Mercorella v Manmall, LLC
2008 NY Slip Op 32879(U)
October 14, 2008
Supreme Court, New York County
Docket Number: 118824/06
Judge: Louis B. York
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SCANNED ON 10/21/2008

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Mercorella

INDEX NO. 118824/06

MOTION DATE

- v -

Marmall, et al.

MOTION SEQ. NO. 003

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 is decided in accordance with the decision in motion seq #003.

~~MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION~~

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/14/08

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

---X

JOSEPH MERCORELLA,

Plaintiff,

Index No. 118824/06

- against -

MANMALL, LLC, MANHATTAN MALL, LLC, STEVE & BARRY'S, LLC, STEVE & BARRY'S MANHATTAN, LLC, STEVE & BARRY'S NEW YORK, INC., STEVE & BARRY'S NEW YORK, LLC, STRUCTURE TONE (UK) INC., STRUCTURE TONE GLOBAL SERVICES, INC., CIROCCO & OZZIMO, INC., CIROCCO & OZZIMO CONTRACTING, INC., and UNISTRUT CORPORATION,

Defendants.

---X

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

STRUCTURE TONE, INC. /I/S/H/A STRUCTURE TONE (UK) INC., STRUCTURE TONE GLOBAL SERVICES, INC.,

Third-Party Plaintiffs,

- against

EMANON ELECTRIC, INC.,

Third-Party Defendant.

---X

YORK, J.:

Motion sequence numbers 002, 003, 005, and 006 are consolidated for disposition.

This is a personal injury action arising from a workplace accident. In motion sequence number 002, defendants/third-party plaintiffs Structure Tone (UK) Inc. and Structure Tone Global Services, Inc. (collectively Structure Tone) move to strike this matter from the trial calendar and/or for an order directing discovery of the third-party action and extending the time

for summary judgment motions.

In motion sequence number 003, Structure Tone moves for summary judgment: 1) dismissing plaintiff's complaint; 2) on its cross claims for indemnification, defense, and breach of promise to procure insurance against defendants Cirocco & Ozzimo, Inc. and Cirocco and Ozzimo Contracting Inc. (collectively Cirocco); and 3) on its third-party complaint against third-party defendant Emanon Electric, Inc. (Emanon) for defense, indemnification, and failure to procure insurance.

In motion sequence number 005, defendants Steve & Barry's LLC, Steve & Barry's Manhattan, LLC, Steve & Barry's New York, LLC, Steve & Barry's New York, Inc. (collectively Steve & Barry's) moves for summary judgment dismissing plaintiff's complaint.

In motion sequence number 006, defendant Manmall LLC, Manhattan Mall, LLC (collectively Manmall), Steve & Barry's, and Structure Tone move to amend the caption to add Manmall and Steve & Barry's as third-party plaintiffs, and for summary judgment: 1) dismissing the complaint; 2) on their cross claims for defense, indemnification, and insurance procurement against Cirocco; and 3) on the third-party complaint against Emanon for defense, indemnification, and insurance procurement.

Steve & Barry's and defendant Unistrut Corporation (Unistrut) separately cross-move: 1) to vacate plaintiff's note of issue and strike this matter from the trial calendar; 2) for an order directing all parties to comply with a court order to serve a copy of plaintiff's medical records; 3) to conduct discovery of third-party defendant Emanon; and 4) to extend the time for summary judgment motions.

Plaintiff cross-moves to sever the third-party action.

I. Background

Manmall, owner of Manhattan Mall, and Steve & Barry's made a lease for the latter to rent space for a clothing store in the mall. In the lease, Manmall agreed to build out or construct a space for the store. Manmall hired Structure Tone to act as general contractor, which hired the subcontractors, Cirocco and Emanon. Plaintiff was an electrician in the employ of Emanon. On August 2, 2005, plaintiff suffered an accident, allegedly caused by a chunk of concrete on the floor.

Rupert Heron, an employee of Structure Tone and the superintendent on the project, was deposed. Heron testified that he had the power to direct, control, and oversee the project work. He was responsible for safety on the job. Heron stated that the project required the removal of two tenants, demolition of the walls between their spaces, and completely gutting and refashioning the space for Steve & Barry's store. The finished product boasted an exposed ceiling, with the lighting structures, HVAC, and piping visible and suspended on a metal structural support grid, known as the Unistrut system.

To achieve this effect, subcontractor Liberty Demolition (Liberty), which is not a party, chopped more than 400 holes in the ceilings with hammer and chisel. The chopping produced a great deal of debris that fell to the ground from a height of 20 to 30 feet. Heron testified that he watched all the holes being chopped, and that no one ever placed a drop cloth or other material to catch the debris or prevent it scattering upon impact with the floor. No barricades were set up to prevent the debris from scattering into the work area of others subcontractors at the site at the same time.

The holes exposed the I beams embedded in the concrete. After the holes were made,

employees of defendant Unistrut attached the Unistrut support frame to the I beams, to create an open grid effect. Then Cirocco patched the holes. The patching work also produced falling debris. Heron testified that the patching did not produce concrete debris. Heron stated that no precautions were taken about the debris, which fell from the ceiling and splattered on the floor. Electrical and other trades worked within 20 feet of where the patching was proceeding.

Heron stated that the subcontractors were responsible for the removal of the debris caused by their work. They would stockpile their debris and Angel Soto would remove it. Angel Soto, a Structure Tone employee, was deposed. He said that Heron directed his work. He said it was his job to clean up debris on the job site. If a subcontractor did not clean up its work, Soto removed the debris. Heron testified that he never directed Soto to clean up debris that fell from the ceiling and that he never saw Soto clean up such debris.

Plaintiff testified that he was a foreman for Emanon, and that he supervised others and performed labor himself. Plaintiff stated that he took direction from Heron. Plaintiff stated that he was told that Structure Tone was responsible for cleaning the site and keeping it clear of debris. During his six weeks on the job, plaintiff saw only Structure Tone cleaning up. On some occasions before his accident, plaintiff complained to Heron and Soto about the chunks of concrete all over the job site.

On August 2, 2005, Cirocco was patching the ceiling. Plaintiff laid out light fixtures and conduit markings on the floor, as preparation for suspending lights from the ceiling. Plaintiff kept his tools in a lock box about four feet high and three feet wide, with caster wheels, weighing from 250 to 300 pounds. Plaintiff stated that he looked around before he pushed his lock box and saw nothing on the ground to impede his progress. Plaintiff started to push his box to the

part of the floor where he would work next. As plaintiff pushed his lock box, the front right wheel got caught in a chunk of cement, and the box stopped dead, causing plaintiff to be jerked backwards. Plaintiff states that his back was seriously hurt. He has had two operations on his back. Plaintiff stated that the chunk of cement run over by the lock box was size of a grapefruit or softball.

Plaintiff sued owner/tenant Manmall and Steve & Barry's, general contractor Structure Tone, and subcontractors Unistrut and Cirocco for violations of Labor Law §§ 240 (1), 241 (6), and 200. Cirocco has not appeared in this action. Each of the other defendants asserted cross claims for contribution and indemnification against its co-defendants. In addition, Steve & Barry's cross- claimed against its co-defendants for breach of promise to procure insurance. Structure Tone brought a third-party action against Emanon, plaintiff's employer, for contribution, indemnification, and breach of promise to procure insurance. Emanon brought a counterclaim against Structure Tone for indemnification and contribution.

II. The Part of Structure Tone's Motion To Dismiss the Complaint (003)

Structure Tone contends that Labor Law § 240 (1) does not apply to this case. Labor Law § 240 (1), also known as the Scaffold Law, was designed to prevent those accidents in which the scaffold or other protective device proves inadequate to prevent the worker from sustaining an injury directly flowing from the application of the force of gravity to an object or person (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001]). While the Scaffold Law protects workers against the hazards of falling from heights or being struck by falling objects (*Melber v 6333 Main St., Inc.*, 91 NY2d 759, 763 [1998]), it does not encompass every danger that may be connected in some tangential way with the effects of gravity (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93

NY2d 914, 915-916 [1999]). Here, assuming the truth of plaintiff's assertion that an object that fell from a height caused his accident, his injury did not directly flow from the application of gravity to his person or to the object that fell. The chunk of concrete did not fall on plaintiff. Nor did plaintiff fall from a height or otherwise, and he was not pulled or lifted. His injury does not fall within the purview of the Scaffold Law. The cause of action predicated upon the Scaffold Law must be dismissed.

Labor Law § 241 (6) imposes a nondelegable duty upon an owner or general contractor to provide for the reasonable and adequate protection of laborers on construction sites (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]). To state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 [1993]). Plaintiff's bill of particulars alleges violations of 12 NYCRR 23-1.7 (e) (1) and (2), 23-1.19, and 23-3.3.

Industrial Code 12 NYCRR 23-1.7 (e) is specific enough to support a section 241 (6) claim (*Farina v Plaza Constr. Co.*, 238 AD2d 158, 159 [1st Dept 1997]). The code concerns "[t]ripping and other hazards" (12 NYCRR 23-1.7 [e]). Part (e) (1) provides that passageways must be kept free of debris. Structure Tone alleges that plaintiff's accident did not take place in a passageway, but in a work space. Plaintiff does not dispute this allegation or argue that he was injured in a passageway. Section (e) (1), therefore, does not apply.

Section (e) (2) of the rule provides that working areas must be kept free from accumulations of dirt and debris. Structure Tone argues that the section is not applicable because plaintiff testified that, when he arrived at work at seven in the morning on the day of the accident,

the floor was clean. But plaintiff also stated that before his accident he saw debris on the ground, although not the chunk of cement that caught the wheels of his lock box. Whether there was debris on the floor, whether this constituted a violation of the code, and whether this debris caused the accident, are all issues of fact.

The other Industrial Code provisions cited in plaintiff's bill of particulars are not mentioned in its motion papers and are deemed abandoned (*see Keane v Chelsea Piers, L.P.*, 16 Misc 3d 1116[A], *7, 2007 NY Slip Op 51443[U] [Sup Ct, NY County 2007]). Structure Tone is entitled to dismissal of those 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 (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). If an accident results from the method of work, to be held liable under Labor Law 200, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Where liability is premised on supervisory control, it must be control over the work in which plaintiff was engaged at the time of his injury (*Wong v New York Times Co.*, 297 AD2d 544, 549 [1st Dept 2002]). If a defective condition is alleged to be the cause of a worker's injuries, the worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it (*Murphy v Columbia Univ*, 4 AD3d 200, 202 [1st Dept 2004]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]). Supervision and control of the injured worker is not required to prove that a defective condition existed (*see Murphy*, 4 AD3d at 202). However, there must be evidence that the general contractor had enough control over the

work site to have notice of the dangerous condition (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]).

Plaintiff stated that Structure Tone directed him (Structure Tone motion, Ex. 2, Deposition Transcript [Tr.], at 19). But he did not state explicitly that it controlled his method of working. Heron, on the other hand, stated that he controlled how the subcontractors did their work (*id.*, Ex. 5, Tr., at 12-13, 75-76). Therefore, this case presents a question of whether Structure Tone had the authority to control the activity bringing about the injury, assuming that plaintiff's work brought about the injury, which presents another factual question.

Plaintiff stated that Structure Tone was responsible for cleaning up the job site, while he and his crew were responsible for their own materials and "keeping it orderly" (*id.* Ex. 2, Tr., at 25). Cleaning up debris was Structure Tone's responsibility (*id.* at 26). Heron testified that subcontractors Liberty and Cirocco cleaned up the debris created by their work (*id.*, Ex. 5, Tr., at 64-65, 75). Heron never told Soto to clean up debris resulting from patching or chopping the ceiling (*id.* at 85-86). He also stated that Soto's job was to clean what the subcontractors did not clean (*id.* at 85).

Soto stated that Heron directed his work (Ex. 9, Tr., at 9). Soto "maintained a clean job" (*id.* at 10). He cleaned the floor (*id.* at 11, 13). He did not clean concrete from the floor because that was the responsibility of the trade that produced the concrete and the trades did their own cleaning (*id.* at 12). If the trades left things behind, he would clean up after them (*id.* at 22). Heron told him that if the trades did not clean up, he had to do it (*id.* at 22-23).

The parties' depositions do not conclusively establish that Structure Tone had no responsibility to clean the floor and that it lacked notice of the alleged dangerous condition.

Structure Tone bears the burden of establishing the lack of notice as a matter of law (*see Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). From the facts alleged here, one could conclude that Structure Tone should have discovered the littered floor and cleaned it (*see Gonzalez v American Oil Co.,* 42 AD3d 253, 256 [1st Dept 2007]). Summary judgment is not warranted simply because the worker, like plaintiff in this case, is unable to identify with precision what debris was on the floor, how long it was there, and the manner in which it came to be on the floor (*Kesselman v Lever House Rest.,* 29 AD3d 302, 305 [1st Dept 2006]). The motion to dismiss plaintiff's Labor Law § 200 claim is denied.

III. The Part of Structure Tone's Motion for Indemnification and Breach of Contract (003)

Structure Tone seeks summary judgment against co-defendant Cirocco and third-party defendant Emanon for conditional indemnification, defense, and failure to procure insurance.

The contracts between Structure Tone and Emanon, and Structure Tone and Cirocco provide, in pertinent part:

> To the fullest extent permitted by law, subcontractor will indemnify and hold harmless [Structure Tone] and Owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by or for Subcontractor ... . Subcontractor will defend and bear all costs of defending any actions or proceedings brought against [Structure Tone] and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default

(Structure Tone motion, Ex. F, Emanon contract ¶ 7; Cirocco contract, ¶ 11.2).

The contracts also contain the subcontractors' promise that they will procure commercial general liability insurance for coverage worth at least $4 million per occurrence and aggregate.

Coverage shall "encompass ... Endorsement naming Structure Tone Inc. as Additional Insured and endorsements of specified owners and other Additional Insureds as may be required from time to time" (*id.*, ¶ 3.2).

Attached to Structure Tone's motion are two certificates of insurance. The certificate of insurance naming Cirocco as the insured party names Structure Tone as additional insured. The certificate for Emanon does not name Structure Tone as additional insured, but does name Manmall, Steve & Barry's, and nonparties HRO International, Argent Ventures, and Cushman & Wakefield. These last three entities are associated with Manmall. The certificates state that they are issued for information only and confer no rights on the certificate holders. Both certificates note coverage at $1 million per occurrence/$2 million aggregate.

Turning first to the indemnification question, liability under Labor Law § 241 (6) is nondelegable. This means that general contractors and owners are liable for a worker's injuries even if they did no wrong and the injury was solely due to another's wrong (*Rizzuto,* 91 NY2d at 349-350). In such a case, the liability is vicarious. A general contractor who must pay damages and legal fees because of vicarious liability is entitled to be indemnified by the party whose negligence actually caused the laborer to suffer an injury (*Tighe v Hennegan Constr. Co.,* 48 AD3d 201, 202 [1st Dept 2008]).

The indemnification provisions in the contracts at issue here clearly provide that the subcontractors will indemnify Structure Tone for injuries caused by their negligence. Structure Tone raises the issue of whether the indemnification provisions provide for partial as well as full indemnification. They do. The phrase in the indemnification section, "'to the fullest extent permitted by applicable law,'" means that if Structure Tone is found partially liable for the

accident it may be partially indemnified by the other negligent party (*see Dutton v Charles Pankow Bldrs., Ltd.*, 296 AD2d 321, 322 [1st Dept 2002]). At the same time, if Structure Tone's liability is wholly vicarious and it engaged in no active negligence that contributed to the accident, it would be entitled to full indemnification by the negligent party.

To be entitled to an order of conditional indemnification, Structure Tone would have to establish that it was not negligent or it would have to show the degree of its partial negligence and the degree of the subcontractor's negligence. At this point, the relative culpability, if any, of Structure Tone and the subcontractors has not been determined. Therefore, a grant of conditional indemnification is not appropriate.

Structure Tone wants the subcontractors to pay for its defense, as promised in the contracts. Although, as often proclaimed, the duty to defend is broader than the duty to indemnify (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]), this rule is generally applicable to insurers. Where the party promising defense is not an insurer, the duty to defend is no broader than its duty to indemnify and is limited by the contractual language (*Viacom, Inc. v Philips Elec. N. Am. Corp.*, 16 AD3d 215, 215-216 [1st Dept 2005]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]). Under the contracts in this case, the subcontractors were to defend and indemnify against damages caused by their own whole or partial negligence. As with the duty to indemnify, the duty to defend depends upon whether the subcontractors are found negligent.

Regarding the failure to procure insurance, Structure Tone contends that unless the subcontractors produce evidence that they actually procured the promised insurance, summary judgment should issue against them for failure to do so.

[* 13]

A subcontractor's breach of a promise to procure insurance for the benefit of a general contractor renders the breacher liable for all the resulting damages, including the general contractor's liability to the injured plaintiff (*Kinney v G. W. Lisk Co.*, 76 NY2d 215, 219 [1990]). This would be so, even if the general contractor's sole negligence caused plaintiff's injuries (*id.*; *Turillo v Helmsley*, 251 AD2d 243, 244 [1st Dept 1998]). The purpose of insurance is to protect the insured regardless of its own misconduct. Thus, a contract to procure insurance is distinct from a contract to indemnify (*Ribadeneyra v The Gap, Inc.*, 287 AD2d 362, 363 [1st Dept 2001]; *Mathew v William L. Crow Constr. Co.*, 220 AD2d 490, 491 [2d Dept 1995]). Summary judgment may be granted on a claim of failing to procure insurance, without awaiting a final determination as to whose negligence, if anyone's, caused the accident (*id.*).

A party who procures the promised insurance may still be liable for a breach, if the insurance procured does not match the coverage promised (*see Nrecaj v Fisher Liberty Co.*, 282 AD2d 213, 214 [1st Dept 2001]). The certificates of insurance attached to Structure Tone's motion show that insurance purchased by the subcontractors was less than the promised coverage, assuming that the subcontractors purchased insurance. Whether they did is not certain. Emanon and Cirocco have not responded to Structure Tone's motion, and certificates of insurance are not conclusive proof that the insurance exists and are not contracts to insure (*see Penske Truck Leasing Co. v Home Ins. Co.*, 251 AD2d 478, 479-480 [2d Dept 1998]).

Structure Tone, therefore, is entitled to summary judgment on the issue of liability against Emanon for failing to procure insurance. While the third-party complaint against Emanon contains a cause of action for breach of promise to buy insurance, no such cross claim is asserted against Cirocco. Summary judgment against Cirocco is not granted.

Structure Tone's request for an inquest to determine damages is denied. Although summary judgment on liability may be granted now, there is no way to determine the damages until plaintiff's trial is over. There is also the consideration that where the general contractor has procured its own insurance, the breaching party is required to reimburse it only for out of pocket expenses (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 115 [2001]; *International Couriers Corp. v North Riv. Ins. Co.*, 44 AD3d 568, 570 [1st Dept 2007]). If Structure Tone has its own insurance, the subcontractors' damages for failing to procure insurance will be reduced.

IV. Steve & Barry's Motion to Dismiss the Complaint (005)

Steve & Barry's moves for summary judgment dismissal on the bases that it was not an owner as defined in the Labor Law when the accident occurred, and that it never had notice of a defective condition.

Steve & Barry's and Manmall entered into a lease dated May 1, 2005. The lease defined Commencement Date as the "date possession of the Premises is made available to Tenant, with the Landlord's Initial Construction (as hereinafter defined) substantially complete" (Steve & Barry's motion, Ex. G, Lease, ¶ 1, D). Rent was to commence the earlier of the 75th day after the Commencement Date or the date that the tenant opened for business (*id.*, ¶ 1, E). The landlord's initial construction was the work the landlord would perform to prepare the premises for the tenant's initial occupancy (*id.*, Ex. B to the lease, ¶ 1, C). Substantial completion meant the completion of the landlords' initial construction, except for punch-list items that do not prevent the tenant's initial work or prevent the tenant from operating its business on the premises (*id.*, ¶ 1, E). The tenant would not take possession until after substantial completion (*id.*).

In the lease, the landlord appointed one Eric Anderson to act as its representative in all matters related to the landlords' initial construction, and the tenant appointed one Dave Oberdorfer (*id.* ¶ 1, B).

Plaintiff had his accident in August 2005. Steve & Barry's director of real estate, Douglas Calvin, testified during his deposition that the store opened in November 2005 (Steve & Barry's motion, Ex. E, Tr., at 8). He stated that the landlord, Manmall, was responsible for building the store in the landlord phase of the renovation (*id.* at 12-13). Steve & Barry's took no part in the landlord phase of the construction, which ended in October 2005 (*id.* at 13). August 2005 was within the landlord phase (*id.*).

Calvin stated that a Steve and Barry's employee, Dave Oberdorfer, who is no longer with the company, visited the construction site once a month during the landlord phase of work to assess the progress (*id.* at 16-17). Calvin stated that Oberdorfer gave input into the design of the store, but not as to the construction or build out and did not direct any work (*id.* at 17-18).

Manmall's representative, John DeMaso, was deposed. At the time of the accident, DeMaso was an employee of Manmall's property manager, Cushman & Wakefield. DeMaso stated that Steve & Barry's began occupying the premises in September 2005 and the store opened in October 2005 (Steve & Barry's motion, Ex. C, Tr., at 56, 57).

For purposes of the Labor Law, a lessee of a property under construction is deemed an owner and thus subject to liability for a breach of the labor law (*Kane v Coundorous,* 293 AD2d 309, 311 [1st Dept 2002]). On the other hand, an out-of-possession lessee who neither contracted for nor supervised the work and had no authority to exercise control over the work is not considered an owner (*Saaverda v East Fordham Road Real Estate Corp.,* 233 AD2d 125, 126 [1st

Dept 1996]). In this case, Manmall contracted for the work. At the time that it was performed, as shown by the provisions of the lease and the deposition testimonies, Steve & Barry's was not in possession of the premises. Therefore, Steve & Barry's was not an owner under the Labor Law.

In addition, the deposition testimony and the lease are sufficient to show that Steve & Barry's was not in a position to possess notice of the alleged dangerous condition. "[T]he fact that [the owner] may have dispatched persons to observe the progress and method of the work does not render it actively negligent inasmuch as this sort of activity does not bespeak supervision of the kind which would render a property owner liable at common law" for plaintiff's injuries (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). There is no evidence that Steve & Barry's exercised this sort of supervision over the work site. The entire complaint must be dismissed as to this particular defendant.

V. Structure Tone's, Manmall's, and Steve & Barry's Motion to Dismiss the Complaint and for Indemnification and Failure to Procure Insurance (006)

This motion is made by amended notice of motion. While it appears to be an amended version of Structure Tone's motion, the motion has a separate motion sequence number.

Structure Tone's part in this motion has already been discussed.

As for Manmall, the Labor Law § 241 (6) claim cannot be dismissed. As an owner, Manmall is vicariously liable for any negligence. Liability under Labor Law § 200 depends upon whether Manmall controlled plaintiff's work or was in a position to take notice of the alleged dangerous condition. Plaintiff nowhere alleges that Manmall controlled his work.

As stated above, DeMaso, who testified on behalf of Manmall, was employed by

Cushman & Wakefield, Manmall's property manager. DeMaso stated that he inspected the worksite from time to time to get a general idea of the progress of the construction (Steve & Barry's motion, Ex. C, Tr., at 28-29). He stated that he never spoke to anyone from Manmall and instead communicated with Argent Ventures or HRO International (*id.* at 63-64). HRO International was Manmall's asset manager (*id.* at 17). Argent Ventures was the employer of Anderson (*id.* at 34), the person named in the lease as Manmall's representative. DeMaso did not know the relationship between his employer and Argent Ventures (*id.* at 60).

DeMaso stated that no one from Manmall oversaw the construction (*id.* at 33). He stated that no one from his particular employer, Cushman & Wakefield, had a representative on the job site (*id.*). He did not know if Anderson went to the job site on a daily basis (*id.* at 42). Heron, Structure Tone's representative, testified that he was in charge of the work site. He also testified that his contact at Manmall was at the site on a daily basis (Structure Tone motion, Ex. D, Tr., at 112-113). The evidence does not establish that Manmall "had no authority to control the allegedly defective condition of the work site" (*Piazza v Frank L. Ciminelli Constr. Co.,* 2 AD3d 1345, 1349 [4th Dept 2003]). Its motion to dismiss the Labor Law § 200 claim is denied.

Manmall and Steve & Barry's argue that they are entitled to indemnification from Emanon and Cirocco. The contracts between Structure Tone and the subcontractors provide that subcontractor will defend and indemnify Structure Tone and owner against damages incurred by reason of the subcontractor's act or omission. For indemnification purposes, Manmall, as owner, is in the same position as Structure Tone. Manmall would be entitled to indemnification and defense to the extent that its liability for plaintiff's accident is vicarious.

Since Steve & Barry's is not an owner, the contractual provision indemnifying owners

does not apply to it. It asks for common-law indemnification of attorneys' fees incurred in defending against plaintiff's claim.

To establish a claim for common-law indemnification, the one seeking indemnity must prove that its liability is purely statutory or vicarious (*Tighe,* 48 AD3d at 202; *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]). Here, the complaint must be dismissed in regard to Steve & Barry's. Given that Steve & Barry's will not become directly or vicariously liable to plaintiff, it is not entitled to be indemnified against attorneys' fees by any party who will become liable for damages by reason of negligence or otherwise. It must pay its own attorneys' fees (*see Chapel v Mitchell,* 84 NY2d 345, 348-349 [1994]). Common-law indemnity requires that a duty run from the proposed indemnitor to the indemnitee (*Raquet v Braun,* 90 NY2d 177, 183 [1997]). The subcontractors have no duty towards Steve & Barry's.

As for insurance, the contracts state that subcontractor will procure insurance for Structure Tone and "specified owners and other Additional Insureds as may be required from time to time" (Structure Tone motion, Ex. F, ¶ 3.2 [e]). With the exception of Structure Tone, the contracts do not clearly indicate for whom the subcontractors were to obtain insurance. Although Emanon's certificate of insurance lists Manmall and Steve & Barry's as insured parties, that is not enough for a determination that subcontractors promised to procure insurance for them. The motion for failure to buy insurance is denied.

Manmall and Steve & Barry's seek to be added as third-party plaintiffs to the third-party action. The motion is granted.

VI. Structure Tone's Motion to Strike this Action from the Trial Calendar and/or for Discovery of the Third-Party Action and to Extend Time for Summary Judgment Motions

(motion 002) and the Cross Motions

Structure Tone moves to strike this action from the trial calendar and/or for an order directing disclosure of the third-party action and to extend the time for summary judgment motions.

Unistrut and Steve & Barry's cross-move separately to vacate the notice of trial, to strike the action from trial calendar, for an order directing all parties to comply with a court order to serve the reports of plaintiff's physical examinations, for an order directing discovery of the third-party action, and to extend the time to file summary judgment motions.

Plaintiff cross-moves to sever the third-party action.

This action commenced on December 20, 2006. On April 18, 2007, a preliminary conference order issued. Under the order, all impleaders had to be completed on or before September 7, 2007, the note of issue had to be filed by November 14, 2007, and defendants had to serve their CPLR 3101 (d) disclosure within 60 days of the filing of the note of issue.

Structure Tone served the third-party complaint on the third-party defendant on June 18, 2007. Issue was joined on October 22, 2007 when Emanon served its answer. Discovery of Emanon has not been conducted. Plaintiff filed the note of issue and certificate of readiness on October 10, 2007. Defendants contend that these notices should be vacated because the certificate of readiness falsely states that discovery was finished. Plaintiff argues that Structure Tone's commencement of the third-party action was untimely. Plaintiff argues that the impleader was complete only when issue was joined. Per the court order, therefore, the impleader was late. That was not the Court's intention. By completed, the Court meant when the third-party plaintiff effected service. Therefore, the third-party action was timely and is not

dismissed.

Regarding Emanon, Structure Tone asserts that discovery, such as depositions, are needed. Structure Tone also stresses that the amount of discovery needed is small and that it will not take much time. In reliance on this assertion, the note of issue will not be vacated and the matter will not be stricken from the trial calendar. Discovery of Emanon should proceed and should be completed within two months after notice of entry of this order has been served on the parties. The parties have two months after that to move for summary judgment. The defendant who ordered the examination of plaintiff should serve a copy of the reports on the other defendants, as ordered in the preliminary conference order.

VII. Conclusion

Based on the foregoing, it is hereby

ORDERED that so much of the motion by defendants/third-party plaintiffs Structure Tone (UK) Inc. and Structure Tone Global Services, Inc. (collectively Structure Tone) (motion sequence number 002) as seeks to strike this matter from the trial calendar is denied; and it is further

ORDERED that so much of the motion by Structure Tone (motion sequence number 002) as seeks an order directing discovery of the third-party action and extending the time for summary judgment motions is granted, and said discovery shall be completed within two months of Structure Tone serving copies of this order with notice of entry upon the other parties, and summary judgment motions shall be submitted within two months after discovery is completed; and it is further

ORDERED that so much of the motion by Structure Tone (motion sequence number 003)

for summary judgment

(1) dismissing plaintiff's complaint is granted to the extent that plaintiff's Labor Law § 240 (1) claim, and Labor Law § 241 (6) claim insofar as it is premised on 12 NYCRR 23-1.7 (e) (1), 12 NYCRR 23-1.19, and 12 NYCRR 23-3.3, are severed and dismissed, and the motion is otherwise denied;

(2) on the cross claims for indemnification and defense and breach of promise to procure insurance against defendants Cirocco & Ozzimo, Inc. and Cirocco and Ozzimo Contracting Inc. (collectively Cirocco) is denied;

(3) on the third-party claim against third-party defendant Emanon Electric, Inc. (Emanon) for defense and indemnification is denied;

(4) on the third-party claim against third-party defendant Emanon for breach of promise to procure insurance is granted on liability, and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein;

and it is further

ORDERED that the motion by defendants Steve & Barry's LLC, Steve & Barry's Manhattan, LLC, Steve & Barry's New York, LLC, Steve & Barry's New York, Inc. (collectively Steve & Barry's) (motion sequence number 005) for summary judgment dismissing plaintiff's complaint is granted, and the complaint is hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that so much of the motion by defendants Manmall LLC, Manhattan Mall, LLC (collectively Manmall), Steve & Barry's, and Structure Tone (motion sequence number

006) as seeks to amend the caption to add Manmall and Steve & Barry's as third-party plaintiffs is granted; and it is further

ORDERED that so much of the motion by Manmall, Steve & Barry's, and Structure Tone (motion sequence number 006) as seeks summary judgment dismissing the complaint

(1) is granted as against Steve & Barry's as provided in the part of this order dealing with motion sequence number 005;

(2) is partly granted and partly denied as against Structure Tone and Manmall as provided in the part of this order dealing with motion sequence number 003;

and it is further

ORDERED that so much of the motion by Manmall, Steve & Barry's, and Structure Tone (motion sequence number 006) as seeks summary judgment on cross claims for defense, indemnification, and failure to procure insurance against Cirocco is denied; and it is further

ORDERED that so much of the motion by Manmall, Steve & Barry's, and Structure Tone (motion sequence number 006) as seeks summary judgment on the third-party complaint against Emanon for defense, indemnification, and breach of promise to procure insurance is

(1) denied as to Steve & Barry's;

(2) is granted as to Manmall and Structure Tone on liability only, and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein, and is otherwise denied;

and it is further

ORDERED that the separate cross motions by Steve & Barry's and defendant Unistrut Corporation (Unistrut)

(1) to vacate plaintiff's note of issue and strike this matter from the trial calendar is denied;

(2) for an order directing all parties to comply with a court order to serve a copy of plaintiff's medical records is granted and such service shall be done forthwith,

(3) to conduct discovery of third-party defendant Emanon and to extend the time for summary judgment motions is granted and said discovery and motions shall be conducted as provided in the part of this order dealing with motion sequence number 002;

and it is further

ORDERED that plaintiff's cross motion to sever the third-party action is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 10/14/08

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.