KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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ADALBERTO PEREZ,

Plaintiff,

- v -

50 SUTTON PLACE SOUTH OWNERS, INC., SKYLINE RESTORATION, INC., POFI CONSTRUCTION, CORP.,

Defendants.

INDEX NO. 157463/2014

MOTION DATE 09/26/2018

MOTION SEQ. NO. 005, 006, 007

DECISION AND ORDER

----------X

50 SUTTON PLACE SOUTH OWNERS, INC., SKYLINE RESTORATION, INC., POFI CONSTRUCTION, CORP.,

Third-Party Plaintiffs,

- v -

FIFTH AVE CONTRACTING,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 234, 243, 244, 245, 250, 255, 259

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 232, 235, 246, 247, 248, 256, 257, 258, 260

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 233, 236, 238, 239, 240, 241, 242, 249, 251, 252, 253, 254, 261

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 005, 006, and 007 are hereby consolidated for disposition.

This is a Labor Law action arising from an alleged fall from a ladder.

Plaintiff Adalberto Perez moves (mot. seq. 005) for an order granting partial summary judgment in his favor on the Labor Law § 240(1) claim, and upon the grant of summary judgment, setting this matter down for an immediate trial. Defendants/third-party plaintiffs 50 Sutton Place South Owners, Inc. (hereinafter, Sutton Place), Skyline Restoration, Inc. (hereinafter, Skyline), and POFI Construction, Corp. (hereinafter, POFI) (collectively, hereinafter, defendants) as well as third-party defendant Fifth Ave Contracting (hereinafter, Fifth Ave) all oppose.

Defendants move (mot. seq. 006) for an order, (1) pursuant to CPLR § 3212, dismissing plaintiff's Labor Law § 200 and/or common law negligence claims, (2) granting defendants contractual indemnity as against Fifth Ave, and (3) granting defendants reasonable attorneys' fees. Fifth Ave opposes the branch of the motion seeking contractual indemnity.

Fifth Ave moves (mot. seq. 007) for an order, pursuant to CPLR § 3212, (1) dismissing plaintiff's complaint in its entirety based upon the allegation that plaintiff's conduct was the sole proximate cause of his alleged accident, (2) granting Fifth Ave summary judgment in its favor, dismissing defendants' common-law indemnity and contribution claims, (3) granting Fifth Ave summary judgment in its favor, dismissing defendants' contractual indemnity claims, (4) granting Fifth Ave summary judgment in its favor, dismissing defendants' breach of contract for failure to procure insurance claim, and (5) granting Fifth Ave summary judgment in its favor, dismissing the third-party complaint in its entirety. Defendants oppose the branch of the motion seeking to dismiss defendants' contractual indemnity claims. Plaintiff opposes the branch of the motion seeking to dismiss the complaint.

BACKGROUND

Plaintiff worked as a helper on a restoration project for a building located at 50 Sutton Place South in Manhattan (hereinafter, the building). Sutton Place owned the building. Sutton Place hired Skyline to perform construction-related services for the building. Skyline hired POFI, which in turn entered into a subcontract with Fifth Ave to perform all of its work at the building. Plaintiff's duties included carrying bricks and cement, cleaning work areas, and taking out garbage [Deposition of Plaintiff (ex. I to the Lichtman aff.) at 17]. Plaintiff states that either Neftalin Martinez, the foreman for Fifth Ave (hereinafter, Neftalin) or Israel Martinez, Neftalin's brother and owner of Fifth Ave (hereinafter, Israel), would supervise and direct his work [Continued Deposition of Plaintiff (ex. J to the Lichtman aff.) at 101].

On the morning of April 17, 2014, Neftalin instructed plaintiff to clean everything up because the job was complete (Deposition of Plaintiff at 41). This task involved gathering the tools from the roof so that they could be lowered by his co-workers on a hoist (*id.* at 41-45). Plaintiff alleges that at around 2:00 p.m., Israel directed him to retrieve a ladder from the terrace area, located a floor below the roof (hereinafter, the terrace), by climbing down an aluminum ladder from the roof to the terrace (*id.* at 47, 49; Continued Deposition of Plaintiff at 69, 73, 80-81). Plaintiff stated that he had not used that ladder to reach the terrace prior to this request (*id.* at 66). Plaintiff testified that the ladder was leaning against the roof and it was not tied or secured in any way (*id.* at 74, 84, 93). Plaintiff asserts that he descended the ladder, untied the other ladder that he intended to retrieve from the terrace, and leaned the retrieved ladder against the wall next to the ladder he descended (Deposition of Plaintiff at 56, 71). He began to ascend the same ladder he used to access the terrace (*id.* at 72). When plaintiff was at about five or six feet up, the unsecured aluminum ladder slipped backwards, causing him to fall (*id.* at 72-74;

Continued Deposition of Plaintiff at 84-87). Plaintiff testified that he does not believe anyone saw him fall, but after he fell, Neftalin and another worker came to his aid (*id.* at 89, 95). Plaintiff was not wearing a safety harness at the time of his accident, and he testified that he did not need to use a safety harness to use the ladder (*id.* at 104).

Kevin Cahill, the project manager for Skyline, testified that Sutton place hired Skyline to do façade restoration, balcony and shelf angle repair, and miscellaneous brick work at the building [Cahill tr. (ex. K to the Lichtman aff.) at 10]. Mr. Cahill stated that Neftalin was the foreman for the project and that he would supervise the workers (*id.* at 18). Mr. Cahill asserted that Skyline did not provide any equipment, materials, or tools for the project and that he himself never instructed the workers (*id.* at 20).

Marco Gonzalez, the project manager for POFI, testified that Skyline hired POFI to do the entire job that Skyline was hired to perform [Gonzalez tr. (ex. L to the Lichtman aff.) at 9-10]. Mr. Gonzalez stated that he was on the site daily (*id.* at 15). He said that POFI subcontracted the work to Fifth Ave (*id.* at 16). POFI did not provide equipment, materials, or tools for the work, as those were provided by Fifth Ave (*id.* at 22-23). Fifth Ave also prepared daily logs of its work (*id.* at 17). Mr. Gonzalez testified that Fifth Ave placed, set up, and tied off the aluminum ladder that went from the roof to the terrace, and that this particular ladder was always in place from the beginning of the job (*id.* at 33, 54, 57). He testified that he was told by Neftalin that plaintiff was sent down to retrieve some debris before the accident (*id.* at 58). He also said that workers would always have to wear a safety harness at the site including when climbing the ladder (*id.* at 69, 76). Mr. Gonzalez filled out an incident report based on the information that Neftalin told him [*id.* at 45-46, 48; Incident Report (ex. T to the Lichtman aff.)]. The incident report states that at the time of the accident, plaintiff was in the process of setting

up the extension ladder, and that he climbed the ladder to go secure it at the top when the accident occurred (*id.*).

Benjamin Garcia, the President and owner of POFI, testified that Sutton Place was not involved in directing, controlling, or supervising the work [Garcia tr. (ex. M to the Lichtman aff.) at 83]. Mr. Garcia said that Israel was present at the building at the time of the accident and had called him right after the accident (*id.* at 87). He confirmed that POFI entered into a subcontract with Fifth Ave to perform the work (hereinafter, the subcontract) [*id.* at 24; Subcontract (ex. S to the Lichtman aff.)].

Neftalin, the foreman for Fifth Ave, testified that Fifth Ave was a business owned by his brother, Israel [Martinez tr. (ex. N to the Lichtman aff.) at 14]. He confirmed that Fifth Ave provided all the equipment, materials, and tools for the project (*id.* at 31). He testified that on the date of the accident, Fifth Ave had finished up its work at the building and its workers were cleaning up (*id.* at 44-45). Notably, Neftalin asserted that they had already removed the ladder between the roof and the terrace (*id.*). He said that plaintiff had left personal items on the terrace, including a hammer, and that he threw a ladder down to the terrace without tying it off to retrieve his belongings (*id.* at 45-47). Neftalin stated that at that time, there was no safety line in place because they had already removed everything from the site except the subject ladder and a rope to tie it off (*id.* at 58). Neftalin arrived at the roof after the accident and saw that the ladder had slipped and that plaintiff was on the ground (*id.* at 59). Neftalin asserts that plaintiff had told him that he was gathering his personal belongings from the terrace and that he slipped (*id.* at 65). Neftalin further asserts that he never instructed plaintiff to go to the terrace to retrieve a ladder, as there was no other ladder to retrieve (*id.* at 65, 67). Neftalin contends that at the time of the accident Fifth Ave had no work to do on the terrace as its work was complete (*id.* at 69). He

asserts that plaintiff admitted that he did not tie off the ladder when they were at the hospital after the accident (*id.* at 72). Neftalin also states that there was a rope in the corner of the roof available for plaintiff to use to tie off the ladder (*id.* at 74).

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a *prima facie* showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Labor Law § 240(1) Claim

Plaintiff moves (mot. seq. 005) for summary judgment as to the Labor Law § 240(1) claim.

Labor Law § 240(1) 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 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 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 N.Y.2d 259, 267 (2001); *See Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008), *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007). The statute's objective in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. *Nieves v. Fire Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914, 916 (1999). To prevail on a Labor Law § 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 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224-225 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

Plaintiff asserts that Labor Law § 240(1) was violated due to defendants' failure to provide adequate safety devices so as to provide proper protection to plaintiff. Plaintiff states that his own comparative negligence does not preclude judgment on Labor Law § 240(1). Defendants assert that plaintiff was the sole proximate cause of his accident, as he chose to use the ladder without tying it off, despite a rope being available near the ladder. Defendants also contend that plaintiff was a recalcitrant worker due to his failure to use the available safety devices, such as the rope to tie off the ladder and his safety harness. Fifth Ave and defendants argue that plaintiff was not engaged in a construction-related activity at the time of his fall, as he

was retrieving his personal belongings. Fifth Ave asserts that there are unresolved issues of fact regarding the sole proximate cause of the accident and plaintiff's alleged recalcitrance.

There are several triable issues of fact precluding summary judgment. They arise mainly out of inconsistencies between the testimonies of plaintiff and his foreman, Neftalin. Plaintiff testified that Israel instructed him to go to the terrace to retrieve a ladder, that he untied the ladder on the terrace, and that placed it against the wall next to the other ladder prior to the accident (Deposition of Plaintiff at 47, 49, 56; Continued Deposition of Plaintiff at 74-75, 80-81). Plaintiff never testified that he himself placed the ladder between the roof and terrace to access the terrace. Neftalin testified that plaintiff threw the ladder off and did not tie it to access the terrace to retrieve his personal belongings (Martinez tr. at 45-47). Mr. Gonzalez testified that from the beginning of the job, the ladder was always in place between the roof and the terrace (Gonzalez tr. at 54). Thus, there are issues of fact as to whether plaintiff himself placed the unsecured ladder to reach the terrace from the roof or whether the unsecured ladder was already in place when plaintiff used it. These issues of fact are material and relate to whether plaintiff was the sole proximate cause of his accident.

As there exist several triable, material issues of fact, the court denies plaintiff's motion for summary judgment as to the Labor Law § 240(1) claim. For the same reasons, the court denies the branch of Fifth Ave's motion (mot. seq. 007) for dismissal of the complaint based on the allegation that plaintiff was the sole proximate cause of his accident.

Labor Law § 200 Claim

Defendants move (mot. seq. 006) for summary judgment and dismissal of the Labor Law § 200 and common law negligence claims.

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' [citation omitted]." *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep't 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317 (1981). Labor Law § 200 states, in pertinent part, as follows:

> 1. 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 employed 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 such persons.

There are two distinct standards applicable to Labor Law § 200 cases, depending on whether the accident is the result of the means and methods used by the contractor to do its work, or whether the accident is the result of a dangerous condition. *See McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797-798 (2d Dep't 2007).

New York courts have long held that allegations of inadequate or missing safety equipment are claims that arise out of the means and methods of the work, not out of a dangerous condition existing on the premises. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 506 (plaintiff alleged that he was provided with a defective scaffolding/elevated work platform and the court held that the claim appears to arise from an alleged defect in the methods and materials used by his employer). Here, the accident arose from the use of an unsecured ladder at the work site. An unsecured ladder is the result of a failure to provide adequate safety equipment, which warrants an analysis based on the "means and methods" standard.

To find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised

some supervisory control over the injury-producing work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1999); *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep't 2008). Mere presence at the job site and the ability to perform general supervisory control over a job site is insufficient to impose liability. *See Orellana v. Dutcher Ave. Bldrs., Inc.*, 58 A.D.3d 612, 614 (2d Dep't 2009).

Defendants assert that they did not supervise or control plaintiff's work, as those were responsibilities rested solely on his employer, Fifth Ave. The branch of the motion predicated on dismissal of the Labor Law § 200 claim was unopposed.

There is no evidence presented that anyone other than Fifth Ave supervised or controlled plaintiff's work. Plaintiff testified that his immediate and only supervisors were Neftalin and Israel from Fifth Ave (Deposition of Plaintiff at 36-37; Further Deposition of Plaintiff at 101). Neftalin confirmed that he instructed plaintiff's work (Martinez tr. at 22, 44, 68).

Based on the evidence that defendants did not supervise or control plaintiff's work and as this branch of the motion was unopposed, the court grants defendants' motion for summary judgment as to Labor Law § 200 and that claim is dismissed.

Contractual Indemnity Claim

Defendants move (mot. seq. 006) for contractual indemnification as against Fifth Ave. Fifth Ave also moves (mot. seq. 007) to dismiss the contractual indemnification claim against it.

Article 7 of the subcontract contains the following indemnification provision:

> "To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Architect, Architect's consultants, and Contractor from all damages, losses, or expenses, including attorney fees, from any claims or damage for bodily injury, sickness, disease, or death, or claims for damage to tangible property, other than the Work itself. *This indemnification shall extend to claims resulting from performance of this subcontract and shall apply only to the extent that the claim or loss is caused in whole or in part by any negligent act or omission of Subcontract* or any of its agents, employees or subcontractors. This

> indemnity shall be effective regardless of whether the claim or loss is caused in some part by a party to be indemnified. The obligation of Subcontractor under this Article shall not extend to claims or losses that are primarily caused by the Architect or Architect's consultant's performance or failure to perform professional responsibilities." (emphasis added) (Subcontract at Art. 7)

The subcontract contains a "hold harmless" addendum, which states in relevant part:

> "To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless POFI Construction Corp. and Owner, their officers, directors, partners, representatives, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability (including statutory liability) arising in whole or in part and in any manner from injury and/or death of person or damage to or loss of any property resulting from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by or for Subcontractor *pursuant to any contract Purchase Order and/or related Proceed Order*, except these claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of Fifth Avenue Contracting Corp., Subcontractor will defend and bear all costs of defending any actions or proceeding brought against POFI Construction Corp. as Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default." (emphasis added) (Subcontract)

Fifth Ave asserts that defendants are not entitled to contractual indemnity because the subcontract contains multiple conflicting and inconsistent indemnification provisions which fail to demonstrate any clear indemnification obligation in favor of defendants. Specifically, Fifth Ave suggests that Article 7 of the subcontract contains a negligence trigger, while the "hold harmless" addendum creates an exception to indemnification for the negligence of Fifth Ave.

Defendants submitted an affidavit by Mr. Garcia to clarify the conflicting and inconsistent indemnification provisions [Garcia Affidavit (ex. A to the Heffernan aff. in reply)]. It states that the agreement of the parties was clearly understood to require Fifth Ave to provide defense and indemnity for any of its work under the agreement (*id.* at ¶ 9). Mr. Garcia suggests that it was the agreement and understanding of both parties and a material term of the contract that Fifth Ave agreed to provide defense and indemnity to POFI, as well as the property owner

and the agents of both the owner and POFI, for any accidents that arose out of Fifth Ave's work (*id.* at ¶ 9, 10). Mr. Garcia clarifies that to the extent that any language in the subcontract could be read or construed to excuse Fifth Ave for its own negligence, such provision was written in error and does not reflect the clear, agreed to understanding and agreement of the parties (*id.* at ¶ 14). Mr. Garcia further posits that it was never the case that POFI would excuse one of its subcontractors for its own negligence or that such subcontractor would be relieved of its obligations because of its own negligence (*id.* at ¶ 15).

"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 N.Y.2d 774, 777 (1987) (internal quotations and citations omitted). "An agreement to indemnify must be strictly construed and should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances, i.e., there must be an unmistakable intention to indemnify." *Goldwasser v. Geller*, 279 A.D.2d 297, 297 (1st Dep't 2001) (internal citations and quotations omitted).

Article 7 of the subcontract contains a negligence trigger, where Fifth Ave would be obligated to indemnify defendants where the claim arises from the negligent act or omission of Fifth Ave or its agents. The court understands that the word "Subcontract" in the negligence-triggering sentence of Article 7 was intended to read as "Subcontractor." The word was capitalized and would not convey any other meaning as it is stated in the subcontract. The "hold harmless" addendum contains the critical, qualifying language, "[P]ursuant to any contract Purchase Order and/or related Proceed Order." Therefore, the "hold harmless" addendum applies only to Fifth Ave's work done pursuant to a purchase order or proceed order. Since the

subcontract makes this distinction, its various indemnification obligations are not inconsistent or ambiguous. There is no evidence that Fifth Ave's work at the premises was subject to any purchase order or related proceed order, and therefore Article 7 of the subcontract would apply. Article 7 requires that Fifth Ave indemnify POFI for any claims resulting from performance of the work to the extent that the claims are caused in whole or part by a negligent act or omission of Fifth Ave or any of its employees. It is unclear whether plaintiff's accident was a result of Fifth Ave's negligence, as defendants have failed to establish Fifth Ave's negligence, and thus it is unclear whether the indemnification language in Article 7 of the subcontract was triggered.

Thus, the court denies both the branch of defendants' motion for contractual indemnification as against Fifth Ave and Fifth Ave's motion for dismissal of the contractual indemnification claim against it. The court also denies the branch of defendants' motion seeking attorneys' fees from Fifth Ave.

Other Claims

Fifth Ave moves (mot. seq. 007) for summary judgment and dismissal of defendants' claims for common-law indemnity, contribution, and breach of contract for failure to procure insurance, as well as dismissal of the third-party complaint in its entirety.

Defendants did not oppose the branches of the motion seeking dismissal of the common-law indemnity, contribution, and breach of contract for failure to procure insurance claims. Defendants abandoned these claims by failing to oppose those branches of Fifth Ave's motion. *See Josephson LLC v. Column Fin., Inc.*, 94 A.D.3d 479, 480 (1st Dep't 2012); *see also Ng v. NYU Langone Medical Center*, 157 A.D.3d 549, 550 (1st Dep't 2018); *see also Saidin v. Negron*, 136 A.D.3d 458, 459 (1st Dep't 2016).

Fifth Ave asserts that the common-law indemnity and contribution claims should be dismissed because plaintiff did not sustain a grave injury, and therefore those claims are barred by Workers' Compensation Law § 11. Fifth Ave also asserts that the breach of contract for failure to procure insurance claim should be dismissed because Fifth Ave procured the required insurance coverage.

Since defendants did not oppose these claims, the court finds that they have been abandoned, and thus the court grants summary judgment dismissing the common-law indemnity, contribution, and breach of contract for failure to procure insurance claims. The court denies the branch of Fifth Ave's motion seeking to dismiss the third-party complaint in its entirety, as the contractual indemnification claim remains.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Adalberto Perez's motion (mot. seq. 005) for an order granting partial summary judgment in his favor on the Labor Law § 240(1) claim is denied; and it is further

ORDERED that the branch of defendants/third-party plaintiffs 50 Sutton Place South Owners, Inc., Skyline Restoration, Inc., and POFI Construction, Corp.'s motion (mot. seq. 006) for an order, pursuant to CPLR § 3211(a)(7) and/or § 3212, dismissing plaintiff's Labor Law § 200 and/or common law negligence claims is granted and the Labor Law § 200 and/or common law negligence claims are dismissed; and it is further

ORDERED that the branch of defendants/third-party plaintiffs 50 Sutton Place South Owners, Inc., Skyline Restoration, Inc., and POFI Construction, Corp.'s motion (mot. seq. 006) for an order granting defendants contractual indemnity as against Fifth Ave is denied; and it is further

ORDERED that the branch of defendants/third-party plaintiffs 50 Sutton Place South Owners, Inc., Skyline Restoration, Inc., and POFI Construction, Corp.'s motion (mot. seq. 006) for an order granting defendants reasonable attorneys' fees is denied; and it is further

ORDERED that the branch of Fifth Ave Contracting's motion (mot. seq. 007) for an order, pursuant to CPLR § 3212, dismissing plaintiff's complaint in its entirety is denied; and it is further

ORDERED that the branch of Fifth Ave Contracting's motion (mot. seq. 007) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing the common-law indemnity and contribution claims is granted and those claims are dismissed; and it is further

ORDERED that the branch of Fifth Ave Contracting's motion (mot. seq. 007) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing the contractual indemnity claims is denied; and it is further

ORDERED that the branch of Fifth Ave Contracting's motion (mot. seq. 007) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing the breach of contract for failure to procure insurance claim is granted and that claim is dismissed; and it is further

ORDERED that the branch of Fifth Ave Contracting's motion (mot. seq. 007) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing the third-party complaint in its entirety is denied.

This constitutes the decision and order of the court.

12-21-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE