Telesco v St. Nich 655 Realty LLC
2015 NY Slip Op 32385(U)
November 16, 2015
Supreme Court, Bronx County
Docket Number: 304043/2013
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

PETER TELESCO and LEZA TELESCO,

Plaintiffs,

-against-

ST. NICH 655 REALTY LLC, CITY LIMITS GROUP INC., 655 ST, NICHOLAS HOLDINGS LLC and MARCAL CONTRACTING CO., LLC,

Defendants.

INDEX NUMBER: **304043/2013**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 6,

Read on this Plaintiff's Motion and Defendants' Cross-Motion for Summary Judgment

On Calendar of **4/13/15**

Notices of Motion/Cross-Motions-Exhibits, Affirmations 1, 2,3

Affirmations in Opposition/Support 4, 5

Reply Affirmation 6

Upon the foregoing papers, plaintiff's motion for summary judgment and defendants' cross-motions for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, plaintiff's motion for summary judgment is granted with respect to his Labor Law §240(1) claim. Defendants St. Nich 655 Realty LLC (hereinafter "655 Realty"), 655 St. Nicholas Holdings LLC (hereinafter "655 Holdings") and Marcal Contracting Co., LLC's (hereinafter "Marcal") branch of the cross-motion seeking dismissal of plaintiff's claims is denied; and the branch of the cross-motion seeking contractual defense and indemnity for 655 Holdings and Marcal is granted. Defendant City Limits Group, Inc.'s (hereinafter "City Limits") branch of the cross-motion seeking dismissal of 655 Realty's contractual defense and indemnification claim is granted.

This is a personal injury action arising out of an alleged accident on May 10, 2013 at a demolition site at 655 St. Nicholas Avenue, New York, New York. Plaintiff was allegedly injured while in the course of his employment while working at an old multi-floor parking garage which was in the process of being demolished. Plaintiff claims that while in the process of removing a tarp off of a Brokk machine, a robotic, remote controlled jackhammer and walking backwards with the tarp, he stumbled over demolition debris, causing him to fall through an open, uncovered, unprotected hole in the second floor of the building, falling 15 to 20 feet onto the concrete below. Defendant 655 Realty was the owner of the subject premises on the date of the accident, however, defendant 655 Holdings had previously entered into a contract to buy the property, and as part of the purchase, was required to demolish the garage located on the property. Defendant 655 Holdings hired defendant Marcal as the general contractor for the demolition project at the premises. Marcal then subcontracted with defendant City Limits to perform the actual demolition work. At the time of the accident, plaintiff was employed by non-party FMC as an equipment operator.

Darryl Hagler, the managing member of defendant 655 Realty, testified at a deposition that 655 Realty was the owner of the subject property which contained a commercial garage. Mr. Hagler testified that it was his decision to require the buyer of the property, 655 Holding, to demolish the garage. He admitted that his company did not provide any safeguards to the workers at the job site.

Schlomo Tajerstein, who testified that he is employed by defendant Marcal, appeared at a deposition on behalf of defendant 655 Holdings. He testified that Marcal is in the real estate acquisitions business and controls the business operations of 655 Holdings which is also in the real estate acquisitions business. Mr. Tajerstein denied any personal knowledge of the demolition project at issue but admitted that 655 Holdings provided no protective devices, covering for holes, protection against tripping or fall hazards and no safety devices of any kind.

Abraham Caller, project coordinator for defendant Marcal, testified at a deposition that there was a contract between Marcal and defendant City Limits for City Limits to perform the demolition work at the subject premises. Mr. Caller testified that he first learned of plaintiff's accident when he got a telephone call from his assistant Aharon Steinberg. Mr. Caller then directed a manager from Marcal named Frank to visit the site and investigate. He testified that Frank went to the site following the accident and observed a hole on the second floor that was big enough for a person to fall through. Frank stated that here was no protection

around the hole. When Frank spoke to George, the foreman at the site, George stated that the plaintiff was not supposed to be part of the demolition operation and was not supposed to be on the second floor. It was supposed to be cordoned off and no one was supposed to be there. George did not know why the plaintiff was there. Frank told Mr. Caller that the hole was made during the demolition process. Mr. Caller admitted that neither he nor anyone on behalf of Marcal provided any safety devices or precautions; that neither he nor anyone on behalf of Marcal did anything to ensure the safety of the workers; did not provide the workers with any safety devices nor ensured that the site was protected from fall or tripping hazards.

