Kosc v King St. Condominium Corp.
2017 NY Slip Op 32427(U)
November 16, 2017
Supreme Court, New York County
Docket Number: 150868/2012
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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TERESA KOSC, as Administratrix of the Estate of LUKASZ SALATA, Deceased,

Plaintiff,

-against- Index No.: 150868/2012

KING STREET CONDOMINIUM CORPORATION, AMSTERDAM RESTORATION CORP. and STAY SECURE CONSTRUCTION CORP.,,

Defendants.

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THE KING STREET CONDOMINIUM CORPORATION i/s/h/a KING STREET CONDOMINIUM CORPORATION and AMSTERDAM RESTORATION CORP.,

Third-Party Plaintiffs,

-against-

SILVER STONE RENOVATION CORP.,

Third-Party Defendant.

----------X

DEBRA A. JAMES, J.:

In this negligence action, plaintiff administratrix seeks to recover damages for injuries suffered by a construction worker, now deceased, when on October 14, 2011, he allegedly fell from a scaffold while working at a construction site located at 29 King Street, New York, New York (the Premises).

Defendant The King Street Condominium (Condominium) and Amsterdam Restoration Corp. (Amsterdam)(together, the King Street defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claim

against them, and for summary judgment in their favor on their third-party claims for contractual indemnification and breach of contract for failure to procure insurance against third-part defendant Silver Stone restoration Corp. (Silver Stone) (Motion Sequence Number 007).

Plaintiff Teresa Kosc, as administrator of the estate of decedent Lukasz Salata (plaintiff), moves, pursuant to CPLR 3212, for summary judgment in plaintiff's favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against the King Street defendants (Motion Sequence Number 008).[1]

Third-party defendant Silver Stone moves, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 241 (6) claim against the King Street defendants and defendant Stay Secure Construction Corp. (Stay Secure), as well as all cross claims against it

The motions are hereby consolidated for disposition.

CONCLUSION

The motion of the Kings Street defendants (Motion Sequence Number 007) for summary judgment dismissing the complaint against them shall be granted to the extent of dismissing plaintiff's common law negligence and Labor Law § 200 claims.

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[1] Plaintiff's motion papers are silent with respect to the claims against Stay Secure Construction Corp., and therefore the issue of Stay Secure Construction Corp.'s negligence is not before the court on this motion.

The motion of plaintiff (Motion Sequence Number 008), pursuant to CPLR 3212, for summary judgment as to liability on her common law negligence and Labor Law §§ 240(1) and 241(6) claims against the King Street defendants shall be denied.

The motion of Silver Stone (Motion Sequence No. 009), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241(6) claim shall be denied with respect to such claim premised on violations of the Industrial Code sections 23-1.15, 23-5.1(j) and 23-5.3(e), and shall be otherwise granted; and for summary judgment dismissing all cross claims against shall be denied on the ground that no cross claims have been asserted against it.

BACKGROUND

On the day of the accident, King Street owned the Premises. King Street hired Amsterdam as the general contractor on a project underway at the Premises, which entailed the exterior renovation of a multi-story building (the Project). Amsterdam hired Silver Stone, plaintiff's employer, to waterproof the exterior of the building and to rebuild the parapets along the building's roof. Plaintiff served as Silver Stone's foreman at the Project.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (Genger v Genger, 123 AD3d 445, 447 [1st Dept 2014], quoting Schiraldi v U.S. Min. Prods., 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against the King Street defendants. Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and

> other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1). "Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). Indeed, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004]).

Here, plaintiff argues that he is entitled to summary

judgment in his favor as to liability on the Labor Law § 240 (1) claim, because his testimony, as well as the affidavit of his co-worker, establishes that he was injured due to a fall from a scaffold that was not properly equipped with a railing to keep him from falling (see Ritzer v 6 E. 43rd St. Corp., 57 AD3d 412, 413 [1st Dept 2008] [plaintiff established entitlement to judgment on the section 240 (1) claim, where it was "undisputed that the scaffold had no safety railings" and plaintiff fell from said scaffold]; see also Nelson v Ciba-Geigy, 268 AD2d 570, 572 [2d Dept 2000] ["[w]hether the device provided proper protection is a question of fact, except when the device . . . fails to support the plaintiff . . ."]).

In opposition, the King Street defendants argue that plaintiff is not entitled to judgment in his favor, because a question of fact exists regarding the proximate cause of the accident. While plaintiff testified that he was injured when he fell from a scaffold, at their examinations before trial, both the owner of plaintiff's employer Silver Stone and Amsterdam's project manager, testified that, two or three weeks after the accident, plaintiff told each of them that he was injured when he sat on a pipe. Moreover, when explaining the cause of his accident to the two men, plaintiff never mentioned any fall from a scaffold (see e.g. Buckley v J.A. Jones/GMO, 38 AD3d 461, 462 [1st Dept 2007] [denying summary judgment on section 240 [1]

cause of action where two credible theories of the accident existed]).

Accordingly, this is a case where the parties offer two distinct versions of the accident. As here, "[w]here credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441, 442 [1st Dept 2012]; see also Santiago v Fred-Doug 117, L.L.C., 68 AD3d 555, 556 [1st Dept 2009]).

Initially, Silver Stone's owner and Amsterdam's project manager's testimonies contain hearsay, as they both rely on plaintiff's statements for their truth. Hearsay evidence alone is insufficient to warrant denial of a summary judgment motion "where it is the only evidence upon which the opposition to summary judgment is predicated" (Narvaez v NYRAC, 290 AD2d 400, 401 [1st Dept 2002]). Nonetheless, as is applicable here, plaintiff's statements are admissible as party admissions, an exception to the hearsay rule (Jerome Prince, Richardson on Evidence § 8-206, at 512 [Farrell 11th ed 1995] ["If a party makes an admission, it is receivable even though knowledge of the fact was derived wholly from hearsay"], citing Reed v McCord, 160 NY 330, 341 [1899] ["admissions by a party of any fact material to the issue are always competent evidence against him, wherever,

whenever or to whomsoever made"]; see also Vendette v Feinberg, 125 AD2d 960, 960 [4th Dept 1986] [a party admission "constitutes evidence in admissible form necessary to defeat a motion for summary judgment"). Accordingly, Silver Stone's owner and Amsterdam project manager's testimony are admissible and may be considered in opposition to the instant motion.

As plaintiff argues, Silver Stone owner's testimony regarding his knowledge of the cause of the accident is countered by the C-2 report, which listed the cause of plaintiff's accident as not known. However, Silver Stone's owner testified that he did not personally fill out the report, although he signed it. In addition, as the C-2 report contains no specific information with respect to any substantive issue, a fact finder must determine the weight of such record.

Thus, as a question of fact exists as to the cause and nature of plaintiff's accident, plaintiff is not entitled to partial summary judgment in his favor as to the Labor Law § 240 (1) claim against the King Street defendants.

The Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against the King Street defendants. Initially, as the King Street defendants argue, that part of plaintiff's motion, which seeks summary judgment in his favor as to liability on the Labor Law § 241 (6)

claim against them, is defective, because the notice of motion fails to identify this ground for relief, as required by CPLR 2214 (a). CPLR 2214 (a) requires that "[a] notice of motion shall specify . . . the grounds therefor." However, as plaintiff has set forth arguments in support of such relief, and as the King Street defendants fully responded to plaintiff's motion in their opposition, no prejudice exists. Accordingly, the court will address this part of plaintiff's motion on its merits.

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

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

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; see also Ross, 81 NY2d at 501-502). Importantly, to sustain a Labor Law § 241 (6) claim,

it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (Annicaro v Corporate Suites, Inc., 98 AD3d 542, 544 [2d Dept 2012]).

Despite alleging several other Industrial Code violations in his bill of particulars, plaintiff moves solely for relief as to alleged violations of Industrial Code sections 23-1.15, 23-5.1 (j) (1) and 23-5.3 (e).

Industrial Code 12 NYCRR 23-5.1 (j) provides, as relevant:

> "(1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule).
>
> "Exceptions: Any scaffold platform with an elevation of not more than seven feet . . ."

Industrial Code 12 NYCRR 23-5.3 (e) provides:

> "Safety railings constructed and installed in compliance with this Part (rule) shall be provided for every metal scaffold."

Industrial Code 12 NYCRR 23-1.15 provides, as relevant:

> "Whenever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:
>
> "(a) A two inch by four inch horizontal wooden hand rail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four inch vertical posts at intervals of not more than

> eight feet.
>
> "(b) A one inch by four inch horizontal midrail."

Each of the above mentioned Industrial Code provisions governs scaffolds and safety railings. As discussed above, questions of fact exist as to whether plaintiff was injured from a fall from a defective scaffold or by sitting on a pipe.

Thus, as questions of fact exist as to whether such provisions apply to the facts of this case, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against the King Street defendants.

The Common-Law Negligence and Labor Law § 200 Claims

The King Street defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Singh v Black Diamonds LLC, 24 AD3d 138, 139 [1st Dept 2005], citing Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices

> in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by the contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]; see also Griffin v New York City Tr. Auth., 16 AD3d 202, 202 [1st Dept 2005]). "Under either liability standard, the common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200 (1), has also been extended to include the tools and appliances without which the work cannot be performed and completed" (Chowdhury v Rodriguez, 57 AD3d 121, 128-129 [2d Dept 2008]).

The King Street defendants argue that they are entitled to dismissal of the common-law and Labor Law § 200 claims, because they did not direct or supervise plaintiff's work, nor did they provide him with any equipment. Notably, plaintiff does not oppose the King Street defendants' motion.

Thus, the King Street defendants are entitled to dismissal of said claims against them.

Silver Stone's Motion

Third-party defendant Silver Stone seeks summary judgment dismissing the Labor Law § 241 (6) claim against the King Street defendants and Stay Secure. While this motion is untimely, Silver Stone has established good cause for the delay, to wit, that it was not a party to this lawsuit on the date of the issuance of the preliminary conference order that set the deadline for dispositive motions. See Serradilla v Lords Corp., 12 AD3d 279 (1st Dept, 2004). On that basis, the motion will be considered.

While plaintiff has alleged multiple Industrial Code violations, plaintiff only opposes that part of Silver Stone's motion seeking dismissal of those parts of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.15, 23-1.16, 23-5.1 (h) and (j) and 23-5.3 (e). Accordingly, the unaddressed Industrial Code provisions are deemed abandoned, and Silver Stone is entitled to summary judgment dismissing those abandoned provisions (Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 [1st Dept 2012] ["Where a [party] so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

As discussed above, a question of fact exists as to whether

sections 23-1.15, 23-5.1 (j) and 23-5.3 (e) apply to plaintiff's accident. Thus, Silver Stone is not entitled to summary judgment dismissing the Labor Law § 241 (6) claim predicated on these provisions. The remaining provisions, sections 23-1.16 and 23-5.1 (h) will be addressed below.

Industrial Code 12 NYCRR 23-1.16 sets forth standards pertaining to safety belts and harnesses. It provides, in pertinent part:

> "Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal use shall be used by such an employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. . . ."

Here, as Silver Stone argues, section 23-1.16 is inapplicable to the facts of the case because safety belts were available but plaintiff was not utilizing one at the time of the accident (Ramirez v Metropolitan Transp. Auth., 106 AD3d 799, 801 [2d Dept 2013] [no violation of this provision where "the plaintiff was not wearing any of these devices at the time when he fell, and [] such devices were offered"]). Moreover, in opposition, plaintiff fails to put forth any argument that such provision applies.

Thus, Silver Stone is entitled to dismissal of that part of the Labor Law § 241 (6) claim premised on an alleged violation of Industrial Code section 23-1.16.

Industrial Code 12 NYCRR 23-5.1 (h) governs scaffold erection and removal. It provides that "[e]very scaffold shall be erected and removed under the supervision of a designated person" (id.). While there is a question of fact as to whether plaintiff fell from a scaffold, in any event, this section would not apply because, here, the absence of a proper supervisor during the erection and/or removal of the scaffold was not the proximate cause of the accident.

Thus, Silver Stone is entitled to dismissal of that part of the Labor Law § 241 (6) claim premised on an alleged violation of Industrial Code section 23-5.1 (h).

Further, while Silver Stone's motion seeks dismissal of all cross claims against it, a review of the record reveals that no cross claims have been brought against Silver Stone.

The King Street Defendants' Third-Party Claim For Contractual Indemnification Against Silver Stone

The King Street defendants move for summary judgment in their favor on the third-party claim for contractual indemnification against Silver Stone. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]; see also Tonking v Port Auth. of N.Y. &

N.J., 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; see also, Murphy v WFP 245 Park Co., L.P., 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (Correia, 259 AD2d at 65).

Additional Facts Relevant To This Issue

The Contract

The contract between Amsterdam and Silver Stone (the Contract), dated June 30, 2011, governs Silver Stone's work at the Premises and includes an indemnification provision, which states, in pertinent part, as follows:

> "To the fullest extent permitted by law, the Subcontractor [Silver Stone] shall indemnify and hold harmless the Owner [King Street], Contractor [Amsterdam]. . . and agents and employees of any of them from and against all claims . . . including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim . . . is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor . . ."

Further, the Contract contains an "Other Documents"

provision, which provides the following, as relevant:

> "Other Documents, if any, forming part of the Subcontract Documents are as follows . . .
>
> * * *
>
> "Hold Harmless Agreement"

The Agreement

Amsterdam and Silver Stone also entered into "Agreement #1" (the Agreement), an undated single page document, which also contains an indemnification provision. The Agreement provides, in pertinent part, the following:

> "Whereas [Silver Stone] is and will be performing certain work for [the King Street defendants] pursuant to an agreement for [the Premises], [Silver Stone] and [Amsterdam] hereby agree:
>
> * * *
>
> "To the fullest extent permitted by law, Sub-Contractor [Silver Stone] agrees to indemnify, defend and hold harmless General Contract [sic] [Amsterdam] and Owner [King Street] from any and all claims . . . including attorneys' fees . . . related to death, personal injuries or property damage . . . arising out of or in connection with the performance of the work of the Sub-Contractor . . ."

Here, the Contract contains a narrow indemnification provision that will not trigger absent a finding of negligence against Silver Stone. The Agreement, on the other hand, contains a broader indemnification provision that will trigger merely upon a finding that plaintiff's accident arose from the performance of

Silver Stone's work on the Project.

Silver Stone argues that the narrower indemnification provision in the Contract is the controlling document. In support of this argument, Silver Stone submits its owner's affidavit, wherein its owner states that he has no recollection of the Agreement ever being part of the Contract, and that the indemnification provision in the Agreement was not intended to replace the indemnification provision in the Contract.

The King Street defendants argue that the broader indemnification provision in the Agreement is the controlling document. In support of this argument, the King Street defendants submit the affidavit of the president of Amsterdam,[2] wherein he states that the Contract and the Agreement are part of a single, incorporated document, and that both were signed by himself and Silver Stone's owner contemporaneously, prior to Silver Stone's work at the Project.

In addition, relying on Amsterdam owner's affidavit, the King Street defendants argue that the Agreement's indemnification provision is controlling, because (1) the Contract refers to the

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[2] Amsterdam owner's affidavit is submitted for the first time in reply. However, as it addresses arguments raised in Silver Stone's opposition papers, it may be considered (see e.g. OneWest Bank, FSB v Simpson, 148 AD3d 920, 923 [2d Dept 2017] [evidence provided for the first time in reply may be considered in response to arguments raised in opposition papers]).

Agreement in the Other Documents clause, (2) the Agreement explicitly references the Contract, and (3) the Agreement is a typewritten provision that should override the printed provision in the Contract (Matter of Cale Dev. Co. v Conciliation & Appeals Bd., 94 AD2d 229, 234 [1st Dept 1983], *affd* 61 NY2d 976 [1984], citing Laurino v Hewman, 10 AD2d 725, 725 [2d Dept 1960]).

However, while the Contract's Other Documents provision does make reference to a "Hold Harmless Agreement," the Agreement, itself, is not titled as such. Rather, the Agreement is titled "Agreement #1." Accordingly, a question of fact exists as to whether the Agreement was, in fact, incorporated into the Contract, and/or whether it supersedes the indemnification provision in the Contract.

Thus, the King Street defendants are not entitled to summary judgment in their favor on the third-party claim for contractual indemnification.

The King Street Defendants' Third-Party Claim For Breach Of Contract For Failure To Procure Insurance Against Silver Stone

The King Street defendants move for summary judgment in their favor on the third-party claim for breach of contract for the failure to procure insurance against Silver Stone.

Additional facts relevant to this claim

A review of the Contract reveals no provision that requires Silver Stone to provide additional insurance coverage on behalf of the King Street defendants.

However, the Agreement contains an insurance procurement provision that provides, as relevant, the following:

> "[Silver Stone] shall, by specific endorsement to its primary and umbrella/excess liability policy cause [King Street] and [Amsterdam] to be named as Additional Insureds. . . . [T]he coverage afforded to the additional insureds thereunder to be primary to and not concurrent with other valid and collectible insurance available . . ."

The King Street defendants argue that the insurance procurement provision found in the Agreement is operative and controlling, and requires that Silver Stone name the King Street defendants as additional insureds on their insurance.

Such defendants put forth that, after the accident, by letter dated February 6, 2013, the King Street defendants sought from Silver Stone's insurer, Arch Specialty Insurance Company (Arch), coverage, as additional insureds, for plaintiff's claims, as additional insureds. By letter dated February 13, 2013, Arch responded, in pertinent part, as follows:

> "We are currently investigating this claim and are unable to respond to your tender demand at this time.
>
> "Upon completion of our investigation and receipt and review of all discovery to date, we will respond to your tender demand"

Relying solely on the Letter, the King Street defendants argue that Silver Stone failed to procure the insurance required in the Agreement. However, as the Letter does not affirmatively

acknowledge or deny that the King Street defendants are additional insureds under the Arch policy, it does not establish that Silver Stone, in fact, failed to procure additional insured coverage on behalf of the King Street defendants, in accordance with the Agreement. Further, the King Street defendants provide no other evidence in support of this claim, such as a copy of the insurance policy, to establish that Silver Stone, in fact, failed to procure the required insurance.

Thus, as the King Street defendants have not established their prima facie case, they are not entitled to summary judgment in their favor on the third-party claim for breach of contract for failure to procure insurance.

The court has considered the parties' remaining arguments and finds them to be without merit.

ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants/third-party plaintiffs King Street Condominium Corporation and Amsterdam Restoration Corp.'s motion (motion sequence 007) for summary judgment is granted to the extent of dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them, and such causes of action are dismissed as against them, and the motion is otherwise denied; and it is further

ORDERED that the motion of Teresa Kosc, in her capacity as

administratrix of the estate of plaintiff Lukasz Salata (motion sequence number 008), pursuant to CPLR 3212, for partial summary judgment as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants/third-party plaintiffs King Street Condominium Corporation and Amsterdam Restoration Corp. is denied; and it is further

ORDERED that the part of third-party defendant Silver Stone Renovation Corp.'s motion (motion sequence 009) for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is denied with respect to the section 241 (6) claims premised on violations of Industrial Code sections 23-1.15, 23-5.1 (j) and 23-5.3 (e), and is otherwise granted; and it is further

ORDERED that the part of third-party defendant Silver Stone Renovation Corp.'s motion (motion sequence 009) for summary judgment dismissing all cross claims against it is denied on the ground that there are no cross claims; and

Dated: November 16, 2017 ENTER:

DEBRA A. JAMES J.S.C.