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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

TIGHE, PETER

INDEX NO. 108884/04

MOTION DATE 9/27/06

- v -

HENNEGAN CONSTRUCTION, et al.

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read 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

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the part of defendant DBAB Wall Street, LLC (DBAB)'s motion for summary judgment dismissing that portion of plaintiff Peter Tighe's (plaintiff) complaint asserting a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that the part of defendant DBAB's motion for summary judgment asserting common law negligence and a violation of Labor Law § 200 is granted, and these portions of the complaint are dismissed as to this defendant; and it is further

ORDERED that the part of defendants Henegan Construction Company, Inc., incorrectly s/h/a Hennegan Construction Company, Inc.'s (Henegan) motion for summary judgment dismissing that portion of plaintiff's complaint asserting common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (c) (2) is denied; and it is further

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

Dated: _____ _____ J.S.C.

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 35

----------x

PETER TIGHE,

Index No.: 108884/04

Plaintiff,

-against-

DECISION/ORDER

HENNEGAN CONSTRUCTION CO., INC., DBAB WALL STREET, LLC, CARPETCYCLE, LLC and LIBERTY CONTRACTING CORP.

Defendants.

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Edmead, J.:

MEMORANDUM DECISION

This is an action to recover damages for personal injuries sustained by a journeyman electrician when he slipped on debris at a construction site located at 60 Wall Street in Manhattan.

Defendants Henegan Construction Co., Inc., incorrectly s/h/a Hennegan Construction Co., Inc. (Henegan) and DBAB Wall Street, LLC (DBAB) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and the cross claim asserted against them, and summary judgment on their cross claims for common-law and contractual indemnification, including attorney's fees, as against co-defendant Liberty Contracting Corp. (Liberty). Liberty cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint premised upon violations of Labor Law §§ 240 (1), 241 (6) and 200 and common-law negligence, and dismissing Henegan and DBAB's cross claims for common-law and contractual indemnification and breach of contract for the alleged failure to procure insurance. All actions against defendant Carpet Cycle, LLC have been discontinued by stipulation.

BACKGROUND

On April 16, 2003, the date of plaintiff's alleged accident, defendant DBAB was the owner of the building located at 60 Wall Street, New York, New York where plaintiff's accident took place. At the time, portions of the premises were in the process of being demolished and renovated pursuant to an agreement between Deutsche Bank AG (Deutsche Bank), contract vendee of the building, and Henegan, the construction manager on the project. Henegan hired subcontractor Liberty, pursuant to a contract, to perform demolition on the 37th floor, the location of plaintiff's alleged accident.

As part of the contract between Deutsche Bank and Henegan, Henegan agreed to "be solely responsible for, and have control over, all construction means, methods, techniques, sequences and procedures and for all coordination of all portions of the Work for which Construction Manager is responsible under the Contract Documents" (Affirmation in Opposition, Exhibit B, at 9). In addition, Henegan agreed to "take all reasonable and necessary precautions for the safety of its employees and all other persons in or about the Site or at any other locations where the Work is being performed," and such precautions were to include posting warning signs, conducting inspections and making sure that all federal, state and municipal health laws and regulations were complied with (id. at 16). Further, Henegan agreed to keep the site and surrounding areas free from the accumulation of debris and other waste material caused in connection with its work on the project.

Dominick Bullaro (Bullaro) was deposed on behalf of Liberty. Bullaro testified that the demolition of the premises included removal of acoustic ceiling materials and sheetrock. In

addition, Liberty was also responsible for carting away the debris at the construction site. Bullaro also testified that the demolition and debris removal took place simultaneously, and that Liberty did not have any problems with their debris removal process. Angelo Puleri (Puleri), Liberty's foreman on the project, testified that Liberty would remove debris in mini-carts and transport it via freight elevator to the basement level of the premises and then into the back of a garbage truck.

Joseph Livecchi (Livecchi), Henegan's project director, testified that, due to logistical problems, there were times when containers full of debris could not be taken down the freight elevators. If the containers could not be removed, then they could not be properly emptied and refilled with debris. Livecchi also stated that there was nothing in the agreement between Henegan and Liberty to the effect that Liberty was to specifically clear areas of the floor for the electricians who would be working on a particular floor. Livecchi also testified that Liberty's work was performed to Henegan's satisfaction, that there were no complaints regarding Liberty's work on the project, and that Liberty was paid in full for its work.

Plaintiff Peter Tighe testified that he was employed by P.E. Stone (Stone) as an A-journeyman electrician on the date of his alleged accident. Henegan hired Stone as a subcontractor to perform electrical work, including providing and maintaining the temporary lighting necessary during the demolition process when the power was shut off. Plaintiff stated that at the time of his accident, he was stringing temporary lights to make sure the area was well lit.

Plaintiff further testified that, at approximately 6:00 P.M., plaintiff brought some temporary lighting up to the 37th floor and noticed about 10 laborers picking up debris created by

the demolition of the ceiling and walls, and carting it to the elevator for removal. Plaintiff stated that the entire 37th floor was covered with debris at that time, because the demolition company ripped down the ceilings and walls during the day and then removed the debris at night.

After leaving the 37th floor for a few hours, plaintiff then returned to the 37th floor to continue stringing temporary lights. Plaintiff testified that he found the laborers still performing debris removal. Just prior to plaintiff's accident, plaintiff was engaged in searching for a power source for the temporary lighting he was setting up in the elevator room. The 110-volt power source could only be found in the junction boxes located in the floor. The junction box that plaintiff needed to open was covered by a two-foot by two-foot metal tile secured by four screws. As the entire tile floor was covered with debris, plaintiff asserted that he had to "move stuff out of the way so I could actually find the tile because everything was covered with the garbage" (Notice of Motion, Exhibit E, at 48-50). Plaintiff stated that he had only cleared the two-foot by two-foot area around the tile in order to access it, and that he did not clear the area where his feet were standing before attempting to lift it.

After plaintiff had removed the four screws, and as he was picking up the tile, the sheetrock debris that plaintiff was standing on, and which was located on top of other garbage created from the demolition process, slipped out from underneath him and caused him to fall backwards and land on his tailbone. Plaintiff testified that he had not observed the two-foot square piece of sheetrock debris that he had slipped on before his alleged accident. To that effect, plaintiff stated that "there was garbage all over the place and I was sort of standing on it" (id. at 54).

DISCUSSION

"Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law" (Flores v City of New York, 29 AD3d 356, 358 [1st Dept 2006]; Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent 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]; 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 v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or 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 311, 317 [1981]). 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."

Although the parties in this case discuss at great length the issue of supervision, or lack thereof, on the part of defendants, that standard applies in Labor Law § 200 cases which involve

injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries arose from an unsafe condition present at the construction site. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004]).

As there is no evidence in the record to indicate that building owner DBAB created or had actual or constructive notice of the unsafe condition that caused plaintiff's accident in this case, DBAB is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims.

However, Henegan is not entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as Henegan may have had actual notice of the unsafe condition which caused plaintiff's accident. Henegan was responsible, pursuant to its contract with Deutsche Bank, for keeping the site and surrounding areas free from the accumulation of debris and other waste materials, as well as taking necessary precautions for the safety of its employees and all other persons at the site. In addition, Henegan had control over the work performed by Liberty, the subcontractor hired by Henegan to be responsible for removing debris at the construction site.

In addition, Henegan may have had constructive notice of the unsafe condition. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

Henegan's project director testified that containers were sometimes not properly

removed. In addition, plaintiff had noticed that the entire 37th floor was covered with debris, and that garbage was all over the place, because the ceilings were ripped down during the day, and then the debris was removed at night. In fact, plaintiff stated that he had to move debris out of the way just to find the tile that he needed to access in order to get to the junction box. Thus, the unsafe condition was visible and apparent and may have existed for a sufficient length of time for Henegan to have discovered the unsafe condition and have the debris properly removed.

