Visone v Goldman Sachs Headquartes LLC
2017 NY Slip Op 32338(U)
November 1, 2017
Supreme Court, New York County
Docket Number: 103152/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LEONARD VISONE and BARBARA VISONE,

Plaintiffs,

-against-

GOLDMAN SACHS HEADQUARTES LLC, THE GOLDMAN SACHS GROUP, INC., TISHMAN CONSTRUCTION CORPORATION, STRUCTURE-TONE, INC., and HI TECH DATA FLOORS, INC.,

Defendants,

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GOLDMAN SACHS HEADQUARTERS LLC, THE GOLDMAN SACHS GROUP, INC., TISHMAN CONSTRUCTION CORPORATION, STRUCTURE-TONE, INC. and HI-TECH FLOORING, INC.,

Third-party Plaintiff,

-against-

UNITY ELECTRIC CO., INC.,

Third-party Defendant.

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UNITY ELECTRIC CO., INC.,

Second Third-party Plaintiff,

-against-

SHERLAND & FARRINGTON, INC.

Second Third-party Defendant.

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Index No. 103152/16
Motion Seq. Nos. 005 and 006

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants/third-party plaintiffs Goldman Sachs Headquarters LLC (Goldman Headquarters), The Goldman Sachs Group, Inc. (Goldman), Tishman

Construction Corporation (Tishman), Structure-Tone, Inc. (Structure-Tone), and Hi-Tech Flooring, Inc. (Hi-Tech), as well second third-party defendant Sherland & Farrington, Inc. (Sherland) (collectively, the Goldman defendants) move, pursuant to CPLR 3212, for summary judgment: (1) dismissing plaintiff's Labor Law §§ 200 and 241 (6) claims as against Goldman Headquarters LLC, Goldman, Tishman, Structure-Tone and Hi-Tech Flooring; (2) granting Goldman Headquarters, Goldman, Tishman, Structure-Tone, and Hi-Tech Flooring contractual liability against defendant/second third-party plaintiff Unity Electric Co. Inc. (Unity); and (3) dismissing Unity's second third-party complaint against Sherland (motion seq. No. 005). Unity moves for summary judgment, dismissing all claims and cross claims as against it and for liability as to its claim for common-law indemnification against Sherland (motion seq. No. 006).

BACKGROUND

This case arises from a large project involving the construction of Goldman's 44-story world headquarters at 200 West Street. The building has a high-tech, environmentally friendly underfloor air system and plaintiff Leonard Visone (Visone) alleges that he was injured, toward the end of the project, on October 1, 2009, when he tripped and fell into an air conditioning hole concealed by a carpet tile. At the time, Visone was performing electrical work for Unity and he alleges that the accident caused injuries to his shoulder, ankle, and back. More specifically, Visone alleges that he was testing data connections when he tripped while walking through a passageway (Visone tr at 37-38). "After I fell," Visone testified, "I came to realize that the carpet was over an opening cut out in the floor so it gave out because there was nothing supporting the carpet underneath" (*id.* at 38).

On July 26, 2011, plaintiff filed a complaint against Goldman Headquarters, Goldman, Tishman, Structure-Tone, High-Tech Flooring, and Eleven Eleven Construction Corporation

(Eleven Eleven) alleging two causes of action. The first cause of action alleges that defendants are liable under Labor Law §§ 200 and 241 (6), while the second cause of action alleges that defendants are liable to plaintiff Barbara Visone for loss of her husband's services.

On February 24, 2012, defendants filed a third-party complaint alleging five causes of action against Unity. The first and second causes of action in the third-party complaint are for contractual indemnification, the third cause of action is for common-law indemnification, the fourth is for breach of contract for failure to procure insurance, while the fifth is for contribution. Unity filed the second third-party complaint on May 9, 2011 alleging that Sherland is liable to it for common-law and contractual indemnification, contribution, and breach of contract for failure to procure insurance.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by

admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

I. Labor Law § 241 (6)

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

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation

of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

The first threshold question in a Labor Law § 241 (6) analysis is whether a party is an owner, general contractor or statutory agent. Below, the court will examine whether each defendant moving for summary judgment passes this threshold.

Tishman

The Goldman defendants argue that Tishman was not an owner, general contractor or statutory agent. In support, the Goldman defendants submit the deposition transcript of Marcel Rhoden (Rhoden), Tishman's corporate safety director. Rhoden testified that Tishman had no role on the fourth floor, where plaintiff's accident happened, on the date of plaintiff's accident:

Q: "Was the fourth floor one of the floors that Tishman controlled as part of its safety program?
A: In what time frame?
Q: On or about October 1st, 2009.
A: No, that was not our floor.
Q: On or about October 1st, 2009, what company would have been responsible for safety on the fourth floor at the [subject] project?
A: Lehr Construction [Lehr], and also, they had their own safety person.
...
Q: After Tishman turned over the floor to Lehr, concrete slab broom swept, did Tishman have occasion to return to the fourth floor to perform any work, that you are aware of?
A: Not that I'm aware of, not at all"

(Rhoden tr at 43-44).

Rhoden later stated that, at the time of the accident, "the floor was in [the] control of Lehr" (*id.* at 62). Plaintiffs did not bring any claims against Lehr.

In opposition, plaintiffs read Rhoden's testimony to say that Tishman was the general

contractor of the project. Rhoden, however, while acknowledging that Tishman is in the business of construction management and general contracting (*id.* at 11), testified that Tishman operated as a construction manager for the "core and shell" portion of this project (*id.* at 26-27). Rhoden testified that the "core and shell" work consisted of "concrete and steel, no interior finishes," that there was no general contractor for this portion of the project, and that Tishman hired subcontractors for this work and coordinated their schedules (*id.* at 23, 27). Rhoden acknowledged that the core and shell work encompassed the fourth floor, but that the scope of the work was to "deliver the fourth floor to Lehr broom swept concrete slab" (*id.* at 28).

Plaintiff notes that Tishman hired Unity to do work on the core and shell portion of the project, including on the fourth floor, which Rhoden acknowledges at his deposition (*id.* at 36). Rhoden loosely described Unity's Electric's work on this part of the project: "It would have been stairwell lighting, possibly. Maybe light stringers, temporary lighting, you know, on cords . . ." (*id.* at 36-37). Plaintiff also points out that Rhoden acknowledged, at his deposition, that Tishman's daily report for October 1, 2009 shows that Unity was a Tishman subcontractor present at the building that day, although there was no indication as to location within the building.

Here, the record clearly shows that Tishman was not an owner or general contractor with respect to the construction of Goldman's world headquarters building. Thus, Tishman can only be liable under Labor Law § 241 (6) if it is a statutory agent. "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured." (*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]). There is no indication in the record that Tishman had supervisory control over plaintiff's work.

Consequently, Tishman is not a statutory agent under the Labor Law and plaintiff's Labor Law § 241 (6) as against it must be dismissed.

Structure-Tone

Similarly, the Goldman defendants argue that Structure-Tone is not a proper defendant under Labor Law § 241 (6), as it is neither an owner, a general contractor, or a statutory agent with respect to the subject work. The Goldman defendants submit the deposition testimony of James McGowan (McGowan), Structure-Tone's site superintendent for the subject project. McGowan testified that Structure-Tone is a general contractor and that it only worked on the fit-out stage of the project and only on floors 14 through 42 (McGowan tr at 10, 14).

In opposition, plaintiffs submit an affidavit from Anthony Carvette (Carvette), which was exchanged earlier, and helped support the dismissal of defendant Eleven Eleven from this case. In the affidavit, Carvette not only stated that Eleven Eleven was not hired to provide services on the subject project (Carvette aff, ¶ 8), but also stated that he was attaching "the face page of the construction contract" of the contract between Structure-Tone and Goldman, "which clearly indicates that Structure-Tone Inc. was the interior fit out contractor" (*id.*, ¶ 9).

Plaintiffs, in opposition, do not contend that Structure-Tone was actually an owner, general contractor, or agent with respect to the work on the fourth floor where Visone was injured, but instead argue that Structure-Tone misled them, as well as the court. Plaintiffs note that the Goldman defendants' answer, dated May 26, 2011, acknowledges that Goldman was the owner and Structure-Tone was the construction manager for the subject project. Plaintiff also notes that they, subsequently, on June 20, 2011, exchanged their bill of particulars, which named the floor where Visone's accident occurred. Moreover, plaintiffs note that the Goldman defendant's third-party complaint, dated February 21, 2012, alleged that Structure-Tone hired

Unity and that Unity owed Structure-Tone contractual indemnification. Finally, plaintiffs call it "convenient" that defendants provided field reports -- 19 months after they were initially demanded and 4 months after the statute of limitations ran -- which identified Lehr as a contractor possibly involved with the subject work.

Plaintiffs ask the court, without moving for such relief, to preclude Structure-Tone from denying that it was the general contractor of the subject work and to treat Structure-Tone's prior statements regarding its work on the job as judicial admissions. In support, plaintiffs cite to *Figueiredo v New Palace Painters Supply Co. Inc.* (39 AD3d 363 [1st Dept 2007] [finding that the defendant had made a judicial admission by acknowledging, in its answer, that it was the general contractor for the subject project, where the admission was also confirmed by affidavits and deposition testimony]).

Here, unlike *Figueiredo*, deposition testimony contradicted Structure-Tone's earlier statements regarding Visone's work. Moreover, Structure-Tone never made any admission that would render it a proper Labor Law defendant. That is, unlike the defendant in *Figueiredo*, Structure-Tone never admitted that it was the general contractor for the subject work. Thus, whether Structure-Tone's earlier statements are treated as judicial admissions is immaterial because, even if they were, Structure-Tone would still be entitled to dismissal of plaintiff's Labor Law § 241 (6) claims because there is no evidence, including past statements, that Structure-Tone was an owner, general contractor, or statutory agent in connection with the subject work. Accordingly, the branch of the Goldman defendants' motion that seeks dismissal of Visone's Labor Law § 241 (6) claims as against Structure-Tone must be granted.

Hi-Tech

The Goldman defendants submit an affidavit from Robert McCrossan (McCrosson), Hi-

Tech's president. McCrosson states in his affidavit that Hi-Tech "installed computer data flooring on only the 8th through 40th floors of the building," and it "did not install the computer data flooring or raised flooring on the trading floor, otherwise known as the 4th floor . . . and the only work performed by Hi-Tech Flooring on the 4th floor was the installation of a raised floor within the closets" (McCrosson aff, ¶ 3). McCrosson concluded that, as Hi-Tech did not install the computer floor where plaintiff fell, or the carpet tiles which obscured the hole where he fell, Hi-Tech is "an improper party to this action" (*id.*, ¶ 5).

Plaintiffs do not address this proposition in their opposition. Hi-Tech has, then, made an unrebutted showing of entitlement to summary judgment dismissing plaintiffs' claims, including the Labor Law § 241 (6) claim, as it was not an owner, general contractor, or statutory agent.

Goldman Headquarters and Goldman

The Goldman defendants do not argue that Goldman Headquarters and Goldman, as owners of the subject property, are not proper Labor Law defendants. Instead, they argue that none of the alleged Industrial Code violations are both sufficiently specific and applicable to Visone's accident.

Industrial Code Violations

In opposition, plaintiffs only defend the applicability of 12 NYCRR 23-1.7, subsections (b) (1), (d), and (e) (1). Consequently, plaintiffs abandon reference to any other Industrial Code provisions (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Plaintiffs lead with 12 NYCRR 23-1.7 (e) (1), "Protections from general hazards; tripping and other hazards; passageways," which provides: "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp

projections which could cut or puncture any person shall be removed or covered."

This provision is sufficiently specific to sustain a section 241 (6) violation (*see e.g.*, *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [2013]). The Goldman defendants argue, without citing to caselaw, that this provision cannot be applicable because Visone did not slip on any scattered tools, debris or other materials. However, the Appellate Division has made clear that holes in a floor can be considered another condition "which could cause tripping" under this regulation (*see McCullough v One Bryant Park*, 132 AD3d 491 [1st Dept 2015] [finding that there was an issue of fact as to whether a violation of this regulation was present where the worker stepped into an uncovered hole and tripped]; *Thomas*, 109 AD3d at 421 [finding that the motion court erred in finding this provision inapplicable in an accident involving "a gap in the floor approximately 8 to 10 inches wide and 12 to 18 inches deep]).

Here, Visone, while working in a passageway, stepped into an air conditioning hole covered by a carpet tile (*see* Visone tr at 28-29, 37-40, 42, 44, 49). This is plainly a condition which could cause tripping. As there is, at the least, a question of fact as to whether a violation 12 NYCRR 23-1.7 was a proximate cause of Visone's injuries, the branch of the Goldman defendants' motion seeking dismissal of the Labor Law § 241 (6) claims against all defendants must be denied.

Plaintiffs also argue that defendants violated 12 NYCRR 23-1.7 (b) (1), "Protection from general hazards; Falling hazards; Hazardous openings," which provides:

> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule). (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit. (iii) Where employees are required to work close to the edge of

> such an opening, such employees shall be protected as follows: (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (b) An approved life net installed not more than five feet beneath the opening; or (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

While conceding, as they must, that this provision is sufficiently specific to serve as a predicate for liability, the Goldman defendants argue that it is inapplicable because plaintiff did not fall through a hole. The Goldman defendants cite to *Cerverizzo v City of New York*, 111 AD3d 535, 536 [1st Dept 2013]), which held that the regulation was inapplicable, as "the hole that plaintiff stepped into, as he described it, was not large enough for a person to fit through."

In opposition, plaintiffs argue that Visone was exposed to a "potential 3 to 4 drop through an unguarded hole." However, Visone's own testimony indicates that while distance between the floor and the sub-floor was four feet, the hole was only 12-inches in diameter (Visone tr at 58). Plaintiffs cite to *Keegan v Swissotel N.Y.* (262 AD2d 111 [1st Dept 1999]). The defect in *Keegan* was an 18-inch square hole (*id.* at 112). Here, as the opening was only 12 inches in diameter and Visone could not have fallen through the hole, the protections of 12 NYCRR 23-1.7 (b) (1) are not applicable.

Plaintiffs also allege that defendants are liable under 12 NYCRR 23-1.7 (d), "Protection from general hazards; slipping hazards," which provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

This regulation would seem to be inapplicable on its face, as no foreign substance was involved in plaintiff's accident. While plaintiffs are correct that the Labor Law is to be interpreted such that its purpose is carried out and that courts should not be overly formal in

drawing the borderline of words like "tripping" and "slipping" in interpreting the Industrial Code, it does not make sense to contort 12 NYCRRR 23-1.7 (d) to the extent they urge. Accordingly, as the subject defect was not a slipping hazard, as described by this regulation, it cannot serve as a predicate to liability.

However, as discussed above, Visone's accident falls neatly within the parameters of a NYCRR 23-1.7 (e) (1) violation, and that is enough to require denial of the Goldman defendants' application to dismiss the Labor Law § 241 (6) claims for lack of an applicable and sufficiently specific violation of the Industrial Code. Accordingly, the branch of the Goldman defendants' motion seeking dismissal of the Labor Law § 241 (6) claim as against Goldman and Goldman Headquarters must be denied.

II. Labor Law §200 and Common-Law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work

was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Initially, all Labor Law § 200 claims must be dismissed as against Tishman, Structure Tone, and Hi-Tech for the reasons discussed above in the discussion of the Labor Law § 241 (6) claims. That is, they are not proper Labor Law defendants. Moreover, there is no allegations that they created the subject defect.

Next, the court notes that Visone's accident arose from a dangerous condition on the worksite rather than the method and manner of his work. Thus, inquiry looks toward whether defendants had notice of the condition, rather than whether defendants had supervisory control over the work. The Goldman defendants spend much of their Labor Law § 200 argument discussing supervisory control, which is irrelevant to the analysis in these circumstances, although they do briefly state that they did not have any notice of the subject condition.

"Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*id.* [internal quotation marks and citation omitted]).

"Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

It is the defendant's burden to present evidence as to notice (*see, e.g., Jahn v SH Entertainment, LLC* (117 AD3d 473 [1st Dept 2014]). Generally, a defendant in a slip or trip and fall case must offer some evidence as to when the area in question was last inspected relative to the plaintiff's accident (*see e.g., Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008]). In *Jahn*, which involved a slip on water, the defendant provided an affidavit from one of its owners, but it "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident" (117 AD3d at 473). The First Department held that the owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident" (*id.*).

Here, defendants have not met their burden on the issue of constructive notice, as they have not submitted any evidence suggesting when the fourth floor was last inspected for defects. Accordingly, the portion of defendants' motion seeking dismissal of the Labor Law § 200 and common-law negligence claims as against Goldman and Goldman Headquarters is denied.

IV. Third-Party Claims Against Unity

Initially, the court acknowledges that Unity was not negligent in plaintiff's accident, as it had no role in creating the subject defect. It had no role in the installation of the floor, the air conditioning, or the carpet that covered the subject hole. Thus, it cannot be liable for contribution or common-law negligence (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept

2003] [contribution requires a showing of active negligence]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law negligence requires a showing of common-law negligence]).

Contractual Indemnification

Unity argues that it does not owe contractual indemnification to Tishman, Structure-Tone, or High Tech because its work on the fourth floor was pursuant to its contract with Lehr, which does not name any of them as being covered by its indemnification provision. As the Goldman defendants do not respond specifically to this argument, they effectively abandon Tishman, Structure-Tone and High Tech's claims for indemnification against Unity. Moreover, the Goldman defendants' arguments in the Labor Law 241 (6) context -- that these parties were not contractor's related to the work giving rise to this accident -- support Unity's argument here that the Lehr/Unity contract is the relevant one for analyzing contractual indemnification. Thus, the contractual indemnification claims of Tishman, Structure-Tone and High Tech must be dismissed.

As to Goldman and Goldman Headquarters, Unity argues that it does not owe contractual indemnification, as the language of the indemnification provision in the contract between Lehr and Unity is not triggered because the accident did not arise from Unity's work. The provision states that:

> "to the fullest extent permitted by law, [Unity] shall hold harmless, indemnify, and defend the Contractor, [Lehr], Owner, and Architect/Engineer against any and all claims, damages, liabilities, losses and expenses, including, without limitation, attorney's fees arising out of or occasioned by, or in any way connected with the Work or Subcontractor's breach of this purchase order. This indemnity agreement shall survive the completion of the project.

Here, Unity's only connection to the accident giving rise to this action is that it was its employee who tripped on a defect created by other trades on the worksite. Unity argues that this

is not enough to satisfy the broad "arising out of/in connection with" language in the provision.

In support, Unity cites to *Pepe v Center for Jewish History, Inc.* (59 AD3d 277 [1st Dept 2009]), where the Court interpreted a similarly broad indemnification clause. The First Department found that the provision was not triggered because there was only a tenuous connection between the plaintiff's accident and the contractor's work (*id.* at 278). However, the plaintiff in *Pepe* was an employee of the general contractor, rather than the subcontractor that was granted summary judgment dismissing claims against it for contractual indemnification. Thus, *Pepe* is not necessarily dispositive here, although it does stand for the proposition that broad "arising out of/in connection with" language still requires something more than a tenuous connection to plaintiff's accident.

The question, then, is whether plaintiff's employment with Unity, and his carrying out work for it when he was injured, are merely tenuous connections to the accident. The Goldman defendants cite to *Masciotta v Morse Diesel Intl.* (303 AD2d 309 [1st Dept 2003]) in arguing that the employment relationship is sufficient to trigger the indemnification provision. In *Masciotta*, the court found that a broad indemnification provision was applicable where the plaintiff was an employee of the putative indemnitor, the accident happened while he was acting within the scope of his employment, and the instrumentality involved in his accident, a ladder, apparently belonged to the putative indemnitor (*id.* at 309-311). *Masciotta* is distinguishable from the present case in that the putative indemnitor in *Masciotta* owned the ladder that gave rise to plaintiff's accident. Here, plaintiff tripped over a defect that Unity did nothing to create.

Thus, neither *Pepe* nor *Masciotta* resolves the question of whether an employment relationship is enough to satisfy broad "arising under/in connection with" language in an indemnification provision. In general, courts interpret "arising out of" language in additional

insured and indemnification provisions to warrant a causal analysis, rather than a fault analysis (*see Regal Constr Corp. v National Union Fire Ins. Co. of Pittsburgh, PA* [15 NY3d 34, 38] [2010] [interpreting "arising out of" in the additional insured context "to mean originating from, incident to, or having connection with"] [internal quotation marks and citation omitted]). In the indemnification context, the First Department has held that in order for a claim to "arise out of" a party's work in the indemnification context, there must be a showing that "a particular act or omission in the performance of such work [was] causally related to the accident" (*Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 [1st Dept 2007] [internal quotation marks and citation omitted]).

Here, it is plain that the performance of Visone's work for Unity played a causal role in the accident. That is, if he had not been checking connections on the fourth floor trading room for Unity, he would not have tripped. Thus, as the accident arose from and was in some connected to Unity's work, it's obligation to provide indemnification to Goldman and Goldman Headquarters is triggered. Accordingly, the branch of the Goldman defendants' motion seeking summary judgment on the issue of contractual indemnification owed by Unity to Goldman and Goldman Headquarters is granted, while the branch of Unity's motion seeking dismissal of these claims is denied.

Breach of Contract for Failure to Procure Insurance

Unity argues that all claims for breach of contract the by the Goldman defendants, alleging that it failed to procure insurance should be dismissed. Specifically, Unity argues that no evidence has been produced showing that Lehr, as required by the contract between Unity and Lehr, ever requested any parties to be named as additional insureds under Unity's insurance policy. As the Goldman defendants do not respond to this argument, they effectively abandon all

claims for breach of contract for failure to procure insurance against Unity. Accordingly, the branch of Unity's motion seeking dismissal of these claims for breach of contract for failure to procure insurance must be granted.

IV. Unity's Second Third-Party Claims Against Sherland

Common-Law Indemnification

Unity argues that Sherland owes it common-law indemnification, as Sherland was actually negligent in causing Visone's accident. In support, Unity submits deposition testimony from John Koopman (Koopman), Sherland's project manager for the subject project. Koopman testified that Sherland was the only flooring contractor installing carpet on the subject trading floor (Koopman tr at 37). Thus, plaintiffs argue that, since they allege that Visone's accident was caused by faulty carpeting work, they should be able to get summary judgment against Sherland on the issue of common-law indemnification.

However, New York courts have long recognized that "[n]egligence cases by their very nature do not usually lend themselves to summary judgement, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). Such is the case here, where Unity's circumstantial negligence allegations against Sherland cannot be established as a matter law. Nor, though, may they be denied as a matter of law. Thus, the branch of Unity's motion seeking summary judgment on its common-law negligence claim against Sherland is denied, and the branch of the Goldman defendants motion seeking dismissal of that claim is also denied.

Contractual Clams

As Unity fails to provide a contract between itself and Sherland, its contractual claims for breach of contract for failure to procure insurance and for contractual indemnification must be dismissed.

Accordingly, it is

ORDERED that defendants/third-party plaintiffs Goldman Sachs Headquarters LLC (Goldman Headquarters), The Goldman Sachs Group, Inc. (Goldman), Tishman Construction Corporation (Tishman), Structure-Tone, Inc. (Structure-Tone), and Hi-Tech Flooring, Inc. (Hi-Tech), and second third-party defendant Sherland & Farrington, Inc.'s (Sherland) motion for summary judgment (motion seq. No. 005) is granted only to the following extent:

- plaintiffs' complaint is dismissed and severed as against Tishman, Structure-Tone, and Hi-Tech;
- Goldman and Goldman Headquarters are granted summary judgment on their contractual indemnification claims against third-party defendant/second third-party plaintiff Unity Electric Co. Inc. (Unity);
- Unity's second third-party claims for contractual indemnification and breach of contract for failure to procure insurance are dismissed;
- All allegations of violations Industrial Code, except for those relating to 12 NYCRR 23-1.7 (e) (1), are dismissed

and it is further

ORDERED that the Clerk is enter judgment accordingly.

ORDERED that Unity's motion for summary judgment is granted only to following extent:

- All claims against Unity for common-law indemnification, contribution, and breach

of contract for failure to procure insurance are dismissed;

the contractual indemnification claims of Tishman, Structure-Tone, and Hi-Tech against Unity are dismissed;

and it is further

ORDERED that counsel for the Goldman defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 1, 2017

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.