Frances Miceli, the President of defendant City Limits, testified at a deposition that City Limits was the only entity that performed the actual demotion on the job. She confirmed that at the time of the accident, plaintiff was employed by FMC, a company owned by her husband, Frank Miceli. Ms. Miceli testified that she had no personal knowledge of any information that would contradict plaintiff's testimony that he fell through an open hole that had been created by City Limits which was uncovered and unguarded. Ms. Miceli further testified that she did not know if City Limits provided any fall protection or safety equipment, but admitted that City Limits did not provide any safety measures or devices for the workers at the site.

Frank Miceli testified at a deposition that he is the owner and President of FMC, plaintiff's employer at the time of the accident. Mr. Miceli testified that plaintiff's job was to use the Brokk machine to do demolition work on the second floor of the subject premises. A decision was made to cut a hole on the second floor to run the electric cable up to the Brokk. The hole was big enough for a man to fall through and plaintiff fell through the hole. The hole was not covered at the time of plaintiff's fall. Mr. Miceli was on the ground floor of the premises at the time of plaintiff's accident.

Jorge (George) Lopez, City Limit's foreman, submits an affidavit wherein he states that at his direction, a hole was cut in the floor of the second floor of the subject premises to run an electric power cord from a generator on the ground floor to the Brokk machine on the second floor. He states that there were other options for getting the cable to the Brokk machine, such as running a cable up a ramp to the second floor, but he decided that it would be easier to have a hole cut. He further admits that the hole was large enough for a man to fall through and was not covered by any protective barrier, and it was not surrounded by any barricade, warning or railing. He confirms plaintiffs' testimony that plaintiff had covered the Brokk machine at the end of the prior work day to protect it from rain that was expected that night and that plaintiff was in the process of uncovering

the machine when the accident occurred. He admitted that plaintiff fell from 15 to 18 feet through that opening and landed on concrete below. He further admitted that an employee of City Limits, Elijah, was responsible for inspecting the demolition site and looking for safety hazards.

Joe Nuara, another foreman employed by City Limits, submits an affidavit wherein the states that City Limits employees had cut a hole through the second floor to run an electric cord from a generator on the ground to the Brokk machine above. He states that it was supervisor George Lopez's decision to cut the hole even though there were other ways of getting electricity to the machine. He further confirms that the hole through which plaintiff fell was not covered by any protective barrier nor was it surrounded by any barricade, warning or railing at any time before plaintiff's accident.

Marc Caller, the owner of Marcal, submits an affidavit wherein he states that neither her nor anyone from Marcal did any demolition work and did not provide any safety or protective devices for workers at the site.

Plaintiff moves for summary judgment on his Labor Law §240(1) claim against defendants on the grounds that he was not provided a safe work site notwithstanding that he was required to work at an elevated height to perform his job. Plaintiff argues that he stumbled over debris and fell through a hole that was not covered or protected in any way. Plaintiff also seeks summary judgment on his Labor Law §241 (6) claim based on defendants violations of 12 NYCRR §23-1.7(b) and (e) of the Industrial Code.

Defendants 655 Realty, 655 Holdings and Marcal cross-move for summary judgment arguing that all of plaintiff's claims against them should be dismissed. Marcal argues that it played no role whatsoever with respect to the project apart from the financial arrangements, and it hired City Limits to perform the work including the maintenance of safety at the jobsite, pursuant to both the Subcontract Agreement as well as the proposal submitted by City Limits. Abraham Caller, the project manager, testified that while both he and his assistant Aharon Steinberg visited the site on occasion to check on the progress of the demolition, neither were permitted on the second floor of the structure. Prior to the accident, he had no knowledge of any holes having been cut on the second floor. Likewise, Mr. Tajerstein testified that Marcal does not perform demolition work or provide any safety related services at the jobsite and confirmed that 655 Holdings did not own the property on the date of the accident. Mr. Hagler confirmed that 655 Realty owned the property on the date of plaintiff's accident but had nothing to do with the demolition work being performed. Ms. Miceli confirmed that the

contract between City Limits and Marcal required City Limits to name, among other entities, Marcal, 655 Realty and 655 Holdings as additional insureds.

