At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of June, 2017.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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ORION CAPIZZI,

Plaintiff,

- against -

Index No. 504329/13

EMPIRE STATE BUILDING ASSOCIATES, LLC, EMPIRE STATE BUILDING COMPANY, LLC, ICON INTERIORS, INC., AND LF USA, INC.,

Defendants.

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ICON INTERIORS, INC.,

Third-Party Plaintiffs,

- against -

CRANA ELECTRIC, INC.,

Third-Party Defendant.

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The following papers numbered 1 to 18 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6, 7-9
Opposing Affidavits (Affirmations)	10, 11, 12, 13, 14, 15
Reply Affidavits (Affirmations)	16, 17
Supplemental Affidavit (Affirmation) Expert Report	18
Other Papers	

Upon the foregoing papers, defendants Empire State Building Associates, LLC and Empire State Building Company, LLC, (collectively referred to as the Empire State Defendants) move for an order, pursuant to CPLR 3212, granting them summary judgment: (1) dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action; (2) dismissing all cross claims against them; and (3) granting their cross claims for contractual indemnification against defendant LF USA, Inc. and third-party defendant Crana Electric, Inc. (Crana) (motion sequence 7). Plaintiff Orion Capizzi cross-moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor with respect to liability on his Labor Law §§ 240 (1) and 241 (6) causes of action (motion sequence 8). Defendant LF USA, Inc. (LF USA) moves for an order: (1) pursuant to CPLR 3025 (b), granting it leave to amend its verified answer to assert a cross claim against Crana for contractual indemnification; (2) pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action and any cross claims; and (3) pursuant to CPLR 3212, granting it summary judgment on its cross claim for contractual indemnification from Crana and setting the matter down for a hearing with respect to attorney's fees (motion sequence 9).

The Empire State Defendants' motion (motion sequence 7) is granted and plaintiff's Labor Law § 200 and common-law negligence causes of action and any cross claims and/or counterclaims are dismissed against them and they are entitled to summary judgment in their favor on their contractual indemnification claims against LF USA and Crana. Plaintiff's

motion (motion sequence 8) is denied. LF USA's motion (motion sequence 9) is granted, plaintiff's Labor Law § 200 and common-law negligence causes of action and any cross claims or counterclaims are dismissed against LF USA, LF USA's answer is amended to add a cross claim for contractual indemnification, and LF USA is entitled to summary judgment in its favor with respect to its contractual indemnification claim against Crana. A hearing with respect to the defendants' entitlement to costs and attorneys fees as part of their respective contractual indemnification claims will be scheduled at the conclusion of the main action.

Plaintiff Orion Capizzi suffered injuries on June 12, 2013 when he fell to the ground from a ladder while performing electrical work as part of a renovation of the fourth floor of the Empire State Building. Defendant Empire State Building Associates, LLC, (ESBA) the master lease holder of the Empire State Building, leased the building to defendant Empire State Building Company (ESBC), which in turn leased several floors of the Empire State Building, including the fourth floor, to defendant LF USA. LF USA contracted for defendant Icon Interiors, Inc., (Icon) to be the general contractor for the restoration project, and Icon, by way of a written contract, hired plaintiff's employer, Crana, to perform the electrical work for the project.

Before the accident, plaintiff was working with a co-worker, Nkosi Doyle, who plaintiff knew as Percy, running cable through a ceiling of a hallway. All of the supervision and direction plaintiff and Doyle received regarding the performance of the work was by

Crana supervisors and the ladder at issue was a new fiberglass eight-foot tall A-frame ladder that belonged to Crana. In order to run the cable, plaintiff and Doyle each stood on an eight-foot A-frame ladders that they placed approximately five feet from each other in order to either feed cable to or pull cable from the other worker depending on who was further down the hallway at the time. Plaintiff had set up his ladder numerous times and he did not notice any problems with the ladder.

Plaintiff testified at his deposition that the floor at the location where he placed the ladder just before his fall, while rough concrete, did not have any holes, tools or debris in the area (Plaintiff, dep. tr. at 121, lines 2-8; at 150, lines 1-11). Plaintiff was able to place the ladder so that all four feet of the ladder were squarely on the floor such that, after he locked the braces, the ladder did not rock (Plaintiff, dep. tr. at 121, lines 2-12; at 122, lines 12-20). Once he placed the ladder, plaintiff stated that he did not notice "anything" with the ladder, that he had no difficulty with the ladder as he was climbing up and that he did not recall it moving or shaking as he was doing so (Plaintiff, dep. tr. at 92, lines 9-18). At the time of the accident, plaintiff was standing with both feet on the sixth rung of the ladder, which was approximately six feet above the ground, and he believes he was attempting to pass cable to Doyle (Plaintiff, dep. tr. at 90, lines 16-21; at 145, lines 10-21). In order to do this work, plaintiff was reaching up over his head with both hands, and was not holding on to the ladder with his hands (Plaintiff, dep. tr. at 145, lines 22-25; at 146, lines 2-6).

