SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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VINCENT SCOTTO,

Index No.: 154444/12

Plaintiff,

-against-

DECISION/ORDER

315 PARK AVE S, LLC, BCN DEVELOPMENT NY, LLC, CREDIT SUISSE SECURITIES (USA) LLC, RESPONSYS, INC. and PLAZA CONSTRUCTION CORP.,

Defendants.

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315 PARK AVE S, LLC,

Third-Party Index No.: 590271/13

Third-Party Plaintiff,

-against-

CREDIT SUISSE SECURITIES (USA) LLC,

Third-Party Defendant.

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CREDIT SUISSE SECURITIES (USA) LLC,

Second Third-Party Index No.: 590835/13

Second Third-Party Plaintiff,

-against-

RESPONSYS, INC.,

Second Third-Party Defendant.

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RESPONSYS, INC.,

Third Third-Party Plaintiff,

-against-

PLAZA CONSTRUCTION CORP.,

Third Third-Party Defendant.

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PLAZA CONSTRUCTION CORP.,

Fourth Third-Party Plaintiff,

-against-

AGILITY CABLE INC.,

Fourth Third-Party Defendant.

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PLAZA CONSTRUCTION CORP.,

Fifth Third-Party Plaintiff,

-against-

COSMOPOLITAN DECORATING CO., INC.,

Fifth Third-Party Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence numbers 011 and 012 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a data wiring apprentice on May 30, 2012, when, while working in a 9th floor conference room located at 315 Park Avenue South, New York, New York (the "Premises"), the ladder that he was working on kicked out from underneath him, causing him to fall to the ground.

In motion sequence number 011, defendant/third-party plaintiff 315 Park Ave S, LLC ("Park") and defendant/third-party defendant/second third-party plaintiff Credit Suisse Securities (USA) LLC ("Credit Suisse") move, pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint and all cross claims and/or counterclaims asserted against Credit Suisse and the common-law negligence and Labor Law § 200 claims asserted as against Park; (2)

summary judgment in Park's favor on its cross claim for common-law indemnity as against co-defendant/third third-party defendant/fourth third-party plaintiff/fifth third-party plaintiff Plaza Construction Corp. ("Plaza"); and (3) summary judgment in Credit Suisse's favor on its cross claims for common-law indemnity as against Plaza and contractual indemnity as against co-defendant/second third-party defendant/third third-party plaintiff Responsys, Inc. ("Responsys") and fourth third-party defendant Agility Cable Inc. ("Agility").

In motion sequence number 012, Plaza moves, pursuant to CPLR 3212, for summary judgment in its favor on its fourth third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against Agility.

BACKGROUND

On the day of the accident, Park owned the Premises where the accident occurred. Park leased the entire building to Credit Suisse, and Credit Suisse subleased the ninth floor to Responsys. Park did not have a presence at the site on the day of the accident. On February 1, 2012, Credit Suisse hired Plaza to fit out the ninth floor of the Premises in preparation for Responsys's occupancy. This work ended in April of 2012. On May 15, 2012, Responsys contracted with Plaza to serve as the general contractor on a project to build out the subject space for its new office (the "Project"). Plaza hired plaintiff's employer, Agility, to install data wiring for the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that he was working on the Project as an apprentice for Agility on the day of the accident, and that his work was solely supervised by his Agility foreman, Lucas Cain. Plaintiff explained that at the time of the accident, at the instruction of Cain, he was utilizing a

six-foot-tall A-frame ladder (the "Ladder") to zip-tie cables to the eight-foot-high ceiling, so that they would not hang down. Plaintiff could not state who owned the Ladder, and he maintained that it was set up before he arrived to begin work.

Plaintiff explained that while his feet were on the fourth and fifth steps of the Ladder, and as he was about to zip-tie the wires to a two-to-three-inch thick pipe, the Ladder "kicked out and then it collapsed," causing him to fall onto a conference desk and injure his back (plaintiff's first tr at 41). Plaintiff asserted that his accident was caused due to the fact that the Ladder did not have rubber feet, only metal, which he noticed for the first time after the accident. He also asserted that the carpet that was underneath the feet of the Ladder at the time of the accident was covered in clear "painter's plastic that you tape down to the sides of the carpet so the floor doesn't get paint on it" (*id.* at 42).

Deposition Testimony of Louis Caruso (Plaza's Project Manager)

Louis Caruso testified that he was Plaza's project manager on the day of the accident, and that he was present at the job site just a couple of times per week. He also testified that he "[v]ery rarely" prepared daily reports (Caruso tr at 78). He explained that it was part of Plaza's job to enforce site safety, and that if he saw "someone working unsafely," he had the authority to have the situation corrected (*id.* at 39). He also noted that Plaza hired Agility to install data cable for the Project.

Deposition Testimony of Thomas McMahon (Plaza's Superintendent)

Thomas McMahon testified that he was Plaza's superintendent on the day of the accident. On that day, Plaza was involved in a build-out of the ninth floor of the Premises, pursuant to a subcontract with Responsys. McMahon testified that if he observed an unsafe practice at the site,

he had the authority to stop that work. He also maintained that everyone on the Project was "in charge of safety" (McMahon tr at 25). While he communicated with a couple of people from Credit Suisse while working on the Project, they never gave him any direction on how to perform any work, and they were not at the site on a daily basis.

The Affidavit of F. Vincent Connolly, Jr. (Agility's President)

In his affidavit, F. Vincent Connolly stated that he has been the president of Agility since 2011. He stated that the terms of the agreement set out in the purchase order for Agility's work on the Project (the "Purchase Order") "became effective on June 7, 2012 when the Purchase Order was executed" (Agility's opposition to Plaza's motion, exhibit G). In addition, the Proposal contained no terms or obligations in respect to indemnity or insurance coverage. He also maintained that prior to April 25, 2012, Agility "had not established any customary course of business with Plaza" (*id.*).

Connolly also asserted that it was Agility's custom for indemnity and insurance issues to be spelled out in a written contract and reviewed by proper Agility personnel, rather than being agreed to in an oral contract. He stated that Cain, Agility's foreman on the Project, had "no authority to speak on behalf of Agility . . . with respect to contractual obligations with other entities," and that "Cain did not participate in any contractual negotiations" for the subject work (*id.*). He also stated that Agility did not do any work for Credit Suisse in May of 2012.

Deposition Testimony of Lucas Cain (Agility's Foreman)

Cain testified that on the day of the accident, Agility was installing data on the ninth floor of the Premises. When he was shown a copy of the Purchase Order and asked if Agility was performing work pursuant to it on the date of the accident, Cain replied, "I guess so" (Cain tr at

114). When he was asked if the work described in the Purchase Order was the work being performed on the date of the accident, he replied, "Yes" (*id.* at 115). When asked if the terms and conditions reflecting insurance requirements were in effect on the date of the accident, he replied, "Yes, but I don't know; its office stuff. It's out of the foreman's hands . . . I don't have knowledge" (*id.*).

Cain also testified that Agility had two six-foot ladders at the site for use by its employees, and that only Agility instructed its employees at the site. In fact, Cain did not report to or interact with anyone at the site except for his own project manager.

Cain further testified that after the accident, when he asked plaintiff to tell him how he was injured, plaintiff told him that he skipped the bottom step of the Ladder as he was descending it, which caused him to fall backwards and hit a table.

The Accident Reports

The C-2 form (the "Employer's Report of Work-Related Injury/Illness") prepared in regard to plaintiff's accident indicates that plaintiff was injured when "descending from a ladder [he] lost his footing" (Agility's opposition to Plaza's motion, exhibit D).

The C-3 form (the "Employee Claim") filled out by plaintiff in regard to the accident states that he was injured when he "[f]ell of[f] ladder and landed on edge of metal desk" (Agility's opposition to Plaza's motion, exhibit E).

The New York University Medical Center Hospital's nursing assessment entry, dated May 30, 2012, states that plaintiff stated that the accident was caused when he "lost [his] footing, fell back and [his] back hit a desk" (Agility's opposition to Plaza's motion, exhibit F).

DISCUSSION

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Common-Law Negligence and Labor Law § 200 Claims Against Park and Credit Suisse (motion sequence number 011)

Initially, at oral argument held on June 24, 2019, counsel for plaintiff stated that plaintiff does not oppose that part of Park and Credit Suisse's motion seeking to dismiss the common-law negligence and Labor Law § 200 claims against Park. Accordingly, this Court granted that part of the motion seeking dismissal of said claims against Park. In addition, at the same oral argument, this Court dismissed the common-law negligence and Labor Law § 200 claims against Credit Suisse, on the ground that Credit Suisse "did not have direct control or supervision of the worker," also noting that "it is insufficient to state that [Credit Suisse had] some general oversight of safety" (June 24, 2019 oral argument tr at 39).

Park's Cross Claim for Common-Law Indemnity Against Plaza (motion sequence number 011)

Park moves for summary judgment in its favor on its cross claim for common-law indemnity as against Plaza. "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 Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, there is no evidence in the record that any negligence on the part of either Park or Plaza contributed to or caused the accident. To that effect, plaintiff testified that his work was solely supervised by his Agility foreman, and Cain, Agility's foreman, testified that only Agility instructed its workers on the Project.

Thus, Park is not entitled to summary judgment in its favor on its cross claim for common-law indemnification as against Plaza.

The Labor Law §§ 240 (1) and 241 (6) Claims Against Credit Suisse (motion sequence number 011)

Credit Suisse moves for dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. 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]). 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]).

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, it must be determined whether Credit Suisse, Park's tenant, may be liable under the Labor Law as either an owner or as an agent of the owner and/or general contractor. As to whether Credit Suisse can be deemed an owner of the Premises for the purposes of the statute, it should be noted that "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has not been limited to titleholders but has 'been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for its benefit.'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). "[O]wnership of the premises where the accident occurred - standing alone - is not enough to impose liability under [the] Labor Law . . . where the property owner did not contract for the work resulting in the plaintiff's injuries . . . . Rather, . . . [there must be] some nexus between the owner and the worker" (*Morton v State of New York*, 15 NY3d 50, 56 [2010] [internal quotation marks and citations omitted]; *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 52 [2004]).

Here, while Credit Suisse had a lease interest in the Premises, it did not fulfill the role of an owner because on the day of the accident, the work underway at the Premises, was not being performed for its benefit. Rather, it was being performed for the benefit of Responsys. To that effect, a review of the record reveals that Plaza's work for Credit Suisse was completed by April

of 2012, and Plaza's work for Responsys began in May of 2012. In fact, at the time of the accident, Credit Suisse had no involvement with the Project, and its presence at the site was limited to such tasks as taking out garbage.

Accordingly, Credit Suisse cannot be deemed an owner for the purposes of the Labor Law.

As to whether Credit Suisse can be deemed an agent of the owner and/or general contractor, it is important to note that

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, Credit Suisse may not be held liable under Labor Law § 240 (1) as an agent, because it did not supervise and/or control the injury-producing work. Credit Suisse did not supply or place the Ladder, nor did it supervise or direct plaintiff's data installation work. It is undisputed that plaintiff's work on the Project was solely supervised by his Agility foreman, and it was his foreman who instructed him to use the Ladder to perform his work.

Thus, as Credit Suisse is not a proper Labor Law defendant, it is entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. In addition, as Credit Suisse had no involvement with the Project, nor did any negligence on its part contribute to or cause the accident, it is entitled to dismissal of any and all cross claims and counterclaims against it.

Credit Suisse's Third-Party Claims (motion sequence number 011)

At oral argument held on September 9, 2019, Credit Suisse's counsel indicated that in the event that this Court denies its motion to dismiss the complaint against it, "in the alternative," it seeks summary judgment in its favor on its cross claims asserted against Plaza, Agility and Responsys (September 9, 2019 oral argument tr at 18). Therefore, as the complaint and all cross claims and counterclaims have been dismissed as against Credit Suisse, the remainder of Credit Suisse's motion seeking summary judgment in its favor on said cross claims is denied as moot.

Plaza's Fourth Third-Party Contractual Indemnification and Breach of Contract for Failure to Procure Insurance Claims Against Agility (motion sequence number 012)

Plaza moves for summary judgment in its favor on its fourth third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against Agility.

Additional Facts Relevant To This Issue:

Affidavit of Nicholas Downes (Plaza's Director of Estimating and Purchasing)

In his affidavit, Nicholas Downes stated that he has served as Plaza's director of estimating and purchasing since January of 2000, and that he negotiated and executed the Purchase Order, dated June 7, 2012, between Plaza and Agility for certain data and telecommunications services to be performed for the Project by Agility.[1] He further stated that the Purchase Order "incorporates the project scope of work and the terms, including cost, reflected in Agility's written proposal dated April 25, 2012 (the "Proposal") (Plaza's notice of motion, exhibit Q, Downes aff). He maintained that "Plaza and Responsys, which retained Plaza

[1]It is noted that the Purchase Order is dated eight days after the accident.

for the subject project, accepted that proposal and the customary court of the parties' businesses, Plaza and Agility endeavored to enter into a written Purchase Order agreement memorializing the work set forth in the April 25, 2012 proposal" (*id.*).

Downes asserted that even though the Purchase Order was not executed until June 7, 2012, which was eight days after the accident, the parties intended for it to be in full force and effect as of April 25, 2012, the date the Proposal was executed. While Downes admitted that the Purchase Order's indemnity and insurance procurement provisions, which inured to the benefit of Plaza, were not part of the Proposal, he maintained that, nevertheless, these provisions were intended to "apply retroactively to on or about April 25, 2012" (*id.*). Downes explained that the Purchase Order was not executed until June 7, 2012 "due to a clerical oversight" (*id.*).

In support of his assertion that various actions and documents in the record reflect the parties' intent for the Purchase Order to apply retroactively, Downes put forth that Agility forwarded certificates of liability insurance to Plaza reflecting that Agility intended to have Plaza named as an additional insured on its commercial general liability insurance policy, pursuant to the terms and conditions of the Purchase Order. In addition, he submitted Plaza's daily superintendent's reports for the Project, which indicate that Agility began its work on the Project on May 7, 2012, as well as an invoice for materials and labor that Agility provided to Plaza since that date.

The Proposal

A review of the Proposal reveals that it lists, among other things, the scope of Agility's work, materials, manufacturers, quantities and costs. That said, the Proposal contains no provisions regarding any indemnification and/or insurance procurement owed by Agility to Plaza.

The Purchase Order

The Purchase Order was executed on June 7, 2012. The face sheet of the Purchase Order contains the following statement in bold letters: SUBCONTRACTOR WILL NOT BE ALLOWED ON JOB SITE IF PURCHASE CONTRACT IS NOT SIGNED IMMEDIATELY" (Plaza's notice of motion, exhibit Q, the Purchase Order). In addition, the front page of the Purchase Order makes reference to the scope of the work and architect's drawings, as follows:

> "As per drawings dated 4/10/12 NS 4/13/12 and prepared by the TPG Architecture, Power Con and Align and Scope of Work reference #C-5394-02, cost to furnish and install telecommunications work..."

(*id.*).

Article 10.4 of the Purchase Order contains an indemnity provision which stated, in pertinent part, as follows:

> "To the extent permitted by law, [Agility] shall defend, indemnify and hold [Plaza] . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever [including attorney's fees and disbursements] which arise out of or are connected with . . . the performance of Work by [Agility], or any act or omission of [Agility]"

(*id.*).

The Purchase Order also required that Agility obtain certain commercial general liability insurance ($2 million per occurrence and $4 million in the aggregate) naming Plaza as an additional insured on a primary and non-contributory basis and that it provide a certificate of insurance reflecting the same.[2]

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[2] It should be noted that Plaza argues that the policy obtained from Sentinel Insurance Company (the "Policy") by Agility does not explicitly name Plaza as an additional insured (see Plaza's notice of motion, exhibit S, the Policy). That said, in its opposition, Agility does not assert that it obtained additional insurance on Plaza's behalf, only that, as no contract requiring it to do so was in effect on the date of the accident, it was under no duty to do so.

In addition, Article 14 of the Purchase Order, entitled, "Merger," (the "Merger Provision") states:

> "All previous date orders, proposals, letters, oral or written promises and understandings relating to the subject matter of this Contract, are hereby declared to be null and void. This Contract is complete and shall not be interpreted by any reference to any previous letter, proposal, document or understanding, written or oral, or other document or agreement, except as specifically provided in this Contract"

(*id.*).

Initially, as plaintiff was an employee of Agility, 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]).

It should be noted that "[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]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

"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]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Here, as plaintiff was Agility's employee, and as Agility's foreman supervised plaintiff's work, the accident clearly arose from the work that Agility performed on the Project. In addition, under these circumstances, it cannot be said that any negligence on the part of Plaza caused the accident. As a result, pursuant to the indemnification provision contained in the Purchase Order, Plaza would be entitled to contractual indemnity from Agility.

However, in order for Agility to owe contractual indemnification to Plaza, it must first be determined whether or not the Purchase Order, which was not executed until June 7, 2012, was intended to apply retroactively to the date of the accident, which occurred on May 30, 2012.

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 579 [2002]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*id.*).

Here, the Purchase Order contains no explicit language indicating that any of its terms have a retroactive effect. In addition, the language of the Merger Provision makes clear that any and all previous agreements are null and void, and that the Purchase Order is complete on its face and not intended to be interpreted with any reference to any other documents or agreements, except those specifically referenced in the Purchase Order. Further, while the first page of the Purchase Order does make reference to Agility's scope of work and the architect's drawings, the Purchase Order references no prior agreements between the parties in regard to indemnification and/or insurance procurement.

As a result, there was no written contract in effect on the date of the accident which required Agility to indemnify Plaza or to procure insurance on Plaza's behalf (*see Vail v 1333 Broadway Assoc., L.L.C.*, 105 AD3d 636, 637 [1st Dept 2013] ["[d]ismissal of the contractual indemnification claim . . . was proper, since there was no indemnification agreement in existence at the time of the accident, and nothing indicates that the terms and conditions on the back of the purchase order, which contains an indemnification clause, were to have a retroactive effect"]; *Regno v City of New York*, 88 AD3d 610, 610 [1st Dept 2011] [third-party plaintiff failed to raise

an issue of fact as to whether the agreement signed in 2009, seven months after the accident, was effective as of a date before plaintiff's accident and that the parties intended it to have a retroactive effect"]; *Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 365 [1st Dept 2005] [court properly denied third-party plaintiff's motion for contractual indemnification based on an indemnification provision in a purchase order where it was "dated more than one month after plaintiff's accident and [was] devoid of any language demonstrating an intention by the parties that it be retroactively applied"]).

That said, in support of its motion, Plaza puts forth that the courts have found that a clause in a contract executed after a plaintiff's accident may nevertheless be applied retroactively where evidence establishes that the agreement pertaining to the contractor's work "'was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date'" (*see Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 362 [1st Dept 2004], quoting *Stabile v Viener*, 291 AD2d 395, 396 [2d Dept 2002]). Plaza argues that, as such, it would be proper for this Court to also consider evidence outside the Purchase Order, including statements made by Cain and Downes that the negotiating parties to the Purchase Order intended for the indemnification and insurance procurement provisions to apply retroactively.

However, in his affidavit, Connelly, Agility's president, maintained that, as foreman, Cain was not actively involved in any contract negotiations. In addition, Cain testified that he did not have any real knowledge as to whether the parties intended the subject terms be applied retroactively.

Further, in support of his assertion that the parties intended for the Purchase Order's indemnity and insurance provisions to apply retroactively, Downes put forth the Project's daily

reports and certain payments made to Agility, which demonstrate that Agility started on the Project prior to the execution of the Purchase Order. He also put forth a certificate of insurance, dated May 3, 2012, listing Plaza as an additional insured on Agility's insurance policy.

However, it should be noted that in his affidavit, Downes conceded that, while the Proposal sets forth the scope of work to be performed, materials, quantities and costs, it makes no mention of any indemnification or insurance procurement responsibilities on the part of Agility. Moreover, Connelly stated that Agility had no previous customary course of business with Plaza, and that it was Agility's custom to put indemnity and insurance agreements in writing. It is also inconsequential to the issues of indemnity and insurance procurement that daily reports and payments reflect that Agility commenced work prior to the execution of the Purchase Order.

Finally, "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage but it is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*see Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). Therefore, the intent to make the aforesaid provisions retroactive cannot be gleaned from the fact that Agility provided a certificate of insurance to Plaza.

Therefore, unlike *Podhaskie* (3 AD3d at 362), the evidence put forth by Plaza is insufficient to establish as a matter of law that the Purchase Order "'was made 'as of' [a date prior to the accident], and that the parties intended that it apply as of that date'" (*id.*).

Thus, Plaza is not entitled to summary judgment in its favor on its fourth third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against Agility.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the parts of defendant/third-party plaintiff 315 Park Ave S, LLC ("Park") and defendant/third-party defendant/second third-party plaintiff Credit Suisse Securities (USA) LLC's ("Credit Suisse") motion (motion sequence number 011), pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint and all cross claims and/or counterclaims asserted against Credit Suisse is granted, and the complaint and all cross claims and/or counterclaims against Credit Suisse are dismissed as against Credit Suisse, with costs and disbursements to Credit Suisse as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Credit Suisse; and it is further

ORDERED that the part of Park and Credit Suisse's motion (motion sequence number 011), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against Park is granted, and these claims are dismissed as against Park, and the motion is otherwise denied; and it is further

ORDERED that defendant/third third-party defendant/fourth third-party plaintiff/fifth third-party plaintiff Plaza Construction Corp.'s ("Plaza") motion (motion sequence number 012), pursuant to CPLR 3212, for summary judgment in its favor on its fourth third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against fourth third-party defendant Agility Cable Inc. is denied; and it is further

ORDERED that the remainder of the action continue.

Dated: January 24, 2020

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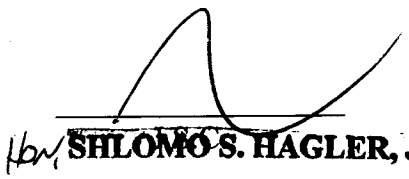

HON. SHLOMO S. HAGLER, J.S.C.