The contract provides, in pertinent part, Paragraph 5 ("Insurance Requirements") that

> The insurance coverage required hereunder shall include contractual liability insurance which shall provide coverage for, among other things, the subcontractor's obligation to indemnify, defend and hold harmless Marcal Contracting Co., LLC, 655 St. Nicholas Ave. Holdings, LLC, it agents, representatives and employees from any losses, claims, actions, demands, damages, liabilities or expenses, including but not limited to attorney's fees and all other costs of defense, by reason of the liability imposed by law or otherwise upon Marcal Contracting Co., LLC and 655 St. Nicholas Ave. Holdings, LLC because of bodily injuries, including death, at any time resulting from said bodily injuries, which is sustained by any person or persons including the subcontractor's employees... arising directly or indirectly from the performance or non-performance of the subcontractor's work, or arising from any acts or omissions on the part of the subcontractor, its employees, agents, representatives, material men, suppliers and/or contractors. If such indemnity is made void or otherwise impaired by any law controlling the construction thereof, such indemnity shall be deemed to conform to the indemnity permitted by law, as to require indemnification in whole or in part to the fullest extent permitted by law.

The Indemnification/Hold Harmless Agreement further provides

> The subcontractor agrees to defend, indemnify and hold harmless 655 St. Nicholas Ave. Holdings, LLC and its members, officers, employees, agents, representatives and subsidiaries, regardless of their negligence or fault, from and against any and all claims, actions, judgments, damages, liability and expenses, incidental thereto (including but not limited to reasonable attorney's fees) imposed upon, incurred by or asserted against any or all of them as a result of injury, death, disease, occupational disease, to any person... arising out of or in any degree directly or indirectly caused by or resulting from: (1) activities or of work performed by the subcontractor, its officers, employees, contractors, subcontractors of any other person acting for or by permission of the subcontractor... The foregoing obligation shall not extend to situations where the negligence or fault of Marcal Contracting Co. LLC and 655 St. Nicholas Avenue Holdings, LLC is the sole cause [of] negligence or fault...

Based on these contractual provisions, defendants 655 Realty, 655 Holdings and Marcal argue that they are entitled to contractual indemnification as against City Limits' primary and excess insurance policies. Defendants 655 Realty, 655 Holdings and Marcal state that they tendered the matter to both the primary and excess carrier for City Limits, Ironshore Specialty Insurance Company (hereinafter "Ironshore"). On February 26, 2014, Gallagher Basset, as third party administrator on behalf of Ironshore accepted the tender of the defense of Marcal and 655 Realty on a primary and non-contributory basis. On March 6, 2014, acceptance of the tender was clarified and Ironshore accepted the defense of 655 Holdings as well. Ironshore

has not responded to the tender of the excess insurance policy. Without any clarity as to the primacy of the insurance, defendants argue that they are compelled to make the instant application for a finding of contractual indemnity.

Defendant City Limits also cross-moves for summary judgment seeking dismissal of plaintiff's claims pursuant to Labor Law §§200, 240(1), 241(6) and common law negligence and granting summary judgment as to City Limits in favor of defendants 655 Realty, 655 Holding and Marcal for contractual defense and indemnity. City Limits argues that 655 Realty is not entitled to contractual indemnity and defense from City Limits because there was no contract in effect on the date of the accident which required City Limits to indemnify or defend 655 Realty. Additionally, City Limits agues that there are questions of fact as to whether 655 Holdings and Marcal were actively negligent and had notice of an allegedly dangerous condition. Even though 655 Realty was the owner of the premises, 655 Holdings entered into a contract with Marcal on August 1, 2012 to "furnish in accordance with the terms and conditions of this contract, all labor, materials and equipment, layout, supervision..., in order to complete in a first class workmanlike manner the work" at the subject premises. The subcontract agreement also required Marcal to provide "all materials, tools, equipment, permits, transportation and other facilities as well as all labor, including proper supervision." On August 23, 2012, City Limits entered into a Subcontractor Agreement with Marcal. Rider "A" Scope of Work to the contract refers to City Limits June 27, 2012 proposal which provides that City Limits will "supply all labor, materials, equipment, containers, supervision and insurance for the scope of work listed below per site visit on 6/21/12 and specifications provided."

The "General Requirements" on the part of Marcal as set forth in the contract with City Limits provided, in pertinent part, as follows:

> 5. Perform all work in a manner consistent with the current OSHA Regulations, specific owner requirements and MC [Marcal] Safety Program... Failure to comply with Safety Program will result in a back chargeable fix or removal from site.
>
> 8. Coordinate and cooperate with other contractors and MC Construction Manager...
>
> 13. Materials shall be stored as directed by MC Construction Manager...
>
> 25. Marcal reserved the right to reject all work not conforming to contract drawings, acceptable workman like practices, and industry standards for this trade.

City Limits argues that these requirements placed the responsibility for supervising the work site on Marcal and placed Marcal in charge of site safety and required Marcal to have a construction manager at the work site. Moreover, despite Marcal's contractual obligations to provide all labor and proper supervision, City Limits argues that Marcal was deficient in its duties because Abe Caller testified that he only visited the site two or three times prior to the date of the accident.

City Limits also argues that plaintiff was the sole proximate cause of his accident. Defendant submits the affidavit of Elijah Fredericks, City Limits safety manager for this job, wherein he states that the second floor of the subject premises was not to be accessed by workers the morning of plaintiff's accident. Mr. Fredericks states that her personally placed yellow caution tape and barricades at the entrance of the ramp leading up to the second floor to completely block access to the second floor. City Limits also argues that there are no witnesses to the accident.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: "[a]ll 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... 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." Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York , 716 N.Y.S.2d 50 (1st Dept 2000). Not every gravity-related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 N.Y.2d at 317. When the work giving rise to these duties has been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Id.

Plaintiff has adduced evidence that he was performing work covered by §240(1) of the Labor Law and that he is a member of the protected class contemplated by the statute. Plaintiff has further submitted evidence that he fell from an elevated level while performing his work. Moreover, he has submitted evidence in admissible form that the area he was working on was unstable, that there was a hazardous hole in his work area that was not properly covered and secured and that he was not provided with the necessary safety equipment or safeguards. See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985)("Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker 'proper protection', absolute liability is 'unavoidable' under §240(1).") Additionally, he has submitted evidence that the hazardous hole on the floor and the failure to provide adequate safety measures were the proximate cause of his injury.

Any recalcitrant worker argument is without merit. The recalcitrant worker defense would allow defendant to escape liability imposed by Labor Law §240(1). In order to establish a recalcitrant worker defense,

a defendant must show that a plaintiff deliberately refused to use available safety devices provided by the owner or contractor. Hagins v. State of New York, 81 N.Y.2d 921, 922-923 (1993); Stolt v. General Foods Corp., 81 N.Y.2d 918 (1993). The defense is not established by merely showing that the worker failed to comply with an employer's instruction to avoid using unsafe equipment or engaging in unsafe practices or to use a particular safety device, or by the mere presence of safety devices on the work site. Hagins v. State of New York, *supra*; Gordon v. Eastern Railway, 82 N.Y.2d 555 (1993). On these facts, the recalcitrant worker defense is inapplicable. In the instant matter, plaintiff was not provided with any safety equipment for him to perform his job and avoid the elevated risk fall that occurred. It is undisputed that plaintiff was caused to fall through an opening in the second floor. Such a fall on its own is sufficient to establish plaint's entitlement to summary judgment under Labor Law §240(1). See, Sanatass v. Consolidated Investing Co., Inc., 10 N.Y.3d 333 (2008); Sferraza v. Port Authority of New York and New Jersey, 777 N.Y.S.2d 645 (1st Dept. 2004); Ross v. Curtis-Palmer Hydroelectric Co., 81 N.Y.2d 494 (1994); Rocovich v. Consolidated Edison, 78 N.Y.2d 509 (1991); Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513 (1985). Defendant City Limits argument that the only cause of the accident was plaintiff's own negligence in going to the second floor when the ramp to the second floor had been cordoned off is inadequate to defeat plaintiff's motion. The argument overlooks plaintiff's evidence that no safety devices were provided to protect him from the hole in the ground. Given the hole and no other safety devices, plaintiff cannot be held solely to blame for his injuries. Plaintiff's going to the second floor, even if it had been cordoned off, amounts to, at most, to comparative negligence, which is not a defense to a section 240(1) claim); Bonanno v. Port Authority, 750 N.Y.S.2d 7(1st Dept. 2002); Mirraglia v. H&L Holding Corp., 828 N.Y.S2d 329 (1st Dept. 2007); Hernandez v. 151 Sullivan Tenant Corp., 762 N.Y.S.2d 603 (1st Dept. 2003). The fact that there were no other witnesses to plaintiff's accident does not alter this result. Verdon v. Port Authority of New York and New Jersey, 977 N.Y.S.2d 4 (1st Dept. 2013); Marrero v. 2075 Holding Co. LLC, 964 N.Y.S.2d 144 (1st Dept. 2013); Noble v. 260-61 Madison Avenue, 954 N.Y.S.2d 918 (1st Dept. 2012); Gambino v. William M. Crow Construction Co., 655 N.Y.S.2d 537 (1st Dept. 1997); Casabianca v. Port Authority of New York and New Jersey, 655 N.Y.S.2d 2 (1st Dept. 1997); Klein v. City of New York, 635 N.Y.S.2d 634 (1st Dept. 1995).

Having granted plaintiff's motion based upon Labor Law 240(1), the Court declines to consider defendants' argument for summary judgment on plaintiff's Labor Law §§241(6) and 200, and common law

negligence claims as the arguments are academic. See, Fanning v. Rockefeller University, 964 N.Y.S.2d 525 (1st Dept. 2013); Carchipulla v. 6661 Broadway Partners, LLC, 945 N.Y.S.2d 4 (1st Dept. 2012); Torino v. KLM Construction Co. Inc., 257 A.D.2d 541 (1st Dept.1999). Accordingly, since the branch of plaintiff's motion for summary judgment on his Labor Law §240(1) is granted, defendants 655 Realty, 655 Holdings and Marcal's branch of the cross-motion to dismiss plaintiff's claims is denied.

With respect to the branch of defendants 655 Realty, 655 Holdings and Marcal's motion for contractual defense and indemnity from both insurance policies (the primary and excess insurance policies) issued by Ironshore, it is granted with respect to 655 Holdings and Marcal. The contract language between City Limits and Marcal required City Limits to indemnify, defend and hold harmless both Marcal and 655 Holdings as a result of bodily injuries arising out of City Limits work. A party is entitled to full contractual indemnification provided that the intention to indemnify can be implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. Drzewinski v. Atlantic Scaffold & Ladder Co., Inc., 70 N.Y.2d 774 (1987). In the instant matter, 655 Holdings and Marcal are entitled to contractual indemnification and defense from City Limits pursuant to the plain terms of the applicable written agreement between the parties. Since the record contains no evidence that plaintiff's injuries resulted from negligence on the part of either 655 Holdings or Marcal, there is no statutory bar to enforcement of the indemnity agreements. See, Vargas v. New York City Transit Authority, 874 N.Y.S.2d 446 (1st Dept. 2009). "Given the absence of any negligence on its part, [a defendant] is entitled to summary judgment on its contractual indemnification claim." Gory v. Neighborhood Partnership Housing Development Fund Co., 979 N.Y.S.2d 314 (1st Dept. 2014) citing Mahoney v. Turner Construction Co., 831 N.Y.S.2d 47 (1st Dept. 2007). However, 655 Realty's claim for contractual indemnification and defense is dismissed since 655 Realty and City Limits were not in contractual privity with each other. With respect to 655 Realty's claim for common law indemnity, a party seeking common-law indemnification must prove not only that it was free of negligence, but also that the proposed indemnitor negligently contributed to the cause of the accident for which the indemnitee is liable to the injured party by virtue of some obligation imposed by law. Lewis-Moore v. Cloverleaf Tower Housing Development Fund Corp., 810 N.Y.S.2d 70 (1st Dept. 2006) citing 17 Vista Fee Associates v. Teachers Ins. and Annuity Assen of America, 693 N.Y.S.2d 554 (1st Dept. 1999) (The principle of "implied indemnification" permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to

the injured party. In the classic case, implied indemnity permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer. The party that has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of implied indemnification. To be entitled to implied indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.) See also D'Ambrosio v. City of New York, 55 N.Y.2d 454 (1982)(Common-law indemnification applies when the party seeking indemnity "has committed no wrong but by virtue of some relationship with the tortfeasor or obligation imposed by law, was nevertheless liable to the injured party.") Moreover, a claim for common law contribution can only succeed against someone who is negligent. Glasser v. M. Fortunoff of Westbury Corp., 71 N.Y.2d 643 (1988)(A contribution claim is available only "where a party is held liable at least partially because of its own negligence," and may be sought only "against other culpable tort-feasors.").

In the instant matter, 655 Realty were out of possession owners that engaged in no action that could rise to the level of active negligence. The case of Gory v. Neighborhood Partnership Housing Development Fund Co. is similar to the case herein. In that action, the owner of a property under demolition for which the injured plaintiff was an employee of a third-party subcontractor was found to be not liable under common law negligence principles or Labor Law §200 as no one from the ownership ever visited the demolitions site or otherwise had notice of the dangerous condition. Accordingly, 655 Realty is entitled to common law indemnification from City Limits. Therefore, as already stated, the branch of City Limits' cross-motion that seeks dismissal of 655 Realty's claim for contractual indemnification and defense is granted and the branch of the cross-motion that seeks to dismiss 655 Realty's claim with respect to common law indemnification is denied.

This constitutes the decision and order of this Court.

Dated: 11/6/15

Hon. Alison Y. Tuitt