Rashid v R.C. Dolner, Inc.
2007 NY Slip Op 30833(U)
April 10, 2007
Supreme Court, New York County
Docket Number: 0117973/2003
Judge: Emily Jane Goodman
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SCANNED ON 4/20/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 117973/2003
RASHID, MOHAMMED
VS.
R.C. DOLNER, INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided per attached

FILED
APR 20 2007
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/10/07

EMILY JANE GOODMAN
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
---X
MOHAMMED RASHID,

Plaintiff,

-against-

Index No. 117973/03

R.C. DOLNER, INC., R.C. DOLNER, LLC., 2 SPRUCE STREET, LLC., 150 NASSAU STREET, LLC., YITZCHAK TESSLER, 150 NASSAU ASSOCIATES, LLC., 150 NASSAU CONDOMINIUM and IN/EXTERIOR CORP.,

Defendants.
---X

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.S.C:

This action arises out of personal injuries suffered by plaintiff while he was working at a construction site. The parties' motion and five cross motions will be decided in this opinion.

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants' liability under Labor Law §§ 240 and 241. Defendant 150 Nassau Condominium (Condo) cross-moves, (1) for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, and (2) for summary judgment on its cross claims for indemnification as against defendants R.C. Dolner, Inc. and R.C. Dolner, LLC. (together, RCD). Defendant RCD cross-moves for summary judgment on its common-law and contractual indemnification claims as against defendant In/Exterior Corp. (In/Ex). Defendants 2 Spruce

Street, LLC. (Spruce), 150 Nassau Street, LLC. (Street), 150 Nassau Associates, LLC. (Associates), and Yitzchak Tessler (Tessler) (together, defendants) cross-move, pursuant to CPLR 3212, for summary judgment: (1) on their common-law indemnification cross claim[1] as against RCD and In/Ex; (2) on their contractual indemnification cross claim as against RCD; (3) dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action; and (4) dismissing all claims and cross claims asserted as against Tessler. Defendant In/Ex cross-moves (September 14, 2006) for summary judgment "on all claims and cross claims," and cross-moves again (October 12, 2006) for summary judgment "dismissing all cross claims."[2]

BACKGROUND

On June 27, 2003, the date of plaintiff's accident, the building located at 150 Nassau Street in Manhattan was undergoing renovation in order to convert the building from office space to condominium residences. As part of the renovation, the outside of the building was being restored, which included cleaning the

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[1]Defendants' answer denominates their second cross claim as one for common-law negligence, and it seeks no relief. However, since all parties appear to have accepted it and submitted their briefs as if a cross claim for common-law indemnification were pleaded, the court shall so deem it.

[2]In/Ex's papers seem to indicate that its cross motions seek summary judgment dismissing the complaint, and oppose RCD's cross motion for summary judgment against In/Ex on RCD's cross claims for common-law and contractual indemnification.

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façade. Plaintiff was standing near the top of a 12- to 14-foot metal extension ladder, removing tar from the façade, when the ladder slipped out from under him and fell, taking plaintiff with it. As a result, plaintiff was injured.

The ladder had been placed on a stone step and propped against the building by plaintiff's supervisor. The ladder itself had no rubber or slip-resistant feet; it was not secured to the building either at the top or the bottom; and no one held the ladder to stabilize it and keep it from sliding.

Ownership of the building changed hands several times, as partially reflected in the various contracts entered into for the project. On June 26, 2001, Associates, as owner, and RCD, as construction manager, entered into an owner-construction manager agreement (the Associates/RCD Contract). On June 11, 2002, In/Ex contracted with YT & T Corp. (the then-owner [McConnell 10/25/06 Reply Affirm., ¶ 9], or the then-owner's representative [McConnell 9/06 Affirm., ¶ 12] with respect to the building) for In/Ex to clean all masonry on the north and west elevations of the building (the In/Ex/YT&T Contract). An unexecuted proposal from Annex Restoration Inc. (Annex), plaintiff's employer, to In/Ex, dated August 7, 2002, provided that Annex would clean the brick and granite front façade of the building. According to In/Ex, it subcontracted the In/Ex/YT&T Contract work to Annex in this document. On August 12, 2003, In/Ex contracted with RCD for

In/Ex to restore the west elevation granite entranceway (the In/Ex/RCD Contract). According to In/Ex, it subcontracted this work to Annex, also.

