SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 34

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DAVID THIERRY and PHYLLIS THIERRY,
Plaintiffs,

Index No.: 157924/2015

-against-

BAM GO DEVELOPERS, LLC, BAM GO DEVELOPERS II, LLC, GOTHAM CONSTRUCTION COMPANY, LLC, and SPIELER & RICCA ELECTRIC COMPANY, INC.,
Defendants.

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SPIELER & RICCA ELECTRIC COMPANY, INC.,
Third-Party Plaintiff,

Third-Party Index No.: 595771/2016

-against-

PAR PLUMBING CO., INC. d/b/a PAR PLUMBING,
Third-Party Defendant.

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Carmen Victoria St. George, J.:

Motion sequence numbers 001, 003 and 004 are hereby consolidated for disposition. This action seeks damages for personal injuries allegedly sustained by plaintiff David Thierry on July 23, 2015, when, while working at a construction site located at 250 Ashland Place, Brooklyn, New York (the Premises), he was struck in the head by a falling 10-foot long, 50-pound pipe. Plaintiff alleges that he sustained injuries to his back, shoulders and head, as well as to his brain. Plaintiff's brain injuries include, inter alia, permanent damage to the anterior left temporal lobe, short term memory loss, difficulty in expressing speech, difficulties with walking and coordination, and difficulties following directions. In motion sequence number 001, plaintiffs Mr. Thierry (plaintiff) and his wife Phyllis Thierry move for partial summary judgment under CPLR § 3212 on liability with respect to their Labor Law §§ 240 (1) and 241 (6) claims against defendants BAM GO Developers, LLC (BAM), BAM GO Developers II, LLC (BAM II) (collectively, the BAM defendants) and Gotham Construction Company, LLC (Gotham). Plaintiffs confirmed at

oral argument that they have withdrawn their Labor Law claims against defendant/third-party plaintiff Spieler & Ricca Electric Company, Inc. (Spieler). In motion sequence number 003, the BAM defendants and Gotham move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims against them, as well as for summary judgment in their favor on their cross claims for common-law and contractual indemnification against Spieler. In motion sequence number 004, third-party defendant Par Plumbing Co., Inc. (Par) moves, pursuant to CPLR § 3211 (a) (7), to dismiss Spieler's third-party complaint against it for indemnification and for contribution under the Worker's Compensation Law or, in the alternative, to sever the third-party action so that it may conduct further discovery.

BACKGROUND

During the relevant period, the BAM defendants were the owners of the Premises where the accident occurred. They hired Gotham to provide construction management services for a project at the Premises that entailed the construction of a new 53-floor high-rise residential building (the Project). In turn, Gotham hired Spieler to provide the electrical construction and installation work for the Project. Par, plaintiff's employer, provided the plumbing installation work at the Project. There was no general contractor for the Project.

Article 10 of the contract between Gotham and Spieler noted that Gotham established the safety program for the project, although Spieler was responsible to adhere to the safety program and prevent accidents. Gotham retained the ability to stop work it deemed unsafe, and it designated an employee to monitor the safety plans and enforce their compliance.

Plaintiff's Deposition Testimony

Plaintiff testified that, on July 23, 2015, his work at the Project involved installing water and gas pipes. Among other things, he ran plumbing pipe through the holes and welded the pipes

together. His foreman, Billy Moore, was also a Par employee. Plaintiff received his instructions and directions from Moore. He stated that a safety manager from Gotham would walk through the premises to ensure that the Project was proceeding safely and that occasionally plaintiff and the safety manager would discuss the Project. Par provided plaintiff with his safety gear, including a hardhat and a welder's mask. Plaintiff stated that the hardhat he was provided could not be worn at the same time as the welder's mask.

Plaintiff explained that the floors of the Premises were comprised of poured concrete. Each floor had several sleeves, called "penetrations," which plaintiff described as 6-12" diameter holes that were used to run various utilities, such as plumbing and electricity, between the floors (plaintiff's tr at 54, 57). The penetrations had temporary protective covers over them, which were made of 34" plywood. Before he began work, plaintiff generally checked the ceiling above him to make sure that the covers were in place over the area where he was working.

Plaintiff testified that when the accident occurred he was installing and welding a pipe. He stated that he would have been wearing his welding mask. He cannot recall the specifics of his accident and does not remember being struck by the pipe. He only remembers waking up in the hospital approximately one week later. He learned more about his accident from the other workers, who told plaintiff that he was found lying in a pool of blood, near a large piece of electrical pipe that had fallen through an open penetration and struck him on his head. When plaintiff was shown photographs of the accident location, he stated that the photographs depicted him, with the pipe he was installing at the time of the accident, and an electrical pipe lying on the ground near him.

Deposition Testimony of Stephen Boyd (Gotham's Superintendent)

Stephen Boyd testified that he was a superintendent for Gotham, the Project's construction manager, when the accident occurred. His duties included coordinating the trades so that they

worked together, and scheduling "when they are suppose[d] to start on site and keep everyone flowing" (Boyd tr at 13). Gotham did not direct the way that the trades performed their work, nor did it supply any safety equipment to them.

Boyd testified as to the scope of his supervision in other respects as well. If the foremen for one of the trades had "an issue," Boyd stated, they would speak to him about it (*id.* at 20). He stated, "I can't say the buck stops with me, no. But they would come see me. I was part of the equation" (*id.*). For problems with technical aspects of their work, they would go to Boyd, the project manager, the project executive, or the engineer. Boyd further stated that Gotham conducted safety meetings with the various foremen, who in turn would hold "toolbox" safety meetings with their employees and provided Gotham with forms concerning these meetings. In addition to Boyd, there was a site safety manager and a project executive who oversaw safety at the Project. He indicated that the individual forepersons were responsible for safely carrying out their work, Boyd, the safety supervisor John Conceciao (who worked for Total Safety Corporation but was employed by Gotham), and other Gotham employees monitored and enforced compliance with Gotham's safety plans.

Boyd explained that the Premises were equipped with an exterior construction elevator, which was used to move men and materials from floor to floor. Materials also were moved from floor to floor by crane. Notably, Boyd testified that, on prior occasions, he witnessed electricians "passing pipe from floor to floor through [penetrations]" (*id.* at 52). Further, his testimony continued, before they opened any penetration the workers had to create a temporary "control access zone" around the newly opened penetration, essentially cordoning off the area or otherwise giving workers notice that an open hole was present (*id.* at 53). Boyd stated that Gotham hired Prince Carpentry to build the protection covers. Boyd further indicated that there was an unwritten

rule that the workers would ask either him or their foreperson for permission to remove a cover to pass materials from floor to floor through the penetrations. He stated that moving a pipe through the penetrations constituted a safety issue if the activity was not reported.

After he learned of the accident, Boyd immediately went to view the accident area. Once there, he was told by Gotham's safety supervisor that plaintiff was struck by "a galvanized pipe, 4 inch in diameter . . . about 8 feet in length," of the type used by electricians (*id.* at 38). Thereafter, the safety supervisor John Conceciao performed an investigation and found that "workmen [had been] passing material through the [penetration]. And a pipe was dropped, a pipe had slipped out of someone else's hand through the [penetration]" (*id.* at 44). The hard copy of the investigation report was placed in Gotham's project executive's field office.

Boyd also testified that he understood that the electrical pipe was being lowered through a penetration in the 31st floor down to the 30th floor when the accident occurred. When the pipe was dropped, it fell through the 31st floor penetration and then through an uncovered floor penetration on the 30th floor, ultimately striking plaintiff, who was on the 29th floor. Boyd did not know who removed the floor protection on the 30th floor. At his deposition, Boyd was shown two Gotham witness statement forms regarding the accident. He confirmed that the forms were standard Gotham forms. In addition, the statements therein comported with his understanding of how the accident occurred.

The Witness Statements

In support of his motion, plaintiff puts forward the unsigned witness statements of Kurt Krotz and George Bagnasco, the Spieler workers. These statements were written on Gotham's "Witness Statement" forms (plaintiff's notice of motion, exhibit G, the witness statements). Bagnasco's statement, dated July 23, 2015, states, "My partner was passing a 4" conduit thru a

hole that was covered with oil and it slipped out of his hand and fell 2 floors down" (*id.*). Krotz's statement, dated July 23, 2015, states, "While passing 4" EMT conduit thru deck from 31st floor to 30th floor, lost control of conduit due to grease or oil on conduit, which passed thru hole in deck to 29th floor" (*id.*).

Deposition Testimony of Anthony Medina (Spieler's Foreman)

Anthony Medina testified that, on the day of the accident, he was Spieler's foreman at the Project. As such, he directed and supervised Spieler's workers at the Project, and he was present on the day of the accident. On that day, he assigned two of Spieler's workers, Krotz and Bagnasco, to install conduit from the 29th floor to the 31st floor of the Premises.

After Medina learned of the accident, he immediately took the elevator to the 29th floor. Once there, in addition to seeing plaintiff and the paramedics, he observed Krotz and Bagnasco in the accident area. When he spoke with them, he learned that, immediately prior to the accident, Krotz was passing a 10-foot long pipe to Bagnasco through a penetration on the 31st floor. As Bagnasco was waiting for the pipe on the 30th floor, the pipe suddenly slipped out of Krotz's hand and fell through the floor penetrations from the 31st floor to the 29th floor, striking the plaintiff.

Medina testified that, well before the day of the accident, a hydraulic pump burst near where Spieler's pipes were being stored at the Premises, coating them in hydraulic oil. It was his understanding that the pipes were subsequently cleaned before being used on the Project. Medina also testified that construction material, such as pipes, should be transferred via the stairs or the construction elevator, and that he never observed any Spieler employee transferring materials via penetrations. In addition, Medina testified that a control access zone was not necessary when opening a small penetration, as such zones "would be for a large opening or something that had a higher elevated [sic] of danger" (Medina tr at 58).

The Expert Medical Reports

Spieler provides the expert medical report of Dr. Edward von der Schmidt, plaintiff's neurosurgeon. The report indicates that the doctor concludes plaintiff is "totally disabled" and his disability is "considered permanent" and "unlikely to change" (Par's notice of motion, exhibit F at 7). In support of its motion to dismiss the third-party complaint, third-party defendant Par provides the expert medical report of Dr. David Masur, a neuropsychologist, who examined plaintiff on May 13, 2016. He observed that plaintiff suffered from "deficits in aspects of memory, attention and speed of processing," concluding that plaintiff's condition "cannot be the result of a neurologically-based injury stemming from the accident," but instead was caused by "ongoing depression." He asserted that, if the depression was treated, plaintiff would likely return "to his prior level of cognitive functioning" (Par's notice of motion, exhibit H, at 7). Par also provides the expert medical report of Dr. Robert April, a neurologist, who examined plaintiff around April 6, 2016. He concluded that plaintiff has "no impediment to his returning to work," and that the accident "did not produce a permanent neurological diagnosis or disability" (Par's notice of motion, exhibit I, at 6).

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 a 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, 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] [citation and internal quotation marks omitted]). 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 Against the BAM Defendants, Gotham and Spieler (Motion Sequence Number 001 and 003)

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against the BAM defendants, Gotham and Spieler. The BAM Defendants and Gotham move for summary judgment dismissing said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as is relevant here:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, . . . 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."

The statute's purpose is "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] [internal citation and quotation marks omitted]). 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]). Where the accident is "caused by the failure to provide a safety device" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]), 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]). Thus, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated and this violation proximately caused the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

At oral argument on the record on October 17, 2017, plaintiffs' counsel conceded that their Labor Law claims do not apply to Spieler (tr., p 5, ll 19-21). Thus, the Court dismisses the Labor Law §§ 240 (1) and 241 (6) claims as to Spieler and turns to the remaining Labor Law §§ 240 (1) and 241 (6) claims.[1] "When the work giving rise to [the duty to comply with these provisions] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). In this circumstance, "the third party fall[s] within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*id.*). For a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Here, plaintiff was injured when an unsecured, oily 50-pound pipe, which was in the process of being lowered from the 31st floor to the 30th floor, slipped out of Krotz's hand and fell through two floor penetrations to the 29th floor, striking plaintiff in the head. Accordingly, plaintiff argues – and this Court agrees – that the cause of the accident is at least partly that the oily pipe that was being lowered was not properly secured against falling and that the cover over the penetration on the 30th floor was missing. Gotham argues that it is not liable because it was merely

[1] It is undisputed that Spieler employees lowered the pipe from the 31st to the 30th floor, and lost hold of it, causing it to fall through the 31st and 30th floors, hitting plaintiff on the head on the 29th floor. Thus, issues of fact remain as to its common law liability, and Spieler has not moved for dismissal of the common law claim against it.

the construction manager and lacked the ability to control the work of the subcontractors. The Court disagrees, and concludes that Gotham is liable under Labor Law §§ 240 (1). As described above, Gotham oversaw the implementation of its safety plan. Boyd stated that Gotham hired Prince Carpentry to build the protection covers. Boyd further indicated that there was an unwritten rule that the workers would ask either him or their foreperson for permission to remove a cover to pass materials from floor to floor through the penetrations. Moreover, there was no general contractor and the description of Boyd's duties and of Gotham's contractual duties with respect to its oversight of Spieler show that Gotham was a de facto general contractor (*see Walls v Turner Construction Co.*, 4 NY3d 861 [2005] [where, as here, there was no general contractor and construction manager took on more of a supervisory role, construction manager is liable as agent]). Accordingly, the Court grants plaintiffs' motion for summary judgment on their Labor Law §§ 240 (1) or 241 (6) claims as against Gotham, and denies Gotham's motion under these provisions.

Next, the Court addresses the Labor Law §§ 240 (1) claims as against the BAM defendants. As owners of the Premises, the BAM defendants are liable for plaintiff's accident under Labor Law § 240 (1). To recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, plaintiffs must demonstrate that the pipe was in the process of being hoisted or secured at the time of the accident, or that the load required securing for the purposes of the undertaking when it fell (*see Cammon v City of New York,* 21 AD3d 196, 200 [1st Dept 2005] [internal citation and quotation marks omitted]). Here, the slippery and heavy pipe was a load that required a hoisting or securing device to prevent it from falling while being lowered through the penetration. These hoists and securing devices were not present at the time of plaintiff's accident, in violation of Labor Law § 240 (1) (*Narducci*, 96 NY2d at 268). In addition, a proper cover over the 30th floor penetration was necessary to protect plaintiff and other workers from the falling pipe, this safety

device, and its absence was a proximate cause of the accident and a violation of Labor Law § 240 (1) (*Cammon*, 21 AD3d at 200). In *Dedndreaj v ABC Carpet & Home* (93 AD3d 487, 487 [1st Dept 2012]), the First Department found that even if the plaintiff was negligent, he was entitled to summary judgment where the defendants did not provide an adequate safety device and this "proximately caused a pipe that was in the process of being hoisted to fall and strike him."

The BAM defendants argue that, nonetheless, they are entitled to dismissal of the Labor Law § 240 (1) claim against them because plaintiff's failure to wear a hardhat was the sole proximate cause of his accident and "there can be no liability under section 240 (1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). This argument fails, however. Wherever the "owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, [the] negligence, if any, of the injured worker is of no consequence" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] [internal quotation marks and citation omitted]). As stated, the lack of hoists, securing devices, and a proper cover over the 30th floor penetration all were contributing causes of the accident. As comparative fault is not a defense to Labor Law § 240 (1), the BAM defendants' argument regarding sole proximate cause must fail (*see Clarke v Morgan Contracting Corp.*, 60 AD3d 523, 523 [1st Dept 2009]. Thus, Court grants plaintiffs' summary judgment motion as to the BAM defendants' liability under Labor Law § 240 (1) claim and denies the BAM defendants' motion on this issue.

The Labor Law § 241 (6) Claim Against the BAM Defendants and Gotham (Motion Sequence Number 001 and 003)

When this matter was argued before Justice Billings, who previously presided over the case, the judge stated that if plaintiffs prevailed on their Labor Law 240 (1) claim they would not

need to proceed with their Section 241 (6) claim. In the interest of creating a complete record, however, the Court discusses this alternative relief briefly. 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:
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> * * *
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> (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."

This provision imposes a nondelegable duty of reasonable care upon owners and contractors (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). To sustain a Labor Law § 241 (6) claim, the plaintiff must show 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) and show that the violation was a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Plaintiffs move for summary judgment as to Industrial Code § 23-1.7 (a) (1) (overhead hazards) alone and do not oppose the defendants' request for dismissal of the remaining Industrial Code claims. Accordingly, the Court grants defendants' motions for summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions. Section 23-1.7 (a) (1), which governs overhead hazards, provides:

> "Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size,

> tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

This provision is sufficiently specific to support a Labor Law § 241 (6) claim (*see Clarke*, 60 AD3d at 523-24). Moreover, the area where plaintiff was working at the time of the accident was normally exposed to falling material or objects because, as the accident at issue shows, workers were passing heavy objects between the floors. The record makes it clear that workers at the Project engaged in this activity with some regularity. Thus, it was not, as the BAM defendants argue, an unforeseeable intervening event. Thus, summary judgment is proper in favor of plaintiffs under this provision as well. The Court rejects the BAM defendants and Gotham's argument that they provided proper protection against the danger in the form of the plywood covers as, at the time of plaintiff's accident, no such protections were in place over the hole located above plaintiff's head.

The Common-Law Negligence and Labor Law § 200 Claims Against the Bam Defendants and Gotham (Motion Sequence Number 003)

The BAM Defendants and Gotham move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. Plaintiffs do not oppose this portion of the BAM defendants and Gotham's motion. Thus, the Court grants BAM defendants and Gotham summary judgment dismissing these claims against them.

The BAM Defendants' and Gotham's Cross-Claim for Common-Law and Contractual Indemnification Against Spieler (Motion Sequence Number 003)

The BAM defendants and Gotham seek summary judgment on their cross-claims for common-law and contractual indemnification against Spieler, the Project's electrical contractor. They point to Article 9 of Exhibit D, part A, subsections 2 and 3, of the October 30, 2013 trade contract between Spieler and Gotham (Gotham's notice of motion, exhibit Q [the Indemnification Provision]), which states that Spieler would indemnify Gotham for "[a]ny accident or occurrence

which happens, or is alleged to have happened, in or about the place where the Work is being performed . . . while [Spieler] is performing the Work, either directly . . . or through its subcontractors . . . [or] while any of [Spieler's] property, equipment or personnel are in or about such place" as well as for "[t]he use, misuse, . . . or failure of any machinery or equipment (including, but not limited to, . . . hoists, rigging supports, etc.)." Citing *Bonaerge* (134 AD3d at 650) and *Guzman v 170 W. End Ave. Assoc.* (115 AD3d 462, 463-64 [1st Dept 2014], movants argue that this provision is sufficient to establish their claim for contractual indemnification. Alternatively, they seek common law indemnification, arguing that Spieler's employees' negligence was the cause of the accident and they did not supervise or control Spieler's work (citing *Guaman v 1963 Riyer Realty Corp.*, 127 AD3d 454, 456 [1st Dept 2015]; *Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). At the very least, they argue that an order of conditional indemnification is appropriate pending any judgment as to liability against them (citing *Masciotta v Morse Diesel Int'l, Inc.*, 303 AD2d 309, 310 [1st Dept 2003]).

In its opposition to the motion, Spieler argues that movants have not substantiated their argument with any admissible evidence. The deposition transcript of Steven Boyd, Spieler contends, lacks evidentiary value as to the terms of the contract because Boyd lacks personal knowledge regarding the contractual relationship between movants and Spieler. It also contends that Boyd's testimony reveals that triable issues exist as to Gotham's control over the project and negligent coordination of the workers at the Project. Spieler points to Boyd's statements that he held bi-weekly safety meetings with the foreman, that it conducted safety orientations, that he

coordinated the work of the various contractors and handled any problems, and that he was aware of the existence of the sleeves and the need to cover them when they were not in use.[2]

A party is entitled to contractual indemnification if "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] [internal citation and quotation marks omitted]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). If this intention exists, "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,* 259 AD2d at 65; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 004]). Unless the indemnification clause explicitly requires a finding that the indemnitor was negligent, the indemnitor's negligence "is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

As previously stated, plaintiff's accident arose out of Spieler's work at the Project. Additionally, as discussed above, no actual negligence on the part of the BAM defendants caused or contributed to the accident. Thus, pursuant to the Indemnification Provision, the BAM defendants are entitled to summary judgment on their cross claim for contractual indemnification against Spieler. Moreover, as plaintiffs have not opposed the motion to dismiss their negligence claims against Gotham, Gotham is entitled to summary judgment in its favor on its cross-claims for contractual indemnification against Spieler. Spieler's argument that an issue of fact remains as to whether Gotham negligently failed to coordinate the subcontractors' work activity cannot be asserted where, as Gotham points out, plaintiffs no longer assert this argument.

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[2] Spieler further states that the Court should not consider the subcontract because movants have not authenticated it. The Court rejects this argument. The Contract was exchanged during discovery, and Spieler voiced no objection. Also, Spieler does not show that the Contract is inaccurate, incomplete, or defective.

"[T]o recover on a claim for common law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Blank Rome, LLP v Parrish*, 92 AD3d 444, 444 [1st Dept 2012], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). If issues of fact exist about whether the movant "had control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury," the court should deny summary judgment (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]).

The BAM defendants have established that they were not negligent. In addition, they have established that Spieler was at least a contributing cause because its workers did not properly secure the pipe against falling while they lowered the pipe between floors. Thus, they are entitled to summary judgment in their favor on the cross-claim for common-law indemnification against Spieler. Based on the outstanding negligence claims against Gotham, Gotham is not entitled to summary judgment in its favor on the common-law indemnification claim against Spieler (*see Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 557 [1st Dept 2009]).

Par's Motion to Dismiss the Third-Party Complaint (Motion Sequence Number 004)

Par moves to dismiss Spieler's third-party complaint, which asserts claims for contribution and common-law indemnification, contractual indemnification, breach of contract and negligence, arguing that it fails to state a cause of action (under CPLR § 3211 (a) (7)). "On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Courts accept the complaint's allegations as true and give the plaintiffs the benefit of every favorable inference, deciding only whether the facts as alleged fit within any cognizable legal theory (*id.* at 87-88). The complaint cannot "consist of bare legal conclusions, as

well as factual claims either inherently incredible or flatly contradicted by documentary evidence" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]), but the "court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon,* 84 NY2d at 88, [internal quotation marks and citations omitted]).

As Par was plaintiff's employer when the accident occurred, Workers' Compensation Law § 11 applies. Workers' Compensation Law § 11 sets forth, in pertinent part:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean [inter alia] an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

(*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004] [stating that although employers' liability is usually limited to workers' compensation benefits for on-the-job injuries, they may be liable to indemnify third parties if there is a grave injury]). The Court of Appeals has explained that "permanent total disability" arising from brain injuries requires a showing that the plaintiff is "unemployability in any capacity" (*id.* at 417 [emphasis omitted]). In addition, "the burden of the party seeking summary judgment to show, by competent admissible evidence, that the plaintiff's injuries were not 'grave'" (*Altonen v Toyota Motor Credit Corp.*, 32 AD3d 342, 343 [1st Dept 2006] [citation omitted]). Spieler has not satisfied this burden. Moreover, it has not produced or identified a written contract containing a provision which overrides this principle (compare to *Flores v Lower East Side Services Center*, 4 NY3d 363, 367-68 [2005] [finding that unsigned contract containing such provision was sufficient to override the Worker's Compensation Law).

Thus, Spieler's contractual indemnification and breach of contract claims do not state viable causes of action, and the Court grants its motion to dismiss Par these claims.

The portion of the third-party complaint that seeks contribution and common-law indemnification from Par sufficiently states a cause of action, however. The third-party complaint specifically alleges that Workers' Compensation Law § 11 does not apply because "the plaintiff's allegations of injury to date qualify as a 'grave injury' as defined by the New York State Workers' Compensation Law § 11" (Par's notice of motion, exhibit A, ¶ 19, the third-party complaint). This allegation is supported by plaintiff's bill of particulars, which allege permanent brain injuries, and by the report of plaintiff's medical expert, which concluded that plaintiff has continuing brain injuries and is permanently disabled and unable to work. Par submits two expert medical reports which conclude that plaintiff did not sustain a grave injury to his brain, but these merely raise an issue of fact that, on this record, cannot be resolved on a motion to dismiss (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]). Accordingly, the Court denies Par's motion for dismissal of the claims for contribution and common-law indemnification against it.

Alternatively, Par seeks to sever the third-party action from the main action, arguing that a further deposition of plaintiff and an additional independent medical examination will be needed with respect to plaintiff's brain injury. As the additional discovery Par requests is minimal, severance of the third-party action is unnecessary. The parties are directed to complete any further discovery forthwith, so the discovery will not impede settlement talks or necessitate delay of the trial.

CONCLUSION AND ORDER

The court has reviewed the remaining contentions of the parties and finds them to be unavailing. For the foregoing reasons, therefore, it is hereby

ORDERED that plaintiffs David Thierry and Phyllis Thierry's motion (motion sequence number 001), pursuant to CPLR § 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim is granted; and it is further

ORDERED that plaintiffs' motion (motion sequence number 001) as to the violation of Industrial Code section 23-1.7 (a) (1) is granted, and the motion of the BAM defendants and Gotham insofar as it seeks to dismiss this claim is denied; and it is further

ORDERED that the part of the BAM defendants and defendant Gotham Construction Company, LLC's (Gotham) motion (motion sequence number 003), pursuant to CPLR § 3212, for summary judgment dismissing those parts of the Labor Law § 241 (6) claim predicated on the abandoned Industrial Code provisions is granted, and these Industrial Code provisions are dismissed as against these defendants, and it is further

ORDERED that the part of BAM defendants and Gotham's summary judgment motion under CPLR § 3212 motion sequence number 003), seeking dismissal of the common-law negligence and Labor Law § 200 claims and of Spieler's cross-claims for indemnification, is granted; and it is further

ORDERED that Par Plumbing Co., Inc. d/b/a Par Plumbing's (Par) motion (motion sequence number 004), pursuant to CPLR § 3211 (a) (7), to dismiss the third-party complaint is granted to the extent of dismissing the third-party complaint's contractual indemnification and breach of contract claims, and the motion is otherwise denied.

Dated: 3/19/2018

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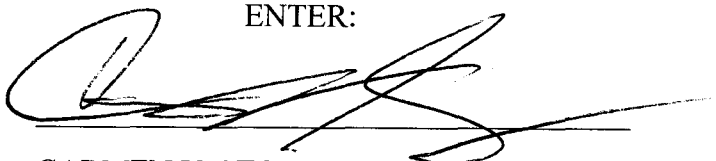

CARMEN VICTORIA ST. GEORGE, J.S.C.

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