Mullen v Hines 1045 Ave. of the Ams. Invs., LLC
2019 NY Slip Op 33247(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 151060/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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DONALD MULLEN, Index No.: 151060/2017

Plaintiff,

-against-

HINES 1045 AVENUE OF THE AMERICAS INVESTORS, LLC, PACOLET MILLIKEN ENTERPRISES, INC., STRUCTURETONE and 7BP OWNER, LLC,

Defendants.

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HINES 1045 AVENUE OF THE AMERICAS INVESTORS, LLC, STRUCTURE TONE LLC f/k/a STRUCTURE TONE, INC. incorrectly s/h/a STRUCTURETONE, 7BP OWNER, LLC and PACOLET MILLIKEN ENTERPRISES, INC., Third-Party Index No.: 595563/2017

Third-Party Plaintiffs,

-against-

JACOBSON & CO., INC.,

Third-Party Defendant.

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Kalish, J.:

This is an action to recover damages for personal injuries allegedly sustained by a drywall taper on September 9, 2016, when, while walking on stilts at a construction site located at 7 Bryant Park, New York, New York (the Premises), wherein construction was underway involving the interior fit-out of a Bank of China (the Project), he tripped on Masonite.

In motion sequence number 001, defendants/third-party plaintiffs Hines 1045 Avenue of the Americas Investors, LLC (Hines), Pacolet Milliken Enterprises, Inc. (Pacolet), Structure Tone LLC (Structure) and 7BP Owner, LLC (7BP) (collectively, defendants) move pursuant to CPLR

3212 for summary judgment dismissing the complaint against them and for summary judgment in their favor on the third-party contractual indemnification claims against third-party defendant Jacobson & Co., Inc. (Jacobson).

In motion sequence number 002, plaintiff Donald Mullen moves pursuant to CPLR 3212 for summary judgment in his favor on the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against defendants.

Jacobson cross-moves in motion sequence number 001 pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint against it.

BACKGROUND

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Jacobson as a drywall taper for the Project. Plaintiff's Jacobson foreman, Sal Chinnici, gave plaintiff his job instructions, which included taping various areas of the 11th floor of the Premises. Chinnici also observed plaintiff's work. Plaintiff provided his own taping tools, and Jacobson provided a pair of stilts, which were necessary for the performance of said work. Plaintiff testified that the stilts could be adjusted to accommodate work on the nine-foot ceilings of the Premises, and that, prior to the accident, he inspected them and found them to be without any defects. Plaintiff also noted that, in the past, he had never had any problems with the stilts issued to him by Jacobson.

Plaintiff further testified that, after performing taping work in the offices, kitchen and closet of the 11th floor, he began to work on the 11th floor ceiling near the elevator lobby. Plaintiff described the floor of the lobby as being "12 feet by 28 feet maybe" and "entire[ly]"covered in protective Masonite (plaintiff's tr at 31-32, 53). He described the

Masonite as "4 by 8 sheets, brown color" (*id.* at 31). The Masonite seams were taped down with duct tape. Plaintiff had no problems with the lighting in the elevator lobby.

Plaintiff explained that, while in the elevator lobby, he walked around on the stilts as he performed his job duties. At one point, after taking three or four steps on the Masonite, his (stilt) foot got caught in a taped seam that had split, causing him to trip and fall approximately 10 feet to the floor.

Plaintiff maintained that prior to the day of the accident, he had not heard any complaints about the condition of the Masonite that he tripped on, nor had he noticed the tape "split down the middle" prior to the date of the accident (*id.* at 66). Plaintiff specifically testified that his foot was caused to get caught "[w]hen the foot applied pressure on the one piece [of Masonite], one side of the tape went down, and the other side either went up or just stayed there" (*id.* at 67).

Plaintiff also testified that a Baker scaffold was located in the elevator lobby on the 11th floor at the time of the accident, which had been provided by Jacobson. However, plaintiff chose to use the stilts because "[i]t's faster to use the stilts; gets the job done faster" (*id.* at 59-60).

Deposition Testimony of Jack Western (Structure's Superintendent)

Jack Western testified that he was Structure's superintendent on the Project on the day of the accident, and that Structure was the general contractor on the Project. As such, he oversaw subcontractors, schedules and day-to-day issues. He explained that the Project involved the interior fit-out of the Bank of China, the owner of the Premises, from the second cellar level to the 14th floor. Jacobson was hired to do all the drywall work on the Project, which included studs, framing, sheet rock and grid ceiling linings.

He explained that the 11th floor elevator lobby's floor, which was comprised of terrazo

and stone, was fully finished at the time of the accident. Accordingly, it was necessary "[t]o protect it" with Masonite during the rest of the construction on the 11th floor (Western tr at 19). The Masonite was installed by "[t]he Structure Tone laborers" at the request of Structure's superintendent, and the pieces of Masonite were attached together with duct tape (*id.* at 22). Western could not recall whether any inspections were performed after the Masonite and duct tape were put down. When asked as to which entity was in charge of such inspections, he opined that it could be subcontractors, superintendents and/or foremen, charged with managing their company's own safety.

Deposition Testimony of Conor McCullaugh (Structure's Project Manager)

Conor McCullaugh testified that, as Structure's superintendent, he walked the site everyday. He maintained that everyone working for Structure was responsible for safety at the site. He explained that the subject floor was comprised of a combination of stone and Terrazzo, which had been fully installed prior to the accident, and that Masonite had been temporarily placed on the finished floor "to protect the finish," so that it didn't "get scratched or damaged" (McCullaugh tr at 30). He also confirmed that the Masonite was secured with duct tape.

Deposition Testimony of Salvatore Chinnici (Jacobson's Foreman)

Salvatore Chinnici testified that he served as Jacobson's foreman on the Project, and that Jacobson's workers were working on the 11th floor of the Premises on the day of the accident, and that Jacobson had a safety director who visited the Premises once a week. Chinnici stated that he gave plaintiff the task of taping the ceiling that day, and that plaintiff had the choice as to whether to utilize a Baker scaffold or stilts in order to perform said work. Chinnici explained that his crews only worked on stilts when performing work on ceilings, and that he inspected the

stilts every time he gave them out.

Chinnici further testified that, on the day of the accident, Structure was pressuring Jacobson to finish the ceilings on the Project. Before plaintiff began working on the 11th floor ceiling, Chinnici inspected the Masonite and did not see anything wrong with it. In addition, he was unaware of any complaints having been made in regard to the condition of the Masonite. Chinnici also inspected the stilts, and found that "[n]othing was wrong with them" (Chinnici tr at 37).

Chinnici testified that he found out about the accident in a call from plaintiff, wherein plaintiff told him that he was injured when "he fell, tripped on Masonite" (*id.* at 40). Plaintiff also told him that the accident happened because "[the Masonite] popped up and tripped [him] on the stilts" (*id.*).

After the accident, Structure workers tried to fix the popping up problem by putting new tape down, but, as the problem was caused by warping of the Masonite board, it simply popped up again. Specifically, Chinnici said that

> "they tried to put duct tape on it and it popped up again. So the duct tape didn't do nothing. So obviously, it was the board -- there was something wrong with the board. It was probably warped. Because when these boards get wet, they tend to warp. And that's probably what it was. It wasn't getting -- going down anymore. So it was staying warped, it was staying up. It had this up -- this upstroke of the board (indicating), like an imperfection. Obviously, the tape wasn't holding it that much anymore."

(*Id.* at 73, lines 18-25; at 74, lines 2-4.)

The Labor Law § 240 (1) Claim Against Defendants

Plaintiff moves in seq. 002 for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants move in seq. 001 for dismissal of said claim

against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

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

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

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

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

Here, Labor Law § 240 (1) does not apply to the facts of this case because while plaintiff may have been elevated on the stilts at the time of his accident, his injury resulted, first and foremost, due to his trip on the unsecured Masonite, which was a separate hazard from any elevation-related risk associated with working on stilts (*see Nicomenti v Vineyards of Fredonia, LLC*, 25 NY3d 90, 99 [2015] [where the plaintiff, who was utilizing stilts at the time of the accident, slipped on a thin patch of ice, court determined that Labor Law § 240 (1) did not apply because the "plaintiff's accident was plainly caused by a separate hazard - ice - unrelated to any elevation risk"]; *Melber v 6333 Main St.*, 91 NY2d 759, 761 [1998] [no Labor Law § 240 (1) liability where plaintiff was injured when he tripped over electrical conduit while walking on stilts to retrieve a tool because the "injury resulted from a separate hazard - electrical conduit protruding from the floor," rather than from the hazard of working from a height, which would required a protective safety device to keep plaintiff safe from falling]).

> "The 'special hazards' [referred to in Labor Law § 240 (1)] . . . do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'"

(*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [citations omitted]).

Thus, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants are entitled to dismissal of said claim against them.

The Labor Law § 241 (6) Claim Against Defendants

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendants. Defendants move for dismissal of said claim against them. Labor

Law § 241 (6) provides, in pertinent part, as follows:

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

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Initially, while plaintiff asserts multiple alleged Industrial Code violations in his bill of particulars, with the exception of opposing the dismissal of sections 23-1.7 (e) (1) and (2), plaintiff has not put forth any specific arguments establishing his entitlement to summary judgment in his favor on any alleged violations, nor does he oppose any dismissal of the same. Therefore, those alleged Industrial Code violations are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, plaintiff is not entitled to summary judgment in his favor on the Labor Law § 241 (6) claim against defendants, and defendants are entitled to dismissal of those parts of the Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2)

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]).

Sections 23-1.7 (e) (1) and (2) provide, in pertinent part:

"(e) Tripping and other hazards.

> (1) Passageways. All passageways shall be kept free from . . . debris and from any other obstructions or conditions which could cause tripping.
>
> * * *
>
> (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."

Here, section 23-1.7 (e) (1) does not apply to the facts of this case, as there has been no showing whatsoever that plaintiff's accident, which occurred in an open elevator lobby, occurred in a passageway (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157 [4th Dept 2007]; *O'Sullivan*, 28 AD3d at 225-226; *Appelbaum*, 6 AD3d at 310; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]).

To that effect, the measurements of the lobby where the accident took place, as well as

photographs of the same, which were annexed to defendants' motion as exhibit G, reflect that the accident occurred in an open space/room (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 595 [1st Dept 2010] [no section 23-1.7 (e) (1) liability where plaintiff described the main lobby area where he fell as "a big open space"]; *Fura v Adam's Rib Ranch Corp.*, 15 AD3d 948, 948 [4th Dept 2005] [section 23-1.7 (e) (1) did not apply "because plaintiff and his coworker were working in a ballroom and no one was using the area to travel from one place to another]; *Canning v Barney's New York*, 289 AD2d 32, 33-34 [1st Dept 2001] [area where the accident occurred was not a passageway for the purposes of section 23-1.7 (e) (1), as it was located "within the inner wall at the approximate center of the building"]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2d Dept 2001] [no section 23-1.7 (e) (1) liability where the plaintiff tripped on plywood while walking through an 8th floor space at the construction site]; *Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 392 [1st Dept 1997] [open space on the 41st floor of an office building where the accident occurred was not a passageway for the purposes of section 23-1.7 (e) (1) liability]; *compare Rossi v 140 West JV Manager LLC*, 171 AD3d 668, 668 [1st Dept 2019] ["[t]he area where plaintiff fell was, by definition, a passageway, as he tripped over . . . demolition debris along the only route he could take to return to his work area"]).

Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (e) (1).

In addition, section 23-1.7 (e) (2), which refers to tripping hazards in working areas, may apply to the facts of this case, because while the edge of the Masonite that plaintiff tripped on was not an accumulation of dirt or debris or scattered tools and materials, the Court finds that a genuine issue of material fact exists as to whether the Masonite formed a sharp projection for the

purposes of the provision, as a "sharp object" has been defined by the court as to include any "distinct object jutting out from the rest of the floor's surface" (*Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 394 [1st Dept 1997] [door stop that caused plaintiff to fall was a sharp object for the purposes of section 23-1.7 (e) (2)]). This is contrast to a "bolt, which was embedded in the ground, was not . . . a 'sharp projection[],' as required by the . . . provision" (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]).

Here, the testimony of Chinnici raises a genuine issue of material fact as to whether Masonite was "warped" and, if so warped, created an "upstroke" or sharp projection which constituted a tripping hazard that was a proximate cause of plaintiff's fall. While it is undisputed that, generally speaking, the Masonite was integral to the work being performed on the Project at the time of the accident-its purpose being to protect the floor during the construction process-Plaintiff has "raised a triable issue of fact as to whether the warped piece of [Masonite] that allegedly caused his accident was an integral part of his work (*Giza v NYC Sch. Constr. Auth.*, 22 AD3d 800, 801 [2d Dept 2005]; *see Egan v West Square Corp.*, 2018 NY Slip Op 33376 [U] [Sup Ct, Kings County, December 31, 2018, Landicino, J.] [holding that "the Masonite itself was integral to the work inasmuch as it was needed to protect the wood floors. However the hazardous condition present in the Masonite that caused the accident (i.e., the raised edge) was not integral to the work]; *cf. Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013] [holding that there was no section 23-1.7 [e] [2] liability where the plaintiff tripped over a piece of unwarped plywood that had been purposely laid over the sidewalk to protect it, and thus, it was an integral part of the work]).

As such, defendants are not entitled to dismissal of that part of the Labor Law § 241 (6)

claim predicated on an alleged violation of section 23-1.7 (e) (2), and plaintiff is also not entitled to summary judgment on this particular claim.

The Common-Law Negligence and Labor Law § 200 Claims

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

Labor Law § 200 (1) states, in pertinent part, as follows:

> "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 section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when 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 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept

2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]; *see also Lopez v Dagan*, 98AD3d 436 [1st Dept 2012]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, plaintiff was injured when, while walking on stilts across the floor, he tripped on the duct-taped seam of protective Masonite that had popped up because the tape holding the Masonite pieces together split. Therefore, first and foremost, the accident was caused due to the means and methods of the installation and/or maintenance of the Masonite at the Premises. "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Here, there is no evidence in the record indicating that defendants Hines, Pacolet or 7BP were responsible in any way for installing and/or maintaining the Masonite floor at the Project. In addition, as asserted by defendants, the testimonial evidence indicates that the alleged defect in the Masonite that contributed to the accident was not visible upon inspection prior to the accident. Therefore, it has not been established that they created or had actual or constructive notice of any unsafe condition (*see Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1st Dept 2014]). Notwithstanding the foregoing, Hines, Pacolet, and 7BP have the burden in seq. 001 of demonstrating by proof in admissible form that they did not actually exercise supervisory control over the injury-producing work." No witness was ever deposed for any of these parties, and no affidavit has been submitted by any of these parties as to their role with respect to the Project.

As such, the Court finds that Hines, Pacolet, and 7BP have failed to show prima facie entitlement to dismissal of plaintiff's Labor Law § 200 and common-law negligence causes of action against them.

Turning to Structure, the record establishes that Structure employees were charged with

installing, maintaining and inspecting the Masonite over the floor. Thus, an issue of fact exists as to whether any negligence on the part of Structure's work was responsible for the accident.

Therefore, plaintiff is not entitled to summary judgment in his favor on the common-law negligence and Labor Law § claims against Structure, and Structure is not entitled to dismissal of said claims against it.

The Third-Party Claims Against Jacobson

Jacobson cross-moves for summary judgment dismissing the third-party claims against it sounding in contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance. Defendants move for summary judgment in their favor on their third-party claim for contractual indemnification against Jacobson.

Initially, defendants argue that Jacobson is not entitled to summary judgment in his favor as to liability on the third-party claims against it because his cross motion is untimely, in that it was made after the expiration of the court's 60-day deadline for bringing such motions. Jacobson filed the note of issue on March 12, 2019, and the cross motion was not filed until June 20, 2019, more than 60 days thereafter. However, it should be noted that

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

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal

citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, that part of Jacobson's cross motion seeking relief on the third-party contractual indemnification claim against it is "nearly identical" to that raised by defendants in their motion. Therefore, no showing of good cause is required, and the court will consider Jacobson's request for summary judgment dismissing the third-party contractual indemnification claim against it.

In any event, while those parts of Jacobson's cross motion seeking dismissal of the third-party claims for contribution and common-law indemnification are untimely, in their opposition, defendants state that they do not oppose dismissal of said third-party claims.

Thus, Jacobson is entitled to dismissal of the third -party claims for contribution and common-law indemnification against it (*see* oral arg tr at 31).

In addition, Jacobson is also entitled to dismissal of the third-party claim for breach of contract for failure to procure insurance against it. A review of the record reveals that Jacobson fully satisfied its obligations to obtain insurance on behalf of defendants by purchasing a policy of liability insurance with Travelers Indemnity Company for the period commencing April 1, 2016 to April 1, 2017 and containing a blanket endorsement covering contractually designated additional insureds, which included Structure.

Importantly, even in the event that an insurance company refuses to indemnify under the coverage purchased, as is alleged here, a party is not liable to another for contractual indemnification or breach of contract under the insurance procurement provisions of a contract when that party fulfilled its contractual obligation to procure proper insurance for the benefit of that other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996] [third-

party defendant was not liable to appellants for breach of contract for failure to procure insurance "inasmuch as [it] had fulfilled its contractual obligation to procure proper liability insurance on behalf of appellants"]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Thus, Jacobson is also entitled to dismissal of the third-party claim for breach of contract to procure insurance against it.

The Third-Party Claim for Contractual Indemnification Against Jacobson

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *see also Posa v Copiague Pub. School Dist.*, 84 AD3d 770, 773 [2d Dept 2011] [where the defendants had a contractual right to indemnification from the subcontractor who supplied the defective tabletop that injured the plaintiff, but where the defendants' own proof raised a triable issue of fact as to whether they themselves were partially at fault in causing the accident, defendants could not be granted summary judgment]).

Initially, as plaintiff was an employee of Jacobson, relevant to this issue is Workers' Compensation Law § 11, which prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Notably, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]).

Here, the purchase order between Structure and Jacobson (the Purchase Order) contained an indemnification provision (the Indemnification Provision), which states, in pertinent part, that:

> "To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless [Structure], the owner of the project, the owner of the property where the job/project . . . from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, arising in

> whole or in part and in any manner from the acts, omissions, breach or default of the Subcontractor, its officers . . . employees and Subcontractors, in connection with the performance of any work by subcontractor . . . pursuant to this Subcontractor/Purchase Order and/or related Proceed Order. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against [Structure] and/or Owner . . . arising in whole or in part out of any such acts, omission, breach of default"

(Jacobson's notice of cross motion, exhibit K, the Purchase Order, the Indemnification Provision, ¶ 11.2).

As plaintiff was working on the Project on behalf of Jacobson at the time he was injured, the accident arose under the Purchase Order, and, therefore, "the contractual indemnity provision was triggered by plaintiff's personal injury claim" (*see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [defendant was entitled to summary judgment on contractual indemnification claim against roofing contractor since the work the plaintiff was performing on behalf of his employer was considered "Work" pursuant to the contract]).

The record is devoid of proof in admissible form that Hines, Pacolet and 7BP were in fact owners of the Premises on the day of the accident, although based on their papers it is clear to the Court that it is the position of these parties that they are owners for the purposes of the contract. In fact, the only reference to ownership of the Premises is Western's testimony that the Bank of China was the owner of the Premises. It is problematic for Hines, Pacolet and 7BP both in seq. 001 and seq. 002 that no testimony was submitted by these parties as to either their role in the Project specifically or their status as owner generally.

As such, as Hines, Pacolet and 7BP have not shown prima facie that they are owners for the purposes of the contract and the instant motion, they are not entitled to summary judgment on their third-party complaint. Likewise, Jacobson has failed to show prima facie that Hines, Pacolet

and 7BP were not owners for the purposes of the contract. The issue of their ownership status remains a genuine issue of material fact.

As to Structure, a review of the record reveals that Structure's employees were responsible for installing, maintaining and inspecting the Masonite, and, as discussed prior, at least a question of fact exists as to whether any negligence on their part in doing so caused the accident. "'[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefore'" (*id.*, quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *DiFilippo v Parkchester N. Condominium*, 65 AD3d 899, 899 [1st Dept 2009] [although the indemnification provision would have been enforceable had the indemnitee been found not negligent, "[b]ased on issues of fact as to who created the dangerous condition [water and debris on floor] causing plaintiff's slip and fall, the motion for summary judgment and cross motion for summary judgment as to contractual indemnification were properly denied"]).

Thus, subject to a determination of Structure's liability to plaintiff, Structure is entitled to conditional contractual indemnification from Jacobson at this time, and Jacobson is not entitled to dismissal of the third-party claim for contractual indemnification against it (*see DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

CONCLUSION

Accordingly, it is

ORDERED that the branch of the motion by defendants/third-party plaintiffs Hines 1045 Avenue of the Americas Investors, LLC (Hines), Pacolet Milliken Enterprises, Inc. (Pacolet), Structure Tone LLC (Structure) and 7BP Owner, LLC's (7BP) (collectively, defendants) motion

(motion sequence number 001) pursuant to CPLR 3212 for summary judgment dismissing the complaint against Hines, Pacolet and 7BP is granted to the extent that the Labor Law § 240 (1) claim is dismissed and the Labor Law § 241 (6) claim is dismissed except as predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2), and the branch of the motion is otherwise denied; and it is further

ORDERED that the branch of motion seq. 001 pursuant to CPLR 3212 seeking summary judgment on the third-party complaint is granted to the extent Structure is granted conditional contractual indemnification against Jacobson, and the motion is otherwise denied; and it is further

ORDERED that plaintiff Donald Mullen's motion (motion sequence number 002) pursuant to CPLR 3212 for summary judgment in his favor on the common-law negligence and Labor Law §§ 200, 240 (1), and 241 (6) claims is denied; and it is further

ORDERED that the branch of Jacobson's cross motion in motion sequence number 001 pursuant to CPLR 3212 for summary judgment dismissing the third-party contribution, common-law negligence and failure to procure insurance claims is granted, and the cross motion is otherwise denied.

Dated: Oct 31, 2019

ENTER:

J.S.C.

HON. ROBERT D. KALISH
J.S.C.