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

HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 107197/2004

BABIAN, EDWARD

VS

ROCKEFELLER GROUP

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/1/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 17 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-12
Replying Affidavits	13-17

Cross-Motion: [X] Yes [ ] No

FILED

JUN 18 2007

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: June 7, 2007

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

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

----------X

EDWARD BABIAN,

DECISION & ORDER

Plaintiff,

-against-

Index No.: 107197/04

ROCKEFELLER GROUP, INC., THOMAS BRADY, 1251 AMERCAS ASSOCIATES, L.P., MITSUI FUDOSAN AMERICA, INC., ROCKEFELLER GROUP DEVELOPMENT CORP., 1251 AMERICAS ASSOCIATES II, LP, KNIGHT ELECTRICAL SERVICES CORP. & ROCKEFELLER CENTER MANAGEMENT CORP.,

Defendants.

----------X

ROCKEFELLER GROUP, INC., 1251 AMERICAS ASSOCIATES, LP, & MITSUI FUDOSAN AMERICA,

Third-Party Plaintiffs,

Index No. 590964/04

-against-

YORK INTERNATIONAL,

Third-Party Defendant.

----------X

THOMAS BRADY,

Plaintiff,

Index No. 108494/03

-against-

YORK INTERNATIONAL CORPORATION, EDWARD BABIAN, ROCKEFELLER GROUP, INC. 1251 AMERICAS ASSOCIATES, LP, MITSUI FUDOSAN AMERICA, INC., ROCKEFELLER GROUP DEVELOPMENT CORP., ROCKEFELLER MANAGEMENT CORP.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motions Before the Court

In these actions for personal injuries based upon Labor Law §§ 241(6), 200 and the common law, Rockefeller Group, Inc., 1251 Avenue of Americas Associates, LP, Mitsui Fudosan America, Inc. ("Mitsui"), Rockefeller Group Development Corp., 1251 Associates II, LP, Rockefeller Management Corp. and Rockefeller Center Management Corp., move for summary judgment dismissing the complaint and all cross-claims against them and for summary judgment based upon contractual indemnification against Knight Electrical Services Corp. ("Knight") and York International Corporation ("York").

The parties stipulated to discontinue both plaintiffs' claims under Labor Law §240(1) and Thomas Brady's action against his employer, Knight. In addition, in the absence of opposition and on consent of the parties, the motions by the following defendants for summary judgment dismissing all actions and cross-claims against them are granted: Rockefeller Group, Inc., 1251 Americas Associates, LP, Rockefeller Management Corp. and Rockefeller Center Management Corp. The remaining defendants affiliated with the building where the accident occurred are Mitsui, Rockefeller Group Development Corp. ("Manager") and 1251 Associates II, LP ("Owner"). It is undisputed that the building located at 1251 Avenue of Americas, New York, NY ("Building"), where the accident occurred, is owned by the Owner and is managed by the Manager. It is unclear from the record what relationship Mitsui has to the Building. The Owner and Manager will be referred to collectively as the "Rockefeller Defendants."

The grounds for the motion by Mitsui and the Rockefeller Defendants are that §241(6) does not apply because the work being performed was routine maintenance; that they are not liable under Labor Law §200 because they did not supervise or control the work; that Thomas

Brady ("Brady") was not their statutory agent; that the Knight contract did not delegate to Knight the responsibility to supervise York's employees; and that Brady was not negligent.

Defendants Brady and Knight oppose the motion and cross-move for summary judgment dismissing the claims against them by plaintiff Edward Babian ("Babian"); all cross-claims against Knight and Brady; and all indemnification claims against Knight. The grounds for the cross-motion are that Brady was a special employee of the Rockefeller Defendants and Mitsui, who are the only entities that could be vicariously liable for his negligence, and that Knight did not supervise or control Brady so that Knight cannot be liable under Labor Law §200. Knight and Brady also contend that the amended cross-claims of the Rockefeller Defendants and Mitsui, dated August 31, 2006, were served in violation of C.P.L.R. §3025; that Labor §241(6) does not apply to the work that was being performed; that Workers' Compensation Law §11 bars the third-party action against Knight because Brady did not suffer a grave injury; that the contractual indemnification clause violates General Obligations Law, §5-322; that Brady and Knight had no authority to supervise and control Babian; and that Brady and Knight were not negligent.

