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

PRESENT: **HON. MICHAEL D. STALLMAN** PART 7

Index Number : 107959/2005
MCCARTHY, JOHN
VS
TURNER CONSTRUCTION
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/23/07
MOTION SEQ. NO. _____
MOTION CAL. NO. 81

The following papers, numbered 1 to 6 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-D	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

HON. MICHAEL D. STALLMAN

Dated: 5/16/07

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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JOHN McCARTHY and PHYLLIS McCARTHY,

Plaintiffs,

-against-

Index No.: 107959/05

TURNER CONSTRUCTION, INC., JOHN GALLIN & SON, INC., BOSTON PROPERTIES, INC. and TIMES SQUARE TOWER ASSOCIATES, LLC,

Decision and Order

Defendants.

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JOHN GALLIN & SON, INC.,

Third-Party Plaintiff,

-against-

LINEAR TECHNOLOGIES, INC.,

Third-Party Defendant.

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LINEAR TECHNOLOGIES, INC.,

Second Third-Party Plaintiff,

-against-

SAMUELS DATACOM, LLC,

Second Third-Party Defendant.

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HON. MICHAEL D. STALLMAN, J.:

In this action, a journeyman electrician seeks to recover for personal injuries allegedly resulting from a fall from a ladder on March 2, 2005, while working at a construction site located at 7 Times Square in Manhattan. This decision addresses three motions (Motion Seq. Nos. 003, 004

and 006) which seek summary judgment and other relief as to plaintiffs' claims against the owners of the premises where the electrician fell and against the general contractor, and seek summary judgment as to the third-party claims and cross claims for, among other things, contractual and common-law indemnification.

In Motion Sequence Number 003, plaintiffs John McCarthy and Phyllis McCarthy move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on their Labor Law § 240 (1) claim against defendants Boston Properties, Inc. and Times Square Tower Associates, LLC (collectively, Owners) and John Gallin & Son, Inc. (Gallin).

In Motion Sequence Number 004, second third-party defendant Samuels Datacom, LLC (Samuels) moves for summary judgment dismissing all adverse claims against it. Third-party defendant/second third-party plaintiff Linear Technologies, Inc. (Linear) cross-moves for summary judgment in its favor on its causes of action against Samuels for breach of contract and contractual indemnification.

In Motion Sequence Number 006, Owners move: (1) for summary judgment dismissing plaintiffs' common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims as against them; (2) for summary judgment in their favor against Gallin for indemnification; (3) for a declaration that Linear is a "statutory agent" for the purposes of Labor Law liability;[1] (4) for leave to amend their answer to assert cross claims against Linear and Samuels for common-law and contractual indemnification; and (5) for summary judgment in their favor against Linear and Samuels on those proposed cross claims.

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[1] In their reply affirmation to Linear's opposition, Owners withdrew this branch of their motion.

Gallin cross-moves for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claims as against it and for summary judgment in its favor against Linear for breach of contract and for common-law and contractual indemnification, including attorney's fees and costs. Linear cross-moves for summary judgment dismissing plaintiffs' complaint in its entirety.

The action against Turner Construction, Inc. (Turner) was discontinued by stipulation dated November 30, 2005.

BACKGROUND

On March 2, 2005, Owners were part of an ownership team for Times Square Tower (premises) in Manhattan, the construction site where McCarthy's accident allegedly occurred. Pursuant to a contract dated December 20, 2004, the intended tenant of the premises, non-party Ann Taylor, Inc. (Ann Taylor), hired Gallin as the construction manager and general contractor to build out its space. Gallin retained Linear as a subcontractor to install telephone and data cables, pursuant to a purchase order dated December 29, 2004. Linear hired Samuels to perform the actual installation of the telephone and data cables for the project, pursuant to a purchase order dated January 11, 2005. McCarthy was a Samuels electrician. Frank Vomero, another Samuels employee, was McCarthy's foreman.

McCarthy testified that, on March 2, 2005, Vomero assigned him the task of installing one-to-three inch support rods into the ceiling of a data room which was to become the space for an Ann Taylor store. The rods were to support a previously installed ladder rack which was to hold data cable. To perform this work, McCarthy was required to drill a hole in the ceiling with an electric hammer drill, insert an anchor into the hole, and then insert the rod into the anchor. Samuels supplied McCarthy with the drill.