According to defendants, the only parties which were the owner of the property at some point in the project were Spruce, Associates, and Condo. It is uncontested that at the time of the accident, Condo was the owner of the premises.

THE PLEADINGS

Plaintiff's third amended complaint alleges two causes of action, for negligence, and for violations of Labor Law §§ 200, 240, and 241.

RCD's answer contains six cross claims against its co-defendants, all sounding in contribution, common-law and contractual indemnification.

Defendants' answer alleges three cross claims against RCD, In/Ex and Condo, for common-law and contractual indemnification and contribution.

Condo's answer asserts three cross claims against its co-defendants, for common-law and contractual indemnification, and breach of contract by failure to procure insurance.

In/Ex's answer alleges two cross claims against its co-defendants, sounding in common-law indemnification and contribution.

DISCUSSION

Summary Judgment Standard

> "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Once the [movant] establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the [opposing party] to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment" (*DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff's Motion for Partial Summary Judgment on the Issue of All of This Case's Defendants' Liability Under Labor Law §§ 240 and 241

Labor Law § 240 (1) provides, in relevant part:

> All contractors and owners and their agents ... in the ... cleaning ... of a building ... shall furnish or erect, or cause to be furnished or erected for the performance of

> such labor, ... ladders ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"In enacting this statute, the legislative intent was to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident [internal quotation marks and citations omitted]" (*Morales v Spring Scaffolding*, 24 AD3d 42, 45 [1st Dept 2005]). "[T]he section imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty that proximately causes a plaintiff's injury" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003], quoted in *Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 [2003]). The term "absolute liability" is used "in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work [internal citation omitted]" (*Blake*, 1 NY3d at 287).

Violation of the statute was a proximate cause of plaintiff's injuries here. The ladder was not so placed as to give plaintiff the protection needed to prevent his fall. The next issue to be resolved is whether any of the defendants in this matter may be held liable to plaintiff for this violation.

It is uncontested that Condo was the owner of the premises at the time of plaintiff's accident. Harold Schertz (Schertz), who testified on behalf of defendants, averred that Associates bought the property (the date of purchase is not stated), started the construction, and sold the property to Spruce in February 2003 (Schertz Depo., at 9). Spruce's business was "[t]o convert the location at 150 Nassau Street to condominiums" (*id.* at 7). By declaration of condominium, ownership passed from Spruce to Condo, title being transferred on March 21, 2003 (*id.* at 7-8, 15). Tessler was "the manager of [Associates], who was the developer of the property located at 150 Nassau Street" (*id.* at 16). Schertz also testified that Tessler was a principal of Associates and a member of Spruce (*ibid.*). Schertz himself was the manager of Spruce in June 2003, and was also "the individual with operating authority, the person that [he] would deal with from [Condo] at that time ... because [he] was on the board of [Condo] as well as [Spruce] and the other members of the other boards" (*id.* at 7, 9). As manager, he was responsible for overseeing the financial control of the project, but he was not on site on a regular basis (*id.* at 7).

Under section 240 (1), the term "owner" includes owners in fee (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 560 [1993]), as well as "a 'person who has an interest in the property and who fulfilled the role of owner by contracting to

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have work performed for his benefit' [citation omitted]" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]; *see also Lynch v City of New York*, 209 AD2d 590, 591 [2d Dept 1994] ["owner" includes "those entities with interests in the property which have the right, as a practical matter, to hire and fire the subcontractors and to insist that proper safety practices are followed"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609 [1st Dept 1993] [same]).

From the above, it is clear that Condo, as owner in fee at the time of the accident, is absolutely liable under Labor Law § 240 (1). Associates and Spruce are not liable because, although they once were owners in fee of the property, they no longer had that status, and had no authority to hire or fire any of the contractors at the site. Street and Tessler cannot be held liable as owners because there is no evidence that either of them ever owned the property in fee or had any authority to hire or fire any contractor.

The parties vigorously contest the issue of whether RCD, the construction manager, acted as a general contractor or agent of the owner, and thus, is liable under section 240 (1).

> Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. "When the work

> giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor." Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law. ... The label of construction manager versus general contractor is not necessarily determinative [internal citations omitted]

(*Walls v Turner Construction Co.*, 4 NY3d 861, 863-864, 864 [2005]). "[A] general construction manager charged with the duty of co-ordinating 'all aspects' of a construction project is a 'contractor' with nondelegable duties under sections 240 and 241 of the Labor Law" (*Kenny v George A. Fuller Co.*, 87 AD2d 183, 190 [2d Dept 1982]).

The Court in *Walls* found the construction manager there to be liable under section 240 (1) because it "was not the 'typical construction manager'"; rather, it "functioned as the eyes, ears, and voice of the owner," and its "broad responsibility was both that of coordinator and overall supervisor for all the work being performed on the job site" (*Walls*, 4 NY3d at 864). On the appellate level, construction managers have been held liable under the statute when they were "responsible 'for coordinating and supervising the ... project and [were] invested with a concomitant power to enforce safety standards and to hire responsible contractors'" (*Ewing v ADF*

Construction Corp., 16 AD3d 1085, 1085 [4th Dept 2005]); when they "had the responsibility to coordinate and the authority to supervise all aspects of the renovation project" (*Maniscalco v Liro Engineering Construction Management, P.C.*, 305 AD2d 378, 380 [2d Dept 2003]); when their construction management agreement "unambiguously authorized [them] to select the various contractors and to supervise and control their work" (*Griffin v MWF Development Corp.*, 273 AD2d 907, 908 [4th Dept 2000]); and when they were "understood to be 'in charge' of the project and to have overall responsibility for the work, including matters of safety" (*Ortega v Catamount Construction Corp.*, 264 AD2d 323, 324 [1st Dept 1999]).

However, appellate courts have found that a construction manager had no status as general contractor or agent when the "role was only one of general supervision, which is insufficient to impose liability under Labor Law §§ 240 (1) and 241 (6)" (*Linkowski v City of New York*, 33 AD3d 971, 975 [2d Dept 2006]), and when they "only coordinated the different subcontractors, created work schedules, and prepared progress reports for the instant construction project" (*Armentano v Broadway Mall Properties*, 30 AD3d 450, 451 [2d Dept 2006]).

Appellate courts have also found questions of fact when "[t]he agreement [between the construction manager and owner] gave [the construction manager] many of the powers of a general

contractor" (*Nienajadlo v Infomart New York, LLC*, 19 AD3d 384, 385 [2d Dept 2005]), and when the construction manager "was on the job full-time to supervise and manage the subtrades" (*Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]).

The Appellate Division, Second Department, in *Kenny* (87 AD2d 183, *supra*), found that the construction manager was liable under Labor Law § 240 (1) because

> under its agreement with the owner [it] was required, *inter alia*, to analyze design programs and costs; co-ordinate implementation of the design; prepare all cost analyses for the owner; continuously review and make recommendations concerning construction detailing; review the contract documents; *recommend the establishment and implementation of a comprehensive safety program for the project*; and, during the construction stage, establish procedures for and maintain co-ordination among the owner, architect, the various contractors and itself concerning *all aspects of the project* and regularly observe the work being performed by the contractors by inspecting the site for the purposes of controlling quality, co-ordinating, expediting and reporting construction progress

(*Kenny*, 87 AD2d at 189 [emphases in original]).

As set forth above, the Associates/RCD Contract was an owner-construction manager agreement. According to the agreement, RCD was responsible, among other things, "to recommend on-site organizational lines of authority in order to carry out the Work on a coordinated basis"; to provide monthly updates concerning the anticipated aggregate cost of the project; to

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provide a monthly project schedule, describing the previous month's work activity, the anticipated month's activity for each of the major trades, and a cash flow analysis with respect to the work; to coordinate the scheduling of the work; to prepare necessary job and coordination meetings and to prepare detailed written minutes of these meetings; to prepare and maintain an on-site record keeping system, including daily manpower and trade breakdowns, and monthly job-progress reports for the owner; to inspect and coordinate the work of all subcontractors and use its best efforts to ensure that the same was being performed in accordance with the requirements of their respective subcontracts "so as to guard the Owner against any defects and deficiencies in the Work"; in connection with its coordination of subcontractors: "to prepare and enforce a security and safety plan per Construction Manager's plan," to "conduct inspections of the Site and endeavor to ensure that all Subcontractors comply with all Federal, State and local safety, health, environmental protection and other requirements, laws, rules and regulations applicable to the Work and/or the Project" and to prepare and issue change orders (Associates/RCD Contract, Article II, ¶ 2.2.1). The evidence also indicates that plaintiff was performing work contracted for within the In/Ex/RCD Contract, and which had been subcontracted to Annex by In/Ex.

In light of the above, the court finds that RCD is

liable as an agent or as a construction manager that acted as a general contractor under Labor Law § 240 (1).

In/Ex entered into contracts with YT & T Corp., which was either the owner or the owner's agent at the time of contracting, and with RCD, which was then acting as an agent or general contractor.[3] In those contracts, In/Ex agreed to "supply all protection, labor, supervision and insurance for above." The Court of Appeals has held that "[a]n agency relationship for purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job" (*Blake*, 1 NY3d at 293, citing *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Morales v Spring Scaffolding*, 24 AD3d 42 [1st Dept 2005]; *Bopp v A.M. Rizzo Electrical Contractors*, 19 AD3d 348 [2d Dept 2005]). The work of cleaning the façade of the building was delegated to In/Ex, and it agreed to take on responsibility for the protection and supervision of that work. Therefore, it acted as an agent of RCD, which was acting as general contractor, and is liable to

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[3]Although RCD asserts that its contract with In/Ex was merely a "proposal" because "PO [purchase order] to follow" was written below RCD's signature, the document itself states, below the signature line, that "When above proposal is sign[ed] this proposal becomes a valid contract including all provisions in attached Terms and Conditions." *See T. Moriarty & Son v Case Contracting Ltd.*, 287 AD2d 390, 390 (1st Dept 2001) ("That the parties may have contemplated a more comprehensive expression of their understanding did not ... render their initial agreement ineffectual").

plaintiff under Labor Law § 240 (1).

Liability under Labor Law § 241 (6) is also imposed on "[a]ll contractors and owners and their agents." Thus, those parties in this matter which are liable under section 240 (1) are also liable under section 241 (6), and those which are not, are not.

In light of the above, plaintiff's motion which seeks partial summary judgment on the issue of all of this action's defendants' liability under Labor Law §§ 240 (1) and 241 (6) is granted with respect to Condo, RCD, and In/Ex, but is denied with respect to Associates, Spruce, Street, and Tessler.

Defendant Condo's Cross Motion (1) for Summary Judgment Dismissing Plaintiff's Labor Law § 200 and Common-Law Negligence Claims and (2) for Summary Judgment on Condo's Cross Claims for Indemnification as Against RCD

(1) Summary Judgment Dismissing Plaintiff's Labor Law § 200 and Common-Law Negligence Claims

> Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury. Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 [internal quotation marks and citations omitted]

(*Smith v 499 Fashion Tower, LLC*, ___ AD3d ___, 2007 WL 677990, *1, 2007 Slip Op 01856 [2d Dept 2007]; *see also Peay v New York*

City School Construction Authority, 35 AD3d 566, 567 [2d Dept 2006] [same]; *DeSimone v Structure Tone*, 306 AD2d 90, 90 [1st Dept 2003] [same]).

The accident here was caused by Annex's method of performing its work, i.e., plaintiff's supervisor, also an Annex employee, positioned the ladder on the steps and failed to secure it in any way before plaintiff ascended it to work on the façade. There is no evidence whatever that Condo had any supervision or control over how Annex performed its work. Therefore, the part of Condo's cross motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it is granted.

(2) Summary Judgment on Condo's Cross Claims for Indemnification as Against RCD

In its answer to plaintiff's complaint, Condo asserts three cross claims against its co-defendants, one of which sounds in common-law indemnification. Condo's moving papers make it clear that it is this claim upon which it is moving against RCD.

> "It is well settled that 'an owner or general contractor who is held strictly liable under Labor Law § 240 (1) is entitled to full indemnification from the party actually responsible for the incident.' The principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer" [internal citations omitted]

(*Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 691 [2006];

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see also Kelly v City of New York, 32 AD3d 901, 902 [2d Dept 2006], citing *Storms v Dominican College of Blauvelt*, 308 AD2d 575, 577 [2d Dept 2003] ["Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious"]). "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' [citations omitted]" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]; *see also Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999] [same]).

Here, both Condo, the owner, and RCD, its agent and/or construction manager/general contractor, have been held statutorily liable under Labor Law § 240 (1), but such liability is not tantamount to a finding of negligence (*see e.g. Correia*, 259 AD2d at 64 ["liability under Labor Law § 240 (1) is statute-based, not fault-based"]). Condo has also established that it is not liable under Labor Law § 200 or common-law negligence. However, no such showing, with respect to RCD's negligence or lack thereof, has been made. Absent Condo's demonstration that RCD was negligent, the part of its cross motion seeking summary judgment on its common-law indemnification claim as against RCD

must be denied.

Defendant In/Ex's Cross Motions for Summary Judgment Dismissing the Complaint and All Cross Claims Asserted as Against It

Summary Judgment Dismissing the Complaint

As set forth above, In/Ex was found liable to plaintiff under Labor Law §§ 240 (1) and 241 (6) because it was an agent of RCD, which was acting as general contractor. Thus, the part of its cross motion which seeks summary judgment dismissing the complaint's Labor Law §§ 240 (1) and 241 (6) claims is denied.

In/Ex also seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims. In/Ex's president, Vincent Scandole (Scandole), testified that In/Ex's business was "to get contracts with building owners or general contractors, and then sub the work out to one subcontractor or another" (Scandole Depo., at 37-38). According to Scandole, In/Ex entered into three contracts (two written, one oral) for work at 150 Nassau Street in Manhattan, all of which were subcontracted out to Annex. Scandole visited the site two or three times a week during the course of the work, "[t]o see how the work was progressing; see any problems" (*id.* at 16). Although Scandole testified that Annex's principal "was very experienced in cleaning ... [h]e knew what he was doing" (*id.* at 36), he also testified at that time that "[a]rbitrarily, did I allow him to do whatever he wanted to? No. ... We may have, prior to this, talked about what chemicals to use and how he was

going to do the job; what areas and that, what procedures" (*ibid.*). He also testified that if he had noticed what he considered to be unsafe work conditions at the site, he would "[a]bsolutely" have had the authority to direct that the work be stopped or the conditions changed (*id.* at 56).

Although it is well-settled that general supervision of a site and the authority to stop unsafe work are not enough to impose liability under Labor Law § 200 and common-law negligence (*see e.g. Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]), where the evidence indicates that other responsibilities were also undertaken, a question of fact is raised as to whether the obligations constituted supervision of the work site (*see e.g. Brennan v 42nd Street Development Project*, 10 AD3d 302, 302 [1st Dept 2004]). In addition, where an owner or general contractor directs "how to do" the work, liability may be imposed (*see O'Sullivan v IDI Construction Co.*, 28 AD3d 225, 226 [1st Dept], *affd* 7 NY3d 805 [2006]).

Here, Scandole testified that he visited the site two or three times a week, in part to check for "any problems"; he did not simply allow Annex to do whatever it wanted to do; he "may have" spoken with Annex's principal concerning what chemicals to use and how Annex was to do the job, as well as what procedures were to be used; and he had the authority to stop work if he considered it unsafe. In these circumstances, the court

finds that there is a triable question of fact as to whether In/Ex's supervision of the site was sufficient to render it liable under Labor Law § 200 and common-law negligence. Accordingly, the part of In/Ex's cross motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is denied.

Summary Judgment Dismissing All Cross Claims Asserted as Against In/Ex

Nine cross claims have been asserted as against In/Ex: RCD alleges claims for contribution, common-law and contractual indemnification; defendants assert the same; and Condo alleges claims for common-law and contractual indemnification, as well as a claim for breach of contract by failure to procure insurance.

RCD's Cross Claims

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). Here, In/Ex has not demonstrated that it was without fault or negligence so as to be entitled to have RCD's cross claim for contribution dismissed. Thus, the part of In/Ex's cross motion which seeks summary judgment dismissing RCD's contribution cross claim is denied.

In/Ex is not entitled to summary judgment dismissing RCD's cross claim for common-law indemnification because it has

not established that it was without negligence in the causation of plaintiff's accident. Nor has it demonstrated that RCD was negligent. Therefore, the part of In/Ex's cross motion which seeks dismissal of RCD's common-law negligence cross claim is denied.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [interior quotation marks omitted]" (*Watral & Sons v OC Riverhead 58, LLC*, 34 AD3d 560, 563 [2d Dept 2006], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]; *see also Torres v Morse Diesel International*, 14 AD3d 401, 403 [1st Dept 2005]). In addition, "[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Management*, 259 AD2d at 65; *see also De La Rosa v Philip Morris Management Corp.*, 303 AD2d 190, 193 [1st Dept 2003], quoting *Correia*; *Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002], quoting *Correia*).

The In/Ex/RCD Contract, below the signature line, states that the contract "includ[es] all provisions in attached

Terms and Conditions." Neither the "Proposal" page, nor the "Terms and Conditions" pages of the contract contain any indemnification language. Thus, there can be no intention that In/Ex indemnify RCD found in the contract. Therefore, the part of In/Ex's cross motion which seeks summary judgment dismissing RCD's contractual indemnification cross claim is granted.

Defendants' Cross Claims

For the same reasons set forth above, the part of In/Ex's cross motion which seeks summary judgment dismissing defendants' contribution and common-law indemnification cross claims is denied.

There is no contract in evidence between any of the defendants and In/Ex. Therefore, no contractual indemnification claim lies, and the part of In/Ex's cross motion which seeks dismissal of defendants' contractual indemnification cross claim is granted.

Condo's Cross Claims

As determined above, In/Ex cannot obtain summary judgment dismissing cross claims against it for common-law indemnification. With respect to Condo's contractual cross claims, even in the event that the In/Ex/YT&T Contract were considered a contract between In/Ex and Condo, the contract could not form the basis for claims for contractual indemnification or breach of contract by failure to procure insurance. The In/Ex

form of contract simply does not contain language which requires it to indemnify Condo, or to procure insurance for Condo's protection. Therefore, the part of In/Ex's cross motion which seeks summary judgment dismissing Condo's cross claim for common-law indemnification is denied, but summary judgment dismissing Condo's contractual cross claims is granted.

Defendant RCD's Cross Motion for Summary Judgment as Against In/Ex for Common-Law and Contractual Indemnification

In order to determine whether RCD can obtain summary judgment as against In/Ex for common-law indemnification, the court must first consider whether RCD has established that it was not negligent in the causation of plaintiff's accident. It has not.

In his testimony, RCD's project superintendent, Tom Ricci (Ricci), stated, at page 66, that in the course of his work as project superintendent, he would make daily inspections of the site. In/Ex's "Vinnie" [Scandole] "would come to me and tell me he was going to be over in this area, just to let me know where he would be most of the time or ask me for water, if he needed water, if I can provide him with something, that type of thing" (Ricci Depo., at 71). In answer to the question about whether RCD was "responsible for overseeing this archway, entranceway work" (*id.* at 78), Ricci responded that he "was only responsible to make sure that area was going to look nice at the end of the day" (*id.* at 79). Yet, when asked if In/Ex had to

report to him, he answered, "No," and when asked if he was responsible for supervising In/Ex's work, he also answered, "No" (*id.* at 86).

Such unsubstantial supervisory control over In/Ex's work pursuant to the In/Ex/RCD Contract is insufficient to constitute a basis for liability for common-law negligence (*see Singh*, 24 AD3d 138, *supra*). The court must next determine whether RCD has established that In/Ex was negligent, such that it would be liable to RCD for common-law indemnification.

RCD maintains that In/Ex owes it common-law indemnification because In/Ex took on the responsibility of supervising the cleaning of the façade in the In/Ex/RCD Contract, which cleaning work it then subcontracted out to Annex. Thus, In/Ex "assumed responsibility for supervising Annex" (McConnell 10/25/06 Reply Affirm., ¶ 9), and since the accident happened during the cleaning of the façade, In/Ex was negligent in its supervision of the work it had contracted to do.

