SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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CHRISTOPHER CABRAL, JAIME CABRAL,

Plaintiff,

- v -

THE ROCKEFELLER UNIVERSITY, TURNER CONSTRUCTION COMPANY,

Defendant.

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INDEX NO. 156724/2016

MOTION DATE 01/27/2023

MOTION SEQ. NO. 015

DECISION + ORDER ON MOTION

THE ROCKEFELLER UNIVERSITY, TURNER CONSTRUCTION COMPANY

Plaintiff,

-against-

THE PRINCE MANUFACTURING COMPANY

Defendant.

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Third-Party
Index No. 595221/2017

THE ROCKEFELLER UNIVERSITY, TURNER CONSTRUCTION COMPANY

Plaintiff,

-against-

NORTHERN TOOL & EQUIPMENT CATALOG COMPANY, LLC, NORTHERN TOOL & EQUIPMENT CATALOG HOLDINGS, INC., NORTHERN TOOL & EQUIPMENT COMPANY, INC., NORTHERN TOOL & EQUIPMENT PARTS, LLC.

Defendant.

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Second Third-Party
Index No. 595627/2021

The following e-filed documents, listed by NYSCEF document number (Motion 015) 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 632, 635, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

On August 8, 2016, at 10:30 a.m., Plaintiff, Christopher Cabral (Cabral) was struck in the face when a hydraulic piston, being used as part of a large mechanism to pull a mooring arm and whaler beam in a northerly direction up the East River alongside the FDR Parkway, broke or malfunctioned. Cabral was an Ironworker who was part of a gang for steel subcontractor New York City Constructors (NYCC).

The accident occurred at the Rockefeller University (RU) extension project located at 1228-1230 York Avenue at 63rd through 66th Streets, between York Avenue and FDR Drive in Manhattan. RU is the owner of the construction site. RU retained Turner Construction Company (Turner) as the general contractor, who then subcontracted with various trades to construct a modular building above the FDR on the Upper East Side. To move the modules, Turner subcontracted with Banker Steel, who subcontracted with NYCC. NYCC used a barge crane that they pulled up the East River using tugboats. The barge was connected by a mooring arm to a whaler beam that sat on the land east of the FDR roadway. NYCC then used a hydraulic piston, a Prince F500, to move the whaler beam laterally north and south to reposition the crane to set the modules. On each end of the hydraulic piston were clevis ears, that contained clevis pins.

The Prince Manufacturing Company (Prince) manufactured the hydraulic piston. RU and Turner allege that the Prince F500 hydraulic piston was defectively designed, and that Prince breached the implied warranty of merchantability by producing a product that was not fit for its intended use and reasonably foreseeable purpose. Further, they allege that Prince failed to warn users of the inherent and unobservable dangers of the product, and assert causes of action for common law indemnity, contractual indemnity, and for failure to procure insurance. Prince asserts counterclaims against RU and Turner for indemnity and contribution.

Second third-party defendants Northern Tool & Equipment Catalog Company, LLC Northern Tool & Equipment Catalog Holdings, Inc., Northern Tool & Equipment Company, Inc., Northern Tool & Equipment Parts, LLC (collectively, Northern Tool) are the distributor of this Prince F500 hydraulic piston, and RU and Turner brought a second Third-Party action against Northern Tool.

PROCEDURAL HISTORY

By decision and order dated February 18, 2022, the court granted Northern Tool's motion to dismiss (mot. seq. 10) the causes of action against it in the second third party complaint for common law indemnification and contribution, strict liability, and breach of implied warranty of merchantability, but declined to dismiss the causes of action against it for contractual indemnity and failure to procure insurance. The court also granted plaintiffs' motion to sever the remaining second third-party action (mot. seq. 9).

By the same order, the court denied RU and Turner's motion for partial summary judgment against Prince (mot. seq. 8), finding that while RU and Turner met their *prima facie* showing, the parties competing expert opinions and theories of liability "create questions of fact which must be determined at trial" and that "[t]he conflicting affidavits of the parties' experts present issues of credibility that cannot be resolved on a motion for summary judgment."

Additionally, by the same order the court granted plaintiffs' motion for partial summary judgment against RU and Turner (mot. seq. 11) to the extent of finding them liable under Labor Law § 241(6) for violations of Industrial Code §§ 23-1.5(c) (3) and 23-9.29(a) and denied the motion as plaintiffs' Labor Law §§ 240(1) and 200 claims.

By decision and order dated March 14, 2022, the court granted RU and Turner's motion to dismiss plaintiffs' Labor Law §§ 240(1) and 200 claims (mot.seq.12).

By decision and order dated September 30, 2022, the court denied RU and Turner's motion for leave to reargue the court's granting of summary judgment on plaintiffs' Labor Law § 241(6) claim and to reargue and renew Northern Tool's motion to dismiss their claims for indemnification and contribution, and for leave to re-argue plaintiffs' motion to sever the second third-party complaint (mot. seq. 13).

By the same order, the court granted Northern Tool's motion to dismiss the causes of action against it in the amended second third party complaint for common law indemnification and contribution, strict liability, and breach of implied warranty of merchantability, and again declined to dismiss the causes of action against it for contractual indemnity and failure to procure insurance (mot. seq. 14).

By decision and order dated May 18, 2023, the Appellate Division affirmed this Court's dismissal of RU and Turner's claim for common law contribution but found that they adequately pleaded a cause of action for common law indemnity against Northern Tool. *Cabral v Rockefeller Univ.*, 2023 N.Y. Slip Op. 02738 (1st Dept 2023).

PENDING MOTIONS

On October 11, 2022, Third-party defendant The Prince Manufacturing Company (Prince) moved for an order pursuant to CPLR 3212 awarding it summary judgment against defendants/third-party plaintiffs RU and Turner and dismissing the third-party complaint against it.

On December 20, 2022, RU and Turner cross moved for an order pursuant to CPLR 3211 dismissing Prince's counterclaims for common law indemnity and contribution.

The motions are consolidated herein for determination as set forth below.

PRINCE'S MOTION FOR SUMMARY JUDGMENT

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Evidentiary Issues

Turner and RU object to Prince's use of several unsigned deposition transcripts as exhibits, arguing that they are inadmissible to support its motion. They additionally object that Prince fails to establish a foundation for the admission of several other exhibits.

"[W]hile a motion for summary judgment must be supported by evidentiary facts, they need not necessarily be in the form used at trial." *State v Metz*, 241 AD2d 192 (1st Dept 1998). Turner and RU are correct that, pursuant to CPLR 3116, unsigned deposition transcripts ordinarily are not admissible, with limited exceptions, in support of a motion for summary judgment. *Pina v Flik Intern. Corp.*, 25 AD3d 772 (2d Dept 2006). However, as RU and Turner have relied on the same unsigned deposition transcripts in this case, annexing them as exhibits to prior motion papers, they have waived objections to the transcripts' admissibility for the purposes of this motion. *See King v Brown*, 72 Mic.2d 560 (App Term, 1st Dept 1972).

"[A]n attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment." *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324 (1st Dept 2004). Here, as Prince references its exhibits within its attorney affirmation, it has established a proper foundation for the purposes of this motion.

RU and Turner's Contract Claims

Prince contends that there was no contract between Prince and Turner or NYCC, necessitating dismissal of Turner's contractual indemnity and failure to procure insurance claims.

In opposition, RU and Turner argue that as Prince's denial of the existence of a contract is supported solely by an affirmation of Prince's defense counsel and not a witness with knowledge, it has failed to meet its burden to dismiss their contractual indemnity and failure to procure insurance claims.

In reply, Prince contends that as it is undisputed that NYCC purchased the piston, not RU or Turner, and as they fail to offer proof to rebut the lack of a contract, their contractual indemnity and failure to procure insurance claims should be dismissed.

While Prince asserts the lack of existence of a contract, it cites no evidence for this claim other than its attorney's affirmation stating that no contract exists. Merely pointing to gaps in a plaintiff's proof is insufficient to carry the burden on a motion for summary judgment. *Torres v Merill Lynch Purch.*, 95 AD3d 741 (1st Dept 2012). Absent an affidavit of an individual with personal knowledge, or other evidence in support of this assertion, Prince fails to meet its *prima facie* burden to support dismissal of RU and Turner's claims for contractual indemnity and failure to procure insurance. *Saunders v J.P.Z. Realty, LLC*, 175 AD3d 1163 (175 AD3d 1163 (1st Dept 2019); *see Vermette v Kenworth Truck Co.*, 68 NY2d 714 (1986).

RU and Turner's Common Law Indemnity Claims

Prince claims that as the court found Turner liable to plaintiff under Labor Law § 241(6), and on that basis dismissed the common law indemnity claim against Northern Tool, it should dismiss the common law indemnity claim against it.

In opposition, RU and Turner argue that dismissal of its common law indemnity claim is not warranted as Prince was at fault, and that the court's prior determination that they are liable under Labor Law § 241(6) does not equate to a finding of fault which would preclude them from seeking indemnity.

In reply, Prince argues that as there has been a finding of wrongdoing against RU and Turner, they are not entitled to common law indemnity.

> (T)he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is "a separate duty owed the indemnitee by the indemnitor" (*Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690, 555 N.Y.S.2d 669, 554 N.E.2d 1257). The duty that forms the basis for the liability arises from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him" (*Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 468, 31 N.E. 987; see, *McDermott v. City of New York*, 50 N.Y.2d 211, 216–217, 428 N.Y.S.2d 643, 406 N.E.2d 460).

Raquet v Braun, 90 NY2d 177, 183 (1997). A party who is at fault to some degree is not entitled to common law indemnity. *Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656 (2d Dept 2014); *Broyhill Furniture Industries, Inc. v Hudson Furniture Gallaries, LLC*, 61 AD3d 554 (1st Dept 2009).

This court previously found that not only that RU and Turner are liable pursuant to Labor Law § 241(6), but that "unlike a 240(1) claim which imposes strict liability regardless of fault, a § 241(6) claim does require a finding of wrongdoing" based on which the Court dismissed RU and Turner's cause of action for common law indemnity against Northern Tool. However, the

Appellate Division modified this Court's order, reinstating RU and Turner's common law indemnity claim against Northern Tool. *Cabral*, 2023 N.Y. Slip Op. 02738, citing *Cunha v City of New York*, 12 NY3d 504, 508-10 (2009), *Kemp v Lakelands Precast*, 55 NY2d 1032 (1982), *Gjeka v Iron Horse Transp., Inc.*, 191 AD3d 526 (1st Dept 2021).

In accord with the Appellate Division's decision, RU and Turner's cause of action against for common law indemnity against Prince cannot be dismissed on the basis that there has been a finding of liability against RU and Turner under Labor Law 241(6). Absent any other arguments for dismissal by Prince, it fails to meet its *prima facie* burden to dismiss this claim.[1]

RU and Turner's Breach of Implied Warranty Claim

Prince argues that its express warranty, which limits its obligation to replacing defective products and explicitly disclaims implied warranties, and which it contends was available on its website and included in the Terms and Conditions that were sent out with every purchase order filled by Prince, bars all of RU and Turner's claims including their breach of warranty claim.

In opposition, RU and Turner contend that there is no evidence that Prince's disclaimer of implied warranties was actually provided to them.

In reply, Prince contends that as its warranty was included with the terms and conditions that were sent out with every purchase order, and as it is undisputed that NYCC purchased the piston, it logically follows that they received it.

While the third-party complaint does not contain an enumerated cause of action for breach of warranty, it is undisputed that RU and Turner assert cause of action for breach of implied warranty of merchantability.

[1] While RU and Turner argue against dismissal of their common law contribution claim against Prince, they do not assert a cause of action for common law contribution in the third-party complaint, and Prince does not seek dismissal of this unasserted cause of action, so the argument is not addressed herein.

Pursuant to NY UCC § 2-316(b):

> to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

Here, while there is no dispute that the waiver language is sufficiently clear and conspicuous, RU and Turner dispute Prince's assertion that it was actually received by the Purchaser, NYCC. While it is undisputed that the disclaimer was available on Prince's website, and would be provided on request, that is insufficient to effectively waive implied warranties. *See Whalen v CSX Transportation, Inc.*, 2017 WL 4075200 (SD NY 2017). Prince does contend that they would include the disclaimer of warranty as part of their invoice, however the invoice they attach as an exhibit is dated 2 years after plaintiff's accident. Additionally, while one of Prince's witnesses, Kent Thompson, testified that Prince's warranty accompanies its purchase orders, its other witness, Joel Nelson when asked if the warranty went out to the public, initially answered "no" before qualifying that "it does, yes, if they go to the website." Thus, absent any alternative arguments by Prince, it fails to meet its burden of demonstrating that it effectively disclaimed implied warranties here.

Additionally, even if Prince did meet its burden of demonstrating the applicability of the disclaimer in this case, its unsubstantiated contention that it would result in the dismissal of all of RU and Turner's claims is without merit.

RU and Turner's Product Liability Claims

Prince contends that dismissal of all claims against it is warranted as the piston at issue was a mere component of a complex system designed by NYCC and used by Turner, for which it gave no advice, guidance, or recommendation as to its use. It argues that Turner's operation of

the piston without use of a cotter pin to engage one of the clevis ears constitutes unforeseeable misuse.

In opposition, RU and Turner contend that Prince's failure annex an expert affidavit, which was the basis for the court's prior denial of RU and Turner's motion for summary judgment due to its creation of a triable issue of fact, not only precludes summary judgment for Prince, but also justifies the court to award them summary judgment in their favor. They reference the affidavit of their expert, arguing that as the court ruled it was sufficient to support a *prima facie* showing of summary judgment in their favor, it is sufficient to raise triable issues of fact here as to whether the piston was defectively designed by Prince, and that the defective design caused the accident. They contend that their use of the piston was normal and foreseeable, that Prince did not warn against the use of a bent nail in place of a clevis pin, and that it was the piston itself, not the system that it was used in, that failed, and thus argue that the component part defense is unavailable.

In reply, Prince contends that the record is undisputed that the piston was not defective but failed due to misuse. It argues that RU and Turner's expert is purely speculative, as it is not based on inspection of the product, lacks empirical data or calculations, and ignores key facts. It argues that while the piston's use on the project was not unique or unforeseeable, the failure to use cotter pins to secure the clevis ear was unique and unforeseeable. It references the affidavit of its expert, which it had relied on in opposition of RU and Turner's prior motion for summary judgment.

> "A party injured as a result of a defective product may seek relief against the product manufacturer ... if the defect was a substantial factor in causing the injury" (*Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38, 41, 760 N.Y.S.2d 79, 790 N.E.2d 252 [2003]: *see Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 110, 463 N.Y.S.2d 398, 450 N.E.2d 204 [1983]). "A strict products liability cause of action may be premised on a defect in the manufacturing process, a defect in the design or a failure by the

> manufacturer to provide adequate warning or instructions" (*Perazone v. Sears, Roebuck & Co.*, 128 A.D.2d 15, 17–18, 515 N.Y.S.2d 908 [1987], citing *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d at 102, 106–107, 463 N.Y.S.2d 398, 450 N.E.2d 204).

Fitzpatrick v Currie, 52 AD3d 1089 (3d Dept 2008). "The duty of a manufacturer… extends to the design and manufacture of a finished product which is safe at the time of sale." *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471 (1980). "Substantial modifications of a product from its original condition by a third party which render a safe product defective are not the responsibility of the manufacturer." *Id*; *see Landrine v Mego Corp.*, 95 AD2d 759 (1st Dept 1983). Additionally, a component part manufacturer is not strictly liable where the part is produced "in accordance with the design, plans and specifications of the buyer and such design, plans and specifications do not reveal any inherent danger in either the component part or the assembled unit." *In re New York City Asbestos Litigation*, 121 AD3d 230 (1st Dept 2014), quoting *Leahy v Mid-West Conveyor Co.*, 120 AD2d 16, 18 (3d Dept 1986), *lv denied* 69 NY2d 606 (1987); *see Munger v Heider Mfg Corp.*, 90 AD2d 645 (3d Dept 1982).

As there is no allegation or evidence that the piston here was made according to NYCC or Turner's specifications, the central fact issue is whether the piston failed due to defective design, or due to an improper, unforeseeable use or modification. Also, as clarified in Prince's reply, the only alleged modification is the use the piston without one of the cotter pins.

"A defendant moving for summary judgment based on substantial modification must establish entitlement to that defense 'sufficiently to warrant the court as a matter of law in directing judgment'" in its favor. *Hoover v New Holland North America, Inc.*, 23 NY3d 41, 56 (2014), quoting CPLR 3212(b). "If the defendant establishes *prima facie* entitlement to summary judgment based on substantial modification, the burden shifts to the plaintiff." *Id.* The substantial modification defense may be overcome by demonstrating that the post-sale modification did not

render a "safe product defective" because the product incorporated a defectively designed safety feature at the time of sale. *Id.*

While the court may consider Prince's expert affidavit, submitted in reply, to the extent that it is directly responsive to RU and Turner's opposition (*Whale Telecom Ltd. V Qualcomm Inc.*, 41 AD3d 348 [1st Dept 2007]), a party moving for summary judgment "cannot meet its *prima facie* burden by submitting evidence for the first time in reply" *Wells Fargo Bank, N.A. v Mitselmakher*, 2023 WL 3486621 (2d Dept 2023), quoting *Deutsche Bank Nation Trust Co. v Adlerstein*, 171 AD3d 868 (2d Dept 2019). Absent the expert affidavit, Prince fails to meet its burden of demonstrating that the use of a nail in place of a pin was a substantial modification.

Even if Prince were able to meet its burden, RU and Turner raise triable issues of fact with its own expert affidavit, as conflicting expert affidavits present issues of credibility that cannot be resolved on a motion for summary judgment. *See Hill v Lorac House, Inc.*,135 AD3d 659 (1st Dept 2016); *Riley v ISS Intl. Serv. Sys.*, 5 AD3d 754, 756 (2d Dept 2004); *Slomin v Skaarland Constr. Corp.*, 207 AD2d 639, 641 (3d Dept 1994); *see generally Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 (4th Dept 2011); *Swormville Fire Co., Inc. v. K2M Architects P.C.*, 147 AD3d 1310, 1311 (4th Dept 2017).

RU AND TURNER'S CROSS-MOTION TO DISMISS

Contentions

RU and Turner seek dismissal of Prince's counterclaims for common law indemnity and contribution. They argue that Prince cannot possess a viable common law indemnity claim as there are no direct claims asserted against it by Cabral, and it is clear that none will be, and thus any liability by Prince would be contingent on a finding of fault against them, rather than vicarious liability. They contend that Prince's common law contribution claims against RU and

Turner is barred by law of the case and collateral estoppel, as the court found that they were not negligent when it dismissed plaintiffs' Labor Law § 200 claim against them.

In opposition, plaintiffs argue that the cross-motion is untimely, as it was filed after the deadline to file dispositive motions and is not sufficiently related to Prince's motion. They argue that while the motion is made under CPLR 3211, it is really a summary judgment motion. They also argue that collateral estoppel is inapplicable as it only applies to issues decided in prior actions, and that law of the case is not a proper basis for a CPLR 3211 motion. They argue that the court's finding that RU and Turner violated Labor Law § 241(6) does establish that they are at fault, and that the court's dismissal of their Labor Law § 200 does not have preclusive effect here as it was based on plaintiffs' failure to put forth arguments in opposition to dismissal of that claim. They also note that both the decisions dismissing plaintiffs' Labor Law § 200 is pending appeal, and that the court could not only overturn that decision but also grant plaintiffs summary judgment even though they did not appeal the decision denying them summary judgment on that claim. In separate opposition, Prince reiterates plaintiffs' arguments as to their claims.

In reply, RU and Turner argue that there is no time limit to make a CPLR 3211 motion, and that collateral estoppel and law of the case constitutes a proper basis for such motion. They also note that as Prince fails to oppose their arguments that its cause of action for indemnification should be dismissed.

Analysis

A CPLR 3211 motion may be made at any time, even during trial. *Stolarski v Family Services of Westchester, Inc.*, 110 AD3d 980 (2d Dept 2013). Collateral estoppel is not applicable here, as RU and Turner do not cite a decision a prior action that would have preclusive effect here. *See Kaufman v Eli Lilly and Co.*, 65 NY2d 449 (1985); *Matter of*

Donziger, 163 AD3d 123 (1st Dept 2018). However, law of the case constitutes a proper basis for a CPLR 3211(a)(5) motion. *See A.M. v Holy Resurrection Greek Orthodox Church of Brookville*, 199 AD3d 489 (1st Dept 2021); *Ahrorgulova v Mann*, 144 AD3d 953 (2d Dept 2016).

Absent substantive argument by plaintiff or Prince opposing the portion of RU and Turner's cross motion seeking to dismiss Prince's counterclaim for common law indemnity, that claim is dismissed.

"Generally, a claim for common-law contribution involves the apportionment of liability amongst joint tortfeasors, both of whom owed a duty to an injured plaintiff." *Aiello v Burns Intern. Sec. Services Corp.*, 110 AD3d 234, 247-48 (1st Dept 2013), citing *Smith v Sapienza*, 52 NY2d 82, 87 (1981).

While the court dismissed plaintiff's Labor Law § 200 claims against RU and Turner, that decision was based on Plaintiff's failure to offer arguments opposing dismissal. "[W]hile res judicata and collateral estoppel are rigid rules of limitation, LOTC has been described as amorphous and involving "an element of discretion." *In re Part 60 RMBS Put -Back Litigation*, 195 AD3d 40, 48 (1st Dept 2021) (internal citations omitted). "[I]t requires that the underlying legal determination on which preclusion is based was resolved on the merits." *Id.* Under the doctrine of law of the case, dismissal of a claim based on a failure to oppose a motion does not constitute a resolution of a factual issue on the merits. *T. Mina Supply, Inc. v Clemente Bros. Contracting Corp.*, 139 AD3d 1040 (2d Dept 1040); *Mamani v Kiesling*, 117 AD3d 804 (2d Dept 2014). This is especially true where, as here, the party that would be bound was not party to the original motion. *Cf. Windley v City of New York*, 104 AD3d 597 (1st Dept 2013) (defendant

was collaterally estopped from litigating issue which it failed to oppose in summary judgment motion against it in the prior action).

While this Court previously found that its finding of liability against RU and Turner under Labor Law § 241(6) constituted a finding of fault against them, that decision was modified by the Appellate Division. *Cabral*, 2023 N.Y. Slip Op. 02738. Thus, this court's prior decision finding RU and Turner liable under Labor Law § 241(6) does not, as a matter of law, constitute a finding of fault against RU and Turner. Thus, there has been no judicial determination on the merits for which the doctrine of law of the case would bar Prince's common law contribution claim.

PRINCE'S FAILURE TO MOVE FOR DEFAULT JUDGMENT ON ITS COUNTERCLAIMS

RU and Turner note for the first time in their reply papers on their cross-motion that Prince does not claim that an answer was served to its counterclaims, arguing that as it did not file a default judgment within one year, its counterclaims must be dismissed pursuant to CPLR 3215(c), regardless of the sufficiency of their motion.

Pursuant to CPLR 3215(c):

> If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

This provision has been found to be applicable to counterclaims as well as direct claims. *Bazile v Saleh*, 190 AD3d 811 (2d Dept 2021); *Clemente v Clemente*, 50 AD3d 514 (1st Dept 2008). As the argument is raised for the first time in reply papers, it is not considered for

purposes of RU and Turner's cross motion. However, the statute allows the court to raise the issue on its own initiative. *Perricone v City of New York*, 62 NY2d 661 (1984).

On review of the record, it appears that while the third-party answer, which contained counterclaims, was e-filed on May 16, 2017, no reply was ever e-filed, and Prince never moved for a default judgment on its counterclaims. Thus, Prince will have to show cause why its remaining counterclaim should not be dismissed as abandoned.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion for summary judgment of third-party defendant The Prince Manufacturing Company is denied; and it is further

ORDERED that the motion to dismiss of defendants/third-party plaintiffs The Rockefeller University and Turner Construction Company is granted, to the extent that Prince's counterclaim against it for common law indemnity is severed and dismissed, and is otherwise denied; and it is further

ORDERED that Prince is ordered to show cause on or before July 10, 2023, at a virtual appearance at 11:30 am, why its remaining counterclaim should not be dismissed as abandoned pursuant to CPLR 3215(c); and it is further

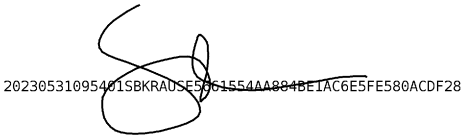
ORDERED that, within 20 days from entry of this order, defendants/third-party plaintiffs shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



5/31/2023
DATE

SABRINA KRAUS, J.S.C.

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