Donnelly v Apple Food Serv. of N.Y., LLC
2018 NY Slip Op 31634(U)
March 2, 2018
Supreme Court, New York County
Docket Number: 159237/13
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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PAUL DONNELLY,

Plaintiff,

DECISION & ORDER

Motion Seq. Nos.: 006, 007
008

APPLE FOOD SERVICE OF NEW YORK, LLC, D&D DEVELOPMENT GROUP, INC., VALLEY STREAM GREEN ACRES LLC, GREEN ACRES MALL LLC, MACERICH PROPERTY MANAGEMENT COMPANY, LLC, MACERICH PARTNERSHIP, L.P., D.C.M. OF NEW YORK, LLC, doing business as DIMENSION CONSTRUCTION OF NEW YORK, LLC, D.C.M. OF NEW JERSEY, LLC and DCM CONSTRUCTION ENTERPRISES, LLC,

Index No.: 159237/13

Defendants.

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APPLE FOOD SERVICE OF NEW YORK, LLC,

Third-Party Plaintiff,

Index No.: 590015/14

-against-

CENTER LINE INTERIORS CONTRACTING and DIMENSION CONSTRUCTION MANAGEMENT OF NEW YORK, LLC,

Third-Party Defendants.

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APPLE FOOD SERVICE OF NEW YORK, LLC, VALLEY STREAM GREEN ACRES LLC and MACERICH PROPERTY MANAGEMENT COMPANY, LLC,

Second Third-Party Plaintiffs,

Index No.: 595215/15

-against-

D.C.M. OF NEW YORK, LLC, D.C.M. OF NEW JERSEY, LLC and DCM CONSTRUCTION ENTERPRISES, LLC,

Second Third-Party Defendants.

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D.C.M. OF NEW YORK, LLC, individually and/or doing

Business as DIMENSION CONSTRUCTION OF NEW YORK, LLC, D.C.M. OF NEW JERSEY, LLC and DCM CONSTRUCTION ENTERPRISES, LLC,

Index No.: 595255/15

Third Third-Party Plaintiffs,

-against-

CENTER LINE INTERIORS CONTRACTING,

Third Third-Party Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Motion Sequence Numbers 006, 007 and 008 are hereby consolidated for disposition. This is an action to recover damages for personal injuries sustained by plaintiff Paul Donnelly, a carpenter, when a stack of plywood fell on him while he was working on a renovation project located at an Applebee's Restaurant in the Green Acres Mall, Valley Stream, New York on or about July 12, 2013 (the "Accident").

In Motion Sequence Number 006, defendants Apple Food Service of New York, LLC ("Apple Food" or "Applebee's"), and Valley Stream Acres LLC ("Valley Stream"), Green Acres Mall LLC, Macerich Property Management Company LLC and Macerich Partnership, L.P. (collectively, the "Mall Owners"), move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's Supplemental Amended Complaint (the "Complaint"), as well as all cross-claims and counterclaims asserted against them. Apple Food also moves for summary judgment pursuant to CPLR 3212 in the alternative against third-party defendant Centerline Interiors Contracting ("Centerline") for contractual indemnification.[1]

[1]Although Apple Food and the Mall Owners' motion seeks summary judgment in their favor on a contractual indemnification claim against Centerline, only Apple Food seeks such

Plaintiff cross-moves for summary judgment pursuant to CPLR 3212 in his favor as to liability on the Labor Law § 240(1) claim, as well as that part of the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code 23-2.1(a)(1), against defendants Apple Food and Valley Stream.[2] Third-Party Defendant Centerline cross-moves for summary judgment pursuant to CPLR 3212, dismissing all claims, cross-claims and counterclaims asserted by Apple Food, the Mall Owners, and D.C.M. of New York, LLC, individually and doing business as Dimension Construction of New York, LLC ("DCM"), D.C.M. of New Jersey and D.C.M. Construction Enterprises, LLC (collectively the "DCM Defendants"), including dismissal of Apple Food's Third-Party Complaint against Centerline for contractual indemnification.

In Motion Sequence Number 007, D&D Development Group, Inc. ("D&D") moves for summary judgment pursuant to CPLR 3212 dismissing plaintiff's Complaint, as well as any cross-claims and counterclaims asserted against it.

In Motion Sequence Number 008, the DCM Defendants move to amend their answers to plaintiff's Complaint, and the Second Third-Party Complaint pursuant to CPLR 3025. The DCM Defendants further move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's Complaint, and all cross-claims and counterclaims asserted against them, and dismissing the Second Third-Party Complaint against D.C.M. of New York, LLC.[3]

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relief in its first third-party complaint against Centerline.

[2]Plaintiff does not oppose the motion by Apple Food and the Mall Owners to the extent they seek summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against Apple Food and Valley Stream (Affirmation in Support of Plaintiff's Cross-Motion, ¶ 2, fnt. 1).

[3]Plaintiff does not oppose the DCM Defendants' motion to the extent they seek summary judgment dismissing plaintiff's action against D.C.M. of New Jersey, LLC and DCM

BACKGROUND/STATEMENT OF FACTS

On the date of the Accident, defendant Apple Food Service of New York LLC owned the subject Applebee's restaurant that was being renovated, and the Mall Owners owned the mall where the Applebee's restaurant was located. Apple Food hired DCM as the general contractor on a project which entailed renovating the facade of the subject Applebee's restaurant.[4] DCM hired third-party defendant Centerline to provide the carpentry work for the project pursuant to a written contract dated June 13, 2013 (Notice of Motion, Exhibit "W"). Plaintiff was employed by Centerline as a carpenter. Plaintiff claims that on the date of the Accident, he was in a crouched position plugging in extension cords and power tools between a fence and the Applebee's building, when a stack of plywood that had been leaning against the facade of Applebee's fell on him. Plaintiff alleges that his co-worker Declan Lafferty ("Lafferty"), and John Pietsch ("Pietsch"), who was allegedly employed by DCM, pulled a temporary fence attached to the subject plywood sheets away from the Applebee's building, causing the entire stack of plywood sheets to fall on plaintiff striking him on his head, face and back. Plaintiff was removed from the scene by helicopter.

At his deposition, plaintiff testified that he was working for Centerline on the date of the Accident doing carpentry work along with non-party Lafferty, also employed by Centerline. The job that day was to secure plywood to the second level of the subject Applebee's wall. Plaintiff testified that his direct supervisor was Pietsch and that he "thought" that Pietsch worked for

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Construction Enterprises, LLC (Plaintiff's Affirmation in Opposition, ¶ 2, fnt. 1).

[4]Gordon Gross ("Gross"), Director of Construction for non-party Doherty Enterprises ("Doherty"), parent company of Applebee's, testified that the project entailed designing a new look for the front of Applebee's (Gross Deposition at 8-9, 12, 15-16, 50).

DCM (Plaintiff Deposition at 8). Plaintiff testified that "apart from John Pietsch, nobody gave us instructions" (Plaintiff Deposition at 45).

It is undisputed that at the subject location, there was a temporary fence running along the sidewalk parallel to the wall of the Applebee's being renovated (*See* Gross Deposition at 76, 91). At the end of each day, the fence was moved toward the building so as not to obstruct the sidewalk. Plaintiff testified at his deposition, "[i]n preparation every morning we were instructed to move out the fence two feet and every evening we were told to pull it back in two feet" (Plaintiff Deposition at 16; Lafferty Deposition at 22-25, 29, 38). Prior to the date of the Accident, plaintiff and Lafferty completed installing the layer of plywood on the first level by bolting it to the wall (Plaintiff Deposition at 9-10) and intended to begin attaching the second layer of plywood on the wall by using a scissor lift (*Id*).

Each sheet of plywood was [f]our feet wide, eight feet long" (Lafferty Deposition at 103). Plaintiff estimated that he and Lafferty stacked approximately one-hundred sheets of plywood against the wall of Applebee's (Plaintiff Deposition at 81). The plywood was "three quarter inch pressure treated plywood" (Plaintiff Deposition at 9). Plaintiff believed that based on information Lafferty gave him, each sheet weighed one-hundred pounds (Plaintiff Deposition at 102). Lafferty testified that each sheet weighed forty-five to fifty pounds (Lafferty Deposition at 116) and that there were approximately twenty sheets up against the wall (Lafferty Deposition at 103).[5]

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[5]Pietsch estimated that there were ten to fifteen plywood sheets up against the wall, but stated he would not quarrel with Lafferty's estimate that there may have been twenty sheets against the wall (Pietsch Deposition at 196-197). Pietsch also estimated that each piece of plywood weighed approximately twenty pounds (Pietsch Deposition at 197).

The area between the fence and the wall stored other materials, including stucco material, styrofoam and stone (Plaintiff Deposition at 10). When plaintiff and Lafferty arrived at the construction site on the morning of the Accident, they found that there were sheets of plywood "standing straight up against the wall [of Applebee's]" (Plaintiff Deposition at 10-11).[6] Lafferty testified that at the end of day before the Accident, Pietsch was taking care of tidying up the job site, and that Lafferty and plaintiff told him to secure the plywood to the building (Lafferty Deposition at 106).[7] Lafferty testified that Pietsch said "I will take care of it, leave it with me" (*Id*).[8]

On the morning of the Accident, Lafferty and Pietsch moved the temporary fence away from the Applebee's building. Lafferty was pulling from the outside of the fence (on the street side) and Pietsch was pushing from behind the fence in the work area beside plaintiff (Lafferty Deposition at 88-89, 97). Plaintiff was not working with Lafferty and Pietsch to move the fence and was located inside the fence between the fence and the plywood (Plaintiff Deposition at 17; Lafferty Deposition at 98). Plaintiff was in a "crouched position plugging in [his] battery for the

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[6]Plaintiff testified that on approximately the day before the Accident, Pietsch instructed plaintiff and Lafferty to lean the plywood up against the wall in bundles (to make room for the scissor lift machine which was being delivered). Plaintiff also testified that Pietsch told them he was getting additional storage space from Applebee's but that he never did (Plaintiff's Deposition at 10-12, 79-80). Plaintiff stated that he and Lafferty had to work in a tight work space (Plaintiff's Deposition at 11-12).

[7]At the end of the prior work day at the subject site, plaintiff and Lafferty tied the fence to plywood that had already been bolted on the wall using a strap that was originally used to bundle the plywood (Plaintiff Deposition at 87; Lafferty Deposition at 105).

[8]At the end of the day before the Accident, Lafferty observed the plywood sheets leaning unsecured against the building. Lafferty would not have "left the [plywood] like that" because a gust of wind or somebody accidently knocking them, could cause "a few of them [to] fall over" (Lafferty Deposition at 107).

charger for the screw gun" and extension cords (Plaintiff Deposition at 17, 99). Lafferty testified that he could see plaintiff's silhouette through the fence and that plaintiff was bent over plugging in extension cords and setting up tools (Lafferty Deposition at 98-99).

As Lafferty and Pietsch were working on moving the fence, plaintiff alleges that bundles of plywood fell on him and hit him on the right side of his head. Plaintiff testified "I just got walloped" and the plywood boards "crushed my head down onto the bars on the gate" (Plaintiff Deposition at 21, 100). Lafferty observed plaintiff face down under twenty sheets of plywood (Lafferty Deposition at 111-112).

Plaintiff alleges that on the evening before the Accident after the fence was moved in from the sidewalk, Pietsch attached the nylon strap to a single sheet of plywood that constituted one of the plywood sheets which were leaning unsecured against the wall. Lafferty testified that Pietsch attached the strap to the first piece of plywood that was closest to the wall, rather than securing the strap to the wall (Lafferty Deposition at 111-112, 114). As the fence was being moved away from the building, the strap was tied to unstable sheets of plywood "so when the fence fell over[,] it pulled the plywood with it" hitting plaintiff (Lafferty Deposition at 113-114). "Rather than screw the [strap] to wall, he [Pietsch] screwed it to the first sheet of the plywood" (Lafferty Deposition at 114).

Pietsch testified that he could not remember if he ever tethered the strap from the fence to the building and does not recall if anyone ever informed him that the fence needed to be secured at the end of the day so as to prevent materials stored at the workplace from becoming dislodged when the fence was moved (Pietsch Deposition at 109). Pietsch also testified that he did not believe that the plywood was ever strapped to the wall to prevent it from falling (Pietsch

Deposition at 202).

DISCUSSION

"'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 issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). 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]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law 240 (1) Claim-Motion Sequence Number 006 (Apple Food and the Mall Owners' Motion for Summary Judgment dismissing Plaintiff's Complaint and Plaintiff's Cross-Motion for Summary Judgment against Apple Food and Valley Stream on liability).[9]

Apple Food and the Mall Owner defendants move to dismiss the Labor Law § 240 (1) claim against them. Plaintiff cross-moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the Apple Food and Valley Stream defendants.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d

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[9]The DCM Defendants submit a partial opposition to plaintiff's cross-motion for summary judgment on grounds that there is a dispute as to whether Pietsch worked for DCM or D&D. The DCM Defendants have subsequently taken the position in its later filed motion to amend their answers to assert a Worker's Compensation defense that Pietsch was a "special employee" of DCM [Motion Sequence Number 008].

615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *see Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, as it is undisputed that the Mall Owners were owners of the mall and Apple

Food was owner of the Applebee's being remodeled, these defendants may be liable for plaintiff's injuries under Labor Law § 240 (1).

In opposition to plaintiff's cross-motion and in support of their motion, Apple Food and the Mall Owners argue that plaintiff's Accident did not result from an elevation-related hazard under Labor Law § 240 (1) because in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). As such, plaintiff is not entitled to judgment under Labor Law § 240 (1) because the plywood sheets were on the same level as plaintiff was when the Accident occurred.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured four inches in diameter. As in the instant case, the plywood sheets that fell onto plaintiff were located at about the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605; *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *McCallister v 200 Park, L.P.*, 92 AD3d 927 [1st Dept 2012]).

Apple Food and the Mall Owners also argue that plaintiff must show more than simply

that an object fell on him causing injury: he must show that the object fell, because of some absence or inadequacy of a safety device of the kind enumerated in the statute. However, under Labor Law § 240 (1), it is enough that said object simply needed securing "'for the purposes of the undertaking,'" such as the plywood sheets herein (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005]).

Applying *Wilinski* to the instant case, plaintiff is not precluded from recovery simply because the plywood sheets and he were on the same level, and, given the significant amount of force they generated during their fall, his Accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603). Here, the testimony reveals that there were at a minimum ten to fifteen plywood sheets up against the wall weighing approximately twenty pounds each. In addition, as the vertically stacked plywood sheets were precariously leaning against the subject wall, and no protective devices, such as braces or ropes, were provided to secure them from falling over, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*id.*).

In reply, Apple Food and the Mall Owners maintain that the record reveals that plaintiff and Lafferty were concerned about the stability of the fence rather than the sheets of plywood.[10] However, the fact that the fence may have been unstable does not change the fact that the sheets of plywood were not sufficiently secured.

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[10] Apple Food and the Mall Owners also refer to an email sent by Lafferty to Centerline entitled "Accident Report as [W]itnessed by Declan Lafferty" wherein he states that he and plaintiff were concerned about the fence as it was "leaning away" (Affirmation in Reply, Exhibit "B").

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Apple Food and Valley Stream. As such,

Apple Food and Valley Stream are not entitled to dismissal of the Labor Law 240 (1) claim against them.

Plaintiff's Labor Law § 241 (6) Claim-Motion Sequence Number 006 (Apple Food and the Mall Owners' Motion for Summary Judgment dismissing plaintiff's Complaint and Plaintiff's Cross-Motion for Summary Judgment against Apple Food and Valley Stream on liability)

Apple Food and the Mall Owners move for dismissal of the Labor Law § 241 (6) claim against them. Plaintiff cross-moves for summary judgment in his favor on the Labor Law § 241 (6) claim against Apple Food and Valley Stream.

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

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

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in

order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, plaintiff does not address these Industrial Code violations in his cross-motion or reply papers other than Industrial Code section 23-2.1 (a) (1), and, thus, they are deemed abandoned (*see generally Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 fn* [3d Dept 2003]). As such, Apple Food and the Mall Owners are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-2.1 (a) (1)

Section 23-2.1 (a) (1) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]; *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149, 149 [1st Dept 1999]).

Industrial Code 12 NYCRR 23-2.1 (a) provides:

> "(a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Here, section 23-2.1 (a) (1) does not apply to the facts of this case, because the location

where plaintiff was working at the time of the Accident was not a "passageway, walkway, stairway or other thoroughfare," as the rule requires (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 [1st Dept 2007] [section 23-2.1 (a) (1) inapplicable where the room where the accident occurred measured only 18 feet by 20 feet, and thus, it was not a passageway]; *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159-160 [1st Dept 2005] [plaintiff injured his hand when he tripped on a pipe protruding from the base of an uninstalled radiator situated in the middle of the room where he was installing drywall, section 23-2.1 (a) (1) was inapplicable, because said room was not a passageway]).

Thus, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-2.1 (a) (1) against Apple Food and Valley Stream, and Apple Food and the Mall Owners are entitled to dismissal of same.

Apple Food's Motion for Summary Judgment directing Contractual Indemnification against Centerline [Motion Sequence Number 006]

Apple Food contends that, in the event that this Court does not dismiss all claims, cross-claims and counterclaims asserted against it, Centerline is obligated to defend and indemnify Apple Food pursuant to a hold harmless/indemnification clause set forth in the contract entered into between DCM and Centerline (the "DCM/Centerline Agreement") on May 21, 2003. Section 4 of the DCM/Centerline Agreement provides in pertinent part

> "To the fullest extent permitted by law, the subcontractor [Centerline] shall indemnify, defend and hold harmless contractor and project owner, and the affiliates of the project owner, contractor. . . ("the "Indemnified Parties") from and against any and all loss, cost, expense, damage, injury, liability, claim, demand, penalty, or cause of action (including attorney's fees) directly or indirectly arising out of, resulting from or related to (in whole or in part (1) the work; (2) this purchase order; (3) the acts or omissions of subcontractor.

> . .The obligation of the subcontractor under this indemnification shall apply to all matters except those arising solely from the wanton and willful negligence or the malicious acts or omissions of the project owner or contractor. . . The obligations of subcontractor under this section shall survive the expiration or the other termination of the subcontract" (Hold Harmless/Indemnification Clause)"

(Notice of Motion [Seq. No. 006], Exhibit "W").

In opposition, Centerline argues that it is premature to grant summary judgment to Apple Food with respect to indemnification because there are triable issues of fact as to its negligence. Centerline maintains that Apple Food, the party seeking indemnification, had complete control over the subject workspace and is therefore potentially liable. Centerline argues further that the Hold Harmless/Indemnification Clause violates General Obligations Law ("GOL") § 5-322 and is against public policy as negligence on the part of Apple Food is not excluded from Centerline's indemnification obligation. Finally, Centerline contends that the Hold Harmless/Indemnification Clause does not apply in the first instance as it only applies to work performed by Centerline in connection with Centerline's responsibilities under the DCM/Centerline Agreement. Centerline argues that the Accident did not occur because of any acts or omissions of a Centerline employee but rather it was Pietsch, a DCM employee, who was the sole cause of the Accident.

In reply, Apple Food argues that the Hold Harmless/Indemnification Clause does not violate the GOL as it authorizes indemnification only "to the fullest extent permitted by law." In any event, Apple Food maintains that because it is free from negligence, the Hold Harmless/Indemnification is enforceable obligating Centerline to indemnify it.

GOL § 5-322.1 provides in pertinent part

"A covenant, promise, agreement or understanding in, or in connection with or collateral

> to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Pursuant to the Hold Harmless/Indemnification Clause, Centerline must indemnify the contractor and project owners and their affiliates for all claims "arising out of, resulting from or related to (in whole or in part (1) the work; (2) th[e] purchase order; (3) the acts or omissions of subcontractor (Centerline)." As noted previously, plaintiff was employed by Centerline on the day of the Accident. It is undisputed that the subject Accident arose out of the work being performed.

It is well established that an indemnification provision which purports to indemnify a party for its own negligence does not violate GOL § 5-322.1 provided it authorizes

indemnification "to the fullest extent permitted by law" (*Smith v Broadway 110 Devs.*, LLC, 80 AD3d 490, 491 [1st Dept 2011]; *Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870-871 [2d Dept 2008]; *Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2d Dept 2006]. Given that the subject Hold/Harmless Indemnification Clause imposes an indemnification obligation on Centerline only "to the fullest extent permitted by law", such clause is not void on its face.

An indemnification clause is enforceable however only where the party to be indemnified is found to be free of negligence (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 180-181 [1990]). Here, there is no evidence in the record that the Accident was caused by actions of Apple Food. The Hold Harmless/Indemnification Clause requires the subcontractor [Centerline] to indemnify an owner for claims "arising out of, resulting from or related to the subject work." As it is undisputed that plaintiff's claims arose from the work being performed at the subject site and that there is no evidence that Apple Food was negligent, Apple Food is entitled to indemnification from Centerline pursuant to the DCM/Centerline Agreement.

Centerline's cross-motion for summary judgment against (1) Apple Food and the Mall Owners on the first third-party action by Apple Food against Centerline to the extent Apple Food seeks contractual indemnification against Centerline; and (2) the DCM Defendants on the third third-party action by the DCM Defendants against Centerline for common law and contractual indemnification [Motion Sequence Number 006]

Centerline cross-moves for summary judgment seeking to dismiss Apple Food's first third-party action against it to the extent Apple Food seeks contractual indemnification pursuant to the Hold Harmless/Indemnification Clause in the DCM/Centerline Agreement. Centerline's cross-motion for affirmative relief is based on many of the same arguments made in opposition to Apple Food's motion seeking contractual indemnification against Centerline. In support of its cross-motion, Centerline maintains that (1) the Hold Harmless/Indemnification Clause is

inapplicable as Centerline had no involvement with the project; and (2) the Hold Harmless/Indemnification Clause violates GOL § 5-322 and is against public policy. Having previously made a determination on these issues, and granted Apple Food's motion to the extent of finding that it is entitled to contractual indemnification from Centerline under the DCM/Centerline Agreement, Centerline's cross-motion to dismiss Apple Food's first third-party action against it for contractual indemnification is denied.

Centerline also cross-moves to dismiss the Third Third-Party Complaint asserted by DCM against it for common law and contractual indemnification on the basis that plaintiff was a special employee of DCM thus rendering the Third Third-Party Complaint against Centerline moot. A "special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment" (*Bellamy v Columbia Univ.*, 50 AD3d 160 [1st Dept. 2008]). However, here there has been no determination as to whether plaintiff was a special employee of DCM, and as such, Centerline's motion to dismiss DCM's third third-party action against Centerline for indemnification on Centerline's is denied.

Motion by D&D for Summary Judgment dismissing Plaintiff's Complaint and all cross-claims and counterclaims asserted against it [Motion Sequence Number 007]

D&D primarily maintains that it cannot be held liable for violations of the Labor Law as it was not the contractor of the subject project. D&D states that DCM requested that D&D obtain a permit from the relevant municipality in the capacity of general contractor in order to allow DCM to continue working at the project. D&D delivered the permit to DCM but had no further involvement in the project. D&D argues that the deposition testimony of various parties

establishes that D&D was not the general contractor for the project.[11]

Daniel Mahony ("Mahony"), President of D&D testified that D&D was not hired to perform work at the project, and its only connection to the project was to obtain the permit. He recalls that DCM had a conflict with mall management which resulted in the Mall Owners opposition to retaining DCM. Mahony also stated that Pietsch was not an employee of D&D (Mahony Deposition, at 9, 11, 43-44).

Gross of Doherty which operated the Applebee's restaurant, testified he retained DCM as the general contractor, that it was DCM's role to hire the subcontractors and oversee safety on the project and that Pietsch who was employed by DCM, was the super for the project (Gross Deposition at 18-20, 25). Gross also testified that DCM hired D&D, "another GC" "to pull the permit and monitor the job because of an issue [DCM] had with Macerich. So they hired D&D to be the general contractor of record for this job" (Gross Deposition at 23).[12]

Pietsch testified that he was employed by DCM at the time of the Accident and was directed to report to the site by DCM CEO, Brian Abbey ("Abbey") (Pietsch Deposition at 11-12, 26, 36, 184, 234). DCM was the general contractor for the subject project. (Pietsch Deposition at 163, 178, 184, 186).[13] Pietsch was paid only by DCM (Pietsch Deposition at 133-134). Pietsch would check on "logistics of the construction" with Abbey (Pietsch Deposition at 39). Pietsch

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[11]D&D alternatively argues that the Accident was not elevation related and therefore does not fall under Labor Law 240(1).

[12]Macerich is the owner of the Mall (Gross Deposition at 15). Gross testified that Macerich "didn't like a job that [DCM] had done on another mall in Kings Plaza, Brooklyn" (Gross Deposition at 24).

[13]Pietsch testified that "the general contractor is the one that is doing all the work, hiring the subs, and talking with the client, getting paid from the client" (Pietsch Deposition at 184),

considered himself to be a project manager (Pietsch Deposition at 31, 186). Pietsch stated that he never saw any D&D employees at the project site (Pietsch Deposition at 131) and that D&D's role was only to pull the permit for the job.[14]

Abbey's deposition testimony regarding the role of DCM and D&D is inconsistent. He attempts to characterize D&D's role as a general contractor. He testified that DCM's "role was to oversee the project for architectural compliance" but also "to build the project for Doherty [the Mall Owners] and make sure the funds were distributed to the people that did the work [the subcontractors]" (Abbey Deposition at 25-26, 100). He acknowledged that DCM had entered into a construction contract with Applebee's and did not know why the contract failed to name D&D (Abbey Deposition at 59-63). He conceded that the subcontractors, including Centerline, had contracts with DCM but denied that DCM had a role in coordinating them (Abbey Deposition at 26-27, 49). He testified that it was up to D&D to supervise the subcontractors but did not know who supervised plaintiff at the time of the Accident, including any employee of D&D (Abbey Deposition at 48-49, 98, 117). Abbey conceded that he never visited the project site (Abbey Deposition at 100).

In opposition, plaintiff argues that Abbey's deposition testimony raises an issue of fact as to whether DCM was the general contractor for the project.[15] Plaintiff argues further that D&D should be estopped from denying its role as contractor given its representation to the relevant

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[14]Pietsch testified that "the only thing that I knew that D&D did was file the job (*Id.* at 163).

[15]Plaintiff also refers to DCM's allegedly inconsistent claim in its affirmation in partial opposition to plaintiff's cross-motion for summary judgment wherein DCM alleged that any actions by Pietsch pertaining to construction work at the project were not carried out by DCM.

public authority that it was the general contractor (when obtaining the permit) and its name on the fence outside the project as the "company that's permitted to do the work" (Pietsch Deposition at 65). In reply, D&D maintains that Abbey's testimony fails to establish that D&D was the general contractor, and that even considering Abbey's testimony, the record establishes that D&D did not supervise or control the job site or in any way act as the general contractor for the subject project. D&D argues further that there is no basis for D&D to be judicially estopped as it neither secured a judgment in a legal proceeding nor assumed a contrary position.

Here, the evidence establishes that D&D's role in the subject project was limited to pulling the permit for the project. The only evidence that points to possible D&D involvement beyond this limited role is the vague and inconsistent testimony of Abbey of DCM who lacked personal knowledge of the work site. He neither went to the project site nor had knowledge as to who supervised plaintiff. Pietsch, employed by DCM, was the party who supervised the subject work. D&D never supervised or controlled the subject work site, and as such, there is no basis for a Labor Law claim against D&D. Therefore, D&D's motion for summary judgment dismissing plaintiff's Complaint and all cross-claims and counterclaims asserted against it is granted.

Motion by the DCM Defendants to amend their answers to assert a Workers' Compensation Defense and for summary judgment dismissing plaintiff's claims and third-party claims on this basis [Motion Sequence Number 008]

The DCM Defendants argue that plaintiff was a "special employee" of DCM and, as such, any action against DCM is barred by the applicable Workers' Compensation rules. The DCM Defendants maintain further that any claim for contribution or indemnification against DCM by the Mall Owners and Apple Food in the second third-party action against DCM for

indemnification and contribution must be dismissed because there was no written contract between DCM and Apple Food and plaintiff did not sustain a 'grave injury' pursuant to § 11 of the Worker's Compensation Law. DCM also seeks to dismiss plaintiff's claims, all cross-claims and counterclaims, and Second Third-Party Plaintiffs' Apple Food and the Mall Owners' Complaint for indemnification and contribution against D.C.M. of New Jersey, LLC and D.C.M. Construction Enterprises, LLC as these defendants played no role in the subject project and are therefore not proper parties.[16]

In opposition, plaintiff argues that DCM has made contradictory claims as to whether Pietsch worked for DCM or D&D.[17] Plaintiff argues further that even assuming it is established that Pietsch worked for DCM, the "borrowed servant" or "special employee" defense fails as a matter of law on grounds that DCM has failed to demonstrate that DCM assumed control over Pietsch and that Centerline surrendered control over plaintiff.[18] In opposition to DCM's motion, D&D argues that plaintiff was not a special employee of DCM, and DCM is also not entitled to dismissal on the basis that DCM was an active tortfeasor as Pietsch's negligence was a proximate cause of the Accident.

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[16]Plaintiff does not oppose dismissal of its action against D.C.M. of New Jersey, LLC and D.C.M. Construction Enterprises, LLC (Plaintiff's Affirmation in Opposition, ¶ 2, fnt. 1). Second Third-Party Plaintiffs Apple Food and the Mall Owners have not submitted any opposition to that portion of DCM's motion to dismiss D.C.M. of New Jersey, LLC and D.C.M. Construction Enterprises, LLC.

[17]Plaintiff refers to DCM's partial opposition to plaintiff's cross-motion for summary judgment (Motion Seq. No. 006) wherein DCM claimed that there is at the very least an issue of fact as to whether Pietsch worked for DCM or D&D at the time of the Accident.

[18]In opposition to the motion by the DCM Defendants to amend their answer to assert a Workers' Compensation defense, D&D adopts plaintiff's arguments that DCM has failed to establish *prima facie* the 'borrowed servant' defense.

In reply to plaintiff's opposition, DCM maintains that Abbey's testimony that Pietsch was acting as the general contractor on behalf of D&D and not DCM, was not based on personal knowledge.[19] Rather, DCM argues that the other witnesses confirm that Pietsch, as an employee of DCM, was supervising and directing plaintiff's work, and as such, was DCM's special employee.

"Leave to amend a pleading is freely given (CPLR 3025 [b]), absent prejudice or surprise resulting directly from the delay. The determination of whether to allow such an amendment is reserved for the court's discretion" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009] [internal citation omitted]). "[I]n order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] [internal citations omitted]; *see Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]).

It is well established that an employee's sole remedy against his employer for injuries sustained in the course of employment is benefits under the Workers' Compensation Law (*see* Worker's Compensation Law, §§ 11, 29 [6]; *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 357 [2007]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 139 [1st Dept 2000]). "[A]n employee,

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[19]According to DCM, its position taken in partial opposition to plaintiff's cross-motion for summary judgment [Motion Sequence No. 006] that Pietsch was acting on behalf of D&D, was submitted before the deposition of Pietsch. DCM contends "it was not until [P]ietsch's deposition that the exclusivity of DCM's control over plaintiff's work was confirmed by a representative of DCM who had personal knowledge of the daily work at the jobsite. Before [P]ietsch's testimony, there was no testimony from a DCM representative who had personal knowledge of the daily work at the Applebee's project" (Reply Affirmation to Opposition of Plaintiff at 4-5).

although generally employed by one employer, may be specially employed by another employer, and [a] special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment" (*Bellamy v Columbia Univ.*, 50 AD3d 160, 161 [1st Dept. 2008]). "[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [internal citations omitted]).

In determining whether a special employment relationship exists, no one factor is decisive (*Id* at 558). "Although not determinative, a significant and weighty feature" in making such a determination is "who controls and directs the manner, details and ultimate result of the employee's work" (*Id*).

Here, based on evidence in the record that Pietsch of DCM supervised and gave direction to plaintiff with respect to the subject project and that Centerline played no role in supervising or directing plaintiff, the proposed amendment is not "palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal citation and quotation marks omitted]).

However, "to rebut the presumption of general employment the putative special employer

must clearly demonstrate that the general employer [Centerline] surrendered control over the employee and that the putative special employer [DCM] assumed such control" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 *citing Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557). Here, there are issues of fact as to whether or not Centerline surrendered control over plaintiff, and whether DCM assumed such control. Issues of fact as to whether Centerline surrendered control are raised, by among other things, the DCM/Centerline Agreement which provides a description of the tasks that Centerline was to perform but gives no indication of a transfer of control. Further, plaintiff testified that "James", the foreman from Centerline, showed plaintiff the job and gave him drawings, and plaintiff called "James" every evening with his hours (Plaintiff Deposition at 54-57, 124). Pietsch testified that plaintiff did not work for DCM (Pietsch Deposition at 57, 187). On the other hand, Finnegan of Centerline testified that Centerline only supplied labor for the job, and that he never went to the jobsite or spoke with plaintiff about the progress of the work (Finnegan Deposition at 11, 15, 39). Further there is testimony that Pietsch controlled the manner details and ultimate result of plaintiff's work (*See* Lafferty Deposition at 21, 55; Pietsch Deposition at 66-69, 179, 184,189, 57-61), and plaintiff testified that Pietsch was the only person who provided him with directions (Plaintiff Deposition at 45).

Given there is an issue of fact as to whether or not plaintiff was a "special employee" of DCM, the motion by DCM for summary judgment dismissing plaintiff's claims, all cross-claims and counterclaims, and dismissing the Second Third-Party Complaint asserted by Apple Food and the Mall Owners against DCM for common law indemnification and contribution are

denied.[20]

CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the motion by defendants Apple Food Service of New York, LLC, Valley Stream Green Acres LLC, Green Acres Mall LLC, Macerich Property Management Company, LLC and Macerich Partnership, L.P. [Motion Sequence Number 006] pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Complaint is denied; and it is further

ORDERED, that the motion by Apple Food Service of New York, LLC [Motion Sequence Number 006] for summary judgment pursuant to CPLR 3212 to the extent it seeks contractual indemnification in its favor on the First Third-Party Complaint against third-party defendant Centerline Interiors Contracting is granted; and it is further

ORDERED, that plaintiff's cross-motion [Motion Sequence Number 006] to the extent it seeks partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Apple Food Service of New York, LLC and Valley Stream Green Acres LLC, is granted; and it is further

ORDERED, that plaintiff's cross-motion [Motion Sequence Number 006] to the extent it seeks partial summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendant Apple Food Service of New York, LLC and Valley Stream Green Acres LLC is denied; and it is further

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[20]Given this Court's denial of the DCM Defendants' motion for summary judgment to dismiss plaintiff's claims and any third party claims based on the claim that plaintiff was a special employee of DCM, this Court need not address DCM's contention that DCM cannot be liable for contribution or indemnity to a third person in the absence of a written contract or unless plaintiff suffered from a "grave injury" as defined by Worker's Compensation Law § 11.

ORDERED, that the cross-motion by Centerline Interiors Contracting [Motion Sequence Number 006] for summary judgment pursuant to CPLR 3212 to the extent it seeks to (1) dismiss the claims, all cross-claims and counterclaims of Apple Food Service of New York, LLC, Valley Stream Green Acres LLC, Green Acres Mall LLC, Macerich Property Management Company, LLC and Macerich Partnership, L.P. set forth in the First Third-Party Complaint asserted by Apple Food Service of New York, LLC for contractual indemnification against Centerline; and (2) dismiss the Third Third-Party Complaint of D.C.M. of New York, LLC, individually and doing business as Dimension Construction of New York, LLC, D.C.M. of New Jersey, LLC, and D.C.M. Construction Enterprises, LLC against Centerline is denied; and it is further

ORDERED, that the motion by D&D Development Group, Inc. [Motion Sequence Number 007] for summary judgment dismissing plaintiff's Complaint and all cross-claims and counterclaims asserted against it is granted; and it is further

ORDERED, that the motion by D.C.M. of New York, LLC, individually and doing business as Dimension Construction of New York, LLC, D.C.M. of New Jersey, LLC, and D.C.M. Construction Enterprises, LLC [Motion Sequence Number 008] to amend their answers pursuant to CPLR 3025(b) to include the affirmative defense that plaintiff's and second third-party plaintiff's claims are barred by the exclusive remedy of Workers' Compensation and deeming the Amended Answers served *nunc pro tunc* is granted; and it is further

ORDERED, that the motion by D.C.M. of New York, LLC, individually and doing business as Dimension Construction of New York, LLC, D.C.M. of New Jersey, LLC, and D.C.M. Construction Enterprises, LLC [Motion Sequence Number 008] for summary judgment pursuant to CPLR 3212 to the extent it seeks to dismiss plaintiff's claims and all cross-claims

and counterclaims asserted against them, and to dismiss the second third-party action against D.C.M. of New York LLC on grounds that plaintiff was a special employee of D.C.M. of New York LLC is denied; and it is further

ORDERED, that the motion by D.C.M. of New York, LLC, individually and doing business as Dimension Construction of New York, LLC, D.C.M. of New Jersey, LLC, and D.C.M. Construction Enterprises, LLC [Motion Sequence Number 008] for summary judgment pursuant to CPLR 3212 to the extent it seeks to dismiss plaintiff's Complaint, all cross-claims and counterclaims as asserted against D.C.M. of New Jersey, LLC and D.C.M. Construction Enterprises, LLC, and to dismiss the second third-party action against D.C.M. of New Jersey, LLC and D.C.M. Construction Enterprises, LLC is granted.

ORDERED, that the remainder of the action shall continue.

Dated: March 2, 2018

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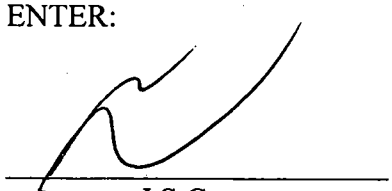

J.S.C.

SHLOMO HAGLER
J.S.C.