The court agrees. Although In/Ex was unable to obtain summary judgment dismissing RCD's cross claim for common-law indemnification because the testimony of In/Ex's president, Scandole, raised questions of fact about whether its supervision was sufficient to render it liable under Labor Law § 200 and common-law negligence, RCD's showing is sufficient to establish

[* 25]

that it was not negligent and to show that In/Ex was negligent in the performance of the work it had contracted to do. Therefore, that part of RCD's cross motion which seeks summary judgment on its common-law indemnification claim as against In/Ex is granted.

The part of its cross motion which seeks summary judgment on its cross claim against In/Ex for contractual indemnification must be denied. There is no indemnification language in the In/Ex/RCD Contract.

Cross Motion by Spruce, Street, Associates and Tessler for Summary Judgment (1) Dismissing Plaintiff's Common-Law Negligence and Labor Law § 200 Causes of Action; (2) on Their Common-Law Indemnification Cross Claim as Against RCD and In/Ex; (3) on Their Contractual Indemnification Cross Claim as Against RCD;; and (4) Dismissing All Claims and Cross Claims Asserted as Against Tessler

(1) Dismissing Plaintiff's Common-Law Negligence and Labor Law § 200 Causes of Action

There is no evidence that defendants supervised or controlled the work being done at the site at the time of plaintiff's accident. This court has already found that none of the defendants were the owner of the property at that time. The only contract linking any of the defendants to the project is that between Associates and RCD, by which Associates delegated to RCD "the obligation to supervise, oversee, perform and furnish, or cause to be performed and furnished, all work, labor, materials, supplies, tools and equipment" needed for the

construction project (Associates/RCD Contract, Introductory Statement, ¶ D). Thus, there was also no contractual basis for any obligation of one of the defendants to supervise or control the work. In addition, plaintiff, himself, testified that only his Annex supervisor directed him in the performance of his work. As such, no claim as against defendants sounding in common-law negligence or Labor Law § 200 lies, and that part of defendants' cross motion which seeks summary judgment dismissing these claims is granted.

The court has already determined that defendants could not be liable to plaintiff pursuant to Labor Law §§ 240 (1) and 241 (6). Thus, pursuant to CPLR 3212 (b), summary judgment is granted to them, dismissing these claims as against them.

Summary judgment is granted dismissing the entire complaint as against defendants.

(2) Summary Judgment on Their Common-Law Indemnification Cross Claim as Against RCD and In/Ex

Having established that they were not negligent in the causation of plaintiff's injuries, defendants must now demonstrate that RCD and/or In/Ex owes them common-law indemnification.

As Against RCD

Defendants, although touting that there is no evidence that any of them directed or supervised any work done at the site, completely fail to adduce any evidence that RCD was

negligent. Accordingly, the part of defendants' cross motion which seeks summary judgment on their common-law indemnification claim as against RCD is denied.

As Against In/Ex

Defendants assert, without any substantiating support, that In/Ex was a general contractor under the In/Ex/YT&T contract (Gandy 10/26/06 Reply Affirm., ¶ 7). They argue that In/Ex's Scandole "was in charge of the personnel working on the In/Exterior project" (*ibid.*), and that this constitutes a basis for their claim for common-law indemnification as against In/Ex. However, this court has found that there is a question of fact as to whether Scandole's testimony was sufficient to establish In/Ex's "supervision" under Labor Law § 200 and common-law negligence, and defendants have failed to resolve that question of fact and to demonstrate that Scandole's participation at the site makes In/Ex liable to defendants for common-law indemnification. Therefore, this part, too, of defendants' cross motion must be denied.

(3) Summary Judgment on Their Contractual Indemnification Cross Claim as Against RCD

Defendants cite to Article XI, paragraph 11.4.1 of the Associates/RCD Contract in support of their contention that RCD owes them contractual indemnification. That provision states, in relevant part:

> To the extent permitted by law, the

[* 28]

> Construction Manager [RCD] shall indemnify, defend and hold the Owner and its indemnitee (those individuals and entities listed on Exhibit D) harmless from and against all Claims, to the extent such Claims are asserted against the Owner ... as a result of, in connection with, or as a consequence of any act, error, or omission of the Construction Manager or its Subcontractors in the performance of the Work services provided by the Construction Manager ... .

Only Associates is listed in Exhibit D as someone that RCD would have to indemnify. Therefore, Spruce, Street and Tessler are not entitled to be indemnified pursuant to the Associates/RCD Contract, and the part of defendants' cross motion which seeks contractual indemnification as to these defendants is denied.

With respect to Associates, however, it is entitled to contractual indemnification from RCD, on the bases that claims arising from RCD's work as construction manager/general contractor were asserted as against Associates, and Associates has been found not liable to plaintiff under any provision of the Labor Law or common-law negligence. Therefore, the part of defendants' cross motion which seeks contractual indemnification from RCD is granted as to Associates.

(4) Dismissing All Claims and Cross Claims Asserted as Against Tessler

This court has already found that none of plaintiff's claims lie as against defendants. Therefore, "all cross claims are dismissed as a necessary consequence" of the dismissal of the complaint as against these parties (*see Terce v AT & T*

Communications, 256 AD2d 245, 246 [1st Dept 1998]).

Accordingly, the part of defendants' motion which seeks summary judgment dismissing all claims and cross claims as against Tessler is granted.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion which seeks partial summary judgment on the issue of all of this action's defendants' liability under Labor Law §§ 240 (1) and 241 (6) is granted with respect to 150 Nassau Condominium, R.C. Dolner, Inc. and R.C. Dolner, LLC., and In/Exterior Corp., but is denied with respect to 150 Nassau Associates, LLC., 2 Spruce Street, LLC., 150 Nassau Street, LLC., and Yitzchak Tessler; and it is further

ORDERED that the part of 150 Nassau Condominium's cross motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it is granted; and it is further

ORDERED that the part of 150 Nassau Condominium's cross motion which seeks summary judgment on its common-law indemnification claim as against R.C. Dolner, Inc. and R.C. Dolner, LLC. is denied; and it is further

ORDERED that the part of In/Exterior Corp.'s cross motions which seeks summary judgment dismissing the complaint is

denied; and it is further

ORDERED that the part of In/Exterior Corp.'s cross motions which seeks summary judgment dismissing R.C. Dolner, Inc. and R.C. Dolner, LLC.'s, defendants' and 150 Nassau Condominium's cross claims as against it is denied with respect to their contribution and common-law indemnification cross claims, but is granted with respect to their contractual indemnification and breach of contract cross claims; and it is further

ORDERED that the part of R.C. Dolner, Inc. and R.C. Dolner, LLC.'s cross motion which seeks summary judgment on its common-law indemnification cross claim against In/Exterior Corp. is granted; and it is further

ORDERED that the part of R.C. Dolner, Inc. and R.C. Dolner, LLC.'s cross motion which seeks summary judgment on its contractual indemnification cross claim against In/Exterior Corp. is denied; and it is further

ORDERED that summary judgment dismissing plaintiff's complaint is granted, and the complaint is severed and dismissed as against 150 Nassau Associates, LLC., 2 Spruce Street, LLC., 150 Nassau Street, LLC., and Yitzchak Tessler, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall

continue; and it is further

ORDERED that the part of defendants' cross motion which seeks summary judgment on their common-law indemnification claim as against R.C. Dolner, Inc. and R.C. Dolner, LLC. and In/Exterior Corp. is denied; and it is further

ORDERED that the part of defendants' cross motion which seeks contractual indemnification from R.C. Dolner, Inc. and R.C. Dolner, LLC. is denied as to 2 Spruce Street, LLC., 150 Nassau Street, LLC. and Yitzchak Tessler; and it is further

ORDERED that the part of defendants' cross motion which seeks contractual indemnification from R.C. Dolner, Inc. and R.C. Dolner, LLC. is granted as to 150 Nassau Associates, LLC.; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing all claims and cross claims as against Yitzchak Tessler is granted.

This Constitutes the Decision and Order of the Court.

Dated: April 10, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE