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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JOHN GARREN,

Plaintiff,

-against-

Index No.: 103036/04

CAPPELLI ENTERPRISES, INC., HRH CONSTRUC. LLC, GEORGE A. FULLER CO., INC. & AVALON BAY COMMUNITIES, INC.,

DECISION & ORDER

Defendants.

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CAPPELLI ENTERPRISES, INC., HRH CONSTRUC. LLC & GEORGE A. FULLER CO., INC.

Third-Party Plaintiff,

-against-

T.P. Index No.: 590352/05

UNISTRESS CORP. & TAYLOR ERECTORS, INC.,

Third-Party Defendant.

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UNISTRESS CORP.,

Fourth-Party Plaintiff.

-against-

F.P. Index no.: 590352/05

ROGERS & SONS CONCRETE, INC.,

Fourth-Party Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action brought pursuant to Labor Law §§200, 240(1), and 241(6) for injuries suffered by plaintiff, a stone derrickman, on December 22, 2003 when he slipped on ice at a construction site. Plaintiff has discontinued his action against Avalon Bay Communications, Inc.

and withdrawn his Labor Law §240(1) claim.

The complaint alleges that Cappelli Enterprises, Inc. ("Cappelli") was the owner of the land and developer of the subject property, George A. Fuller Co., Inc. ("Fuller") was the general contractor and HRH Construction LLC ("HRH") also was a general contractor and the construction manager. Defendants' third-party complaint alleges that Unistress Corporation ("Unistress") was a contractor hired by Fuller, that Taylor Erectors, Inc. ("Taylor"), plaintiff's employer, was a subcontractor hired by Unistress and that the negligence of Unistress and Taylor caused plaintiff's accident. Defendants, third-party plaintiffs, ask for common law and contractual indemnification and contend that Unistress and Taylor failed to obtain required liability insurance coverage. Unistress crossw-claimed against Taylor for contractual indemnification and brought a second third-party complaint against Rogers & Sons Concrete, Inc. ("Rogers"), alleging that Rogers' negligence caused the accident and asking for common law indemnification.

Unistress now moves for summary judgment dismissing all claims and cross-claims against it. It argues that it was not negligent, violated no duty on the construction site, cannot be held liable either pursuant to common law or contractual indemnification and obtained the insurance required of it pursuant to contract.

Taylor cross-moves for summary judgment. It contends that, under Section 11 of the Workers' Compensation Law, it, as plaintiff's employer, cannot be held liable for common law indemnification. It then argues that it was not negligent, that the accident did not arise from its work and that it cannot be held liable pursuant to the parties' indemnification contracts. Finally, it contends that it obtained the insurance required of it pursuant to contract.

Cappelli and Fuller also cross-move for summary judgment and oppose Unistress' motion to dismiss their claims against it. They contend that Unistress has failed to demonstrate that the accident did not arise from the performance of Taylor's work. In addition, they argue that Unistress and Taylor are required by contract to indemnify them for all claims arising from Taylor's work whether or not Taylor was negligent. Moreover, they submit proof that Unistress's and Taylor's insurance carriers have refused to defend and indemnify Cappelli and Fuller on the instant claim and the issue is the subject of a declaratory judgment action.

Finally, Rogers cross-moves for dismissal. It argues that it was off-site at the time of the subject accident, did not control, manage or own the area where plaintiff fell and owed plaintiff no duty. In the alternative, it moves to strike plaintiff's note of issue, arguing that it has not had an opportunity to conduct any discovery.

Plaintiff opposes defendants Fuller's and Cappelli's motion for summary judgment. He argues that questions of fact exist as to defendants liability both under Labor Law §200 and Labor Law §241(6). He alleges that a trial issue has been raised as to violations of Industrial Code §§23-1.7(d) and 23-1.30.

All of the movants have replied. Unistress emphasizes that by failing to oppose summary judgment as to the other allegations in the complaint of violations of Industrial Code §§23-1.5, 23-1.7(a), (b)(1) &(2), (c), (e)(1) & (2), (f), (g), (h), 23-1.8(a), (b), (c)(1), (2), (3)(d) and 23-1.2(a)& (b), plaintiff has admitted that these claims are not viable. Unistress further contends that no issue of fact exists as to a violation of Industrial Code §23-1.30, and it argues that plaintiff has not demonstrated any negligence on its part in regard to Industrial Code §23-1.7(d). Also, it argues that if defendants,

third-party plaintiffs, are free from liability, the third-party action is moot, but it notes that if third-party plaintiffs are found to have been negligent, GOL §5-322.1 would bar them from seeking indemnification from Unistress and the Workers' Compensation Law would bar their indemnification against Taylor. Finally, Unistress contends that it fulfilled its contractual obligation of procuring insurance whether or not the coverage was to third-party plaintiff's liking.

Taylor too contends that it does not owe third-party plaintiffs indemnification since the accident arose from their negligence and not from any acts or omissions on the part of Taylor. It states that it procured the insurance required by contract.

Defendants Cappelli and Fuller, in their reply, contend that Industrial Code §§23-1.7(d) and 23-1.30 are not applicable here.

FACTS

A. Movants' Submissions

1. Plaintiff's Deposition

Plaintiff testified that on the day of the accident, he was employed by Taylor, installing precast concrete panels on the exterior of a three-floor addition to a seven story parking garage in White Plains, New York ("the air rights project"). Plaintiff's EBT, pp. 14, 16. When Taylor began this work, the garage was completed and the floors for the air rights project had been poured. *Id.* at 16. For the first three weeks of work, plaintiff worked on the ground outside, attaching the panels to a crane which lifted the panels to the side of the project. *Id.* at 17. When the panels were erected and the crane removed from the site, plaintiff's job changed, and he worked inside of the air rights project, lining up and leveling the stones on the wall. *Id.* The work encompassed the eighth through the tenth floors of the building. *Id.* at 34-35.

Plaintiff worked from 7:00 a.m. to 2:30 p.m. from Monday to Friday. *Id.* at 21. He had been working for four or five days in the interior of the project when the accident occurred. *Id.* Taylor, as well as iron workers and steam fitters, were also working in the interior of the project. *Id.* at 19-20. He did not know if Unistress was working at the site at the time of the accident. *Id.* at 63.

Plaintiff was supervised by and reported to a Taylor foreman, Donald Leonard, while working on the interior of the project. *Id.* at 18-19. Previously while working with the crane, he had been supervised by a Taylor employee named Jim. *Id.* at 19. No one else supervised his work. *Id.* at 64. The equipment he used was supplied by Taylor, and he was not supervised by anyone other than Taylor. *Id.* at 64. Although plaintiff was sure there was a general contractor on the site, he had never seen one. *Id.* at 66-67. Nor had he ever seen any ice melt or sand at the work site. *Id.* at 74. Moreover, unlike his experience at other work sites, he never saw any workers doing general site clean-up. *Id.* at 67. Additionally, he did not recall any safety meetings taking place. *Id.* at 66. Plaintiff had never heard of Cappelli or Fuller. *Id.* at 75.

The accident occurred on a Monday at approximately 7:02 a.m. *Id.* Plaintiff had parked his car on the seventh level of the garage, had eaten his breakfast and was proceeding to that day's work area on the ninth floor. *Id.* at 18, 22, 23. A wooden staircase led from the seventh to the eighth floor, pipe scaffolding at the other end of the 400 foot building, led from the eighth to the ninth floor and a twenty foot ladder led from the ninth to the tenth floor. *Id.* at 18, 24-25.

Plaintiff, accompanied by Mr. Leonard, had climbed the wooden staircase to the eighth floor and was crossing to the pipe scaffolding in order to reach the ninth floor work area, when he slipped on the edge of a large patch of black ice and hurt his knee. *Id.* at 24, 31. There were patches of ice throughout the eighth floor, a large open area, and the ice patch upon which plaintiff slipped was five

to six feet in diameter and was located approximately twenty feet from the pipe scaffolding. *Id.* at 25, 26, 31, 44. Although three sides of the eighth floor were enclosed, the side where the pipe scaffolding was located was open. *Id.* at 23, 27. Plaintiff estimated that he was eight to ten feet from the outside of the building when he slipped. *Id.* at 26.

When plaintiff slipped, the sun had not as yet come up; no permanent or temporary lights were installed in the building and plaintiff was unable to see the ice as he walked. *Id.* at 27. Plaintiff had taken the same route the week before and had not seen any ice. *Id.* at 27, 28. The ice was still on the floor on December 23, the day after the accident. *Id.* at 39-40. Plaintiff continued to work that day and until December 29, hoping his knee would get better. *Id.* at 34, 38, 40. No accident report was filled out although plaintiff stated he had asked Mr. Leonard to do so and Mr. Leonard had said he reported the accident but filled out no report. *Id.* at 37-38.

2. Pembroke Deposition

Unistress submitted only portions of the Pembroke deposition. The Court, therefore, relied upon the full deposition of Pembroke submitted by plaintiff.

3. Joseph Anello's Deposition

Joseph Anello testified that he was employed by Fuller, a general contractor/design builder, as vice president of construction. Anello EBT, pp. 5-6. In 2003, Mr. Anello worked on the air rights project. *Id.* at 6-7. Fuller was hired by the owners of the air rights building, L.C. White Plains Recreation, LLC, and hired Unistress; Unistress hired Taylor. *Id.* at 9, 15-16. The City of White Plains owned the garage. *Id.* at 10.

Mr. Anello testified that the only trade at the site in December 2003, aside from some Fuller laborers performing clean up, was Taylor working through Unistress. *Id.* at 15, 35. Cappelli

Enterprises, Inc. is the parent company of Fuller, and Lewis R. Cappelli is the president of Fuller. *Id.* at 18. Cappelli Enterprises and Fuller did not have a contract with respect to the air rights project. *Id.* Additionally, H.R.H. Construction had no responsibilities with respect to the air rights project. *Id.* at 76.

In December 2003 , the columns, floor slabs and roof structure of the building were up. *Id.* at 8. Fuller had contracted with Rogers who built the concrete superstructure for the building. *Id.* at 19, 76. They finished their work in mid-November 2003. *Id.* at 20, 22. Once Rogers had finished its work, Taylor began its work. *Id.* at 22.

Fuller employed a safety consultant, Pro Safety Services, who was to call safety meetings. *Id.* at 22-23. A Pro Safety employee, Robert Krisler, monitored the project, but not on a daily basis. *Id.* at 23-24. Pro Safety walked the job site and kept logs . *Id.* at 24-25. If it came upon an unsafe condition, it could not stop the work but would notify the general superintendent of Fuller or, if the danger was immediate, it would notify James Bruno, Fuller's site superintendent. *Id.* at 25-26. Mr. Bruno had the authority to stop the work, as did John Alba, Fuller's assistant site superintendent. *Id.* at 28, 34-35. Moreover, Fuller had a site safety plan for all of its projects. *Id.* at 31-32. That plan was not given to the contractors, but the contractors gave Fuller their safety programs. *Id.* at 32, 60.

Mr. Bruno was responsible for removing snow and ice from the project and would use Fuller's laborers to do so. *Id.* at 34-35, 59, 82-83. Snow and ice would be removed if it was in a work area or if it prevented workers from being able to get to their work area. *Id.* at 40-41. The Fuller laborers performed cleanup operations, but were not at the project daily, particularly in December 2003 when there was not a lot to clean up. *Id.* at 62. If the laborers were not on premises, cleanup would not take place. *Id.* at 83. Mr. Anello testified that there would not have been

any need for water on the project in December 2003. *Id.* at 73.

Mr. Anello believed that there was a string of temporary lights down the center of the project and on the staircase. *Id.* at 41. An electrical contractor employed by Fuller, would have put them up. *Id.* at 42. Those lights were always on. *Id.* at 58.

4. Petricca Affidavit

Unistress submitted the affidavit of Richard T. Petricca, project executive of Unistress in December 2003. He averred that a search of the Unistress payroll files indicated that no Unistress employees were at the project site On December 20, 21 and 22, 2003. He stated that the last delivery of Unistress precast occurred on December 16 and that once the crane left the project site, no Unistress employee was present at the site on a full time basis. Additionally, he averred that Unistress employed no electricians, owned no temporary construction lighting and neither received any complaints of icy conditions at the project nor was responsible for site conditions.

5. Climatological Data

The Climatological data for the New York City metropolitan area indicated that .52 inches of precipitation had fallen on December 17, 2003, .01 inches of precipitation had fallen on December 15 and 5.8 inches of snow had fallen on December 14. The minimum temperature on December 20, 2003 had been 27 degrees; on December 21, it had been 25 degrees; and on December 22, it had been 36 degrees.

6. Unistress/Fuller Trade Contract

A written agreement existed between Unistress and Fuller, which stated that Fuller was acting as the "Design Builder" and "solely as agent for Cappelli Enterprises, Inc." The agreement, which referred to Unistress as the "Contractor" and Fuller as the "Design Builder", was signed by Saul

Shenkman for Unistress, Louis Cappelli for Fuller and Louis Cappelli for Cappelli Enterprises.

Schedule B of the agreement addresses the air rights project. Paragraph cc of the agreement required Unistress to "comply with the minimum requirements of CFR 29 as established by OSHA," provide a safety plan to Fuller and hold weekly tool box talks. Schedule D of the agreement, provided:

> All insurance policies shall contain a waiver of insurer's right of subrogation against the Owner, Design Builder and the agents, officers[,] partners, representatives and employees of any of the above.
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> * * * *
>
> All insurance shall protect against claims arising out of the Work, regardless of whether such Work shall be performed by the Contractor[,] its subcontractors, vendors, suppliers or anyone directly or indirectly employed by the Contractor or its subcontractors, vendors, suppliers or by anyone for whose acts the Contractor or the subcontractors, vendors or suppliers may be liable.

Article 11 of the General Conditions of the Agreement was titled Indemnification and provided:

> Contractor shall, subject to the provisions of this section 11, defend, indemnify and hold harmless Design Builder and Owner and their respective directors, officers, employees, shareholders, agents and any and all other representatives from any claim, action, suit, proceeding or other liability, loss, damage, penalty, fee, cost or expense (collectively, "losses"), to the extent arising out of, based upon, relating to, or resulting from the negligent performance of the Work, or action of the Contractor or any of its Subcontractors or any of their respective directors, supervisors, employees, shareholders, agents or representatives for Losses for injury to or death to persons or damage to or loss of property, . . .
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> * * * *
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> Nothing in Article 11 shall be construed to require any indemnification which would make Article 11 void or unenforceable or to eliminate or reduce indemnification or rights which the Indemnities or Contractor has by law.

Article 12, styled Insurance/Bonds, provides:

> The terms and conditions of insurance to be provided by Contractor are described in the Insurance Exhibit attached to the Trade Contract Agreement. . . .[1]
>
> * * * *
>
> If an action for bodily injury and/or property damage is commenced against Owner

[1] No insurance exhibit was submitted to the Court.

and/or Design Builder, which is covered by the indemnity provisions of Article 11, Contractor shall, upon Design Builder's written request, promptly cause Contractor's insurance carrier to have its attorneys appear timely in the action on behalf of Owner and/or Design Builder and provide the defense of Owner and/or Design/Builder. The insurance required to be provided by Contractor...Shall not be deemed to be a limitation in any way upon the obligations of the Contractor that are required by the indemnity provisions of Article 11.

Article 15 of the agreement, speaks to safety:

15.1 Contractor shall conduct its operation in accordance with all applicable regulations and requirements of local, state and federal laws. . . .

* * * *

15.3 The Contractor must have representatives attend all Design Builder's weekly safety meetings at the site. Contractor shall establish its own regular weekly safety meeting and submit written minutes of the same to Design Builder.

* * * *

15.6 Contractor shall remove all snow and ice as may be required or requested for the proper protection and prosecution of Contractor's Work. Contractor shall provide and maintain adequate protection against weather so as to protect the Work from injury or damage. Removal of snow or ice from the project site (ground) is not the responsibility of this Contractor.

7. Unistress Insurance Contract

Unistress has submitted a policy between Travelers Property Casualty and Petricca Industries, Inc. for the period of this accident. The policy covers Unistress and contains a Blanket Additional Endorsement, which defines an insured as "any person or organization you are required to include as an additional insured." However, the insurance for the additional insured is limited to liability arising out of Petricca/Unistress's "work" and excludes injury arising out of acts or omissions of the additional insured "other than in connection with the general supervision of Petricca/Unistress's "work" . Moreover, the coverage provided to the additional insured is excess over any other insurance available to the additional insured.

8. Unistress/Taylor Agreement

The written contract between Unistress and Taylor refers to the Fuller/Unistress contract,

denominates it as the "Prime Contract", incorporates it and states that Taylor assumes Unistress's responsibilities under the Prime Contract. Article 6 of the contract addresses indemnification and states:

> To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, General Contractor, Unistress, . . . against claims, damages, losses, liens, cause of action and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury. . . to the extent caused in whole or in part by acts or omissions of [Taylor]. . . Anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . . in claims against any person or entity indemnified under this Paragraph 6 by an employee of the subcontractor, . . . The indemnification obligation under this Paragraph 6 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the subcontractor . . . under workers' compensation or workmen's compensation acts, disability benefit act or other employee benefit acts.

9. Doheny Affidavit

Taylor has submitted the affidavit of James Doheny, who avers that he was the general foreman at the subject work site on December 22, 2003. He states that he was present at the site on the day in question, was not advised of any accident involving Mr. Garren and observed no snow or ice conditions in the air rights building. He avers that he would have notified Fuller of such a condition had he observed it. He further avers that it was Fuller's responsibility to remove any snow and ice from the work site and to install any required temporary lighting. He refers to Fuller as the general contractor.

10. Taylor Insurance Contract

Taylor has submitted its Hartford policy of insurance. The commercial liability insurance, in defining who is an insured, states:

> 6. The following are also an insured when you have agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured on your policy, provided the injury or damage occurs subsequent to the execution of the contract or agreement.

The policy waives any right of recovery against Unistress. Further, excess insurance was obtained, and that policy defines an insured similarly but with the proviso that the insurance is provided "only with respect to your operations, 'your work' or facilities owned or used by you."

11. Rodrigues Affidavit

Antonio Rodrigues, the president of Rogers, submitted an affidavit in which he avers that Rogers was a subcontractor on the project but was not on site at the time of the accident. He further states that Rogers did not own, supervise or control the work performed by plaintiff. He avers that Rogers was not responsible for snow and ice removal or temporary lighting and that Rogers entered into no contract with Unistress.

12. Insurance Rejections of Claim

Fuller and Cappelli have submitted the letters of Travelers and Hartford, rejecting their claims for coverage. Travelers, in an April 19, 2004 letter, denied coverage because: the details of the accident were insufficient to establish that the accident did not occur due to Fuller's and Cappelli's negligence; and they did nto fit into the definition of additional insureds under the policy.

Hartford rejected the claim in a June 9, 2004 letter. It did so because it stated that it was required to insure the owner and general contractor and the contracts did not define Cappelli and Unistress as such.

B. Plaintiff's Submission

1. Pembroke's Deposition

Russ Pembroke, an employee of Petricca, the parent company of Unistress, and of Unistress,

testified that Unistress fabricates pre-cast concrete. Pembroke EBT, p. 6-7. Unistress was responsible for fabricating and erecting the precast for the White Plains garage and air rights project, but contracted out the installation of the precast to Taylor. *Id.* at 8, 12, 14. Mr. Pembroke was a project supervisor in 2002 and had oversight of the work at the garage from November of 2002 through August of 2003, making sure that the precast was installed properly. *Id.* at 8, 16.

Subsequently, Unistress was involved in the air rights project. *Id.* at 11, 22. Mr. Pembroke coordinated loads, "k[ept] an eye on" Taylor and answered any questions Taylor had about the prints and details. *Id.* at 8, 17. However, during construction, he was not allowed to be present in the work area; he did not go beyond the area of the crane. *Id.* at 17-18. Apart from Mr. Pembroke, no Unistress employee was regularly on site. *Id.* at 19. Mr. Pembroke left for vacation the week before the accident occurred. *Id.* at 28. Mr. Pembroke interacted with a Taylor supervisor named Jim, who supervised the Taylor employees. *Id.* at 37-38. To Mr. Pembroke's knowledge, no one other than Jim directed the Taylor employees. *Id.* at 37. Mr. Pembroke never instructed Taylor employees. *Id.* at 37-38.

Mr. Pembroke, who inspected the project work, estimated the floor dimensions of each floor of the garage as 300 feet by 100 feet. *Id.* at 39. He did not recall seeing temporary string lights in the air rights project, but recalled seeing "light trees" – poles with two to four spotlights on them. *Id.* at 39-40. Mr. Pembroke never attended any toolbox meetings. *Id.* at 45, 64. Mr. Pembroke did not know if Unistress ever submitted any safety plan to Fuller, but he had seen such a plan. *Id.* at 48. If Mr. Pembroke saw snow or ice on the floor of the air rights project, he would inform Fuller of it and ask them to take care of it. *Id.* at 64.

C. Reply Submission

1. Doheny Deposition

James Doheny, a Taylor employee involved in the air right project, testified that there was no temporary lighting during the day. Donehy EBT at 15. However, "temporary light plants" were used when Taylor worked at night. *Id.* He further testified that when he left his car on the seventh floor of the parking garage, in order to get to the work site, "it was light enough to get out of the car and go to work." *Id.* at 15-16. The seventh floor was open on all sides. *Id.* at 15. CONCLUSIONS OF LAW

I. Cappelli/Fuller's Cross-Motion for Summary Judgment as Against Plaintiff

A. Labor Law § 200

Section 200 of the Labor Law codifies the common law duty of a building owner and general contractor to maintain a safe workplace. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993) citing to *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998). Implicit in this duty is the owner's and general contractor's obligation to control or exercise supervision over "'the activity bringing about the injury to enable [them] to avoid or correct an unsafe condition.'" *Rizzuto, id. Accord Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 683 (2d Dept. 2005).

Here, plaintiff's injury was allegedly caused by ice which should have been removed from the work area. Cappelli and Fuller, the alleged general contractors, argue that they were not negligent and should not be held liable under Labor Law §200. But itis clear from the evidence – both deposition and written submissions – that Fuller, Cappelli's agent, had the duty to clear away snow and ice from the construction site. Indeed, Fuller had employed a safety consultant who was to walk the site and keep daily logs. The safety consultant was to notify Fuller of any danger. Two of Fuller's on-site employees, Bruno and Alba, had the capacity to stop work if a hazardous condition,

such as snow and ice in the workplace, existed and to clear the condition. Most important, Fuller employed laborers whose job it was to keep the work site clean. Although questions of fact exist as to whether the ice, in fact, was there and whether there was sufficient notice – *viz*, should the safety inspector, Bruno, Alba and/or the laborers have inspected for and cleared the alleged snow and ice before the work day -- these questions are issues which must be decided by the jury. Therefore, Fuller's and Cappelli's motion to dismiss plaintiff's Labor Law §200 claim is denied.

B. Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty upon general contractors to respond in damages for injuries sustained by a construction worker due to breach of specific rules and regulations promulgated by the Commissioner of the Department of Labor for the protection of such worker. *Rizzuto*, *supra* at 349-50; *Ross*, *supra* at 501-2. If a violation of such a rule or regulation is established, it is for the jury to determine whether the negligence of a contractor caused plaintiff's injury and, if proven, the general contractor is vicariously liable without regard to its fault *Rizzuto*, *id.*

Plaintiff alleges that two sections of the Industrial Code were violated in this case – 12 NYCRR §§23-1.7(d) and 23-1.30. 12 NYCRR §23-1.7(d) provides:

> Slipping Hazards. Employees 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.

Here, there was testimony that plaintiff worked on the eighth, ninth and tenth floors, that the only means of ingress to the ninth floor area where plaintiff was working on the day of the accident, was by walking across the eighth floor and that there was ice on the eighth floor, upon which

plaintiff slipped. Triable issues of fact, thus, exist as to whether there was ice on the floor of the project and an eighth floor passageway, whether Cappelli and Fuller were negligent and whether plaintiff was comparatively negligent.

Similarly, Cappelli and Fuller have not met their burden of establishing a *prima facie* case for dismissal of plaintiff's claim that 12 NYCRR §23-1.30 was violated. 12 NYCRR §23-1.30 provides:

> Illumination. Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

In the instant case, the accident occurred right before sunrise, on the eighth floor of a construction site that was enclosed on three sides. There was divergent testimony as to whether temporary lights existed at the project. Also, there was conflicting testimony as to whether there was sufficient natural light in the area of the accident. There was no testimony that the lighting at the time was either five or ten foot candles. Accordingly, defendants failed to make a showing that the lighting sufficiently complied with the requirements of 12 NYCRR§23-1.30. *See Earl v. Starwood Ceruzzi Saratoga, LLC*, 9 A.D.3d 879, 880 (4th Dept. 2004)(defendant failed to meet burden on motion to dismiss Labor Law §240 claim based upon 12 NYCRR§23-1.30, where it did not prove lighting complied with regulation); *Lucas v. KD Dev. Constr. Corp.*, 300 A.D.2d 634 (2d Dept. 2002)(where construction worker struck by car at work site in early morning while still dark outside, defendants failed to show lighting sufficient pursuant to 12 NYCRR§23-1.30). In sum, defendants have failed to to establish their entitlement to summary judgment on the main claim.

II. Indemnification

A. Common Law Indemnification against Unistress

> To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Correia v Professional Data Mgt., 259 A.D.2d 60, 65, 693 N.Y.S.2d 596; accord Priestly v Montefiore Med. Ctr., Einstein Med. Ctr., 10 A.D.3d 493, 495, 781 N.Y.S.2d 506) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 A.D.2d 556, 557, 757 N.Y.S.2d 65). *Perri, supra*, 14 A.D.3d 684-685.

Here, defendants Fuller and Cappelli seek common law indemnification from Unistress. The evidence submitted establishes that Unistress was not present at the job site on the day of the accident, did not supervise or direct plaintiff's work, and was not responsible for the lighting or snow and ice removal at the project. On the other hand, Mr. Anello, Vice President of Construction for Fuller, testified that Fuller was responsible for both temporary lighting and snow and ice removal. Under these facts, Cappelli and Fuller have failed to demonstrate their right to common law indemnification, and Unistress has established its entitlement to dismissal of this cause of action.

B. Common Law Indemnification against Taylor

Workers' Compensation Law §11 prohibits third-party claims against a plaintiff's employer unless the plaintiff's injuries are "grave" or there exists a written contract expressly providing for such indemnification. Grave injury is defined as death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers or toes, paraplegia or quadriplegia, total and permanent blindness or deafness, loss of a nose, ear or index finger, permanent and severe facial disfigurement or brain injury. Workers' Comp. Law §11. Here, plaintiff's injuries were not "grave." Consequently, Cappelli/Fuller may not seek indemnification from Taylor, plaintiff's employer.

C. Contractual Indemnification

The contract between Cappelli/Fuller and Unistress provided that Unistress was to indemnify Fuller for any claim "arising out of, based upon, relating to, or resulting from the negligent performance of the Work, or action of [Unistress] or any of its Subcontractors." The contract between Taylor and Unistress provides for indemnification of Unistress and Cappelli/Fuller by Taylor for damages arising from Taylor's work caused by Taylor's negligence. Unistress and Taylor now argue that they were not negligent and thatFuller was. They, therefore, contend that General Obligations Law § 5-322.1 prohibits Cappelli/Fuller from seeking indemnification from them.

General Obligations Law § 5-322.1 provides:

> 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

The Court of Appeals in *Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172, 180-1 (1990), has interpreted this statute to permit a general contractor to assert a claim for contractual indemnification when there is no negligence on its part. Moreover, even where the general contractor is negligent, a clause requiring indemnification only for the contractor's or subcontractor's negligence does not run afoul of General Obligations Law § 5-322.1. *Mannino v. J.A. Jones Constr. Group, LLC*, 16 A.D.3d 235, 236-237 (1st Dept. 2005), citing to *Dutton v. Charles Pankow Bldrs.*,

Ltd., 296 A.D.2d 321 (1st Dept. 2002), *lv denied* 99 N.Y.2d 511 (2003). *Accord Landgraff v. 1579 Bx. River Ave.*, 18 A.D.3d 385, 387 (1st Dept. 2005); *Murphy v. Columbia Univ.*, 4 A.D.3d 200, 203 (1st Dept. 2004).

Here, although there is no evidence of any negligence on the part of Unistress, the evidence submitted demonstrates that plaintiff was walking with his supervisor, who had the ability to stop him from crossing the floor and report any hazardous condition to Fuller. Further, plaintiff's testimony was that there were patches of ice throughout the eighth floor and that he and his supervisor had traversed the floor, walking over this ice, and that he slipped at the end of this walk. A question, thus, is raised as to Taylor's negligence. Since Unistress is obligated to indemnify Cappelli/Fuller for the negligence of its subcontractor Taylor, Unistress has failed to satisfy its burden of showing that there is no triable issue of fact as to partial indemnification. Similarly, Taylor, by contract with Unistress was obligated to indemnify both Unistress and Cappelli/Fuller. Its motion to dismiss Cappelli/Fuller's claim for contractual indemnification against it, thus, is denied for the reasons stated above. However, Unistress' motion for summary judgment on its cross-claim against Taylor for contractual summary judgment, is granted.

III. Insurance

The parties do not dispute that the contract between Unistress and Cappelli/Fuller and that between Unistress and Taylor required Unistress and Taylor to purchase liability insurance which was to cover Cappelli/Fuller as additional insureds. Unistress's policy, however, provides only excess coverage for additional insureds and limits liability only to damages arising from Unistress's work, specifically excluding "injury arising out of acts or omissions of the additional insured." Unistress argues that such coverage was sufficient to fulfill its contractual obligation to insure

Cappelli/Fuller.

The Court in *Wong v. New York Times Co.*, 297 A.D.2d 544 (1st Dept. 2002), addressed this very issue. There, a subcontractor obligated to obtain liability insurance for the contractor as an additional insured, argued that its procurement of excess, rather than primary, insurance satisfied its duty under the contract. *Id.* At 547. The Court rejected the subcontractor's argument, reasoning that a contract should be construed in accordance with the parties' purpose, that only primary insurance would be reasonable under the circumstances of the case and that "'additional insured' has "'a well-understood meaning in the insurance industry as an "entity enjoying the same protection as the named insured."'" *Id.* Here, as in *Wong*, Unistress' argument is unavailing. The Court, therefore, denied Unistress' motion to dismiss this cause of action, and grants Cappeli/Fuller's motion for summary judgment on this cause of action. Cappelli/Fuller are entitled to their out-of-pocket costs – its payment for its insurance premiums and any additonal costs such as deductibles, co-payments or increased future premiums. *Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 96 N.Y.2d 111 (2001); *Wong, supra.*

The Court, on the other hand, grants Taylor's motion for summary judgment on this issue. Taylor did procure primary insurance for any entity it had agreed by contract to insure as an additional insured. Taylor, thus, fulfilled its obligation.

IV. Roger's Cross-Motion

Rogers has presented evidence that it was a subcontractor on the work site with no control or supervision of plaintiff's work, that it had no duty to remove snow and ice from the project and that it no longer was on premises at the time of the accident. It, thereby, met its burden of establishing entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the

absence of any material issue of fact. *Giuffrida* v. *Citibank Corp.*, 100 N.Y.2d 72, 81 (2003)(movant on summary judgment has burden of demonstrating no triable issue of fact). Unistress has presented no proof establishing any liability on the part of Rogers. *See Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980)(once prima facie showing of entitlement to summary judgment is made, burden shifts to non-moving party to produce evidentiary proof in admissible form sufficient to establish existence of material issue of triable fact). Rather, the evidence introduced by the other parties demonstrates that Rogers had completed its work a month before the accident. Consequently, Roger's motion for summary judgment must be granted.

V. HRH

Although there is no motion by HRH seeking dismissal, the Court now searches the record and dismisses the action against it. The record evidence demonstrates that HRH n was not the general contractor on this project. Accordingly, it is

ORDERED that the action against Avalon Communities, Inc. is discontinued with prejudice, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the action against HRH Construction, LLC is dismissed and HRH Construction, LLC's third-party action for indemnification shall be discontinued, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the plaintiffs' Labor Law §240(1) claim is discontinued with prejudice; and it is further

ORDERED that Roger and Son's Concrete, Inc.'s motion to dismiss the second third party claim against it is granted and the second third-party complaint, styled "fourth party complaint", is dismissed, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' Labor Law §200 claim is denied and that claim shall be severed and shall continue; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' Labor Law §240(1) claim is denied, and that claim shall be severed and shall continue; and it is further

ORDERED that third-party defendant Unistress Corp.'s motion to dismiss third-party plaintiffs' causes of action for common law indemnification against it, is granted and that cause of action is dismissed; and it is further

ORDERED that third-party defendant Unistress Corp.'s motion to dismiss third-party plaintiffs' causes of action for contractual indemnification against it, is denied and that cause of action is severed and continued; and it is further

ORDERED that third-party defendant Unistress Corp.'s motion for summary judgment on its cross-claim against Taylor Erectors, Inc. for contractual indemnification, is granted and the Clerk shall enter judgment accordingly; and it is further

ORDERED that third-party defendant Unistress Corp.'s motion to dismiss third-party plaintiffs' cause of action against it for breach of contract (failure to procure liability coverage on behalf of third-party plaintiffs), is denied; and it is further

ORDERED that third-party plaintiffs Cappelli/Fuller's motion for summary judgment against Unistress for breach of contract for its failure to procure insurance on their behalf, is granted, Cappelli/Fuller is awarded its out-of-pocket costs and the matter is referred to a Special Referee to hear and determine those costs; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk

shall notify all parties of the date of the hearing; and it is further

ORDERED that third-party defendant Taylor Erectors, Inc.'s motion to dismiss third-party plaintiffs' cause of action against it for common law indemnification, is granted, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that third-party defendant Taylor Erectors Inc.'s motion to dismiss third-party plaintiffs' cause of action against it for contractual indemnification, is denied and that cause of action is severed and shall continue; and it is further

ORDERED that third-party defendant Taylor Erectors Inc.'s motion to dismiss third-party plaintiffs' cause of action against it for failure to obtain required liability coverage on behalf of third-party plaintiffs, is granted and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the caption herein shall be amended to read:

----------X

JOHN GARREN,

Plaintiff,

-against-

CAPPELLI ENTERPRISES, INC. & GEORGE A. FULLER CO., INC.,

Defendants.

----------X

CAPPELLI ENTERPRISES, INC. & GEORGE A. FULLER CO., INC.,

Third-Party Plaintiffs,

-against-

UNISTRESS CORP. & TAYLOR ERECTORS, INC.

Third-Party Defendants..

----------X

And it is further

ORDERED that plaintiff shall serve defendant Bertha Fertil and newly added defendants with the amended complaint in the proposed form annexed to the moving papers, and a copy of this order with notice of entry, by mail within ten (10) days of entry of this order; and it is further

ORDERED that the additional defendants shall serve their answers to the amended complaint within twenty (20) days from the date of said service; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon both the Trial Support Office (Room 158) and the County Clerk so that their records may be altered to reflect the changes in the caption; and it is further

ORDERED that the parties are to appear in Part 54, 111 Centre Street, New York, N.Y., for a pre-trial conference on April 27, 2006.

Date: April 7, 2005

J.S.C.