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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 101607/2006

FERNANDEX, LUIS

VS.

SP WEST 33-34 LLC

SEQUENCE NUMBER : # 003/004

SUMMARY JUDGMENT

INDEX NO. 101607-06

MOTION DATE

MOTION SEQ. NO. #003/004

MOTION CAL. NO.

re read on this motion to/for 3 cross-motions for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	11, 12, 13, 14, 16, 17, 18
Replying Affidavits	19, 20, 21, 22, 23, 24, 26

Cross-Motion: ☒ Yes ☐ No 5, 6, 7-8, 9-10

Upon the foregoing papers, it is ordered that ~~this~~ these motions + cross-motions for summary judgment are decided in accordance with the attached memorandum decision.

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

FILED
OCT 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/14/08

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: PART 36

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LUIS FERNANDEZ,

Plaintiff,

-against-

SP WEST 33-34 LLC, STONEHENGE MANAGEMENT LLC, E.W. HOWELL CO., INC. and MUSIC CHOICE,

Defendants.

----------x

MUSIC CHOICE,

Third-Party Plaintiff,

-against-

THE MNM GROUP, INC.,

Third-Party Defendant.

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Index No.: 101607/06

Motion Seq. No.: 003 & 004

Ling-Cohan, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages sustained by a worker when he fell from a ladder while working at a construction site located at 315 West 33rd Street, New York, New York on July 6, 2005. In motion sequence number 003, plaintiff Luis Fernandez moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants SP West 33-34 LLC (SP West), Music Choice (Music) and E.W. Howell Co., Inc. (Howell). Defendant and third-party plaintiff Music cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240(1) and 241 (6) claims and all cross claims against it, as well as granting it summary judgment in its

favor on its cross claims against co-defendant Howell and third-party claims against third-party defendant The MNM Group, Inc. (MNM). Defendants SP West and Stonehenge Management LLC (Stonehenge) cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against them, as well as granting them summary judgment in their favor on their cross claims for indemnity against co-defendants Music and Howell.

In motion sequence number 004, defendant Howell moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against it.

BACKGROUND

On the date of plaintiff's accident, the building where plaintiff's accident occurred was owned by defendant SP West. Defendant Stonehenge is the company in charge of managing the subject building. Defendant and third-party plaintiff Music, a provider of music services for the cable industry, leased the second floor of the building from SP West. Seeking to renovate the premises to meet its needs, Music contracted with various entities to renovate the second floor of the building. Music hired defendant Howell to serve as construction manager and third-party defendant MNM to perform cable installation work for the project.

Plaintiff testified that, on the day of his accident, he was employed as a technician for a company named United States Information Services, Inc. (USIS), a subcontractor hired by MNM to install ceiling data lines. Plaintiff stated that, while he was working on a task involving pulling telephone and computer cables through an unfinished ceiling, he fell off a 10-foot fiberglass A-frame ladder that he was standing on and became injured. In his September 5, 2007 affidavit, plaintiff explained that, as he was descending the ladder, which was owned by USIS,

"[t]he ladder shifted and slid out from under [him] due to the cracked, uneven, unfinished and broken condition of the floor beneath the ladder" (Plaintiff's Notice of Motion, Affidavit of Luis Fernandez, at 2). In addition, plaintiff stated that, prior to his accident, he had opened the ladder, locked it into position and inspected it. Plaintiff further noted that the ladder, which had no defects, "was not tied, lashed or secured," and that he "was also not provided with any spotters to secure the ladder" (id.). During his deposition, plaintiff testified that the ladder was already in place when he approached it. Plaintiff also maintained that he received his assignments and instructions on how to perform his work solely from his supervisor.

In his affidavit of November 20, 2007, Donovan Hines (Hines), plaintiff's coworker, stated that when he went to assist plaintiff after his accident, he observed that the floor where plaintiff fell was "unfinished, uneven and that it contained cracks throughout" (Plaintiff's Reply Affirmation in Opposition to Howell's Motion, Exhibit A, Hines Affidavit).[1]

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form

[1]It should be noted that defendant Howell maintains that Hine's affidavit should not be considered by the court, as it was first presented by plaintiff in his reply papers (see Klimis v Lopez, 290 AD2d 538, 538 [2d Dept 2002] [court declined to consider report of defendant's radiologist, as it was improperly submitted for the first time in reply papers]). However, in fact, plaintiff put forth Hine's affidavit in direct opposition to Howell's motion for summary judgment dismissing plaintiff's complaint against it.

sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

THE MOTIONS AND CROSS MOTIONS ON THE COMPLAINT

LABOR LAW § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

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

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

Under the facts of this case, defendant SP WEST, as owner of the premises where plaintiff was injured, and Stonehenge, its managing agent for the premises, would be liable for any violation of Labor Law § 240 (1) that proximately caused plaintiff's injuries (See Torres v Monroe College, 12 AD3d at 262).

In addition, Music, as lessee of the premises, would also be liable for a violation of Labor Law § 240 (1) that proximately caused plaintiff's injuries. "The meaning of 'owners' under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (Kwang Ho Kim v D & W Shin Realty Corporation, 47 AD3d 616, 618 [2d Dept 2008], quoting Copertino v Ward, 100 AD2d 565, 566 [2d Dept 1984] [defendant tenant acted as an owner when it hired the plaintiff's employer pursuant to an oral contract to perform siding work on the building, from which it derived a benefit for the operation of its business]).

In addition, even if the lessee did not hire the general contractor, "[t]he statute may also apply to a lessee, where the lessee had the right or authority to control the work site" (Bart v Universal Pictures, 277 AD2d 4, 5 [1st Dept 2000]; Kane v Coundorous, 293 AD2d 309, 311 [1st Dept 2002]). "While one way to prove such control of the work site is through evidence that the lessee actually hired the general contractor, the right to control the work site may be proved by

other means, such as contractual or statutory provisions granting such right [internal citations omitted]" (Bart v Universal Pictures, 277 AD2d at 5]). Here, evidence in the record demonstrates that Music not only had an interest in the property at issue, but it also contracted to have work performed for its benefit. Thus, Music would be liable for any violation of Labor Law § 240 (1).

Howell argues that, as construction manager on the project, it is not liable for plaintiff's injuries under Labor Law § 240 (1). However, "[t]he label of construction manager versus general contractor is not necessarily determinative" (see Walls v Turner Construction Company, 4 NY3d 861, 864 [2005]). Walls v Turner Construction Company, 4 NY3d at 864). "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (id. at 863-864; Millard v Hueber-Breuer Construction Company, Inc., 4 AD3d 817, 818 [4th Dept 2004]).

When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains "'the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (Walls v Turner Construction Company, 4 NY3d at 864, quoting Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). The parties' actual course of practice is controlling for the purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of Labor Law § 240 (1) (Ortega v Catamount Construction Corporation, 264 AD2d 323, 324 [1st Dept 1999] [statutory agency found where construction manager was

understood to be in charge of the project and to have overall responsibility for the work, including matters of safety]).

A review of the record reveals that Howell was a statutory agent of the owner for the purposes of Labor Law § 240 (1), as it had an overall responsibility for the work, including matters of safety (see Lodato v Greyhawk North America, LLC, 39 AD3d 491, 493 [2d Dept 2007] [plaintiff made a prima facie showing that the construction manager was a statutory agent, where the construction manager's contract with the school district gave it the responsibility to act as a coordinator and supervisor for all work being performed at the job site, as well as the authority to demand compliance with safety requirements]). Christopher Bassignani (Bassignani), senior property manager for Stonehenge, testified that he believed that the general contractor for the work taking place on the second floor of the building was "a company named E.W. Howell" (Plaintiff's Notice of Motion, Exhibit F, Bassignani Deposition, at 37). James Wistar (Wistar), employed by Music, testified that Music "hired E.W. Howell [as] the general contractor who completed the job that we understood" (Plaintiff's Notice of Motion, Exhibit H, Wistar Deposition, at 15). Wistar also noted that the cable installation performed by USIS was not part of Howell's scope of work. Bruce Elliot (Elliot), Music's manager of information technologies, also stated that Howell was the general contractor for the renovation work at the space, and that Howell was in charge of overall safety on the project.

Robert Bassen (Bassen), Howell's project field supervisor, testified that he was responsible for controlling, overseeing and coordinating the construction work and for ensuring safety on work sites. In fact, Bassen stated that Howell has a full safety program, which includes weekly safety programs which are attended by Howell employees, as well as other contractors

that are on the site. Bassen noted that if he observed a condition on the construction site which he deemed to be unsafe, he "would jump on it" (Plaintiff's Notice of Motion, Exhibit G, Bassen Deposition, at 12). Bassen also noted that Howell's safety inspector on the project, George Grower, would make unannounced visits to the job site to check for safety issues, and that if he observed an unsafe condition, he had the power to stop the work. However, it should be noted that Bassen testified that he did not direct, control or manage any of the work performed by USIS, and that running cable lines was not within the scope of Howell's work.

Although the contract between Music and Howell refers to Howell as a construction manager, in fact, Howell's duties under said contract indicate that Howell operated as a general contractor on the project. Pursuant to the contract, Howell had the authority to hire subcontractors in connection with the project, such as plaintiff's employer USIS. In addition, Howell was to "supervise and direct the Work" and be "solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work being performed under the Contract" (Plaintiff's Notice of Motion, Exhibit L, Music/Howell Contract, Article 3.3.1 of Rider to General Conditions of the Contract for Construction, at 9).

In addition, according to Articles 3 and 10 of AIA Document A201-1997, which was incorporated by reference in section 1.2 of the Music/Howell Contract, Howell was responsible for supervising and directing all of the work being performed on the subject property, for controlling the means and methods of the work, and for ensuring job safety. Further, Howell's daily report, dated July 6, 2005, notes plaintiff's work at the location on the day of his accident.

In the instant case, plaintiff does not assert that the ladder at issue was defective, nor does

he rely on a "falling object" theory of liability, but rather alleges that defendant's failure to properly secure the ladder or to provide a safety device, led to his injuries caused when the ladder fell to its side (see also Montalvo v J. Petrocelli Construction, 8 AD3d 173, 174 [1st Dept 2004]). Plaintiff asserts that, as the ladder was inadequately secured so as to protect him while subject to an elevation-related risk, and as no other safety devices were provided to him, defendants are liable for his injuries under Labor Law § 240 (1).

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (Montalvo v J. Petrocelli Construction, Inc., 8 AD3d at 174 [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting Kijak v 330 Madison Avenue Corporation, 251 AD2d 152, 153 [1st Dept 1998]; Klein v City of New York, 89 NY2d 833, 835 [1996]; Hart v Turner Construction Company, 30 AD3d 213, 214 [1st Dept 2006] [plaintiff met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground]; Peralta v American Telephone and Telegraph Company, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]; Chlap v 43rd Street-Second Avenue Corporation, 18 AD3d 598, 598 [2d Dept 2005]).

Although the parties in this case argue at length the issue of whether the ladder shifted as

a result of being placed on an uneven and broken floor, this determination need not be reached in order to find a violation of Labor Law § 240 (1) in this case. The collapse or malfunction of a safety device creates a presumption in plaintiff's favor that the device was not good enough to provide proper protection (Blake v Neighborhood Housing Services of New York City, 1 NY3d at 289 n 8; see Panek v County of Albany, 99 NY2d 452, 458 [2003] [summary judgment appropriate to plaintiff where it was uncontroverted that a ladder collapsed beneath plaintiff, causing him to fall]; Loreto v 376 St. Johns Condominium, 15 AD3d 454, 455 [2d Dept 2005] [where it was uncontested that the plaintiff fell from an unsecured ladder which slipped out from underneath him, the Court properly determined that the plaintiff was entitled to summary judgment on the issue of liability on his cause of action to recover damages for a violation of Labor Law § 240 (1)]; Cosban v New York City Transit Authority, 227 AD2d 160, 161 [1st Dept 1996]; Aragon v 233 West 21st Street, 201 AD2d 353, 354 [1st Dept 1994]). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006]).

In addition, Labor Law § 240 (1) also requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (Wasilewski v Museum of Modern Art, 260 AD2d 271, 271 [1st Dept 1999] [defendant liable under Labor Law § 240 (1) for failure to provide other safety devices, such as a safety belt, to a worker who fell from an unsecured ladder]; Peralta v American Telephone and Telegraph Company, 29 AD3d at 493). Here, testimony in the record indicates that plaintiff was not provided with a safety harness or other protective device to protect him while working on the ladder at issue.

In their opposition to plaintiff's motion for summary judgment, defendants allege that Labor Law § 240 (1) does not apply to the facts of this case, as plaintiff was negligent in his placement of the ladder. However, it does not avail defendants to argue that the manner in which plaintiff set up the ladder was the sole proximate cause of the accident, where there is no dispute that the ladder was unsecured and no other safety devices were provided (see Orphanoudakis v Dormitory Authority of State of New York, 40 AD3d 502, 502 [1st Dept 2007]; Vega v Rotner Management Corporation, 40 AD3d 473, 474 [1st Dept 2007]). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002] [claims concerning plaintiff's failure to use the locking wheel devices and his movement of the scaffold while standing on it were not determinative, since contributory negligence is not a defense]).

In addition, plaintiff was not the sole proximate cause of his injuries, as any alleged contributory negligence attributable to him is immaterial, because the statutory violation has been established as a proximate cause of his injuries (see Figueiredo v New Palace Painters Supply Company, 39 AD3d 363, 364 [1st Dept 2007]; Valensisi v Greens at Half Hollow, LLC, 33 AD3d at 696 [where "a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it"]).

As the subject ladder failed to remain stable and erect, and as no other safety devices were provided to plaintiff by defendants so as to protect him while subjected to an elevation-related risk, plaintiff is entitled to summary judgment on the issue of liability under Labor Law §

240 (1) as against defendants SP West, Music and Howell. As a result, defendants Music, SP West, Stonehenge and Howell are not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claims as against them.[2]

LABOR LAW § 241 (6)

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

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

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized

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[2] In spite of plaintiff's urging that the court not consider defendant Music's cross motion on the ground that it was untimely, this court will consider Music's cross motion for summary judgment dismissing plaintiff's complaint along with the timely and still-pending motion of plaintiff. While a note of issue was filed on or about August 16, 2007, with the court's permission, the parties were still dealing with discovery issues through, on or about February 13, 2008. Thus, the court will consider Music's cross motion which was filed on or about October 16, 2007, arguably, one day after the 60-day deadline for filing a motion for summary judgment.

requirements for worker safety (id.).

Although plaintiff alleges multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code section 12 NYCRR 23-1.21 (b) (4) (ii), plaintiff either withdrew the Industrial Code violations in his moving papers, or the violations do not apply to the facts of this case.

Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) , relied upon by plaintiff, is specific enough to serve as a predicate for a Labor Law § 241 (6) cause of action (see Sprague v Peckham Materials Corporation, 240 AD2d 392, 394 [2d Dept 1997]), and states as follows:

> Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) states:
>
> All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Here, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii), which requires that all ladder footings be firm, as there is no evidence in the record to suggest that the subject ladder's footings were not sufficiently firm. Plaintiff testified that he inspected the ladder and it had no defects. In addition, plaintiff stated that the ladder did not move in any way when he was climbing up to pull the cables prior to his accident. Moreover, plaintiff testified that the ladder had rubber on the bottom of its legs, as well as on its rungs. Thus, plaintiff's claims based upon a violation of Labor Law § 241(6) are dismissed.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation

omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

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

Although defendants argue the issue of supervision, or lack thereof, on its part, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries allegedly arose from an unsafe condition created when the ladder was placed on an uneven concrete surface, causing the ladder to shift and plaintiff to fall and become injured. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (see Keating v Nanuet Board of Education, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but, rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200, when it had control over the work site and actual or constructive notice of the same]; Thomas v Claffee, 24 AD3d 749, 751 [2d Dept 2005]; Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, there is no indication in the record to support a finding that defendants created the unsafe condition at issue, or that they had actual or constructive notice of the same. In fact, defendants testified that the concrete surface under the ladder was not compromised in any way. Thus, defendants are therefore entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against them.

COMMON-LAW INDEMNIFICATION CLAIMS

Defendants SP West and Stonehenge cross-move for summary judgment in their favor on their common-law indemnity and contribution claims against Howell and Music. Defendant Music cross-moves for summary judgment in its favor on its common-law indemnity claims against Howell, as well as for summary judgment in its favor on its third-party common-law indemnity and contribution claims as against third-party defendant MNM.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Management, 259 AD2d 60, 65 [1st Dept 1999]; Priestly v Montefiore Medical Center/Einstein Medical Center, 10 AD3d 493, 495 [1st Dept 2004]). In the absence of any negligence, a claim for common-law indemnity may be established upon a showing that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v Two East End Avenue Apartment Corporation, 303 AD2d 556, 557 [2d Dept 2003]). "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 [internal quotation marks and citations omitted]" (Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 61-62 [2d Dept 2003]).

Here, although defendants SP West, Stonehenge, Music and Howell are vicariously liable for plaintiff's injuries under Labor Law § 240 (1), such liability is not tantamount to negligence, so as to bar these defendants from establishing claims for common law indemnification and contribution . In addition, as the record is replete with testimony from the various parties that plaintiff's work was supervised solely by his supervisor, these defendants did not have the authority to direct, supervise or control plaintiff's work. Thus, SP West and Stonehenge are not entitled to summary judgment in their favor on their common-law indemnity and contribution claims against Howell and Music and Howell and Music are entitled to summary judgment dismissing SP West and Stonehenge's common-law indemnity and contribution claims against them. In addition, defendant Music is not entitled to summary judgment in its favor on its common-law indemnity claim against Howell; however, Howell is entitled to summary judgment dismissing Music's common-law indemnity claim against it.

Defendant Music also cross-moves for summary judgment in its favor on its third-party common-law indemnity and contribution claims against third-party defendant MNM. In MNM's proposal for the work, MNM set forth that MNM's installation manager's duties "include overseeing project management, estimating and project design," as well as being involved in the final inspection. Further, MNM's project manager would be responsible "for all aspects of the installation phase of the project," such as scheduling the work, managing the materials, and coordinating and dispatching the technicians who would be performing the installation (Music's Notice of Cross Motion, Exhibit N, MNM's Response to Music's Request for Proposal, dated

March 18, 2005).

However, plaintiff testified that his actual work was supervised and controlled solely by his supervisor. In addition, Elliot asserted that, although Music hired MNM to pull and terminate all the data, voice and cabling, MNM subcontracted this work out to USIS. Tom Reading (Reading), a director of MNM and project manager on the project, also testified that MNM hired subcontractor USIS to do the actual work. Reading noted that MNM was not responsible for the safety of USIS workers, and that he was unaware of any entity except USIS that was responsible for supervising the USIS workers on the project. In addition, MNM never conducted an investigation or received any accident reports regarding plaintiff's accident. Finally, Michael Lagana, vice president of sales and marketing for USIS, testified that all USIS workers were under the supervision of the USIS foreman.

Thus, as Music has not established that plaintiff's accident was caused by any negligence on the part of third-party defendant MNM, or that MNM had the authority to direct, supervise, and control the work giving rise to the injury, Music is not entitled to summary judgment in its favor on its third-party claim for common-law indemnification as against MNM.

CONTRACTUAL INDEMNIFICATION CLAIMS

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Company, Inc., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Insurance Company, 32 NY2d 149, 153 [1973]; see Torres v Morse Diesel International, Inc., 14 AD3d 401, 402 [1st Dept 2005]). It is well settled that with respect to contractual indemnification, the one seeking

indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability under Labor Law § 240 (1), and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (De La Rosa v Philip Morris Management Corporation, 303 AD2d 190, 193 [1st Dept 2003]; Keena v Gucci Shops, Inc., 300 AD2d 82, 82 [1st Dept 2002]).

While Music cross-moves for summary judgment in its favor on its third-party claims for contractual indemnification against third-party defendant MNM, as MNM's Response to Music's Request for Proposal, dated March 18, 2005, does not contain indemnification language, Music is not entitled to contractual indemnification from MNM.

MUSIC'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST HOWELL

Defendant Music cross-moves for summary judgment in its favor on its contractual indemnity claims against Howell. The indemnification provision, contained in Article 3.18 of the Rider to General Conditions of the Music/Howell Contract for Construction, dated April 22, 2005, states, in pertinent part:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect ... and agents and employees of any of them from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable

(Plaintiff's Notice of Motion, Exhibit L, Rider to Music/Howell Agreement, at 8).

In addition, Article 33.2 of the Rider states, at 4:

> The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other

persons performing portions of the Work under a contract with the Contractor.

However, as Music has not established that plaintiff's accident was caused by any negligent acts or omissions on the part of Howell, as required by the rider to the Music/Howell agreement, Music is not entitled to summary judgment in its favor on its contractual indemnification claim against Howell; however, Howell is entitled to summary judgment dismissing Music's contractual indemnification claim against it.

SP WEST AND STONEHENGE'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST MUSIC

SP West and Stonehenge cross-move for summary in their favor on their claim for contractual indemnification against Music. While owners and general contractors owe non-delegable duties under the Labor Law to plaintiffs who are employed at their work sites, these defendants can obtain indemnity contractually and at common law for those responsible for the accident (see Brown v Two Exchange Plaza Partners, 76 NY2d 172, 178 [1990]).

Upon SP West purchasing the property from Penmark Owners LLC (Penmark), the former owner of the subject building, as of April of 2005, Music continued to maintain possession of the demised premises pursuant to a lease modification based on the original lease between Penmark and Music, dated July 23, 2004 (the lease). Regarding Music's indemnification obligations to SP West and Stonehenge under the lease, the lease states, in pertinent part:

> Tenant shall indemnify the Landlord Indemnities, and hold the Landlord Indemnities harmless, from and against, all losses, damages, liabilities, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) that are incurred by a Landlord Indemnitee and that derive from a claim ... made by a third party against such Landlord Indemnitee arising from or alleged to arise from:

(1) an act or omission of any Tenant Indemnitee during the Term ...

(SP West/Stonehenge Notice of Cross Motion, Exhibit J, Music Lease, at 76). Also pursuant to the language of the lease, Stonehenge, as SP West's manager, is to be considered a landlord indemnitee. Further, a tenant indemnitee under the lease includes tenant Music's employees.

Here, as SP West and Stonehenge have not established that plaintiff's accident was caused by an act or omission on the part of Music, as required by the lease, these defendants are not entitled to contractual indemnification from Music. Accordingly, Music is entitled to summary judgment dismissing SP West and Stonehenge's claim for contractual indemnification against it.

SP WEST AND STONEHENGE'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST HOWELL

SP West and Stonehenge also maintain that they are entitled to contractual indemnification from Howell pursuant to the indemnification agreement contained in the Music/Howell agreement, which requires that Howell indemnify and hold harmless the owner and its agents from damages arising out of or resulting from Howell's negligent acts or omissions. The indemnification provision, contained in Article 3.18 of the Rider to General Conditions of the Music/Howell Contract for Construction, dated April 22, 2005, states, in pertinent part:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect ... and agents and employees of any of them from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable

(Plaintiff's Notice of Motion, Exhibit L, Rider to Music/Howell Agreement, at 8).

In addition, Article 33.2 of the Rider states:

> The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor

(id. at 4).

However, as SP West and Stonehenge have not established that plaintiff's accident was caused by any negligent acts or omissions on the part of Howell, SP West and Stonehenge are not entitled to summary judgment in their favor on their contractual indemnification claim against Howell; however, Howell is entitled to summary judgment dismissing SP West and Stonehenge's contractual indemnification claim against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment by plaintiff Luis Fernandez (Motion Seq. No. 003) is granted in his favor as to liability on his Labor Law § 240 (1) claim as against defendants SP West 33-34 LLC (SP West), E.W. Howell Co., Inc. (Howell) and Music Choice (Music); and it is further

ORDERED that the cross motion for summary judgment by defendants SP West and Stonehenge Management LLC (Stonehenge) is granted to the extent that plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims, as well as all cross claims against them are dismissed, and SP West and Stonehenge's cross motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by defendant and third-party

plaintiff Music is granted to the extent that plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims, as well as all cross claims against them are dismissed, and Music's cross motion is otherwise denied; and it is further

ORDERED that the motion for summary judgment by defendant Howell (Motion Seq. No. 004) is granted to the extent that plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims, as well as all cross claims against it, are dismissed, and Howell's motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: October 14, 2008

Hon. Doris Ling-Cohan, J.S.C.

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