The question and answers at plaintiff's deposition regarding the fall proceeded as follow:

> "Q. And as you attempted to pass the cable to him [Doyle], what, if anything, did you feel or notice?
>
> A. I noticed absolutely nothing, but the next thing I knew I was falling and trying to grab onto something, and . . . " (Plaintiff, dep. tr. at 90, lines 23-25; at 91, lines 2-4).

After plaintiff explained that the time it took him to move a ladder, set it up in one spot and then pull it to the next spot would take one to three minutes, counsel asked:

> "Q. I understand, but let me ask you: After you moved the ladder and you set it up, and then you climb up that ladder, okay, how long were you on that ladder when something happened? Not the time it took you to move the ladder, but once it's moved and set up; you get on the ladder . . .
>
> A. Within fifteen seconds, ten seconds, even. I couldn't tell you an exact time. All I know is that I was doing the job the way it was going, and then the next second, I am falling in the air, falling to the ground" (Plaintiff dep. tr. at 91, lines 18-25, at 92, lines 2-5)."

And a few questions later:

> "Q. So, you said you were on the ladder now ten to fifteen seconds, actually on the ladder, when something happened?
>
> A. Correct.
>
> Q. An the next thing you know is that you were falling?
>
> A. Yes.
>
> Q. In what direction were you falling? Straight down, to one side, the other side?

A. I couldn't even tell you. All I know is that I felt something that I was falling and I tried to grab on, spun around a little bit and then wound up on my back on top of the ladder.

Q. Did you wind up on the floor of that hallway?

A. I wound up on top of the ladder on the floor . . . Okay, what happens is: The ladder was kicked out from under me a little bit or knocked - - I don't know what words to use, but one second, I am on top of the ladder, not the very top, but the third from the top, and when it was over, I am laying on the top of the splintered ladder, brand new ladder that's destroyed on my back" (Plaintiff's dep. tr. at 92, lines 10-25; at 93, lines 2-25).

Later in the same deposition, the questions and answers proceeded as follows:

"Q. Did the ladder move while you were standing on it? Let me rephrase that: Prior to the ladder falling, just the period of time where you were standing on it, passing the cable over to Percy, did the ladder move at that point in time?

A. No" (Plaintiff's dep. tr. at 123, lines 5-12).

Again, later in the same deposition:

"Q. Did you dismount the ladder on your own? Did you purposely jump off the ladder when the incident occured?

A. No.

Q. Did something cause you to fall off of the ladder?

A. Yes. But I don't know what it was

. . .

Q. Did the footing from your understanding, did you feel that come out in one direction or another? Is that what you felt when you were caused to fall?

[over objection to form]

> A. Yes" (Plaintiff, dep. tr. at 147, lines 24-25; at 148, lines 2-20).

And:

> "Q. As you sit here today, do you know why the ladder fell?
>
> A. Why the ladder fell? I would be speculating now.
>
> Q. So you don't know?
>
> A. No. I fell off the ladder. I don't know how. It must have gotten moved. I don't know." (Plaintiff, dep. tr. at 149, lines 2-9).

Of note, Colin Sholes, a Crana supervisor, testified that, while he did not witness the accident, he saw plaintiff lying on the ground near the ladder and saw that the fiberglass part of the ladder was cracked and that "the metal piece that holds it" was disjointed and bent (Scholes, dep. tr. at 51, lines 23-25; at 52, lines 2-5).

Turning first to the Labor Law § 240 (1) cause of action, Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with working at an elevation proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).[1] Defendants do not dispute that plaintiff's electrical work at the time of

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[1] As is relevant here, Labor Law § 240 (1) provides that,
> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or

(continued...)

the accident was of the kind of work that is covered under section 240 (1) (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-883 [2003]; *Blanco v NBC Trust No. 1996A*, 122 AD3d 409, 410 [1st Dept 2014]; *Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 850 [2d Dept 2011]), or that plaintiff's work on the sixth rung of the ladder constitutes a sufficient elevation to implicate the protections of section 240 (1) (*see Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *Robinson v Golman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097 [2d Dept 2012]; *Barber v Kennedy Gen Contrs.*, 302 AD2d 718, 720 [3d Dept 2003]; *Gange v Tilles Inv. Co.*, 220 AD2d 556, 557 [2d Dept 1995]). As such, determination of plaintiff's motion turns on whether the ladder on which plaintiff was standing provided proper protection and/or whether additional safety devices were required under the circumstances.

With respect to falls from ladders, the Appellate Division, Second Department has emphasized that "The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). In order to find the absence of proper protection, "[t]here

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[1](...continued)

> 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."

must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Karanikolas*, 120 AD3d at 555 [internal quotation marks omitted]; *Hugo*, 108 AD3d at 745). The absence of proper protection is thus not shown, in and of itself, where a plaintiff simply losses his or her balance and falls (*see Gaspar v Pace Univ.*, 101 AD3d 1073, 1074 [2d Dept 2012]). Generally, absent evidence that a ladder slipped, moved or collapsed, the issue of whether the ladder provided proper protection and/or whether additional safety devices were required presents an issue of fact for the jury (*see Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722 [2d Dept 2010]; *Olberding v Dixie Contr. Inc.*, 302 AD2d 574, 575 [2d Dept 2003]; *Gange*, 220 AD2d at 558).

Contrary to plaintiff's contention, plaintiff did not unequivocally testify at his deposition that he fell because the ladder on which he was standing kicked out. Rather, plaintiff's testimony suggests that his assertion that he fell because the ladder kicked out is based on after-the-fact speculation rather than any first hand awareness of the ladder kicking-out during the accident. Indeed, plaintiff appears to ultimately concede that he does not know what caused him to fall. Plaintiff's own testimony thus presents factual issues as to how the accident happened and leaves open the possibility that he simply fell from the ladder, which, as noted above, does not, in and of itself, make out a Labor Law § 240 (1) violation (*see Karanikolas*, 120 AD3d at 555; *Hugo*, 108 AD3d at 745; *see also Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014]).

Plaintiff has also provided an affidavit from Doyle, his coworker, who states that he witnessed plaintiff's "ladder wobble side to side and tip over, so that Mr. Capizzi and the ladder both fell to the floor" (Doyle, Aff. at ¶ 7). While Doyle's averments support a finding of liability under section 240 (1) (*see Ramirez v I.G.C. Wall Systs., Inc.*, 140 AD3d 1047, 1049 [2d Dept 2016]; *Corchado v 5030 Broadway Props., LLC*, 103 AD3d 768, 769 [2d Dept 2013]; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097 [2d Dept 2012]), the factual issues presented by plaintiff's own deposition testimony preclude finding that plaintiff has made a prima facie showing with respect to the Labor Law § 240 (1) claim (*see Nunez v City of New York*, 100 AD3d 724, 725 [2d Dept 2010]).

Even if Doyle's affidavit could be deemed sufficient to establish plaintiff's prima facie entitlement to summary judgment despite plaintiff's testimony, defendants have demonstrated the existence of factual issues warranting denial of the motion. In this respect, Icon has submitted an affidavit from Stephen Pawlowski, Icon's project superintendent, who states that, although he did not witness the accident, he arrived at the scene of the accident while plaintiff was still lying on the ground, and that he spoke with a person who identified himself as the person working on the ladder next to plaintiff at the time of the accident.[2] According to Pawloski, plaintiff's coworker told Pawloski that "he was not looking at plaintiff when it occurred. Rather, he first looked over at [plaintiff] after the accident, when [plaintiff] was already on the ground" (Pawlowski Aff. at ¶ 5). Icon has also submitted an

[2] Pawlowski concedes that he is uncertain of the name of plaintiff's partner.

affidavit from Noreen Bruen, a private investigator, who states that she spoke with someone on the telephone who identified himself as Nkosi Doyle and who told Bruen that he did not see the accident, but saw plaintiff lying with his back on top of the ladder (Bruen Aff. at ¶5).

The affidavits from Pawlowski and Bruen show that they would be able to provide testimony about the prior statements that is in substantial contradiction to Doyle's assertion contained in his affidavit submitted by plaintiff that he saw the accident. Thus, upon a proper foundation being laid at trial, testimony from Pawloski and Bruen would be admissible at trial for impeachment purposes as prior inconsistent statements (*see People v Bradley*, 99 AD3d 934, 936-937 [2d Dept 2012]; *Seaberg v North Shore Lincoln-Mercury, Inc.*, 85 AD3d 1148, 1151-1152 [2d Dept 2011]; *Lind v City of New York*, 270 AD2d 315, 316-317 [2d Dept 2000]; *Noskewicz v City of New York*, 155 AD2d 646, 646-647 [2d Dept 1989]; Jerome Prince, Richardson on Evidence § 6-411 [Farrell 11th ed]). Plaintiff's assertion that defendants have failed to lay a foundation for the admission of the inconsistent statements is misplaced because defendants have not yet had a trial at which they could attempt to lay the foundation. Plaintiff's further assertion that the statements that Doyle made to Pawlowski and Bruen are hearsay and may not be considered is irrelevant as these statements attributed to Doyle would not be not be admitted for their truth, but rather "to show that there is an inconsistency between what the witness said on trial and what he [or she] she said on another occasion, and it is the fact of this inconsistency which tends to impair the witness' credibility" (Jerome Prince, Richardson on Evidence § 6-412 [Farrell 11th ed 1995]).

While there appears to be little case law addressing prior inconsistent statements of non-party witnesses submitted in opposition to summary judgment, the Appellate Division has recognized that a prior inconsistent statement may, under certain circumstances, be sufficient to raise an issue of fact warranting denial of summary judgment (*see Edmonds v Quellman*, 277 AD2d 579, 580-581 [3d Dept 2000]). Notably, in this case, the impeachment would go to the core of plaintiff's case since Doyle's affidavit is the only unequivocal evidence suggesting that the ladder wobbled and caused plaintiff to fall, and thus the only evidence before the court supporting summary judgment with respect to plaintiff's section 240 (1) cause of action as a matter of law (*cf. People v Bradley*, 99 AD3d at 937-938 [failure to admit inconsistent statements central to defense warranted a new trial]; *Robinson*, 95 AD3d at 1098 [omissions from statements plaintiff made that were contained in accident reports sufficient to warrant denial of summary judgment]).[3] Under these circumstances, defendants have demonstrated that they are entitled to denial of plaintiff's cross motion with respect to his Labor Law § 240 cause of action (*see Nunez*, 100 AD3d at 725; *Robinson*, 95 AD3d at 1098).

Turning to plaintiff's Labor Law § 241 (6) cause of action, plaintiff's deposition testimony in which he asserted that the floor was a little rough and that it may not have been exactly level fails to demonstrate, as a matter of law, that the Industrial Code sections relied

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[3] The court, of course, recognizes that the issue relating to the constitutional right to present defense at stake in *People v Bradley* does not apply here. However, the court finds that the inconsistent statements at issue here, like those at issue in *People v Bradley*, go to the core of the factual issues in this case.

upon by plaintiff in support of the motion (12 NYCRR 23-1.21 [b] [4] [ii] [requiring, among other things, that ladder footings shall be firm] and 12 NYCRR 23-1.21 [e] [3] [standing stepladders shall be used only on firm, level footings]) were violated. Accordingly, plaintiff's cross-motion must be denied with respect to his Labor Law § 241 (6) cause of action regardless of the sufficiency of defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

With respect to plaintiff's Labor Law § 200 and common-law negligence causes of action, LF USA and the Empire State Defendants have demonstrated their prima facie entitlement to summary judgment dismissing those causes of action through the deposition testimony in the record showing that they did not supervise or control plaintiff's work and that the accident did not occur as the result of a defective property condition (*see Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2015]; *Pilato v 866 U.N. Plaza Associates, LLC*, 77 AD3d 644, 645-646 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 61-63 [2d Dept 2008]). As plaintiff took no position on this portion of LF USA and Empire State Defendants' motions, he has failed to demonstrate a factual issue warranting denial of summary judgment dismissing the common-law negligence and section 200 causes of action.

Aside from these issues relating to the main action, LF USA seeks leave to amend its answer to assert a cross claim against Crana for contractual indemnification and for summary judgment in its favor on the claim. As is relevant here, while LF USA has no direct indemnification agreement with Crana, at or around the time Crana entered into its contract

with Icon, Crana, at Icon's request, signed an indemnification agreement dated March 4, 2014, providing, as is relevant here, that:

> "To the fullest extent permitted by law, subcontractor [Crana] shall indemnify and hold harmless Icon Interiors, Inc., owner, owner's consultants, the building landlord, and their directors, offices [sic], employees, agents and representatives from and against all claims, damages, losses and expenses, including, but not limited to attorney's fees, arising out of or resulting from the performance of subcontractor's work, provided that such a claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, or to injury or to destruction of tangible property, (other than the work itself), including the loss of use resulting there from [sic] regardless of whether or not it is caused in part by a party indemnified hereunder"

"In general, leave to amend a pleading may be granted at any time, including during trial, absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Gallarraga v City of New York*, 54 AD3d 308, 310 [2d Dept 2008]; *see McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828 [2d Dept 2008]). Although a court's discretion should be exercised more sparingly after a case has been certified as ready for trial, the issue of whether leave should be granted at such a time still turns primarily on whether the amendment will cause the opposing party prejudice (*see Yong Soon Oh v Hau Jin*, 124 AD3d 639, 640-641 [2d Dept 2015]; *Morris*, 49 AD3d at 828).

Here, even though LF USA has provided no excuse for its delay in pleading the contractual indemnification claim, it has, as discussed below, demonstrated that it has a

meritorious claim, and Crana has failed to identify any prejudice that it would suffer as a result of the delay. Most notably, in this respect, LF USA's right to contractual indemnification turns on primarily a legal issue of whether it is an intended third-party beneficiary of the above quoted provision executed by Crana at Icon's request. Crana has already been put on notice that parties associated with the building might bring claims based on the provision in view of the Empire State Defendants' timely instituted cross claims. Further, as represented by LF USA's counsel, Crana's counsel had been operating under the belief that LF USA had already pled a contractual indemnification claim. Finally, Crana has failed to identify any discovery it might have sought if the claim had been instituted sooner. Under these circumstances, LF USA is granted leave to amend its answer to include a cross claim for contractual indemnification from Crana (*see Lui v Town of E. Hampton*, 117 AD3d 689, 690 [2d Dept 2014]; *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 757 [2d Dept 2014]; *Shiavone v Victory Memorial Hosp.*, 300 AD2d 294, 295-296 [2d Dept 2002]).[4]

On the merits, LF USA has likewise demonstrated its entitlement to summary judgment in its favor on its contractual indemnification claim against Crana. Crana, in opposing the motion, asserts that since Crana's indemnification agreement it entered into with Icon does not specifically identify LF USA as the owner and since the term owner is not otherwise defined in the agreement, LF USA cannot demonstrate that it is the intended third-

[4] The court notes that LF USA could undoubtedly commence a third-party action for contractual indemnification from Crana without leave of court (CPLR 1007). It would be then up to Crana to seek dismissal or severance of the indemnification claim under CPLR 1009.

party beneficiary of the agreement. This argument ignores the fact that Icon undoubtedly included the owner language in the indemnification provision with the intent of protecting LF USA, the entity that contracted with it to perform the work, and which is identified as the owner in the contract between LF USA and Icon (*see Logan-Baldwin v L.S.M. Gen. Constrs., Inc.*, 94 AD3d 1466, 1468 [4th Dept 2012] [determination of whether party is intended third-party beneficiary focuses on intent of promisee]). Indeed, even if at the time of its entering the contract with Icon, Crana did not know the exact name of the party for whom the project was being performed, it is inconceivable that they were unaware that such party would be an intended beneficiary of the indemnification provision (*see Logan-Baldwin*, 94 AD3d at 1469; *see also Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 455-456 [2d Dept 1988]). LF USA is thus the "owner" contemplated by the indemnification provision (*see Piccione v Sweet Constr. Corp.*, 60 AD3d 510, 513-514 [1st Dept 2009]; *see also Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015]), and entitled to contractual indemnification under the terms of the provision because it has demonstrated that it was not negligent and did not supervise or control the work at issue (*see Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796, 798 [2d Dept 2014]; *Tarpey v Kalanu Partners, LLC*, 68 AD3d 1097, 1098-1099 [2d Dept 2009]). Crana, in opposition, has failed to demonstrate the existence of a factual issue warranting denial of LF USA's motion in this respect.

For essentially the same reasons, the Empire State Defendants have demonstrated that they are entitled to contractual indemnification as third-party beneficiaries of the

indemnification provision between Icon and Crana because they are undoubtedly the entities contemplated as the "landlord"[5] in the agreement (*see Piccione v Sweet Constr. Corp.*, 60 AD3d at 513-514; *see also Beasock*, 126 AD3d at 1404) and because they have shown that they were free from negligence and did not supervise or control the work (*see Gonzalez*, 115 AD3d at 798; *Tarpey*, 68 AD3d at 1098-1099). Crana, in opposition, has failed to demonstrate the existence of a factual issue warranting denial of this portion of the Empire State Defendants' motion.

Similarly, the Empire State Defendants are entitled to summary judgment on their contractual indemnification claim based on the broad terms of the indemnification provision of the lease between ESBC and LF USA (*see Campisi v Gambar Food Corp.*, 130 AD3d 854, 855 [2d Dept 2015]). There are no factual issues with respect to this claim as LF USA has not submitted opposition to this portion of the Empire State Defendants' motion.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

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[5] Given the broad scope of the language of the provision and the ownership/landlord structure of the Empire State building, the court declines to find that the use of the word "landlord" in singular form was intended to limit the right to obtain indemnification as a landlord to a single entity.