Liberty is also not entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims. As Liberty was responsible for the demolition of the premises, which included removal of acoustic ceiling materials and sheetrock, Liberty may have had a hand in creating the unsafe condition that caused plaintiff's injury. In addition, as Liberty was also responsible for the removal of the debris it created, Liberty may have had actual notice of the unsafe condition, as well.

Defendants argue that, due to the open and obvious nature of the unsafe condition, the duty to provide a safe place to work does not apply in this case. However, liability under Labor Law § 200 is not negated by plaintiff's awareness that debris was present at the location of his accident, or by the open and obvious nature of the unsafe condition, as these factors merely go to plaintiff's comparative negligence (DeJesus v F.J. Sciame Construction Company, Inc., 20 AD3d 354, 354 [1st Dept 2005][although raised metal door frame on which plaintiff tripped was open, obvious and readily observable, this fact only eliminated the defendant contractor's duty to warn of the hazardous condition and did not negate the broader duty to maintain the workplace in a safe condition]; Maza v University Avenue Development Corporation, 13 AD3d 65, 65 [1st Dept 2004][where laborer sustained injuries when he tripped over debris and snow and ice in a

courtyard at a construction site, liability under section 200 was not negated by plaintiff's awareness that workers were throwing debris in the courtyard, or by the open and obvious nature of the danger; rather, those factors went to plaintiff's comparative negligence]).

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation and demolition work (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993]).

However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation, rather than a provision containing only generalized requirements for worker safety (id. at 501-502). However, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (Thompson v Ludovico, 246 AD2d 642, 644 [2d Dept 1998]).

If a violation of the statute is proven, the owner or general contractor is vicariously liable

without regard to his or her fault (Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 350 [1998]; Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 521-522 [1985]). "Section 241 (6) imposes a nondelegable duty upon owners and general contractors, regardless of the level of control or supervision" (Piccolo v St. John's Home for the Aging, 11 AD3d 884, 886 [4th Dept 2004]).

Although DBAB is found to be without negligence, as owner, it is still subject to vicarious liability under the statute. With respect to Henegan, as construction manager, Henegan may or may not be liable under the statute (see Walls v Turner Construction Company, 4 NY3d 861, 864 [2005][a construction manager, though generally not liable under the statute, may be vicariously liable as an agent of the property owner for injuries sustained under the statute where he had the ability to control the activity that brought about the injury]; Millard v Hueber-Breuer Construction Company, Inc., 4 AD3d 817, 817 [4th 2004][defendant construction manager's cross motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim properly granted where defendant established that it was not authorized to supervise or control the injury-producing work, and plaintiff failed to raise a triable issue of fact concerning defendant's alleged liability as an agent of the owner]; Kenny v George A. Fuller Company, 87 AD2d 183, 188 [2d Dept 1982]).

However, as Henegan has failed to address the issue of whether or not it was a statutory agent in its motion, it has not met its prima facie burden, and thus, it is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim on this issue. The court may not search the record and grant summary judgment on an issue not raised by the motion (Baseball Office of the Commissioner v Marsh & McLennan, Inc., 295 AD2d 73, 82 [1st Dept 2002]).

However, Liberty is not to be considered a statutory agent of Henegan and DBAB, and thus, Liberty is not liable for plaintiff's injuries under the statute. "Only upon obtaining the authority to supervise and control does the third party fall with the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]; see Morales v Spring Scaffolding, Inc., 24 AD3d 42, 46-47 [1st Dept 2005]; Smith v McClier Corporation, 22 AD3d 369, 369-370 [1st Dept 2005][Labor Law § 241 (1) claim dismissed as against defendant subcontractor, because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]; Bopp v A.M. Rizzo Electrical Contractors, Inc., 19 AD3d 348, 348 [2d Dept 2005][since defendant electrical subcontractor did not exercise requisite supervisory control over plaintiff's work, subcontractor was not deemed an agent of the owner or general contractor for the purposes of Labor Law § 241 (6)]).

Here, no evidence was presented that Liberty had the authority to supervise and control plaintiff's work. In fact, Liberty had only the authority to control its own activities at the work site, and it had no responsibility for any safety at the work site other than its own. Liberty was simply hired as a subcontractor responsible for the demolition of the premises and for removing the debris created by that demolition.

Initially, it should be noted that, although plaintiff asserts violations of Industrial Code 12 NYCRR 23-1.11, 23-1.7 (d), 23-1.7 (e) (1) and (2), 23-1.7 (f), 23-2.1 and 23-2.7 in his bill of particulars, with the exception of 12 NYCRR 23-1.7 (e) (2), plaintiff did not address these violations in his affirmation in opposition to defendants' summary judgment motions. Thus, this court deems these claims as abandoned (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept

2003][where plaintiff did not oppose that branch of defendant's summary motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). In any event, the provisions of 12 NYCRR 23-1.11, 1.7 (d), 1.7 (e) (1), 1.7 (f), 2.1 and 2.7 do not need to be addressed by this court, as they either lack the requisite specificity required to support a claim or do not apply to the facts of this case.

Industrial Code 12 NYCRR 23-1.7 (e) (2) provides:

> "Working areas - The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Industrial Code 12 NYCRR 23-1.7 (e) (2) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (see Singh v Young Manor, 23 AD3d 249, 249 [1st Dept 2005]; Lopez v City of New York Transit Authority, 21 AD3d 259, 259 [1st Dept 2005]).

Here, it is undisputed that, as plaintiff attempted to uncover the metal tile in order to access a junction box, he was injured when the sheetrock debris and garbage he was standing on caused him to fall and injure himself. Thus, DBAB, as owner, and Henegan, as construction manager, are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on Industrial Code 12 NYCRR 23-1.7 (e) (2).

LABOR LAW § 240 (1)

Labor Law § 240 (1) is referred to as the Scaffold Law (Ryan v Morse Diesel, Inc., 98 AD2d 615, 615 [1st Dept 1983]). Labor Law § 240 (1) 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) imposes absolute liability upon an owner or general contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 523 [1985]; Correia v Professional Data Management, Inc., 259 AD2d 60, 63 [1st Dept 1999]). The duty imposed by Labor Law § 240 (1) is nondelegable and an owner or contractor who breaches that duty may be held liable in damages regardless of whether they actually supervised or controlled the work (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d at 500).

In order 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 (Felker v Corning, Inc., 90 NY2d 219, 224-225 [1997][worker injured by fall from elevated work site must generally prove that the absence of safety device was the proximate cause of his or her injuries to prevail on scaffolding law claim]).

Initially, it should be noted that, although Henegan and DBAB move for summary judgment dismissing plaintiff's complaint as against them, they do not specifically address plaintiff's Labor Law § 240 (1) claim. As such, defendants Henegan and DBAB, as proponents of the motion for summary judgment, have not met their burden of establishing that there are no material issues of fact in dispute on this issue, and thus, they are not entitled to summary

judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them.[1]

However, as this court has determined that Liberty did not supervise or control plaintiff's work so as to be considered a statutory agent of the owner in this case, Liberty is entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it (see Armentano v Broadway Mall Properties, Inc., 30 AD3d 450, 451 [2d Dept 2006][plaintiffs failed to establish prima facie entitlement to summary judgment as they presented no evidence that defendant subcontractor had any authority to supervise or control the injured plaintiff's work]; Jones v West 56th Street Associates, 33 AD3d 551, 551 [1st Dept 2006]). Moreover, plaintiff has not raised an issue of fact which would preclude the grant of summary judgment to Liberty.

COMMON-LAW AND CONTRACTUAL INDEMNIFICATION

"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 Enterprises, Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Management, Inc., 259 AD2d at 65; Priestly v Montefiore Medical Center/Einstein Medical Center, 10 AD3d 493, 495 [1st Dept 2004]).

Henegan and DBAB are not entitled to common-law indemnity from Liberty in this case, because, although Henegan and DBAB have alleged that plaintiff's injuries did not arise as a result of their negligence, they have not established that plaintiff's injuries arose as a result of

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[1]It should be noted that, when this case goes to trial, plaintiff's section 240 (1) claim will likely be dismissed as to DBAB and Henegan as recovery under the statute is unavailable in the instant case, because plaintiff's alleged injury resulted from his slip and fall on debris which covered the floor, and not as a result of an elevation-related hazard (Rocovich v Consolidated Edison Company, 78 NY2d 509, 515 [1991]).

Liberty's negligence and that its negligence contributed to the causation of plaintiff's alleged accident. In fact, Livecchi, Henegan's project director, testified that Liberty's work was performed to Henegan's satisfaction, that there were no complaints regarding Liberty's work on the project, and that Liberty was paid in full for its work for Henegan. As such, Liberty is entitled to summary judgment on its cross motion dismissing DBAB and Henegan's cross claim against Liberty for common-law indemnity.

Henegan and DBAB also assert that Liberty is obligated to them for contractual indemnification and attorney's fees, pursuant to the subcontractor's indemnity agreement between Henegan and Liberty. Initially, there is no language in the indemnity provision that requires Liberty to contractually indemnify DBAB or pay DBAB attorney's fees, as owner of the premises at issue, in the event of injuries arising out of the performance of Liberty's work. Thus, DBAB is not entitled to contractual indemnification as against Liberty. As such, Liberty is entitled to summary judgment on its cross claim dismissing DBAB's cross claim against it for contractual indemnification and attorney's fees.

As to Henegan, the written purchase order for Liberty's demolition services was signed and dated by Henegan and Liberty several weeks after plaintiff's alleged accident. Henegan signed the purchase order on April 28, 2003, and Liberty signed it on May 1, 2003 (Notice of Cross Motion, Exhibit D). In addition, a separate subcontractor indemnity agreement (indemnity agreement) was signed by Liberty and dated May 29, 2003 (id.). The indemnity agreement states, in pertinent part:

> "To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Contractor and its directors, officers, employees, agents, and representatives from and against all claims, damages, losses and expenses, including, but not limited to attorney's fees, arising out of or resulting from the

performance of Subcontractor's Work ...

(id.). It should also be noted that Liberty obtained a general liability insurance policy which contained an additional insured endorsement for Henegan and DBAB, as well as an excess umbrella policy (Notice of Cross Motion, Exhibit G and H).

Catherine Ziegler (Ziegler), general counsel for Henegan, stated in her affidavit that she was in overall charge of drafting and negotiating the terms and provisions of all contracts to which Henegan is a party, including all of the subcontracts for work on construction projects. Ziegler stated that Henegan uses a standardized format and language for all of its subcontractor agreements, which Henegan refers to as "Subcontractor Purchase Orders" (Notice of Motion, Exhibit F, Ziegler Affidavit). She also asserted that, prior to April 16, 2003, Henegan and Liberty had a well-established and long-standing business relationship, working together on up to four projects a year. In addition, all demolition work performed by Liberty was done pursuant to the terms and conditions of the purchase orders.

Ziegler also noted that, even though the subcontractor purchase order for the construction project in the instant case was not signed until April 24, 2003, the agreement pertaining to this contracted work was entered into prior to the date upon which Liberty first started performing demolition work at the site, and that it was the intention of the parties that all work performed by Liberty would be done in accordance with, and pursuant to, the terms and conditions as outlined in that purchase order. However, Livecchi, Henegan's project director, testified that he was not aware of any writing that Henegan may have maintained that the purchase order and subcontractor indemnity agreements were meant to apply retroactively. In addition, Ziegler stated that Liberty signed separate subcontractor indemnity agreements on a semi-annual basis,

though none of these semi-annual indemnity agreements were produced.

Liberty asserts that Henegan is not entitled to contractual indemnification or attorney's fees from Liberty, because the subcontractor's indemnity provision between Liberty and Henegan at issue was dated after plaintiff's alleged accident and is devoid of any language demonstrating an intention by the parties that it be retroactively applied (see Temmel v 1515 Broadway Associates, L.P., 18 AD3d 364, 365 [1st Dept 2005][no contractual indemnification found where the indemnification provision contained in a purchase order was dated more than a month after plaintiff's alleged accident and devoid of any language that it was to be applied retroactively, and in the absence of any explicit indemnification agreement existing prior to the purchase order between the parties]; Burke v Fisher Sixth Avenue Company, 287 AD2d 410, 410 [1st Dept 2001][no contractual indemnification where contracts incorporating attachments containing the indemnity clause were dated and executed after plaintiff's accident, and there was nothing in the contract to suggest that they were intended to have a retroactive effect]; Beckford v City of New York, 261 AD2d 158, 158 [1st Dept 1999][summary judgment on contractual indemnification issue properly denied where contract between defendant and plaintiff's employer was not executed until two days after plaintiff's accident]).

However, "[i]ndemnity contracts must be viewed with reference to the purpose of the entire agreement and the surrounding facts and circumstances" (Podhaskie v Seventh Chelsea Associates, 3 AD3d 361, 362 [1st Dept 2004]). An indemnification clause in a written contract executed after a plaintiff's accident may nevertheless be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date [internal

quotation marks and citations omitted]" (id.; Pena v Chateau Woodmere Corporation, 304 AD2d 442, 443 [1st Dept 2003][retroactive term in contract at issue was clear and unambiguous on its face and the obtaining of the certificate of insurance, which was required before commencing work, was considered persuasive evidence that the contract was anticipated]).

Here, the testimony of Ziegler, in charge of drafting and negotiating the terms and provisions of all contracts to which Henegan is a party, is insufficient to raise an issue of fact as to whether the parties intended the indemnification clause to apply on the date of plaintiff's alleged accident. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purpose of the entire agreement, and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Company, Inc., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Insurance Company, 32 NY2d 149, 153 [1973]; see Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 [1st Dept 2005]).

Thus, Henegan is also not entitled to summary judgment on its cross claim against Liberty for contractual indemnification and attorney's fees.[2] As such, Liberty is entitled to summary judgment on his cross motion to dismiss Henegan's cross claim for contractual indemnification and attorney's fees.[3]

FAILURE TO PROCURE INSURANCE

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[2]It should be noted that although DBAB and Henegan cross-claimed for contribution and breach of contract to procure insurance, they only addressed common-law and contractual indemnification and attorney's fees in their summary judgment motion.

[3]It should also be noted that although Liberty cross-claimed for contribution, it did not address this claim in its summary judgment motion.

Although addressed by Liberty in its cross motion, Henegan and DBAB do not address the issue of whether Liberty breached its contract with Henegan and DBAB by failing to procure insurance. Thus, this court deems this claim to be abandoned by Henegan and DBAB (see Genovese v Gambino, 309 AD2d at 833).

In any event, evidence in the record establishes that Liberty did, in fact, obtain a general liability insurance policy which contained an additional insured endorsement for Henegan and DBAB, as well as an excess umbrella policy. No cause of action lies for breach of an obligation to procure insurance when the record establishes that an insurance policy with the proper blanket endorsements was, in fact, procured (see Perez v Morse Diesel International, Inc., 10 AD3d 497, 498 [1st Dept 2004]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant DBAB Wall Street, LLC (DBAB)'s motion for summary judgment dismissing that portion of plaintiff Peter Tighe's (plaintiff) complaint asserting a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that the part of defendant DBAB's motion for summary judgment asserting common law negligence and a violation of Labor Law § 200 is granted, and these portions of the complaint are dismissed as to this defendant; and it is further

ORDERED that the part of defendants Henegan Construction Company, Inc., incorrectly s/h/a Hennegan Construction Company, Inc.'s (Henegan) motion for summary judgment dismissing that portion of plaintiff's complaint asserting common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) predicated on a violation of Industrial Code 12

NYCRR 23-1.7 (c) (2) is denied; and it is further

ORDERED that the part of defendants Henegan and DBAB's motion for summary judgment dismissing those portions of plaintiff's complaint asserting a violation of Labor Law § 241 (6) which is predicated on violations of Industrial Code 12 NYCRR 23-1.11, 23-1.7 (d), 23-1.7 (e) (1), 23-1.7 (f), 23-2.1 and 23-2.7 is granted, and these portions of the complaint are dismissed as to these defendants; and it is further

ORDERED that the part of defendant Liberty Contracting Corporation's (Liberty) cross motion for summary judgment dismissing that portion of plaintiff's complaint asserting causes of action under Labor Law § 240 (1) and Labor Law § 241 (6) which is predicated on violations of Industrial Code 12 NYCRR 23-1.11, 23-1.7 (d), 23-1.7 (e) (1) and (2), 23-1.7 (f), 23-2.1 and 23-2.7 is granted, and these portions of the complaint are dismissed as to this defendant; and it is further

ORDERED that the part of defendant Liberty's cross motion for summary judgment dismissing that portion of the plaintiff's complaint asserting common-law negligence and a violation of Labor Law § 200 is denied; and it is further

ORDERED that defendants Henegan and DBAB's cross claim for summary judgment for common-law and contractual indemnification, as well as an award of attorney's fees, as against co-defendant Liberty and in favor of Henegan and DBAB, is denied; and it is further

ORDERED that the part of co-defendant Liberty's cross motion for summary judgment dismissing co-defendants' cross claim for common-law and contractual indemnification, as well as attorney's fees, as against Liberty and in favor of Henegan and DBAB, is granted; and it is further

ORDERED that the remainder of the action shall continue.

DATED: January 4, 2007

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

ORDERED that the part of defendants Henegan and DBAB's motion for summary judgment dismissing those portions of plaintiff's complaint asserting a violation of Labor Law § 241 (6) which is predicated on violations of Industrial Code 12 NYCRR 23-1.11, 23-1.7 (d), 23-1.7 (c) (1), 23-1.7 (f), 23-2.1 and 23-2.7 is granted, and these portions of the complaint are dismissed as to these defendants; and it is further

ORDERED that the part of defendant Liberty Contracting Corporation's (Liberty) cross motion for summary judgment dismissing that portion of plaintiff's complaint asserting causes of action under Labor Law § 240 (1) and Labor Law § 241 (6) which is predicated on violations of Industrial Code 12 NYCRR 23-1.11, 23-1.7 (d), 23-1.7 (e) (1) and (2), 23-1.7 (f), 23-2.1 and 23-2.7 is granted, and these portions of the complaint are dismissed as to this defendant; and it is further

ORDERED that the part of defendant Liberty's cross motion for summary judgment dismissing that portion of the plaintiff's complaint asserting common-law negligence and a violation of Labor Law § 200 is denied; and it is further

ORDERED that defendants Henegan and DBAB's cross claim for summary judgment for common-law and contractual indemnification, as well as an award of attorney's fees, as against co-defendant Liberty and in favor of Henegan and DBAB, is denied; and it is further

ORDERED that the part of co-defendant Liberty's cross motion for summary judgment dismissing co-defendants' cross claim for common-law and contractual indemnification, as well as attorney's fees, as against Liberty and in favor of Henegan and DBAB, is granted; and it is further

ORDERED that the remainder of the action shall continue.

Dated 1/4/07 ENTER: _____ J.S.C.
HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE