Urban v No. 5 Times Sq. Dev. LLC

2008 NY Slip Op 30551(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0103255/2004

Judge: Emily Jane Goodman

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SCANNED ON 2/29/2008

[* 1]

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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 103255/2004
URBAN, PAUL
VS
NO. 5 TIMES SQ. DEVELOPMENT
Sequence Number : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion And WSM Motion are decided per attached

FILED
FEB 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/14/08

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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PAUL URBAN,

Plaintiff,

-against-

NO. 5 TIMES SQUARE DEVELOPMENT LLC, BOSTON PROPERTIES LIMITED PARTNERSHIP, ERNST & YOUNG U.S. LLP, AMEC CONSTRUCTION MANAGEMENT, INC., SPECTACOLOR MEDIA LLC, and MAXIMUM SECURITY PRODUCTS CORP. d/b/a HILLSIDE IRONWORKS, INC.,

Defendants.

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Index No. 103255/04

FILED
FEB 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

AMEC CONSTRUCTION MANAGEMENT, INC.,

Third-Party Plaintiff,

-against-

OHM ELECTRICAL CORPORATION,

Third-Party Defendant.

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Third-Party
Index No. 591295/04

NO. 5 TIMES SQUARE DEVELOPMENT LLC, BOSTON PROPERTIES LIMITED PARTNERSHIP and ERNST & YOUNG U.S. LLP,

Second Third-Party Plaintiffs,

-against-

OHM ELECTRICAL CORP.,

Second Third-Party Defendant.

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Second Third-Party
Index No. 590401/05

NO. 5 TIMES SQUARE DEVELOPMENT LLC, BOSTON PROPERTIES LIMITED PARTNERSHIP and ERNST & YOUNG U.S. LLP,

Third Third-Party Plaintiffs,

-against-

SPECTACOLOR MEDIA LLC,

Third Third-Party Defendant.

Third Third-Party Index No. 590391/05

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NO. 5 TIMES SQUARE DEVELOPMENT LLC, BOSTON PROPERTIES LIMITED PARTNERSHIP and ERNST & YOUNG U.S. LLP,

Fourth Third-Party Plaintiffs,

-against-

MAXIMUM SECURITY PRODUCTS CORP. d/b/a HILLSIDE IRONWORKS, INC.,

Fourth Third-Party Defendant.

Fourth Third-Party Index No. 590810/05

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Emily Jane Goodman, J.:

Motions with sequence nos. 003, 004, and 005 are hereby consolidated for disposition.

On September 17, 2002, plaintiff, an electrician then employed by OHM Electrical Corp. (OHM), was working on a third-floor catwalk at a new building being erected at 5 Times Square in New York City, when his left leg fell through a 10- to 12-inch gap between the catwalk and the building, and he was injured. This action ensued.

In motion sequence no. 003, defendant/third-party plaintiff AMEC Construction Management, Inc. (AMEC) moves,

pursuant to CPLR 3212, (1) for summary judgment dismissing the complaint and all cross claims asserted against it; or, in the alternative, (2) for summary judgment on its cross claims for indemnification against Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc. (Hillside). Third-party defendant OHM cross-moves, pursuant to CPLR 3212, for summary judgment dismissing all claims against it, including the third-party complaint.[1]

In motion sequence no. 004, defendants/third/fourth-party plaintiffs No. 5 Times Square Development LLC (No. 5 Times Square) and Boston Properties Limited Partnership (Boston Properties) move for summary judgment dismissing the complaint, and on their cross claims as against AMEC. Plaintiff cross-moves for partial summary judgment on the issue of No. 5 Times Square/Boston Properties' and AMEC's liability under Labor Law § 240 (1).

In motion sequence no. 005, defendant/fourth third-party defendant Hillside moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and fourth third-party complaint and all other claims asserted as against it.

BACKGROUND

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[1]The second third-party action was discontinued by stipulation dated March 8, 2007.

By stipulation dated September 18, 2006, the action was discontinued as against Ernst & Young U.S. LLP.

On the day of plaintiff's accident, the work on the structure was substantially complete, and only certain punchlist work remained to be done (Kennedy [No. 5 Times Square/Boston Properties] Depo.[2], at 18; Kennedy 3/13/07 Aff., ¶ 15). Plaintiff was on the third-floor catwalk, pulling cable through conduit in order to provide electricity and electrical distribution panels for exterior signage. Plaintiff had been working there for three weeks, and had complained to his supervisor, Ralph Betner, that there was a gap between the third-floor catwalk and the building (Plaintiff's Depo., at 46-47). On the day of his accident, he had been working on a ladder, pulling the heavy cable, but he needed to move the ladder so that he would be in a better position to pull the wire. As he was walking backwards with the ladder, his left leg fell up to his knee into a gap between the catwalk and the building, and he sustained injuries.

John P. Kennedy, who was Boston Properties' senior construction manager in September 2002, testified that Boston Properties was the owner of the building, and that No. 5 Times Square was set up to build and develop the property into a 40-story, million-square-foot office tower (Kennedy [No. 5 Times Square/Boston Properties] Depo., at 10-11; Kennedy 3/13/07 Aff.,

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[2]For ease in remembering which witness was speaking for which party, the party each witness represents will be set forth in brackets throughout this decision.

