SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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NICHOLAS LETTERESE,

Plaintiff,

-against- Index No. 156434/14

A&F COMMERCIAL BUILDERS, L.L.C. and
SOL GOLDMAN INVESTMENTS, LLC,

Defendants.

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A&F COMMERCIAL BUILDERS, LLC,

Third-Party Plaintiff(s),

-against- Third-Party
Index No. 595052/16

LONG ISLAND CONCRETE, INC. and AMERICAN
EMPIRE SURPLUS LINES,

Third-Party Defendant(s).

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Hon. James E. d'Auguste, J.S.C.

The following e-filed documents, listed by NYSCEF document number 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 70, 81, 82, 127, 130, 131, 132, 133, 167, 137, 138, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 123, 134, 135, 139, 140, 141, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 128, and 129, were read on these motions for summary judgment.

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

In this action arising out of a construction site accident, defendant Sol Goldman Investments, L.L.C. ("Sol Goldman") moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing the complaint; and (2) summary judgment on its common-law indemnification claim against defendant/third-party plaintiff A&F Commercial Builders, LLC ("A&F") (motion sequence number 003).

Defendant/third-party plaintiff A&F moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing the complaint and all cross claims against it with prejudice; and (2) summary judgment on its contractual indemnification claim against third-party defendant Long Island Concrete, Inc. ("LIC") (motion sequence number 004).

Third-party defendant LIC also moves, under CPLR 3212, for summary judgment dismissing the third-party complaint (motion sequence number 005).

BACKGROUND

On November 5, 2012, plaintiff Nicholas Letterese was injured while working for nonparty New York Roofing Company ("New York Roofing") on a parking garage construction/renovation project at a Stop & Shop supermarket located at 8989 Union Turnpike in Queens, New York. The premises were owned by Sol Goldman and were leased to nonparty Stop & Shop Supermarket Company ("Stop & Shop"). Stop & Shop hired A&F as a construction manager on the project. A&F hired New York Roofing as the roof deck replacement subcontractor. New York Roofing subcontracted the concrete work to LIC.

Letterese testified at his deposition that he was employed as a foreman by New York Roofing (Letterese tr at 17-18). His accident occurred as he was working in a parking garage of the Stop & Shop (*id.* at 20). Letterese had been working at the site for between six weeks to two months before the accident occurred (*id.*). He had five roofers working under him on the project

(*id.* at 23). Letterese's supervisor was Phil Vacchio, the superintendent (*id.* at 23-24). The construction was performed in three phases (*id.* at 24). In November 2012, the project was in the second phase (*id.*). Each phase followed the same procedure, which included removing the original concrete and waterproofing, priming the existing decking, adding new waterproofing materials and membrane, and then pouring the concrete over the new waterproofing (*id.* at 24-25). After the new waterproofing had been installed, LIC drilled metal dowels into the decking (*id.* at 25, 26). Letterese's accident occurred at about 9:00 a.m. (*id.* at 39). On the morning of the accident, Letterese arrived at the site at approximately 6:45 a.m. and started working at 7 a.m. (*id.*). At 7:00 a.m., New York Roofing workers started to heat the kettle to melt the tar that was used during the waterproofing process (*id.* at 42). Letterese stated that it took about ninety minutes for the kettle to heat the tar and for the workers to start working (*id.*).

Letterese further stated that his accident occurred as he was leaving the elevator and was walking into the work area where the dowels were located (*id.* at 48). Letterese was walking towards another roofer who was waterproofing a section of the garage that was about 40 feet from where he fell (*id.* at 47-48). As Letterese was walking, his right foot got caught on a dowel and he fell forward (*id.* at 56). He tripped on the first row of dowels, and fell forward (*id.* at 55-56). The dowel did not have an orange cap on it at the time (*id.* at 44). Letterese stated that the dowels had been waterproofed the day before the accident (*id.* at 130-131). He was looking straight ahead before his accident occurred (*id.* at 140-141). According to Letterese, LIC was going to pour concrete on that section of the parking garage (*id.* at 43-44). At some point, the workers stopped using the safety caps because the waterproofing was coming off the dowels when the caps were removed (*id.* at 44). Letterese's boss told him to cover the dowels with coffee cups (*id.* at 45).

Tom Farrell, testified that he was A&F's superintendent on the project, and that he walked the job, and "if [he] didn't like the way the saety was set up that somebody could get hurt, [he'd] tell them to fix that" (Farrell tr at 12, 30). Pieces of rebar, referred to as dowels, were drilled into the concrete and were epoxied (*id.* at 38-39). The dowels were straight, about five or six inches long, and were installed to keep the new concrete in place (*id.* at 39, 45). After the dowels were installed, New York Roofing workers waterproofed the dowels by wrapping the dowels with tar paper and hot tar (*id.* at 41-42). Once the dowels were waterproofed, orange mushroom caps were placed on top of them to alert people that dowels were on the roof (*id.* at 45-47). Farrell testified that if he noticed one of the caps missing, he would either replace it, or if there were many missing, he would tell Letterese to make sure that they were covered up (*id.* at 52).

Kathleen Weeks, a claims risk manager employed by Sol Goldman, testified that Sol Goldman owns the premises, and that Stop & Shop occupies the space (Weeks tr at 6, 7). Sol Goldman did not send any representatives to Stop & Shop during construction (*id.* at 9-10).

Robert Ansbro, New York Roofing's president, stated at his deposition that Letterese was New York Roofing's foreman for the project, and directed the installation of the waterproofing (Ansbro tr at 11-12, 21). New York Roofing installed a new roofing system and applied new concrete to the roof deck (*id.* at 19). According to Ansbro, dowels were used to secure the concrete slab (*id.* at 29). LIC installed the dowels (*id.* at 29-30). After the dowels were installed by LIC, they were waterproofed by New York Roofing (*id.* at 71).

Thomas Perno testified that he was the owner of LIC on the date of the accident, and that he was the manager for the job at the Stop & Shop (Perno tr at 9-10, 14). New York Roofing hired LIC to install reinforcements and to pour a new concrete slab (*id.* at 13). The process for

installing a dowel is "[you] drill a hole, clean a hole, put epoxy in, [and] stick the dowel in" (*id.* at 17). During phase one of the project, rebar safety caps were placed on top of the exposed dowels (*id.* at 47). New York Roofing removed the caps to perform the waterproofing, and then placed the caps back on the dowels when the waterproofing was finished (*id.* at 51). LIC would then install wire mesh on top of the waterproofing and pour the concrete slab (*id.*). At the end of phase one, the engineer made a complaint that the orange rebar caps were removing the waterproofing (*id.* at 52-53, 55-56). As a result, safety caps were not used during phase two of the project (*id.* at 55-56). LIC did not pour the final slab until about 72 hours after the dowels had been waterproofed (*id.* at 85). Perno testified that New York Roofing and A&F made the decision to not use the safety caps (*id.* at 91).

Letterese commenced this action on July 1, 2014, asserting causes of action for violations of Labor Law §§ 240 (1), 241 (6), and 200 and under principles of common-law negligence.

A&F subsequently brought a third-party action against LIC and American Empire Surplus Lines, asserting the following five causes of action: (1) contractual indemnification against LIC; (2) failure to procure insurance against LIC; (3) common-law indemnification against LIC; (4) contribution against LIC; and (5) insurance coverage against American Empire Surplus Lines. By decision and order dated May 9, 2016, this Court (Kern, J.) severed the third-party complaint as to American Empire Surplus Lines.

DISCUSSION

"It is well settled that '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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make

such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553–554 [1st Dept 2010]). On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017] [internal quotation marks and citation omitted]).

A. Labor Law Section 240(1)

Sol Goldman and A&F move for summary judgment dismissing Letterese's Labor Law Section 240(1) claim. Letterese did not oppose dismissal of this claim (McGrath affirmation in opposition, ¶ 1). Accordingly, Letterese's Labor Law Section 240(1) claim is dismissed.

B. Labor Law Section 241(6)

Labor Law Section 241(6) provides, in relevant part, as follows:

> "All contractors and owners and their agents, . . . , when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . , shall comply therewith."

Labor Law Section 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to

construction workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). "To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). The "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and citation omitted]).

Letterese's verified bill of particulars alleges violations of 12 NYCRR 23-1.7 (e); 12 NYCRR 23-2.1(a); and 12 NYCRR 23-2.1(b) (verified bill of particulars, ¶ 17). Sol Goldman and A&F move for summary judgment dismissing Letterese's Labor Law Letterese 241 (6) claim, arguing that Letterese has failed to identify a specific or applicable Industrial Code provision. In opposition to these motions, Letterese only relies on 12 NYCRR 23-1.7(e)(2), and has, therefore, abandoned reliance on the other provisions (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal. . ."]). Therefore, the court shall only consider section 23-1.7(e)(2).

12 NYCRR 23-1.7(e)(2)

Section 23-1.7(e), entitled "Tripping and other hazards," provides in subdivision (2) that:

> "(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections *insofar as may be consistent with the work being performed*"

(12 NYCRR 23-1.7[e][2] [emphasis added]).

Sol Goldman and A&F argue that section 23-1.7(e)(2) is inapplicable, because the dowel was not debris, scattered tools and materials, or a sharp projection, but rather was an integral part of the work.

Letterese maintains, in opposition to the moving defendants' motions, that the dowel constituted a tripping hazard. As pointed out by Letterese, he testified that his right foot got caught on a dowel, which caused him to fall forward. Letterese further argues that the dowel was not an integral part of the work because his work with the dowel was completed, and that the dowel remained uncovered for several days before it was covered by the final slab.

Section 23-1.7(e)(2) is sufficiently specific to support a plaintiff's Labor Law Section 241(6) claim (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 488 [1st Dept 2018]; *Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]). Nevertheless, this section does not apply where the injury-producing object was an integral part of the work (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

As argued by the moving defendants, section 23-1.7(e)(2) does not apply because the dowel over which Letterese tripped was purposefully installed as an integral part of the project, and, therefore, cannot be considered accumulated debris, scattered tools and materials, or a sharp projection (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013] ["Regardless of whether plaintiff was using Masonite for his work when the accident occurred, the protective covering had been purposefully installed on the floor as an integral part of the renovation project"]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] ["the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris, scattered tools and materials, or a sharp projection"]).

Since Letterese has failed to identify a specific or applicable violation of the Industrial Code, his Labor Law Section 241 (6) claim must be dismissed (*see Kowalik*, 81 AD3d at 783).

C. Labor Law Section 200 and Common-Law Negligence

Labor Law Section 200 (1) provides that:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all persons. The board may make rules to carry into effect the provisions of this section."

Liability under Labor Law Section 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where the worker is injured as a result of the manner in which the work is performed, the owner or general contractor is liable if it "exercised supervisory control over the injury-producing work" (*Rohan v Turner Constr. Co.*, 142 AD3d 887, 887 [1st Dept 2016]; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

In contrast, where the worker's injury stems from a dangerous or defective premises condition, "a property owner is liable under Labor Law Section 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). Similarly, a general contractor may be liable under section 200 and the common law if it had

"control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury" (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] ["In the case of a general contractor, this standard makes sense because a general contractor is unlikely to have notice without some control or supervision over the work site"]).

Sol Goldman

Sol Goldman argues that it cannot be held liable under Labor Law Section 200 and in common-law negligence, because it was an out-of-possession owner that was not contractually obligated to repair or maintain the premises, and because Letterese's accident was not caused by a structural or design defect. Additionally, Sol Goldman contends that it did not supervise Letterese's work. In opposition, Letterese does not argue that Sol Goldman may be held liable under Labor Law Section 200 or in common-law negligence; Letterese's arguments are limited to A&F.

Here, Sol Goldman has established that it did not exercise supervision or control over the work at the site (*see Rohan*, 142 AD3d at 887). Sol Goldman did not have any representatives at the Stop & Shop during the construction work (Weeks tr at 9-10). In addition, pursuant to article 10.02 of the lease, which was assumed by Sol Goldman, "Tenant . . . shall take good care of the Premises and . . . and shall keep the same in good order and condition, and make all necessary repairs thereto, interior and exterior, structural and non-structural, ordinary and extraordinary, foreseen and unforeseen" (Cannavo affirmation in support, exhibits Q, R). Thus, Sol Goldman, an out-of-possession owner that was not involved in the construction work, demonstrated that it did not have any actual notice of any dangerous conditions (*see Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539 [1st Dept 2018]). In addition, Sol Goldman cannot be charged with

constructive notice, since there is no evidence that the conditions constituted structural or design defects that violated specific safety statutes (*id.*). Letterese has failed to raise an issue of fact. Therefore, Sol Goldman is entitled to dismissal of Letterese's labor Law Section 200 and common-law negligence claims.

A&F

A&F contends that it did not have the authority to supervise, direct or control Letterese's work at the site. In addition, A&F asserts that it did not cause the dowels to be left uncovered, and that it did not have any notice of any defects with the dowels.

Letterese maintains, in opposition to A&F's motion, that A&F had actual notice of the defective condition that caused his injuries. Specifically, Letterese points out that: (1) the black dowel on the black roof clearly posed a risk of tripping; and (2) Farrell testified that he was on the job site every day, walked the job, and that, if he observed something unsafe, he would fix it or would direct someone to fix it.

Contrary to Letterese's contention, the accident arose out of the means and methods of the work, and not a dangerous or defective condition inherent in the premises (*see Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]).

In this case, A&F has established that it did not exercise supervisory control over Letterese's or LIC's work. Letterese testified that A&F's superintendent did not give him instructions as to how to do the work, and did not provide any tools (Letterese tr at 37, 38). In addition, he stated that LIC installed the dowels, and was responsible for providing the orange protective caps (*id.* at 36, 131; *see also* Ansbro tr at 29, 32-33). Monitoring and oversight of the timing and quality of the work, mere presence on the job site, and a general duty to ensure compliance with safety regulations, are insufficient to impose liability under Labor Law Section

200 or in common-law negligence (*see Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]; *Dalanna*, 308 AD2d at 400). Moreover, the authority to stop work for safety reasons is insufficient to raise a triable issue of fact as to a defendant's supervision and control of the work (*Foley*, 84 AD3d at 478).

Although Letterese argues that A&F had actual notice of the uncovered dowels, "[m]ere notice of unsafe methods of performance is not enough to hold the . . . general contractor vicariously liable under this section" (*Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993] ["this Court has not . . . imposed liability under the statute solely because the owner had notice of the allegedly unsafe manner in which the work was performed"]). Accordingly, A&F is entitled to dismissal of Letterese's Labor Law Section 200 and common-law negligence claims.

D. Sol Goldman's Request for Common-Law Indemnification From A&F

Sol Goldman moves for common-law indemnification from A&F, arguing that A&F actually supervised the work and implemented safety procedures at the site.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). "[A] party's . . . [contractual] authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification" (*Naughton*, 94 AD3d at 11 [internal quotation marks and citation omitted]).

Common-law indemnification includes the right to attorney's fees, costs, and disbursements in defending the main action (*Perez v Spring Cr. Assoc.*, 283 AD2d 626, 627 [2d Dept 2001]).

Although Sol Goldman requests common-law indemnification from A&F, there is no basis for A&F to indemnify Sol Goldman under the common law. The court has dismissed Letterese's complaint against Sol Goldman. "Absent liability, vicarious or otherwise, there is no basis for [common-law] indemnification" (*Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012] [trial court erred in granting common-law indemnification against decedent's employer, where prior to the grant of indemnification, the court had dismissed the complaint on the ground that there was no non-speculative basis for liability]). Therefore, Sol Goldman's request for common-law indemnification from A&F is denied.

E. A&F's Request for Contractual Indemnification from LIC/ LIC's Request for Summary Judgment Dismissing A&F's Contractual Indemnification and Common-Law Indemnification Claims

Third-Party Claims for Common-Law Indemnification and Contribution

Moreover, in light of the dismissal of the complaint against A&F, A&F's third-party claims for common-law indemnification and contribution against LIC are academic (*see Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]).

Third-Party Claims for Contractual Indemnification and Failure to Procure Insurance

A&F's contractual indemnification claim, however, to the extent that it seeks to recover attorneys' fees and costs, and A&F's failure to procure insurance claims, are not academic (*see id.*; *see also Natarus v Corporate Prop. Invs., Inc.*, 13 AD3d 500, 501 [2d Dept 2004] [issue of whether third-party defendant procured contractually-mandated insurance coverage was not academic notwithstanding dismissal of the underlying complaint]). Since LIC did not address

the failure to procure insurance claim (third-party complaint, second cause of action), it is not entitled to dismissal of this claim.

A&F seeks contractual indemnification from LIC "[i]n the event that this court denies A&F's motion for summary judgment dismissing Letterese's complaint and all cross claims" (O'Donnell affirmation in support, ¶ 71). As noted above, A&F is entitled to dismissal of Letterese's complaint. None of the parties oppose dismissal of any cross claims against A&F. Thus, A&F is entitled to dismissal of the cross claims against it. Therefore, A&F's request for contractual indemnification from LIC is moot and is denied.

LIC moves for summary judgment dismissing A&F's contractual indemnification claim, which is based upon the indemnification provision in its subcontract with New York Roofing, which provides as follows:

> "4.6.1 *To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor . . . and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract*, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death . . . *but only to the extent caused by the negligent acts or omissions of the Subcontractor*, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6"

(Mezzacappa affirmation in support, exhibit T at 7, § 4.6.1 [emphasis added]).

LIC argues that there is no evidence that Letterese's accident was caused by the negligence of LIC. According to LIC, it did not make the decision to discontinue the use of orange mushroom caps during phase two, and did not have the authority to oppose the decision made by A&F and New York Roofing.

In opposing LIC's motion, A&F contends that it was acting as the owner's agent, based upon language in the agreement between Stop & Shop and A&F indicating that A&F is placed in "a relationship of trust and confidence" to use its "skill and judgment in furthering the interests of the Owner" (Mezzacappa affirmation in support, exhibit R at 3, § 1.1). Thus, A&F maintains that it is entitled to the same indemnification as the owner. A&F points out that LIC provided the safety caps, and that there is sufficient evidence of LIC's negligence.

In reply, LIC argues that A&F is not a party to the indemnification provision, and that the agreement does not evince an intent to indemnify A&F.

It is well established that "[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., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Initially, the court may consider LIC's argument that A&F does not qualify as an indemnitee under the indemnification provision, even though it was raised for the first time in reply, because it was made in direct response to A&F's contentions made in opposition (*see Home Ins. Co. v Leprino Foods Co.*, 7 AD3d 471, 471 [1st Dept 2004] [trial court correctly considered plaintiff's no-oral-modification argument, "although raised for the first time in reply," because it was "directly responsive to defendant's opposition"]; *Davison v Order Ecumenical*, 281 AD2d 383 [2d Dept 2001] [trial court "properly considered the arguments

raised in the defendants' reply affirmation, since they were made in direct response to the plaintiffs' opposition papers"]; *cf. Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

In *Tonking v Port Auth. of N.Y. & N.J.* (3 NY3d 486, 489-490 [2004]), the Court of Appeals held that a construction manager did not qualify as an owner's "agent" under an indemnification provision. As explained by the Court, "the language of the parties is not clear enough to enforce an obligation to indemnify," and that "[i]f the parties intended to cover [the construction manager] as a potential indemnitee, they had only to say so unambiguously" (*id.* at 490). Here, as in *Tonking*, the subcontract between New York Roofing and LIC does not define the term "agent," and the language of the agreement is not clear enough to enforce an obligation to indemnify.

Moreover, even if A&F qualifies as an indemnitee, the court finds that the indemnification provision has not been triggered. Letterese testified that, during phase one of the project, New York Roofing waterproofed the dowels and then placed plastic orange mushroom caps on the dowels (Letterese tr at 43, 128). When the caps were removed, the waterproofing material that had been applied to the dowels peeled off (*id.* at 43). Letterese further testified that Ansbro told him to use coffee cups to cover the dowels, but also stated "[w]ho actually made the decision not to use those caps anymore I'm not sure" (*id.* at 46). In phase two, Letterese asked Ansbro where the caps were, and he said "don't worry about it, use paper cups" (*id.* at 129). He also asked Farrell, who "just shrugged his shoulders" (*id.*). Significantly, Farrell testified that Ansbro made the decision to cover the dowels with coffee cups (Farrell tr at 36). In addition, Perno testified that New York Roofing safety caps were not used in phase two, because New York Roofing opted not to use safety caps (Perno tr at 56).

While A&F points out that LIC provided the safety caps, Letterese claims that his accident was a result of his employer's decision to stop using the caps (Letterese tr at 44). In light of the above evidence, A&F has failed to raise an issue of fact as to whether LIC was involved in the decision to discontinue using the safety caps during phase two. There is no evidence that Letterese's accident resulted from a negligent act or omission of LIC (*see DaSilva v Everest Scaffolding, Inc.*, 136 AD3d 423, 424 [1st Dept 2016] [owner and general contractor's contractual indemnification claim was correctly dismissed "in the absence of any evidence of negligence on [subcontractor's] part in the performance of its work"]; *Mikelatos v Theofilaktidis*, 105 AD3d 822, 824 [2d Dept 2013] [subcontractor demonstrated that "plaintiff's accident was not 'caused by the negligent acts or omissions of the (subcontractor),' such that the indemnification clause was not triggered"]). Therefore, LIC is entitled to dismissal of A&F's contractual indemnification claim against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 003) of defendant Sol Goldman Investments, LLC for summary judgment is granted and the complaint against said defendant is dismissed, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of defendant/third-party plaintiff A&F Commercial Builders, LLC for summary judgment is granted and the complaint and all cross claims against said defendant are dismissed, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 005) of third-party defendant Long Island Concrete, Inc. for summary judgment is granted to the extent of dismissing the third-party claims

for contractual indemnification, common-law indemnification, and contribution, and is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: August 16, 2018

ENTER: