

Decided on July 10, 2008

Supreme Court, Queens County

Kevin J. Tarpey and Wendy Tarpey, Plaintiffs,

against

**Kolanu Partners, LLC, RC DOLNER, INC., OLYMPIC
PLUMBING & HEATING CORP., and SAFETY
CONSULTANT, INC., Defendants. X RC DOLNER,
LLC and KOLANU PARTNERS, LLC, Third-Party
Plaintiffs, S & C PRODUCTS CORP., METAL SALES
CO., INC., and HP ELECTRICAL DESIGNS, INC.,
Third-Party Defendants.**

163192005

Allan B. Weiss, J.

The following papers numbered 1 to 18 read on the motion by defendant and third-party defendant S & C Products Corp. for an order dismissing the plaintiff's causes of action for common-law negligence and violations of Labor Law §§ 200 and 241(6) and all cross claims against this defendant; granting summary judgment dismissing all claims and cross claims against this defendant for common-law indemnification and contribution, for contractual indemnification and for breach of contract based upon the failure to procure insurance; and for summary judgment in its favor against third-party defendant Metal Sales Co, Inc. for common-law indemnification and contribution and for contractual indemnification. Defendant [*2]and third-party defendant HP Electrical Designs, Inc. cross-moves for an order granting

summary judgment dismissing the third-party complaint.

Plaintiff Kevin J. Tarpey sustained personal injuries at approximately 7:05 A.M. on October 25, 2004, during his employment with Metal Sales Company, when he tripped and fell over a pipe at a construction site, located on the 9th floor of 119 East 23rd Street, New York, New York. Plaintiff alleges that the defendants created or permitted a dangerous condition to exist and that the lighting at the construction site was inadequate. The complaint and bill of particulars alleges claims for common-law negligence and for violations of Labor Law §§ 200 and 241(6), based upon violations of 12 NYCRR 23-1.7(e)(1),(2), 12 NYCRR 23-1.30, 12 NYCRR 23-2.1(a)(1),(2), (b) and 29 CFR Section 1926.

The construction site was owned by defendant Kolanu Partners LLC, and defendant RC Dolner Inc., was its general contractor. Defendant and third-party defendant S & C Products Corp. (S & C), pursuant to a subcontract with RC Dolner, Inc., installed aluminum windows at the construction site. S & C entered into a subcontract for the performance of this work with third-party defendant Metal Sales Co., plaintiff's employer. Defendant Olympic Plumbing & Heating Corp., pursuant to a subcontract with RC Dolner, Inc. installed waste lines at the premises. Defendant Safety Consultant, Inc., is alleged to have been the safety engineer for the construction project. Defendant and third-party defendant HP Electrical Designs, Inc. (HP Electrical) subcontracted with RC Dolner Inc. to provide lighting and electrical services at the construction site.

The parties, pursuant to a compliance conference order dated February 20, 2007, were directed to file a note of issue and certificate of readiness by September 2, 2007. Said order also addressed certain outstanding discovery. The preliminary conference order of July 24, 2006, provided that all motions for summary judgment pursuant to CPLR 3212(b) shall be made no later than 120 days after the filing of the note of issue. The note of issue was filed in this action on September 21, 2007. Following a telephone conference on September 25, 2007 in Justice Ritholtz' part, counsel for S & C and counsel for Kolanu Partners LLC, and RC Dolner Inc., executed a stipulation dated September 25, 2007 providing for various outstanding discovery and extending the time in which to move for summary judgment to February 29, 2008. However, a fully executed stipulation was not returned to the court, and it was never so ordered by the court. Therefore, pursuant to the prior order of the court, the parties' time in which to serve the motion for summary judgment pursuant to CPLR 3212(b) remained 120 days from the date of filing the note of issue. The 120 time period thus ran from September 22, 2007 to January 19, 2008. However, as January 19, 2008 was a Saturday, and as January 21, 2008 was Dr. Martin Luther King Jr. Day, a holiday the 120-day period expired on January 22, 2008. (*See General Construction Law*, §§ 24, 25-a; *see also Simon v PABR Associates LLC*, 18 Misc 3d 1117A [2008]).

The Parties' Deposition Testimony: [*3]

Plaintiff Kevin Tarpey testified at his deposition that he was employed by Metal Sales, and was a worker at the subject construction project. He stated that his foreman was Dave Rivera, and that Rivera told him where to work and what kind of work he would be doing on a daily basis. He

stated that no one other than Mr. Rivera provided him with direction and supervision on this job. Mr. Tarpey stated that residential condominium apartment units were being constructed at the subject premises. The accident occurred at approximately 7:05 A.M., on the ninth floor, in an area that would eventually be an apartment. Mr. Tarpey and a co-worker intended to install a window in an area within this unit, and walked from a small interior apartment hallway to a separate room. He stated that when he turned a corner, his left foot stepped on a black or cast iron pipe that had been left on the floor, causing the pipe to roll. Mr. Tarpey stated that his left knee popped, which caused him to fall over and strike his right arm and elbow on a pile of sheet rock. He stated that there was no temporary lighting in the area where the accident occurred, that it was dark and hard to see, and that he could not see far in front of him. Mr. Tarpey stated that after he fell he saw the pipe lying flat on the ground next to him; that it was six to eight-inches long and two inches in diameter; and that he did not see the pipe prior to the accident. He stated that the pipe was consistent with that used by plumbers for waste lines; that it was dark in color and looked like the pipe that had been installed for waste lines in that wall. The sheetrock had been stacked in a pile. He stated that he did not know how long the pipe was present at the site, but that the plumbers had worked at that particular unit on that floor prior to his working at this job site.

David Rivera, a general foreman, testified that Metal Sales (plaintiff's employer), performed window installation at the subject premises. He stated that his duties were to tell the ironworkers, including plaintiff, where to work and what duties they were to perform, and that he was present at the job site on the day of the accident. He stated that Mr. Tarpey's job was to install windows on the ninth floor of the building, and that there was no temporary lighting in the individual condominium units under construction, other than scant lighting in the common corridors. He stated that the only other light source was from the outside of the building, but that one could not see the surface of the floor using this light. He also stated that he had made several complaints to the electricians about inadequate lighting and was told that they would only supply what the general contractor paid to install. Mr. Rivera stated that after he was notified of the accident, he went to the site and saw pieces of pipe and debris on the floor of the unit where the accident occurred.

Chris Richardson, the president of Metal Sales, stated that he is also employed by S & C as a field superintendent. He stated that he has no ownership interest in S & C, and that he was S & C's only employee at the job site which he visited approximately three times a week. He stated that Metal Sales obtained the job from S & C via a purchase order, and that it provided the labor for the installation of the windows. He stated that while at the job site he supervised his men on behalf of Metal Sales and conducted any business on behalf of S & C that may have existed between S & C and the general contractor. Mr. Richardson stated that he was aware that Dave Rivera had made complaints at general safety meetings regarding debris and inadequate lighting at the job site, but did not know if these complaints were responded to. He stated that he [*4]received a telephone call from Mr. Rivera who informed him of the plaintiff's accident, and that he thereafter went to the job site.

Matthew Sabbatine, S & C's president and sole shareholder testified at his deposition that it supplies ornamental iron workers to construction projects, and that it entered an agreement with

RC Dolner to furnish and install aluminum windows at the subject premises. He stated that S & C would obtain the materials and typically would subcontract out the labor portion of the contract. As regards this job, the installation work was subcontracted out pursuant to a purchase order with Metal Sales through Chris Richardson, an employee of S & C and the president of Metal Sales. Mr. Sabbatine stated that when Mr. Richardson was present at the job site it was to supervise the employees of Metal Sales, and that Richardson acted in his capacity as a principal of Metal Sales. He stated that S & C did not direct the means and methods of window installation performed by Metal Sales, and did not have discussions with Mr. Richardson as regards this job other than scheduling matters. Mr. Sabbatine stated that he visited the job site between five and ten times over the course of the job; that he did not get involved with Richardson's work; that he met with RC Dolner's project superintendent; that he did not attend any safety meetings; that he could not specifically recall whether at any of the meetings he attended whether there were any discussions about inadequate lighting or the removal of debris; that Metal Sales was not required to provide the lighting on this job; that the general contractor was to provide the lighting; and that he learned of plaintiff's accident some time after it occurred. He stated that it was RC Dolner's responsibility to coordinate and check the window installation after it was done, but that the actual supervision and direction of the work would be performed by Metal Sales.

Steven Buffa, RC Dolner's field superintendent, testified that RC Dolner had contracted with HP Electrical to install temporary stringer lighting in the premises, and to install all the electric in the building. He stated that in October 2004, there was temporary stringer lighting on the ninth floor. He stated that on the day of the accident, Mr. Tarpey told him that he had slipped on a pipe and hurt his elbow and that he was going home to see his doctor. He stated that prior to that day Mr. Rivera had mentioned that the lighting conditions in the areas where the iron workers were installing the windows, and that HP Electrical was contacted to supply the different foremen with drop lights on the floor. He stated that he did not specifically recall whether any of the discussions about the lighting concerned the ninth floor. He stated that after the accident occurred he went to the area where Mr. Tarpey was injured and observed cast pipe, piles of sheet rock, and some BX cable on the floor. Although he stated that there was a drop light in place, he acknowledged writing a report in which he stated that there was no temporary light in the unit. He stated that while two of the subcontractors employed laborers who would remove the debris left by their own workers, RC Dolner also employed laborers who would remove debris left by the other trades, including HP Electrical, Olympic Plumbing, and S & C. he was aware of the lighting conditions in the subject area, and that he in turned complained to about the lighting.

S & C's Motion for Summary Judgment Dismissing the Labor Law §§ 200 and 241(6) [*5]Claims:

S & C's motion for summary judgment, was served on January 22, 2008 and filed with the court on January 30, 2008. Although S & C, in its motion papers relies upon the September 25, 2007 stipulation, and incorrectly asserts that said stipulation was so ordered, as the motion was served on January 22, 2008, it is timely. To the extent that an identical notice of motion was designated a "cross motion" and submitted to the court, it appears that the attached affidavit and exhibits are intended to be part of a single motion and will be treated so accordingly.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]). "Where ... a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2007]). Here, the debris (the piece of pipe) left on the site by a subcontractor and the inadequate lighting, constitutes a defective condition of the premises.

S & C, subcontracted to install the windows, and supplied the materials which were installed by Metal Sales, plaintiff's employer. S & C's employee Chris Richardson, is also the president of Metal Sales. Mr. Richardson testified that he was present at the job site three days a week, and that he coordinated the work schedules with the general contractor on behalf of S & C, and also supervised the installation of the windows on behalf of Metal Sales. He also testified that he was aware of complaints made by Metal Sales' foreman Dave Rivera regarding debris and inadequate lighting. Therefore, knowledge of the debris and inadequate lighting may be imputed to both S & C and Metal Sales.

S & C's contract with RC Dolner provides in pertinent part as follows:

"ARTICLE XII. SITE MAINTENANCE

12.1 The Subcontractor shall, at its own cost and expense: (1) keep the Site free at all times from all waste, packaging materials and rubbish and shall collect and deposit these materials and rubbish in the locations or containers designated by RC Dolner LLC; ... Should the Subcontractor fail to perform any of the foregoing to RC Dolner LLC's satisfaction, RC Dolner [*6]LLC shall have the right to perform and complete such Subcontractor's Work and charge the cost to the Subcontractor."

Said subcontract did not limit S & C's responsibility to disposing of debris left by its own workers. S & C, thus has failed to establish, prima facie, that it lacked control over the condition of the work site (*see Lane v Fratello Constr. Co.*, ___ AD3d ___, 2008 NY Slip Op 5483; 2008 NY App Div LEXIS 5406, [June 10, 2008]; *Keating v Nanuet Bd. of Educ.*, *supra* at 709; *Kerins v Vassar Coll.*, 15 AD3d 623, 625 [2005]), and further has failed to establish, prima facie, that it lacked actual or constructive notice of the alleged defect (*see Keating v Nanuet Bd. of Educ.*, 40 AD3d at 709; *see also Mikhaylo v Chechelnitskiy*, 45 AD3d 821, 847 [2007]). Therefore, that branch of this defendant's motion which seeks to dismiss plaintiffs' causes of action for common

law negligence and a violation of Labor Law § 200, is denied.

The statutory duties imposed by Labor Law § 241(6) place ultimate responsibility for safety practices on owners of the work site, general contractors and their agents (*see Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). The duty to comply with the regulations under § 241(6) is non-delegable, subjecting the owner of the premises, the general contractor and their agents to liability for a violation even if they exercised no supervision or control and had no notice of work site conditions (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]); *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-503 [1993]). While a failure to provide the safety protections required by this statute, proximately causing injury, does not impose absolute liability absent negligence, the statute imposes liability on the owner, general contractor or their agents for injuries caused by another party's negligence regardless of the defendant owner, general contractor, or agent's own negligence. (*Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 349-50 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*). Here, S & C pursuant to the terms of the subcontract with RC Dolner, was required to remove debris from the work site. Furthermore, S & C's employee Chris Richardson was aware of the complaints regarding debris and the lack of adequate lighting. Responsibility under Labor Law § 241(6) extends not only to where work currently was being conducted, but to the entire work site, including ensuring the safe passage of workers transporting materials or tools or simply proceeding, like plaintiff, to and from their workplaces. (*Smith v McClier Corp.*, 22 AD3d 369, 370-71 [2005]; *Whalen v City of New York*, 270 AD2d 340, 342 [2000]).

To the extent that plaintiffs assert a violation of 29 CFR Section 1926, alleged violations of OSHA regulations cannot serve as a predicate to liability under Labor Law § 241(6) (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 351 [1998]). Plaintiffs also allege that defendants violated the provisions of 12 NYCRR § 23-1.7(e)(1) and (2), and these provisions are specific enough to sustain an action under Labor Law § 241(6) for their violation (*Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378 [2006]; *Boss v Integral Construction Corp.*, 249 AD2d 214 [1998]; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316 [1997]; *McDonagh v Victoria's [*7]Secret, Inc.*, 9 AD3d 395 [2004]). Plaintiffs further allege a violation of 12 NYCRR 23-1.30 and this section is sufficient to support a Labor Law § 241(6) claim (*Murphy v Columbia University*, 4 AD3d 200 [2004]). Finally, plaintiffs allege a violation of 12 NYCRR 23-2.1(a)(1), and (2), and 12 NYCRR 23-2.1(b). Although section 23-2.1(b) is not sufficiently specific to support a statutory violation (*see Gonzalez v Glenwood Mason Supply Co.*, 41 AD3d 338 [2007]; *Quinlan v City of New York*, 293 AD2d 262 [2002]), section 23-2.1(a) contains concrete specifications required to sustain a Labor Law § 241(6) cause of action (*see Rosado v Briarwoods Farm*, 19 AD3d 396 [2005]). In view of the fact that S & C had a contractual duty to maintain the work site, and as there is sufficient evidence that its field superintendent Chris Richardson was aware of complaints pertaining to debris and inadequate lighting, the court finds that S & C has failed to establish, prima facie, its entitlement to summary judgment dismissing plaintiffs' Labor Law § 241(6) claim.

S & C's Request to Dismiss All Claims and Cross Claims for Common-Law Indemnification and Contribution, and to Dismiss All Claims and Cross Claims for Contractual Indemnification and Failure to Procure Insurance:

S & C's request to dismiss all claims and cross claims for common-law indemnification and contribution is denied, as it has failed to establish, prima facie, that it cannot be liable to the plaintiff. As regards the claims for contractual indemnification, and the failure to procure insurance, S & C has failed to establish that it complied with the site maintenance provision and insurance procurement provision of its subcontract with RC Dolner.

S & C's Request for Summary Judgment Against Third-Party Defendant Metal Sales on Its Cross Claims for Common-Law Indemnification and Contribution, and for Contractual Indemnification and the Failure to Procure Insurance:

It is undisputed that plaintiff Kevin Tarpey did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11. Workers' Compensation Law § 11 expressly states that "grave injury ... shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." Therefore, S & C may not maintain its third party cross claims as against Metal Sales for contribution and common-law indemnification, and dismissal of these claims is mandated (*see generally O'Berg v MacManus Group, Inc.*, 33 AD3d 599 [2006]; *Lipshultz v K & G Industries*, 294 AD2d 338 [2002]; *Schuler v Kings Plaza Shopping Center & Marina*, 294 AD2d 556, 559 [2002]; *Hussein v Pacific Handy Cutter*, 272 AD2d 223, 223-224 [2000]).

"In the absence of a 'grave injury,' Workers' Compensation Law § 11 ... bars a third-party action for contribution or indemnification against an employer when its employee is injured in a [*8]work-related accident, unless the employer entered into a written contract 'prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered'" (*Guijarro v V.R.H. Constr. Corp.*, 290 AD2d 485, 486 [2002] quoting Workers' Compensation Law § 11). Here, S & C's claims for contractual indemnification is based upon a "Hold Harmless/Indemnity Agreement" dated April 4, 2004 executed by "Chris Richardson, President," which provides as follows:

"Subcontractor hereby assumes sole responsibility and liability for any and all damage or injury of any kind or nature whatever (including death) to all persons, whether employees of the Subcontractor or otherwise, and to all property, where such damage or injury is caused by, results from, or arises out of, or occurs in connection with the execution of the Work.

Subcontractor shall indemnify and save harmless S & C Products Corp., the Prime Contractor and/or the Owner and their officers, agents, servants and employees (the "Indemnified Parties") from and against any and all claims for such damage or injury (including death) and from and against any and all loss, cost expense, liability, damage or injury, including legal fees and disbursements that the Indemnified Parties, or any of them may sustain suffer or incur, directly or indirectly, as a result of the execution of the Work.

Subcontractor shall assume the defense of any action at law or in equity which may be brought against the Indemnifies(sic) Parties, or any one of them, upon or by reason of such claims, and to pay on behalf of the Indemnified Parties, upon demand, the amount of any judgment that may be entered against the Indemnified Parties, or any one of them, in any such action.

Project: Blanket agreement for all projects with S & C Products Corp."

S & C's reliance on the blanket Hold Harmless/Indemnity Agreement is misplaced. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491 [1989]). The blanket agreement, however, does not identify Metal Sales as the "subcontractor," and does not contain any provision expressly requiring Metal Sales to indemnify and harmless any party. Furthermore, the blanket agreement violates General Obligation Law § 5-322.1, as it requires the "subcontractor" to indemnify and hold harmless S & C, the prime contractor and the owner, for "any and all claims" that arose "as a result of the execution of the work" without regard to who or what caused the injury, without any limitation. Therefore, S & C, is barred from seeking contractual indemnification based upon the blanket Hold Harmless/Indemnity Agreement (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]; *Kalinsky v Square*, 41 AD3d 785 [2007] *Brooks v Judlau Contr., Inc.*, 39 AD3d 447 [2007]; *Flores v Jeffrey M. Brown Constr. Assoc.*, 28 AD3d 711, 712 [2006]; *Carriere v Whiting Turner Contr.*, 299 AD2d 509, 511 [2002]). [*9]

S & C' agreement with Metal Sales required Metal Sales to name S & C as an additional insured. An obligation to insure does not give rise to or infer an obligation to indemnify (*Kinney v G. W. Lisk Co.*, 76 NY2d 215, 218 [1990] *Goncalves v 515 Park Ave. Condominium, supra*; citing *Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]). Furthermore, S & C has failed to establish that Metal Sales breached this term of the agreement.

In view of the foregoing, S & C's motion for summary judgment is denied in its entirety.

HP Electrical Design Inc.'s Cross Motion for Summary Judgment:

Defendant and third-party defendant HP Electrical's cross motion for an order granting summary judgment dismissing the third-party complaint was served on April 24, 2008, which was 213 days from the filing of the note of issue, and 93 days after the expiration of the 120-day period. In *Brill v City of New York*, (2 NY3d 648, 652 [2004]), the Court of Appeals held that CPLR 3212(a) permitted a late summary judgment motion upon the showing of good cause, which "requires ... a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy No excuse at all, or a perfunctory excuse, cannot be good cause" (*see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726, 727 [2004]). The Appellate Division, Second Department, in applying *Brill* to late cross motions has taken two different approaches. In *Thompson v Leben Home for Adults*, (17 AD3d 347 [2005]) the court stated that "in the absence of such a good cause' showing, the court has no discretion to entertain even a meritorious, non-prejudicial [cross] motion for summary judgment." However, the Appellate Division, Second Department has also stated that a cross motion for summary

judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion (*see Grande v Peteroy*, 39 AD3d 590 [2007]; *Fahrenheit v Security Mut. Ins. Co.*, 32 AD3d 1326 [2006]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2005]; *see Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 [2006]). An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212[b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion (*see Dunham v Hilco Constr. Co., Inc.*, 89 NY2d 425, 429-430 [1996]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [2006]; *Baseball Off. of Commr. v Marsh & McLennan, Inc.*, 295 AD2d 73, 82 [2002]).

Here, third-party plaintiffs RC Dolner asserts in the third-party complaint's ninth cause of action that RC Dolner had a contract with HP Electrical to provide certain lighting and electrical services in connection with the construction project, and asserts a claim against HP Electrical for the apportionment of damages and attorneys' fees, costs and expenses; in the tenth cause of action RC Dolner asserts a claim against HP Electrical for common-law indemnification; in the eleventh cause of action RC Dolner asserts a claim against HP Electrical for contribution; in the twelfth cause of action RC Dolner asserts a claim for contractual indemnification pursuant to its [*10]contract with HP Electrical; in the twenty-first cause of action Kolanu Partners asserts that it is an intended beneficiary of the contract between RC Dolner and HP Electrical and asserts a claim for the for the apportionment of damages and attorneys' fees, costs and expenses; in the twenty-second cause of action Kolanu Partners asserts a claim against HP Electrical for common-law indemnification; in the twenty-third cause of action Kolanu Partners asserts a claim against HP Electrical for common-law contribution; in the twenty-fourth cause of action Kolanu Partners asserts that it is a third party beneficiary of the contract between HP Electrical and RC Dolner and asserts a claim against HP Electrical for contractual indemnification and breach of contract.

HP Electrical asserts that its defenses to these third party claims are nearly identical to those raised by RC Dolner and Kolanu in their cross motion for summary judgment. The cross motion is also offered as opposition papers to RC Dolner and Kolanu Partners's cross motion for summary judgment. It is noted that RC Dolner and Kolanu Partners did not serve a cross motion in response to S & C's motion. Rather, RC Dolner and Kolanu served a cross motion as part of another motion, which was fully submitted to the court on March 12, 2008, and said cross motion has been determined in a companion order of this date. The court further finds that as HP Electrical has not offered any excuse for its late motion, and that the claims raised in this cross motion are not nearly identical to those raised by the movant S & C. In addition, the claims raised by HP Electrical are not nearly identical to those raised by DC Dolner and Kolanu Partners in their cross motion which was submitted to the court on March 12, 2008 (Number 29 on the calendar, Motion Sequence 2). Therefore, the court may not entertain HP Electrical's cross motion for summary judgment, nor may it search the record and grant summary judgment pursuant to CPLR 3212(b).

Conclusion

S & C's motion for summary judgment is denied in its entirety, and its claims against Metal Sales for common-law contribution and indemnification and for contractual indemnification are dismissed pursuant to CPLR 3212(b). HP Electrical's cross motion is denied, as it is untimely.

Dated: July 10, 2008

J.S.C.