SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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VINCENT BARBATO,

Plaintiff,

-against-

200 PARK, L.P., and ARAGON LLC.,

Defendants.

DECISION AND ORDER

Index No.: 112933/11

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200 PARK, L.P. and ARAGON, LLC.,

Third-Party Plaintiff,

-against-

KORN/FERRY INTERNATIONAL,

Third-Party Defendant.

Index No.: 590192/12

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ARAGON, LLC.,

Second Third-Party Plaintiff,

-against-

SOUND REFRIGERATION & AIR CONDITIONING and OMC SHEETMETAL,

Second Third-Party Defendant.

Index No.: 590595/12

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SOUND REFRIGERATION & AIR CONDITIONING,

Third Third-Party Plaintiff,

-against-

OMC, INC. and OMC SHEETMETAL, INC.,

Third Third-Party Defendant.

Index No.: 590834/12

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ARAGON LLC,

Fourth-Party Plaintiff,

-against-

STRIANO ELECTRIC, INC.,

Fourth-Party Defendant.

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SOUND REFRIGERATION & AIR CONDITIONING,

Fifth Third-Party Plaintiff,

-against-

STRIANO ELECTRIC, CO., INC.,

Fifth Third-Party Defendant.

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**DAVID B. COHEN, J.:**

Motion sequence numbers 010, 011, 012, 013, and 014, have been consolidated for disposition.

In motion sequence 010, second third-party defendant/third third-party plaintiff/fifth third-party plaintiff Sound Refrigeration and Air Conditioning (Sound) moves, pursuant to CPLR 3212, for an order granting summary judgment, dismissing plaintiff Vincent Barbato's (plaintiff) complaint; dismissing the second third-party complaint; granting contractual indemnification against second third-party defendant/third third-party defendants OMC, Inc., and OMC Sheetmetal, Inc. (collectively known as OMC), together with interest, costs, disbursements and attorney's fees.

In motion sequence 011, defendants/third-party plaintiffs 200 Park, L.P. (200) and third-party defendant Korn/Ferry International (Korn/Ferry) move, pursuant to CPLR 3212, for an order granting summary judgment, dismissing plaintiff's complaint and any cross claims. 200 and Korn/Ferry move for conditional summary judgment for contractual indemnification against second third-party plaintiff/ fourth-party plaintiff Aragon, LLC (Aragon). 200 and Korn/Ferry

also move for conditional summary judgment against Aragon and Sound for common law indemnification.

In motion sequence 012, fourth-party defendant/fifth third-party defendant Striano Electric, Inc. (Striano), moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing all claims asserted by Aragon and any cross claims.

In motion sequence 013, Aragon moves, pursuant to CPLR 3212, for an order granting summary judgment as to its claim of contractual indemnification and common law indemnification against Sound and Striano.

In motion sequence 014, third third-party defendants OMC defendants move, pursuant to CPLR 3212, for an order granting summary judgment, dismissing the third-party complaint and all cross claims and counterclaims asserted against it.

## FACTUAL ALLEGATIONS

### Plaintiff's deposition

Plaintiff testified that he was working for OMC on December 10, 2010, as a metal journeyman on the 32nd floor of 200 Park Avenue in Manhattan, New York. He maintains that Mike Cheecci (Checci) was his supervisor and that OMC had another worker at the site whom plaintiff supervised. Plaintiff testified that Aragon, the general contractor, was working on the subject floor along with electricians, carpenters, and laborers. Plaintiff maintains that Al Toosie (Toosie) from OMC instructed him to install and lay out hangers for the HVAC system and provided him the blueprints for the work.

Plaintiff testified that he would utilize an eight-foot ladder and metal hangers which were provided by OMC. He maintains that his apprentice, who was standing to his right at the time of his accident, would hand him hangers while he was on the ladder. He recalls electricians working nearby who were using cable and pipe. He maintains that there was debris on the floor, but that it was not in the immediate work area where the ladder was placed.

Plaintiff maintains that when he came down from the ladder after laying out a hanger, he stepped off of the ladder to the ground on his left. Upon turning to his left, he stepped onto an electrician's bridle hanger with his left foot while his right foot was located on the ground. He was not holding the ladder at the time. Plaintiff testified that a bridle hanger, which is used by electricians, has a beam clamp which looks like an open circle. He recalls seeing bridle hangers on the ground in the area where he was working. Plaintiff testified that he had not observed the bridle hanger which he stepped on before he ascended the ladder.

Plaintiff testified that his left foot rolled when it contacted the bridle hanger and that he proceeded to fall into dumpsters, striking his right shoulder. Plaintiff did not recall if there was any debris on the ground in the area where he fell. Following his accident, workers nearby came over to see what had occurred. Shortly thereafter, an ambulance was contacted. Plaintiff filled out an accident report with OMC about six days later.

Plaintiff testified that prior to the date of his accident, he did not make any complaints about debris left on the floor in the area in which he was working. He maintains that no one other than himself checked on OMC's work, that OMC does not use bridle hangers, and that if OMC created any debris, Aragon was to provide workers for clean up. He did not see anyone cleaning on the day of the accident. He was not sure how long the bridle bracket was on the ground prior to his accident.

Plaintiff did not know who Korn/Ferry was. He maintains that Aragon was always at the site, but that he did not speak with anyone from the company, nor did they supervise his work. Plaintiff maintains that while there were electricians working in his vicinity, he did not complain about their work. Plaintiff recalls that the six times he ascended and descended the ladder, he did not observe the bridle hanger on which he fell.

Plaintiff testified that his supervisor at the site was Angelo from Sound, which subcontracted OMC for work. At his first deposition on February 6, 2014, plaintiff testified that Angelo did not tell him how to perform his work. However, at his January 13, 2016 deposition, plaintiff testified that Angelo told him what needed to be done and would direct OMC through Cheechi or Toosie, what work to conduct, the location of where to complete it, and when to complete the work.

Plaintiff testified that when he arrived at the site on the date of his accident, he received instructions, but that he did not remember who told him what to do or if Angelo was at the site. He recalls observing electricians throwing bridle hangers on the floor after removing them from the time of his break until the time of his accident. He maintains that the hanger on which he stepped had a beam clamp with fireproofing on it.

**Donn Wilson's deposition**

Donn Wilson (Wilson) testified that he works as the Executive Director of Office Services and Facilities at Korn/Ferry. Wilson testified that Korn/Ferry occupies the 32nd and 33rd floor of 200 Park Avenue. He maintains that he oversees the day to day operations of the office for facilities and manages renovations and construction projects.

Wilson testified that the building manager is Tishman Speyer, and 200 is a managing company under the Tishman Speyer umbrella. He maintains that prior to Korn/Ferry occupying the 33rd floor, a build out was needed. Korn/Ferry retained Aragon to serve as the general contractor and Striano was an electrical subcontractor hired by Aragon. He testified that himself and Stacey Marinello from Korn/Ferry would oversee the work of Aragon.

Wilson maintains that his responsibilities at the site were to ensure that everything was consistent with building protocols. He would check on the construction two to three times a day. He did not direct any of the construction workers regarding how to conduct their work. Wilson contends that Korn/Ferry did not have management authority over the trades and that he would provide concerns to the general superintendent. Korn/Ferry did not provide any construction materials, or equipment to the trades. There was no one stationed at the site on a consistent basis.

Korn/Ferry retained a tenant representative who would hold meetings run by Tamela Johnson (Johnson). Johnson would be on-site once a week, walk the site, and conduct meetings with himself and Aragon. Wilson maintains that scheduling and site safety would be an issue discussed at the meeting.

Wilson testified that he was not present for plaintiff's accident. Wilson recalls that Aragon retained a waste debris removal company and that he observed Aragon employees cleaning and sweeping the area. He maintains that 200 did not hire any subcontractors. Wilson maintains that he did not observe any hazardous conditions.

**Michael Mucci's deposition**

Michael Mucci (Mucci) testified that he works for Tishman Speyer as the director of operations and construction. He maintains that 200 runs the 200 Park Avenue property for Tishman Speyer. Korn/Ferry was one of its tenants that was renovating the 32nd Floor. He testified that the building did not have contractual work with Aragon, the general contractor, or any of the parties which were involved with the work.

Mucci testified that he would periodically walk the site and attend project meetings on behalf of the landlord. He maintains that scheduling, elevator shutdowns, and safety would be discussed at such meetings. While he had stop work authority, he did not supervise any of the wok which was being performed. Mucci testified that 200 did not provide equipment.

Mucci was not aware of plaintiff's accident. He maintains that a bridle hanger is a device used by electricians to hang certain things on a ceiling, however he has not observed one at the site. He maintains that the project was conducted by the "tenant hiring" contractors and subcontractors. Mucci testified that Tishman and 200 had no responsibility for the subject project except to support functions including freight requests, shutdowns, and to ensure that the project was run in accordance with established rules and regulations.

**Evangelos Sakkos's deposition**

Evangelos Sakkos (Sakkos) testified that he works as a project manager for Sound, a company which installed heating, ventilation, and air conditioning. He recalls that for the subject project, Aragon was the general contractor and had hired Sound. Sakkos coordinated work and scheduling, checked manpower, and overlooked subcontractors. Sound did not have laborers at the site. Sakkos testified that Sound's subcontractor, OMC, was performing HVAC

work at 200 Park Avenue on December 10, 2012. Sakkos would visit the site every other day and would speak with Cheechi.

Sakkos did not have communications with plaintiff about his work. Sound did not hold safety meeting with its employees, nor did it require OMC to hold such meetings. Aragon would host safety meeting once a week which were required to be attended by every trade.

After reviewing a picture of a hanger holding a wire, Sakkos testified that Sound did not use this type of hanger at 200 Park Avenue, nor did he see OMC workers at the site working with this type of wire. He does not recall observing that type of hanger on the floor at the site, nor did he recall receiving or making a complaint about construction debris. Sakkos maintains that Sound had six subcontractors, but that Sound did not employ electricians at the site.

Sakkos testified that he did not have the authority to tell one the employees of subcontractors to stop working or tell them how to perform their work. He did not provide tools or ladders to subcontractors. Sakkos did not have communications with Korn/Ferry about its work at the site. He would meet with the general contractor, review the documents and schedules, and would relay that information to the subcontractors who worked for Sound.

Sakkos maintains that he would conduct walk throughs to observe work, and if there was something which he could discard, he would apprise the general contractor. Subcontractors would report complaints and he would tell Aragon and his superiors. He did not provide instructions to OMC workers and he was not aware of anyone from Aragon giving workers instructions. Sakkos testified that every trade could create a pile with debris and the laborer would throw the garbage in containers. Sakkos was not present at the time of plaintiff's accident.

**James Murphy's deposition**

James Murphy (Murphy) testified that he works as director of security for Tishman at 200 Park Avenue. Murphy testified that 200 is the business entity for the real estate portion of Tishman Speyer. He recalls that in 2010, Korn/Ferry had a construction project on the 32nd floor of 200 Park Avenue.

Murphy does not believe that himself or anyone from Tishman had any involvement with the construction project. He did not see any construction going on during that time, did not have walkthroughs, did not have safety meetings, and did not conduct inspections. He was not present for plaintiff's accident and could not locate an incident report.

**Robert Driscoll's deposition**

Robert Driscoll (Driscoll) testified that he works for Striano as a subforeman. At 200 Park Avenue, Driscoll was working at a space occupied by Korn/Ferry. Driscoll did not witness the accident, but was told by another worker when it occurred and drafted an incident report. Driscoll maintains that plaintiff's accident took place in an open area. He testified that Striano was not performing work near plaintiff and were located fifty to sixty feet away from his work area.

Driscoll testified that he decided where to work based upon the blue prints which he received. Driscoll maintains that Aragon, as the general contractor, coordinated the day to day work. He testified that no one from Aragon instructed Striano how to conduct its work or provided tools. He maintains that Striano was not the only electric subcontractor on the job. Driscoll testified that Nead Electric was also working on the 32nd floor in December of 2010, as close to as five and ten feet as to where plaintiff was working.

Driscoll testified that he recalls seeing the bridle hanger involved in the accident with fireproofing spray which could mean that it was old. He testified that Striano was using clean bridle hangers which did not have spray. He did not know who put the bridle hanger on the floor or when it was there. Driscoll maintains that Aragon employees cleaned in that general area that day.

Driscoll testified that employees of Striano were instructed by him to push debris to a safe location. He maintains that although Striano utilized bridle hanger beam claps on the 32nd floor, Striano had been finished working in that area of plaintiff's accident. Driscoll maintains that a worker cleaned the area thirty minutes or less before the accident occurred. He testified that after the worker stopped sweeping, he did not see any debris. Driscoll testified that although it was an active construction site with debris on the ground, he did not recall seeing a bridle hanger. If there were hazards, he would report them to the general contractor.

**Michael Checchi's deposition**

Michael Checchi (Checchi) testified that he worked for OMC as president and owner and that it stopped conducting business in 2014 due to filing bankruptcy. Checchi did not recall if he went to OMC's jobsite at 200 Park Avenue in 2010. He does not have an independent recollection of the project at 200 Park Avenue in December of 2010. He recalls that OMC took direction from Sound for general oversight of the project. They would go over OMC's performance of the project, and go to job site and make sure it was installed as per drawings.

## DISCUSSION

### Summary Judgment Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

### Motion sequence 010

Sound contends that plaintiff's allegation that Labor Law § 240 (1) was violated, must be dismissed. Labor Law § 240 (1) provides in part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted).

The Court of Appeals has held that not every accident involving a worker who falls at a construction site gives rise to the protections of Labor Law § 240 (1). Liability depends upon the existence of a hazard contemplated by Labor Law § 240 (1) and the failure to use, or the inadequacy of, a safety device enumerated by the statute. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

Sound argues that it was not the owner or the owner's agent and was merely a subcontractor, hired by Aragon pursuant to a limited contract, to construct the HVAC system. Sound argues that because plaintiff's accident did not occur at a height, there is no basis for a Labor Law § 240 violation. Furthermore, Sound contends that plaintiff was the sole proximate cause of his accident, as he placed his ladder in an area containing construction debris.

The Appellate Division, First Department, has held that "[t]o be treated as a statutory agent, the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury." *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 (1st Dept 2011) (citations omitted). Here, while there exists testimony which suggests that Sound was acting as an agent and may have been directing plaintiff through its worker Angelo, plaintiff fails to demonstrate that Labor Law § 240 (1) was violated.

Plaintiff testified that he fell to the ground upon stepping on a bridle hanger after he had already descended the ladder. Plaintiff does not testify that he was elevated when he stepped on the bridle hanger. Furthermore, plaintiff does not demonstrate that the ladder was an inadequate safety device or that its failure caused his accident.

Therefore, because plaintiff does not demonstrate that the failure of a safety devices caused his accident or that he was not provided proper protection, the part of plaintiff's complaint which alleges a violation of Labor Law § 240 (1) must be dismissed.

Sound contends that plaintiff's claims of negligence and a violation of Labor Law § 200, must be dismissed.

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

> "[a]ll 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. . . ."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

Sound argues that it monitored the progress of the work, that it did not direct the means and methods of OMC employees, and that it had no authority or control over contractors

involved with the project. Sound contends that if a hazard was observed, Sound would notify Aragon which monitored safety at the site.

The testimony of plaintiff raises a question of fact as to whether Sound had authority to supervise or control the performance of the injury producing work. Plaintiff testified that his supervisor at the site was Angelo from Sound, which had subcontracted OMC. At his first deposition on February 6, 2014, plaintiff testified that Angelo did not tell him how to perform his work. However, at his January 13, 2016 deposition, plaintiff testified that Angelo told him what needed to be completed, and would direct OMC as to what work to conduct, the location of where to complete it, and when to complete the work.

As plaintiff's testimony is inconsistent as to what level of supervision Sound had at the site and over OMC and plaintiff's alleged injury producing work, the part of Sound's motion seeking summary judgment as to plaintiff's claim of a violation of Labor Law § 200 must be denied.

Sound also argues that Aragon's claims for contractual indemnification must be dismissed, and that Sound should be granted contractual indemnification as against OMC. 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 that "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *De La Rosa v Philip Morris Mgmt. Corp.*, 303 AD2d 190, 193 (1st Dept 2003) (citations and quotations omitted).

Sound argues that the contract between itself and Aragon requires Sound to indemnify Aragon only under certain conditions. Sound argues that section 4.6.1 of the agreement states "[t]o the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold

harmless Owner, Contractor . . . caused in whole or in part by any actual or alleged: Act or omission of the Subcontractor. . . ." (NYSCEF DOC. NO. 77). Sound contends that because there is no evidence that plaintiff's accident was caused in whole, or in part by any act or omission on its part, Aragon's claims for contractual indemnification must be dismissed.

Sound also contends that it should be granted contractual indemnification against OMC. Sound maintains that the indemnification clause in the purchase order between OMC and Sound states that OMC is to defend, indemnify, and hold harmless against claims for personal injury caused by or in connection with the negligent or intentional wrongful acts or omissions of the subcontractor.

Here, a question of fact exists as to whether Sound may have directed the injury producing work which caused plaintiff's accident. Therefore, it is premature to determine if the contractual indemnification clauses were triggered as it is disputed whether negligence existed. *See Gomez v Sharon Baptist Bd. Of Directors, Inc.*, 55 AD3d 446, 447 (1st Dept 2008) (holding "[t]hus far there has been no finding that either [third party defendant] or its agents were negligent let alone that such negligence proximately caused plaintiff's injuries. Accordingly, summary judgment on the contractual indemnification claim is premature").

Sound also argues that all claims for common law indemnification and contribution as against itself must fail as there is no evidence that it was negligent or breached a duty. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident.' " *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 (2d Dept 2005) *quoting Correia v. Professional Data Mgmt.*, 259 AD2d 60, 65 (1st Dept 1999).

As it remains disputed if Sound was negligent due to the testimony that plaintiff may have been directed by Angelo, the claims for common law indemnification and contribution must be denied.

Sound maintains that claims made pursuant to Labor Law § 241 (6) must be dismissed as it was not the owner, an owner's agent, or a contractor. "To be treated as a statutory agent for claims brought pursuant to Labor Law § 241 (6), the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury. If the subcontractor's area of authority is over a different portion of the work or a different area than the one in which the plaintiff was injured, there can be no liability under this theory." *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 (1st Dept 2011) (citations and quotations omitted).

Here, plaintiff's testimony raises a question of fact as to whether Sound can be considered to be an agent of the general contractor as plaintiff testified that Angelo told him what work to conduct, the location of where to complete it, and when to complete the work. Therefore, because it is unclear if Sound had control over the specific work area involved in plaintiff's accident or the work which gave rise to his injury, the court will not dismiss plaintiff's cause of action for a violation of Labor Law § 241 (6).

Sound also contends that any claims by Aragon alleging that it failed to procure insurance must be dismissed because Sound purchased insurance which was required under the contract with Aragon. Sound argues that the policy provides coverage for assumption of liability. Sound submits a copy of policy number GL 093-59-88 with Chartis which was dated April 11, 2010 and which was for the period of April 11, 2010 through April 11, 2011. Sound also submits a copy of Chartis' umbrella policy (number BE 16019044) for the same time period.

As Sound submits a copy of the insurance policy which it purchased for the period covering plaintiff's accident, and because there is no opposition to Sound's argument, the part of Aragon's complaint alleging that Sound failed to procure insurance must be denied.

**Motion Sequence 011**

200 and Korn/Ferry argue that plaintiff's claims pursuant to Labor Law § 241 (6) must be dismissed because plaintiff has failed to plead any violation of a specific applicable provision of the Industrial Code.

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

> "[a]ll 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, 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 . . . ."

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 regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

200 and Korn/Ferry maintain that in his second amended complaint, as well as the bill of particulars, plaintiff alleges violations of Industrial Code section 23-1.7 (e).

Section 23-1.7 (e) (1) and (2) provides:

> "(e) Tripping and other hazards.
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause

> tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (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."

Section 23-1.7 (e) of the Industrial Code has been held to be specific enough to support a claim made pursuant to Labor Law § 241 (6). *See Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004).

200 and Korn/Ferry contend that section 23-1.7 of the Industrial Code is inapplicable as to plaintiff's accident, because plaintiff testified that he did not observe the subject bridle hanger before he climbed up the ladder, that he denied making any complaints about seeing any debris on the floor in the area in which he was working, and that plaintiff denied making any complaints about electricians leaving equipment in the area where he was performing his work. They argue that plaintiff did not know where the bridle hanger came from or how long it had been on the floor. 200 and Korn/Ferry suggest that assuming bridle hangers were located on the floor, plaintiff may have been the proximate cause of his own accident.

Here, as debris was allegedly located in plaintiff's work area which caused him to trip and fall, the court denies the part of 200 and Korn/Ferry's motion seeking to dismiss the violation of Labor Law § 241 (6) predicated upon Section 23-1.7 (e) of the Industrial Code.

200 and Korn/Ferry also contend that they are not liable pursuant to Labor Law § 200 or common law negligence because they did not supervise, direct, or control the injury producing work and did not have notice of a dangerous condition. 200 and Korn/Ferry argue that plaintiff testified that his work was directed by his supervisor from OMC and Angelo from Sound. Murphy testified that no one from 200 had any involvement with the project and Wilson testified that Korn/Ferry had no management authority over the project. Mucci also testified that the

building did not have contractual work with Aragon or supervisory control over the work being performed.

200 and Korn/Ferry also contend that they did not provide any tools or equipment for the work, that the tools were provided by OMC, and that Sakkos testified that OMC provided ladders to its workers. They maintain that there is no evidence that 200 or Korn/Ferry exercised any supervisory control over the manner or method of the work, nor did they have actual or constructive notice of the dangerous condition.

In opposition, plaintiff fails to demonstrate that these defendants had the authority to supervise or control the performance of the injury producing work. Furthermore, plaintiff fails to demonstrate that 200 or Korn/Ferry created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. Therefore, plaintiff's cause of action alleging that 200 of Korn/Ferry violated Labor Law § 200 must be dismissed.

Korn/Ferry and 200 also contend that they are entitled to contractual indemnification from Aragon based upon the agreement between Korn/Ferry and Aragon. They contend that section 3.18 of the agreement pertains to indemnification and provides:

> "[c]ontractor shall indemnify and hold harmless Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or any for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."
>
> (NYSCEF DOC. NO. 8, ¶ 64).

Korn/Ferry and 200 argue that there is no evidence that Korn/Ferry or 200 were negligent as they were not responsible for the construction project or site. They argue that because Aragon was the general contractor on the project, and was responsible for hiring the subcontractors, Aragon is required to indemnify Korn/Ferry and 200 for this incident.

Here, it has yet to be determined which party, if any, were negligent. Therefore, the court denies the part of Korn/Ferry and 200's motion seeking summary judgment as to contractual indemnification.

Korn/Ferry and 200 also contend that they are entitled to conditional summary judgment as against Aragon and Sound for common-law indemnification because both defendants were active tortfeasors which caused plaintiff's alleged accident. They argue that negligence should be attributable to Aragon acting as the general contractor and Sound acting as a subcontractor. They further argue that there is no evidence which demonstrates that Korn/Ferry and 200 acted negligently.

Here, issues of fact exist as to whether Aragon and Sound were negligent. Therefore, the part of the moving defendants' motion seeking summary judgment for common law indemnification must be denied as to Aragon and Sound.

Finally, as the co-defendants have failed to meet their burden to demonstrate that Korn/Ferry was negligent in causing plaintiff's accident, any cross claims based upon Korn/Ferry's alleged negligence for common law indemnification and contribution purposes must be dismissed.

**Motion sequence 012**

Striano moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing all claims asserted by Aragon and any cross claims. Striano contends that all claims against it must fail because the subject accident did not arise out of its work.

Striano argues that Aragon and Sound fail to state or establish any entitlement to common law indemnification. It contends that Angelo from OMC and Toosie from Sound supervised plaintiff's work and provided him with instructions. Striano argues that it was contracted to install new hangers and the presence of fireproofing on the subject bridle hanger establishes that it was an old hanger. It also argues that only Aragon was responsible for labor on site.

Here, the testimony raises a question of fact as to whether Striano's work may have caused or contributed to plaintiff's accident. Plaintiff testified that he recalls electricians working nearby and that bridle hangers are utilized by electricians. Plaintiff also testified that he recalls seeing electricians throwing bridle hangers on the ground after removing them and testified that OMC did not utilize bridle hangers for their work. Driscoll testified that Striano utilized bridle hanger beam claps on the 32nd floor, and that Striano had previously completed its work in the area.

Here, because it is unclear who left the bridle hanger on the ground, and because plaintiff recalls seeing an electrician throwing bridle hangers at the site, a question of fact exists as to whether Striano, an electrician working at the site, may have been negligent in causing or contributing to plaintiff's accident. Therefore, the part of Striano's motion seeking to dismiss the claims for common law indemnification must be denied.

Striano contends that claims against it for contractual indemnification must fail because it is only required to indemnify Aragon for its own act or omission or is any way connected with the performance of Striano's work under the agreement.

Striano maintains that its contract with Aragon states that Striano:

> "shall defend, indemnify, and hold harmless, Owner, Contractor, Architect and consultants, agents and employees of any of them (individually or collectively, "Indemnity") from and against all claims, damages, liabilities, losses and expenses including not limited to attorneys' fees, arising out of or in any way connected with the performance or lack of performance of the work under the agreement and any change orders or additions to the work including in the agreement, provided that such claim, damage liability, loss or expense is attributable to bodily injury, sickness, disease or death, or physical injury . . . cause in whole or in part by any actual or alleged:
> Act or omission of [Striano] or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable."

(NYSCEF DOC. NO. 102, ¶ 15).

As it remains unclear who caused the subject bridle hanger to be left on the ground, the part of Striano's motion seeking to dismiss the claim for contractual indemnification, must be denied.

Striano also argues that Aragon's cause of action that it failed to procure insurance must be dismissed. Striano maintains that it was only required to name Aragon as an additional insured, which it maintains that it did, for all claims that result from Striano's performance of the work under the contract documents. Aragon fails to oppose this cross claim.

Therefore, as Aragon fails to offer any opposition to Striano's argument that this cause of action is meritless, the part of Striano's motion seeking to dismiss the claim of breach of contract for failure to procure insurance must be granted.

**Motion sequence 013**

Aragon moves, pursuant to CPLR 3212, for an order granting summary judgment as to its claim for common law and contractual indemnification against Sound and Striano.

Aragon contends that the subject accident allegedly occurred because the plaintiff stepped on an electrical bridal hanger arising out of the performance of his work for OMC. Aragon argues that it was not negligent and that it has established its prima facie showing that this claim arose out of work of its subcontractors Striano and Sound.

Based upon the testimony, it remains disputed whether Aragon may have caused or contributed to plaintiff's injury. Plaintiff testified that Aragon was working on the subject floor of his accident, that Aragon was responsible for cleaning debris, and that Aragon was always at the site. Wilson testified that he recalls laborers from Aragon cleaning the floor. Driscoll testified that he recalls Aragon cleaning in the vicinity of plaintiff's accident.

As it is disputed as to how long the bridle hanger was on the floor and whether it should have been removed by an Aragon laborer, a question of fact exits as to whether Aragon was negligent. Therefore, the part of Aragon's motion seeking summary judgment as to common law indemnification must be denied.

Aragon also moves for summary judgment for contractual indemnification. Aragon contends that the pertinent part of the relevant indemnification clause in the contracts between Aragon, Striano, and Sound requires the subcontractors to indemnify Aragon for claims that Aragon or the owner may directly or indirectly incur which arise out of the performance of the work under the subcontracts.

The contract between Sound and Aragon, which Aragon argues includes the same indemnification clause which it has in a contract with Striano states:

> " [t]o the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Owner, Contractor, Architect, and consultants, agents and employees of any of them individually or collectively, "Indemnity") from and against all claims, damages, liabilities, losses and expenses, including but not limited to attorneys' fees, arising out of or in an way connected with the performance or lack of performance of the work under the agreement and any change orders or additions to the work included in the agreement, provided that any such claim, damage, liability, loss or expense is attributable to bodily injury, sickness, disease or death, or physical injury to tangible property including loss of use of that property, or loss of use of tangible property that is not physically injury, and caused in whole or in part by any actual or alleged:
> - Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or
> -Violation of any statutory duty, regulation, ordinance, rule or obligation by an Indemnitee provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the work under the agreement . . . ."
> (NYSCEF DOC. NO. 145 Ex. E).

As it remains disputed as to which subcontractor, if any, caused or contributed to the alleged injury of plaintiff, the part of Aragon's motion seeking summary judgment as to contractual indemnification must be denied.

**Motion sequence 014**

OMC moves, pursuant to CPLR 3212, for an order granting summary judgment, dismissing the third-party complaint and all cross claims and counterclaims asserted against these defendants.

OMC contends that as plaintiff's ankle tears do not constitute a grave injury under the Workers' Compensation Law, Sound's claims for common law indemnification and contribution must be dismissed.

Section 11 of the Workers' Compensation Law provides, in part:

> "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, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

"An 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). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury." *Way v Grantling*, 289 AD2d 790, 793 (3d Dept 2001).

OMC contends that plaintiff sustained a partial ligament tear to his left ankle. Plaintiff does not demonstrate that the injury was one which was discussed in the statute. Therefore, because plaintiff's injury does not constitute a grave injury pursuant to the Workers' Compensation Law, Sound's causes of action for common law indemnification and contribution must be dismissed.

OMC contends that Sound's claim against OMC for contractual indemnification fails because plaintiff's accident did not arise out of OMC's negligence. OMC argues that paragraph 5 of the rider of the OMC and Sound purchase order states that OMC was to defend, indemnify, and hold harmless Sound against claims which arise out of, or in connection with the negligent or intentional wrongful acts or omissions of OMC in the course of its work.

The Court of Appeals has held that even in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract. *See*

*Rodrigues v N & S Bldg. Contrs.*, 5 NY3d 427, 429-430 (2005). Here, while OMC contends that it was neither negligent nor engaged in intentional wrongful acts or omissions, it remains unclear which entity, if any, was negligent. Therefore, the cause of action for contractual indemnification must not be dismissed.

OMC also contends that Sound's claims for breach of contract and for failure to procure insurance must be dismissed because OMC fulfilled its obligations to obtain commercial liability insurance and submit the subject policy. OMC argues that the they obtained a commercial general liability insurance as required under the terms of the purchase order. They maintain that the terms of the policy by Endurance included the subject project and had the applicable required limits of $1,000,000.00 per occurrence and $2,000,000.00 in the aggregate for the policy period which covered the date of the injury.

In opposition, Sound fails to discuss the arguments of OMC and does not meet its burden to demonstrate that OMC breached a contract for failing to procure insurance. Therefore, Sound's cause of action for breach of contract for failure to procure insurance must be dismissed.

**CONCLUSION and ORDER**

Accordingly, it is

ORDERED that Sound Refrigeration and Air Conditioning motion for summary judgment (sequence 010) is denied with the exception of the part of plaintiff's complaint which alleges a violation of Labor Law § 240 (1) which is dismissed as well as Aragon, LLC's claim which alleges that it failed to procure insurance, which is also dismissed; and it is further

ORDERED that 200 Park, L.P., and Korn/Ferry International's motion (sequence 011) pursuant to CPLR 3212, for summary judgment, dismissing plaintiff's complaint and any cross

claims is granted only to the extent that the cause of action as to a violation of Labor Law § 200 is dismissed as against 200 Park, L.P., and Korn/Ferry International as well as the cross claims alleging common law indemnification and contribution as against 200 Park, L.P., and Korn/Ferry International; and it is further

ORDERED that Striano Electric, Inc.'s motion for summary judgment (sequence 012) is denied with the exception of the part of Striano's motion seeking to dismiss Aragon LLC's cause of action for breach of contract for failure to procure insurance which is dismissed; and it further

ORDERED that Aragon, LLC's motion for summary judgment (sequence 013) is denied; and it is further

ORDERED that OMC, Inc., and OMC Sheetmetal, Inc.'s motion for summary judgment (sequence 014) is partially granted only to the extent that Sound Refrigeration and Air Conditioning Inc.'s causes of action for common law indemnification, contribution, and for breach of contract for failure to procure insurance, are dismissed.

Dated: December 23, 2019

J.S.C.

**HON. DAVID B. COHEN**
**J.S.C.**