¶ 4). In early 2000, No. 5 Times Square, as developer, entered into a contract with AMEC, then known as Morse Diesel International, Inc., for AMEC to provide general contracting/construction management services for the core and shell of the project (*see* Kennedy [No. 5 Times Square/Boston Properties] Depo., at 12, 17-18; No. 5 Times Square/AMEC Contract). A couple of months thereafter, AMEC, as contractor, entered into a contract with Hillside, as subcontractor, for Hillside to provide metal stairs. In 2001, AMEC contracted with plaintiff's employer, OHM, to provide electrical power for the east fin and cornice parts of the building. This work was completed by the end of 2001 (Lynch [OHM] Depo., at 38-39).

By change order dated January 31, 2002, AMEC contracted with Hillside to provide "misc iron - ext metal signage & catwalks." Hillside's work under the contract included the plans for, and the installation of the catwalk (Guido [Hillside] Depo., at 23). Those plans included the installation of a threshold[3] to cover the gap between the catwalk and the building (*id.* at 18, 24). Peter Guido, who was Hillside's field supervisor for the project, testified that when Hillside's work at the job site was complete, and he left the site, the threshold was in place, and

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[3]Various names have been given for the metal plate that was supposed to be covering the gap on the date of plaintiff's accident, including threshold, angle, angle iron, metal plate, and cover plate. "Threshold" is the term that will be used in this decision.

there was no gap between the catwalk and the building (*id.* at 25, 30-31, 64; *see also* Greenhaw [Hillside] Depo., at 49-50 [during prior investigation, Greenhaw asked Guido if the threshold had been installed, and he said yes]). No. 5 Times Square/Boston Properties' Kennedy estimated that the catwalk on the third floor was completed approximately three to five months before September 2002 (Kennedy [No. 5 Times Square/Boston Properties] Depo., at 130-131), and Guido testified that the work was completed somewhere around the end of March, beginning of April of that year (Guido [Hillside] Depo., at 27; *see also* Greenhaw [Hillside] Depo., at 55 [catwalk finished around the end of April]). Once Hillside's work at the job site was complete, it left and did not return (Guido [Hillside] Depo., at 30; Greenhaw [Hillside] Depo., at 55-56, 108).

In June 2002, No. 5 Times Square, as owner, retained OHM to provide the components required to power outdoor signage on the third floor. It was while he was working on this project that plaintiff was injured.

Spectacolor is a media sales company which provided media sales services for exterior signage at the building (Sinodinos [Spectacolor] Depo., at 11; Huang [No. 5 Times Square/Boston Properties' counsel] 3/13/07 Affirm., ¶ 13). It was not involved in the construction of the building (Sinodinos [Spectacolor] Depo., at 10), and has taken no part in the motions

being decided at this time.

THE PLEADINGS

The second amended complaint alleges four causes of action, sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff has since withdrawn his Labor Law §§ 240 (1) and 241 (6) claims as against Hillside. Hillside's answer asserts two causes of action against all its co-defendants, for contribution and common-law indemnification. No. 5 Times Square/Boston Properties' answer alleges three causes of action against its co-defendants, for contribution or common-law indemnification, contractual indemnification, and breach of contract to procure insurance. In its answer, AMEC brings three causes of action against its co-defendants, alleging claims for contractual and common-law indemnification, contribution, and a claim that, as beneficiary/third-party beneficiary of its co-defendants' contracts, it is entitled to be indemnified. Spectacolor's answer asserts claims for common-law and contractual indemnification and contribution.

AMEC's third-party complaint against OHM alleges five causes of action, sounding in contractual and common-law indemnification, contribution, and breach of contract to procure insurance. In its answer, OHM brings a cross claim against No. 5 Times Square/Boston Properties and a counterclaim against AMEC for common-law indemnification.

The second third-party action has been discontinued pursuant to stipulation.

In No. 5 Times Square/Boston Properties' third third-party complaint against Spectacolor, claims for contribution or common-law indemnification, contractual indemnification, and breach of contract to procure insurance are alleged. Spectacolor brings no claims in its answer.

No. 5 Times Square/Boston Properties' fourth third-party complaint against Hillside alleges claims for contribution or common-law indemnification, contractual indemnification, and breach of contract to procure insurance. In its answer, Hillside asserts a counterclaim and two cross claims against No. 5 Times Square/Boston Properties, AMEC, Spectacolor, and OHM for contribution and common-law indemnification.

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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Once the [movant] establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the [opposing party] to present facts, in admissible form,

demonstrating that genuine, triable issues exist precluding the grant of summary judgment" (*DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Motion Sequence No. 004: Plaintiff's Cross Motion for Partial Summary Judgment on the Issue of No. 5 Times Square/Boston Properties' and AMEC's Liability Under Labor Law § 240 (1)

Labor Law § 240 (1) provides protection for workers involved in the "erection ... of a building or structure" and requires owners, contractors and their agents to "furnish or erect, or cause to be furnished or erected for the performance of such labor, ... [safety] 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 on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards. Breach of the statutory duty must be the proximate cause of the injury. The statute is to be interpreted liberally to accomplish its purpose

(*Striegel v Hillcrest Heights Development Corp.*, 100 NY2d 974, 977 [2003]).

Three issues must be considered in determining the section 240 (1) portion of these motions: (1) whether Labor Law § 240 (1) applies in this matter, i.e., (a) whether plaintiff was engaged in a protected activity, and (b) whether plaintiff was subjected to an elevation-related hazard; (2) if so, whether the catwalk, a permanent part of the building, was a safety device; and (3) if the statute applies, whether AMEC can be held liable as a general contractor or agent of No. 5 Times Square/Boston Properties.

At the time of plaintiff's accident, the construction of the building was substantially complete, and plaintiff was performing certain punchlist work. In describing what "punch list work" is, AMEC's then project manager, George Mow, testified:

> Q. When you say "ongoing punch list work," can you explain what you mean?
>
> A. Um, I'm going to talk in general as far as ... trades.
>
> Their work would be basically all in place. A punch list would be generated as far as incidental items that were either in nonconformance, ... incomplete or deficient, ... to the best of anyone's knowledge.
>
> So for an example, there may be some light fixtures that were on order from the electrician that still needed to be put in or were waiting for ... some other trade to finish his work in order for them to allow them to install that work.
>
> There was ... incidental lists basically of balance work or issues that needed to be ... remediated or completed

(Mow [AMEC] Depo., at 68-69). The Appellate Division, First Department, has found that a worker who was performing punchlist work, "testing recently installed fans, was engaged in construction for purposes of Labor Law § 240 (1) and § 241 (6)" (*Griffin v New York City Transit Authority*, 16 AD3d 202, 203 [1st Dept 2005]). Indeed, the First Department has found that a project superintendent that was on a walk-through of a newly built store in order to compile a punch list, was covered when he was injured in a fall from a ladder he was using to tape opaque paper to the windows (*Greenfield v Macherich Queens Limited Partnership*, 3 AD3d 429, 429-430 [1st Dept 2004] ["compiling a punch list is work that falls under the 'erection' category of (section 240 [1]), and ... plaintiff is therefore protected thereby even if he was not directly involved in compiling a punch list when injured"]). Further, the evidence establishes that the work plaintiff was performing was an integral part of the construction project. Thus, this court finds that plaintiff was engaged in an activity covered by Labor Law § 240 (1).

No. 5 Times Square/Boston Properties and AMEC argue that plaintiff's § 240 (1) claim must be dismissed because there was no defect in the ladder which was provided in connection with the height differential between the elevation of the required work and the third floor catwalk. Accordingly they argue that plaintiff was provided with an adequate safety device, which did

not fail. Moreover, they maintain that the catwalk cannot be considered a safety device because it was a permanent structure and was not used as a "tool" or a "safety device" in connection with plaintiff's work, and was not intended to protect plaintiff from an elevation-related risk, citing *Ryan v Morse Diesel, Inc.*, 98 AD2d 615, 616 (1st Dept 1983) (permanent stairway was not a safety device). AMEC further argues that plaintiff's accident does not involve an elevation differential sufficient to trigger Labor Law §240 (1), because the gap he fell through was only approximately 10-12 inches, citing *Piccuillo v Bank of New York Company* (277 AD2d 93 [1st Dept 2000] [trip and fall in a hand hole on the floor]) and *Alvia v Teman Electrical Contr., Inc.* (287 AD2d 421 [2d Dept 2001] [trip and fall in a hole on the floor]).

Plaintiff counters that liability is based on the fact that the catwalk failed, and that the catwalk was the safety device which could have prevented the accident. Citing several cases, plaintiff maintains that the permanency of the structure is not a bar to liability in this case. As to the elevation differential, plaintiff notes that the catwalk was 30-40 feet above the ground and cites cases standing for the proposition that a plaintiff need not fall to the ground, or fall at all, in order to sustain a Labor Law §240 (1) claim.

The fact that there was no defect in the ladder is not

a bar to liability because the liability alleged here is based on the failure of the catwalk. Further a permanent catwalk can be the equivalent of a scaffold or other safety device, intended to give a worker protection while working at a height (*see Foote v Lyonsdale Energy Ltd Partnership*, 23 AD3d 924 [3d Dept 2005] [guardrailed catwalk permanently affixed to a wood chip stacker was the equivalent of a scaffold intended to give worker proper protection when working on the stacker]; *see also Beard v State of New York*, 808 NYS2d 802 [3d Dept 2006] [permanent bridge, which was not structurally sound, was the functional equivalent of a scaffold because it was suspended 15 to 20 feet above the ground]). Moreover, the permanence of a structure is irrelevant if the structure was installed for the purpose of affording workers access to an elevated height, thereby exposing a worker to an elevation-related risk (*see Brennan v RCP Assoc.*, 257 AD2d 389 (1st Dept 1999) (steam fitter injured while repairing cooling towers located on roof accessed by permanent interconnecting grating was entitled to summary judgment under §240 (1) because the gratings were "a device belonging to a class enumerated in the statute, specifically, a scaffold").[4]

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[4]No. 5 Times Square/Boston Properties artificially distinguishes this case. It acknowledges that like the gratings, the catwalk was intended to provide access to the signage, yet claims that maintenance of the signage would be performed from the street, via a bucket truck. Here, the plaintiff was not involved in maintenance, but rather, construction, and in any event, Boston Properties own witness testified that the

Ryan v Morse Diesel, Inc., supra, cited by No. 5 Times Square/Boston Properties, does not compel a different result. There the Court rejected a Labor Law §240 (1) claim because the permanently installed stairway was used by plaintiff as a place of passage from one place of work to another. Contrarily here, the catwalk was not a passageway from one place of work to another, but was a means for workers to access an elevated height, thereby subjecting the worker to an elevation risk.

However, the court finds that plaintiff was not injured as a result of exposure to an elevation-related hazard because of the dimensions of the gap in which he fell. As this court reads the relevant case law, whether a fall through a gap or a hole can support a Labor Law §240 (1) claim depends upon whether the gap or hole is of sufficient size to allow a body to pass, whether or not plaintiff's entire body falls through the hole (*see Carpio v Tishman Constr. Corp. of New York*, 240 AD2d 234 [1st Dept 1997] [Labor Law §240 (1) was applicable where plaintiff's leg fell three feet through a 10-14 inch wide hole, up to plaintiff's groin area, while standing on a third floor permanent concrete floor because plaintiff was subject to "an elevation-related risk"]; *Kulovany v Cerco Prdts., Inc.*, 26 AD3d 224 [1st Dept

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"[p]urpose of the catwalk was to access the signs, to access for maintenance purposes, maintaining, access to bring power out there." (Kennedy [No. 5 Times Square/Boston Properties] Depo., at 87).

2006] [Labor Law §240 (1) was not applicable where one of plaintiff's legs fell through the floor of a trailer, up to his knee, because the accident "cannot be considered to have resulted from an elevation-related risk]; *Keavey v New York State Dorm. Auth.*, 24 AD3d 1193 [3d Dept], affd, 6 NY2d 859 [2005] [Labor Law §240 (1) was not applicable where plaintiff's right foot slipped into a five to six inch gap between boards, up to his knee, because it "is not a gravity-related accident"]). Here, plaintiff's left leg fell through the gap, up to his left knee. Plaintiff testified that the gap was 10-12 inches (Urban Depo., at 73, 91). The photographs of the gap, taken by plaintiff two days after the accident, depict a gap between the catwalk and the mechanics room with mechanical equipment/protrusions appearing in the interior of the gap. Accordingly, based upon the photographs and the plaintiff's description of the dimensions of the gap, a worker's body could not pass through this gap.

Accordingly, the court finds that section 240 (1) is inapplicable in this matter. Plaintiff's cross motion which seeks summary judgment on the issue of No. 5 Times Square/Boston Properties' and AMEC's liability under section 240 (1) is denied.

Motion Sequence No. 004: No. 5 Times Square/Boston Properties' Motion for Summary Judgment Dismissing the Complaint, and for Summary Judgment on Its Cross Claims Against AMEC

The part of the motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted.

Labor Law § 200 and Common-law Negligence

"Labor Law § 200, the codification of the common law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work" (*Buckley v Columbia Grammar and Preparatory*, ___ AD3d ___, 2007 WL 2324611, *6, 2007 NY App Div LEXIS 9186, *17, 2007 NY Slip Op 06452, *7 [1st Dept 2007]; *see also Gonzalez v Glenwood Mason Supply Co.*, 41 AD3d 338, 339 [1st Dept 2007]). Where, as here, the injury was caused by a defective condition, rather than the manner in which the work was performed, liability may be imposed upon a defendant which "fail[s] to show that it did not create the dangerous condition or that it lacked control over the premises and lacked actual or constructive notice of the dangerous condition" (*Verel v Ferguson Electric Construction Co.*, 41 AD3d 1154, 1156 [4th Dept 2007]; *see also McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 798 [2d Dept 2007]; *Dowd v City of New York*, 40 AD3d 908, 910 [2d Dept 2007]). "[C]ontrol or direction is not necessary to establish liability under Labor Law § 200 where the injury arises from the condition of the workplace created by or known to the owner, rather than the method used in performing the work" (*Griffin v New York City Transit Authority*, 16 AD3d at 202). The fact that plaintiff was aware of the gap and had complained about it to his supervisor, i.e., that it was an open

and obvious dangerous condition, does not negate liability under section 200. Rather, "these factors go to plaintiff's comparative negligence" (*Maza v University Avenue Development Corp.*, 13 AD3d 65, 65 [1st Dept 2004]).

Dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is granted. There is no evidence that No. 5 Times Square/Boston Properties either created the dangerous condition or had any notice of it. Although plaintiff refers to the evidence that No. 5 Times Square/Boston Properties was aware that the catwalk was installed approximately three to five months before the accident (*see* Kennedy [No. 5 Times Square/Boston Properties] Depo., at 130-131), there is no indication in that evidence that No. 5 Times Square/Boston Properties was made aware of any defect in the catwalk, if, indeed, any defect existed at that time. While plaintiff points out that No. 5 Times Square/Boston Properties' employees walked the site, including the catwalk, Kennedy testified that the purpose of their walking the site was to check on the progress of the construction project (*see id.* at 54). Moreover, Kennedy attested that "Boston Properties was never informed that the steel angle that should have been placed over the subject gap was not installed, nor that an accident occurred. We only came to know of these facts during this litigation" (Kennedy [No. 5 Times Square/Boston Properties] 3/13/07 Aff., ¶ 13). As such, plaintiff's section 200 and

common-law negligence claims against No. 5 Times Square/Boston Properties fail.

Labor Law § 241 (6)

> Section 241 (6), which imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers, is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*Buckley v Columbia Grammar and Preparatory*, ___ AD3d at ___, 2007 WL 2324611, at *5, 2007 NY App Div LEXIS 9186, at *14-15, 2007 NY Slip Op 06452, at *6-7).

Plaintiff alleges that his section 241 (6) claims are addressed to tripping and falling hazards, under Industrial Code (12 NYCRR Part 23) §§ 23-1.7 (b) and (e).

Although section 23-1.7 (b) contains several subsections, the court concludes that plaintiff is alleging a violation of section 23-1.7 (b) (1) (i), which provides:

> (b) Falling hazards.
> (1) Hazardous openings.
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a

> substantial cover
> fastened in place or by a
> safety railing
> constructed and installed
> in compliance with this
> Part (rule).

