Gilchrist v Wang Tech., LLC
2018 NY Slip Op 30187(U)
January 29, 2018
Supreme Court, New York County
Docket Number: 155695/13
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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CORNELIUS GILCHRIST and RACHEL GILCHRIST,

Plaintiffs,

- against -

WANG TECHNOLOGY, LLC, JUDLAU CONTRACTING INC., METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, and CITY OF NEW YORK,

Defendants.

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JUDLAU CONTRACTING INC., METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, and CITY OF NEW YORK,

Third-Party Plaintiffs,

- against -

BRISK WATERPROOFING COMPANY and WANG TECHNOLOGY, LLC,

Third-Party Defendants.

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JUDLAU CONTRACTING INC., METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, and CITY OF NEW YORK, and BRISK WATERPROOFING COMPANY,

Second Third-Party Plaintiffs,

- against -

LIBERTY CONSTRUCTION CORP.,

Second Third-Party Defendants.

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DECISION AND ORDER
Seq. Nos. 007, 008, 009

Index No. 155695/13

Third Party Index No. 290638/13

Motion sequence numbers 007, 008, and 009 are consolidated for disposition.

Plaintiff, Cornelius Gilchrist, and his wife, Rachel Gilchrist, bring claims based on Labor Law §§ 200 and 241 (6) and common-law negligence, seeking recovery for injuries that plaintiff allegedly sustained when he tripped over an extension cord on the sidewalk in front of an historic building under renovation.

Defendants/third-party plaintiffs/second third-party plaintiffs The City of New York (the City), Metropolitan Transportation Authority (MTA), and New York City Transit Authority (NYCTA) (collectively "the owners") own the site. Judlau Contracting, Inc. (Judlau), defendant/third-party plaintiff/second third-party plaintiff, was the general contractor. Brisk Waterproofing Company (Brisk), third-party defendant/second third-party plaintiff, was a subcontractor and plaintiff's supervisor. Wang Technology, Inc. (Wang), defendant/third-party defendant, was a subcontractor. Liberty Construction Corp. (Liberty), second third-party defendant, was, according to the owners and contractors, plaintiff's employer. Liberty denies that it employed plaintiff.

The City, MTA, NYCTA, Judlau, and Brisk are represented by the same attorney. By stipulation dated November 29, 2013, the third-party action against Brisk was discontinued without prejudice. Plaintiff does not assert any claims against Brisk and Liberty.

Plaintiff does not oppose the dismissal of the Labor Law § 200 and common-law negligence claims asserted against MTA and NYCTA. Therefore, plaintiff's Labor Law § 200 and common-negligence claims against these defendants are dismissed. Plaintiff also discontinues all claims against Wang, and thus plaintiff's claims against Wang are dismissed.

All of the motions seek summary judgment. Wang moves to dismiss all claims and cross claims against it (motion sequence number 007). MTA, NYCTA, and Brisk move to 1) dismiss plaintiff's common-law negligence and Labor Law § 200 claims; 2) dismiss Wang's and Liberty's claims against them; 3) grant MTA and NYCTA summary judgment on their contractual indemnification claim against Wang; and 4) grant MTA and Brisk summary judgment on contractual indemnification against Liberty (motion sequence number 008). Wang cross-moves for summary judgment on its common-law indemnification cross claim against Judlau, MTA, and Brisk. Liberty moves to dismiss all claims and cross claims against it (motion sequence number 009).

The City, MTA, NYCTA, and Judlau claim common-law and contractual indemnification, contribution, and breach of contract to procure insurance against Wang. The City, MTA, NYCTA, Judlau, and Brisk claim common-law and contractual indemnity, contribution, and breach of contract to procure insurance against Liberty. Liberty cross-claims for common-law and contractual indemnification and contribution against Wang. Liberty claims contractual and common-law indemnification, breach of contract, and contribution against the City, MTA, NYCTA, Judlau, and Brisk.

I. Background and Deposition Testimony

During his deposition, plaintiff testified that his duties included helping the masons, and building, raising, and lowering scaffolds. Every morning, he reported to Brisk's foreman, who told him what to do. Brisk's foreman was his only supervisor and director. On November 29, 2012, plaintiff and another employee took down a scaffold that was on the outside of the building. On his way to return a tool borrowed from another worker, plaintiff's shoe got caught on an extension cord

and he fell. The accident occurred under the sidewalk bridge in front of the building.

Plaintiff testified that he had moved the cord out of the way so that he could tie up the dismantled scaffold, thereby allowing it to be pulled up to the sidewalk bridge. The cord came down from the left side of the sidewalk bridge and over the top of the bridge, down to the ground, and under a door leading inside the building. Plaintiff knew of no complaints about the cord and he never complained about it or tripped on it before. He never moved the cord before the date of the accident.

Wang had a subcontract with Judlau to install vibration and noise monitors, liquid level sensors, and temperature gauges at the project site. The subcontract explicitly excluded "protection of wiring and equipment" as part of Wang's duties (Judlau-Wang contract, Amendment 'B' at 9 of 12). Vincent Chin testified for Wang. Chin said that it was Judlau's duty to provide Wang with a place to plug in its equipment. Judlau told Wang which power source to use. When the power source for an outdoor noise monitor stopped working, Judlau told Wang it could obtain electrical power from inside the building.

Chin further testified that the outdoor noise meter was on a scaffold. Chin ran an extension cord from the noise meter, along the scaffold and a wooden barricade to under the door to the inside of the building. Every two feet, the cord was secured with ties to the scaffold and to the wooden barricade. The barricade was between the sidewalk bridge and the entrance of the building. Chin came to the site once a week to take readings. The last time he saw the extension cord before the accident, it was secured to the scaffold and the barricade. Chin did not know anything about the removal of the cord from the barricade and was not at the site when the cord was removed or when the alleged accident occurred.

James Bigger, a Brisk foreman, was produced for deposition on behalf of that entity. According to Bigger, who supervised and directed plaintiff, Brisk was hired to do masonry work on the building under renovation. Two weeks before the accident, Bigger notified Judlau that a wooden barricade would have to come down so that Brisk could erect a scaffold. Judlau's employees removed the wooden barricade the day before plaintiff's accident. Bigger did not see the extension cord before the barricade was taken down because the cord was underneath sheets of plywood which were attached to the barricade. When Judlau removed the barricade, Bigger saw the cord on the ground. On the day before the accident, the extension cord was released from its ties, was hanging down from the scaffold, and ran under a door.

On the day of the accident, plaintiff and another worker erected a scaffold, which was taken down later the same day. Bigger saw the cord on the ground on the day of the accident and warned plaintiff about it.

According to Bigger, there was no common ownership or management between Brisk and Liberty, but plaintiff was employed by Brisk through Liberty. Liberty provided Brisk with union workers who were under Brisk's supervision and control. Brisk paid Liberty the workers' salaries and benefits, and Liberty issued the checks. Liberty was not involved at the job site.

Matt Iacobazzo, ombudsman for Liberty, testified that the company was a signatory for different unions, and that Brisk did not have a signatory relationship with a union. Brisk, one of Liberty's clients, requested that Liberty obtain union workers for the job. Liberty acted strictly as a paymaster doing clerical tasks and did not decide which employees to send to a job. The union hall decided which employees to send to a job. He said that Liberty did not supervise or visit the site.

Robert Sammons, Judlau's property manager, testified that NYCTA/MTA hired Judlau to

restore the premises, which was an old building. Judlau contracted with approximately 30 subcontractors, including Brisk and Wang, in connection with the project. He maintained that, until the day of his deposition, he had never heard of Liberty.

II. Summary Judgment Standard

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence that shows the absence of any material issues of fact in the case (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). If the moving party meets this burden, the party opposing the motion must demonstrate the existence of a triable issue of fact (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If there is any doubt whether the case contains a triable fact, the court must deny the motion for summary judgment (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). The court must view the evidence in the light most favorable to the party opposing the summary judgment motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). If the moving party fails to make the prima facie showing, the motion will be denied regardless of the merit of the opposing arguments (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008]).

III. Wang's Motion For Summary Judgment Dismissing All Claims Against It (Seq. No. 007)

Although plaintiff does not assert any claims against Wang, its liability for the accident must be addressed since Judlau, MTA, NYCTA, the City, and Liberty assert claims against it for contribution, as well as common-law and contractual indemnification.

A. Wang's Liability for Common-Law Negligence/ Labor Law § 200

"Section 200 of the Labor Law 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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). An accident may be the result of the contractor's means and methods in doing its work or the result of a dangerous condition at the work site (*id.*; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). While plaintiff bases his theory of liability on the allegedly defective condition of the premises rather than on the manner in which the work was performed, the site owners and contractors address both types of liability.

A party is liable under Labor Law section 200 or common-law negligence principles if it supervised and controlled the plaintiff's work (with respect to claims arising from the manner in which work was performed) or created the dangerous condition or had notice of it (with respect to claims arising from a dangerous condition) (*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 591 [1st Dept 2009]).

Wang establishes that it was not negligent. Wang did not create the dangerous condition, have actual or constructive notice of it, or control or supervise plaintiff's work. Wang left the extension cord tied down and in a condition that did not cause or contribute to the accident. Wang was not at the work site the day before the accident, when the cord was moved, or on the day of the accident. Brisk's foreman testified that, the day before the accident, the extension cord was released from its ties and was hanging down. Plaintiff testified that, twenty minutes before the accident, he moved the cord and that, as far as he knew, no one else touched the cord between the time that he moved it and the time that he fell. Plaintiff said that he had to move the cord in order to do his work.

Wang also establishes that it had no duty to supervise plaintiff, and plaintiff admitted that he received direction solely from Brisk.

B. Wang's Liability Pursuant to Labor Law § 241 (6)

Labor Law § 241 (6) requires contractors, owners, and their agents to provide adequate protection and safety to workers. The statute imposes a nondelegable duty upon owners and general contractors to comply with Industrial Code provisions mandating compliance with concrete specification (*Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]). A subcontractor, not being a contractor or an owner, is not liable under this section, unless it is the statutory agent of an owner or contractor (*Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46 [1st Dept 2005]). A subcontractor who is given authority to supervise and control the work becomes a statutory agent of the general contractor or owner (*id.*). Although the contractors and owners argue that Wang was an agent, Wang had no control over the placement of the extension cord and did not control plaintiff's work. Thus, the claims against it pursuant to Labor Law § 241 (6) are dismissed.

C. Wang's Obligation to Provide Common-Law Indemnification and Contribution

To establish that Wang has a duty to provide common-law indemnity, the parties seeking such indemnification must establish that Wang committed negligence which resulted in the accident, or that Wang had authority to control the work giving rise to the accident, and that proposed indemnitees, without actual fault on their own part, are vicariously liable for Wang's acts (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375-376 [2011]; *Aiello v Burns Intl. Sec. Servs.* Corp., 110

AD3d 234, 247 [1st Dept 2013]). The party from whom contribution is sought must have breached a duty to the injured party or to the party seeking contribution, or have negligently caused the injury (*Burgos v 213 W. 23rd St. Group LLC*, 48 AD3d 283, 284 [1st Dept 2008]; *Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [1st Dept 1999]). Here, there is no evidence that Wang was negligent or that it breached a duty of care. Nor is there any triable issue of fact regarding whether Wang supervised or controlled plaintiff's work at the job site, caused or created the dangerous condition, had actual or constructive notice of the condition, or acted as an agent under Labor Law § 241 (6). Thus, Wang is not liable under a theory of common-law indemnification or contribution.

D. Wang's Obligation to Provide Contractual Indemnification

The contract between Judlau and Wang contains the following.

> "12. INSURANCE AND INDEMNIFICATION: The Subcontractor, shall to the fullest extent permitted by law, hold the Contractor and the Owner, their agents, employees and representatives harmless from any and all liability ... from any claims or causes of action of whatever nature arising from the Subcontractor's work . . . by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by the Subcontractor . . . The Subcontractor acknowledges that specific consideration has been received by it for this indemnification. As part of the Subcontractor's overall obligation, the Subcontractor shall obtain . . . full insurance coverage as specified in Amendment "C" . . . [and the policy shall name Judlau as a named insured].
>
> Subcontractor agrees to indemnify and hold harmless Contractor . . . against any and all claims . . . any and all costs, expenses and attorney's fees, by reason of illness, injury, loss . . . arising out of, in connection with, or in any manner related to the use of Subcontractor's equipment, tools, supplies or materials by any other subcontractor"

(Judlau-Wang Contract at 4 of 12).

The proposed indemnitees correctly argue that Wang is obligated to contractually indemnify them regardless of its fault. "Contractual indemnity agreements in construction cases usually fall into two broad categories i.e., those in which indemnitor agrees to provide indemnity irrespective of indemnitor's fault, and those in which the indemnitor's fault is a necessary predicate for the obligation to indemnify" (*Robinson v City of N.Y.*, 8 Misc 3d 1012[A], 2005 NY Slip Op 51067[U], *6 [Sup Ct, Bronx County], *affd* 22 AD3d 293 [1st Dept 2005]). Under the Judlau-Wang contract, Wang's obligation to indemnify is not conditioned on its fault (*see Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82 [1st Dept 2002]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Wang must thus act as indemnitor even if it was not negligent, provided that the accident arose out of or was connected to its work.

As discussed in *Robinson* (8 Misc 3d 1012[A], 2005 NY Slip Op 51067[U], *6), courts generally hold that agreements, such as the Judlau-Wang contract, which provide that a party must indemnify another for claims "arising out of" or "in connection with" the indemnitor's work do not require fault by the indemnitor. Such language, however, does mean that there must be some connection between the indemnitor and the claims or injuries for which indemnification is sought. The parties seeking contractual indemnification from Wang argue that the accident is sufficiently connected to Wang's work for the indemnification provision to be triggered. They stress that Wang placed the extension cord in the general area where plaintiff tripped over it, and that the cord belonged to Wang.

An indemnification clause must be carefully "parsed" and its meaning construed in light of the facts of the particular case (*Robinson*, 8 Misc 3d 1012[A], 2005 NY Slip Op 51067[U], *6). Cases in which subcontractors agree to provide indemnification using language similar to that in the

Judlau-Wang agreement provide a guide to the circumstances under which the subcontractor, although not negligent, will be obligated to indemnify. In some instances, the injured person is in the subcontractor's employ. A subcontractor has been held obligated to indemnify where the agreement covered claims "'arising out of or in consequence'" of its work where a plaintiff was injured working for the subcontractor (*Hurley v Best Buy Stores, L.P.*, 57 AD3d 239, 239 [1st Dept 2008]). Where the subcontractor promised to indemnify for injuries "'arising out of, in connection with or as a consequence of the performance of the Work hereunder,'" and the injured person was the subcontractor's employee who was injured en route to his employer's shanty on the site, the court ruled that the injury arose out of the subcontractor's work, although the employee was not actually engaged in work at the time (*Engel v 33 West End Ave.*, 2011 WL 11070172, *22 [Sup Ct, NY County 2011]). In this case, the injured plaintiff was neither Wang's employee nor performing Wang's work.

In other situations, liability for contractual indemnification exists although the injured person is not the indemnitor's employee. It is not "necessary that plaintiff himself be actively engaged in the type of work covered by the indemnity contract in order for such injury to fall within this broadly worded indemnification provision" (*Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008]). In *Balbuena*, the subcontractor promised to indemnify against any claim that "arose out of, was incidental to, or resulted from, the work of erecting or dismantling the scaffold" (*id.*). The injured employee, who did not work for the subcontractor, fell off a scaffold erected by the subcontractor and the latter had to provide indemnification.

Other cases in which a subcontractor had to indemnify against claims by one who was not its employee include *Urbina v 26 Ct. St. Assoc., LLC* (46 AD3d 268 [1st Dept 2007]), in which the

court held that indemnification applied to claims "arising out of the work performed under [the sub]contract" (*id.* at 270). When the subcontractor's employees left for the day after erecting a scaffold solely for their use, and the scaffold collapsed causing the accident, the subcontractor had to provide indemnification, as the injury arose out of its work, although the plaintiff was not performing that work (*id.* at 271). A subcontractor also had to provide indemnification "for claims arising out of" its work where it removed the window from which the employee fell, although the employee did not work for the subcontractor (*Wilk v Columbia Univ.*, 150 AD3d 502, 503 [1st Dept 2017]; *Keena,* 300 AD2d at 82 [subcontractor had to indemnify where it supplied the plank which gave way causing plaintiff to fall]; *Allen v City of New York,* 2012 NY Slip Op 32907[U], *2 [Sup Ct, NY County 2012] [subcontractor had to indemnify where it installed the joint over which plaintiff fell and there was no intervening change to the accident location]; *Davis v Breadstreet Holdings Corp.*, 2012 NY Slip Op 30870[U] [Sup Ct, NY County 2012] [subcontractor had to indemnify, where plaintiff was injured stepping on sheetrock which the subcontractor left "around the worksite"]).

However, in *Brown v Two Exch. Plaza Partners* (146 AD2d 129, 136 [1st Dept 1989], *affd* 76 NY2d 172 [1990]), the subcontractor who built the scaffolding from which plaintiff fell did not have a duty to indemnify, since once the scaffold was built, the subcontractor had no control over scaffold use and the work of building the scaffold was not causally related to the accident. Here, Wang owned the extension cord, but it was not until after other parties moved the cord that plaintiff tripped on it.

"As a general rule, the 'arising out of' language will not be satisfied where the indemnitor's work bears little relation to the loss and it had no employees working at the site at the time of the

loss" (3 Bruner & O'Connor Construction Law § 10:58.10 [Westlaw ed]). Indemnification will be triggered upon a showing that a particular act or omission was causally related to the accident (*Urbina*, 46 AD3d at 271). In *Pepe v Center for Jewish History, Inc.* (59 AD3d 277 [1st Dept 2009]), the subcontractor was not liable for indemnification where an employee of the general contractor was injured when he hopped over a parapet wall which the subcontractor was in the process of building. In addressing whether the injuries "arose out of" or "in connection with" the subcontractor's work, the court stated that the "connection between plaintiff's accident and the mere existence of the partially constructed wall . . . [was] too tenuous to trigger the indemnification clause" (*id.* at 278).

In this case, the indemnification clause in the Judlau-Wang contract is broadly worded, but it does not apply since Wang had no causal connection to the accident (*see Howell v Bethune West Assocs., LLC*, 33 Misc 3d 1215[A], 2011 NY Slip Op 51939[U] [Sup Ct, NY County 2011]). Thus, the owners and Judlau are not entitled to contractual indemnification from Wang and Wang is entitled to dismissal of this claim.

E. Wang's Failure to Procure Insurance

The Judlau-Wang contract requires Wang to purchase insurance naming Judlau, the City, MTA, NYCTA and others as additional insureds. Wang was required to purchase, inter alia, workers' compensation insurance covering its employees directly or indirectly engaged in the performance of the subcontract, as well as commercial general liability (CGL) insurance. The Judlau-Wang contract required that the CGL policy contain premises/operations coverage "for all work to be performed by the Subcontractor & their Subcontractors" (Judlau-Wang Contract,

Amendment "C") and it specifically identified Wang as the subcontractor.

A contract must be interpreted according to its plain meaning (*Steinberg v Schnapp,* 73 AD3d 171, 175 [1st Dept 2010]). The Judlau-Wang contract required that Wang's insurance policy insure the additional insureds in the event that a claim against those parties resulted from work performed by Wang's employees or the employees of Wang's subcontractors. Wang failed to procure this insurance which, if it had been purchased, would not apply to damages resulting from plaintiff's accident, since plaintiff was not performing Wang's work or the work of a Wang subcontractor, and Wang did not create the allegedly dangerous condition. Thus, the parties who were required to be named additional insureds by Wang's policy would not have been covered by Wang's policy.

Although the parties who were to be additional insureds cannot show that they were damaged by Wang's failure to procure the requisite insurance, they are entitled to nominal damages for breach of contract (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]; *Ledy v Wilson,* 40 AD3d 239, 239-240 [1st Dept 2007]). Since Wang fails to demonstrate that it procured the insurance, the claim that it failed to procure the required insurance cannot be dismissed (*see Simmons v Berkshire Equity, LLC,* 149 AD3d 1119, 1121 [2d Dept 2017]).

Thus, Wang's motion for summary judgment dismissing all claims against it is granted, except for the claim that it breached the Judlau-Wang contract by failing to procure insurance.

IV. Motion by MTA, NYCTA, and Brisk (Seq. No. 008)

MTA, NYCTA, and Brisk move to 1) dismiss plaintiff's common-law negligence and Labor Law § 200 claims against MTA and NYCTA; 2) dismiss Wang's and Liberty's claims against them; 3) grant MTA and NYCTA summary judgment for contractual indemnification against Wang; and

4) grant MTA and Brisk summary judgment for contractual indemnification against Liberty.

The first branch of the motion is granted.[1] The third branch of the motion is denied.[2] Thus, the second and fourth branches of the motion must be resolved.

A. Branch of the Motion By MTA, NYCTA,

and Brisk to Dismiss Claims by Wang and Liberty

Wang asserts claims against MTA, NYCTA, and Brisk for common-law indemnification and contribution. Given this Court's findings above that Wang was neither negligent nor vicariously liable, it is not entitled to recover from those who may bear liability. Thus, these claims by Wang as against MTA, NYCTA, and Brisk are dismissed.

Liberty asserts claims against MTA, NYCTA, and Brisk for contractual and common-law indemnification, breach of contract for failure to procure insurance, and contribution. Since Liberty does not allege the existence of a contract in which it was promised indemnification, its claims for contractual indemnification and breach of contract to procure insurance are dismissed.

The deposition testimony revealed that Liberty was not at the site and had no control over the work. Since contribution takes place among tort-feasors (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568 [1987]), Liberty's contribution claim against MTA, NYCTA, and Brisk is dismissed because it was not a tortfeasor.

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[1]As noted previously, plaintiff does not oppose the dismissal of its claim pursuant to Labor Law § 200 or its common-law negligence claim against MTA and NYCTA and plaintiff has asserted no claims against Brisk.

[2]As also discussed above, Wang is entitled to dismissal of the contractual indemnification claim against it.

MTA, NYCTA, and Brisk contend that they cannot be under a duty to provide common-law indemnification to Liberty because they were not negligent (*see Martins v Little 40 Worth Assocs., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). In support of their argument that they were not negligent, MTA and NYCTA submit an affidavit by Priscilla Yen, their senior claims specialist. Yen states that neither the MTA nor NYCTA supervised, controlled, or directed the means, manner or methods by which plaintiff performed his work, and that they had no knowledge of the extension cord or its location. However, Yen does not represent that she has any personal knowledge of what occurred at the construction site. She does not state how she knows that the transit entities did not direct the work. For that reason, her affidavit does not establish the absence of negligence on the part of MTA and NYCTA. Further, Brisk had supervision and control over plaintiff, and it may have placed the cord in a dangerous manner. Since MTA, NYCTA and Brisk may have been negligent, that branch of their motion seeking to dismiss Liberty's claim for common-law indemnification is denied.

B. The Branch of the Motion by MTA and Brisk Seeking Contractual Indemnification Against Liberty

The fourth branch of the motion, pursuant to which MTA and Brisk seek summary judgment on their claim for contractual indemnification against Liberty, calls for an analysis of the entire contract between Brisk and Liberty.

The first part of the Brisk-Liberty contract is two pages long. The opening paragraph of the contract provides that Brisk is the contractor and that Liberty is the subcontractor that will "perform certain work described in Section B of this Subcontract" (Brisk-Liberty Contract at 1). The second paragraph recites that the contractor entered into a subcontract with Judlau and that Judlau entered

into a "Prime Contract" with "NYCMTA," called "Owner" (*id.*). Contractor refers to Brisk and Owner refers to "either the Owner or the prime contractor referred to above" (*id.*). "Subcontractor referred to above is understood to be a sub-subcontractor on this project. All references to 'Contractor' and 'Subcontractor' in this subcontract agreement, [sic] and shall be construed to be consistent with this relationship and all of the contracts and documents relating to this project" (*id.*).

Liberty argues that these provisions create an ambiguity as to the identity of the subcontractor and sub-subcontractor. Brisk argues that the contract merely acknowledges that Liberty is a sub-subcontractor on the project and does not change the fact that Liberty is clearly identified as the subcontractor for the purposes of the Brisk-Liberty agreement. This Court agrees that the subcontractor and the sub-subcontractor are both Liberty. Where the Brisk-Liberty contract refers to the Judlau-Brisk contract, Judlau is the contractor, Brisk is the subcontractor, and Liberty the sub-subcontractor. Where the Brisk-Liberty contract refers to that agreement itself, Liberty is the subcontractor and Brisk the contractor.

That portion of the Brisk-Liberty contract entitled "Section B - Scope of Work" provides that "Subcontractor agrees to furnish all labor, material, skill and equipment to perform the Work more particularly described as: Provide mason labor as requested by Contractor . . . Subcontractor is required to maintain its responsibilities as paymaster . . ." (Brisk-Liberty contract, at 1). "Section C - Scheduling of Work" provides that "Subcontractor shall begin work on or as otherwise directed in a written notice to proceed from Contractor. The Work must be completed as directed by Contractor" (*id.* at 2). The subcontractor must maintain insurance and the parties agree to the "General Subcontract Conditions attached hereto" (*id.*). At the bottom of page two are the names and signatures of Brisk and Liberty.

The next section, entitled "General Subcontract Conditions," consists of eight pages and includes the indemnity and insurance provisions, examined below. Article 2.1 provides that the work described in section B shall be performed in accordance with all drawings and specifications. Subcontractor must pay for all labor, materials and equipment used in connection with the performance of this subcontract (¶ 2.2). Subcontractor shall at all times have a designated superintendent or foreman on the job site (¶ 4.3). Subcontractor shall attend all project meetings (¶ 4.4). Subcontractor shall not use any of the contractor's equipment without express permission (¶ 7.2). Subcontractor shall be solely responsible for the safety of the workers, sub-subcontractors and suppliers (¶ 8.1). Subcontractor shall not bring hazardous substances to the project site (¶ 8.3). The last page is headed with Liberty's name and, underneath, "Interior Demolition and Recycling," "Mason Tenders Hourly Rate," and "Paymaster." Listed are rates for wages, benefits, FICA, disability insurance, and other items relating to payment.

Brisk argues that the Brisk-Liberty contract rendered Liberty responsible for worker safety and that Liberty breached this duty to plaintiff. Liability under section 200 or common-law negligence requires actual supervision or control of the work (*Rizzo v Hellman Elec. Corp.* 281 AD2d 258, 259 [1st Dept 2001]), which Liberty did not exercise here. Liability under section 241 (6) does not require actual supervision or control; it requires the authority or right to exercise supervision or control (*id.*). To have that authority over plaintiff, Liberty would have had to become the owners' or Judlau's statutory agent and there is no evidence, or even an allegation that this occurred (*id.*). Nor does the contract give Liberty that authority or right. The provision about worker safety in the Brisk-Liberty contract confers "general supervisory duties" to monitor safety at the work site (*see DaSilva v Haks Engrs., Architects, & Land Surveyors, P.C.*, 125 AD3d 480, 481-482 [1st

Dept 2015]). Such duties are not enough to form a basis for liability (*id.*; *Suconota v Knickerbocker Properties, LLC*, 116 AD3d 508, 508-509 [1st Dept 2014]). The evidence fails to raise a triable issue of fact that Liberty supervised or controlled plaintiff's work at the job site, caused or created the dangerous condition, had actual or constructive notice of the condition, or acted as an agent under Labor Law § 241 (6).

Brisk and Liberty disagree over which entity was plaintiff's employer, since this issue affects Liberty's duty to indemnify. Page 5 of the Brisk-Liberty contract provides:

> "9.1 INDEMNIFICATION AND DEFENSE OBLIGATION
> To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, Contractor . . . against any liability . . . and attorney's fees arising out of resulting from the performance of the Work by Subcontractor, sub-subcontractors, or anyone for whose acts they may be liable, regardless of any negligence on the part of the party seeking indemnity hereunder, except if caused by the sole negligence of the part seeking indemnity."

The putative indemnitees and Liberty disagree whether plaintiff's claims can be characterized as arising out of or resulting from the performance of the subcontractor's work. If Liberty's work was confined to providing labor from the union hall and acting as paymaster, plaintiff's injury could not be regarded as arising out of Liberty's work. In that case, the causal connection between the work and the injury would be lacking, given that Liberty did not supervise the work and was not negligent (*see Urbina*, 46 AD3d at 271; *Kosiv v ATC Group Servs., Inc.*, 53 Misc 3d 1201[A], *5, 2016 NY Slip Op 51307[U] [Sup Ct, New York County 2016]). On the other hand, if Liberty's work fell within the scope of the obligations described by the contract, there could be a causal connection between the injury and the work that plaintiff was performing when he was injured.

The first two pages and the last page of the Brisk-Liberty contract are tailored to the specific

parties and project, while the other part appears to be a general agreement. The first part states that Brisk will direct the work and limits Liberty's duties to providing mason labor and acting as paymaster, in contrast with the other part, entitled "General Subcontract Conditions", which places many more obligations upon Liberty. Sections refer to the subcontractor's use of drawings, its having a foreman on site, and other matters indicating a direct involvement with the work. However, the parties, including Brisk's foreman, testified that Liberty was not at the job site, that it did not supervise the work, and that it had no involvement in the work. Thus, the parties' performance of the contract did not precisely follow the terms of the contract.

This Court must look to the contract as a guide to what the parties intended (*see Blank Rome, LLP v Parrish,* 92 AD3d 444, 445 [1st Dept 2012]). In this case the contract is not clear about Liberty's duties. The parties' conduct subsequent to making the contract may indicate that they changed their intention or that their original intention is not reflected by the agreement. Parties may modify an agreement by their conduct (*Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 212 [1st Dept 1998]), or their conduct may demonstrate that their intention at the time of contracting was not fully or correctly expressed in their contract (*Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 85-86 [1st Dept 2009]). Whether the parties followed the second, general portion of the Brisk-Liberty contract for the sake of convenience, and did not intend that it be enforceable in its entirety, is a question of fact.

Liberty contends that the indemnification clause violates General Obligations Law § 5-322.1, by purporting to indemnify the owner and contractor for their own negligence. The rule has long been that such provisions are enforceable as to partial indemnification, provided that they contain the limiting language, "to the fullest extent permitted by law." The indemnitee is indemnified to the

extent that it was not negligent and its liability is vicarious (*Dutton v Pankow Bldrs.*, 296 AD2d 321, 321-322 [1st Dept 2002]; *see also Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543 [1st Dept 2015]). The provision permits partial indemnification of MTA and Brisk for injuries partially caused by their negligence.

Thus, the fourth branch of the motion (Seq. No. 008), pursuant to which the MTA and Brisk seek summary judgment against Liberty on their claim for contractual indemnification, is denied.

V. Liberty's Motion to Dismiss All Claims Against It (Seq. No. 009)

Judlau, MTA, NYCTA, Brisk, and the City assert claims against Liberty for common-law and contractual indemnification, contribution, and breach of an agreement to procure insurance. Since Liberty was not negligent, it is not liable for common-law indemnification or contribution. Thus, the claims by Judlau, MTA, NYCTA, Brisk, and the City against Liberty for common law-indemnification and contribution are dismissed. However, the claims by those parties against Liberty for contractual indemnification are not dismissed given the issues of fact regarding the Brisk-Liberty contract discussed above.

With respect to the agreement to procure insurance, the Brisk-Liberty contract provides that Liberty shall procure CGL insurance naming Brisk, Judlau, NYCTA, MTA, and the City as additional insureds. Liberty demonstrates that it purchased insurance covering Brisk, but not the other defendants. Thus, only Brisk's claim for breach of contract to procure insurance is dismissed.

Wang may not counterclaim against Liberty for contribution and common law or contractual indemnification. The parties did not enter into a contract and, since neither Wang nor Liberty was negligent, they cannot assert claims against each other based on one another's negligence. Thus, all

claims by Wang against Liberty are dismissed.

VI. Wang's Cross Motion

Wang cross-moves for summary judgment on its common-law indemnification claims against Judlau, MTA, and Brisk. Unlike MTA and Brisk, Judlau did not make a previous motion.[3] A cross motion is a motion by a party against the party who made the original motion (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013]). "The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party" (*id.* at 88). Wang's cross motion is thus improper to the extent it seeks relief from Judlau, a nonmoving party.

The cross motion is also untimely. Pursuant to the preliminary conference order, the time to file motions for summary judgment expired on October 27, 2016, 120 days after the note of issue was filed. Wang's cross motion was filed on November 1, 2016.

Wang offers no good cause for the untimeliness. A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered, even in the absence of good cause, only where a timely motion for summary judgment was made seeking nearly identical relief to that sought by the cross motion (*Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 282 [1st Dept 2006]). Wang concedes that its cross motion is late, but argues that it should be considered because it seeks relief on the same issues raised in motion # 008, which is timely.

Given that the cross motion is untimely by only a few days, that the issues raised by the cross motion are related to the issues raised in motion sequence 008, and that the evidence herein reveals

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[3] As noted previously, MTA, NYCTA, and Brisk moved (Seq. No. 008) to dismiss Wang's claims for common-law indemnification and contribution against them.

that Wang was not negligent, this Court will consider the same. Upon consideration of the cross motion, however, Wang is not entitled to summary judgment on its claim for common-law indemnification, since it bears no liability, vicarious or otherwise, for the alleged accident.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendant/third-party defendant Wang Technology, LLC for summary judgment dismissing all claims asserted against it (Seq. No. 007) is granted, with the exception of the claim against it by defendant/third-party plaintiff/second third-party plaintiff Judlau Contracting Inc. for breach of contract to procure insurance; and it is further

ORDERED that the branch of the motion for summary judgment (Seq. No. 008) by defendants/third-party plaintiffs/second-third party plaintiffs Metropolitan Transportation Authority and New York City Transit Authority and third-party defendant/second third-party plaintiff Brisk Waterproofing Company seeking to dismiss plaintiff's claim for common-law negligence and plaintiff's claim pursuant to Labor Law § 200 is granted, without opposition; and it is further

ORDERED that the branch of the motion for summary judgment (Seq. No. 008) by defendants/third-party plaintiffs/second-third party plaintiffs Metropolitan Transportation Authority and New York City Transit Authority and third-party defendant/second third-party plaintiff Brisk Waterproofing Company seeking to dismiss the claims against them by Wang Technology, LLC for contribution and common-law indemnification is granted; and it is further

ORDERED that the branch of the motion for summary judgment (Seq. No. 008) by defendants/third-party plaintiffs/second-third party plaintiffs Metropolitan Transportation Authority and New York City Transit Authority and third-party defendant/second third-party plaintiff Brisk Waterproofing Company seeking to dismiss the claims against them by Liberty Construction Corp. for contribution, contractual indemnification and breach of contract to procure insurance is granted; and it is further

ORDERED that the branch of the motion for summary judgment (Seq. No. 008) by defendants/third-party plaintiffs/second-third party plaintiffs Metropolitan Transportation Authority and New York City Transit Authority and third-party defendant/second third-party plaintiff Brisk Waterproofing Company seeking to dismiss the claim against them by Liberty Construction Corp. for common-law negligence is denied; and it is further

ORDERED that the branch of the motion for summary judgment (Seq. No. 008) by defendants/third-party plaintiffs/second-third party plaintiffs Metropolitan Transportation Authority and New York City Transit Authority seeking summary judgment on their contractual indemnification claim against Wang Technology, LLC is denied; and it is further

ORDERED that the branch of the motion for summary judgment (Seq. No. 008) by defendants/third-party plaintiffs/second-third party plaintiffs Metropolitan Transportation Authority and third-party defendant/second third-party plaintiff Brisk Waterproofing Company on their claim for contractual indemnification against Liberty Construction Corp. is denied; and it is further

ORDERED that the motion by Liberty Construction Corp. (Seq. No. 009) for summary judgment dismissing all claims against it is granted to the extent that the claims by Judlau Contracting Inc., Metropolitan Transportation Authority, New York City Transit Authority, Brisk Waterproofing Company, and the City of New York against Liberty Construction Corp. for common-law indemnification and contribution are dismissed, and all claims against Liberty Construction Corp. by Wang Technology, LLC for common-law and contractual indemnification and contribution are dismissed; and it is further

ORDERED that the branch of the motion by Liberty Construction Corp. (Seq. No. 009) seeking dismissal of all claims against it by Judlau Contracting Inc., Metropolitan Transportation Authority, New York City Transit Authority and the City of New York for breach of contract to procure insurance is denied, except as to the claim that it failed to procure insurance for Brisk Waterproofing Company, which claim is dismissed; and it is further

ORDERED that the branch of the motion by Liberty Construction Corp. (Seq. No. 009) seeking summary judgment dismissing the claims against it for contractual indemnification is denied; and it is further

ORDERED that the branch of the motion by Liberty Construction Corp. (Seq. No. 009) seeking dismissal of the counterclaims against it by Wang Technology, LLC for contribution and common-law and contractual indemnification is granted, and those counterclaims are dismissed; and it is further

ORDERED that the cross motion by Wang Technology, LLC for summary judgment (Seq. No. 009) on its claim for common-law indemnification as against Judlau Contracting Inc., Metropolitan Transportation Authority, and Brisk Waterproofing Company is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: January 29, 2018 ENTER:

KATHRYN E. FREED, J.S.C.