Medina v SP 103 E 86 LLC
2020 NY Slip Op 32217(U)
July 8, 2020
Supreme Court, New York County
Docket Number: 157445/2015
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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EDWIN MEDINA,

Plaintiff,

- v -

SP 103 E 86 LLC, STONEHENGE MANAGEMENT LLC, 103 EAST REALTY CO., SILVER SERVICES GROUP CORPORATION, EMPRISE CONSTRUCTION INC.,

Defendants.

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INDEX NO. 157445/2015

MOTION DATE _____

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 146-157, 173, 176, 181, 182

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 158-169, 174, 178-180, 183-188, 190-192

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 170-172, 175, 177, 189

were read on this motion for summary judgment.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting him partial summary judgment on liability on his Labor Law §§ 240(1) and 241(6) claims (mot. seq. five). Defendants Silver Services Group Corporation, and SP 103 E 86 LLC and Stonehenge Management LLC (collectively, SP) oppose.

By notice of motion, defendant Silver moves pursuant to CPLR 3212 for an order summarily dismissing plaintiff's Labor Law §§ 240(1), 241(6), and 200 and common law negligence claims against it, and dismissing SP's cross claims for contribution and indemnity

(mot. seq. six). Plaintiff and SP oppose.

By notice of motion, defendant SP moves for an order granting it leave to amend its answer to assert a cross claim against Silver for contractual indemnification, and upon such amendment, granting it summary judgment on that claim (mot. seq. seven). Silver opposes.

The motions are consolidated for disposition.

I. BACKGROUND

A. Pleadings (NYSCEF 1, 156)

In his summons and complaint, plaintiff alleges that on March 3, 2014, while he was working at a construction site at 103 East 86th Street in Manhattan (project) for his employer, non-party Legacy Builders Developers Corp., he was struck by falling material that was improperly secured, thereby sustaining injury. In his bill of particulars, plaintiff contends that defendants violated various New York Industrial Code sections and other rules and regulations pertaining to building construction and renovation.

B. Plaintiff's deposition testimony (NYSCEF 148)

At his October 2016 deposition, plaintiff testified, as pertinent here, that in his capacity as project carpenter, his duties included preparing apartments in the building for demolition, such as by removing items and fixtures therein. Silver was the demolition company on the project, and after a particular apartment was demolished, plaintiff was to construct new frames, moldings, walls, ceilings, and openings. His Legacy supervisor alerted him to the demolition of each apartment, told him the work to be done, and showed him pertinent blueprints. Plaintiff was then to begin his work on it immediately. When he was constructing framing, only he and his coworker would be present inside the apartment. Plaintiff's supervisor and Legacy's project manager solely controlled and directed his work at the premises; he neither worked with nor

assisted Silver, and he had no direct contact with its employees.

Three or four days before his accident, plaintiff began work on a demolished fifth floor apartment. Concrete had been stripped from the floors and some pre-existing walls were completely demolished while others had been cut out for doorways or openings.

Having been told by his supervisor what to do in that apartment, the first two days there, he and his coworker framed the walls and ceilings. On the day of his accident, plaintiff worked alone as his supervisor had told him to frame doors in the apartment, which he could do by himself.

When plaintiff entered the apartment the day of his accident, he went to a pre-existing doorway opening, measured it, knelt down within it, as it was the only available open space, and began to cut pieces of wood for the frame with a chainsaw. Some five minutes after he had begun cutting a second piece of wood, his head and neck were hit by something that caused him to lose consciousness. When he awoke, plaintiff saw that he had been hit by five or six concrete blocks that had fallen from above the opening. Before he was hit, he noticed nothing unusual.

Plaintiff's supervisor had previously spray-painted markings around the openings indicating where demolition workers were to cut them. The opening at issue had been widened, at plaintiff's supervisor's request, by Silver employees who cut concrete blocks per the spray-painted markings. The support for the blocks that fell on plaintiff had been removed in order for plaintiff to construct the new frame.

C. Deposition of plaintiff's supervisor (NYSCEF 168)

Plaintiff's supervisor testified that in March 2014, he was employed as a superintendent for Legacy, the general contractor for the project, and the supervisor was both project manager and site superintendent, with the responsibilities of providing on-site supervision, receiving

drawings and plans, and executing them with the sub-contractors and employees hired by Legacy. Legacy received demolition drawings for the premises' fifth floor.

