

Regno v City of New York
2015 NY Slip Op 32951(U)
August 31, 2015
Supreme Court, New York County
Docket Number: 109524/2009
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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JAMES G. REGNO and BRENDA REGNO,

Index No. 109524/2009

Plaintiffs

- against -

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF SANITATION, TULLY
CONSTRUCTION CO., INC., TULLY
INDUSTRIES, INC., DART MECHANICAL
CORP., BOVIS EAST, INC., BOVIS LEND
LEASE, INC., BOVIS CONSTRUCTION CORP.,
J.H. ELECTRIC OF NEW YORK, INC., ALMAR
PLUMBING AND HEATING CORPORATION, and
COASTAL SHEET METAL CORP.,

Defendants

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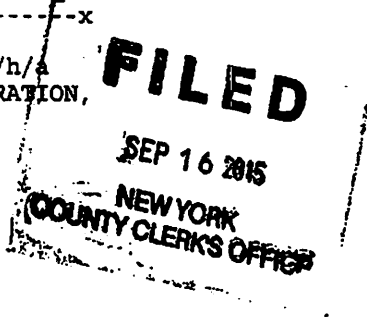
ALMAR PLUMBING & HEATING CORP. s/h/a
ALMAR PLUMBING AND HEATING CORPORATION,

Third Party Plaintiff

- against -

BRUNO GRGAS, INC.,

Third Party Defendant



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DART MECHANICAL CORP.,

Second Third Party Plaintiff

- against -

BRUNO GRGAS, INC.,

Second Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injuries and lost services sustained August 15, 2008, when plaintiff James Regno, an employee of second third party defendant Bruno Grgas, Inc., an insulation subcontractor, was injured while working at premises owned by defendant City of New York and occupied by defendant New York City Department of Sanitation (DOS). He was working on the construction of a new sanitation garage on 12th Avenue between West 55th and West 58th Streets in New York County, where defendant Bovis Lend Lease, Inc., served as the construction manager and defendants Tully Construction Co., Inc., Dart Mechanical Corp., J.H. Electric of New York, Inc., and Almar Plumbing and Heating Corporation were prime contractors. While insulating a pipe, he stepped on a duct that another subcontractor, defendant Coastal Sheet Metal Corp., had installed. The duct collapsed, causing him to fall.

In an order dated September 30, 2010, the court (Jaffe, J.) dismissed Almar Plumbing and Heating's third party action against Bruno Grgas. Dart Mechanical commenced a second third party action against Bruno Grgas seeking contractual indemnification, including defense costs.

Bruno Grgas moves for summary judgment dismissing the second third party complaint and all cross-claims against Bruno Grgas. C.P.L.R. § 3212(b). Dart Mechanical cross-moves for summary judgment on its contractual indemnification claim against Bruno

Grgas, C.P.L.R. § 3212(b) and (e), and separately moves for summary judgment dismissing all claims and cross-claims against Dart Mechanical. C.P.L.R. § 3212(b). For the reasons explained below, the court grants Bruno Grgas's motion in part and conditionally grants Dart Mechanical's cross-motion, but denies its separate motion.

II. SUMMARY JUDGMENT STANDARDS

Bruno Grgas and Dart Mechanical, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If Bruno Grgas and Dart Mechanical satisfy this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the motions and cross-motion, the court construes the evidence in the light most favorable to the opponents. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If Bruno Grgas and Dart Mechanical fail to meet their initial burden, the court must deny

summary judgment despite any insufficiency in the opposition. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

A "motion for summary judgment shall be supported . . . by a copy of the pleadings." C.P.L.R. § 3212(b) (emphasis added). See LaRusso v. Katz, 30 A.D.3d 240, 243 (1st Dep't 2006). "The pleadings" means "all of the pleadings," Washington Realty Owners, LLC v. 260 Wash. St., LLC, 105 A.D.3d 675 (1st Dep't 2013); Weinstein v. Gindi, 92 A.D.3d 526, 527 (1st Dep't 2012); Matsvuk v. Konkalipos, 35 A.D.3d 675, 676 (2d Dep't 2006); Welton v. Drobnički, 298 A.D.2d 757 (3d Dep't 2002), or "a complete set of the pleadings." Washington Realty Owners, LLC v. 260 Wash. St., LLC, 105 A.D.3d 675; Wider v. Heller, 24 A.D.3d 433, 434 (2d Dep't 2005).

III. PROCEDURAL ISSUES

A. Failure to Support Summary Judgment With the Pleadings

Bruno Grgas fails to present copies of all the pleadings. It supports its motion with Dart Mechanical's second third party summons and complaint, its answer to the second third party complaint, and only the answer by Bovis Lend Lease and Bovis Construction Corp. to the main complaint.

Where a party moving for summary judgment fails to include all the pleadings in support of the motion, the court may be constrained to deny the motion for that reason alone. Washington Realty Owners, LLC v. 260 Wash. St., LLC, 105 A.D.3d 675; Weinstein v. Gindi, 92 A.D.3d at 527; State of New York v. Metz,

241 A.D.2d 192, 198 (1st Dep't 1998); Matsyuk v. Konkalipos, 35 A.D.3d at 676. Bruno Grgas, however, seeks dismissal of the second third party complaint and all cross-claims against Bruno Grgas, which only the two Bovis defendants, Bovis Lend Lease and Bovis Construction Corp., had interposed against Bruno Grgas when it moved for summary judgment. Therefore the record is sufficiently complete to determine Bruno Grgas's motion, despite its failure to present all the other pleadings in the action: an omission that inflicts no prejudice on the affected parties, Dart Mechanical and the Bovis defendants. C.P.L.R. § 2002; Guaman v. 1963 Ryer Realty Corp., 127 A.D.3d 454, 456 (1st Dep't 2014); Reyes v. Sanchez-Pena, 117 A.D.3d 621, 622 (1st Dep't 2014). See Washington Realty Owners, LLC v. 260 Wash. St., LLC, 105 A.D.3d 675.

B. Prematurity

Plaintiffs, the City defendants, and Almar Plumbing and Heating insist that the court deny the motions and cross-motion for summary judgment because disclosure is necessary to oppose them. C.P.L.R. § 3212(f). These parties point out that neither Bruno Grgas nor Dart Mechanical presents a witness who explains Dart Mechanical's payment for James Regno's work on Almar Plumbing and Heating pipes, and Bruno Grgas presents no witness who explains records indicating that James Regno was insulating Dart Mechanical pipes when he was injured. Almar Plumbing and Heating seeks Bruno Grgas's disclosure of documents Bruno Grgas relied on, but also failed to present, to support its claim that

James Regno was working on Almar Plumbing and Heating pipes.

While acknowledging factual issues whether the pipes James Regno was insulating belonged to Almar Plumbing and Heating or Dart Mechanical, neither plaintiffs, nor the City defendants, nor Almar Plumbing and Heating points to anything they might elicit from Bruno Grgas or Dart Mechanical that would uncover any factual issues not already raised. C.P.L.R. § 3212(f); Nascimento v. Bridgehampton Constr. Corp., 86 A.D.3d 189, 192 (1st Dep't 2011); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Global Mins. & Metal Corp. v. Holme, 35 A.D.3d 93, 103 (1st Dep't 2006). See Santana v. Danco Inc., 115 A.D.3d 560 (1st Dep't 2014); Griffin v. Pennoyer, 49 A.D.3d 341 (1st Dep't 2008). An explanation of the conflicting evidence regarding James Regno's work when he was injured that further disclosure might reveal simply would reinforce the factual issues and thus provides no reason to delay a determination of the motions and cross-motion. C.P.L.R. § 3212(f); Santana v. Danco Inc., 115 A.D.3d 560; Emery v. Parker, 107 A.D.3d 635, 636 (1st Dep't 2013); Griffin v. Pennoyer, 49 A.D.3d 341; Artigas v. Renewal Arts Realty Corp., 22 A.D.3d 327, 328 (1st Dep't 2005).

IV. BRUNO GRGAS'S MOTION

A. Summary Judgment Dismissing the Second Third Party Claim for Contractual Indemnification

Bruno Grgas, a subcontractor for the heating, ventilation, and air conditioning (HVAC) prime contractor Dart Mechanical,

contends that its claim for contractual indemnification under their subcontract fails because Bruno Grgas was working on a purchase order from Almar Plumbing and Heating and not on Bruno Grgas's subcontract with Dart Mechanical when James Regno was injured. At oral argument November 14, 2013, the parties stipulated to the admissibility of all exhibits, which include the parties' contracts and subcontracts, for purposes of determining the motions and cross-motion for summary judgment.

Dart Mechanical bases its claim against Bruno Grgas on Article 24 of their subcontract dated March 16, 2005, where Bruno Grgas agreed to:

defend, indemnify, and hold harmless DART, OWNER, OWNER'S REPRESENTATIVE and their respective agents and employees . . . from and against any claim . . . attributable to personal injury . . . caused by, arising out of, resulting from or occurring in connection with the performance of the WORK by SUBCONTRACTOR,

referring to Bruno Grgas. Aff. of Christopher Otton Ex. J, at 10. Rider A to the subcontract describes the "WORK" as providing and installing insulation on various types of pipes and ducts, id. at 4, and subjects the "WORK" to approval by Dart Mechanical. Id. at 3.

While Bruno Grgas may not rely on James Regno's speculation that, because the pipe he was working on was copper, it belonged to Almar Plumbing and Heating, an assumption drawn from sources beyond his personal knowledge, Bruno Grgas still meets its initial burden to show that his injury did not arise from work under its subcontract with Dart Mechanical. Dart Mechanical's own supervisor William Dennis Sullivan testified at his

deposition, based on personal knowledge of Dart Mechanical's work and observation of where Regno fell soon afterward, that the pipe he was insulating belonged to Almar Plumbing and Heating. This evidence demonstrates that Regno was not working on Dart Mechanical's pipe under Bruno Grgas's subcontract with Dart Mechanical to trigger this subcontract's indemnification provision. See Vargas v. New York City Tr. Auth., 60 A.D.3d 438, 441 (1st Dep't 2009); Pepe v. Center for Jewish History, Inc., 59 A.D.3d 277, 278 (1st Dep't 2009); Balbuena v. New York Stock Exch., Inc., 45 A.D.3d 279, 280 (1st Dep't 2007); Greco v. Archdiocese of N.Y., 268 A.D.2d 300, 301-302 (1st Dep't 2000).

Plaintiffs, the City defendants, the Bovis defendants, Dart Mechanical, and Almar Heating and Plumbing in opposition, however, all present admissible evidence raising factual issues regarding which subcontract James Regno was working under when injured. DOS's chief engineer Delano Walsh testified at his deposition that the Bovis defendants' daily reports and payroll logs recorded who was on the jobsite at a particular time. The City defendants present the daily sign-in sheet for August 15, 2008, signed by James Regno and referring to their contract with Dart Mechanical by name and registration number 20030018684. The deposition testimony of Calvin Gerson, the Bovis defendants' project manager when Regno was injured, also interprets the sign-in sheets as showing that he was working under the City defendants' contract with Dart Mechanical when injured. A payroll certification by Janet Grgas, Bruno Grgas's president,

corroborates that James Regno worked a full day August 15, 2008, under contract number 20030018684. Gerson further interprets payment requisitions presented by Almar Plumbing and Heating as showing that it was not paid for pipe insulation work between August 1 and 31, 2008.

Supplementing Walsh's deposition, his affidavit attests that Dart Mechanical, but not Almar Plumbing and Heating, requested approval of Bruno Grgas as a subcontractor. Subcontractor lists dated March 18, 2009, confirm that Dart Mechanical, but not Almar Plumbing and Heating, retained Bruno Grgas as a subcontractor. Finally, the City defendants present incident reports by the Bovis defendants and Tully Construction, which both recount that James Regno was working under Dart Mechanical's subcontract with Bruno Grgas when he was injured.

This testimony and documentary evidence, showing that Bruno Grgas was working under its subcontract with Dart Mechanical when James Regno was injured, and thus raising factual issues regarding the subcontract he was working under when injured, rebuts Bruno Grgas's showing that he was insulating a pipe belonging to Almar Plumbing and Heating. Therefore Bruno Grgas has failed to establish as a matter of law that the insulation work he was performing was not subject to Bruno Grgas's subcontract with Dart Mechanical, thus triggering its contractual obligation to indemnify Dart Mechanical as claimed by the second third party complaint.

B. Summary Judgment Dismissing the Claims for Implied Indemnification and Contribution

Bruno Grgas also seeks dismissal of any other second third party claims and all cross-claims against Bruno Grgas. Although the City defendants commenced a third third party action against Bruno Grgas after these pending motions and cross-motion were submitted, before then the Bovis defendants were the only parties other than Dart Mechanical to interpose any claim against Bruno Grgas. The Bovis defendants cross-claim against all co-defendants and Bruno Grgas for contractual and implied indemnification and for contribution.

