Luna v Broadcom W. Dev. Co. LLC
2020 NY Slip Op 34101(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 101340/2015
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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CARMEN LEZCANO LUNA, as Administratrix of the Estate of JOHNNY LUNA, deceased, and CARMEN LEZCANO LUNA, individually,

Plaintiff

- against -

BROADCOM WEST DEVELOPMENT COMPANY LLC and BRODSKY ORGANIZATION LLC,

Defendants

Index No. 101340/2015

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BROADCOM WEST DEVELOPMENT COMPANY LLC and BRODSKY ORGANIZATION LLC,

Third Party Plaintiffs

- against -

PS MARCATO ELEVATOR CO., INC.,

Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues for personal injuries, wrongful death, and lost services sustained January 9, 2015, when a descending

elevator killed her husband Johnny Luna, a mechanic employed by third party defendant PS Marcato Elevator Co., Inc. He was working on an elevator modernization project in a building at 75 West End Avenue, New York County, owned by defendant Brodsky Organization LLC and managed by defendant Broadcom West Development Company LLC. PS Marcato Elevator moves for summary judgment dismissing the third party complaint and the main complaint, C.P.L.R. § 3212(b), which PS Marcato Elevator is entitled to do even though plaintiff does not claim against third party defendant, because it may interpose any defenses of defendants-third party plaintiffs. C.P.L.R. § 1008; Houston Cas. Co. v. Cavan Corp. of NY, Inc., 158 A.D.3d 536, 539 (1st Dep't 2018); Muniz v. Church of Our Lady of Mt. Carmel, 238 A.D.2d 101, 102 (1st Dep't 1997). Defendants move separately for summary judgment dismissing the complaint and for summary judgment on their third party contractual and implied indemnification claims against PS Marcato Elevator. C.P.L.R. § 3212(b) and (e). Plaintiff cross-moves against both motions and seeks summary judgment on defendants' liability under New York Labor Law § 240(1). For the reasons explained below, the court grants the motions in part, but denies the cross-motions.

II. LABOR LAW AND NEGLIGENCE CLAIMS

Plaintiff maintains claims for violation of Labor Law § 200 and for negligence, as well as for violation of Labor Law § 240(1), but at oral argument August 20, 2020, discontinued her claims for violation of Labor Law §§ 241(6) and 241-a. The parties also stipulated that all exhibits presented are authenticated and admissible for the purpose of determining the motions and cross-motions for summary judgment.

A. SOLE PROXIMATE CAUSE

If Luna was the sole proximate cause of his death, defendants are not liable based on Labor Law §§ 240(1), 200, or negligence. Robinson v. East Med. Ctr., LP, 6 N.Y.3d 550, 554-55 (2006); Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 806 (2005); Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39 (2004); Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 290 (2003). See Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d 426, 433 (2015). Luna would be the sole proximate cause of his death if his failure without good reason to follow specific safety instructions of which he was aware caused his death. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d at 40; Guamon v. City of New York, 158 A.D3d 492, 493 (1st Dep't 2018). See Biaca-Neto v. Boston Rd. II Hous. Dev. Fund

Corp., 34 N.Y.3d 1166, 1168 (2020); Gallagher v. New York Post, 14 N.Y.3d 83, 88 (2010).

PS Marcato Elevator and defendants maintain that Luna was the sole proximate cause of his death because he disobeyed his supervisor's direction not to work at the lobby level and failed to use lockout tagout equipment to arrest the elevator. Since Luna was killed in the elevator shaft near the lobby level, had he not been there, the elevator would not have crushed him. PS Marcato and defendants rely on the deposition testimony by Paul Kahl, PS Marcato Elevator's modernization foreman, who was ambiguous at best, if not self-contradictory.

1. Working at the Lobby Level

> On the one hand Kahl clearly instructed Luna that, when
>
> it came to the lobby . . . I am going to talk to the building. And then we'll wait and see what we're going to do with the lobby.
>
> . . . .
>
> . . . And when it came to the lobby, I got to speak to the building about the lobby situation, so wait until I speak to the building.

Aff. of Ingrid Marmol Ex. I, at 60-61. Michael Thornton, a PS Marcato Elevator mechanic, also testified at his deposition that he and Luna were present when Kahl instructed that no work was to be performed "in the lobby areas until we have our rigging

equipment and confirm with the building when we can take the elevators out of service." Id. Ex. L, at 58.

The immediate work to which Kahl assigned Luna and which Luna was performing when he was killed, however, was "finish-off work on the shaft above the lobby." Id. Ex. I, at 60. See id. at 61. Luna was not working in the lobby; he was in the elevator shaft near the lobby level completing his assigned task down the shaft that involved connecting wires from the motor room at the top of the shaft to a box behind the hall button on each floor and covering the connection. Kahl admitted that

> the finish work I needed to square with the building is different than what he [Luna] needed to do.
>
> . . . .
>
> Because I told him from the lobby up, to do the covers and finish off what he needed to finish off then wait 'cause I got to talk to the building about the lobby button.

Id. at 73 (emphasis added). This testimony indicates that Luna was not performing work that Kahl had prohibited. In fact Kahl further admitted in answer to a federal Occupational Health and Safety Administration questionnaire that he instructed Luna to work on the hall buttons between elevators 8 and 9, which is exactly the work Luna was performing when he was killed.

Although Kahl maintained that he did not "know why he [Luna]

was where he was" when he was killed and that the work he was performing at that time "wasn't part of the scope of work I told him to do," id. at 75, and while Luna may have entered the elevator shaft from the lobby level, no evidence indicates that he was working on the "lobby button" that Kahl wanted "to talk to the building about." Id. at 73. Kahl's concern was that Luna was supposed to perform his work from atop the elevator car after setting it to independent mode, which gives the mechanic control over the elevator, and that the work did not require him to be in the shaft at the lobby level. No evidence, however, discloses that Luna received any such instruction.

A statement sworn August 21, 2015, by Brad Heaton, a PS Marcato Elevator helper who assisted Luna, on the other hand, departs from Kahl's and Thornton's testimony above. Heaton attested that Kahl instructed Luna and Heaton in their presence to wait before working "within the shaft" and that a Leo Rig, which is planking, and stack ladders were to be brought to the site. Id. Ex. T, at 1. Again, however, no evidence discloses that Luna was instructed to wait for this Leo Rig to be used for his task of connecting wires from the motor room to the boxes behind the hall buttons down the shaft. Heaton also described this work as running pipe that contained wires or conductors

"from the top floor to the pit" at the bottom of the shaft. Id. This description suggests that the work "within the shaft" that Kahl instructed Heaton and Luna to wait for was not the running of the wires down the shaft and the work on the hall buttons between elevators 8 and 9.

Defendants insist that the Leo Rig was necessary for Luna's task, because the elevator did not descend below the lobby level, and therefore at that level Luna could not perform his work from atop the elevator and needed the planking to stand on. Heaton belies this suggestion, however, when he attests that he and Luna completed their task at the two basement levels before proceeding to the lobby.

Heaton further attested that, after completing the work at the basement levels, he returned to the lobby, where Luna was waiting with the lobby elevator doors open and elevator car 8 on the second or third floor. Luna entered the shaft and asked Heaton to close the doors. Soon afterward, elevator cars 8 and 9 descended to the lobby level. Elevator car 8 struck and killed Luna.

Alfonso Marshall, a New York City Department of Buildings supervisory inspector when Luna was killed, testified at his deposition that he viewed video of the lobby area during the

period leading up to Luna's death. Marshall corroborates and supplements Heaton's account of this time frame. Marshall observed Luna open the hoistway door, look inside and wait for his helper Heaton to arrive. After Heaton arrived, he held the elevator door open as Luna stepped into the hoistway, and then Heaton stepped away from the door, allowing it to close. Approximately 15 seconds later, when a person entering the building approached, Heaton pressed the call button. Lights showing through the hoistway door's seams showed the elevator descend to the lobby level.

2. Using the Lockout Tagout Equipment

It is obvious from this account that Luna was not using the lockout tagout equipment to arrest the elevator's movement. Evidence regarding the availability of this equipment to Luna and any instruction to him to use it for his assigned task is even less clear and more lacking than the evidence that he was instructed not to work where he was working when he was killed. In fact Kahl testified that the lockout tagout equipment to arrest the elevator was incompatible with Luna's task, because his task required the elevator to move.

Thornton's testimony that Luna "had the ability to lock out and tag out the elevator," moreover, is speculation, id. Ex. L,

at 59, as Thornton based his testimony on the mere fact that "we were all issued safety equipment," without specifying who "we" were or what safety equipment. Id. at 60. When asked whether Luna was trained regarding locking out and tagging out an elevator, Thornton admitted that he "never worked with the man." Id. Even if Luna possessed the lockout tagout equipment, Heaton attested that shutting off the elevator required access to the motor room on the top floor, for which he and Luna had no key. Kahl and Thornton testified that mechanics received motor room keys, but not that Luna specifically possessed the key to the 75 West End Avenue building's motor room. No other evidence reveals that Luna possessed either the lockout tagout equipment or the key to the motor room or was ever instructed either to use the equipment for his assigned task or where to obtain the motor room key.

3. The Inconsistencies and Gaps Preclude Summary Judgment.

At best, there are inconsistencies in the instructions that Luna allegedly disobeyed regarding where he was to work and whether he was to use particular equipment, which raise factual issues whether he was the sole proximate cause of his death. Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp., 34 N.Y.3d at 1168; Kolakowski v. 10839 Assoc., 185 A.D.3d 427, 427 (1st Dep't

2020); Armental v. 401 Park Ave. S. Assoc., LLC, 182 A.D.3d 405, 407-408 (1st Dep't 2020); Gelvez v. Tower 111, LLC, 166 A.D.3d 547, 547 (1st Dep't 2018). The accounts by Thornton, Heaton, and Kahl of Kahl's instruction that work at the lobby level was to await the Leo Rig and a plan with the building to shut down the elevators are inconsistent with Kahl's further testimony in several respects. (1) Kahl simply instructed Luna not to work in the lobby and instructed him to perform his task "from the lobby up." Marmol Aff. Ex. I, at 73. (2) Kahl admitted that the work requiring discussion with the building was different than what Luna was to do. (3) After Luna finished that task, "then" he was to wait for Kahl "to talk to the building." Id.

All Kahl's testimony, moreover, is without any specification that the Leo Rig and a plan with the building to shut down the elevators applied to Luna's assigned task. Nor do defendants or third party defendant offer any explanation why it was unsafe for Luna to perform his task at the lobby level, but safe at every other level from the top floor to the basement levels. In sum, these inconsistencies and gaps in the evidence raise abundant factual issues regarding the instructions Luna received and whether they applied to his work, precluding summary judgment that he was the sole proximate cause of his death. Kolakowski v.

10839 Assoc., 185 A.D.3d at 427; Gelvez v. Tower 111, LLC, 166 A.D.3d at 547.

B. LABOR LAW § 200 AND NEGLIGENCE CLAIMS

Labor Law § 200 codifies an owner's duty to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). An owner's managing agent also may be subject to liability under Labor Law § 200. Burgund v. Cushman & Wakefield, Inc., 167 A.D.3d 441, 442 (1st Dep't 2018); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014); Russo v. Hudson View Gardens, Inc., 91 A.D.3d 556, 557 (1st Dep't 2012). If a dangerous condition arising from PS Marcato Elevator's work caused Luna's death, defendants may be liable for negligently allowing that condition and violating Labor Law § 200, if they supervised or exercised control over the activity that caused his death. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). See Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014). If a

dangerous condition on the work site caused Luna's death, liability depends on defendants' creation or actual or constructive notice of the condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144.

Luna's death, however, arose from the methods or means of his work, rather than any condition of the premises. Gilligan v. CJS Bldrs., 178 A.D.3d 566, 566 (1st Dep't 2019); Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d 568, 569 (1st Dep't 2015); Castellon v. Reinsberg, 82 A.D.3d 635, 636 (1st Dep't 2011). Plaintiff identifies hazards or defects related only to the work Luna was performing and not any hazard or defect inherent in the site. Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d 404, 406 (1st Dep't 2018); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607, 608 (1st Dep't 2015); Castellon v. Reinsberg, 82 A.D.3d at 636.

Although plaintiff identifies the door to the elevator control panel that she claims was missing for days before Luna's death as a site defect, because the absence of the door exposed the elevator control switches to the public, the evidence does not support her claim. Heaton attested only that Luna's usual practice was to leave a toggle switch exposed to the public and

did not attest to the actual condition of the elevator control panel at the time leading up to Luna's death. Heaton further attested that Luna's usual practice after setting the elevator on independent mode was to close the hallway elevator door before walking downstairs to the lobby, so that, even if the panel door was missing, the panel was not exposed to the public. Finally, Heaton attested only that he and Luna were on the site for three to four days, not that the panel was exposed during that time.

On the contrary, Kahl testified that he used a screwdriver to remove the panel door after Luna's death because he did not have the key to the door with him. This evidence thus undermines the conclusion by plaintiff's expert, elevator and escalator consultant William Seymour, that the exposed elevator control panel, due to its door being missing for days, was a dangerous condition that permitted anyone to switch the elevator from independent to automatic mode, allowing the elevator to move, for which defendants were responsible. Colon v. 385 Fifth Ave., LLC, __ A.D.3d __, 132 N.Y.S.3d 280, 280 (1st Dep't 2020); Espinoza v. Federated Dept. Stores, Inc., 73 A.D.3d 599, 600 (1st Dep't 2010); Parris v. Port of N.Y. Auth., 47 A.D.3d 460, 461 (1st Dep't 2008); Kleinberg v. City of New York, 27 A.D.3d 317, 318 (1st Dep't 2006). Since plaintiff conceded at oral argument that

defendants did not supervise Luna's work, the Labor Law § 200 and negligence claims against defendants are not viable. Maggio v. 24 West 57 APF, LLC, 134 A.D.3d at 626; Mutadir v. 80-90 Maiden Lane Del LLC, 110 A.D.3d 641, 643 (1st Dep't 2013).

C. LABOR LAW § 240(1) CLAIM

PS Marcato Elevator contends that, since the elevator only pinned Luna to a shaftway beam, he did not die from an elevation related hazard. Defendants contend that a moving elevator, in automatic mode, is not a falling object, relying on Nevins v. Essex Owners Corp., 276 A.D.2d 315, 317 (1st Dep't 2000). The finding there, however, related to a Labor Law 241(6) claim, not a § 240(1) claim. Although the elevator that struck Luna was not being hoisted or secured, it was still a falling object under Labor Law § 240(1). McCrea v. Arnlie Realty Co. LLC, 140 A.D.3d 427, 428 (1st Dep't 2016). In fact plaintiff's very claim is that the elevator was to have been secured by the lockout tagout equipment that Luna lacked. Nevertheless, even if the elevator was not supposed to be secured, there is no pertinent distinction between Luna's injury and consequent death and an injury from materials or equipment being lowered at a construction site. Gove v. Pavarini McGovern, LLC, 110 A.D.3d 601, 602 (1st Dep't 2013); Harris v. City of New York, 83 A.D.3d 104, 109-10 (1st

Dep't 2011); Ray v. City of New York, 62 A.D.3d 591, 591 (1st Dep't 2009).

To establish liability under Labor Law § 240(1), plaintiff must demonstrate that a violation of the statute was the proximate cause of Luna's injury and death. Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d at 433; Robinson v. East Med. Ctr., LP, 6 N.Y.3d at 554; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d at 39; Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d at 289. Luna's negligence, as long as it was not the sole proximate cause of his death, is no defense to a Labor Law § 240(1) claim. Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d at 433; Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d at 289; Concepcion v. 333 Seventh LLC, 162 A.D.3d 493, 494 (1st Dep't 2018); Bonaerge v. Leighton House Condominium, 134 A.D.3d 648, 650 (1st Dep't 2015). Plaintiff claims that defendants violated Labor Law § 240(1) because (1) they failed to advise Luna to use a harness or lockout tagout equipment or to wait for the arrival of other safety equipment on the site; (2) they failed to ensure that the control panel door in the elevator was intact; and (3) Heaton closed the elevator doors and pressed the call button causing the elevator to descend.

Setting aside the factual issues whether Luna was sole proximate cause of his death because he failed without good reason to follow specific safety instructions of which he was aware, defendants' failure to provide the lockout tagout equipment and motor room key to arrest the elevator would establish a Labor Law § 240(1) violation. Since Luna did not fall, but was pinned by the elevator to a shaftway beam, plaintiff fails to show how a harness would have enabled Luna to escape his fate. As discussed above, the evidence fails to show that the control panel door was missing when the elevator descended on Luna. The conflicting evidence discussed above leaves factual issues whether Luna was advised to wait for the Leo Rig before completing his assigned task throughout the elevator shaft.

Regarding the lockout tagout equipment, however, both Thornton and Marshall testified that its use was the safe procedure for the work Luna was performing under the elevator, and Heaton attested that the only way to have prevented Luna's death would have been to shut off the elevator using that equipment, which required access to the motor room. Kahl also testified that the lockout tagout equipment needed to be used in the motor room.

Despite this evidence and Heaton's further attestation that neither Heaton nor Luna possessed a motor room key, Kahl testified that the lockout tagout equipment to arrest the elevator was incompatible with Luna's task because his task required the elevator to move. Based on this testimony, a failure to provide that equipment to Luna would not be a proximate cause of Luna's death while completing work that he and Kahl discussed. Kahl's testimony that the lockout tagout equipment was incompatible with Luna's task thus raises a factual issue undermining Seymour's conclusion that the failure to direct Luna to use lockout tagout equipment or provide him a motor room key contributed to his death. Colon v. 385 Fifth Ave., LLC, 132 N.Y.S.3d at 280; Espinoza v. Federated Dept. Stores, Inc., 73 A.D.3d at 600; Parris v. Port of N.Y. Auth., 47 A.D.3d at 461; Kleinberg v. City of New York, 27 A.D.3d at 318.

Finally, Kahl and Marshall testified that the elevator does not move if its doors are open. See, e.g., Kolb v. Beechwood Sedgewick LLC, 78 A.D.3d 481, 482 (1st Dep't 2010). Thus Heaton's admission that he closed the doors, albeit at Luna's request, while Luna was working in the shaft, without Heaton knowing whether elevator 8 was set to independent mode or otherwise immobilized, also contributed to Luna's death.

Heaton's further negligence in pressing the call button to cause the elevator to descend was of course the ultimate contributing factor. Thus, if in fact, contrary to Kahl's testimony, the failure to provide Luna the lockout tagout equipment or a motor room key contributed to his death, that failure and Heaton's negligence render any negligence on Luna's part comparative. Bonaerge v. Leighton House Condominium, 134 A.D.3d at 649; Rosa v. Macy Co., 272 A.D.2d 87, 87 (1st Dep't 2000). Therefore the factual issues whether the failure to provide safety equipment proximately caused Luna's death and whether Luna was the sole proximate cause preclude summary judgment in any party's favor on the Labor Law § 240(1) claim. Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp., 34 N.Y.3d at 1168; Kolakowski v. 10839 Assoc., 185 A.D.3d at 427; Armental v. 401 Park Ave. S. Assoc., LLC, 182 A.D.3d at 407-408; Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 589 (1st Dep't 2018).

D. LOST SERVICES CLAIM

Because factual issues preclude dismissal of the Labor Law § 240(1) claim, as discussed above, the court denies defendants' motion for summary judgment dismissing plaintiff Carmen Lezcano Luna's derivative claim for lost services. Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp., 34 N.Y.3d at 1168; Elias v. City of

New York, 173 A.D.3d 538, 539 (1st Dep't 2019); Lombardi v. Partnership 92 W., L.P., 129 A.D.3d 547, 547 (1st Dep't 2015). See Royce v. DIG EH Hotels, LLC, 139 A.D.3d 567, 569 (1st Dep't 2016).

III. THIRD PARTY CLAIMS

Defendants-third party plaintiffs claim against PS Marcato Elevator for contribution, implied and contractual indemnification, and breach of a contract to procure insurance. At oral argument, PS Marcato Elevator conceded that it owes defendants contractual indemnification, and defendants conceded that PS Marcato Elevator procured the required insurance.

New York Workers' Compensation Law §§ 11 and 29 bar the third party claims for non-contractual, implied indemnification and contribution, based on third party PS Marcato Elevator's negligence in causing Luna's death, unless Luna suffered a "grave injury" under § 11. Isabella v. Hallock, 22 N.Y.3d 788, 793 (2014); New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d 501, 505 (2014); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Netzahuall v. At Will LLC, 145 A.D.3d 492, 492 (1st Dep't 2016). Because Luna's death is a grave injury, Workers' Compensation Law §§ 11 and 29 do not bar those claims against PS Marcato Elevator. Public Adm'r of Bronx County v. 485

E. 188th St. Realty Corp., 116 A.D.3d 1, 8 (1st Dep't 2014); Rice v. West 37th Group, LLC, 96 A.D.3d 500, 502 (1st Dep't 2012). See Fleming v. Graham, 10 N.Y.3d at 299.

Since the court dismisses the Labor Law § 200 and negligence claims against defendants, they may seek implied indemnification. Serowik v. Leardon Boiler Works Inc., 129 A.D.3d 471, 472 (1st Dep't 2015); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2012). Since defendants were not negligent, and PS Marcato Elevator has not established that it was not negligent, it is not entitled to summary judgment dismissing defendants' implied indemnification or contribution claim. Berihuete v. 565 W. 139th St., L.P., 171 A.D.3d 667, 667 (1st Dep't 2019); Liberman v. Cayre Synergy 73rd LLC, 140 A.D.3d 623, 624 (1st Dep't 2016). PS Marcato Elevator, as the party that carried out, supervised, or was responsible to supervise the work that caused Luna's death, is liable to defendants for implied indemnification and contribution if PS Marcato Elevator was negligent. Joynes v. Acadia-P/A 161st St., LLC, 117 A.D.3d 651, 651 (1st Dep't 2014); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 480; Naughton v. City of New York, 94 A.D.3d at 10; Burgos v. 213 W. 23rd St. Group LLC, 48 A.D.3d 283, 284

(1st Dep't 2008).

IV. PLAINTIFF'S RELAXED BURDEN OF PROOF IN HER WRONGFUL DEATH ACTION

Plaintiff maintains that Johnny Luna's death, preventing Luna from describing the occurrence, entitles her to a relaxed burden of proof. Wingerter v. State of New York, 58 N.Y.2d 848, 850 (1983); Noseworthy v. City of New York, 298 N.Y. 76, 80 (1948); Melendez v. Parkchester Med. Servs., P.C., 76 A.D.3d 927, 928 (1st Dep't 2010); Black v. Loomis, 236 A.D.2d 338, 338 (1st Dep't 1997). See Williams v. Hooper, 82 A.D.3d 448, 449-50 (1st Dep't 2011). Application of this doctrine requires plaintiff to present evidence from which defendants' liability may be inferred. Visone v. Third & Twenty Eight LLC, 184 A.D.3d 543, 544 (1st Dep't 2020); Evans v. Acosta, 169 A.D.3d 438, 439 (1st Dep't 2019); Varona v. Brooks Shopping Ctrs. LLC, 151 A.D.3d 459, 459 (1st Dep't 2017); Ostroy v. Six Sq. LLC, 100 A.D.3d 493, 495 (1st Dep't 2012). The factual issues delineated above prevent plaintiff from making the required showing to demonstrate her entitlement to the lesser burden of proof in the evaluation of her evidence rebutting defendants' and PS Marcato Elevator's motions. Rugova v. Davis, 112 A.D.3d 404, 405 (1st Dep't 2013); Melendez v. Parkchester Med. Servs., P.C., 76 A.D.3d at 928; Lynn

v. Lynn, 216 A.D.2d 194, 196 (1st Dep't 1995); Santos v. City of New York, 135 A.D.2d 426, 431 (1st Dep't 1987).

The doctrine is also inapplicable at this stage because the undisputed evidence in the current record shows that defendants' and PS Marcato Elevator's knowledge of the cause of Luna's unwitnessed death is no greater than plaintiff's knowledge of the occurrence. Walsh v. Murphy, 267 A.D.2d 172, 172 (1st Dep't 1999); Lynn v. Lynn, 216 A.D.2d at 195. Plaintiff contends that Johnny Luna would have been able to address whether he received safety equipment and was instructed to use it and what Kahl instructed Luna before his death. Yet Kahl testified that PS Marcato Elevator issued its mechanics lockout tagout equipment when they were hired. Heaton's statement suggests that he and Luna did not possess such equipment and in any event flatly denies their possession of the key to the motor room that would have enabled them to use the equipment. Kahl, Thornton, and Heaton related Kahl's instructions before Luna's death and confirmed that Luna was present when Kahl gave those instructions. Heaton, who was present when Luna was killed, and Marshall, who viewed lobby video of the occurrence, attested to the circumstances surrounding Luna's death. Thus plaintiff and defendants "are similarly situated insofar as accessibility to

the facts of the deceased's death is concerned." Lynn v. Lynn, 216 A.D.2d at 195.

V. CONCLUSION

In sum, the court grants the motion by third party defendant for summary judgment to the extent of dismissing plaintiff's Labor Law § 200 and negligence claims and defendants' third party claim for breach of a contract to procure insurance. C.P.L.R. § 3212(b) and (e). The court grants defendants' motion for summary judgment to the extent of dismissing plaintiff's Labor Law § 200 and negligence claims and awarding defendants contractual and implied indemnification against third party defendant. Id. The court otherwise denies the motions and denies plaintiff's cross-motions for partial summary judgment. C.P.L.R. § 3212(b).

This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: December 10, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS J.S.C.

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