SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ARTUR WOLOSZYN,

Plaintiff,

-against-

834 FIFTH AVENUE CORPORATION, PHILIPPE LAFFONT, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, and SMI CONSTRUCTION MANAGEMENT INC.,

Defendants.

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SMI CONSTRUCTION MANAGEMENT INC. and PHILIPPE LAFFONT,

Third-party Plaintiffs,

-against-

N. PAGANO PLUMBING & HEATING CONTRACTORS, LTD.,

Third-party Defendant.

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834 FIFTH AVENUE CORPORATION and BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC,

Second Third-party Plaintiffs,

-against-

SMI CONSTRUCTION MANAGEMENT INC. and N. PAGANO PLUMBING & HEATING CONTRACTORS, LTD.,

Second Third-party Defendants.

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Index No. 153505/14
Motion Seq. No. 001, 002, and 003

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants/second third-party plaintiffs 834 Fifth Avenue Corporation (834 Fifth) and Brown Harris Stevens Residential Management, LLC (Brown Harris) move, pursuant to CPLR 3212, for dismissal of all claims and cross claims as against them (motion seq. No. 001). Third-party defendant/second third-party defendant N. Pagano Plumbing & Heating Contractors, LTD. (Pagano) cross-moves for summary judgment dismissing 834 Fifth and Brown Harris's second third-party claims for contractual indemnity, common-law indemnity, and breach of contract for failure to procure insurance. Defendants/third-party plaintiffs SMI Construction Management Inc. (SMI) and Phillipe Laffont (Laffont) move for summary judgment dismissing plaintiff Artur Woloszyn's (plaintiff or Woloszyn) verified complaint (the Complaint) (motion seq. No. 002). In motion seq. No. 003, plaintiff moves for partial summary judgment as to liability on his Labor Law 241 (6) claims against 834 Fifth and SMI. The motions are consolidated for disposition.

BACKGROUND

This action arises out of the renovation of a duplex apartment on Fifth Avenue in New York. 834 Fifth owns the subject building. Laffont lives in the duplex, which consists of an apartment on the third floor and the fourth floor of the subject building. Laffont hired SMI to do the renovation by executing a "Standard Form Agreement Between Owner and Construction Manager as Constructor" (NYSCEF doc No. 80). The work, according to SMI's owner, Steve Mark (Mark), included replacing: "all the finishes, mechanical, electrical and plumbing (Mark tr at 24, NYSCEF doc No. 84).

SMI hired various subcontractors to perform mechanical, electrical, plumbing, demolition, millwork, tile, stone, and painting work. Pagano contracted with SMI to perform plumbing work on the project. On the day of the subject accident, December 20, 2013, plaintiff

was an employee of Pagano. Pagano often worked on SMI projects and, on this project, plaintiff was in the habit of using SMI's table saw (plaintiff's tr at 35, NYSCEF doc No. 76).

Prior to his accident, plaintiff needed to use SMI's table saw to cut a piece of plywood into smaller pieces that he could attach to pipes that Pagano was installing (*id.* at 43-44). While cutting the wood, plaintiff testified that "the plywood jumped up and pulled my arm" (*id.* at 65). Plaintiff's left hand was drawn toward and contacted the saw's blade, and he was injured. Plaintiff filed his summons and complaint on April 11, 2014, alleging that defendants are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6).

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212

[b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

I. Labor Law § 241 (6)

The motion of 834 Fifth and Brown Harris, as well as the motion of SMI and Laffont, seek dismissal of the Labor Law § 241 (6) claim, while plaintiff seeks summary judgment on that claim as against 834 Fifth and SMI.

Labor Law § 241 (6) provides, in relevant part:

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of

action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

SMI and 834 Fifth

Initially, SMI contests whether it is a proper Labor Law defendant. Specifically, SMI argues that it is not within the ambit of the statute because it was hired as a construction manager rather than as a general contractor. SMI cites to *Walls v Turner Constr. Co.*, which held, in the section 240 (1) context, that [a]lthough a construction manager of a work site is generally not responsible for injuries sustained under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the work which brought about the injury" (4 NY3d 861, 863-864 [2005]). The Court of Appeals further specified that "unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*id.* at 864).

Here, SMI had supervisory control over the work that led to plaintiff's injuries. First, SMI hired all of the subcontractors and has acknowledged, through the testimony of their construction manager, Steve Lebron (Lebron), that it maintained authority to intervene if unsafe practices or materials were being used by subcontractors on the project (Lebron tr at 11-18, NYSCEF doc No. 79) (*see Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010] [holding that the defendant construction manager was an agent of the owner where it

had "supervisory authority over the project and specific duties with regard to safety]). Second, the instrumentality that caused plaintiff's injury, the saw, belonged to SMI. In this circumstance, SMI clearly had authority to "avoid or correct the unsafe condition" (*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]). Accordingly, the branch of SMI's motion that seeks dismissal of plaintiff's Labor Law claims based on its status as a construction manager is denied, as SMI was a statutory agent of the owner on the project.

Plaintiff alleges violations of 12 NYCRR 23-1.12 (c) (2), 12 NYCRR 23-1.12 (c) (3), 12 NYCRR 23-1.5 (c) (3), and 12 NYCRR 23-9.2 (a). Plaintiff further alleges that 834 Fifth and SMI are liable for these violations as the owner and general contractor, respectively, on the subject project. 834 Fifth, in contrast to SMI, does not contest that, as the owner of the subject building, it is a proper Labor Law defendant.

12 NYCRR 23-1.12 (c)

12 NYCRR 23-1.12 (c), entitled "Guarding of power-driven machinery; Power-driven saws," provides, in its second subdivision, that all power-driven saws, except for portable saws, shall have a guard. Specifically, the subsection provides:

> Every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth. In operation, such guard shall rise automatically by pressure from the material being cut or shall be so adjusted that as the saw cuts the material, the distance from the material to the underside of the guard does not exceed one-half inch. The exposed teeth of the saw blade beneath the table shall be effectively guarded. Every such saw shall be provided with a cut-off switch within easy reach of the operator without his leaving the operating position. Exception: Any arm saw whose upper blade half is enclosed and which is provided with a front blocking bar or rod is not required to be guarded by the automatic rising pressure guard.

Courts have held that 12 NCYRR 23-1.12 (c) (2) is sufficiently specific to serve as

predicate to section 241 (6) liability (*see Keneally v 400 Fifth Realty LLC, 110 AD3d 624* [1st Dept 2013]).

Plaintiff contends that the subject saw had no guard. This contention is supported by record. Plaintiff, as well as Brown Harris's handyman, Hector Velez (Velez), each testified that the saw did not have a guard on it (plaintiff's tr at 50-51, NYSCEF doc No. 76, Velez tr at 59, NYSCEF doc No. 82). SMI's construction manager, Steve Lebron (Lebron), testified that he was "not sure" whether the saw had a guard at the time of the accident (Lebron tr at 63). This equivocal testimony is not enough to raise an issue of fact as to whether the saw had a guard. Plaintiff makes a *prima facie* showing of entitlement to judgment on the issue of whether 834 Fifth and SMI violated 12 NCYRR 23-1.12 (c) (2) by showing that plaintiff was obliged to use a table saw that lacked a guard.

834 Fifth and SMI contend that plaintiff is not entitled to summary judgment on 12 NYCRR 23-1.12 (c) (2) because plaintiff was the sole proximate cause of his own injuries. Defendants contend that plaintiff was the sole proximate cause of his accident because plaintiff used a saw that he knew might be unsafe without seeking assistance or guidance. This argument fails when it is exposed to the standard for sole proximate causation in a Labor Law context. In *Gallagher v New York Post*, the Court of Appeals held, in a section 240 (1) context, that for a worker to be the proximate cause of his own accident, defendants must show that the worker "knew of the availability of safety devices and unreasonably chose not to use them" (14 NY3d 83, 88-89).

Plaintiff cannot be the sole proximate cause of his accident, as the record raises no issue as to whether a safer saw, or a saw-guard, was available to him. The trial court case that SMI cites, *Scoz v J&Y Electric*, is inapposite because the plaintiff there built his own "makeshift table

saw" that, by the plaintiff's own design, prevented the use of safety devices such as a guard (2014 WL 3870602 [NY County, Rakower, J., 2014]). As plaintiff did not build his table saw here, or prevent the use of safety devices, *Scoz* does not alter the court's application of *Gallagher*. While defendants also try to raise an issue as to whether plaintiff is the sole proximate cause of his own accident because he used a saw that belonged to SMI without permission, the record clearly reflects that the plaintiff had used the saw through the course of the project, and that Pagano employees had at least tacit approval to use SMI materials.

834 Fifth also argues that there is an issue of fact as to whether the violation of 12 NYCRR 23-1.12 (c) (2) was the proximate cause of plaintiff's accident. That is, 834 Fifth argues that the accident would have happened even if a violation, in the form of an absent guard, were not present. In support of this argument, 834 Fifth submits an affidavit from Les Winter (Winter), a forensic engineer. Winter states that "[i]t is unreasonable to assume that the lack of a cover guard caused the plaintiff's accident because the accident could have occurred in the same manner had there be (sic) a cover guard in place" (NYSCEF doc No. 156, ¶ 9). Winter grounds this counterintuitive conclusion in the following reasoning: "If [plaintiff's] glove made contact with the blade, the contact could occur with the guard intact and the lack of a cover guard would not have prevented the accident. There is no evidence that his glove did not make contact with the blade" (*id.*, ¶ 5).

This testimony requires some unpacking. The last sentence is strange because plaintiff's glove clearly made contact with the blade for the following reasons: (1) plaintiff was wearing gloves; and (2) plaintiff's hand was severely lacerated by the blade. Thus, Winter's statement that there "is no evidence that his glove did not make contact with the blade" is a tautology, as it is both true and meaningless for our purposes. Next, Winter does not square the text of the

regulation with his contention that if plaintiff's "glove made contact with the blade," then the accident could have occurred even if a guard were present. The regulation requires, with exceptions that are not applicable here, that every power saw "shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth." Thus, the regulation assumes that a guard will prevent the type of contact involved with plaintiff's accident.

Winter cannot, by speculation, undermine this assumption. It is conceivable that, in some exceptional circumstances, a guard will not prevent the teeth of a power saw from cutting the hand of a worker. Winter does not, however, articulate why any such circumstances were present on the day that SMI's unguarded table saw cut plaintiff's hand. The Court of Appeals has held that, while an expert opinion on a material issue of fact will typically "preclude a grant of summary judgment," if "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation," then "the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). As Winter's conclusion as to 12 NYCRR 23-1.12 (c) (2) is speculative and unsupported by an evidentiary foundation, his opinion fails to raise an issue of fact as to whether the absence of a guard was, in fact, not a proximate cause of plaintiff's accident.

As the regulation requires a guard that will prevent contact between the worker and a saw blade, and as defendants failed to provide such a guard, they violated the regulation. As this violation was a proximate cause of plaintiff's accident, plaintiff is entitled to summary judgment as to liability on his Labor Law § 241 (6) claim against 834 Fifth and SMI. As a corollary, 834 Fifth and SMI's applications for dismissal of plaintiff's Labor Law § 241 (6) must be denied. Although the court's ruling on 12 NYCRR 23-1.12 (c) (2) is sufficient to determine the liability

of 834 Fifth and SMI under the statute, the court will, for the sake of completeness, analyze the other Industrial Code violations alleged by plaintiff.

12 NYCRR 23-1.12 (c) (3)

The third subsection of 12 NYCRR 23-1.12 (c) addresses when spreaders are required for power saws: "Every table circular saw used for ripping[1] shall be provided with a spreader securely fastened in position and with an effective device to prevent to kickback." This regulation is sufficiently specific to serve as a predicate to section 241 (6) liability (*see Bajor v 75 E. End Owners Inc.*, 89 AD3d 458, 458 [1st Dept 2011]).

Plaintiff testified that the saw he used on the day of his accident did not have one (plaintiff's tr at 117). No party argues that the subject saw had a spreader. However, plaintiff fails to allege in his moving papers that he was "ripping" at the time of his accident. Moreover, a review of plaintiff's deposition transcript leaves uncertain whether plaintiff was "ripping" or cutting the wood in a different manner. As plaintiff fails to make a *prima facie* showing of a qualifying element of the regulation, he fails to make a *prima facie* showing that the regulation is applicable. Accordingly, the branch of plaintiff's motion that seeks summary judgment on a violation of this regulation is denied.