Legacy provided the demolition drawings to Silver and plaintiff's supervisor met with Silver's employees for a walk-through of the project before demolition began. Once Silver finished its work in a particular apartment, Legacy examined it daily and verified that it had been performed as required. By February 21, 2014, Silver had finished its work on the project and did not return thereafter. Before Silver began demolishing an apartment, Legacy would spray-paint or tape anything to be demolished and put up screening or plastic sheeting on the doors and windows to control dust.

All of the interior doors were scheduled to be removed in the apartment in which plaintiff was injured. Typically, to demolish a door, a drill was used to unscrew the hinges and the door was cut in half and carted away, as was the surrounding door frame. The subsurface walls in the apartment were made of gypsum block, and when Silver removed a door frame, the wooden frame was stripped down to the gypsum block. Once the door and frame were removed, the gypsum blocks were "supported by the masonry. They were all tied together. There was nothing around it. It was just gypsum block. There was nothing there to support that, but it wasn't like it was falling down."

To widen a door opening, Legacy would install temporary supports with a header across them to hold the gypsum block. The sides of the opening would then be widened, and the supports reinstalled. If the door opening did not need widening, no temporary supports would be installed; rather, new framing would be installed within 48 hours after the demolition. Temporary supports were not required if the door was not being widened," as

> once the door was removed, the door was not a structural entity. The perimeter itself was sufficient, so we didn't have to rush to put in a new header to hold it up. It was only if we

were widening it, we would support it.

If the supervisor, during his daily inspection, saw a doorway that had been widened without supports and new framing, he would schedule a carpenter to install it within 24 to 48 hours.

On the day of plaintiff's accident, his supervisor was present at the site. When the supervisor learned of plaintiff's accident, he went to the apartment and observed that it was generally clean, having been recently demolished and swept, and that plaintiff's work area contained a saw, two pieces of wood, and a few pieces of fallen plaster. The supervisor saw no other debris or construction material in plaintiff's immediate work area and plaintiff was not obliged to cut the wood directly under the opening.

The supervisor also saw that no gypsum block was missing from the opening and plaintiff had told him that plaster had fallen on him while he was cutting the wood**.** The supervisor explained that the plaster coated a cement-based material that covered and was attached to the gypsum blocks. The plaster and cement were part of the building and were not scheduled for demolition, and that given the building's age, the supervisor surmised that the plaster and cement had loosened over time and had fallen independently, which had previously occurred in the building.

According to the supervisor, the wood framing that plaintiff was to install would have prevented the block from falling, and the removal of plaster and cement was not within the scope of Silver's demolition work.

D. Deposition of Stonehenge (NYSCEF 149)

The responsibilities of Stonehenge's operations manager included hiring contractors for apartment renovation projects and managing certain properties, including the premises at issue.

The project at the premises entailed a full renovation, including the removal and replacement of the doors and the installation of new doorjambs.

Stonehenge's property manager was on site daily; he oversaw the project, including ensuring that the work was timely performed. No one from SP was responsible for safety; only Legacy was responsible for safety, but if Stonehenge's property manager saw an unsafe condition, he had the authority to stop work. Stonehenge had no laborers or clean-up staff working on the project.

The operations manager knew of no accidents involving workers on the project nor of any incidents where blocks had become loose and/or fallen.

E. Deposition of Silver (NYSCEF 50)

Silver's controller signed the agreement with Legacy whereby Silver was hired to perform demolition work on the project. Before the agreement between them was prepared or agreed to by Silver, Silver submitted to Legacy a proposal for the work it would perform which included demolition in nine apartments, including that in which plaintiff was injured. The work detailed in the proposal was to be performed in each apartment, but Silver's controller had no personal knowledge of the actual work to be performed.

The proposal would include exclusions, which may or may not have been included in the agreement itself, but if it was not in the agreement, Silver would rely on it having been specified in the proposal. For the instant project, Silver included in its proposal an exclusion for shoring and bracing. Although the controller did not know whether that exclusion was included in the agreementt, he testified that Silver never constructs shoring or bracing, so it includes that exclusion in all of its proposals.

Silver had a foreperson on the project who directed its employees and was responsible for

their safety. Although the removal and disposal of all of the apartment doors were within the scope of Silver's work, the controller did not know if any doorway openings were expanded. He believed that Silver's job was to remove the doors and leave the door frames intacthe purpose of the door frame is to

> maintain the integrity of the material above and around it . . . so that the material above and to the sides of the door frame are being supported by the frame itself so they do not collapse.

