequence number 001, plaintiff Kenneth Koerner moves, pursuant to CPLR 3212, for summary judgment on the issue of defendants 281 Broadway Holdings, LLC (281 Broadway) and Pavarini McGovern, LLC (Pavarini)'s liability under Labor Law § 240 (1).

In motion sequence number 002, defendant S.J. Electric,

Inc. (SJ) moves for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it.

Defendant/third-party plaintiff 281 Broadway moves, in motion sequence number 003, for summary judgment dismissing the complaint and all cross claims asserted against it, and for summary judgment in its favor on its third-party complaint against third-party defendant Genetech Building Systems, Inc. (Genetech) and co-defendant SJ. Motion sequence number 005 seeks summary judgment for the relief requested in motion sequence number 003, with the addition of Pavarini as a co-defendant against whom 281 Broadway is moving.

In motion sequence number 004, Pavarini moves for summary judgment (a) dismissing the complaint and all cross claims alleged against it; (b) on its contractual indemnification cause of action against Genetech; and (c) on its contractual indemnification cause of action against SJ.

Plaintiff has withdrawn all the causes of action in his complaint except the one for defendants' liability under Labor Law § 240 (1).

This action has been discontinued as against All Safe, LLC.

BACKGROUND

On the day of his accident, April 7, 2011, plaintiff was a union ironworker/foreman employed by third-party defendant

Genetech, at a construction site located at 57 Reade Street in Manhattan. The project was a new construction for residential and retail uses. 281 Broadway was the owner of the premises, and hired Pavarini as the construction manager/general contractor for the project. Pavarini entered into subcontracts with SJ, for electrical work, and with Genetech, for installation of a window wall.

In general, installing windows for a window wall is a two-man job. On the day of the accident, plaintiff and his partner, John Mooney, were not assigned to install windows on the 18th floor. They were working on a swing stage scaffold on the 15th floor. Plaintiff received a call from Genetech's window installers on the 18th floor, Thomas Christiano and Thomas Calabrese, asking for a third man to help install certain window pieces which were in a difficult position. Plaintiff and Mooney went to the 18th floor. Mooney helped Christiano and Calabrese with the window frames while plaintiff looked at window crates and took inventory, about 30 feet from the men attempting to install the window. Not long after, plaintiff heard screams from his co-workers that they were losing the panel and needed plaintiff to help them. Plaintiff ran to their assistance, and grabbed one of the suction cups used to hold onto the window, but the weight of the window pulled him and the window out of the opening. Plaintiff fell to the 15th floor. The window fell to

the second. The time that elapsed between the time that plaintiff arrived at the window and his fall was approximately two seconds. The time that elapsed between the time that his co-workers called to him and his accident was no more than four or five, or eight or 10 seconds.

It is alleged that some conduit and coiled wire were present in the area, and may have contributed to the causation of the accident.

The area in which the men were attempting to install the windows was called a controlled access zone (the zone). The zone was an area near the building's edge that was cordoned off with yellow nylon rope, with signs saying that only Genetech employees were permitted to be there. Its purpose was to prevent workers other than ironworkers from going there. When plaintiff arrived on the 18th floor, he did not go into the zone, but stayed outside the zone while checking inventory, until his co-workers yelled to him to come help.

Frank Stabile, Genetech's superintendent/foreman at the site, decided that the I-bolt/anchor-bolt (anchor-bolt) system would be the tie-off method used at the site. To tie off using the anchor-bolt fall protection system, workers had to drill a 5/8-inch hole into a concrete column, install a quick-release anchor with an I-hook on the end, and hook a retractable yo-yo onto the same. The ironworkers did not normally carry the

anchors that were needed to create a tie-off point. The anchors were expensive, and were kept in gang boxes. To create a tie-off point, Genetech's workers needed a hammer and cord, they had to clean up the hole and install the quick release anchor with an eye hook on the end, and then attach a retractable yo-yo. It took about 10 minutes to drill the hole and create the tie-off point.

Both Christiano and Calabrese, who were instructed to install window frames on the 18th floor that day, were tied off using the anchor-bolt system, each attached to his own tie-off point. Only one worker could be tied off to a particular anchor bolt at a time. At the time of the accident, there were only two anchor bolts within the zone, and they were being used by Christiano and Calabrese. It is uncontested that these two anchor bolts were the only ones present within the zone that day.

Although plaintiff was wearing a harness and lanyard, he was not carrying the tools and materials needed to install an anchor-bolt tie-off point. Plaintiff and Mooney were working on the 15th floor on a swing stage scaffold before the men on the 18th floor called for help. The anchor-bolt fall prevention system is not appropriate for men working on a scaffold, and there is no evidence that either plaintiff or Mooney anticipated working any place else, such that they would have carried the tools and materials needed to create an anchor-bolt tie-off

point.

Plaintiff alleges that he did not have time to create an anchor-bolt tie-off point when he ran to help his co-workers, and that there was nowhere else available to tie off to within the zone.

Plaintiff attests that every time he worked within a zone, the first thing he would do is drill the concrete and create a tie-off point. However, plaintiff maintains that there are two reasons that he did not tie off when he entered the zone that day: there was no anchor bolt available, and he was responding to an emergency situation. In light of these assertions, plaintiff also contends that he would not have done anything differently when he responded to his co-workers' screams.

PLEADINGS

Plaintiff's remaining cause of action alleges a violation of Labor Law § 240 (1).

In its answer, 281 Broadway brought cross claims against SJ for common-law and contractual indemnification, and breach of contract. In their later answer, 281 Broadway and Pavarini assert cross claims against SJ for contribution or common-law indemnification.

SJ's answer includes two cross claims against 281 Broadway and Pavarini for contribution or common-law

indemnification, and contractual indemnification. SJ later brought cross claims against Genetech sounding in common-law indemnification and contribution.

In their third-party complaint, 281 Broadway and Pavarini assert claims against Genetech for contribution or common-law indemnification, contractual indemnification, and breach of contract. In its third-party answer, Genetech alleges a cross claim against 281 Broadway, Pavarini and SJ for common-law indemnification, and a counterclaim against 281 Broadway and Pavarini for common-law indemnification.

DISCUSSION

Summary Judgment

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

(*Ostrov v Rozbruch,* 91 AD3d 147, 152 [1st Dept 2012]). The court must determine whether that standard has been met based "on the evidence before the court and drawing all reasonable inferences in plaintiff's favor" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]). "[S]ummary judgment is the

equivalent of a trial" (*Ostrov v Rozbruch*, 91 AD3d at 152), but "[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

Breach of Contract

As no one has addressed the various claims sounding in breach of contract, these claims will not be considered, and any parts of these motions which seek summary judgment on the breach of contract claims are denied.

Plaintiff's Motion (motion sequence number 001) for Summary Judgment on His Labor Law § 240 (1) Cause of Action Against 281 Broadway and Pavarini

Labor Law § 240 (1)

> Labor Law § 240 (1) provides, in pertinent part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site'

proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). "To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 659 [1st Dept 2012]). When considering a section 240 (1) claim, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

"In enacting the statute, the Legislature intended to place ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor rather than on the workers themselves [internal quotation marks and citations omitted]" (*Stringer v Musacchia*, 11 NY3d 212, 216 [2008]). To achieve its object, the statute "must be 'construed as liberally as may be for the accomplishment of the purpose for which it was . . . framed'" (*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494,

500 [1993]).

However, "liability does not attach where a plaintiff's actions are the sole proximate cause of his injuries. Specifically, if adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, then liability under section 240 (1) does not attach [internal citations omitted]" (*Paz v City of New York*, 85 AD3d 519, 519 [1st Dept 2011]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004] [no liability under the statute where a plaintiff's own actions are the sole proximate cause of the accident]).

On the other hand, "'the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence'" (*Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008], quoting *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008]). Indeed, once a violation of the statute is shown, and that violation is a proximate cause of a worker's injury, the worker's "contributory negligence . . . is not a defense to a section 240 (1) claim" (*Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]).

Defendants contend that plaintiff's accident does not fall within the protections of section 240 (1) because: (1) he was a recalcitrant worker and the sole proximate cause of his injuries; (2) he did not use readily available safety devices;

and (3) there is no exception for emergencies in the statute.

> "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1). However, to raise an issue of fact regarding plaintiff's recalcitrance, the owners were required to show that: (a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for no good reason he chose not to use them; and (d) had he used them, he would not have been injured [internal quotation marks and citations omitted]"

(*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012]).

> "Where a plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach. Instead, the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them [internal quotation marks and citations omitted]"

(*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *see also Barreto v Metropolitan Transp. Auth.*, 110 AD3d 630, 632 [1st Dept 2013] ["Where a plaintiff has an adequate safety device readily available that would have prevented the accident, and for no good reason chooses not to use it, Labor Law § 240 (1) does not apply"]).

In this matter, it is uncontested that the anchor bolts were kept in gang boxes. However, there is no indication of

where the gang boxes were at the time of plaintiff's accident. The evidence substantiates only that the gang boxes were moved around, from place to place. There is no evidence that plaintiff knew where the gang boxes were, or that he could have provided himself with the tools and materials he would have needed to create an anchor-bolt tie-off point. Rather, plaintiff and Mooney were not assigned to install windows that day. They were working on the 15th floor, and had no reason to carry tools and materials for creating an anchor-bolt tie-off point, because anchor-bolt tie-off points are not appropriate for the work plaintiff and his partner were performing on a swing stage scaffold that day.

Genetech's superintendent, Frank Stabile, chose the anchor-bolt fall-protection system to be used by Genetech employees at the site. However, Genetech's owner and president, Gregory Tedesco, attests that Genetech employees could tie off through nylon straps placed around columns, and that these straps were stored in a gang box on the 18th floor. Moreover, Tedesco testified that, when he arrived after the accident, he saw two anchor bolts, two nylon straps, one within five feet of the accident site, and possibly another nylon strap. According to Tedesco, it takes five seconds to tie off on a strap.

The Genetech employees who witnessed the accident, plaintiff, Christiano, Calabrese and Mooney, have all testified

that no readily available safety devices were in place in the zone that day.

Numerous issues of fact preclude a determination of the question of whether or not plaintiff was a recalcitrant worker or the sole proximate cause of his injuries.

In addition, determination of whether plaintiff was supplied with appropriate, readily available safety devices must also await the trier of fact. It is undisputed that there were two anchor bolts present and engaged by Christiano and Calabrese on the 18th floor, and that these were the only anchor bolts available there. It is also undisputed that only one worker may be tied off to an anchor bolt at any one time.

Plaintiff was wearing a harness and lanyard; however, it has not yet been determined whether appropriate, readily accessible safety devices were available to him to tie off on.

In addition, resolution of the issue of whether plaintiff's response to a perceived emergency was "no good reason" to forego tying off must also await the trier of fact.

Summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is not appropriate at this time. Accordingly, plaintiff's motion for summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is denied; those portions of defendants' motions which seek summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action are

denied except as to SJ; defendant SJ's motion which seeks summary judgment dismissing plaintiff's complaint as against it is granted (*see below*).

In addition, because plaintiff has discontinued his causes of action sounding in negligence and violations of Labor Law §§ 200 and 241 (6), those parts of defendants' motions which seek dismissal of these claims are denied as moot.

SJ's Motion (motion sequence number 002) to Dismiss the Complaint, and for Summary Judgment Dismissing 281 Broadway and Pavarini's Cross Claims for Contribution, Common-Law and Contractual Indemnity and Breach of Contract, and Genetech's Cross Claim and Counterclaim for Common-Law Indemnity

Whether SJ is a Proper Labor Law Defendant

The provisions of Labor Law § 240 (1) govern "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work." As set forth above, 281 Broadway was the owner of the premises and Pavarini the general contractor/construction manager for the project. SJ was the electrical subcontractor.

> "To be treated as a statutory agent [under Labor Law §§ 240 (1) and 241 (6)], the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury. If the subcontractor's area of authority is over a different portion of the work or a different area than the one in which the plaintiff was injured, there can be no liability under this theory [internal quotation marks and citation omitted]"

(*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011]).

Here, there is no evidence that SJ supervised Genetech's work area, the zone, or the work plaintiff was performing at the time of the accident. SJ's delegated responsibility was limited to controlling the areas in which its electricians worked, and supervising the electricians in their efforts. It is undisputed that SJ's electricians finished their work in the area of the accident at least four months before the accident. The alleged presence of electrical conduit and coiled wire that plaintiff may have come into contact with as he strove to help his co-workers is insufficient to impose an agency relationship on SJ.

Accordingly, SJ is not a proper Labor Law defendant, and the part of SJ's motion that seeks dismissal of plaintiff's complaint as against it is granted.

Negligence

"To state a claim for negligence, a plaintiff must sufficiently allege (1) a duty; (2) a breach of that duty; (3) causation; and (4) actual injury" (*Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 42-43 [1st Dept 2013]). "The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232

[2001]). "[W]ithout a duty running directly to the injured person there is no liability in damages" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013]).

No showing has been made that SJ was in any way negligent. There is no basis on which to find that SJ owed plaintiff any duty, let alone a duty "running directly to the injured person." There is no evidence that any contact plaintiff had with the conduit or coiled wires caused or contributed to plaintiff's being pulled out of the opening with the window.

Accordingly, the court finds that SJ was not negligent.

Common-Law Indemnification

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). "Further, it is well settled that common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries" (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]).

This court has found that SJ was not negligent. Thus, 281 Broadway's, Pavarini's and Genetech's cross claims for

common-law indemnification against SJ must fail, and the part of SJ's motion which seeks summary judgment dismissing these claims is granted.

Contribution

"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' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). As this court has found that SJ was not negligent, no claim in contribution lies against it. Dismissal of 281 Broadway's and Pavarini's claims in contribution against SJ is granted.

Contractual Indemnification (Pavarini/SJ Contract)

> "A party's right to contractual indemnification depends upon the specific language of the contract. Where there is no legal duty to indemnify, a contractual indemnification provision must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]"

(*Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 807-808 [2d Dept 2012]).

The indemnification provision of the Pavarini/SJ contract is found in Exhibit E, the General Conditions, Article 9

(pages 10-11). That article provides, in relevant part:

> "A. To the greatest extent permitted by law, [SJ] shall indemnify, defend, save and hold the Owner [281 Broadway] . . . the General Contractor [Pavarini] . . . (herein collectively called "Indemnitees") harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:
>
> 1. The performance of work by the Trade Contractor [SJ], or any act or omission of Trade Contractor[.]"

As set forth above, SJ had no role in the happening of plaintiff's accident. However, it has been *claimed* that plaintiff's accident arose out of SJ's work. The Appellate Division, First Department, in *Rosen v New York City Tr. Auth.* (295 AD2d 126 [1st Dept 2002]), cited *DiPerna v American Broadcasting Cos.* (200 AD2d 267 [1st Dept 1994]), noting that a

> "contractor [is] liable to indemnify site owner, notwithstanding finding of no liability in contractor's favor in the main action, under contract calling for indemnification of liabilities 'claimed' to arise out of or be connected with any accidents 'alleged' to have happened in or about the place where the contractor was performing work"

(*Rosen*, 295 AD2d at 126).

In *DiPerna*, the Court also noted that,

> "[n]othing in its broad language conditions [the owner's] right to indemnification on a finding of fault by [the contractor] or a

> third party. Indeed, in addressing a loss which arises or is claimed to arise out of . . . any accident or occurrence which . . . is alleged to have happened, the agreement expressly contemplates the absence of fault [internal brackets and quotation marks omitted]"

(*DiPerna*, 200 AD2d at 270). Thus, the terms of the indemnification clause have been triggered, and SJ must afford 281 Broadway and Pavarini indemnification according to the terms of the Pavarini/SJ contract.

Therefore, that part of SJ's motion which seeks summary judgment dismissing 281 Broadway's and Pavarini's claims for contractual indemnification must be denied.

281 Broadway's Motions (motion sequence numbers 003 and 005) for Summary Judgment Dismissing the Complaint and SJ's Cross Claims for Contribution or Common-Law Indemnification and Contractual Indemnification; Dismissing Genetech's Cross Claim and Counterclaim for Common-Law Indemnity; Granting Summary Judgment on Its Third-Party Claims Against Genetech; and Summary Judgment on Its Cross Claims Against SJ and Pavarini

As set forth above, the parts of 281 Broadway's motions which seek summary judgment dismissing plaintiff's Labor Law § 240 (1) claim are denied.

The parts of the motions which seek summary judgment dismissing SJ's cross claims for contribution or common-law indemnification are denied. The court has already dismissed 281 Broadway's, Pavarini's and Genetech's cross claims for common-law indemnification and 281 Broadway's and Pavarini's cross claims against SJ for contribution.

Because this court has determined that SJ owes 281 Broadway and Pavarini contractual indemnification, the parts of 281 Broadway's motions for dismissal of SJ's contractual indemnification cross claim are granted.

281 Broadway moves to dismiss Genetech's cross claim and counterclaim for common-law indemnification. These parts of the motions must be denied, as the Labor Law § 240 (1) claim remains unresolved, and there has been no finding yet of 281 Broadway's possible vicarious liability or negligence, or Genetech's possible negligence, or a possible finding that plaintiff was the sole proximate cause of his injuries.

281 Broadway's and Pavarini's third-party complaint alleges causes of action sounding in common-law indemnity or contribution, contractual indemnification and breach of contract against Genetech.

The parts of 281 Broadway's motions which seek summary judgment in 281 Broadway's favor on its third-party common-law indemnification claim against Genetech must be denied. Plaintiff's Labor Law § 240 (1) claim remains undecided. Therefore, it cannot be said at this time whether or not 281 Broadway will be held vicariously liable without proof of negligence, or whether or not Genetech will be found to be negligent or to have exercised actual supervision of the injury-producing work, or whether or not plaintiff will be found to be a

recalcitrant worker or the sole proximate cause of his injuries.

The same is true of 281 Broadway's third-party claim for contribution against Genetech. No determination of whether or not 281 Broadway and/or Genetech were negligent has yet been made. Therefore, the parts of 281 Broadway's motions which seek summary judgment in 281 Broadway's favor on its contribution claim against Genetech must be denied.

Contractual Indemnification (Pavarini/Genetech Contract)

There is no written contract between 281 Broadway and Genetech. However, 281 Broadway alleges that it was a third-party beneficiary of the Pavarini/Genetech subcontract.

> "A party asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for their benefit and (3) that the benefit to them is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost [internal quotation marks and citation omitted]"

(*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 460 [1st Dept 2009], *affd* 16 NY3d 173 [2011]; *see also Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006] [benefit must be "direct rather than incidental"]).

> "One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee

> intends to give the beneficiary the benefit of the promised performance [internal quotation marks and citations omitted]"

(*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d at 368).

> "[T]he intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee, and the benefit to plaintiffs was sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the non-contracting parties] if the benefit is lost [internal quotation marks and citations omitted]"

(*All Am. Moving & Stor., Inc. v Andrews*, 96 AD3d 674, 675 [1st Dept 2012]).

281 Broadway fulfills all of these conditions. The contract is the Pavarini/Genetech contract, which is valid and binding; the contract contains language naming 281 Broadway, the owner, as an intended additional insured on Genetech's policy; and in the event that Pavarini and/or Genetech failed to fulfill their contractual obligations, if so advised, 281 Broadway would be able to sue them for 281 Broadway's losses (Pavarini/Genetech contract, exhibit F, subsection [f]). Therefore, the court finds that 281 Broadway was an intended third-party beneficiary of the Pavarini/Genetech contract.

Exhibit E of the Pavarini/Genetech contract, General Conditions, Article 9, is an indemnification provision which is almost identical with that found in the Pavarini/SJ contract.

Thus, it contemplates an obligation to indemnify 281 Broadway and Pavarini by Genetech. As with SJ, it is *claimed* that the accident arose out of Genetech's work. Thus, like SJ, the indemnification clause has been triggered, and Genetech must afford 281 Broadway and Pavarini indemnification according to the terms of the Pavarini/Genetech contract.

Accordingly, the parts of 281 Broadway's motions which seek summary judgment in 281 Broadway's favor on its contractual indemnification claim against Genetech are granted.

281 Broadway's Cross Claims Against SJ and Pavarini

In its answer, 281 Broadway brings cross claims against Pavarini and SJ for common-law and contractual indemnification and breach of contract. In the discussion of SJ's motion, this court dismissed 281 Broadway's, Pavarini's and Genetech's claims for common-law indemnification as against SJ. Thus, the parts of 281 Broadway's motions which seek summary judgment in 281 Broadway's favor on its cross claim for common-law indemnification against SJ are denied.

Summary judgment in 281 Broadway's favor on its cross claim against Pavarini for common-law indemnity must be denied. 281 Broadway has not established that it has been held vicariously liable without proof of negligence on its part, nor has it demonstrated that Pavarini was either negligent or exercised actual supervision over the injury-producing work.

281 Broadway also seeks summary judgment in its favor on its cross claims against Pavarini and SJ for contractual indemnification. Summary judgment on this cross claim, as against SJ, must be granted, as it has been alleged that the accident arose out of SJ's work, and SJ is thus obligated to indemnify 281 Broadway according to the terms of the Pavarini/SJ contract.

Paragraph 12.3, page 16, of the 281 Broadway/Pavarini contract, Indemnification, provides as follows:

> "[T]o the fullest extent permitted by law, the Contractor [Pavarini] shall indemnify, defend and hold harmless the Owner [281 Broadway] . . . from and against all claims, damages (both direct and consequential), fines and/or penalties, losses and expenses (including but not limited to attorneys' fees) arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (i) is attributable to bodily injury . . . and (ii) is caused in whole or in part by any negligent or any other wrongful act or omission of the Contractor, any Subcontractor . . . . To the fullest extent permitted by law, Contractor shall provide this indemnity regardless of whether or not such liability is caused in part by a party indemnified hereunder."

Thus, if Pavarini or Genetech, its subcontractor, is found negligent with respect to plaintiff's accident, Pavarini's obligation to indemnify 281 Broadway will be triggered.

However, Pavarini maintains that the antisubrogation rule and a failure to mitigate damages preclude 281 Broadway's

relief on this claim as against Pavarini.

> "[W]hen an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation. Equitable subrogation is premised on the concept that the party who causes injury or damage should be required to bear the loss by reimbursing the insurer for payments made on behalf of the injured party [internal quotation marks and citation omitted]"

(*NYP Holdings, Inc. v McClier Corp.*, 65 AD3d 186, 189 [1st Dept 2009]).

> "Subrogation is an equitable doctrine that allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse. However, under the antisubrogation rule, an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered [internal quotation marks and citations omitted]"

(*Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co.*, 74 AD3d 21, 26 [1st Dept 2010]).

> "Subrogation allocates responsibility for the loss to the person who in equity and good conscience ought to pay it, in the interest of avoiding absolution of a wrongdoer from liability simply because the insured had the foresight to procure insurance coverage. The right arises by operation of law when the insurer makes payment to the insured [internal citations omitted]"

(*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). The antisubrogation rule "bars an insurer from

proceeding against its own insured because of the conflict of interest that it presents" (*Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.*, 53 AD3d 416, 418 [1st Dept 2008]).

Pavarini alleges that 281 Broadway is an additional insured under Pavarini's primary and excess policies. As such, Pavarini claims that the antisubrogation rule precludes any relief for 281 Broadway against Pavarini.

There is no dispute that PM's primary and excess policies cover 281 Broadway as an additional insured. It is also undisputed that, while both Pavarini's primary and excess carriers have accepted 281 Broadway's tender, only Pavarini's primary carrier has accepted 281 Broadway's tender without qualification or reservation of rights. The excess carrier has not yet accepted 281 Broadway's tender without qualification or reservation of rights.

281 Broadway contends that it is entitled to contractual indemnification from Pavarini for any damages in excess of Pavarini's applicable policy limits because the antisubrogation rule only applies to bar indemnification claims to the extent of the limits of the policy that covers both Pavarini and 281 Broadway. As such, 281 Broadway avers that it can maintain indemnification claims against Pavarini for any damages which exceed the applicable policy limits (*see e.g. Karcz v Klewin Bldg. Co., Inc.*, 85 AD3d 1649, 1652 [4th Dept 2011]

["The antisubrogation rule bars (contractor's) third-party action inasmuch as (plaintiff's employer) and (contractor) were insured under the same primary and excess policies, except to the extent that (contractor) seeks indemnification for amounts in excess of the coverage afforded by the policies at issue"]).

The court concludes that the antisubrogation rule applies in this matter, but only to the extent of Pavarini's primary and excess policies' limits. Once those limits have been exhausted, 281 Broadway may pursue its contractual indemnification claim against Pavarini for any damages which might exceed those limits.