The Bovis defendants' contractual indemnification claim against Bruno Grgas relies on the subcontract between Dart Mechanical and Bruno Grgas, which expressly includes the Bovis defendants, as the owner's agent, as an indemnitee. See Naughton v. City of New York, 94 A.D.3d 1, 12 (1st Dep't 2012); Vargas v. New York City Tr. Auth., 60 A.D.3d at 440. This claim therefore survives on the same grounds as Dart Mechanical's contractual indemnification claim.

Bruno Grgas contends that any implied indemnification and contribution claims by Dart Mechanical, Otton Aff. Ex. B ¶ 21, and the Bovis defendants must be dismissed for the same reasons as the court (Jaffe, J.) dismissed Almar Plumbing and Heating's third party claims against Bruno Grgas: the evidence that James Regno did not sustain a "grave injury" under New York Workers' Compensation Law § 11. Workers' Compensation is an employee's exclusive remedy against his employer for an injury sustained in

the course of his employment and bars any other claims against his employer for that injury. N.Y. Workers' Comp. Law §§ 11, 29(6); Macchirole v. Giamboi, 97 N.Y.2d 147, 149-50 (2001); Heritage v. Van Patten, 59 N.Y.2d 1017, 1019 (1983); Alba v. Dani Michaels, Inc., 303 A.D.2d 257 (1st Dep't 2003); Perez v. 1860 Morris Assocs., 275 A.D.2d 248, 249 (1st Dep't 2000). Where the employee's injuries do not qualify as "grave," the employer is not liable for non-contractual, implied indemnification or for contribution to other parties the employee sues. N.Y. Workers' Comp. Law § 11; Vargas v. New York City Tr. Auth., 60 A.D.3d at 441; Jarvis v. Crotona Assoc., LLC, 14 A.D.3d 423, 424 (1st Dep't 2005). See Hansen v. 510 Manhattan Affordable Hous., 2 A.D.3d 274 (1st Dep't 2003); Petrillo v. Durr Mech. Constr., 306 A.D.2d 25, 26 (1st Dep't 2003).

Since all the evidence and allegations regarding plaintiff's injury portray it as not "grave," Workers' Compensation Law § 11 bars any third party claims by Dart Mechanical and cross-claims by the Bovis defendants for implied indemnification and contribution. Aramburu v. Midtown W.B, LLC, 126 A.D.3d 498, 501 (1st Dep't 2015); Vargas v. New York City Tr. Auth., 60 A.D.3d at 441. In fact, neither Dart Mechanical nor the Bovis defendants maintain to the contrary in their opposition to Bruno Grgas's motion. E.g., Parkman v 149-151 Essex St. Assoc., LLC, 122 A.D.3d 439 (1st Dep't 2014); DeSimone v. City of New York, 121 A.D.3d 420, 421 (1st Dep't 2014). See Aramburu v. Midtown W.B, LLC, 126 A.D.3d at 501; Vargas v. New York City Tr. Auth., 60

A.D.3d at 441.

V. DART MECHANICAL'S CROSS-MOTION FOR SUMMARY JUDGMENT ON CONTRACTUAL INDEMNIFICATION

Beyond raising factual issues in opposition to Bruno Grgas's motion, Dart Mechanical does not then establish as a matter of law that the insulation work James Regno was performing was under Dart Mechanical's subcontract with Bruno Grgas, to trigger Bruno Grgas's contractual obligation to indemnify Dart Mechanical. See DeSimone v. City of New York, 121 A.D.3d at 422; Urbina v. 26 Ct. St. Assoc., LLC, 46 A.D.3d 268, 271, 274 (1st Dep't 2007); Keena v. Gucci Shops, 300 A.D.2d 82 (1st Dep't 2002). Instead, Dart Mechanical, relying on the same contractual provision to which Bruno Grgas' motion pertains, conditions its cross-motion for summary judgment awarding contractual indemnification on an ultimate finding that Regno in fact was working under Dart Mechanical's subcontract with Bruno Grgas.

The broad terms of the subcontract's indemnification provision obligates Bruno Grgas to indemnify the City defendants, the Bovis defendants, and Dart Mechanical for injuries arising from or occurring in connection with performance of the work under the subcontract. Amante v. Pavarini McGovern, Inc., 127 A.D.3d 516, 517 (1st Dep't 2015); DePaul v. NY Brush LLC, 120 A.D.3d 1046, 1048 (1st Dept 2014); Fuger v. Amsterdam House for Continuing Care Retirement Community, Inc., 117 A.D.3d 649, 650 (1st Dep't 2014); Cerverizzo v. City of New York, 116 A.D.3d 469, 472 (1st Dep't 2014). Bruno Grgas's negligence is unnecessary to trigger indemnification under this provision. Regal Constr.

Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 5 N.Y.3d 34, 38 (2010); Naughton v. City of New York, 94 A.D.3d at 12; Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 408 (1st Dep't 2010); Callan v. Structure Tone, Inc., 52 A.D.3d 334, 336 (1st Dep't 2008). Although James Regno's injury also may have arisen from or occurred in connection with Coastal Sheet Metal's installation of the duct that collapsed and caused his fall, it unquestionably arose from and occurred in connection with his performance of work. The only dispute is whether that work was under the subcontract.

While Dart Mechanical may have been negligent in supervising its subcontractors, discussed further below, which would reduce its entitlement to contractual indemnification, no evidence indicates its sole negligence caused Regno's injury, to eliminate its entitlement. Aramburu v. Midtown W.B. LLC, 126 A.D.3d at 500; DeSimone v. City of New York, 121 A.D.3d at 423; Fuger v. Amsterdam House for Continuing Care Retirement Community, Inc., 117 A.D.3d at 650. Therefore the court grants Dart Mechanical's motion for summary judgment on the second third party claim for contractual indemnification to the extent requested, conditioned on a finding that James Regno was working under Dart Mechanical's subcontract with Bruno Grgas when he was injured. C.P.L.R. § 3212(b) and (e). See Cerverizzo v. City of New York, 116 A.D.3d at 471-72; Hernandez v. 151 Sullivan Tenant Corp., 307 A.D.3d 207, 208 (1st Dep't 2003). The factual issues regarding whether he was working under that subcontract nonetheless preclude

unconditional summary judgment on this second third party claim.

VI. DART MECHANICAL'S SEPARATE MOTION FOR SUMMARY JUDGMENT
DISMISSING ALL CLAIMS AGAINST DART MECHANICAL

Plaintiffs allege claims against Dart Mechanical based on New York Labor Law §§ 200, 240(1), and 241(6) as well as Dart Mechanical's negligence. The City defendants, Tully Construction and Tully Industries, Inc., the Bovis defendants, J.H. Electric, Almar Plumbing and Heating, and Coastal Sheet Metal, another subcontractor, cross-claim against Dart Mechanical for indemnification and contribution.

To support Dart Mechanical's separate motion for summary judgment dismissing all claims against Dart Mechanical, in an about face, Dart Mechanical turns around and relies on the evidence that James Regno was working on an Almar Plumbing and Heating pipe when he was injured. Dart Mechanical insists that this evidence, albeit rebutted by the evidence opposing Bruno Grgas's motion and supporting Dart Mechanical's own cross-motion, and evidence that Dart Mechanical did not supervise Regno demonstrates that it owed no duty to maintain the area where Regno was injured and did not create or receive notice of a hazard there. It urges that the combined evidence establishes its nonliability as a statutory agent for Labor Law violations as well as its nonnegligence. Finally, Dart Mechanical maintains that, since it did not install the pipe Regno was working on when he fell, it is not liable under its prime contract with the City defendants.

A. Summary Judgment Dismissing Plaintiffs' Claims

Labor Law §§ 240(1) and 241(6) impose absolute liability on construction site owners and general contractors "and their agents for any breach of the statutory duty which has proximately caused injury." Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 338 (2008). See Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320 (2009); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005). Thus if Dart Mechanical, the prime HVAC contractor that subcontracted with Bruno Grgas, qualifies as a contractor that was the general contractor's agent under §§ 240(1) and 241(6), it may be liable to plaintiffs without negligence and solely based on vicarious liability under the statutes for acts or omissions by its subcontractor Bruno Grgas or Coastal Sheet Metal. Walls v. Turner Constr. Co., 4 N.Y.3d at 863-64; Burke v. Hilton Resorts Corp., 85 A.D.3d 419, 420 (1st Dep't 2011); Pacheco v. Kew Garden Hills Apt. Owners, Inc., 73 A.D.3d 578 (1st Dep't 2010); Weber v. Baccarat, Inc., 70 A.D.3d 487, 488 (1st Dep't 2010). Statutory agents also are subject to liability under Labor Law § 200 as well as for negligence. Keenan v. Simon Prop. Group, Inc., 106 A.D.3d 586, 589-90 (1st Dep't 2013); Fraser v. Pace Plumbing Corp., 93 A.D.3d 616 (1st Dep't 2012).

Dart Mechanical bears the burden to establish that it was not a statutory agent of the owner or general contractor. Kittelstad v. Losco Group, Inc., 92 A.D.3d 612 (1st Dep't 2012); Gonzalez v. Glenwood Mason Supply Co., Inc., 41 A.D.3d 338, 339

(1st Dep't 2007). It must demonstrate its lack of authority to control James Regno's work when Regno was injured. DaSilva v. Haks Engrs., Architects & Land Surveyors, P.C., 125 A.D.3d 480, 481 (1st Dep't 2015); Keenan v. Simon Prop. Group, Inc., 106 A.D.3d at 589; Rodriguez v. Gilbane/TDX Joint Venture, 102 A.D.3d 484 (1st Dep't 2013); Parra v. Allright Parking Mgt., Inc., 59 A.D.3d 346, 347 (1st Dep't 2009). See Johnson v. City of New York, 120 A.D.3d 405, 406 (1st Dep't 2014); Tuccillo v. Bovis Lend Lease, Inc., 101 A.D.3d 625, 628 (1st Dep't 2012); Nascimento v. Bridgehampton Constr. Corp., 86 A.D.3d at 192-93. It does not satisfy this burden by showing that it simply refrained from exercising actual control that it was authorized to exercise or that another entity retained authority to supervise and control the work, unless the other entity's authority was exclusive. Tuccillo v. Bovis Lend Lease, Inc., 101 A.D.3d at 628; Naughton v. City of New York, 94 A.D.3d at 10; Nascimento v. Bridgehampton Constr. Corp., 86 A.D.3d at 195; Weber v. Baccarat, Inc., 70 A.D.3d at 488.

James Regno testified that Darko Gregrovic, Bruno Grgas's foreman, was Regno's direct supervisor and that no one else instructed Regno in his work. The Bovis defendants' project manager Gerson testified that their project superintendent when Regno was injured bore principal safety responsibilities. Sullivan, Dart Mechanical's job supervisor, testified that he supervised only its employees, never supervised Bruno Grgas's employees, and, as Dart Mechanical's site safety officer, was

authorized to stop only its employees' unsafe practices.

This deposition testimony on which Dart Mechanical relies falls short of establishing its lack of authority to control James Regno's work, because the testimony ignores whether another entity's supervision or control of Regno's work negated Dart Mechanical's authority or impeded its exercise of supervision or control. The testimony leaves open the question whether Dart Mechanical, although authorized, simply failed to exercise supervision or control.

In fact, Dart Mechanical's very subcontracting of insulation work, part of its HVAC work, to James Regno's employer Bruno Grgas demonstrates Dart Mechanical's authority, supervision, and control over his subcontract work. Tuccillo v. Bovis Lend Lease, Inc., 101 A.D.3d at 628; Naughton v. City of New York, 94 A.D.3d at 10; Nascimento v. Bridgehampton Constr. Corp., 86 A.D.3d at 193; Weber v. Baccarat, Inc., 70 A.D.3d at 488. Dart Mechanical also subcontracted the installation of ducts, another part of the HVAC work, to Coastal Sheet Metal, which installed the duct that collapsed and caused Regno's fall. Thus, insofar as the duct installation may have been faulty, or the work area for the insulation of pipes otherwise may have posed hazards, Dart Mechanical retained authority, supervision, and control over that work and those worksite conditions as well and would be responsible for any negligence by Dart Mechanical's subcontractors.

Finally, Dart Mechanical's prime contract with the City

defendants well may have conferred express authority on the prime contractor to supervise all aspects of its HVAC work, including the subcontracted insulation work. Tuccillo v. Bovis Lend Lease, Inc., 101 A.D.3d at 628; Fraser v. Pace Plumbing Corp., 93 A.D.3d 616; Kittelstad v. Losco Group, Inc., 92 A.D.3d at 612-13. See DaSilva v. Haks Engrs., Architects & Land Surveyors, P.C., 125 A.D.3d at 481; Keenan v. Simon Prop. Group, Inc., 106 A.D.3d at 589. Dart Mechanical's motion for summary judgment, however, omits its prime contract with the City defendants, further failing to meet its initial burden to establish the absence of a statutory agency.

In sum, the deposition testimony and documentary evidence on which Dart Mechanical relies fail to demonstrate it was not a statutory agent liable under Labor Law §§ 240(1) and 241(6). It also nowhere demonstrates that, along with Bruno Grgas's foreman and the Bovis defendants' project superintendent, a Dart Mechanical employee other than job supervisor Sullivan never supervised or controlled Bruno Grgas's employees, even if Dart Mechanical did not instruct Regno personally. Therefore it is not entitled to summary judgment dismissing the Labor Law §§ 200, 240(1), and 241(6) and negligence claims against it. C.P.L.R. § 3212(b); Fraser v. Pace Plumbing Corp., 93 A.D.3d 616; Kittelstad v. Losco Group, Inc., 92 A.D.3d 612; Gonzalez v. Glenwood Mason Supply Co., Inc., 41 A.D.3d at 339. See DeSimone v. City of New York, 121 A.D.3d at 422; Keenan v. Simon Prop. Group, Inc., 106 A.D.3d at 589-90.

B. Summary Judgment Dismissing Cross-Claims

Without Dart Mechanical's contract with the City defendants or any other contracts with co-defendants, Dart Mechanical fails to establish either the absence of a contractual duty to indemnify, Dwyer v. Central Park Studios, Inc., 98 A.D.3d 882, 885 (1st Dep't 2012), or the nonsatisfaction of any contractual condition triggering Dart Mechanical's duty to indemnify. See DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 626 (1st Dep't 2015); DePaul v. NY Brush LLC, 120 A.D.3d at 1048; Mercado v. Caithness Long Is, LLC, 104 A.D.3d 576, 577-78 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d at 12. As discussed above, Dart Mechanical also has failed to eliminate its responsibility for its subcontractors' negligence in carrying out the pipe insulation, installing the duct that collapsed, or allowing any other hazards in the work area where James Regno was insulating pipes. Nor has Dart Mechanical established that it played no part in supervising or controlling that work or work area, including Bruno Grgas's employees, to eliminate its direct negligence.

Having failed to demonstrate that it was not negligent, Dart Mechanical may not escape potential liability for contribution or implied indemnification, as well as contractual indemnification. Stallone v. Plaza Constr. Corp., 95 A.D.3d 633, 634 (1st Dep't 2012); Vargas v. New York City Tr. Auth., 60 A.D.3d at 441; Lelek v. Verizon N.Y., Inc., 54 A.D.3d 583, 586 (1st Dep't 2008). In fact, Dart Mechanical has neglected even to advance any basis for

dismissing the cross-claims against Dart Mechanical, as sought by its motion, which is reason alone to deny summary judgment dismissing the cross-claims. Ruiz v. RHO Assoc., LLC, 92 A.D.3d 410 (1st Dep't 2012); Jones v. 550 Realty Hqts., LLC, 89 A.D.3d 609 (1st Dep't 2011); Ruth B. v. Whitehall Apt. Co., LLC, 56 A.D.3d 273, 274 (1st Dep't 2008); Perez v. Hilarion, 36 A.D.3d 536, 537 (1st Dep't 2007).

VII. CONCLUSION

For the reasons explained above, the court grants the motion by second third party defendant Bruno Grgas, Inc., for summary judgment to the extent of dismissing any second third party claims by second third party plaintiff Dart Mechanical Corp. and cross-claims by defendants Bovis Lend Lease, Inc., and Bovis Construction Corp. for implied indemnification and contribution. C.P.L.R. § 3212(b) and (e). The court also grants Dart Mechanical Corp.'s cross-motion for summary judgment on its second third party claim for contractual indemnification, on the condition that second third party plaintiff proves that plaintiff James Regno was working under its subcontract with second third party defendant when he was injured. **FILED** The court otherwise denies second third party defendant's motion for summary judgment dismissing the second third party complaint and denies defendant Dart Mechanical Corp.'s separate motion for summary judgment dismissing the complaint and all cross-claims against Dart Mechanical Corp. C.P.L.R. § 3212(b).

DATED: August 31, 2015

Lucy Billings

 LUCY BILLINGS, J.S.C.