Although this section is specific enough to support a Labor Law § 241 (6) claim (*see e.g. Bell v Bengomo Realty*, 36 AD3d 479 [1st Dept 2007]), its safety measures "'bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit'" (*id.* at 480, quoting *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]). Since there is no indication that the 10- to 12-inch gap between the catwalk and the building was large enough for a person to fall through, this section is inapplicable to this matter.

Section 23-1.7 (e) is concerned with "Tripping and other hazards." Although it is specific enough to support a section 241 (6) claim (*see e.g. Smith v McClier Corp.*, 22 AD3d 369 [1st Dept 2005]), it has no application here, as plaintiff did not trip, nor were there accumulations of dirt, debris, scattered tools, or sharp projections present.

Accordingly, plaintiff's Labor Law § 241 (6) claim against No. 5 Times Square/Boston Properties is dismissed, and that part of No. 5 Times Square/Boston Properties' motion which seeks summary judgment dismissing this claim is granted.

As a result of the complaint being dismissed as against No. 5 Times Square/Boston Properties, the third third-party and

fourth third-party actions are also dismissed.

No. 5 Times Square/Boston Properties' Cross Claims Against AMEC

No. 5 Times Square/Boston Properties alleges cross claims for contribution or common-law indemnification, contractual indemnification, and breach of contract to procure insurance. Because the complaint has been dismissed as against No. 5 Times Square/Boston Properties, the cross claims against AMEC sounding in contribution and indemnification are dismissed.

With respect to the cross claim against AMEC for breach of contract by failure to procure insurance, this particular issue is not addressed in the parties' papers on these motions. No. 5 Times Square/Boston Properties' only reference to its breach of contract claim is that AMEC has failed to defend No. 5 Times Square/Boston Properties in the underlying action, and that this constitutes its breach of contract. Having failed to make its prima facie showing of entitlement, summary judgment on the breach of contract cross claim against AMEC is denied.

Motion Sequence No. 003: AMEC's Motion For Summary Judgment Dismissing the Complaint and All Cross Claims Asserted Against It, or for Summary Judgment on Its Cross Claims for Indemnification Against Hillside

The part of AMEC's motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted.

Labor Law § 200 and Common-Law Negligence

AMEC contends that it cannot be held liable under Labor

Law § 200 and common-law negligence because it was not the general contractor for the work which plaintiff was doing, and had no contractual or actual authority to supervise or control the work then being done.[5] When plaintiff was injured, the work that his employer was doing was pursuant to its contract with No. 5 Times Square, as owner, and plaintiff's employer OHM, as provider. Thus, AMEC maintains that because it was not the general contractor for the electrical work that plaintiff was performing at the time of his accident, it had no duty to plaintiff.

It is not unheard of that a contractor may act as a general contractor and have responsibility as such for only part of a construction project (*see e.g. Wong v New York Times Co.*, 297 AD2d 544, 549 [1st Dept 2002] [defendant was general contractor "only with respect to the building construction," and not for installation of printing presses]). Moreover, an owner may contract with prime contractors in addition to a general contractor, and the general contractor may not be held liable for injuries to a plaintiff who was working under a separate, prime contract (*see e.g. Balthazar v Full Circle Construction Corp.*,

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[5]The only contracts between AMEC and OHM, under which AMEC had the responsibilities of a general contractor, were those by which OHM was to provide electrical work for the east fin and cornice parts of the building, which were far removed from the third floor and its catwalk. Moreover, that work was completed by December 31, 2001, a good nine months before plaintiff's accident.

268 AD2d 96, 98 [1st Dept 2000] ["It is a defense that the plaintiff's work at the time of the accident was outside the scope of the general contractor's contract"]; *Reid v Lehrer McGovern Bovis*, 248 AD2d 324, 324 [1st Dept 1998] [plaintiff was working pursuant to prime contractor's contract]).

Regardless of the above however, AMEC may still be held liable under Labor Law §200 and common law negligence because issues of fact exist as to whether AMEC was involved in creating the dangerous condition, or had notice of it and failed to guard against it or warn of the dangers (*see Morales* v *Spring Scaffolding, Inc.*, *supra*; *Magrath v J Migliore Constr. Co., Inc.*, 139 AD2d 893 (4th Dept 1988).

AMEC, as general contractor, entered into a subcontract with Hillside, pursuant to which Hillside designed, constructed, and installed the catwalk. Hillside's field supervisor, Guido, testified that when he and the other Hillside employees left the site after completing their work on the catwalk, the threshold was in place, and there was no gap between the catwalk and the building. Guido also testified that AMEC's project manager, Anthony Librizzi, personally inspected the catwalk when it was completed (Guido [Hillside] Depo., at 39; Greenhaw [Hillside] Depo., at 122 [it was "customary for AMEC to inspect the work that Hillside did before making payment to Hillside for that money"]; *but see* Mow [AMEC] Depo., at 161 [if "inspection" means

seeing that "every nut and bolt is in place, that's, in essence, part of the subcontractor's contractual responsibilities"]). According to Guido, the threshold was in place during and after Librizzi's inspection, and Librizzi told Guido that "we did a nice job" (Guido [Hillside] Depo., at 41).

In addition, Hillside's witnesses testified that the threshold would have been attached by welding (Greenhaw [Hillside] Depo., at 122; Guido [Hillside] Depo., at 61-63), which would result in a permanent bond (Guido Depo., at 51). The means of breaking that bond include "[a] torch, a cutting wheel on a grinder, a grinder, grinding wheels, sawzall" (*ibid.*). Breaking the weld would leave some indication of the removal of the threshold (*id.* at 52).

In opposition, plaintiff and No. 5 Times Square/Boston Properties tender photos taken by plaintiff the day after his accident, that they maintain are evidence that indicates that the threshold had not been installed (Plaintiff's 4/13/07 Aff., ¶¶ 4, 5 ["many years in construction industry" made him aware that breaking of weld would leave visible signs, but there were "no signs or indications whatsoever that an angle iron or metal plate ever had been welded and then removed"]; Sassower [plaintiff's counsel] 4/18/07 Affirm., ¶¶ 57, 58 [photos show no evidence that weld was broken; "reasonable inference" that threshold was not installed]; Huang [No. 5 Times Square/Boston Properties' counsel]

3/13/07 Affirm., ¶ 31 ["reasonable inference" that threshold was never installed and removed because removal would have left signs of excision, and no sign of removal in photos]; Huang [No. 5 Times Square/Boston Properties' counsel] 4/12/07 Affirm., ¶¶ 9, 13 [same; "interested witnesses" testified that threshold was installed; no corroborative evidence]).

However, Guido also testified concerning the pictures shown to him during his deposition. After considering those pictures, Guido attested: "I don't actually see the area where we were welding in any of these pictures" (Guido [Hillside] Depo., at 53).

Although "[a]n attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance" (*Warrington v Ryder Truck Rental*, 35 AD3d 455, 456 [2d Dept 2006]), the evidence of plaintiff and Hillside's witnesses raises triable issues of fact concerning whether Hillside actually installed the threshold, and whether the photos relied upon by the opponents of AMEC's motion in fact show the area on the catwalk where plaintiff suffered his injuries.

According to AMEC, the construction of the catwalk fell within the scope of the No. 5 Times Square/AMEC contract (Mow [AMEC] Depo., at 25, 29-30). No. 5 Times Square/Boston Properties concurs, and alleges that, as general contractor under the No. 5 Times Square/AMEC contract, "it was AMEC's duty to

ensure that Hillside performed its work in accordance with the plans and specifications, including, specifically, ensuring that the third floor catwalk was built with the subject angle iron properly in place" (Kennedy [No. 5 Times Square/Boston Properties] 3/13/07 Aff., ¶ 12). "The actual construction work of the subcontractors and overall safety of the project site was the responsibility of and entrusted to AMEC pursuant to [the No. 5 Times Square/AMEC contract]" (*id.*, ¶ 14).

In considering the above, it is clear that there are questions of fact concerning whether AMEC was involved in the creation of the dangerous condition, and/or whether it had actual notice of it and failed to guard against it or warn of the dangers.

In order for a party to have constructive notice of a dangerous condition, the 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]; *see also Pesa v General Electric Co.*, 300 AD2d 53, 53-54 [1st Dept 2002]). Here, there are issues of fact concerning "whether the defective condition dated from the [conclusion of Hillside's work on the catwalk]" (*see Mendez v Union Theological Seminary in City of New York*, 17 AD3d 271, 271 [1st Dept 2005]), and whether AMEC's inspection of the catwalk

prior to paying Hillside for its work would have given AMEC notice of the gap, if it existed at that time.

Accordingly, the part of AMEC's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Labor Law § 241 (6)

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to persons employed in construction, excavation, or demolition work, regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]; *see also Ferrero v Best Modular Homes*, 33 AD3d 847, 851 [2d Dept 2006]). Since AMEC was neither the owner nor the general contractor for plaintiff's work, it cannot be held liable to plaintiff under section 241 (6), and the part of AMEC's motion which seeks summary judgment dismissing this claim is granted (*see Wong v New York Times Co.*, 297 AD2d 544, 549, *supra; Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47, [1st Dept 2005]).

The Cross Claims Against AMEC

No. 5 Times Square/Boston Properties, Spectacolor, OHM and Hillside have all brought claims against AMEC for contribution and/or common-law indemnification. "Contribution is available where 'two or more tortfeasors combine to cause an

injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' [citations omitted]" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]).

Since this court has found questions of fact concerning whether AMEC was negligent, the part of AMEC's motion which seeks summary judgment dismissing Spectacolor, OHM, and Hillside's cross claims sounding in contribution and/or common-law indemnification is denied.

No. 5 Times Square/Boston Properties and Spectacolor have also brought cross claims against AMEC for contractual indemnification. As discussed above, the claim by No. 5 Times Square/Boston Properties has been dismissed. There is no evidence that any contract existed between AMEC and Spectacolor. Thus, that part of AMEC's motion which seeks summary judgment dismissing No. 5 Times Square/Boston Properties' and Spectacolor's contractual indemnification cross claims is granted.

No. 5 Times Square/Boston Properties also brings a cross claim against AMEC for breach of contract by failure to procure insurance. However, as discussed above, this particular issue is not addressed in the parties' papers on these motions. Having failed to make its prima facie showing of entitlement to summary judgment, the part of AMEC's motion which seeks summary judgment dismissing No. 5 Times Square/Boston Properties' breach of contract cross claim is denied.

AMEC's Cross Claims for Indemnification Against Hillside

In its first cross claim in its answer to the complaint, AMEC asserts a claim for contractual and common-law indemnification against its co-defendants, including Hillside. As set forth above, AMEC has not yet established its entitlement to common-law indemnification because there are issues of fact concerning its possible negligence. Thus, summary judgment on its cross claim for common-law indemnification against Hillside is denied.

The AMEC/Hillside change order was issued "pursuant and subject to the terms and conditions" of the AMEC/Hillside subcontract (AMEC/Hillside Change Order, at 2 of 2). The indemnification provision of the AMEC/Hillside subcontract states, in pertinent part:

> To the extent permitted by law, Subcontractor [Hillside] shall indemnify, defend, save and hold ... the Contractor [AMEC] ... harmless from and against all liability, damage, loss,

> claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with the performance of Work by the Subcontractor, or any act or omission of Subcontractor

(AMEC/Hillside Subcontract, ¶ 5 [a]). Since one seeking contractual indemnification must establish that it was free from negligence, AMEC cannot yet prevail on its cross claim for contractual indemnification against Hillside.

AMEC's second cross claim against its co-defendants, including Hillside, alleges that at the time of plaintiff's accident, "there existed contract(s) among and between the above-named co-defendants and other parties" (AMEC Answer, ¶ 19). AMEC further alleges that it was a third-party beneficiary of these contracts, that its co-defendants breached the contracts, and that it is therefore entitled to be indemnified pursuant to those contracts (*id.*, ¶¶ 20-22).

> A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost [internal quotation marks and citation omitted]

(*State of California Public Employees' Retirement System v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]).

It goes without saying that a signatory to a contract

cannot be a third-party beneficiary of its own contract (*see Rockowitz v Raab*, 132 AD2d 916, 918 [3 Dept 1987] [original signatory was "hence not a 'third party'"]). As the only party which contracted with Hillside was AMEC, AMEC cannot establish the existence of a valid and binding contract between "other parties" to which it was an intended beneficiary. Therefore, summary judgment on its cross claim for contractual indemnification from Hillside must be denied.

Motion Sequence No. 003: OHM's Cross Motion for Summary Judgment Dismissing All Claims Against It, Including the Third-Party Complaint

In its third-party complaint, AMEC alleges five causes of action against OHM, sounding in contractual and common-law indemnification, contribution, and breach of contract to procure insurance.

> Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a "grave injury," or the claim is "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"

(*Rodrigues v N & S Building Contractors*, 5 NY3d 427, 429-430 [2005]). As OHM was plaintiff's employer, and the only contract AMEC had with OHM was for work other than that which plaintiff was doing at the time of his accident, and as plaintiff did not

sustain a "grave injury," the part of OHM's cross motion which seeks summary judgment dismissing AMEC's third-party claims for common-law indemnification and contribution is granted.

AMEC's contractual claims against OHM also fail, since the only contract which AMEC entered into with OHM was for work on the east fin and cornice parts of the building, not for the third-floor catwalk. Thus, the part of OHM's cross motion which seeks summary judgment dismissing AMEC's third-party complaint is granted.

The only other claims against OHM are those brought by Hillside for contribution and common-law indemnification. Plaintiff did not sustain a "grave injury" and there is no contract between Hillside and OHM (*see* Workers' Compensation Law § 11). Thus, these claims are also dismissed.

OHM's cross motion is granted in its entirety.

Motion Sequence No. 005: Hillside's Motion for Summary Judgment Dismissing the Complaint and Fourth Third-Party Complaint and All Other Claims Asserted Against It

As set forth above, as a result of the complaint being dismissed as against No. 5 Times Square/Boston Properties, the fourth third-party complaint, as well as No. 5 Times Square/Boston Properties' cross claims for contribution, common-law and contractual indemnification, and breach of contract against Hillside are dismissed. The part of Hillside's motion which seeks this relief is granted.

In its cross motion papers, plaintiff has withdrawn his claims under Labor Law §§ 240 (1) and 241 (6) as against Hillside (see Sassower [plaintiff's counsel] 4/18/07 Affirm., ¶¶ 27, 38). Thus, summary judgment dismissing these claims is also granted.

Labor Law § 200 and Common-Law Negligence

The gist of Hillside's argument concerning plaintiff's Labor Law § 200 and common-law negligence claims is that it properly designed, constructed, and installed the catwalk, including the threshold; that the completed catwalk, including the threshold, was inspected by its own field superintendent, Guido, and AMEC's project manager, Librizzi, and was found satisfactory - indeed, that Librizzi had told Guido that Hillside had done a "nice job" (Guido [Hillside] Depo., at 41); that satisfactory performance of Hillside's work was a condition precedent to its being paid (Mow [AMEC] Depo., at 50); that Hillside had been paid in full after the owner and AMEC were satisfied that Hillside's work had been completed according to the plans which had been approved by the project engineer and AMEC (Greenhaw [Hillside] Depo., at 29-30, 96-97; Muldoon [AMEC] Depo., at 146); and that, since the threshold was no longer there when plaintiff's accident happened, it must have been removed by some other party. It is undisputed that Hillside was paid in full for its work approximately two months before plaintiff's accident, and that Hillside did not return to the site after

completion of its work.

Here, contrary to Hillside's argument, even though it did not supervise plaintiff's work, it may still be liable under Labor Law §200 and common law negligence (*see* prior discussion regarding AMEC's liability under Labor Law §200 and common law negligence). Further, although Hillside maintains that it owed no duty of care to plaintiff because it had nothing to do with the protection made available to plaintiff, and because AMEC accepted the work, it has not met its burden (*see Colonno v Executive I Assoc.*, 228 AD2d 859 (3d Dept 1996). It is not unforeseeable that a defect in the installation of the catwalk, if any, could result in possible injury to a worker using the catwalk in his or her work (*see Magrath v J. Migliore Constr. Co., Inc.*, 139 AD2d 893, *supra* (summary judgment denied on common law negligence claims because questions of fact existed as to whether the subcontractor responsible for steel fabrication of catwalk, who left the site prior to plaintiff's fall, breached a duty to plaintiff by creating, or failing to guard or warn against the dangerous condition of a gap in the catwalk).[6]

Thus, there are issues of fact precluding summary judgment dismissing the Labor Law § 200 and common-law negligence claims

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[6]Contrary to Hillside's argument, *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]) is inapplicable to this case, where it is alleged that the contracting defendant created the condition which allegedly caused the injury; i.e., constructed a dangerous catwalk.

as against Hillside. It is for the trier of fact to decide whether Hillside properly installed the catwalk, given that there is no evidence that another party removed the threshold or had any reason to do so, yet the threshold was absent at the time of plaintiff's accident.

Thus, the part of Hillside's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

The Remaining Cross Claims Against Hillside

Spectacolor alleges cross claims against all its co-defendants, including Hillside, for contribution, common-law and contractual indemnification. This court has already found that issues of fact exist with respect to Hillside's possible negligence. Therefore, summary judgment in Hillside's favor dismissing Spectacolor's contribution and common-law indemnification cross claims is denied.

There is no contract between Spectacolor and Hillside. Therefore, summary judgment dismissing Spectacolor's cross claim for contractual indemnification from Hillside is granted.

As set forth above, AMEC brought cross claims against all its co-defendants, including Hillside, for contribution, common-law and contractual indemnification, and under its alleged third-party beneficiary status under its contracts with Hillside. As there are questions of fact concerning Hillside's possible

negligence, Hillside cannot obtain summary judgment dismissing AMEC's cross claims which sound in contribution and common-law indemnification.

The terms of the AMEC/Hillside change order have been set forth above. As with AMEC, Hillside cannot be granted summary judgment dismissing AMEC's contractual indemnification claim because questions of fact remain concerning Hillside's possible negligence.

However, AMEC's cross claim brought under its alleged third-party beneficiary status under the AMEC/Hillside subcontract is dismissed, and summary judgment is granted to Hillside on this claim.

CONCLUSION

Accordingly, it is

ORDERED that the parts of AMEC Construction Management, Inc.'s motion (motion sequence no. 003) which seek summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are granted; and it is further

ORDERED that the part of AMEC Construction Management, Inc.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied; and it is further

ORDERED that the part of AMEC Construction Management, Inc.'s motion which seeks summary judgment dismissing OHM

Electrical Corporation and Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc.'s cross claims against it which sound in contribution and common-law indemnification is denied; and it is further

ORDERED that the part of AMEC Construction Management, Inc.'s motion which seeks summary judgment dismissing Spectacolor Media LLC's and No. 5 Times Square/Boston Properties Limited Partnership's cross claims for contractual indemnification is granted, but summary judgment dismissing No. 5 Times Square Development LLC/Boston Properties Limited Partnership's cross claim for breach of contract is denied; and it is further

ORDERED that the part of AMEC Construction Management, Inc.'s motion which seeks summary judgment on its cross claims as against Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc. is denied; and it is further

ORDERED that OHM Electrical Corporation's cross motion (motion sequence no. 003) is granted, and the third-party complaint and all other claims against OHM Electrical Corporation are dismissed with costs and disbursements to third-party defendant OHM Electrical Corporation as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the part of No. 5 Times Square Development LLC/Boston Properties Limited Partnership's motion (motion sequence no. 004) which seeks summary judgment dismissing plaintiff's complaint is granted, and the complaint is severed and dismissed as against defendants No. 5 Times Square Development LLC/Boston Properties Limited Partnership, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the part of No. 5 Times Square Development LLC/Boston Properties Limited Partnership's motion which seeks summary judgment on its cross claim against AMEC Construction Management, Inc. for breach of contract is denied; and it is further

ORDERED that the third and fourth third-party actions, and No. 5 Times Square/Boston Properties Limited Partnership's contribution and indemnification cross claims against AMEC Construction Management, Inc. are dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiff's cross motion (motion sequence no. 004) is denied; and it is further

ORDERED that the part of Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc.'s motion (motion sequence

no. 005) which seeks summary judgment dismissing the fourth third-party complaint and the Labor Law §§ 240 (1) and 241 (6) claims in the complaint is granted; and it is further

ORDERED that the part of Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied; and it is further

ORDERED that the part of Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc.'s motion which seeks summary judgment dismissing No. 5 Times Square Development LLC/Boston Properties Limited Partnership's cross claims is granted; and it is further

ORDERED that the part of Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc.'s motion which seeks summary judgment dismissing the cross claims brought against it by AMEC Construction Management, Inc. sounding in contribution, common-law and contractual indemnification is denied, but summary judgment dismissing AMEC Construction Management, Inc.'s cross claim against Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc. for indemnification on the basis of AMEC Construction Management, Inc.'s status as a third-party beneficiary is granted; and it is further

ORDERED that the part of Maximum Security Products Corp. d/b/a Hillside Ironworks, Inc.'s motion which seeks summary

judgment dismissing Spectacolor Media LLC's cross claims for contribution and common-law indemnification is denied, but summary judgment dismissing Spectacolor Media LLC's contractual indemnification cross claim is granted.

This Constitutes the Decision and Order of the Court.

Dated: February 14, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE