Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUSZ IA Part 38
Justice

STEVE FARRINGTON and SHANTIE FARRINGTON, his wife, Plaintiffs, -against- STRUCTURE TONE INC., ET AL.,, Defendants.	Index Numbers 24748/ 2011 Motion Date February 26, 2018 Mot. Seq. Nos. 6 & 7

The following papers numbered 1 to 51 read on this motion by defendants and second third-party defendant, Acme Architectural Products, Inc (Acme) (Seq. 6), along with the cross motion by defendant, A-Val Architectural Metals III, LLC (A-Val), all seeking, among other things, summary judgment dismissing the causes of action of the complaints; the cross motion by plaintiff seeking summary judgment; and the motion by third-party defendant/ second third-party plaintiff, Kleinknecht Electric Company, Inc. (Kleinknecht) (Seq. 7) seeking, among other things, summary judgment dismissing the third-party complaint.

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Upon the foregoing papers, it is ordered that the instant motions and cross motions, all for, among other things, summary judgment pursuant to CPLR 3212, are determined as follows:

Plaintiff, Steve Farrington, an electrical worker employed by third-party defendant, Kleinknecht, allegedly sustained serious personal injuries while performing electrical wiring

work at a building located at 200 Fifth Avenue, New York, New York, on October 8, 2009. It is agreed that the premises were owned by defendant, 200 Fifth Avenue Owner, LLC (200 Fifth). Kleinknecht had been hired by Structure Tone, Inc. (Structure Tone), the general contractor, to perform electrical contracting services as part of an interior renovation of the 2nd, 5th and 6th floors at said premises. Acme and A-Val were allegedly hired by Structure Tone to install the office partitions and/or do the glass and glazing work on said partitions.

Plaintiff alleges that on the date of his accident, he was performing wiring work on the second floor, walking past office space being fashioned, when he stepped on a steel track, which had been drilled and bolted into the concrete floor, which he, allegedly, could not see due to debris all around, and twisted his ankle. Plaintiff commenced this action against defendants in October 2011, alleging common law negligence and violations of Labor Law §§ 200, 240 and 241. Defendants impleaded Kleinknecht in or about April 2012. Kleinknecht impleaded Acme and A-Val in or about October 2013. Plaintiff made Acme and A-Val first-party defendants.

Defendants move for summary judgment dismissing the complaint; for contractual indemnification against Kleinknecht; and to dismiss Kleinknecht's second third-party case against Acme. Plaintiff cross-moves for summary judgment, and A-Val cross-moves for summary judgment dismissing the complaint. Kleinknecht moves for, among other things, summary judgment dismissing the third-party complaint.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993],

citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The court will first address plaintiff's cross motion (Seq. 6), seeking summary judgment on liability against defendants on the Labor Law § 241 (6) claim. Labor Law § 241 (6), imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna,* 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343 [1998]; *King v Villette,* 155 AD3d 619 [2d Dept 2017]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2d Dept 2016]). The ultimate responsibility for safety practices at building construction sites lies with the owner, general contractor and agents (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]).

To succeed in obtaining summary judgment under this section, plaintiff must establish that the Industrial Code sections allegedly violated can serve as a predicate for liability pursuant to Labor Law § 241 (6), because they involve a violation of a provision of the Industrial Code that sets forth specific applicable safety requirements or standards, which were a proximate cause of plaintiff's accident (*see St. Louis v Town of N. Elba*, 16 NY3d 411 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Rodriguez v 250 Park Avenue, LLC*, – AD3d –, 2018 NY Slip Op. 03386 [2d Dept 2018]; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935 [2d Dept 2016]; *Torres v City of New York,* 127 AD3d 1163 [2d Dept 2015]), and that such applicable sections were violated (*see Zaino v Rogers*, 153 AD3d 763 [2d Dept. 2017]; *Cruz v Cablevision Systems Corp.*, 120 AD3d 744 [2d Dept 2014]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221 [2d Dept 2011]).

Plaintiff's pleadings assert that defendants violated Industrial Code Rules 23-1.5, 23-1.7, 23-1.23, and 23-1.32. However, plaintiff has chosen to support his argument on this branch of the motion solely with regard to Rules 23-1.7 (d) and (e) (1) and (2), thereby effectively abandoning those remaining claimed violations. Consequently, plaintiff's motion is denied as to the remaining, alleged Code Rules.

While these provisions of Rule 23-1.7 may serve as predicates for liability under Labor Law § 241 (6) (*see Jara v New York Racing Ass'n, Inc.*, 85 AD3d 1121 [2d Dept 2011]), as they involve an alleged violation of a "specific, positive command" or "concrete specification" of the Industrial Code (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d at 350; *see Przyborowski v A&M Cook, LLC*, 120 AD3d 651 [2d Dept 2014]; *Torres v Perry Street Development Corp.*, 104 AD3d 672 [2d Dept 2013]) *Carey v Five Bros., Inc.,* 106 AD3d 938; *Forschner v Jucca Co., 63 AD3d 996 [2d Dept 2009]*), in the case at bar, opposing defendants contend that said specific Code Rules either did not apply to the facts herein, and/or that they were not violated.

Rule 23-1.7 (e) (1) refers to "tripping hazards" in "passageways," stating, in relevant part, that such areas "shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." Rule 23-1.7 (e) (2) requires owners and contractors to maintain "working areas" free from tripping hazards. Plaintiff's evidence vacillates as to the correct designation of the area he was traversing at the time of his accident, leaving a question as to which, if either, Rule would factually apply to the case at bar. Further, plaintiff has failed to establish the lack of a triable issue of fact as to whether he "tripped." His description of how the accident occurred fails to unequivocally portray the physics of a "trip," as it does not address a "catch" of the foot or a subsequent "stumble" - which terms commonly appear in definitions of the verb (see Merriam-Webster Online Dictionary, trip [https://merriam-webster.com/dictionary/trip]; Oxford English Dictionary [2018]).

As such, plaintiff has failed to show, prima facie, that these provisions of the Industrial Code were applicable to the facts of this case (*see Zaino v Rogers*, 153 AD3d 763; *Aragona v State of New York*, 147 AD3d 808 [2d Dept 2017]). Additionally, plaintiff has failed to demonstrate that the "metal channel/steel track," which allegedly caused his accident, was not an integral part of the ongoing construction, raising another issue of fact as to the applicability of Rule 23-1.7 (e) (1) and (2) (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805 [2006]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214).

Further, plaintiff has failed to establish, prima facie, that Rule 23-1.7 (d), which refers to "slipping hazards," was applicable to the facts of this case, as plaintiff has not alleged that he "slipped." Contrary to plaintiff's contention, the First Department case of *Lopez v City of N. Y. Tr. Auth.*, 21 AD3d 259 [1st Dept 2005], is not controlling in the case at bar. Although plaintiff claims there was "debris" in the area where he was injured, he has failed to state that he "slipped on debris" or demonstrate how said debris "contributed to the occurrence of the accident" (*Lopez v City of N. Y. Tr. Auth.*, 21 AD3d at 259). Even had plaintiff made such a claim, an "accumulation of debris did not constitute a 'slippery condition' within the meaning of this code section" (*Nankervis v Long Island University*, 78

AD3d 799, 801 [2d Dept 2010]). As a result, plaintiff has failed to establish, prima facie, that Rule 23-1.7 (d) was applicable to the facts of the case herein (*see Keener v Cinalta Constr. Corp.*, 146 AD3d 867 [2d Dept 2017]). Consequently, plaintiff's cross motion for summary judgment on his Labor Law § 241 (6) action is denied.

Defendants/third-party plaintiffs move for summary judgment dismissing plaintiff's complaint. Initially, the branch of said motion seeking dismissal of the causes of action claiming violations of Labor Law § 241 (6) is granted, solely with regard to the applicability of Industrial Code Rules 23-1.5, 23-1.23, and 23-1.32. Defendants have presented a prima facie case for dismissal of those Rules, and, as noted in the determination of plaintiff's cross motion, plaintiff has failed to proffer evidence to rebut such entitlement. Additionally, the branch of defendants' motion seeking dismissal of the claims brought pursuant to Rule 23-1.7 (d) is granted. Defendants have stated, in essence, the same arguments they propounded in opposition to plaintiff's motion for summary judgment on the same provision, i.e., the inconsistent assertion that plaintiff claims he did not "slip," and the lack of evidence that a "slipping hazard," as designated in that section, was present at the site of plaintiff's accident. Such evidence demonstrated, prima facie, entitlement to summary judgment on this issue. In opposition, plaintiff has failed to raise an issue of fact sufficient to rebut defendants' claim.

Further, with regard to the alleged lack of appropriateness of Rules 23-1.7 (e) (1) and (2), defendants have demonstrated, prima facie, that these provisions were inapplicable to the facts herein (*see Rodriguez v 250 Park Avenue, LLC*, – AD3d –, 2018 NY Slip Op 03386; *Aragona v State of New York*, 147 AD3d 808), as movants have shown that the "metal channel/steel track," which was the object that plaintiff asserts caused his injury, was an integral part of the ongoing construction (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805 [2006]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214 [2d Dept 2017]; *Aragona v State of New York*, 147 AD3d 808). The submitted evidence shows that the subject "channel" was bolted to the floor for the purpose of holding glass partitions upright, thereby forming the walls of the offices which were the intended creations of the ongoing renovation project. Plaintiff's contention that said "channel" was neither "permanently installed," nor was it "essential to the work" being performed, is without merit. Plaintiff also conceded that he was previously aware of the existence of these "channels" throughout the building, including on the second floor where he was working, and that he did not "trip" on the "debris" he claimed was on the floor at the time. Upon such evidence, plaintiff has failed to raise an issue of fact sufficient to deny defendants' entitlement to summary judgment dismissing these provisions of the Industrial Code. Consequently, this branch of defendants' motion is, also, granted, thereby dismissing all of plaintiff's causes of action made pursuant to Labor Law § 241 (6) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494; *Lopez v New York City Dep't. of Environmental Protection*, 123 AD3d 982 [2d Dept 2014]; *Kozlowski v Ripin*, 60 AD3d 638 [2d Dept 2009]).

The branch of defendants' motion seeking to dismiss plaintiff's claims under Labor Law § 240 (1), is granted. Plaintiff has conceded that this section is not applicable, no doubt appreciating that "the risk to plaintiff was not the type of extraordinary peril section 240(1) was designed to prevent ... because no true elevation-related risk was involved here" (*Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]; *see Jock v Fein*, 80 NY2d 965 [1992]; *Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104 [2d Dept 2016]; *Carey v Five Bros., Inc.*, 106 AD3d 938).

Defendants also move to dismiss plaintiff's claims made pursuant to Labor Law § 200 and common-law negligence. Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor or agent to provide construction site workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290; *DeMilo v Weinberg Bros., LLC*, 122 AD3d 895 [2014]; *Nicoletti v Iracane*, 122 AD3d 811 [2014]; *Carey v Five Bros., Inc.*, 106 AD3d 938]). To be entitled to summary judgment on plaintiffs' claims based on Labor Law § 200, defendants must demonstrate that there is no evidence in the action that, either, defendant created the alleged condition or had actual or constructive notice of the alleged dangerous condition in time to correct it, and failed to do so (*see Martin v I Bldg. Co., Inc.,* 126 AD3d 861 [2015]; *Guilfoyle v Parkash*, 123 AD3d 1088 [2014]; *DiMaggio v Cataletto,* 117 AD3d 974 [2014]; *Quituizaca v Tucchiarone*, 115 AD3d 924 [2014]). A defendant has constructive notice of a dangerous or defective condition when such condition "is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" (*Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629, 629 [2009]; *Gordon v American Museum of Natural Hist.*, 67 NY2d 836 [1986]).

In the case at bar, the property owner hired Structure Tone as the general contractor of the project, and the uncontradicted evidence demonstrated that Structure Tone employed laborers to clean up the job site during the period of the subcontractors' work at the site. Consequently, defendants have failed to submit sufficient evidence to, prima facie, demonstrate entitlement to summary judgment. While movants showed they did not create the alleged dangerous debris condition, which plaintiffs claim concealed such dangerous condition, they failed to adequately establish a lack of actual or constructive notice of such alleged defective condition (*see Wejs v Heinbockel*, 142 AD3d 990 [2016]; *Chilinski v LMJ Contr., Inc.*, 137 AD3d 1185 [2016]). A question of fact exists with regard to whether movants had, or should have had, notice of the alleged dangerous condition of debris on the floor of the work area prior to the accident, by reason of the duties of Structure Tone's's agents in inspecting and cleaning the area, and whether such agents should have remedied, or notified defendants of, such dangerous condition. Defendants' failure to refer to any specific inspection of the area in question prior to the accident, and the results thereof, renders such argument insufficient to establish a lack of constructive notice of the condition

of the area (*see Rogers v. Bloomingdale's, Inc.*, 117 AD3d 933 [2014]). As such, this branch of defendants' motion to dismiss is denied.

Another branch of defendants/third-party plaintiffs' motion seeks contractual indemnity, legal fees and costs against third-party defendant, Kleinknecht. "The right to contractual indemnification depends upon the specific language of the contract" (*Dos Santos v Power Auth. of State of N. Y.*, 85 AD3d 718, 722 [2d Dept 2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see DeSouza v Empire Transit Mix, Inc., 155 AD3d 605 [2d Dept 2017]; Valente v Dave & Buster's of New York, Inc.*, 132 AD3d 973 [2d Dept 2015]; *Shea v Bloomberg, L.P.*, 124 AD3d 621 [2d Dept 2015). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Alayev v Juster Assoc., LLC*, 122 AD3d 886, 887 [2d Dept 2014]; *see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]; *Lawson v R & L Carriers, Inc.*, 126 AD3d 944 [2d Dept 2015]). The subcontract and Blanket Insurance Indemnity Agreement between defendant, Structure Tone, and Kleinknecht satisfies the requirements of Workers Compensation Law § 11, that a "written contract," must have been entered into prior to the accident and must have been sufficiently particular to have encompassed "an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered" (*Rodriguez v N & S Bldg. Contrs., Inc.*, 5 NY3d 427 [2005]; *Tullino v Pyramid Companies*, 78 AD3d 1041 [2d Dept 2010]).

In the case at bar, the initial seven words of the indemnity clauses of the agreements between Structure Tone and Kleinknecht, *i.e.*, "To the full extent permitted by Law," remove this matter from a violation of GOL 5-322.1, in that they do not require the subcontractor to fully indemnify Structure Tone or the owner for their own negligence, but create a partial indemnification obligation on behalf of Kleinknecht (see *Brooks v. Judlau Contr. Inc.*, 11 NY3d 204 [2008}; *Jardin v A Very Special Place, Inc.*, 138 AD3d 927 [2016]; *Guryev v Tomchinsky*, 114 AD3d 723 [2014]). Consequently, the subject indemnification agreements herein are enforceable

However, the party seeking contractual indemnification "must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Mohan v Atlantic Court, LLC*, 134 AD3d 1075, 1078 [2d Dept 2015], quoting *Cava Constr. Co, Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *Bleich v Metropolitan Management, LLC*, 132 AD3d 933 [2d Dept 2015]). In the case at bar, defendants have sufficiently demonstrated that this action arose without any active liability accruing to said moving parties (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]; *Lawson v R & L Carriers, Inc.*, 126 AD3d 944), and that they lacked the contractual authority to supervise and control the construction work (*see Gikas v 42-51*

Hunter Street, LLC, 134 AD3d 987 [2d Dept 2015]). Nevertheless, defendants have failed to demonstrate that the third-party defendant, Kleinknecht, was negligent herein (*see Shaughnessy v Huntington Hosp. Ass'n.*, 147 AD3d 994 [2d Dept 2017]; *Mohan v Atlantic Court, LLC*, 134 AD3d 1075).

The law is clear that "[w]hile owners owe nondelegable duties ... to plaintiffs who are employed at their work sites, these defendants can recover in indemnity, either contractual or common-law, from those considered responsible for the accident" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445-446 [2d Dept 1999]; *see Shea v Bloomberg*, 124 AD3d 621). If it is determined that the owner is liable to plaintiff, and its liability is only vicarious, *i.e.*, statutory, the owner is entitled to implied indemnity, shifting the loss, on the basis that failure to do so would result in the unjust enrichment of the actual wrongdoer at the expense of the owner (*see Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]; *Baek v Red Cap Services, Ltd.*, 129 AD3d 752 [2d Dept 2015]). "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 377-378 [2011]; *see Bermejo v New York City Health & Hospitals Corp.*, 119 AD3d 500 [2d Dept 2014]). Should Kleinknecht be found negligent in this matter, contractual indemnification on the part of Kleinknecht to defendants would be appropriate. However, on the evidence submitted, the branch of the motion seeking contractual indemnification, legal fees, and costs is denied as premature. No determination of negligence has yet been made, as plaintiff's injury has not yet been shown to be attributable solely to any action by Kleinknecht herein (*see Pena v 104 North 6th Street Realty Group*, 157 AD3d 709 [2d Dept 2018]; *Sawicki v GameStop Corp.*, 106 AD3d 979 [2d Dept 2013]; *Arrendahl v. Trizechahn Corp.*, 98 AD3d 699 [2d Dept 2012]; *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2d Dept 2009]). As such, the branch of defendants' motion seeking, among other things, contractual indemnity from Kleinknecht, is denied as premature.

Finally, defendants move to dismiss the second third-party action by Kleinknecht against Acme. Defendants have demonstrated, prima facie, Acme's right to the dismissal of such cause of action, by showing the lack of evidence that Acme installed the metal track; that said metal track was installed negligently; and that Acme was not contractually bound to Kleinknecht on this project. Kleinknecht has failed to oppose this branch of defendants' motion, thereby failing to rebut defendants' prima facie entitlement. Consequently, this branch of the motion is granted, and the second third-party complaint, as against Acme, is dismissed.

Defendant, A-Val cross-moves for summary judgment dismissing Kleinknecht's second third-party complaint as against it, alleging that it was not negligent. The evidence submitted in this matter contains allegations that A-Val was the party who installed the metal

track on the second floor, and, also, that the debris present at the accident site contained pieces of said metal track. Any allegations by A-Val, arose from an attorney's affirmation, and were based on no more than "unsubstantiated hypotheses and suppositions (which were) insufficient to (move) the motion for summary judgment" (*Marrietta v Scelzo*, 29 AD3d 539 [2d Dept 2006]; *see Hoffman v Eastern Long Is. Transp. Enter.*, 266 AD2d 509 [2d Dept 1999]). As such, a question of fact exists as to whether A-Val was negligent, and A-Val's cross motion is denied.

Third-party defendant/second third-party plaintiff, Kleinknecht, moves to, among other things, strike the answer of second third-party defendant, A-Val, and/or preclude A-Val from offering any evidence as to liability, for continued failure to appear for a deposition, both pursuant to CPLR 3126; be granted summary judgment on its common-law indemnity claim against A-Val; and for summary judgment dismissing the third-party complaint as against it.

"Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court" (*Hasan v 18-24 Luquer St. Realty, LLC*, 144 AD3d 631, 632 [2d Dept 2016], quoting *Richards v RP Stellar Riverton, LLC*, 136 AD3d 1011, 1011 [2d Dept 2016]). Striking a pleading or prohibiting the introduction of evidence, pursuant to CPLR 3126, for failure to comply with disclosure is a drastic remedy, and is only appropriate where there is a clear showing that the failure to comply was willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Medical Center*, 144 AD3d 1013 [2d Dept 2016]; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520 [2d Dept 2016]; *Arpino v F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 2091 [2d Dept 2012]). It may be inferred that a party's conduct is willful and contumacious when said party repeatedly fails to comply with court orders compelling disclosure without providing a reasonable excuse for said party's noncompliance over an extended period of time (*see Candela v Kantor*, 154 AD3d 733 [2d Dept 2017]; *Desiderio v GEICO Gen. Ins. Co.*, 153 AD3d 1322 [2d Dept 2017]; *Pesce v Fernandez*, 144 AD3d 653 [2d Dept 2016]).

In the case at bar, A-Val's excuse, i.e., the death of its principal in 2010, and its dissolution, and subsequent loss of its records, are persuasive in demonstrating A-Val's lack of bad faith or willfulness in failing to comply with the demands and court orders/stipulations for depositions herein (*see Jones v LeFrance Leasing Ltd. Partnership*, 110 AD3d 1032 [2013]; *Northfield Inc. Co. v. Model Towing and Recovery*, 63 AD3d 808 [2009]). Hence, A-Val's failure to comply does not support an inference that such failure was willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Medical Center*, 144 AD3d 1013 [2d Dept 2016]; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520; *Arpino v F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 201), and do not warrant the extreme sanction of striking said defendant's answer with regard to depositions. As such, the branch of Kleinknecht's motion seeking the

striking A-Val's answer for failure to comply with deposition demands, is denied. However, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Accepting as reasonable counsel's excuse that they cannot locate a witness to testify on behalf of A-Val, said defendant shall be precluded from offering any testimony on behalf of A-Val at a trial of this action, unless such witness information is exchanged in time to conduct and complete a deposition prior to trial.

With regard to the branch of Kleinknecht's motion seeking summary judgment on its common-law indemnity claim against A-Val, and recoupment of costs for making this motion, as movant previously discussed, in opposition, above, movant has failed to demonstrate that the A-Val was negligent herein (*see Shaughnessy v Huntington Hosp. Ass'n.*, 147 AD3d 994; *Mohan v Atlantic Court, LLC*, 134 AD3d 1075), or that Kleinknecht was only "vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 377-378; *see Bermejo v New York City Health & Hospitals Corp.*, 119 AD3d 500). On the evidence submitted, the branch of the motion seeking contractual indemnification and costs is denied as premature.

The branch of Kleinknecht's motion seeking summary judgment dismissing the third-party complaint, on the grounds of "res judicata, collateral estoppel and/or stare decisis" is denied. Res judicata, or claim preclusion, is invoked to bar a party from relitigating a previous action actually litigated and resolved on the merits between the same parties in a prior proceeding (*see Paar v Bay Crest Ass'n.*, 140 AD3d 1137 [2016]; *Pesa v. Dayan*, 104 AD3d 662 [2013]; *Pondview Corp. v. Blatt*, 95 AD3d 980 [2012]. Similarly, collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party' (*Ryan v. New York Tel. Co.,* 62 NY2d 494, 500 [1984]; *see Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147 [1988]; *In re Kaori*, 144 AD3d 911 [2016]; *Marceda v Mitkowski*, 141 AD3d 508 [2016]; *Matter of S&R Dev. Estates, LLC v Feiner*, 132 AD3d 772 [2015]). "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*FC Notes SVC, LLC v United General Title Ins. Co.*, 146 AD3d 935, 936 [2017], quoting *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]). Under the doctrine of stare decisis, "once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision" (*People v Bing*, 76 NY2d 331, 337-338 [1990]; *see Village of Kiryas Joel v County of Orange*, 144 AD3d 695 [2d Dept 2016]; *Jiannaras v Alfant*, 124 AD3d 582 [2d Dept 2015]).

In the case at bar, the third-party action seeks contractual indemnity. The declaratory judgment action, brought in New York County, by third-party plaintiffs against Kleinknecht and National Casualty Company, its insurer, sought a declaration that said third-party plaintiffs were entitled to coverage as additional insureds under Kleinknecht's liability policy with National. The declaratory judgment decision by Justice Edmead, which was affirmed by the Appellate Division, determined that Structure Tone and 200 Fifth did not qualify as "additional insureds," and, for that reason, National was not required to insure, defend or indemnify them. Such findings were not determinative of any issue of contractual indemnity between third-party plaintiffs and third-party defendant, and such defenses could not form the basis for summary judgment herein.

The parties' remaining contentions and arguments either are without merit, or need not be addressed, in light of the foregoing determinations.

Accordingly, the branch of defendants' and Acme's motion (Seq. 6) seeking dismissal of the claims based on Labor Law § 240 and 241 (6), and the branch of said motion seeking to dismiss Kleinknecht's second third-party action against Acme, are granted, and said motion is, otherwise, denied. The cross motions of plaintiff and A-Val, seeking summary judgment, are denied. The motion by Kleinknecht (Seq. 7) is denied in its entirety.

Dated: June 28 , 2018

CARMEN R. VELASQUEZ, J.S.C.

[* 12]