However, Pavarini raises the defense of failure to mitigate damages. "Parties generally have a duty to mitigate damages, the satisfaction of which generally presents an issue of fact [internal citations omitted]" (*Bernstein v Freudman*, 180 AD2d 420, 421 [1st Dept 1992]). "However, the burden of proof is not upon the plaintiff to prove that he acted to mitigate damages, but rather upon the party who asserts the failure to mitigate" (*Golbar Props. v North Am. Mtge. Invs.*, 78 AD2d 504, 505 [1st Dept 1980], *affd* 53 NY2d 856 [1981]).

Although many papers and exhibits have been submitted on these five motions, Pavarini has not established that 281 Broadway failed to mitigate its damages.

Accordingly, because there are questions of fact

concerning coverage on this claim, summary judgment in 281 Broadway's favor on its cross claim for contractual indemnification against Pavarini must be denied.

Pavarini's Motion (motion sequence number 004) for Summary Judgment Dismissing the Complaint and All Cross Claims Asserted Against It; and For Summary Judgment in Its Favor on Its Claims For Contractual Indemnification Against Genetech and Co-Defendant SJ

The part of Pavarini's motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is denied.

In its answer, 281 Broadway brought cross claims against Pavarini sounding in common-law and contractual indemnification, and breach of contract. In its answer, SJ brought cross claims against Pavarini for contribution or common-law indemnification, and contractual indemnification. Genetech's third-party answer alleges a cross claim and counterclaim against Pavarini for common-law indemnification.

In its discussion of SJ's motion, this court dismissed Pavarini's cross claims for contribution and common-law indemnification against SJ because SJ was not negligent. SJ's cross claim for contractual indemnification against Pavarini was denied because the indemnification clause in the Pavarini/SJ contract requires SJ to indemnify Pavarini. Thus, the part of Pavarini's motion which seeks summary judgment dismissing SJ's contribution and common-law indemnification cross claims is

denied. The part of Pavarini's motion which seeks summary judgment dismissing SJ's contractual indemnification cross claim is denied. This court has found that SJ owes Pavarini contractual indemnification.

281 Broadway has brought cross claims against Pavarini for common-law and contractual indemnification. The part of Pavarini's motion which seeks to dismiss 281 Broadway's common-law indemnification claim must be denied. No finding with respect to Pavarini's or 281 Broadway's possible vicarious liability or negligence has yet been made.

Summary judgment dismissing 281 Broadway's cross claim against Pavarini for contractual indemnification is denied. No finding that Pavarini and/or Genetech was, or was not, negligent has yet been made.

Genetech's third-party answer alleges a cross claim and a counterclaim, both for common-law indemnification, against Pavarini. Summary judgment dismissing these claims must be denied. Pavarini has yet to demonstrate that it was held vicariously liable without fault or that Genetech was either negligent or supervised the injury-producing work.

Contractual Indemnification (Pavarini/Genetech Contract)

As discussed earlier, the indemnification provision of the Pavarini/Genetech contract is almost identical to that in the Pavarini/SJ contract. Because it is alleged that plaintiff's

injuries arose out of Genetech's work, Genetech must indemnify Pavarini according to the terms of the Pavarini/Genetech contract. As such, the part of Pavarini's motion which seeks summary judgment in Pavarini's favor on its claim for contractual indemnification against Genetech is granted.

Contractual Indemnification (Pavarini/SJ Contract)

As set forth above, the Pavarini/SJ contract requires SJ to indemnify Pavarini if it is claimed that plaintiff's injuries arose out of SJ's work. Since that claim has been made, the part of Pavarini's motion which seeks summary judgment in Pavarini's favor on its claim for contractual indemnification against SJ is granted.

CONCLUSION

Accordingly, it is

ORDERED that any part of any of these motions which seeks summary judgment on the breach of contract claims is denied; and it is further

ORDERED that plaintiff Kenneth Koerner's motion (motion sequence number 001) is denied; and it is further

ORDERED that because plaintiff has discontinued his causes of action sounding in negligence and violations of Labor Law §§ 200 and 241 (6), those parts of defendants' motions which seek dismissal of these claims are denied as moot; and it is further

ORDERED that the part of defendant S.J. Electric, Inc.'s motion (motion sequence number 002) which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is granted; and it is further

ORDERED that the parts of S.J. Electric, Inc.'s motion which seek summary judgment dismissing 281 Broadway Holdings, LLC's, Pavarini McGovern, LLC's and Genetech Building Systems, Inc.'s cross claims for common-law indemnification, and 281 Broadway Holdings, LLC's and Pavarini McGovern, LLC's cross claims for contribution as against S.J. Electric, Inc. are granted; and it is further

ORDERED that the part of S.J. Electric, Inc.'s motion which seeks summary judgment dismissing 281 Broadway Holdings, LLC's and Pavarini McGovern, LLC's claims for contractual indemnification is denied; and it is further

ORDERED that the parts of defendant 281 Broadway Holdings, LLC's motions (motion sequence numbers 003 and 005) which seek summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action are denied; and it is further

ORDERED that the parts of defendant 281 Broadway Holdings, LLC's motions which seek summary judgment dismissing S.J. Electric, Inc.'s cross claims for contribution or common-law indemnification are denied; and it is further

ORDERED that the parts of defendant 281 Broadway

Holdings, LLC's motions which seek summary judgment dismissing S.J. Electric, Inc.'s cross claim for contractual indemnification are granted; and it is further

ORDERED that the parts of defendant 281 Broadway Holdings, LLC's motions which seek summary judgment dismissing Genetech Building Systems, Inc.'s cross claim and counterclaim for common-law indemnification are denied; and it is further

ORDERED that the parts of defendant 281 Broadway Holdings, LLC's motions which seek summary judgment in 281 Broadway Holdings, LLC's favor on its third-party claims against Genetech Building Systems, Inc. which sound in common-law indemnification and contribution are denied; and it is further

ORDERED that the parts of 281 Broadway Holdings, LLC's motions which seek summary judgment in its favor on its cross claim against S.J. Electric, Inc. for contractual indemnification are granted; and it is further

ORDERED that the parts of 281 Broadway Holdings, LLC's motions which seek summary judgment in 281 Broadway Holdings, LLC's favor on its contractual indemnification claim against Genetech Building Systems, Inc. is granted; and it is further

ORDERED that the parts of 281 Broadway Holdings, LLC's motions which seek summary judgment in 281 Broadway Holdings, LLC's favor on its cross claims for common-law indemnification against S.J. Electric, Inc. are denied; and it is further

ORDERED that the parts of 281 Broadway Holdings, LLC's motions which seek summary judgment in its favor on its cross claim against S.J. Electric, Inc. for contractual indemnification is granted; and it is further

ORDERED that the parts of 281 Broadway Holdings, LLC's motions which seek summary judgment in its favor on its cross claim against Pavarini McGovern, LLC for common-law and contractual indemnification are denied; and it is further

ORDERED that the part of defendant Pavarini McGovern, LLC's motion (motion sequence number 004) which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is denied; and it is further

ORDERED that the part of defendant Pavarini McGovern, LLC's motion which seeks summary judgment dismissing S.J. Electric, Inc.'s cross claims for contractual indemnification and contribution or common-law indemnification against Pavarini McGovern, LLC is denied; and it is further

ORDERED that the parts of defendant Pavarini McGovern, LLC's motion which seek summary judgment dismissing 281 Broadway Holdings, LLC's cross claims for common-law and contractual indemnification are denied; and it is further

ORDERED that the part of Pavarini McGovern, LLC's motion which seeks summary judgment dismissing Genetech Building Systems, Inc.'s cross claim for common-law indemnification is

denied; and it is further

ORDERED that the part of Pavarini McGovern, LLC's motion which seeks summary judgment on its claims for contractual indemnification against Genetech Building Systems, Inc. and S.J. Electric, Inc. is granted; and it is further

ORDERED that the part of Pavarini McGovern, LLC's motion which seeks summary judgment in Pavarini McGovern, LLC's favor on its claim for contractual indemnification against S.J. Electric, Inc. is granted.

ORDERED that the remainder of the actions shall continue and the parties are to proceed to mediation/trial, forthwith.

Dated: February 10, 2014

ENTER:

J.S.C.