12 NYCRR 23-9.2 (a)

This regulation provides:

> All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

[1] The Appellate Division has defined ripping as "cutting with the grain" (*Bajor v 75 E. End Owners Inc.*, 89 AD3d 458, 458 [1st Dept 2011]).

Courts have held that 12 NYCRR 23-9.2 (a) is sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g. Salsinha v Malcolm Pirnie, Inc.*, 76 AD3d [1st Dept 2010]). Moreover, the Appellate Division, First Department, has held that it applies to cases involving the absence of a guard on a saw (*Alameda-Cabrera v Noble Elec. Contr. Co., Inc.*, 117 AD3d 484 [1st Dept 2014]). Here the power operated saw that plaintiff was operating was not maintained in proper condition at the time of his accident, as it lacked a guard. Thus, 834 Fifth and SMI violated the regulation. Moreover, as discussed above, this violation – the absence of a guard – was a proximate cause of plaintiff's injuries. Accordingly, plaintiff is entitled to summary judgment on its allegations relating to 12 NYCRR 23-9.2 (a).

12 NYCRR 23-1.5 (c) (3)

12 NYCRR 23-1.5 (c) (3), entitled "General responsibility of employers; condition of equipment and safeguards" provides, at its third subdivision, that: "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed if damaged." Courts have held that this regulation is sufficiently specific to serve as a predicate to liability under section 241 (6) (*see e.g. Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]).

This regulation, in essence, is a more generalized version of 12 NYCRR 23-9.2 (a), applying to all equipment, rather than just power-operated equipment. For this reason, 834 Fifth and SMI have violated the regulation for the same reasons discussed above. Accordingly, plaintiff is entitled to summary judgment on its allegations relating to 12 NYCRR 23-1.5 (c) (3) as well.

Laffont

Plaintiff does not move for summary judgment for liability under section 241 (6) against

Laffont. Laffont and SMI, however, move to have all Labor Law claims against Laffont dismissed, arguing that he is not a proper Labor Law defendant because he was merely a tenant. Laffont and SMI cite, in support, to *Ferluckaj v Goldman Sachs & Co.*, which discussed the circumstances in which lessees are liable in the section 240 (1) context (12 NY3d 316). While the statute "says nothing about lessees," the Court of Appeals wrote, "[t]hat does not necessarily mean lessees can never be liable" (*id.* at 320). Although the statute does not refer to lessees, "Appellate Division cases have said that lessees who hire a contractor, and thus have the right to control the work being done, are 'owners' within the meaning of the statute" (*id*).

Here, Laffont hired SMI (*see* construction management agreement between Laffont and SMI, NYSCEF doc No. 80). SMI and Laffont, therefore, fail to make *prima facie* showing that Laffont is not a proper Labor Law defendant and the branch of their motion seeking dismissal of the plaintiff's section 241 (6) claim as against Laffont is denied (*see Morato-Rodriguez v Riva Constr. Group, Inc.*, 115 AD3d 401, 401 [1st Dept 2014] [holding that the plaintiff's sectin 240 (1) claim should not be dismissed as against the tenant/defendant where the tenant "selected the contractor for the work and substantially directed and controlled it"]; *see also Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008] [holding that the tenant/defendant was an owner for section 240 (1) and 241 (6) purposes because it was "acting as an 'owner' when it hired the plaintiff's employer"]).

Brown Harris

Plaintiff's Labor Law 241 (6) claim must be dismissed as against Brown Harris, as Brown Harris was not an owner, contractor, or agent of either for Labor Law purposes.

II. Labor Law § 240 (1)

Plaintiff concedes, as he must, that the scaffold law does not apply to his accident (*see generally Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]). Accordingly, the branches of defendants' motions seeking dismissal of plaintiff's Labor Law § 240 (1) claims are granted.

III. Labor Law § 200 and Common-law Negligence

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 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled

the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

834 Fifth and Brown Harris

834 Fifth and Brown Harris each argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed as against them because they did not have supervisory authority over plaintiff's work. This is plain, both defendants argue, as neither 834 Fifth nor Brown Harris were involved with the construction.

Initially, the court notes that plaintiff does not oppose the branch of motion seq. No. 001 which seeks dismissal of the Labor Law § 200 and common-law negligence as against Brown Harris. Accordingly, that branch of the motion is granted.

As to 834 Fifth, plaintiff does not contend that 834 Fifth had supervisory control over his work. Instead, plaintiff argues that the accident arose from a defect at the workplace rather than the materials plaintiff used to do his work. This argument is counterintuitive, as it seems plain that the guard-less saw involved in plaintiff's accident was equipment, or material he was using

to perform his work. In prosecuting this argument, plaintiff cites to *Jaycoxe v VNO Bruckner Plaza, LLC* (146 AD3d 411 [1st Dept 2017]) and *Chowdhury v Rodriguez* (57 AD3d 121 [2d Dept 2008]).

The plaintiff in *Jaycoxe* alleged that he was injured when a ladder that lacked proper footing "slipped out from under him" (146 AD3d at 411). The First Department reversed the trial court's dismissal of plaintiff's Labor Law § 200 claims holding that where "plaintiff alleged that defendants—the premises owners—provided him with a defective ladder, 'the legal standard that governs claims under Labor Law § 200 is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof'" (*id.*, *quoting Chowdhury*, 57 AD3d at 123). *Chowdbury* also involved a ladder that lacked proper footing. The Second Department acknowledged that "[t]he facts of this case do not fit neatly into either box" (57 AD3d at 129). The key fact in the Second Department's reasoning seems to have been that the building owner, as in *Jaycoxe*, provided the plaintiff with the defective ladder. The Court in Chowdbury reasoned:

> "Where, as alleged here, a defendant property owner provides a worker with a dangerous or defective piece of equipment, having either created the dangerous or defective condition or having actual or constructive notice of it, the defendant is possessed of the authority, as owner, to remedy the condition. Remedial efforts do not involve control over the work per se, but instead involve control over the dangerous or defective device akin to the property owner's authority to remedy dangerous or defective premises conditions"

(*id.* at 130).

The Second Department went on to quote from a now better than a century-old Court of Appeals case, *Hess v Bernheimer & Schwartz Pilsener Brewing Co.*, which held that "'[i]f the [property owner] furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance, but if the contractor

furnishes such appliances the [property owner] does not thereby become responsible for their sufficiency'" (*id.*, *quoting Hess v Bernheimer & Schwartz Pilsener Brewing Co.*, 219 NY 415, [1916]).

Hess, despite its age, contains the answer to whether 834 Fifth is liable to plaintiff under section 200 and common-law negligence: as 834 Fifth did not furnish plaintiff with the defective saw, it was not negligent. Fit within the modern framework of section 200 analysis, plaintiff's accident arose out of the tools he used for his job, so supervisory control is the touchstone of analysis. The holdings of *Chowdbury* and *Jaycoxe* should not be extended to the present circumstances, where the construction manager provided a subcontractor with a guard-less saw. Importantly, the circumstance which caused the Appellate Division to bend section 200 analysis -- the owners' provision of defective ladders -- is absent here. In those cases, rigid application of the supervisory control standard may have absolved the owners from negligently providing defective tools. In this case, there is no tension between fairness and technical application of the section 200 analysis. Under both, 834 Fifth does not have liability under section 200 and common-law negligence. As 834 Fifth did not have supervisory control over plaintiff, the branch of motion seq. No. 001 seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be granted.

SMI and Laffont

SMI and Laffont begin their argument as to plaintiff's Labor Law § 200 and common-law negligence by inauspiciously declaring: "Plaintiff's Labor Law § 200 claim, as well as his common-law negligence claim should be dismissed as against both the City and Cauldwell" (NYSCEF doc No. 104, ¶ 45). Moving on from this vestigial boilerplate, SMI and Laffont argue that they did not have supervisory control over plaintiff's work. In support, they submit

plaintiff's testimony that his boss, Mauricio Taormino would come to job meetings and would sometimes stop in at the jobsite, "when he was in the neighborhood," to supervise plaintiff's work (plaintiff's tr at 30, NYSCEF doc No. 76). Plaintiff also testified that no one from SMI instructed him on how to use the table saw or how to perform his plumbing work (*id.* at 130).

Initially, the court notes that plaintiff does not oppose the branch of motion seq. No. 002 which seeks dismissal of the Labor Law § 200 and common-law negligence claims as against Laffont. Accordingly, that branch of the motion is granted.

As to SMI, plaintiff once again relies on *Chowdbury* and *Jaycoxe*. In contrast to 834 Fifth, these cases cut in favor section 200 liability for SMI. That is, both *Chowdbury* and *Jaycoxe* stand for the proposition that a party that supplies a worker with defective tools may be liable under section 200. In such circumstances, the negligence is so plain that it does not matter which analytical lens is applied to the conduct. Here, the court has determined that plaintiff's accident arose from the tools he was using—specifically, SMI's saw.

SMI had supervisory control over plaintiff's work not only because it maintained authority to intervene if an unsafe practice or material was used on the jobsite, but also because it owned and was in control of the instrumentality that injured plaintiff. In short, SMI was perfectly positioned to prevent the accident by making its own table saw compliant with Industrial Code requirements. Thus, SMI's reference to plaintiff's transcript is insufficient to make a showing as to its entitlement to dismissal of plaintiff's section 200 and common-law negligence claims as against it. Accordingly, the branch of SMI and Laffont's motion that seeks such relief must be denied.

IV. Pagano's Cross Motion

Pagano cross-moves for summary judgment dismissing 834 Fifth and Brown Harris's second third-party claims for contractual indemnity, common-law indemnity, and breach of contract for failure to procure insurance. Although 834 Fifth and Brown Harris do not, in their notice of motion, specifically seek summary judgment on their claims against Pagano, they do argue for such relief in their supporting papers.

Contractual Indemnity

Pagano initially notes that it did not enter into a contract with 834 Fifth. Pagano did, however, enter into a contract with SMI. The indemnity clause of that agreement provides:

> "To the fullest extent permitted by law, the Trade Contractor shall indemnify, hold harmless and defend the Construction Manager and the Owner ... from and against all claims (including claims by employees of the Trade Contractor), damages, liabilities, losses and expenses, including, but not limited to, reasonable attorney's fees arising out of or in any way connected with the performance or lack of performance of the Trade Contractor's Work provided that any such claim ... is attributable to bodily injury ... caused by an actual or alleged (a) Violation of any statutory duty, regulation, ordinance, rule or obligation relating to the Trade Contractor's Work or (b) Act or omission of the Trade Contractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable"

(SMI-Pagano agreement, ¶ 14, NYSCEF doc No. 129).

Pagano and SMI also executed a Hold Harmless agreement, which identifies Laffont and his wife as the "Owner" related to the project. Pagano argues that, as the term "Owner" in its agreement with SMI does not unambiguously refer to 834 Fifth and Brown Harris, the contractual indemnification claims in the Second Third-party Complaint should be dismissed. Without citing to caselaw, 834 Fifth and Brown Harris argue in opposition that the term "Owner" clearly refers to 834 Fifth because 834 Fifth owns the building.

Initially, the court notes that ownership of an apartment is not always simple and self-evident in Manhattan, where buildings are often specially organized by laws for cooperative and condominium buildings, as well as by their own articles of governance. Next, the Court observes that "documents executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so long as they are substantially contemporaneous" (*Brax Capital Group, LLC v WinWin Gaming, Inc.*, 83 AD3d 591, 592 [1st Dept 2011] [internal quotation marks and citation omitted]). Applying this principle, the court must read the term "Owner" in the indemnification provision as it is defined in the Hold Harmless agreement, which named Laffont and his wife as the "Owner" related to the project.

More broadly, it is the longstanding practice of New York courts to strictly construe indemnification provisions to avoid reading in "a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]). Thus, unless a clear intention by one party to indemnify another is demonstrated by the agreement in question, courts do not impose the obligation to indemnify (*see Susko v Greenwich LLC*, 103 AD3d 434 [1st Dept 2013] [holding that the trial court properly denied the owner contractual indemnification where the subject contract did not demonstrate a clear and unambiguous intention to indemnify]). Thus, Pagano is entitled to summary judgment dismissing 834 Fifth and Brown Harris's claims for contractual indemnity because the relevant contracts do not demonstrate that the parties clearly and unambiguously intended that Pagano would indemnify 834 Fifth and Brown Harris.

Although 834 Fifth and Brown Harris do not, in their notice of motion, specifically seek summary judgment on their claims against Pagano, they do argue for such relief in their memorandum of law. In any event, applications by 834 Fifth and Brown Harris for summary

judgment on their contractual indemnification claims against Pagano are necessarily denied, as the court is dismissing these claims.

Common-Law Indemnity

Pagano argues that 834 Fifth and Harris Brown's claim for common-law indemnity must be dismissed, as 834 Fifth and Harris Brown's negligence brought about plaintiff's accident.

Generally, common-law indemnification requires one party that is "actively at fault in bringing about the injury" to indemnify another party that "is held responsible solely by operation of law because of [its] relation to the actual wrongdoer" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [internal quotation marks and citation omitted]).

Pagano cites to Harris Brown's Velez's testimony that he had seen the subject saw before the accident (Velez tr at 97). However, as discussed above, supervisory control, rather than notice, is the standard for determining negligence in workplace accidents. Pagano argues that 834 Fifth and Brown Harris supervised plaintiff's work, citing to the deposition transcript of SMI's Steve Mark (Mark), who testified that the building's super "specifically dealt directly with the plumbers on how he wanted things done and how they had to be done to interact with the portions of the physical plumbing that are owned by the corporation" (Mark tr at 47). As 834 Fifth and Brown Harris point out, Mark clarified his statement about the super's putative oversite over plaintiff's work was limited to how the plumbing fixtures were run to the building's risers (*id.* at 50-51).

This is insufficient to establish the supervisory control that would open 834 Fifth and Harris Brown to liability. Accordingly, as 834 Fifth and Harris Brown were not negligent, the court rejects Pagano's argument that 834 Fifth and Harris Brown's claims for common-law indemnity against it must be dismissed. Similarly, 834 Fifth and Harris Brown fail to make a

prima facie showing that they are entitled to summary judgment against Pagano on this issue. Indeed, such a ruling would be impossible at this stage as no determination has been made as to whether Pagano was negligent in plaintiff's accident.

Breach of Contract for Failure to Procure Insurance

"An agreement to procure insurance is *not* an agreement to indemnify and hold harmless, and the distinction between the two is well recognized" (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Thus, even though Pagano does not owe indemnification to 834 Fifth and Brown Harris, that does rule out the possibility that it is obligated to procure insurance for them. The First Department has held that "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated" (148 AD3d 1092, 1096 [2d Dept 2017]).

The Pagano/SMI contract provided that

> "The Trade Contractor shall procure, pay for and maintain, in full force and effect, at all times during the performance of the Work until the later of (i) Owner's acceptance of the Work; or (ii) one (1) year subsequent to Substantial Completion of the Work, the required policies of insurance. Such insurance shall be issued by a responsible carrier or carriers acceptable to the Construction Manager and Owner and, in form and substance, reasonably I satisfactory to the Construction Manager and Owner. The coverage afforded under any insurance policy obtained shall be primary coverage for any claim or occurrence arising out of the Work performed under this Agreement and the Construction Manager, Owner and Tenants Corporation shall be named as Additional Insureds. The Trade Contractor must comply with and submit proof of the required Insurance prior to commencing the Work. All policies maintained hereunder shall contain an endorsement that the insurer will give written notice to the additional Insured at least 30 days prior to the termination cancellation or redaction in coverage"

(SMI/Pagano, ¶ 17, NYSCEF doc No. 129).

Unlike the indemnification provision, the insurance paragraph refers to "Tenants Corporation." This term may be a reference to 834 Fifth and Brown Harris. However, the term is ambiguous and Pagano has not provided evidence showing that 834 Fifth was intended by that

term. Thus, Pagano is not entitled to dismissal of the 834 Fifth's claim for breach of contract for failure to procure insurance. However, as Harris Brown is clearly not referred to by the insurance provision, its claim for breach of contract for failure to procure insurance against Pagano must be dismissed.

834 Fifth's application for summary judgment on this claim must also be denied for two reasons. First, 834 Fifth, like Pagano, fails to provide any evidence that resolves the ambiguity in the insurance clause. Second, 834 Fifth does not provide any evidence that Pagano actually failed to name it as an additional insured under its insurance (*see DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011] ["A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with"]).

V. 834 Fifth and Brown Harris's Cross Claims Against SMI

834 Fifth and Brown Harris, do not, in their notice of motion, move for relief against SMI. However, in their moving papers, they argue that they are entitled to contractual and common-law indemnification against SMI. SMI, in opposition, does not object to the failure to list this relief in the notice of motion.

A contractor letter between 834 Fifth and SMI provides that:

> To the fullest extent permitted by law, Contractor agrees to indemnify, defend and hold harmless Owner (SHAREHOLDER), Apartment Corporation and Managing Agent from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) arising out of or in connection with the performance of the work of the Contractor, its agents, servants, subcontractors or employees, or the use by Contractor, its agents, servants, subcontractors or employees of facilities owner by Owner. This agreement to indemnify specifically contemplates full indemnity in the event of liability imposed against the Owner and/or Managing Agent without negligence and solely by reason of statute, operation of law or otherwise, and partial indemnity in the event of any actual negligence on the part of Owner and/or

> Managing Agent either causing or contributing to the underlying claim. In that event, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault, whether by statute, by operation of law or otherwise. The undersigned also agrees that it has reviewed and will comply with the Alteration Agreement for 834 Fifth Avenue Corporation and all other work, rules, requirements or instructions of the building managing agent.

SMI does not argue that the terms of this agreement are ambiguous, but instead contends that there are issues as to whether 834 and Brown Harris were actively negligent. As the court has already entertained and rejected the same argument from Pagano, and in its analysis of Labor Law § 200 and common-law negligence, it also rejects it here. In contrast to 834 Fifth, Brown Harris has not made a showing that it is entitled to summary judgment as to its indemnification claim against SMI.

CONCLUSION

Accordingly, it is

ORDERED that defendants/second third-party plaintiffs 834 Fifth Avenue (834 Fifth) and Brown Harris Stevens Residential Management, LLC (Brown Harris) motion for summary judgment (motion seq. No. 001) is resolved as follows:

· the branch of the motion seeking dismissal of Plaintiff's Labor Law § 240 (1) claim is granted;

· 834 Fifth and Brown Harris's application for dismissal of plaintiff's Labor Law § 200 and common-law negligence claims are granted;

· Brown Harris's application for dismissal of plaintiff's Labor Law § 241 (6) claim as against it is granted;

· 834 Fifth's application seeking summary judgment on its claim for contractual indemnification against defendant SMI Construction Management Inc. (SMI) is granted;

· the remainder of the motion is denied;

and it is further

ORDERED that the cross motion of third-party defendant/second third-party defendant N. Pagano Plumbing & Heating Contractors, LTD is resolved as follows:

· the branch of the cross motion seeking dismissal of 834 Fifth and Brown Harris's claims for contractual indemnification is granted;

· the branch of the cross motion seeking dismissal of Brown Harris's claim for breach of contract for failure to procure insurance against Pagano is granted;

· the remainder of the cross motion is denied;

and it is further

ORDERED defendants/third-party plaintiffs SMI Construction Management Inc. (SMI) and Phillipe Laffont (Laffont) is resolved as follows (motion seq. No. 002):

· the branch of the motion seeking dismissal of Plaintiff's Labor Law § 240 (1) claim is granted;

· the branch seeking dismissal of the Labor Law § 200 and common-law negligence as against Laffont is granted;

· the remainder of the motion is denied;

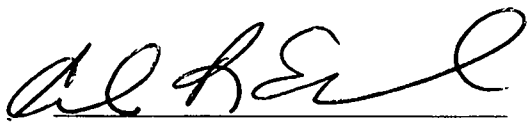
and it is further

ORDERED that plaintiff Artur Woloszyn's motion seeking summary judgment on his Labor Law § 241 (6) claims against 834 Fifth and SMI is granted; and it is further

ORDERED that counsel for 834 Fifth and Brown Harris shall serve a copy of this order on all parties, along with notice of entry, within 10 days of entry.

Dated: September 5, 2018

ENTER:



Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.