The controller did not know whether Silver had removed door frames on other projects and did not believe that it was its practice to do so as it would cause instability, as the frame is the support system. Without the frame, there is a risk that material above it could fall.

According to the controller, once on the job, Silver's foreperson would know what work was to be performed in an apartment by markings provided by Legacy's supervisor. If no markings were provided, the foreperson would not do certain work.

Had Silver been contractually required to remove a door frame, and if the removal created an unstable situation, Silver would coordinate with the general contractor to stabilize the opening immediately following the removal. The controller was unsure whether that was done on the project.

F. Agreement between Legacy and Silver (NYSCEF 167)

By agreement dated December 2013, Legacy retained Silver to work on the project. The project's owner is listed as Stonehenge, and Silver agreed in a rider and as pertinent here, to indemnify and hold harmless Legacy, the owner, and others, from and against claims, damages, losses and expenses, including and not limited to attorney fees, arising out of or resulting from performance of the work,

> but only to the extent caused in whole or in part by negligent acts or omissions of [Silver], anyone directly or indirectly employed by them or anyone 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.

Silver's scope of work for the project, annexed to the agreement, included the removal of interior doors and ensuring that the apartments were broom swept and left free of debris.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. Labor Law § 240(1) claim

1. Contentions

a. Plaintiff (NYSCEF 150)

Plaintiff contends that defendants violated Labor Law § 240(1) by failing to secure the blocks and plaster, which were "falling objects" that required securing for the purpose of the undertaking. He relies on his supervisor's admission that it was not uncommon for blocks to fall if unsecured and that other incidents involving falling blocks and plaster had occurred on the project before plaintiff's accident.

b. Silver's opposition (NYSCEF 176)

Silver denies liability pursuant to either Labor Law §§ 240(1) or 241(6) as both statutes impose liability on contractors and owners and their agents, and it was neither a contractor nor an owner, and there is no evidence that it was an agent within the meaning of the statutes. Rather, Silver's agreement with Legacy was limited in scope and gave it no authority or responsibility to control the work of the trades on the project or supervise workers' safety. Moreover, Silver's work on the project ended 10 days before plaintiff's accident, and it had no continuing obligation to monitor the project for safety.

c. SP's opposition (NYSCEF 181)

SP alleges that as the section of the wall which fell on plaintiff was a permanent part of the building, it was not an object that needed hoisting or securing for the purpose of Labor Law

§ 240(1). It observes that there is no evidence that the section of the wall above the opening, even if the opening had been extended sideways, had been altered in any way. Nor was plaintiff working on the wall or opening when the blocks fell.

d. Plaintiff's reply (NYSCEF 184)

Plaintiff submits no opposition to Silver's papers and agrees that Silver cannot be held liable for violations of Labor Law §§ 240(1) and 241(6). (NYSCE 184).

Plaintiff alleges that the authority cited by SP is inapposite, as here, Silver worked on the door opening before he began his work, and had widened it, removed the existing framework, and left it without support or bracing. Plaintiff denies that the blocks were part of the building's permanent structure.

2. Analysis

a. Silver's liability

Labor Law § 240(1) imposes absolute liability on building owners and their agents for workplace injuries. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). Its purpose "is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), and even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

If responsibility for work is delegated, the owner and contract remain liable along with the party delegated. (*Barreto v Metro. Transp. Auth.,* 25 NY3d 426 [2015]; *see also White v*

31-01 Steinway, LLC, 165 AD3d 449 [1st Dept 2018] [subcontractor was liable as statutory agent of owner as it was delegated supervision and control over work at issue]).

Here, even if Silver had control over and responsibility for the demolition work which resulted in the removal of the pre-existing door frame and unsupported opening, there is no evidence that it had control or responsibility for supporting or bracing the opening, nor was it responsible for the safety of plaintiff or plaintiff's work. As Legacy's supervisor admitted, Legacy was responsible for installing temporary shoring or bracing on the door openings, if needed, and the agreement between Silver and Legacy specifically excludes from Silver's scope of work the installation of shoring or bracing. Thus, Silver does not qualify as an "agent" that may be held liable for plaintiff's injury. (*See Armental v 401 Park Ave. South Assocs., LLC*, 182 AD3d 405 [1st Dept 2020] [affirming dismissal of Labor Law claims against subcontractors as they could not be held liable as statutory agents absent evidence that they controlled work area or had authority to ensure safety regarding placement of material that allegedly caused accident]).

In any event, plaintiff agrees that Silver may not be held liable pursuant to Labor Law §§ 240(1) or 241(6).

b. Applicability of Labor Law § 240(1)

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

Liability for a violation of this statute requires a showing, in pertinent part, that required safety equipment was not provided. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). In a case arising from a falling

object, as here, the plaintiff must demonstrate, in pertinent part, that the object that fell required securing, or that it fell because of the absence of a safety device. (*Fabrizi v 1095 Ave. of the Am.*, 22 NY3d 658 [2014]). The statute does not apply to objects that are part of the building's permanent structure. (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 [2001]).

In *Gonzalez v Paramount Group, Inc.*, the plaintiff was injured when, "while making an opening in a concrete wall for HVAC ductwork to be installed, cinderblocks above the opening fell" and injured him. The Court held that the cinderblocks were falling objects that were required to be secured for the purposes of the undertaking. (157 AD3d 427 [1st Dept 2018]). The Court relied on, among other cases, *Czajkowski v City of New York*, in which it was found that the plaintiff's injury was caused by an object that fell due to the failure to provide a safety device to brace or support a window while it was being removed, where the plaintiff was removing window frames and the unsecured top half of the window he was removing fell out of the wall and injured him. (126 AD3d 543 [1st Dept 2015]). And in *Stawski v Pasternack, Popish & Reif, P.C.*, the plaintiff's injury was held to be caused by the defendants' violation of Labor Law § 240(1) where he was working on a cinder block column and one of the cinder blocks, which had been cut from the column and placed back into the column without being cemented and secured, fell on him. (54 AD3d 619 [1st Dept 2008]).

Here, Silver had finished its work on the building 10 days before plaintiff's accident, and there is no evidence that anyone had worked on the opening in those 10 days. Moreover, plaintiff had not yet begun his work on the opening, and there was no work being performed at the time of plaintiff's accident that would have affected the blocks. Thus, the facts here are distinguishable from those *Gonzalez* and the cases cited therein.

By contrast, in *Flossos v Waterside Redevelopment Co., L.P.*, the Court dismissed the

plaintiff's Labor Law § 240(1) claim as his injury occurred while he was standing on a ladder painting a ceiling and a section of the ceiling collapsed and fell on him. As the ceiling was part of the permanent structure of the building, it was not a falling object that was being, or needed to be, hoisted or secured. (108 AD3d 64 [2d Dept 2013]). Similarly, in *Djuric v City of New York*, there was no violation of Labor Law § 240(1) as the pipe saddle which had detached from a ceiling assembly and fell was a permanent part of the structure and not an object that required securing for purposes of the undertaking. (172 AD3d 456 [1st Dept 2019]; *lv denied* 34 NY3d 910 [2020]; *see also Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824 [2d Dept 2009] [dismissing claim as bracket which fell on plaintiff had been installed prior to accident and thus became part of building's permanent structure]).

While plaintiff argues that the blocks were not part of the permanent structure, it is undisputed that the blocks were part of the existing wall and opening, that they had been there before the commencement of the demolition and were not demolished or scheduled to be demolished, and that no work had been performed on them, and he cites no authority in support of his argument. Plaintiff thus fails to establish, *prima facie*, that his accident was the result of a violation of Labor Law § 240(1).

B. Labor Law § 241(6) claim

1. Contentions

a. Plaintiff (NYSCEF 150)

Plaintiff alleges that defendants violated Industrial Code sections 12 NYCRR §§ 23-3.3(b)(3) and (c). Having failed to address any other Code sections or regulations as a predicate for his Labor Law § 241(6) claim, he is deemed to have waived them.

Plaintiff argues that section 23-3.3(b)(3) was violated as defendants did not protect him

from the falling plaster and bricks and that section 23-3.3(c) was violated by their failure to inspect the demolition to detect hazards resulting therefrom.

b. SP's opposition (NYSCEF 181)

SP denies that it violated the Industrial Code in connection with plaintiff's accident, observing that section 23-3.3 pertains to demolition by hand operations, and that plaintiff was not engaged in demolition at the time of his accident, nor was he part of the demolition crew. Moreover, the removal of the framing and widening of the opening, it asserts, does not constitute demolition work under the Code and it denies having failed to inspect the demolition.

c. Plaintiff's reply (NYSCEF 184)

Plaintiff contends that Silver performed demolition work, including the removal of interior walls, and that its work altered the structural integrity of the building. Moreover, he alleges, the demolition itself did not cause the blocks to fall. Rather, they fell as a result of a structural instability caused by the demolition, which could have been avoided had SP conducted inspections to detect the hazard.

2. Analysis

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. Pursuant to 12 NYCRR § 23-3.3(b)(3), "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration," whereas pursuant to 12 NYCRR § 23-3.3(c),

> [d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

Both subsections apply to "demolition operations," which has been construed as "[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." (*Baranello v Rudin Mgt. Co.*, 413 AD3d 245, 246 [1st Dept 2004], *lv denied* 5 NY3d 706 [2005]). In *Baranello*, the Court dismissed an alleged violation of 12 NYCRR § 23-3.3 on the ground that the removal of a portion of a wall does not constitute demolition work. (*Id.* at 246).

Here, Silver's demolition work encompassed far more than the removal of a portion of a wall. Rather, it performed an entire demolition of numerous apartments in the building, which included the removal of floors, ceilings, walls, doors, and windows. *Baranello* is thus inapposite

Notwithstanding this distinction, these regulations apply to ongoing demolition operations or to work occurring during demolition operations. In *Card v Cornell Univ.*, the Court observed that subsections (b)(3) and (c) require that "walls are not to be left unguarded during hand demolition in such a condition that they may fall, and that continuing inspections must take place during such operations to detect hazards," and that the purpose of them "is to address structural instability resulting from the progress of demolition." (117 AD3d 1225, 1228 [3d Dept 2014]).

Silver's demolition had ended at least 10 days before plaintiff's accident. Plaintiff thus fails to establish, *prima facie*, that these regulations apply here. (*See e.g., Vasquz v Urbahn Assoc., Inc.*, 79 AD3d 493, 494 [1st Dept 2010] [subsection 23-3.3(c) requires continuing inspections "as the work progresses"]; *see also Garcia v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 494 [1st Dept 2014] [triable issues as to whether defendants performed inspections "during the demolition"]; *Toro v E. 97th St. Owners Corp.*, 2018 WL 3230951 [Sup Ct, Bronx County 2018] ["demolition by hand" subsection of Code did not apply

to plaintiff's accident as, when plaintiff was performing his work, demolition had already been completed]).

In any event, it is undisputed that Legacy, on SP's behalf, daily inspected the site during the demolition and was aware that the opening at issue was neither braced nor secured following the demolition, which is why plaintiff was assigned to frame it. Thus, not only does plaintiff fail to establish that defendants did not continually inspect the demolition operations, but there is no evidence that defendants' failure to inspect was the proximate cause of his accident.

III. SILVER'S MOTION FOR SUMMARY JUDGMENT

A. Dismissal of plaintiff's claims

1. Contentions

a. Silver (NYSCEF 192)

Silver denies having created or having had actual or constructive notice of the alleged dangerous condition that caused plaintiff's accident, as it finished its work on the project at least 10 days before the accident. It also had no continuing control over plaintiff's work area and no duty to inspect or maintain the opening. Silver thus argues that it may not be held liable for common law negligence. And, as it was neither an owner nor a general contractor, it may not be held liable pursuant to Labor Law § 200, especially as it did not direct or control the means or manner of plaintiff's work.

Not only does Silver deny responsibility for securing or bracing the opening before plaintiff began his work, and thus did not create the dangerous condition, it denies having had actual or constructive notice of the missing bracing after it finished its work or owing a duty of care to plaintiff, as it did not launch a force or instrument of harm. Rather, it demolished the opening in the manner directed by Legacy and pursuant to the pertinent blueprints and contract

specifications. Subsequent bracing or framing, it asserts, was Legacy's responsibility.

As plaintiff apparently abandons his Labor Law §§ 240(1) and 241(6) claims against Silver, they are not addressed.

b. Plaintiff's opposition (NYSCEF 178)

Although apparently conceding that Silver may not be held liable for violating Labor Law § 200, plaintiff argues that it may be held liable for common law negligence as its work on the doorway left it in a dangerous and less safe condition than before, thereby launching a force or instrument of harm. Even if Silver had no contractual obligation to secure the opening, plaintiff maintains, its failure to do so created an unreasonable risk of harm to him. He also contends that Silver was to wait for Legacy to brace the opening before it widened it, and that its failure to do so constitutes negligence.

c. SP's opposition (NYSCEF 180)

SP also argues that Silver created a dangerous condition, and that it was to notify Legacy before it widened the opening to secure the opening.

d. Silver's reply (NYSCEF 183)

Silver denies any obligation or agreement to notify Legacy before widening an opening, and observes that Legacy's supervisor testified to the contrary and that Legacy was responsible for installing, and would install, bracing after Silver had finished its demolition, as the testimony established that plaintiff's work that day was to install framing to support the opening.

2. Analysis

It is undisputed that Silver had no contractual duty to install bracing for the opening after it finished its demolition work, that Legacy undertook and had that responsibility, and that plaintiff's duty that day was to install the framework to support the opening. The testimony of

plaintiff and of his supervisor also establish that Silver had no duty or contractual requirement to inform Legacy that bracing was needed before it began its work; all of the witnesses testified consistently that bracing would be installed by Legacy only after the demolition was completed. This practice was followed before plaintiff's accident, and when Silver had finished its demolition, Legacy knew that it was complete, and Legacy thereafter assigned plaintiff to install the framework.

Thus, to the extent that it created a dangerous condition by demolishing the framework on the opening, Silver demonstrated that it did so in compliance with its contract specifications and Legacy's directions, and thus may not be held liable for plaintiff's accident. (*Fung v Japan Airlines Co., Ltd.,* 9 NY3d 35 [2007] [as contract did not require contractor to salt or sand after it had plowed snow, it had no duty to do so even if failure to do so may have caused or exacerbated dangerous condition, and thus owed plaintiff no duty of care]; *Miller v City of New York*, 100 AD3d 561 [1st Dept 2012] [as contractor did exactly what was required by contract, it was not liable to plaintiff absent evidence that it negligently performed its obligation and created unreasonable risk of harm to plaintiff]; *Aposto v 30th Pl. Holding, LLC*, 73 AD3d 492 [1st Dept 2010] [contractor contractually required only to remove tiles from floor and not refinish it, and thus even if its work exposed section of floor on which plaintiff tripped, creation of allegedly dangerous condition was precisely what was called for in defendant's contract, and thus, defendant did not create unreasonable risk of harm to plaintiff]).

Farrugia v 1440 Broadway Assocs. is inapposite. There, the Court held that even though the contractor had fulfilled its contractual obligation to remove a tank and had no responsibility to cover or repair any floor opening created by its work, a triable issue existed as to whether its failure to protect or warn about the opening created an unsafe condition. (163 AD3d 452 [1st

Dept 2018]).

Here, by contrast, it is undisputed that Silver fulfilled its obligation to Legacy and warned about the unsecured opening by informing Legacy that the framework had been demolished, to which Legacy responded by taking steps to secure the opening and repair the "unsafe condition" by having plaintiff install new framework. (*Cf. McDowell v Xand Holdings, LLC*, 172 AD3d 547 [1st Dept 2019] [triable issue as to whether contractor launched or created instrument of harm during work at construction site given dispute as to contractor's fulfillment of oral obligation to place tape around or cover trench which it had contracted to excavate]).

Moreover, plaintiff's task that day was to repair or secure the very condition which caused his accident, which also bars his recovery. (*See Polgano v New York City Educ. Fund*, 6 AD3d 222 [1st Dept 2004], *lv denied* 3 NY3d 601 [2004] [negligence claim dismissed where plaintiff was assigned to repair leaking sink and slipped and fell on water emanating from sink as he repaired it]; *Montalvo v NY and Presbyterian Hosp*., 82 AD3d 580 [1st Dept 2011] [common-law negligence claim not viable as plaintiff was injured while remedying condition he was assigned to remedy]).

Neither plaintiff nor SP denies that Silver may not be held liable pursuant to Labor Law § 200.

B. Dismissal of SP's cross claims for contribution and indemnity

As Silver cannot be held liable for negligence (*supra.,*III.A.), SP's cross claims for contribution and indemnity are dismissed.

IV. SP'S MOTION TO AMEND AND FOR SUMMARY JUDGMENT

As plaintiff's accident was not caused by Silver's negligent acts or omissions (*supra.,* III.A.), there is no basis for granting SP leave to amend its answer to assert a contractual

indemnity claim against Silver, nor for granting it summary judgment on that claim.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment (mot. seq. five) is denied in its entirety; it is further

ORDERED, that defendant Silver Services' motion for summary judgment (mot. seq. six) is granted in its entirety, and the complaint and all cross claims against it are severed and dismissed; and it is further

ORDERED, that defendants Silver Services Group Corporation, and SP 103 E 86 LLC and Stonehenge Management LLC's motion for leave to amend their answer and upon amendment, for summary judgment (mot. seq. seven), is denied in its entirety.

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7/8/2020
DATE

BARBARA JAFFE, J.S.C.

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