McCarthy stated that he used an eight-foot A-frame wooden ladder to reach the ceiling to drill the hole for the anchor. McCarthy described the ladder at issue as having eight rungs and a top step. The ladder had no non-skid foot supports, only wood at the bottom of the ladder frame. Samuels supplied the ladder, and McCarthy noted that Samuels had several ladders throughout the building for use by its employees.

According to McCarthy, he inspected it before use and found it to be relatively new, in good working order and with no defects. In addition, he observed the floor around the ladder and did not notice anything unusual. McCarthy set up the ladder by opening it, securing the side braces and placing it fully opened underneath the ceiling area where he needed to drill.

McCarthy also testified that, on the morning of his alleged accident, Ed Mahoney, an apprentice hired by Samuels, was assigned to be on hand to assist McCarthy with his work. McCarthy explained that, as an apprentice, Mahoney would help him by doing such tasks as setting up the ladder and retrieving extension cords. Most of the time, while McCarthy was working on the ladder, Mahoney sat on the floor watching McCarthy work.

After plugging the standard-size drill into an electrical outlet, McCarthy climbed the ladder and began to drill. The drill weighed only a few pounds, and it would take approximately one minute to drill the needed hole. At this time, Mahoney was present in the room, but not doing anything. Thereafter, the power went out and McCarthy climbed back down the ladder. Mahoney then left the room to remedy the power outage. When the power came back on, Mahoney had not yet returned to the room. McCarthy carried the drill back up the ladder and resumed drilling while standing on the sixth rung of the ladder. McCarthy noted that, at this time, the ladder stood firmly on all four of its legs, and it did not wobble.

Holding the drill in both hands so that it did not spin out of his hands, McCarthy raised his left arm directly above his left shoulder and resumed drilling. As McCarthy pushed up on the drill, the ladder tipped to the right, causing McCarthy to fall to the floor and sustain injuries. When the ladder fell over to its side, it remained in the open position with the metal side braces secured in place. McCarthy stated that he did not lose his balance as a result of drilling, and that he did not know what caused the ladder to tip over.

DISCUSSION

"'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'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

Summary Judgment as to Plaintiffs' Claims

Labor Law § 241 (6)

Initially, it should be noted that, in their opposition papers, plaintiffs have withdrawn their Labor Law § 241 (6) claims, conceding that the Industrial Code violations set forth in the bill of particulars are not applicable to the facts at bar.

Labor Law § 240 (1)

Plaintiffs move for summary judgment in their favor as to liability on their Labor Law § 240 (1) claims against Owners and Gallin. Owners move and Gallin cross-moves for summary judgment dismissing these claims. Linear also cross-moves for summary judgment dismissing plaintiffs' complaint in the entirety.

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but rather applies where the work itself involves risks related to differences in elevation (Binetti v MK West St. Co., 239 AD2d 214, 214-215 [1st Dept 1997]; see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 500-501]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe Coll., 12 AD3d 261, 262 [1st Dept 2004]).

Here, as owners of the premises where McCarthy was allegedly injured, Owners would be liable for any violation of Labor Law § 240 (1) that proximately caused McCarthy's injuries. Contrary to its arguments, Gallin would also be liable for any Labor Law violations. In its Notice to Admit, dated November 3, 2005, Gallin admits that it was both a construction manager and general contractor hired to supervise, direct, manage and organize the renovation, construction and demolition of the work to be performed at the premises.

Notwithstanding this admission, Gallin asserts that it served only as a construction manager on the project, not as a general contractor. However, the record belies this assertion. The agreement between Gallin and Ann Taylor (the Ann Taylor agreement) provides that Gallin was responsible for performing the work itself or subcontracting the work out to other companies, in addition to scheduling and conducting meetings to monitor work progress, identifying dangers from unsafe materials and stopping work in the event of the same (see Motion Seq. No. 3, Kownacki Reply Aff., Ex A). The Ann Taylor agreement also incorporates by reference the 1987 Edition of AIA [American Institute of Architects] A201, "General Conditions of the Contract for Construction," which specifies that the construction manager "shall supervise and direct the Work" and "shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work," as well as be responsible for safety precautions and programs (see id., Ex B).

Robert Kondracki, project manager and vice president of Gallin, testified that Gallin served as both the construction manager and general contractor on the job. As construction manager, Gallin provided laborers and hired subcontractors, including Linear. In addition, Kondracki stated that he held safety meetings and did daily walk-throughs of the site to look for unsafe conditions. In the

event that he observed unsafe practices, Kondracki had the authority to stop the work of the subcontractors and fire them. Kondracki also stated that he had the authority to direct the means, methods and techniques of the work performed by the subcontractors. Darrell Devoe, vice-president of corporate purchasing and plant facilities for Ann Taylor, testified that Ann Taylor made Gallin the construction manager on the job, and that no separate general contractor was hired for the job. In addition, Gallin hired all the subcontractors on the job. Therefore, Gallin fails to raise an issue of fact as to whether its status as both a construction manager and general contractor precludes liability under Labor Law § 240 (1).

Turning to the issue of whether Owners and Gallin violated Labor Law § 240 (1), McCarthy asserts that the ladder was inadequate to protect him while he was subject to an elevation-related risk, and that no other safety devices were provided to him. Owners and Gallin argue that McCarthy was the sole proximate cause of his injuries, because he failed to secure the ladder properly by having the apprentice hold it, or by utilizing some other safety device. Vomero, McCarthy's foreman, testified at his deposition that Samuels required its electricians to have their ladders held by another employee when working (*see* Motion Seq. No. 006, Klauber Affirm., Ex D [Vomero EBT], at 51). He stated that if he observed a Samuels worker working on an eight-foot ladder without a co-worker holding it, he would say something to that worker.

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to insure that it remain stable and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173, 174 [1st Dept 2004] [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of

liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting Kijak v 330 Madison Ave. Corp., 251 AD2d 152, 153 [1st Dept 1998]). Here, McCarthy was not supplied with any safety devices which may have prevented the ladder from tipping over.

Contrary to defendants' assertions, a human being is not a "safety device" for the purposes of the statute, and certainly is not of the kind of enumerated safety devices listed in the statute. Moreover, the record contains no evidence indicating that McCarthy was specifically instructed to use his apprentice to hold the ladder. Although Vomero believed that Samuels insisted that a ladder be held by a worker, Vomero articulated no basis for his knowledge. When asked whether Samuels required its electricians to have their ladders held by another employee when working, Vomero responded, "I'm going to say yes," but he did not know whose requirement it was (Vomero EBT, at 51). Vomero also noted that he had never subjected any worker to punishment for not complying with that rule, though the rule was not commonly ignored.

Given the lack of safety devices, the fact that McCarthy did not ask the apprentice to hold the ladder steady constitutes, at best, contributory negligence, which is not a defense to Labor Law § 240 (1), because the statute imposes absolute liability once a violation is shown (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Lopez v Melidis, 31 AD3d 351, 351 [1st Dept 2006]; Peralta v American Tel. & Tel. Co., 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240 (1), notwithstanding claims of comparative negligence or unsupported claims that plaintiff's conduct was the sole proximate cause of her injuries]; Perrone v Tishman Speyer Props., L.P., 13 AD3d 146,

147 [1st Dept 2004]; Dos Santos v State of New York, 300 AD2d 434, 434 [2d Dept 2002]; Jamison v GSL Enter., Inc., 274 AD2d 356, 361 [1st Dept 2000] [Labor Law § 240 (1) applied although plaintiff's injuries were caused in part by his fateful decision to abandon a tilting scaffold in order to escape to the roof]).

The cases that Owners, Gallin, and Linear cite are distinguishable (see Robinson v East Med. Ctr., LP, 6 NY3d 550, 554 [2006]; Montgomery v Federal Express Corp., 4 NY3d 805, 806 [2005]; Blake, 1 NY3d at 290). Unlike this case, there were adequate safety devices available to the plaintiffs in Robinson, Blake and Montgomery, and those plaintiffs knew that the safety devices were available and that they were expected to use them. Nevertheless, the plaintiffs had no reason not to use them. Finally, the fact that McCarthy may have been the sole witness to his accident does not preclude summary judgment on his behalf (see Perrone, 13 AD3d at 147).

Thus, plaintiffs are entitled to summary judgment in their favor as to liability on their Labor Law § 240 (1) claims against Owners and Gallin. The branch of Owners' motion and Gallin's cross motion for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claims against them is denied. The Court also denies Linear's motion for summary judgment dismissing plaintiffs' complaint in its entirety.[2]

Common-law negligence and Labor Law § 200 claims

The Owners also seek summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims as against them.

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or

[2]Denial of this cross motion (Motion Seq. No. 006) is also warranted because Linear has made two cross motions for summary judgment (Motion Seq. Nos. 004 & 006), without seeking leave of court to make an additional motion for summary judgment (see CPLR 3212 [e]).

general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

As discussed above, McCarthy was drilling when the ladder he was standing on tipped over, causing him to fall and sustain injury. Thus, the evidence indicates that his alleged accident may have resulted from a defect or danger arising out of the work methods or materials, as opposed to a dangerous condition of the premises. It is well-settled that, to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Fresco v 157 East 72nd Street Condominium, 2 AD3d 326, 328 [1st Dept 2003]; Cruz, 269 AD2d at 123; Colon v Lehrer, McGovern & Bovis, 259 AD2d 417, 419 [1st Dept 1999]).

Here, there is no evidence in the record to suggest that Owners exercised any control or supervision over McCarthy's work methods or materials. As discussed above, testimony in the record reflects that Samuels controlled and supervised McCarthy's work on the project. Vomero testified that he met with his eight to 15 workers every day to lay out their work and answer any questions that they might have. He also stated that Samuels employed two to three apprentice electricians to help the experienced journeyman electricians on the job. In addition, Samuels

provided all of the ladders for its workers.

Thus, Owners are entitled to summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims against them.

Summary Judgment as to the Third-Party Claims

Owners' claim against Gallin for Indemnification

Owners seek summary judgment against Gallin for contractual indemnification, based on the Section 3.18 of AIA Document A201, "General Conditions of the Contract for Construction" (1987 Edition), which the Ann Taylor agreement incorporated by reference. Owners also assert that the Ann Taylor agreement and the surrounding circumstances demonstrate Gallin's clear and unambiguous intent to indemnify them. Owners submit two certificates of liability insurance listing them as additional insureds under insurance policies issued to Gallin as evidence of Gallin's intent to indemnify them.

Section 3.18 provides, in pertinent part:

> To the fullest extent permitted by law, the Contractor [Gallin] shall indemnify and hold harmless the Owner, Architect ... employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, or 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 ...

(*see* Motion Seq. No. 006, Giard Affirm., Ex Q, at 10).

Owners' reliance on Section 3.18 is misplaced. Owners are clearly not parties to the Ann Taylor agreement, which is between Gallin and Ann Taylor, as defined on the first page of the Ann Taylor agreement (*see* Motion Seq. No. 006, Giard Affirm., Ex P). Under Section 2.1.1 of AIA

Document A201, the "Owner" is the person or entity identified as such in the Ann Taylor agreement.

Owners' argument that they are third-party beneficiaries of the Ann Taylor agreement is unpersuasive. "'Generally it has been held that the ordinary construction contract-i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party-does not give third parties who contract with the promissee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries'" (Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp., 182 AD2d 664, 665 [2d Dept 1992], quoting Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 653, 656 [1976]).

Owners fail to raise an issue of fact as to whether Gallin intended to indemnify them. "It is well settled that an agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify" (Kennelty v Darlind Constr., Inc., 260 AD2d 443, 445 [2d Dept 1999]). Thus, the branch of Owners' motion for summary judgment against Gallin for contractual indemnification is denied.

Gallin's claims against Linear for indemnification and breach of contract

Gallin cross-moves for summary judgment in its favor on its claim against Linear for common-law and contractual indemnification, including attorneys' fees and costs.

"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'" (Perri v Gilbert Johnson Enter., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., Inc., 259 AD2d 60, 65 [1st Dept 1999]).

Here, the record contains no evidence of Gallin's negligence. Although Gallin interacted

with Linear, Gallin had no supervisory authority over Samuel's work. Kondracki stated that Gallin would not have directed McCarthy how to perform his work, and Gallin did not provide any tools or ladders to the subcontractors who worked at the site.

Nevertheless, the record also lacks evidence of Linear's negligence. Again, McCarthy testified that he received his work instructions only from Samuels, and no other entity directed or instructed him in any way as to how to perform his work. In addition, Michael Giustiniani, project manager for Linear, testified that, when he visited the job site, he did not have anything to do with supervising the work of the employees of Samuels, and it was not his responsibility to determine whether the job site was generally safe. Thus, as it has not been demonstrated that Linear, as the proposed indemnitor, was guilty of some negligence, Gallin is not entitled to summary judgment in its favor against Linear for common-law indemnification.

As to contractual indemnification, Gallin has demonstrated entitlement to conditional summary judgment in its favor against Linear. Pursuant to a purchase order dated December 29, 2004 between Gallin and Linear, Linear agreed to

> indemnify, defend and hold harmless, the owner, customer and John Gallin & Son, Inc. from all loss, damage, injury, or death, or claims therefore, including attorney's fees and court costs, on the project or related thereto, from its own negligence or that of its agents or subcontractors, or from its failure to comply with the terms of this purchase order

(see Motion Seq. No. 006, Klauber Affirm., Ex F, at 2). In addition, an additional insurance and indemnification requirement document signed by Linear states:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless John Gallin & Son, Inc., the Owner ... and agents and employees of any of them from and against claims, damages, losses and expense, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such a claim ... is attributable to bodily injury ... but only to the extent caused in

> whole or in part by negligent acts or omissions of the Subcontractors, 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

(see id., Ex G). The scope of both indemnification provisions require Linear to indemnify Gallin for the negligence of Linear's subcontractors, i.e., Samuels. However, Gallin has not established that McCarthy's accident resulted from Samuel's negligence. Therefore, Gallin is granted summary judgment against Linear for contractual indemnification, on the condition that a jury finds Samuels negligent at trial.

As to breach of contract, Gallin maintains that Linear failed to procure adequate insurance for Gallin's benefit. Pursuant to the insurance and indemnification requirement document, Linear must procure and maintain Comprehensive General Liability insurance with at least $3,000,000 per occurrence in coverage limits, and Gallin must be named as an additional insured under the policy. This limit could be satisfied "through a combination of primary and Umbrella policies" (ibid.). Further, the insurance and indemnification requirement document requires that all policies be evidenced by a certificate of insurance designating John Gallin & Son, Inc. as certificate holder. A Certificate of Liability Insurance indicates that Illinois Union Insurance Company issued a policy to Linear with policy limits of $1 million per occurrence. It also indicates that Linear also obtained excess umbrella insurance with American International (Illinois National Insurance Company) with limits of liability of $5,000,000 per occurrence.

It is clear that, under a blanket additional insured endorsement, form CG 20 10 11 85, Gallin is an additional insured under Linear's primary policy (see Motion Seq. No. 006, Leff Opp. Affirm., Exs 5, 7). However, it is unclear whether Gallin is an additional named insured under the American

International umbrella policy issued to Linear. Thus, this branch of Gallin's motion for summary judgment in its favor against Linear is denied, because an issue of fact arises as to whether Linear obtained adequate insurance for Gallin's benefit.

Linear's claims against Samuels for contractual indemnification and breach of contract

Samuels moves for summary judgment dismissing all claims against it, on the ground that Workers' Compensation Law § 11 bars all claims against Samuels. Linear cross-moves for summary judgment in its favor against Samuels for contractual indemnification, based upon the indemnification provision provided in the purchase order between Linear and Samuels.

Section 11 of the Workers' Compensation Law prescribes, in pertinent part:

> For purposes of this section, the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into 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.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which 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.

Neither Samuels nor Linear disputes that McCarthy has not suffered a "grave injury," as defined under Workers' Compensation Law § 11. Therefore, Linear's first cause of action against Samuels, for contribution, is dismissed.

As to contractual indemnification, Samuels contends that the purchase order between Linear

and Samuels did not constitute an express agreement to indemnify. Pursuant to a purchase order between Linear and Samuels issued 1/11/2005, and accepted by Samuels on 7/6/05,[3] Samuels agreed "to indemnify, defend and hold harmless Linear Technologies, Inc., from all liability and/or costs in connection with work performed including additional work and maintain adequate insurance covering any loss" (see Motion Seq. No. 004, Kaye Affirm., Ex F [Linear/Samuels Purchase Order, attached to third-party complaint]).

The parties do not dispute that, although Samuels' signature on the purchase orders post-dates the accident, the parties intended for the indemnification provision to apply retroactively to the start of Samuels's work. Herb Rocchi, vice-president of Samuels, testified that it was his understanding that the provision within the Samuels purchase order at issue obligated Samuels to indemnify Linear for any liability arising from the work performed by Samuels. In his affidavit of January 5, 2007, Kevin Mackey, a principal of Linear, stated that the indemnification language at issue in the subject purchase order between Linear and Samuels is "standard language in all LINEAR Purchase Orders and is intended to protect LINEAR from all liability and costs arising out of the work performed by LINEAR's subcontractors" (see Motion Seq. No. 004, DeCamp Reply Affirm., Ex A [Mackey Aff. ¶ 5]). In addition, Mackey stated that it was Linear's intent that it be defended, indemnified and held harmless by Samuels for any costs arising out of plaintiffs' claims. Therefore, Workers' Compensation Law § 11 does not bar Linear's claim against Samuels for contractual indemnification.

Nevertheless, Samuels argues that the alleged indemnification provision in the Samuels' purchase order violates General Obligations Law § 5-322.1, in that it purports to indemnify and hold

[3]The number 7 in the date appears to have been written over the number 6.

harmless Linear for liability caused by its own negligence (see e.g. Carriere v Whiting Turner Contr., 299 AD2d 509, 511 [2d Dept 2002]).

As discussed above, the record is devoid of evidence that Linear was negligent. Thus, General Obligations Law § 5-322.1's prohibition of indemnification for one's own negligence does not apply (see Brown v Two Exchange Plaza Partners, 76 NY2d 172, 177 [1990]).

Therefore, Linear is entitled to summary judgment against Samuels for contractual indemnification; Samuels' motion for summary judgment dismissing Linear's claim for contractual indemnification is denied. To the extent that Samuels disputes whether Linear is entitled to indemnification for any costs that Linear may incur to indemnify Gallin, the argument goes to the issue of damages, and it is premature. Gallin is entitled to conditional summary judgment from Linear in the event that a jury finds that Samuels was negligent, and such negligence proximately caused McCarthy's injuries. Thus, depending on the jury's verdict, the costs for which Linear seeks indemnification might not include the costs to which Samuels is objecting.

Linear also seeks summary judgment in its favor against Samuels for breach of contract, in that Samuels allegedly breached a requirement to obtain adequate insurance for Linear. Although Rocchi testified that it was his understanding that the aforesaid provision in the purchase order between Linear and Samuels obligated Samuels to maintain insurance coverage for Linear, the purchase order itself does not impose such an obligation. The purchase order requires Samuels "to maintain insurance covering any loss" (see Motion Seq. No. 004, Kaye Affirm., Ex F), but "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated" (Trapani v 10 Arial Way Assocs., 301 AD2d 644, 647 [2d Dept 2003]; Tribeca Broadway Assocs., LLC v Mount Vernon

Fire Ins. Co., 5 AD3d 198, 200 [1st Dept 2004]). Contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured" (id.).

Therefore, Linear has not met its prima facie burden for summary judgment against Samuels as to this cause of action. Because Linear cannot demonstrate that Samuels had an obligation to procure insurance for Linear, Samuels' motion for summary judgment dismissing Linear's breach of contract claim is granted.

Leave to Amend the Owners' Answer

Owners seek leave to amend their answer to assert cross claims for common-law and contractual indemnification as against Samuels and contractual indemnification as against Linear.[4]

"'[L]eave to amend a pleading under CPLR 3025 (b) is freely given in the exercise of the trial court's discretion, provided there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit'" (Matter of Miller v Goord, 1 AD3d 647, 648 [3d Dept 2003]). Absent prejudice or surprise, it is an abuse of discretion, as a matter of law, for the trial court to deny leave to amend (Watts v Wing, 308 AD2d 391, 392 [1st Dept 2003][leave to amend granted inasmuch as proposed amendment did not add new factual allegations]). Mere delay does not warrant a denial of leave to amend, unless the delay is coupled with significant prejudice to the other side (New York State Health Facilities Assn., Inc. v Axelrod, 229 AD2d at 866).

Owners are granted leave to amend their pleading to include cross claims against Linear for contractual indemnification, based on the indemnification provisions contained in the purchase order

[4]It should be noted that, in their motion papers, Owner originally asked for leave to amend their answer to assert a cross claim against Linear for common-law indemnification, but later withdrew this claim in their reply affirmation.

between Gallin and Linear, which were quoted on page 14 (see Motion Seq. No. 006, Giard Affirm., Ex S). The proposed cross claim is not lacking in merit, and Owners' delay in asserting this cross claims has not prejudiced Linear. Owners have not shown that the cross claim for contractual indemnification against Samuels has merit, because they submit no evidence of an indemnification provision wherein Samuels agrees to indemnify them. The purchase order between Samuels and Linear provides for contractual indemnification only for Linear.

Because McCarthy has not suffered a "grave injury" under Workers' Compensation Law § 11, Owners are not entitled to leave to amend their answer to include a claim against Linear and Samuels for common-law indemnification.

Finally, Owners also request summary judgment against Linear and Samuels on the cross claims of their newly amended answer. However, summary judgment is premature, because Linear has not had an opportunity to answer the new cross claim for indemnification (see CPLR 3212 [a]).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment by plaintiffs John McCarthy and Phyllis McCarthy (Motion Seq. No. 003) is granted to the extent of granting summary judgment in their favor against defendants Boston Properties, Inc. and Times Square Tower Associates, LLC and John Gallin & Son, Inc., as to liability only on so much of the first cause of action that alleges violations of Labor Law § 240 (1); and it is further

ORDERED that the motion for summary judgment by second third-party defendant Samuels Datacom, LLC (Motion Seq. No. 004) is granted to the extent that the first and fourth causes of action of the second third-party complaint is dismissed, and the motion is otherwise denied; and it

is further

ORDERED that the cross motion for summary judgment by third-party defendant/second third-party plaintiff Linear Technologies, Inc. (Motion Seq. No. 004) is granted as to liability only on the third cause of action of the second-party complaint against second third-party defendant Samuels Datacom, LLC, and the cross motion is otherwise denied; and it is further

ORDERED that the motion by defendants Boston Properties, Inc. and Times Square Tower Associates, LLC (Motion Seq. No. 006) is partially granted as follows:

1) summary judgment is granted dismissing so much of plaintiffs' complaint as alleges violations of Labor Law §§ 200 and 241 (6) and common-law negligence as against these defendants;

2) leave to amend the answer to assert a cross claim against Linear Technologies, Inc. for contractual indemnification is granted, as indicated in this decision, and defendants are directed to serve an amended answer within 30 days in conformance with the proposed cross claims annexed as Exhibit V to defendants' moving papers, except as indicated in this decision;

3) the remaining branches of these defendants' motion is denied; and it is further

ORDERED that the cross motion for summary judgment by defendant/third-party plaintiff John Gallin & Son, Inc. (Motion Seq. No. 006) is granted only as to granting conditional summary judgment in this defendant's favor against third-party defendant Linear Technologies, Inc. on so much of the first cause of action that seeks contractual indemnification, and on the second cause of action, for attorneys' fees, and the cross motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by third-party defendant/second third-party plaintiff Linear Technologies, Inc. (Motion Seq. No. 006) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 5/16/07
New York, New York

ENTER:

J.S.C.