Mastroianni v Battery Park City Auth.
2018 NY Slip Op 31780(U)
July 26, 2018
Supreme Court, New York County
Docket Number: 161489/2013
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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KEVIN MASTROIANNI and MARY MASTROIANNI, Index No.: 161489/2013

Plaintiffs,

-against-

BATTERY PARK CITY AUTHORITY d/b/a THE HUGH L CAREY BATTERY PARK CITY AUTHORITY, BFP TOWER C CO. LLC, BROOKFIELD FINANCIAL PROPERTIES, L.P., PLAZA CONSTRUCTION CORP. and TURNER CONSTRUCTION COMPANY,

Defendants.

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BATTERY PARK CITY AUTHORITY d/b/a THE HUGH L CAREY BATTERY PARK CITY AUTHORITY, BFP TOWER C CO. LLC, BROOKFIELD FINANCIAL PROPERTIES, L.P., PLAZA CONSTRUCTION CORP. and TURNER CONSTRUCTION COMPANY,

Third-Party Index No.: 595206/2014

Third-Party Plaintiffs,

-against-

ATLANTIC HOISTING & SCAFFOLDING, LLC,

Third-Party Defendant.

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Kalish, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a carpenter on August 2, 2013, when he was caused to lose his balance and fall into an elevator shaft while performing work at a construction site located in the lobby of the World Financial Center, Winter Garden Atrium, 225 Liberty Street, New York, New York (the Premises).

In motion sequence number 001, third-party defendant Atlantic Hoisting & Scaffolding, LLC (Atlantic) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party claim against it for breach of contract for failure to procure insurance. For the reasons stated herein, the motion is granted.

In motion sequence number 002, defendants Battery Party City Authority d/b/a The Hugh L Carey Battery Park City Authority (BPC), BFP Tower C Co. (BFP), Brookfield Financial Properties, L.P. (Brookfield) and Plaza Construction Corp. (Plaza) (collectively, defendants) move, pursuant to CPLR 3212, for (1) summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them; (2) for summary judgment in their favor on their third-party claims for contractual indemnification and breach of contract for failure to procure insurance against Atlantic; and (3) summary judgment dismissing Atlantic's counterclaims against them for contribution and common-law and contractual indemnification. For the reasons stated herein, the motion is granted in part and denied in part.

Plaintiff Kevin Mastroianni cross-moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants.[1] For the reasons stated herein, the cross-motion is denied.

BACKGROUND

On the day of the accident, BPC owned the Premises where the accident occurred. Brookfield, a real estate development company, held the lease for the Premises. Plaza served as the construction manager for a construction project underway at the Premises, which entailed the

[1]On April 11, 2016, plaintiff Mary Mastroianni discontinued her cause of action. Pursuant to a stipulation filed on March 31, 2014, the action was discontinued as against defendant Turner Construction Company.

renovation of the Premises (the Project). Plaza hired Atlantic to serve as the subcontractor in charge of providing temporary protection, scaffolding and sidewalk bridges. Plaintiff was working for Atlantic as a carpenter at the time of the accident.

In the complaint, plaintiff alleges causes of action against defendants sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). In addition, defendants assert third-party claims for contractual indemnification and breach of contract against Atlantic for failure to procure insurance. Atlantic asserts counterclaims for contribution, common-law and contractual indemnification and breach of contract against defendants for failure to procure insurance.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Atlantic as a carpenter on the Project. At the time of the accident, and at the direction of Atlantic's foreman, Colin Fearon, plaintiff was in the process of "[e]recting a sidewalk shed for [overhead] protection" around an elevator shaft, which was located in the interior of the Premises (plaintiff's tr at 82). The purpose of the protection was "so nothing [fell] in the shaft" (*id.* at 84). Plaintiff explained that Atlantic had installed the flooring, consisting of "plywood with Styrofoam underneath it," to protect "the whole floor of the building" during the construction process (*id.* at 88). Plaintiff maintained that the underlying Styrofoam was not adhering to the floor in any manner and that it was "just laid down" (*id.* at 89).

At the time of the accident, plaintiff was wearing a harness and a six-foot long lanyard, which was provided to him by Atlantic. Plaintiff asserted that he was not tied off at that time, because there was no place to which he could tie off. Plaintiff explained that his sidewalk shed

installation work required that he erect four poles for the corners of the overhead protection. Once the four poles were fully installed and secured, he could then connect his lanyard to the poles. However, at the time of the accident, the four poles had not yet been installed or secured. Plaintiff also noted that the wall in the area was too far away to tie off to and still reach his work area.

Plaintiff testified that the accident occurred when his co-worker stepped off of a plank that plaintiff was also standing on. The plank was part of the protective floor covering. As his co-worker stepped off the plank, the plank moved, causing plaintiff to "just [lose] his balance" and fall backward into the elevator shaft and become injured (*id.* at 142). Plaintiff maintained that, during the previous times that he had walked over the subject plank, it had never shifted. Plaintiff was not aware of any complaints made in regard to the floor protection at the Premises.

Plaintiff further testified that his work was not directed by anyone other than Fearon, Atlantic's foreman. In addition, plaintiff testified that only Atlantic employees were allowed in the accident area and that plaintiff never spoke to anyone other than them.

Deposition Testimony of Christian Heimple (Brookfield's Director of Construction)

Christian Heimple testified that he was Brookfield's director of construction on the day of the accident. He explained that Brookfield is a real estate development company. Heimple's duties on the Project included, among other things, overseeing the construction and renovation work and reviewing its progress. He explained that Atlantic was hired to provide temporary protection, including scaffolding and other sidewalk protection, for the Project. Brookfield did not interact with Atlantic's workers or control the types of safety equipment used on the Project.

Deposition Testimony of Lawrence Burns (Plaza's Superintendent)

Lawrence Burns testified that he was Plaza's superintendent on the day of the accident. As superintendent, Burns coordinated the Project, supervised the workload, and oversaw scheduling for Plaza, which he described as being either the construction manager or the general contractor. He testified that Plaza did not perform any actual construction work on the Project and that it only had "a laborer who cleaned up" (Burns tr at 12). Plaza also held weekly safety meetings. On the day of the accident, Atlantic was "finishing the stair tower and building protection" around the elevator shaft (*id.* at 23).[2]

The Deposition Testimony of Lazslo Kecskes (Atlantic Carpenter)

Lazslo Kecskes testified that he was employed by Atlantic as a carpenter on the day of the accident. That day, Atlantic was building a sidewalk shed around an elevator shaft at the Premises. He explained that the Atlantic workers received their instructions solely from their Atlantic foreman, who also held daily meetings with the Atlantic crew wherein he would discuss safety issues.

Kecskes also testified that Atlantic provided safety harnesses to its employees that they were supposed to wear every day. When asked if the men were given any instructions as to when specifically they were to wear the harnesses, he replied, "no" (Kecskes tr at 25). However, he knew it to be Atlantic's policy to have the men tie off whenever they worked over six feet above ground. While he remembered that he and plaintiff were wearing their safety harnesses at the time of the accident, he could not recall whether they were tied off and/or whether there was a place to tie off. Kecskes also asserted that there was no other fall protection around the elevator

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[2]During his deposition, Burns was not asked whether or not Plaza installed the floor protection at the Premises.

shaft at the time of the accident.

Kecskes further testified that plywood planks had been laid over the floor in order to protect it during construction, but he did not know who placed them there. That said, in the past, whenever Atlantic put down floor protection, it would "nail it down or screw it down" (*id.* at 84).

Deposition Testimony of Colin Fearon (Atlantic's Foreman)

Fearon testified that he was Atlantic's foreman on the day of the accident. As foreman, Fearon was responsible for ensuring that the work, which entailed "installing a protective wall around an elevator shaft," was performed properly (Fearon tr at 7). None of the defendants instructed Atlantic's workers as to how to perform their work. Fearon explained that the entire floor was covered by plywood planks, which were installed by Plaza workers "over a period of time" (*id.* at 17). Fearon personally observed Plaza workers installing this protective floor covering, which he described as comprising "[s]heets of plywood" installed over a "pipe heating system . . . to protect it from punctures" (*id.*). Fearon walked over the plywood planks every day, noting that "[i]t felt fine, [he] did not remember having a problem with it" (*id.* at 18). He could not recall whether the planks were nailed down. He never complained about the floor protection at the Premises.

At the time of the accident, Fearon was supervising the scaffolding installation work at the Project, which included the protection around the elevator shaft. He maintained that there was no protection for the shaft, as "[i]t had to be left open so the elevator could be installed in it downstairs" (*id.* at 25). Atlantic provided safety harnesses to its workers, and it was his responsibility to make sure that the workers were properly tied off while working near the elevator shaft. Fearon asserted that tie off spots were available on the framework of the subject

scaffolding at the time of the accident, although he acknowledged that he never checked those posts to make sure that they had been properly secured against movement.

Deposition Testimony of David Santiago (Plaza's Labor Foreman)

David Santiago testified that he was Plaza's labor foreman on the day of the accident. It was his responsibility to keep the site clean. All other work for the Project was performed by the various subcontractors. He explained that Atlantic was the scaffolding subcontractor, and that nobody from Plaza ever worked directly with anyone from Atlantic. Santiago did not know which entity was responsible for installing the wooden floor protection at the Premises. He did remember that when he walked on it, he never noticed it shifting.

Oral Argument

On June 11, 2018, the parties appeared before the court for oral argument and reiterated the arguments which appear in their papers. Notably, plaintiff argued that, although his cross-motion was untimely filed, the Court should consider his cross-motion on the merits because (1) his excuse for the late filing, "identified in [plaintiff's] reply affirmation," that "the partner that was handling the claim was away on vacation and he came back on the 26th and we immediately filed it on the 28th of November" (tr at 19-20), demonstrated good cause for the delay and (2) although defendants do not move for summary judgment on the Labor Law § 240 (1) claim, "factually and conceptually 200 and 240[] deal with the same factual issues that came about . . ." (tr at 18).

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]).

The Labor Law § 240 (1) Claim Against Defendants (Plaintiff's Cross Motion)

Plaintiff cross-moves for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 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]; *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, plaintiff may not recover damages for a violation of Labor Law § 240 (1) because his cross motion is untimely. It should be noted that

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, plaintiff's excuse for the untimeliness of his cross-motion - a partner's vacation -

amounts to a mere perfunctory claim of law office failure, rather than any showing of good cause for the delay. (*See Brill v City of New York*, 2 NY3d 648, 652-653 [2004] [holding that the "good cause" in CPLR 3212 [a] means "good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." *Quinones v Joan and Sanford I. Weill Med. College and Grad. School of Med. Sci. Of Cornell Univ.*, 114 AD3d 472, 474 [1st Dept 2014].) Further, plaintiff does not assert a cause of action that is "nearly identical" to one raised by defendants and/or Atlantic in their timely motions. (*See Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, -NYS3d-, 161 AD3d 691, 2018 WL 2435663, 2018 NY Slip Op 03897, *1 [1st Dept, May 31, 2018].) As such, the court will not consider plaintiff's cross motion for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants.

The Common-Law Negligence and Labor Law § 200 Claims Against Defendants

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

In his opposition to defendants' motion, plaintiff concedes that he does not have viable claims for common-law negligence and Labor Law § 200 against defendants. Thus, defendants are entitled to dismissal of said claims against them.

The Third-Party Claim for Contractual Indemnification Against Atlantic (motion sequence number 002)

Defendants move for summary judgment in their favor on their third-party claim for contractual indemnification against Atlantic. "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 Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *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 an indemnification provision contained in Article 9 of the general conditions section of the subcontract between Plaza and Atlantic (the Atlantic Subcontract) (the Indemnification Provision), Atlantic agreed to indemnify defendants for claims arising out of Atlantic's work. Specifically, the Indemnification Provision states, in pertinent part, as follows:

> "To the fullest extent permitted by Applicable Laws, [Atlantic] shall indemnify and hold harmless each of the [defendants] . . . from and against any and all losses, injuries, liability, damages, judgments, fines, penalties, costs and expenses, including reasonable attorneys' fees and disbursements that may be incurred by any of [defendants] as a result of, in connection with, or as a consequence of (i) any breach of this Agreement by [Atlantic] . . . [and] (v) any negligent acts or omissions or willful conduct of [Atlantic] or any of its subcontractors, suppliers, employees, agents or representatives in connection with the Work . . . or injury to

> any person resulting from the performance of any element . . . of the Work and the access granted to perform the Work"

(defendants' notice of motion, exhibit O, the Atlantic Subcontract, the Indemnification Provision).

Here, the Indemnification Provision provides that Atlantic indemnify defendants for injuries to persons which arise out of its work on the Project. As plaintiff, an employee of Atlantic, was injured while working on the Project, the accident arose from Atlantic's work. Accordingly, the indemnification obligation under the Atlantic Subcontract is triggered.

That said, while a review of the record reveals no negligence on the part of BPC, BFP or Brookfield that might have caused or contributed to the accident, a question of fact exists as to whether it was Atlantic or Plaza that improperly installed the subject floor protection that caused plaintiff's accident.

Thus, only defendants BPC, BFP and Brookfield, and not Plaza, are entitled to summary judgment in their favor on the third-party contractual indemnification claim against Atlantic.

The Third-Party Claim for Breach of Contract for Failure to Procure Insurance Against Atlantic (motion sequence numbers 001 and 002)

Defendants move for summary judgment in their favor on their third-party claim for breach of contract for failure to procure insurance against Atlantic. Atlantic moves for dismissal of said third-party claim against it.

Pursuant to exhibit E of the Atlantic Subcontract, Atlantic was to procure "Commercial General Liability [insurance] with a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least $2,000,000 per occurrence and [$]4,000,000 in the aggregate," naming defendants as additional insureds (defendants' notice of motion, exhibit O, the Atlantic

Subcontract, exhibit E). Also in exhibit E, it is stated that said insurance coverage have "[n]o general liability exclusions for employee bodily injury" (*id.*).

On November 8, 2013, defendants' insurer, Travelers Property Casualty Company of America (Travelers), sent a request to Atlantic's insurer, ACE American Insurance Company (ACE), asking that ACE defend and indemnify defendants, in accordance with the Atlantic Subcontract. In a letter dated April 11, 2014 (the ACE Letter), ACE responded to Travelers letter of tender, stating, "We have carefully reviewed the facts of the claim in the context of the [ACE] policy and will provide a defense to Plaza and the ownership entities" (defendants' notice of motion, exhibit R, the ACE Letter).

The ACE Letter also stated:

> "ACE issued a Commercial General Liability Insurance Policy to [Atlantic] under policy number HDO G27014483. The policy term is January 1, 2013 to January 1, 2014. The policy provides a $5,000,000 each occurrence limit subject to a $100,000,000 general aggregate limit. There is also a $2,000,000 deductible per claim" .

(*id.*). In addition, the ACE Letter acknowledged that defendants had additional insured status under the ACE policy during the time that Atlantic was working on the Project, citing endorsement #181 to the ACE policy, which provides additional insured status to those persons or organizations that Atlantic agreed to include as such under a written contract.

Thereafter, in the ACE Letter, ACE noted that it accepted tender "subject to a full and complete reservation of rights" (*id.*). However, ACE warned that defendants would be entitled to a defense under the ACE policy as additional insureds only if Atlantic's acts and/or omissions were the "sole" cause of the accident (*id.*). To that effect, if ACE's investigation revealed any acts and/or omissions on the part of defendants that caused the accident, additional insured

coverage would be denied.

Now, defendants argue that they are entitled to summary judgment in their favor on the breach of contract for failure to procure insurance against Atlantic because, as ACE stated that it would not defend defendants unless Atlantic was the sole proximate cause of the accident, Atlantic failed to obtain the insurance coverage that it was contractually obligated to procure, i.e. insurance coverage that did not include any exclusions for bodily injury claims.

Here, a review of the record reveals that Atlantic procured proper liability insurance on behalf of defendants to cover the losses incurred by them during Atlantic's work on the Project. While in the ACE Letter, ACE threatened to withhold additional insured coverage for defendants if any of them contributed to the cause of the accident, in fact, the ACE policy reveals no such exclusion.

In any event, importantly, for a breach of contract for failure to procure insurance claim, whether or not Atlantic's insurance carrier ultimately defends defendants is of no consequence, as the ultimate issue is whether Atlantic purchased the required liability coverage. A party is not liable to another for contractual indemnification or breach of contract under the insurance procurement provisions of a contract when that party fulfills its contractual obligation to procure proper insurance for the benefit of the other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996] [third-party defendant was not liable to appellants for breach of contract for failure to procure insurance "inasmuch as [it] had fulfilled its contractual obligation to procure proper liability insurance on behalf of appellants"]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Thus, defendants are not entitled to summary judgment in their favor on their third-party

claim for breach of contract for failure to procure insurance as against Atlantic, and Atlantic is entitled to dismissal of said third-party claim against it.

Atlantic's Counterclaims For Contribution and Common-law Indemnification Against Defendants (motion sequence number 002)

Defendants move for dismissal of Atlantic's counterclaims against them for contribution and common-law indemnification. "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, as discussed previously, the accident was caused by the fact that the plank that plaintiff was standing on at the time of the accident shifted because it and the Styrofoam were not properly secured against movement. In addition, there was no fall protection in place around the elevator shaft to protect plaintiff from falling into it, such as tie-off points for attaching harnesses or guardrails.

As to BPC, BFP and Brookfield, there is no evidence in the record indicating that they had any responsibility over installing and securing the subject floor protection, nor were they charged with providing fall protection around the elevator shaft.

Thus, as no negligence on their part contributed or caused the accident, they are entitled to dismissal of Atlantic's counterclaims against them for contribution and common-law indemnification.

As to Plaza, as noted previously, a question of fact exists as to whether Plaza had a role in installing the floor protection, and whether its failure to make sure that the subject floor protection, which caused plaintiff to lose his balance and fall when it shifted, was properly secured in place.

Thus, as a question of fact exists as to whether any negligence on Plaza's part caused or contributed to the accident, Plaza is not entitled to dismissal of Atlantic's counterclaims against it for contribution and common-law indemnification.

Atlantic's Counterclaims For Contractual Indemnification Against Defendants (motion sequence number 002)

Defendants move for dismissal of Atlantic's counterclaim against them for contractual indemnification. As there was no contract between defendants and Atlantic requiring that defendants contractually indemnify Atlantic, defendants are entitled to dismissal of said counterclaim against them.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that third-party defendant Atlantic Hoisting & Scaffolding, LLC's (Atlantic) motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing the third-party claim against it for breach of contract for failure to procure insurance is granted, and this claim is dismissed as against Atlantic; and it is further

ORDERED that the parts of defendants Battery Party City Authority d/b/a The Hugh L Carey Battery Park City Authority (BPC), BFP Tower C Co. (BFP), Brookfield Financial Properties, L.P. (Brookfield) and Plaza Construction Corp.'s (Plaza) (collectively, defendants) motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as Atlantic's counterclaim for contractual indemnification as against them, is granted, and these claims and counterclaim are dismissed as against defendants; and it is further

ORDERED that the parts of defendants' motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing Atlantic's counterclaims for contribution and common-law indemnification is granted as to BPC, BFP and Brookfield only, and these counterclaims are dismissed as against these defendants; and it is further

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ORDERED that the parts of defendants' motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in their favor on their third-party claim for contractual indemnification against Atlantic is granted as to BPC, BFP and Brookfield only, and the motion is otherwise denied; and it is further

ORDERED that plaintiff Kevin Mastroianni's cross motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 26, 2018

ENTER: