Lopez v Eastport S. Manor Cent. Sch. Dist.
2018 NY Slip Op 30610(U)
April 2, 2018
Supreme Court, Suffolk County
Docket Number: 11-32968
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 11-32968

CAL. No. 16-02330OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-5-17 (005)
MOTION DATE 6-6-17 (006)
MOTION DATE 5-19-17 (007)
MOTION DATE 6-9-17 (008)
ADJ. DATE 9-15-17
Mot. Seq. # 005 - MG # 007 - MG
006 - MG # 008 - MD

RICARDO LOPEZ,

Plaintiff,

- against -

EASTPORT SOUTH MANOR CENTRAL SCHOOL DISTRICT, CAPOBIANCO, INC., TRITON CONSTRUCTION COMPANY, LLC., AND TORINO INDUSTRIAL FABRICATION, INC.,

Defendants.

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TRITON CONSTRUCTION COMPANY, LLC.,

Third-Party Plaintiff,

- against -

JG GENERAL WELDING, INC.,

Third-Party Defendants.

---X

EASTPORT SOUTH MANOR CENTRAL SCHOOL DISTRICT

Second Third-Party Plaintiff,

- against -

JG GENERAL WELDING, INC.,

Second Third-Party Defendants.

---X

TORINO INDUSTRIAL FABRICATION, INC.

Third Third-Party Plaintiff,

- against -

JG GENERAL WELDING, INC.,

Third Third-Party Defendants.

---X

Upon the reading and filing of the following papers in this matter: (1) Notice of Motions by defendant/third-party plaintiff Triton Construction Company, LLC, dated May 1, 2017, by defendant/third-party plaintiff Eastport-South Manor Central School District dated May 5, 2017, by defendant/third-party plaintiff Torino Industrial Fabrication, Inc. dated April 27, 2017, and by defendant Capobianco, Inc. dated May 23, 2017, and supporting papers (including Memorandum of Law dated April 27, 2017); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmations in opposition by plaintiff dated July 18, 2017 and July 20, 2017, and supporting papers; (4) Reply Affirmations by defendant/third-party plaintiff Eastport-South Manor Central School District dated August 29, 2017, by defendant Capobianco, Inc. dated August 1, 2017, and by defendant/third-party plaintiff Triton Construction Company, LLC, dated August 24, 2017 and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (#005) by defendant/third-party plaintiff Triton Construction Company, LLC, the motion (#006) by defendant/third-party plaintiff Eastport-South Manor Central School District, the motion (#007) by defendant/third-party plaintiff Torino Industrial Fabrication, Inc., and the motion (#008) by defendant Capobianco, Inc., are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant/third-party plaintiff Triton Construction Company, LLC, for summary judgment dismissing the complaint and all cross claims against it is granted; and it is

ORDERED that the motion by defendant/third-party plaintiff Eastport-South Manor Central School District for summary judgment on its contractual indemnification cross claims against defendants Capobianco, Inc. and Torino Industrial Fabrication, Inc. is granted, and it is

ORDERED that the motion by defendant/third-party plaintiff Torino Industrial Fabrication, Inc. for, inter alia, conditional summary judgment on its third-party contractual indemnification claim against third-party defendant JG General Welding, Inc. is denied; and it is further

ORDERED that the cross motion by defendant Capobianco, Inc. for, inter alia, conditional summary judgment on its contractual indemnification cross claim against defendant/third-party plaintiff Torino Industrial Fabrication, Inc., is granted.

Plaintiff Ricardo Lopez commenced this action to recover damages for personal injuries he allegedly sustained on April 21, 2011 while working on a renovation project at an elementary school building located in Manorville, New York. Plaintiff, who was in the process installing new sub-flooring of the first floor of the building, allegedly was injured when a section of metal decking on which he was standing came apart and caused him to fall off its edge. As a result, plaintiff fell more than ten feet through the subfloor opening to the building's basement. The school building in question is owned and operated by defendant/third-party plaintiff Eastport-South Manor Central School District. The School District hired defendant Capobianco, Inc., ("Capobianco") as the general contractor, and defendant/third-party plaintiff Triton Construction Company, LLC ("Triton"), as the project's construction manager. Capobianco then hired defendant/third-party plaintiff Torino Industrial Fabrication, Inc. ("Torino"), to serve as the project's prime contractor for steel fabrication and installation. Torino then subcontracted the steel installation portion of its work to third-party defendant JG General Welding, Inc. ("JG General"). Plaintiff was employed by JG General at the time of the alleged accident. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). Defendants joined issue, asserting affirmative defenses and cross claims against each other. Thereafter, the School District, Triton, and Torino commenced three separate third-party actions against JG General, asserting claims for indemnification, contribution, and breach of contract. The note of issue was filed on December 30, 2016.

Triton now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds it was not a general contractor, owner, or agent for the purposes of the Labor Law, and that it merely served as the project's construction manager without any authority to supervise plaintiff's work or control his safety practices. Plaintiff opposes Triton's motion on the basis triable issues exist as to whether Triton, which was contractually required to coordinate the contractors, review their safety

precautions, and suspend work if it became aware of any worksite safety violations, acted as the School District's statutory agent for the purposes of the statute. The School District moves for conditional summary judgment on its contractual indemnification cross claims against Capobianco and Torino, arguing that both entities are contractually required to indemnify the School District against plaintiff's claims, as its liability, if any, for the happening of the accident is vicarious. Torino moves for summary judgment dismissing plaintiff's claim for lost wages, and for conditional summary judgment on its third-party claims against JG General for indemnification and breach of contract for its alleged failure to procure general liability insurance naming Torino as an additional insured.

By way of a separate motion, Capobianco moves for dismissal of plaintiff's common law negligence and Labor Law § 200 claims against it on the grounds it did not possess the authority to control the means and methods of plaintiff's work, and did not provide him with any defective tools or safety equipment. Capobianco also asserts it is entitled to conditional summary judgment on its contractual indemnfication cross claims against Torino, since it is free from negligence for the happening of the subject accident and the parties' agreement requires Torino to indemnify it against plaintiff's claim since it arose out of the work performed by Torino's subcontractor, JG General. Plaintiff opposes the branch of Capobianco's motion seeking dismissal of his Labor Law § 200 claim against it on the basis a triable issue exists as to whether Capobianco, which was retained as the project's general contractor, possessed the authority to control the means and methods of plaintiff's work at the time of the alleged accident. Plaintiff further asserts that a triable issue exists as to whether Capobianco's construction supervisor, Peter Dawson, who testified that he walked the worksite on a daily basis and possessed the authority to stop the work if he observed unsafe safety practices, possessed actual notice that plaintiff had no where to tie off his safety harness, and that no other safety devices were in place to prevent him from falling. Torino opposes the branch of Capobianco's motion for summary judgment on its contractual indemnfication cross claim, arguing that the parties' agreement was not triggered, since it requires a showing that plaintiff's injuries arose out of the performance of Torino's work, and were caused by its negligence. Additionally, Torino avers that the contractual indemnfication cross claims against it by Capobianco and the School District are barred by the anti-subrogation rule, because the entities are all covered by the same insurer.

The 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see* ***Zuckerman v New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

A construction manager of a work site is generally not responsible for injuries under Labor Law §§ 200, 240 (1), or 241 (6) unless it functions as an agent of the property owner or general contractor for the project (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 798 NYS2d 351 [2005]; ***Lamar v Hill Intl., Inc.***, 153 AD3d 685, 686, 59 NYS3d 756 [2d Dept 2017]). The construction manager will only be deemed an agent or general contractor for the purposes of the statute when it was delegated supervisory control and authority

over the work being done, such that it could have avoided or corrected the unsafe condition that caused the accident (***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]; *see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]). In determining whether a construction manager should be treated as a statutory agent for the purpose of the statute, courts look to additional factors such as the terms of the construction manager's agreement with the owner, whether it possessed the authority to control activities at the construction site and to stop unsafe practices, and the absence of a general contractor (*see* ***Walls v Turner Constr. Co.***, *supra*; ***Barrios v City of New York***, 75 AD3d 517, 905 NYS2d 255 [2d Dept 2010]; ***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 491, 834 NYS2d 242 [2d Dept 2007]). Moreover, with respect to Labor Law § 200 claims based on accidents attributed to the alleged unsafe method or manner of a contractor's work, the authority to review work site safety, ensure compliance with safety regulations, and to stop work for observed safety violations, is insufficient to impose liability on a construction manager (*see* ***Marquez v L & M Dev. Partners, Inc.***, 141 AD3d 694, 35 NYS3d 700 [2d Dept 2016]; ***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]; ***Martin v Paisner***, 253 AD2d 796, 677 NYS2d 628 [2d Dept 1998]).

Here, Triton established its prima facie entitlement to summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims by demonstrating it possessed only general supervisory authority and control over the work and safety practices of the subcontractors at the worksite (*see* ***Lamar v Hill Intl., Inc.***, 153 AD3d 685, 59 NYS3d 756 [2d Dept 2017]; ***Marquez v L & M Dev. Partners, Inc.***, *supra*; ***Hargrave v LeChase Constr. Servs., LLC***, 115 AD3d 1270, 982 NYS2d 650 [4th Dept 2014]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]; ***Uzar v Louis P. Ciminelli Constr. Co., Inc.***, 53 AD3d 1078, 862 NYS2d 234 [2d Dept 2008]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]). Conspicuously absent from the agreement between the School District and Triton is any language delegating Triton the authority to control or supervise the work of subcontractors. Instead the agreement assigns Triton, which worked alongside a designated general contractor, the general supervisory duties of coordinating and scheduling the work of subcontractors, and ensuring their work was done in accordance with contract specifications. Although the agreement refers to the construction manager as an "agent" of the owner, it makes clear that such agency was one of general supervision and consultation, and specified that Triton had to obtain written authorizations from the School District before it could require subcontractors to stop their work. As to Triton's alleged authority over subcontractors' safety practices, paragraph 2.6.14 of the agreement explicitly states that "the Construction Manager shall not have supervisory control or authority over the safety practices or procedures under taken by any of the Contractors." Indeed, paragraph 2.6.14 of the agreement further states that nothing therein "shall relieve Contractors of their sole and ultimate responsibility for safety of persons or property and for compliance with all applicable federal, state and local safety . . . statutes."

Triton's submissions also include deposition testimony by its project manager, Leslie Miller, who testified, inter alia, that Triton's duties were limited to scheduling and coordinating subcontractors, that the walkthroughs he conducted were solely for those purposes, and that in the event he observed a safety violation he would inform the subcontractors' foreman of the problem. Although Miller testified that he believed he had the authority to suspend the work of the project's subcontractors, he opined that he would only have done so spontaneously if there was an emergency, and that it was up to the subcontractors' foremen to redress potential safety violations after he informed them. In addition, Miller testified that he did not observe or have any reason to know of any safety violations by plaintiff's employer, including the

alleged violation that caused plaintiff's accident. Triton also submitted the transcript of the deposition testimony by Capobianco's construction supervisor, who testified that Capobianco, as the general contractor, was responsible for ensuring subcontractors' safety compliance, and that during the project, he possessed the authority to stop subcontractors' work and demand they address safety violations.

In opposition, plaintiff failed to raise significant triable issues warranting denial of Triton's motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). As noted above, Triton's agreement did not provide it with the broad authority to control the work of subcontractors or the ability to demand their compliance with safety requirements. Rather, the agreement specifically stated that Triton did not have supervisory control or authority over the safety practices or procedures of the subcontractors. Instead, its role was advisory and consultive in nature. Notwithstanding the references to Triton as the School District's "agent" in the agreement, a closer reading of the agreement reveals that any such agency was restricted to general supervisory authority over subcontractors, and did not bestow upon Triton the type of control that would make it liable under the statute (*see e.g.* ***Walls v Turner Constr. Co.***, *supra*; ***Pino v Irvington Union Free Sch. Dist.***, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]; ***Lodato v Greyhawk N. Am., LLC***, *supra*). Furthermore, as it has been demonstrated that Triton lacked the supervisory authority to control the method and manner of plaintiff's work, and lacked notice of any dangerous condition, it cannot be held liable for plaintiff's common law negligence and Labor Law § 200 claims (*see* ***Marquez v L & M Dev. Partners, Inc.***, *supra*; ***Linkowski v City of New York***, *supra*). Indeed, any alleged failure of Triton to perform its contractual obligations as a safety consultant by discovering plaintiff's failure to wear a safety harness did not launch a force or instrument of harm, or cause some alleged defective condition such that it could be held liable pursuant to principles of common law negligence (*see* ***Marquez v L & M Dev. Partners, Inc.***, *supra*; ***Bauerlein v Salvation Army***, 74 AD3d 851, 856, 905 NYS2d 215 [2d Dept 2010]). Therefore, Triton's motion for summary judgment dismissing the complaint and cross claims against it is granted.

As to the branch of Capobianco's motion for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against it, section 200 of the Labor Law statute codifies the common law duty of owners, contractors, and their agents to ensure workers at a construction site have a safe place to perform their work (*see* ***Comes v N.Y. State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867NYS2d 123 [2d Dept 2008]). Where a claim arises out of an alleged defective premises condition, a general contractor may be held liable for a violation of Labor Law § 200 if it either created the alleged dangerous condition or had actual or constructive notice of its existence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). By contrast, where the accident arises out of alleged dangers in the means and method of the work, there can be no recovery against a general contractor unless it is shown that it had the authority to supervise or control of the performance of the subcontractor's work (*see* ***Dasilva v Nussdorf***, 146 AD3d 859, 45 NYS3d 531 [3d Dept 2017]; ***Rizzuto v LA., Wenger Contr. Co.,Inc.***, 91 NY2d343, 352, 670 NYS2d 816 [1998]; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the

manner in which the work is performed" (***Ortega v Puccia***, *supra* at 62). However, "'[t]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'" (***Austin v Consolidated Edison, Inc.***, 79 AD3d 682, 684, 913 NYS2d 684 [2d Dept 2010], quoting ***Gasques v State of New York***, 59 AD3d 666, 668, 873 NYS2d 717 [2d Dept 2009]).

Capobianco established its prima facie entitlement to dismissal of plaintiff's common law negligence and Labor Law § 200 claims by demonstrating that it did not possess the authority to determine the means or method of plaintiff's work, and that it did not have actual or constructive notice of any allegedly dangerous condition at the worksite prior to the accident (*see* ***Marquez v L & M Dev. Partners, Inc.***, *supra*; ***Sanchez v Metro Bldrs. Corp.***, 136 AD3d 783, 25 NYS3d 274 [2d Dept 2016]; ***Mammone v T.G. Nickel & Assoc., LLC***, 144 AD3d 761, 41 NYS3d 97 [2d Dept 2016]; ***Torres v City of New York***, 127 AD3d 1163,7 NYS3d 539 [2d Dept 2015]). Significantly, Capobianco's construction supervisor testified that its authority over the work of the project subcontractors was limited to the power to demand their compliance with safety regulations rather than to determine the means or methods of their work. He further testified that he did not observe any hazards or safety violations during his time at the worksite. Capobianco's vice president, Michael Melchione, testified that Capobianco was only responsible for determining the manner of the work performed by general laborers it employed for the purposes of cleaning up and miscellaneous carpentry at the worksite, and that the subcontractors had their own respective supervisors who were responsible for determining the work and safety practices of their employees. Likewise, plaintiff and his supervisor both testified that JG General possessed sole authority over the manner of plaintiff's work and the provision of his tools and safety equipment. Furthermore, inasmuch as plaintiff suddenly and unexpectedly fell from the very metal decking he was in the process of installing, Capobianco demonstrated that it did not possess actual or constructive notice of any alleged defective or dangerous premises condition (*see generally* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]).

Plaintiff failed to raise a triable issue in response to Capobianco's prima facie showing. There is no absolute liability for owners or general contractors with respect to alleged violations of Labor Law § 200 (*see* ***Sanatass v Consolidated Investing***, *supra*), and a general contractor's right to demand compliance with safety regulations and to potentially stop a subcontractor's work if a violation is observed, is insufficient to impose liability on it under Labor Law § 200 or the common law (*see* ***Marquez v L & M Dev. Partners, Inc.***, *supra*; ***Linkowski v City of New York***, *supra*). Therefore, the branch of Capobianco's motion for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against it is granted.

As to the branches of the motions by the School District, Torino, and Capobianco seeking conditional summary judgment on their claims for contractual indemnification, the School District and Capobianco entered a general construction agreement in connection with the school renovation project on October 13, 2010. The agreement contains various sections defining the scope of the work and Capobianco's responsibility for such work. Section 1.1.3 of the general conditions of the agreement defines "the work" as follows:

> The term 'Work' means the construction and services required by the Contract Documents, whether completed or partially completed, ans includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the Project.

Section 3.3 of the agreement, entitled "Supervision and Construction Procedures" further provides the following:

> [Capobianco] shall supervise and direct the Work, using [its] best skill and attention. [Capobianco] shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work . . . [Capobianco] shall be responsible to the [School District] for acts and omissions of [its] employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

Additionally, the indemnification provision of the general construction agreement states, in pertinent part, as follows:

> To the fullest extent permitted by law [Capobianco] shall indemnify and hold harmless the [District] . . . from and against any claims, damages, losses and expenses . . . arising out of or resulting from performance of the Work . . . to the extent caused in whole or part by negligent acts or omissions of [Capobianco], a Subcontractor, or anyone directly or indirectly employed by them.

The subcontract between Capobianco and Torino was executed on December 17, 2010. Pursuant to article 1 of the agreement, the terms of the general construction agreement between Capobianco and the School District were incorporated therein. The subcontract contains a separate indemnfication provision, which states as follows:

> To the extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, to the extent caused in whole or part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in party by any party indemnified hereunder. Such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist.

Torino subsequently entered an agreement with JG Welding in April 2011, whereby JG Welding agreed to perform the steel installation work for the project. The agreement also included an indemnity clause in favor of Torino, which states:

> To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless [Torino] and Owner, their officers, directors, partners, representatives, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability (including statutory liability) arising in whole or in part and in any manner from injury and/or death of person . . . resulting from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by or for Subcontractor pursuant to any contract . . . except those claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of [Torino].

"The right to contractual indemnification depends upon the specific language of the contract" (***Roldan v New York Univ.***, 81 AD3d 625, 628, 916 NYS2d 162 [2d Dept 2011]; *see* ***Reyes v Post & Broadway, Inc.***, 97 AD3d 805, 949 NYS2d 141 [2d Dept 2012]), and will not be enforced "unless the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (*see* ***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 491-492, 549 NYS2d 365 [1989]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (***George v Marshalls of MA, Inc.***, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; ***Sobel v City of New York***, 120 AD3d 485, 991 NYS2d 93 [2d Dept 2014]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Moreover, Worker's Compensation Law §11 permits third-party indemnification claims against employers where such claim is based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see* ***Rodrigues v N&S Blg. Contrs. Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]).

Here, the School District established its prima facie entitlement to conditional summary judgment on its contractual indemnification cross claims by demonstrating that the accident arose out of negligent acts or omissions conducted during the course of work performed by an entity directly or indirectly employed by Capobianco and Torino, that its liability for the happening of the accident would be vicarious only, and that it had no actual or constructive notice of any alleged defective condition on its premises (*see* ***Jamindar v Uniondale Union Free School Dist.***, *supra*; ***Reisman v Bay Shore Union Free School Dist.***, 74 AD3d 772, 902 NYS2d 167 [2d Dept 2010]; ***Quilliams v Half Hollow Hills School Dist. (Candlewood School)***, 67 AD3d 763, 892 NYS2d 397 [2d Dept 2009]). As noted above, the agreements executed by Capobianco and Torino both include indemnity provisions in favor of the School District for injuries that arise out of

negligent acts or omissions conducted during the course of work performed by plaintiff's employer, JG General, which was either directly or indirectly employed by Capobianco and Torino. Additionally, it is uncontested that the School District possessed no more than general supervisory authority over plaintiff's work and, due to the sudden nature of the accident, it did not have actual or constructive notice of any alleged defective premises condition. Torino failed to raise a significant triable issue in response to the School District's prima facie showing (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Inasmuch as Torino was the project's prime contractor for steel fabrication and installation, and the accident occurred during work performed by JG General, a steel installation subcontractor hired by Torino, the court rejects Torino's assertion that the accident did not arise out the negligent acts or omission of an entity within its employ (*see* ***Simone v Liebherr Cranes, Inc.***, 90 AD3d 1019, 935 NYS2d 337 [2d Dept 2011]; ***Tapia v Mario Genovesi & Sons, Inc.***, 72 AD3d 800, 899 NYS2d 303 [2d Dept 2010]).

Since no triable issue exists as to whether plaintiff's conduct was the sole proximate cause of the accident, or whether the accident was caused by the negligence of the School District, the court likewise finds Torino's assertions that an award of conditional summary judgment would be premature at this juncture to be without merit (*see* ***Jamindar v Uniondale Union Free School Dist.***, *supra*; ***Correia v Professional Data Mgt.***, *supra*). Furthermore, to the extent that the same insurer covers Torino, Capobianco, and the School District against the same risk, the anti-subrogation rule merely restricts the School District's recovery to the limits of the parties' common liability insurance policy. It does not bar the School District's indemnification claim altogether (*see* ***Storms v Dominican College of Blauvelt***, 308 AD2d 575, 765 NYS2d 882 [2d Dept 2003]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). Therefore, the motion by defendant/third-party plaintiff Eastport-South Manor Central School District for conditional summary judgment on its contractual indemnification cross claims against Capobianco, Inc. and Torino Industrial Fabrication, Inc. is granted.

Capobianco similarly established its prima facie entitlement to conditional summary judgment on its contractual indemnfication cross claim against Torino by demonstrating that its negligence, if any, for plaintiff's injuries would be vicarious, and that it was free of negligence with respect to plaintiff's claims under Labor Law § 200 and the common law (*see* ***Reisman v Bay Shore Union Free School Dist.***, *supra*; ***Quilliams v Half Hollow Hills School Dist. (Candlewood School)***, *supra*; ***Giangarra v Pav-Lak Contr., Inc.***, 55 AD3d 869, 866 NYS2d 332 [2d Dept 2008]; ***Walls v Sano-Rubin Constr. Co.***, 4 AD3d 599, 771 NYS2d 603 [3d Dept 2004]). The subcontract between Capobianco and Torino contains an indemnity provision in favor of Capobianco which requires Torino to indemnify Capobianco against any and all claims arising out of Torino's work, which includes claims that arise out of the work of its subcontractor, JG General. Where, as in this case, the accident was related to JG General's alleged failure to ensure its worker was wearing a safety harness, it can hardly be contested that the claim was not caused "in whole or part by the negligent act or omission" of a party directly or indirectly within Torino's employ. Moreover, to obtain conditional relief on a claim for contractual indemnification Capobianco need only establish that it was free from any negligence. Torino's purported negligence or lack thereof is a non-issue and irrelevant (*see* ***Correia v Professional Data Mgt.***, *supra* at 65). In opposition, Torino failed to raise a significant triable issue (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the branch of Capobianco's motion seeking conditional summary judgment on its contractual indemnification cross claim against Torino is granted.

Finally, as to Torino's motion, the branch seeking dismissal of plaintiff's claim for lost wages based upon his alleged use of a false identification to secure employment is denied, as the evidence submitted failed make a prima facie case that plaintiff was hired based on his submission of false documentation (*see* ***Balbuena v IDR Realty LLC***, 6 NY3d 338, 812 NYS2d 416 [2006]; ***Janda v Michael Rienzi Trust***, 78 AD3d 899, 912 NYS2d 237 [2d Dept 2010]; ***Coque v Wildflower Estates Developers, Inc.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]). The branch of Torino's motion for conditional summary judgment on its third-party claim against JG General is likewise denied. Torino failed to eliminate triable issues as to its freedom from negligence for the happening of plaintiff's accident. When Torino, as the prime steel fabrication and installation contractor delegated a portion of its work to JG General, it became a statutory agent with the authority to supervise and control plaintiff's work and the area of worksite where he was conducting such work (*see generally* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). Thus, to the extent plaintiff alleges that his accident arose out of the means and methods of his work or the existence of a dangerous condition at the worksite, a triable issue exists as to whether Torino may be held liable for plaintiff's injuries pursuant to common law negligence or Labor Law § 200 (*see* ***Tomyuk v Junefield Assoc.***, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; ***Guerra v Port Auth. of N.Y. & N.J.***, 35 AD3d 810, 828 NYS2d 440 [2d Dept 2006]). Torino's failure to establish its freedom from negligence requires denial of the branch of its motion for conditional summary judgment on its third-party contractual indemnification claim against JG General (*see* ***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]; ***Lam v Sky Realty, Inc.***, 142 AD3d 1137, 37 NYS3d 627 [2d Dept 2016]; ***Jamindar v Uniondale Union Free School Dist.***, *supra*). Accordingly, Torino's motion for, inter alia, conditional summary judgment on its third-party contractual indemnification claim against JG General is denied.

Dated: April 2, 2018

PETER H. MAYER, J.S.C.