York cross-moves to dismiss all third-party actions against it. The ground for York's cross-motion is that Workers' Compensation Law §11 bars the third-party actions against it because Babian did not sustain a grave injury.

Factual Background

These actions arose from an explosion on August 7, 2002, in the Building. The accident occurred in the refrigeration room on the lowest level of the Building where a York air conditioning unit, a millennium chiller ("Chiller"), was located. Knight, Brady's employer, had a contract with the Rockefeller Defendants to maintain and repair the electrical service in the Building. York, Babian's employer, had a contract with the Rockefeller Defendants to maintain

and repair the York heating, ventilation and air conditioning ("HVAC") machines in the Building, including the Chiller. Brady and Babian were injured in an explosion in the refrigeration room which occurred when the removable tip of a screwdriver that Babian was using to tighten wire connections in an electrical cabinet fell onto 480-volt electrical bars.

The parties agree that when the accident occurred the power in the Chiller was on. There is also no dispute about the following facts: that the cut-off switch for the Chiller was in a room around the corner, 200 to 300 feet from the refrigeration room where the accident occurred; both Brady and a Building engineer employed by the Manager, Michael McGoldrick ("McGoldrick"), had authority to order the power to be turned off; and Brady did not need permission from anyone to turn the power off. Brady and McGoldrick testified, and there is no countervailing evidence, that it took two men in special suits between five to fifteen minutes to turn the power off. Brady Tr. 36, 56-57, 69 108-109; McGoldrick Tr. 20, 22-23, 25, 93. Finally, Babian admitted that he never asked anyone to turn off the power, that he did not check the two available displays on the Chiller to see if the power were off before working in the high-voltage box, in violation of his usual practice, and that he was working with a screwdriver with a removable tip when the accident happened. Babian Tr. 22-23, 26-31, 36-39, 42, 79-81.

However, the testimony of the parties' witnesses differs in significant respects concerning the timing of what happened on the morning of the accident. Brady testified that at the time of the accident, he was an electrician mechanic employed by Knight, who had worked five days a week at the Building since 1971. At the time of the accident, he was "in charge" of himself and two other mechanics, as well as two other Knight "helpers," a total of five electricians, who were assigned to the Building by Knight on a full-time basis. Tr. 6-10. Brady also testified that he reported to and took direction from McGoldrick, the Building's assistant

chief engineer. Tr. 52, 59. In his affidavit, Brady alleges that he was supervised by and took direction from McGoldrick and Brian Sullivan, the Building's chief engineer. The affidavit of Knight's President, Bruce Hinman, maintains that Knight had no contact or control over its employees assigned to the Building.

Brady testified that on the morning of the accident, McGoldrick called Brady by walkie-talkie radio and told him to meet Babian in the refrigeration room. Tr. 16-17. Brady went to the refrigeration room with another Knight employee in response to McGoldrick's call. Brady said McGoldrick told him over the radio that Babian was there regarding another York machine, a "piggyback," which was unrelated to the Chiller, but when Brady arrived he discovered that Babian was attempting to fix the Chiller which was intermittently losing power. Tr. 16-17, 25-27. Brady said that upon his arrival, McGoldrick was there and Babian was working on the Chiller's low-voltage, green control box. Tr. 17, 35-37. McGoldrick left the refrigeration room ten to fifteen minutes before the accident occurred. *Id.* The control box had a computer screen that would go dark when the power was off. Tr. 37-38. Brady said the computer screen was on when he arrived because the panel was lit. *Id.* Babian tightened some wires in the control box, closed the control box and went across the refrigeration room to tighten connections in a grey high-voltage electrical cabinet that fed power to the control box, opening the door of the cabinet for access. Tr. 39-42, 75-76. Brady said he was staring at the green control box to see if it was on or off when the accident happened. Tr.71, 74-76. Brady testified that he was aware that the power had not been turned off and he assumed that Babian knew the power was on because the control box was lit while he was working on it. Tr. 37-38. Brady testified that he was allowed to shut off the power at Babian's request, but Babian never asked him to do it. Tr. 41-42.

Brady's testimony clearly raises a question of fact as to whether Babian worked on the electrical cabinet knowing that it was electrified.

With respect to the special employment issue, in addition to the affidavits of Brady and Hinman, and Brady's testimony, Knight submits an article from the Building's newsletter describing Brady as "1251's chief electrician," and "a thirty-year veteran of 1251", and announcing that Brady was the recipient of 1251's "Outstanding Service Award." *See,* Exhibit 3 to Knight's cross-motion. The article states that the award had been established by Mitsui and Manager to recognize "the contributions and excellent service of an outstanding employee."

The Manager's witness, McGoldrick, gave testimony that lends support to the claim that Brady was a special employee of the Rockefeller Defendants. McGoldrick, Manager's assistant chief engineer, testified that his supervisor was the Building's chief engineer, Brian Sullivan. Tr. 50. McGoldrick said that "Tom Brady and others answer to Brian." Tr. 51. He referred to Brady as a "house electrician," Tr. 20, who had an office in the Building, Tr. 26. However, McGoldrick stated that he had no authority to supervise employees of outside vendors and that outside vendors had their own supervisors. Tr. 81. McGoldrick also said that he "did not have to instruct Tom Brady" because "Tom Brady has a job that is comparable to mine." Tr. 48. The Rockefeller Defendants assert in the affidavit of Frank Montes that Knight and York supervised, directed and controlled their own employees at the Building.

With respect to the occurrence of the accident, McGoldrick's testimony raises issues of fact as to whether Babian and Brady were negligent. McGoldrick denies that he saw Babian working in the low-voltage control box with the power connected and states that Brady arrived before Babian began doing any work. McGoldrick testified that Brady was standing right behind him in the refrigeration room while he explained what he wanted Babian to do. Tr. 18.

McGoldrick said he did not observe Babian doing any work before the accident happened. Tr. 19-20, 46-47, 82. McGoldrick agreed with Brady's testimony that Babian would be the one to request Brady to shut off the power. Tr. 24-25. McGoldrick also testified that on other occasions he had seen Babian cut off the power himself. Tr. 36. As noted previously, the parties agree that McGoldrick was not in the room when the accident occurred. Thus, according to McGoldrick, Babian must have known that the power was on because he began working after Brady arrived and, according to Babian's testimony, Brady never left the room to turn off the power.

Babian's rendition of the sequence of events was that Brady arrived after he had finished working on the low-voltage control box and before he began working on the high-voltage electrical cabinet. Babian said that he assumed that Brady turned off the power before he reached the refrigeration room. Babian testified that he had worked for York for twenty-two years. Tr. 9. At the time of the accident, he was a supervisor for York. *Id.* His responsibilities included servicing, maintaining and repairing electrical equipment. Tr. 11. On the date of the accident, McGoldrick called York and Babian assigned himself to answer the call. Tr. 13. McGoldrick said he wanted some wiring prints for a parallel drive and that there was a problem with the Chiller starting intermittently. Tr. 14-16. Babian had serviced the Chiller ten to fifteen times before the accident. Tr. 16-17. Babian testified that when he arrived in the refrigeration room, McGoldrick was there with another Building engineer. Tr. 17, 19-20. McGoldrick told Babian he was calling the electricians down and Babian knew from past experience that the procedure in the Building was that the electricians were called to turn off the power whenever work was done on the electrical panel. Tr. 22. The procedure was followed because there wasn't a disconnect switch for the power that was accessible to anyone other than authorized

Building personnel. Tr. 22-23. McGoldrick then left, leaving the other engineer behind. Tr. 24. Babian used a screwdriver to tighten some wires on the control box, which he knew was electrified. Tr. 26-27, 67-68, 76-78. He told the other house engineer that the problem probably was in the other box. Tr. 68. Brady and his co-worker arrived when Babian had finished working on the control box and had opened the electrical panel door. Tr. 68-69, 79-81. Babian began working on the high-voltage electrical panel with the screwdriver after Brady arrived. Tr. 29, 68-69, 79-81. The open door of the electrical panel cabinet obscured an LCD display on one of the other electrical cabinets that indicated whether the power was on. Tr. 31-32. Babian never looked at the LCD display. Tr. 36. He didn't look to see if the control box was dark. Tr. 69. Babian assumed the power was off and didn't check due to Brady's presence and the Building's standard procedure. Tr. 79-81, 37-38. The accident happened three minutes after Babian began working in the electrical cabinet. Tr. 30.

It is undisputed that Knight and York both had contracts with the Rockefeller Defendants to provide services at the Building that were in effect on the date of the accident. The term of York's contract terminated on June 30, 2002, a little over a month prior to the accident, but the contract has an automatic month to month renewal clause. The Rockefeller Defendants have submitted affidavits stating that the York contract was in force on the date of the accident. York did not present any evidence to rebut the Rockefeller Defendants' evidence that the contract was in force on the day of the accident. The record contains a contract between the Rockefeller Defendants and Knight and a letter agreement extending its term through the date of the accident. The contracts refer to Knight and York as the "Contractor," to 1251 Associates II, LP, as the "Owner," and to Rockefeller Group Development Corp. as the "Manager."

Under Knight's contract, it staffed the Building with union electricians, who were billed at rates set forth in the contract, plus an agreed upon profit. Knight's contract provides that:

> Owner engages Contractor, and Contractor agrees, to perform and furnish all labor materials, supplies, tools, apparatus, equipment, services, transportation, scaffolding, and processes required for the repair and maintenance of such electrical equipment and parts of the electrical system as Owner may specify... in or for the building located at 1251 Avenue of the Americas, New York, New York.

The Knight contract provides that the Owner can require the Contractor to remove any employee the Owner deems "incompetent or a hindrance," that the Owner may consult on the selection of employees, compel the Contractor to investigate prospective employees, require the Contractor's employees to wear uniforms or other specific attire, and require the Contractor's employees to correct their work.

The York and Knight contracts also state that the Contractor "shall give full instruction to its... employees" and "take all usual, proper, necessary, and required precautions to prevent accidents or damage to persons...arising out of or in connection with performance of the Services." In addition, the Contractors are required to provide their own materials and to procure insurance naming the Owner and Manager as additional insureds. The contracts contain identical indemnification clauses, which provide that the Contractor will indemnify "the owner, its agents,...the lessor under any ground or underlying lease and any mortgagee of the Premises or of Owner's interest therein" against any liability, including attorneys' fees:

> in relation to: any (or any alleged) injury to...any person or persons (including...employees of any of the Indemnitees or of Contactor)...arising out of or in connection with the performance of the Services...and which shall be (or shall be alleged to be) in whole or in part due to or the result of any act, omission, negligence, carelessness or unlawful conduct on the part of Contractor,...or anyone directly or indirectly employed by any of them.

Discussion

A. *Negligence of Brady and Babian*

There are clearly issues of fact as to whether Brady and Babian were negligent. There is evidence from which a jury could infer that Babian knew he was working in the live control box while Brady was present and then went to the electrical panel knowing that Brady had not left the room to turn off the power. There is also evidence that Babian should have asked Brady to turn off the power and that Babian used a screwdriver with a removable tip to work on high-voltage wires. With respect to Brady, the jury could find that he should have turned off the power without being asked and he admitted that he knew the power was on when Babian was working.

B. Labor Law §241(6)

Labor Law §241(6) applies to repairs that arise during construction, demolition or excavation, but not to repairs that constitute routine maintenance. *Nagel v D & R Realty Corp.*, 99 N.Y.2d 98 (2002); *Donnelly v. The Treeline Companies*, 13 A.D.3d 143 (1st Dept. 2004)(repairing elevator buttons); *Maes v. 408 W. 39 LLC*, 24 A.D.3d 298 (1st Dept. 2005)(loosening nuts). As the accident in this case occurred during a repair of loose wires and there is no evidence that construction, demolition or excavation was in progress, the claims of Brady and Babian under Labor Law §241(6) must be dismissed against the Rockefeller Defendants, Mitsui, York, Knight, Brady and Babian.

C. *Labor Law §200*

Labor Law §200 codifies the common law duty of an owner or managing agent who exercises control or supervision over the work performed at the accident site to provide a safe place to work. *De La Rosa v. Philip Morris Mgmt. Corp.*, 303 A.D.2d 190, 192 (1st Dept. 2003)

However, a general duty to supervise the work and ensure compliance with safety regulations is insufficient to constitute the requisite supervision and control under Labor Law § 200. *Id.* Moreover, a duty to provide a safe workplace is not breached where plaintiff's alleged injuries arose out of an alleged defect in his employer's tools or methods. *Id.*

Here, with respect to Babian, there is no evidence that the Rockefeller Defendants, Mitsui, Knight or Brady exercised supervision or control over the work Babian was performing. Babian admitted that he was his own supervisor and the record is clear that at the time of the accident, nobody told him how to do his work. There is no evidence that anyone gave him the screwdriver with the removable tip that caused the explosion. All parties agree that McGoldrick's instructions were limited to the problems that needed to addressed and that McGoldrick left the refrigeration room before the accident happened. There is no evidence that Brady told Babian what to do. The contract between York and the Rockefeller Defendants obligated York to give "full instruction to its… employees" and "take all usual, proper, necessary, and required precautions to prevent accidents…." Accordingly, Babian's §200 claims against the Rockefeller Defendants, Mitsui, Knight and Brady are dismissed.

With respect to Brady, he admitted that he was the supervisor of the Knight electricians in the Building. While there is evidence that Brady reported to McGoldrick and Sullivan, who were employed by the Manager, the Owner's agent, there is no evidence that the supervision included Brady's work on the day of the accident, when McGoldrick did no more than ask Brady to come down to the refrigeration room to meet Babian. With respect to Mitsui, there is no evidence that they supervised anyone. Brady and McGoldrick both agreed that Brady did not need permission from anyone to turn off the power and the failure to do so is the only negligence

attributable to Brady. Accordingly, the record supports the conclusion that Brady was supervising himself at the time of the accident.

However, that does not resolve the issue of whether Brady was supervising himself for his general employer Knight or as a special employee of the Rockefeller Defendants and Mitsui. But there is no liability on the part of the Rockefeller Defendants and Mitsui for Brady's injuries in either case. If Brady was the special employee of the Rockefeller Defendants and Mitsui, then he cannot maintain his action against them, pursuant to Workers' Compensation Law §29 because Brady received Workers' Compensation benefits. Brady Tr. 85, 100. However, if Brady was supervising himself, as an employee of Knight, then the Rockefeller Defendants and Mitsui were not supervising and controlling his work at the time of the accident. In either event, Brady's §200 claim against the Rockefeller Defendants and Mitsui must be dismissed. By parity of reasoning, Brady's common law negligence claim against Rockefeller Defendants and Mitsui also must be dismissed.

But the special employment of Brady is an issue which requires resolution with regard to Babian's general negligence claim against the Rockefeller Defendants and Mitsui, as they could be liable to Babian under the doctrine of respondeat superior if Brady was their special employee. *Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 429 (1996)(dismissal of §200 claim not dispositive of negligence claim based on respondeat superior).

D. Special Employment

A special employee is an employee who is transferred to the service of another for a period of time, even if the general employer continues to pay wages, maintain workers' compensation and other employee benefits. *Thompsonv. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991). General employment is presumed to continue unless the presumption is

overcome by a clear demonstration of surrender or control by the general employer and assumption of control by the special employer. *Id.* Special employment is usually a question of fact. *Id.* A contract between the general and alleged special employer may be determinative in some cases as a matter of law. *Id.* at 557-558. The weightiest factor in making the determination is who controls and directs the manner, details and ultimate result of the employee's work. *Id.* at 558.

In this case, Brady was assigned for decades to do his work at the bidding of the Rockefeller Defendants, who instructed him what to do on a daily basis. McGoldrick admitted that Brian Sullivan supervised Brady. Brady was given an outstanding employee award by the Manager and Mitsui. While Babian and York urge that Knight's President, Mr. Hinman, testified that Knight had a "presence" at the Building, Hinman did not say that he supervised Brady's work. Clearly, Knight had a presence, as Brady had an office in the Building and worked there for decades.

On the other hand, the contract between Knight and the Rockefeller Defendants provided that Knight was required to provide all labor needed at the Building to maintain the electrical systems and to "instruct" its employees. Knight provided its own supervisor, Brady. If Brady was his own supervisor, then Knight did not surrender control.

There is some precedent holding that the terms of a written contract create an independent contractor relationship that negates a finding of special employment as a matter of law. *See, Braxton v. Mendelson*, 233 N.Y. 122, 125 (1922)(contract for all trucking work for corporation not special employment although corporation told driver where to deliver goods). However, in *Braxton*, there was no countervailing evidence, as there is in this case, of supervision by the Building staff, the Building's recognition of Brady as its employee, and

Brady's long-term assignment to the Building. More often, the issue is for a jury. *Delisa v. Arthur F. Schmidt, Inc.*, 285 N.Y. 314, 318 (1941); *Stone v. Bigley Bros., Inc.*, 309 N.Y. 132 (1955). Here, the language of the contract is inconsistent with the testimony of witnesses and other evidence, which creates a question of fact to be resolved by the trier of fact as to whether Brady was the special employee of the Rockefeller Defendants and Mitsui.

E. Contractual Indemnification

There is no evidence that York and Knight agreed to indemnify Mitsui. Although the indemnification clause lies in favor of the Owner and its "agents,...the lessor under any ground or underlying lease and any mortgagee of the Premises or of Owner's interest therein," there is no showing that Mitsui falls into any of the covered categories.

In addition, the claim of the Rockefeller Defendants and Mitsui for contractual indemnification against Knight and York in the Brady action is moot, as all of Brady's claims against them the Rockefeller Defendants and Mitsui have been dismissed. Accordingly, contractual indemnification is only an issue in the Babian case.

The argument that the indemnification clause violates the General Obligations Law is without merit. G.O.L. § 5-322.1 prohibits an agreement to indemnify a party for its own negligence. *Dutton v. Charles Pankow Builders, Ltd.*, 296 A.D.2d 321, 321-322 (1st Dept. 2002), *appeal denied,* 99 N.Y.2d 511 (2003). The clause in the York and Knight contracts is restricted to indemnification for "any act, omission, negligence, carelessness or unlawful conduct on the part of Contractor,...or anyone directly or indirectly employed by any of them." Therefore, the clause is valid because it does not provide indemnity for the negligence of the indemnitees. *Id.; see also, Mannino v. J.A. Jones Constr. Group, LLC*, 16 A.D.3d 235, 236-237 (1st Dept. 2005).

Equally unpersuasive is the argument that the contractual indemnification claims do not lie because Babian did not suffer a grave injury within the meaning of Workers' Compensation Law §11. That section specifically provides that "[f]or 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...."

However, it is true that the Rockefeller Defendants are not entitled to summary judgment on their contractual indemnification claim at this point in time. Contractual indemnification requires a showing that the indemnitee was free from negligence. *De La Rosa v. Philip Morris Mgmt. Corp.*, 303 A.D.2d 190, 192-193 (1st Dept. 2003). There are questions of fact as to whether Brady was negligent and whether he was the special employee of the Rockefeller Defendants. If these facts are determined adversely to the Rockefeller Defendants, then Brady's negligence will be imputed to them under the doctrine of respondeat superior. *Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 429 (1996). In that event, Knight cannot indemnify the Rockefelle Defendants for their own negligence. Similarly, as to York, there are issues of fact as to whether its employee, Babian was negligent. If the jury rejects the claim that Babian was negligent, then the indemnification clause in the York contract will not be applicable.

In sum, the Rockefeller Defendants' motion for summary judgment on contractual indemnification must be denied in the Babian action and is denied as moot in the Brady action. The motion for contractual indemnification by Mitsui is denied because it has not demonstrated that it is an indemnitee under the contracts.

F. Cross-Claims for Common Law Indemnification and Apportionment

In Babian's action, the Rockefeller Defendants and Mitsui have asserted claims for common law indemnification and apportionment against Brady and Knight. Similarly, in Brady's action, the Rockefeller Defendants and Mitsui have asserted claims for common law indemnification and apportionment against Babian and York. York, Brady, and Knight have cross-moved to dismiss these cross- claims.

Workers' Compensation Law §11 provides that:

> 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"....

There is no dispute that Babian and Brady's injuries were not "grave" as defined in §11. However, in each action, the common law cross-claims are against the employer of the other plaintiff. As the cross-claims for common law indemnification and apportionment are not directed against the employer of the injured workers, the cross-claims against York and Knight do not violate §11.

As all of Brady's claims against the Rockefeller Defendants and Mitsui have been dismissed, there is no basis for common law apportionment or indemnification against York or Babian for Brady's injuries and these cross-claims are dismissed.

As there are questions of fact as to whether Brady's negligence injured Babian, and whether his negligence may be imputed to Knight, Brady and Knight are not entitled to summary judgment dismissing the cross-claims against them for common law indemnification and apportionment in Babian's action.

G. Timeliness of the Amended Cross-Claims

Knight moves to dismiss the amended cross-claims, dated August 31, 2006, on the ground that they were served without stipulation or leave of court after the note of issue was filed. Knight rejected the cross-claims by letter shortly after they were served. Knight argues that it is prejudiced by the newly asserted claim for contractual indemnification against Knight in the Brady action because it was unable to conduct discovery after the note of issue was filed. However, the court has dismissed the contractual indemnification claim against Knight, and all other cross-claims against Knight in the Brady action, with the exception of the claim for failure to procure insurance, which is not the basis of Knight's objection.

Under C.P.L.R. 3025(a), a party may amend a pleading without leave of court within twenty days after its service, at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. Otherwise, a pleading amendment requires leave of court or a stipulation of all parties. C.P.L.R.§3025(b). Service of an amended pleading without leave of court in violation of the statute renders the pleading a nullity. *Nikolic v. Fed'n Empl. & Guidance Serv.*, 18 A.D.3d 522, 524 (2nd Dept. 2005). Accordingly, the court agrees that the amended cross-claims were a nullity.

However, the Rockefeller Defendants and Mitsui have asked in their papers for leave to serve the amended cross-claims, which, in the interest of justice, the court will treat as a motion for leave to amend. C.P.L.R. §104. A motion to amend should be freely granted in the absence of prejudice or surprise, even after trial. *Murray v. New York*, 43 N.Y.2d 400, 406 (1977). Here, there is no prejudice or surprise as the remaining new cross-claims are for failure to procure insurance against York and Knight, and contractual indemnification against York. The terms of

the contracts requiring insurance and contractual indemnification could not be avoided through discovery in any event, and York did not reject the amended cross-claims.

H. The Timeliness of the Cross-Motion by Knight and Brady

The court computer does not reflect that a note of issue was filed in the Brady action and, therefore, the cross-motion by Knight and Brady was not submitted more than 120 days after filing of the note of issue. In addition, the arguments made in the cross-motion were considered in searching the record. Accordingly, it is

ORDERED that summary judgment dismissing the following claims is granted on consent: the claims of Brady and Babian under Labor Law §240(1); Brady's claims against Knight; and all actions and cross-claims against Rockefeller Group, Inc., 1251 Americas Associates, LP, Rockefeller Management Corp. and Rockefeller Center Management Corp.; and it is further

ORDERED that the motions and cross-motions for summary judgment are resolved as follows:

1. the claims by Brady and Babian under Labor Law § 241(6) are dismissed against the Rockefeller Defendants, Mitsui, Babian, York, Brady and Knight;

2. the claims by Brady under Labor Law under §200 and the common law are dismissed as against the Rockefeller Defendants and Mitsui;

3. the claims by Babian under Labor Law §200 are dismissed as against the Rockefeller Defendants, Mitsui, Knight and Brady;

4. the motion by the Rockefeller Defendants and Mitsui for contractual indemnification against York and Knight is denied;

5. Knight and Brady's cross-motion to dismiss all cross-claims against them is granted solely to the extent that, in Brady's action, the cross-claims against Knight for contractual indemnification, common law indemnification and apportionment are dismissed;

6. York's cross-motion to dismiss all cross-claims against it is granted solely to the extent that the cross-claims in the Brady action by the Rockefeller Defendants and Mitsui for contractual indemnification, common law indemnification and apportionment against York are dismissed; and

7. in all other respects the motions and cross-motions are denied; and it is further

ORDERED that the Rockefeller Defendants and Mitsui are granted leave to serve the amended cross-claims, dated August 31, 2006, to the extent that they have not been dismissed by this order and decision, and said amended cross-claims are deemed served; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in Part 54, Room 1227, 111 Centre Street, New York, NY, on June 21, 2007 at 11:00 a.m.; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry, the Clerk is directed to enter judgment accordingly and sever the remainder of the action.

Dated: June 6, 2007

J.S.C.