Francescon v Gucci America, Inc.
2009 NY Slip Op 30123(U)
January 15, 2009
Supreme Court, New York County
Docket Number: 114399/01
Judge: Michael D. Stallman
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SCANNED ON 1/22/2009

[* 1]

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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 114399/2001
FRANCESCON, JOHN
VS.
GUCCI AMERICA
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 114399/01
MOTION DATE 7/2/08
MOTION SEQ. NO. 004
MOTION CAL. NO. 34

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-M	1-2
Answering Affidavits — Exhibits A-C; F-G	3-6
Replying Affidavits — Exhibits A-B	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

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

HON. MICHAEL D. STALLMAN

Dated: 1/15/09 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: PART 7

---x

JOHN FRANCESCON,

Plaintiff,

-against-

Index No.: 114399/01

GUCCI AMERICA, INC. a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Defendants.

---x

GUCCI AMERICA, INC. a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Third-Party Plaintiffs,

-against-

Third-Party
Index No.: 590019/02

PETRILLO SETTING CORP. and PETRILLO STONE CORPORATION,

Third-Party Defendants.

---x

GUCCI AMERICA, INC. a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Second Third-Party Plaintiffs,

-against-

Third-Party
Index No.: 590139/06

FLOORING SOLUTIONS, INC.,

Second Third-Party Defendant.

---x

FLOORING SOLUTIONS, INC.,

Fourth-Party Plaintiff,

-against-

Third-Party
Index No.: 590372/06

CONSOLIDATED CARPET TRADE WORKROOM, INC., CONSOLIDATED CARPET SYSTEMS, LTD. and CONSOLIDATED CARPET WORKROOM, LLC,

Fourth-Party Defendants.

---x

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this job-site tort action, a construction worker alleges that he was injured when he stepped past the covered edge of a floor and fell, while working at a construction site located at 685 Fifth

Avenue, New York, New York on July 31, 2000.

Defendants and the parties in the second and fourth-party actions moved for summary judgment addressed to plaintiff's claims, as well as to cross claims and third-party claims for common-law and contractual indemnification (Motion Seq. Nos. 004, 005, 006). Plaintiff moves for leave to supplement and/or amend the verified bill of particulars adding Industrial Code violations identified for the first time in the affidavit of a site safety manager, and for an order compelling acceptance of an expert disclosure statement as timely under CPLR 3101 (d) (Motion Seq. No. 007). This decision address all four motions.

BACKGROUND

On July 31, 2000, plaintiff was working as a marble helper on the first floor of five floors of a store owned by defendant Gucci America, Inc. a/k/a Gucci Shops, Inc. (Gucci). Defendant Structure Tone, Inc. (Structure Tone) served as the general contractor on a project to renovate the store, located in a 21-story commercial building. Plaintiff's employer, third-party defendant Petrillo Setting Corp. (Petrillo) was hired to perform stone work for the project. Second third-party defendant Flooring Solutions, Inc. (Flooring) was hired to provide carpeting for the project. Flooring subcontracted the carpet installation to fourth-party defendants Consolidated Carpet Trade Workroom, Inc., Consolidated Carpet Systems, Ltd. and Consolidated Carpet Workroom LLC (collectively, Consolidated).

Plaintiff testified that, immediately before his accident, he was asked by his supervisor to make a mix of "screed" out of cement and stone. To carry out this task, it was necessary for plaintiff to retrieve a 50-pound bag of cement from outside of the building. As plaintiff was reentering the building, he found an "A-frame of stone" blocking the entrance to the first floor of the building. The

"A-frame" was loaded with eight stone blocks, each weighing approximately 250 pounds. Plaintiff described the A-frame at his deposition on June 17, 2005 as "a base with four wheels on it with a roll bar," "made so that stone can be laid on an angle so that the weight of each stone keeps the stone down, so you don't have to use a strap." Gucci and Structure Tone refer to the "A-frame" as an A-frame cart.

As plaintiff was moving the A-frame out of his way, his left foot stepped on a piece of carpeting which was bunched up and hanging approximately 18 inches past the edge of the first floor. Past the edge of the first floor was a subfloor approximately 12 to 15 inches below (the edge of the first floor would later become a step leading to the subfloor). Plaintiff mistakenly believed that the carpet where he stepped was supported by concrete flooring, but there was actually nothing underneath, because plaintiff had stepped beyond the edge of the first floor. When plaintiff placed his foot, his foot was caused to go down approximately 12 to 15 inches to the subfloor below. Subsequently, the wheel of the A-frame went over the edge and the stone tumbled down on top of plaintiff, causing him to become injured. Plaintiff stated that no ramps, railings or other safety measures were in place to prevent him from becoming injured. Plaintiff also noted that the subfloor was already carpeted.

Plaintiff commenced this action against Gucci and Structure Tone on July 27, 2001. Gucci and Structure Tone impleaded Petrillo and Petrillo Stone Corporation, and commenced a second third-party action against Flooring. Flooring impleaded Consolidated.

Andrew D'Ambrose, plaintiff's foreman, testified that, on the day of the accident, the steps leading down to the subfloor were not carpeted, and that carpeting was rolled up near the top of the steps. He also stated that the ends of the carpet were not yet fastened in place, so that other necessary

installations could take place first.

Paul Garavalis, president of Flooring, testified that Flooring is a commercial floor covering business. Pursuant to a purchase order, Structure Tone hired Flooring to provide the carpeting for the project. Garavalis stated that Flooring purchased the carpeting for the project based on the project's blueprints and specifications. Flooring then hired Consolidated to install the carpeting. Garavalis explained that Structure Tone and Consolidated coordinated the delivery of the carpeting, and that Structure Tone advised Consolidated as to where to install the carpet. Garavalis also maintained that he never discussed the means and methods that Consolidated would use to install the carpeting.

Paul Meberg, senior project manager for Consolidated, testified that Flooring subcontracted the installation of the carpeting to Consolidated. Meberg maintained that the carpet was delivered to Consolidated's warehouse where it was then cut to size. The carpet was then trucked to the job site by Consolidated's truckers. Meberg explained that he would take the necessary measurements at the job site, and that the general contractor would advise him as to where to install the carpet. Meberg stated that Consolidated installed the carpet only on the subfloor, and that the first floor and the steps leading down to the subfloor had a stone finish. Meberg noted that Consolidated would gather whatever carpet scraps were left over and place them in a pile for the general contractor's laborers to later take away.

At Meberg's deposition, a packet of seven documents was marked for identification. One of these documents included a labor request for additional work that was not in the original contract. This request, dated July 29, 2000, was prepared by a Consolidated employee and signed by employees of Structure Tone and Consolidated. The request called for carpeting to be installed on

the first floor. In addition, the request required that there be additional floor prep by Consolidated in order to prepare the first floor for the installation of the carpeting the next day, Sunday, July 30, 2000. Plaintiff's accident occurred on Monday, July 31, 2000.

DISCUSSION

Plaintiff's Motion to Supplement and/or Amend the Bill of Particulars and to compel acceptance of an expert disclosure statement as timely (Motion Seq. No. 007)

CPLR 3025 (b) authorizes applications for leave to file amended bill of particulars:

> (b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

"While a plaintiff asserting a cause of action under Labor Law § 241 (6) must allege a violation of a concrete specification of the Industrial Code, his failure to identify the Code provision in his complaint or bill of particulars need not be fatal to his claim [internal citations omitted]" (Noetzell v Park Ave. Hall Hous. Dev. Fund Corp., 271 AD2d 231, 232 [1st Dept 2000]). "A plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability" (Balsamo v City of New York, 287 AD2d 22, 27 [2d Dept 2001]; Noetzell v Park Ave. Hall Hous. Dev. Fund Corp., 271 AD2d at 232 [plaintiff's service, without leave of court, of a supplemental bill of particulars identifying a particular alleged Industrial Code violation was proper, "since allegations of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability"]).

Here, plaintiff is entitled to leave to serve a supplemental bill of particulars alleging

violations of Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) and (ii), 1.7 (d), and 1.7 (f), as plaintiff's belated identification of these proposed Industrial Code violations merely expound on plaintiff's Labor Law § 241 (6) cause of action, which was pleaded in plaintiff's first bill of particulars, dated July 19, 2001.

In addition, as the date of trial has not yet been set, plaintiff's motion to compel all parties to accept as timely plaintiff's CPLR 3101 (d) statement as to anticipated expert testimony of site safety manager McKeon is granted. Rule 11 of the Local Rules of New York City states, in pertinent part:

> Expert Disclosure. Unless otherwise directed by the court in a preliminary conference order or otherwise, a party having the burden of proof shall serve a response to an expert demand pursuant to CPLR 3101 (d) no later than 30 days prior to the date set by the court for trial.

Defendants and Flooring argue that plaintiff's motion seeking to compel defendants to accept plaintiff's expert disclosure of McKeon should be denied on the ground that McKeon was only retained by plaintiff in order to change the theory of his case for the purpose of opposing defendants' summary judgment motions. To that effect, defendants and Flooring note that, in his affidavit, McKeon asserts that plaintiff's accident occurred when he stepped on a scrap or remnant of carpet, suggestive of debris, yet plaintiff testified at his deposition that his accident was caused when he stepped, not on a carpet scrap or remnant, but on a piece of yet-to-be-installed carpet, the size of the entire length and width of the first floor.

However, it should be noted that, during his deposition, plaintiff also referred to the bunched-up carpet as "debris [left] on [the] floor where people are working" (Consolidated's Notice of Motion, Exhibit I, Francescon Deposition, at 105). In addition, when he was asked what kind of

debris was left on the floor, plaintiff responded, "A piece of carpeting" (id.). Further, Jennifer Myers, who testified on behalf of defendant Gucci, maintained that no part of the first floor, or the two steps later laid down to the subfloor, were slated to be carpeted, as they were to be surfaced with stone. To that effect, only the floor of the subfloor was to be carpeted.

In any event, even if plaintiff were changing his story about how the accident happened, it raises an issue of credibility for the trier of fact. However, so as to prevent any possible surprise resulting in prejudice to defendants and Flooring's ability to mount an effective Labor Law § 241 (6) defense in this case, defendant, Flooring, and Consolidated are entitled to conduct additional discovery regarding plaintiff's newly alleged Industrial Code violations, as well as circumstances and issues which were raised in McKeon's affidavit pertinent to plaintiff's Labor Law § 241 (6) claim. Thus, the note of issue is vacated to provide an opportunity for defendants, Flooring, and Consolidated to conduct more discovery.

In sum, plaintiff's motion is granted in its entirety.

Summary Judgment Dismissing Plaintiff's Labor Law § 240 (1) Claim Against Gucci and Structure Tone (Motion Seq. Nos. 004, 005 and 006)

"'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 Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; 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 Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

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-Elec. Co., 81 NY2d 494, 501 [1993]). "Although the statute was intended to protect a worker against gravity-related risks arising from the work being performed, not every gravity-related hazard falls within the scope of the statute [internal citations omitted]" (Melo v Consolidated Edison Co. of N.Y., 246 AD2d 459, 460 [1st Dept], affd 92 NY2d 909 [1998]). "Rather, the statute addresses only exceptionally dangerous conditions posed by elevation differentials, when the work site itself is elevated or is positioned below the area where materials or load are hoisted or secured [internal quotation marks and citations omitted]" (id.; Buckley v Columbia Grammar & Preparatory, 44 AD3d at 263).

Here, plaintiff was involved in work that did not impose a gravity-related risk, so as to come within the purview of Labor Law § 240 (1), when, while moving the A-frame across the first floor,

his foot fell approximately 12-16 inches to the subfloor below (see Meslin v New York Post, 30 AD3d 309, 309 [1st Dept 2006] [plaintiff's injuries were not compensable under Labor Law § 240 (1) where plaintiff was allegedly injured when he stepped off a scaffold, which was at ground level, onto a pipe, which then rolled and caused him to fall into a three-foot hole]; Caradori v Med Inn Ctrs. of Am., 5 AD3d 1063, 1064 [4th Dept 2004] [no Labor Law § 240 (1) liability where plaintiff, who was working at ground level, was injured when she fell into a three-foot-deep trench]).

Although plaintiff argues that his work subjected him to an elevation-related hazard, as he was working on a floor that was elevated above a subfloor, "'[t]he fact that levels or floors may exist below the work surface does not, by itself, compel the conclusion that the work surface is an elevated one under [Labor Law § 240 (1)]'" (Wells v British Am. Dev. Corp., 2 AD3d 1141, 1142-1143 [3d Dept 2003], quoting D'Egidio v Frontier Ins. Co., 270 AD2d 763, 765 [3d Dept 2000]). In addition, "mere proximity to an elevation differential, alone, is insufficient to trigger the protection of Labor Law § 240 (1)" (D'Egidio v Frontier Ins. Co., 270 AD2d at 765). In this case, plaintiff's injuries did not result from a special elevation-related hazard under Labor Law § 240 (1), but "rather from the usual and ordinary dangers which exist on a construction site" (Wells v British Am. Dev. Corp., 2 AD3d at 1143; Misseritti v Mark IV Constr. Co., 86 NY2d 487, 491 [1995]; Buckley v Columbia Grammar & Preparatory, 44 AD3d at 267 ["The statute does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"]).

Plaintiff offers no opposition for summary judgment dismissing his Labor Law § 240 (1) claims. Thus, the branches of the motions for summary judgment by Gucci and Structure Tone, by Consolidated, and by Flooring to dismiss plaintiff's Labor Law § 240 (1) claims is granted, and so much of the first and second causes of action against Gucci and Structure Tone that allege

defendants' failure to comply with Labor Law § 240 is dismissed.

Summary Judgment Dismissing Plaintiff's Common-Law Negligence and Labor Law § 200 claims Against Gucci and Structure Tone (Motion Seq. Nos. 004, 005 and 006)

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]). 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 their 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 piece of carpet was allowed to extend unsupported past the edge of the first floor in such a way as to hide the existence of the drop to the subfloor below. 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 Bd. of Educ., 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 Univ., 4 AD3d 200, 202 [1st Dept 2004] [to

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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]).

Plaintiff asserts that, although Consolidated may have created the hazardous condition at issue, contrary to defendants' contention, defendants had constructive notice of it. Plaintiff maintains that the unguarded edge between the two levels of the work site existed for at least the six days that plaintiff was working on the project, and that defendants each had representatives who were present and walking the site every day during the project.

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). Peter Hawkinson, an area manager for Structure Tone, testified that he and a safety manager from Structure Tone walked the site at least once a day. Hawkinson stated that, although he recalled that carpeting was being installed at the project site, the ground floor of the entrance lobby was stone. He explained that the various trades have the responsibility to manage their own debris at the site, which includes making sure that debris is centrally located and not haphazardly thrown about the site. However, if a debris condition exists, a Structure Tone laborer might deal with that situation. Hawkinson also maintained that, if he observed an unsafe condition created by a subcontractor, he would report it to the foreman of that company.

To the extent that the alleged hazardous condition resulted when a piece of bunched-up carpet was allowed to extend over the edge of the first floor (in such a way that it deceptively hid the drop to the subfloor below), defendants have met their burden of demonstrating that they neither had

notice nor created the unsafe condition at issue. Even though Structure Tone was a signatory to the additional work order, which required carpeting to be installed on the first floor, this does not constitute notice of the bunched-up carpet that formed the hidden trap. In turn, plaintiff has not sufficiently demonstrated that defendants knew of the existence of this hidden trap, which was created the day before plaintiff's accident, for a sufficient length of time prior to the accident to permit their employees to discover and remedy it, either by placing a warning about the hidden edge, or, as plaintiff argues, by placing a guard at the edge, or by removing the excess carpeting that extended past the edge.

Thus the branch of defendants', Flooring's, and Consolidated's motions for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is granted, and so much of the first and second causes of action against Gucci and Structure Tone as alleges common-law negligence and a failure to comply with Labor Law § 200 is dismissed.

Summary Judgment Dismissing Plaintiff's Labor Law § 241 (6) claims (Motion Seq. Nos. 004, 005, 006)

As Gucci and Structure Tone, Flooring, and Consolidated indicate, plaintiff's bill of particulars alleges violations of Industrial Code provisions that are too general to support a cause of action for violation of Labor Law § 241 (6) (see Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 349 [1998]). Thus, the branches of their motions for summary judgment addressed to plaintiff Labor Law § 241 (6) claims are granted to the extent that so much of the first and second causes of action that allege violations of Labor Law § 241 (6) that are based on Industrial Code provisions 12 NYCRR 23-1.2 (a), (d), (e); 12 NYCRR 23-1.5 (a), (c) are dismissed, for lack of specific safety standards to support liability under the statute (McGrath v Lake Tree Village Assocs., 216 AD2d 877

[4th Dept 1995][discussing 12 NYCRR 23-1.2]; Maldonado v Townsend Ave. Enter., 294 AD2d 207, 208 [1st Dept 2002][discussing 12 NYCRR 23-1.5]).

In addition, several Industrial Code provisions alleged in the plaintiff's bill of particulars are not applicable to the allegations. 12 NYCRR 23-1.21, which sets forth directives as to ladders and ladderways, does not apply because plaintiff neither alleges that a ladder was involved in his accident nor argues that he should have been provided with the ladder. 12 NYCRR 23-1.23, which pertains to earth ramps and runways, is also inapplicable. Because the alleged accident did not take place on an earth ramp or earth runway, there is no factual basis to challenge the adequacy of the construction requirements for an earth ramp or earth runway. To the extent that the "A-frame" loaded with stones can be considered a "hand-propelled vehicle" under 12 NYCRR 23-1.28, plaintiff does not allege that the "A-frame" was defective in any way. Thus, violations of Labor Law § 241 (6) based on these three Industrial Code provisions are also dismissed as inapplicable.

Because plaintiff has been granted leave to supplement and amend his bill of particulars, and the parties are given the opportunity to conduct discovery, the branches of the motions by Gucci and Structure Tone, Consolidate, and Flooring for summary judgment dismissing plaintiff's Labor Law § 241 (6) claims based on Industrial Code provisions 12 NYCRR 23-1.7 and 12 NYCRR 23-2.7 are denied, with leave to renew after completion of discovery. The issue of whether these Industrial Code provisions are inapplicable as a matter of law must be determined after discovery has been completed.

Summary Judgment on Gucci and Structure Tone's claims against Flooring for contractual indemnification, for common-law indemnification, and on cross claims against Gucci and Structure Tone (Motion Seq. No. 005)

"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 Co., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]; see Torres v Morse Diesel Intl., 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, unless the agreement to indemnify states otherwise, "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 [1st Dept 2003]; Keena v Gucci Shops, Inc., 300 AD2d 82, 82 [1st Dept 2002]).

A party who has been held liable to an injured worker solely on the basis of the statutory liability, without any fault on its part, is entitled to recover under a contract of indemnity (see Brown v Two Exch. Plaza Partners, 76 NY2d 172, 179 [1990] [violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence]).

Pursuant to a stipulation entered into by all of the parties, dated August 6, 2007, a photocopy of the purchase order between Structure Tone and Flooring was provided by defendants' counsel. The photocopy of the purchase order was comprised of two page fronts, which were comprised of the work to be done, as well as two identical pages of the reverse side of the these pages, which listed the "Terms and Conditions" of the purchase order (see Defendants' Reply to Floorings' Affirmation in Opposition, Exhibit B, August 2, 2007 Letter from Bob Giard). In addition, a sample purchase order with the word "Void" handwritten on it was also provided.

Veronica Lewis, a corporate claims manager for Structure Tone's legal department, testified

to Structure Tone's custom and practice in the preparation of purchase orders. She stated in her affidavit that the purchase order recited details of the work that Flooring was to perform on the project, and that a listing of the terms and conditions was stated on the reverse side of the purchase order.

The indemnity provision, which was located in the Terms and Conditions section of the purchase order, states, in pertinent part:

> 11.2. To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc. ("STI") and Owner [Gucci], their officers ... from and against any and all claims, suits ... 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 ... employees and subcontractors, in connection with the performance of any work by Subcontractor pursuant to this Purchase Order .... Subcontractor will defend and bear all costs of defending any actions or proceedings brought against STI and/or Owner ... agents and employees, arising in whole or in part out of any such acts, omission, breach or default

(Defendants' Notice of Motion, Exhibit O, Structure Tone/Flooring Purchase Order, Terms and Conditions).

The record establishes that plaintiff's claims arise in whole or in part from the acts and omissions of Flooring's subcontractor, Consolidated, because Consolidated's actions and omissions in allowing carpet to be left loose and dangling over the edge of the first floor allegedly created the hidden hazard that caused plaintiff's accident. Gucci and Structure Tone have demonstrated that they are free from negligence, because plaintiff's common-law negligence and Labor Law § 200 claims have been dismissed against them. Thus, pursuant to the indemnification provision at issue, Gucci and Structure Tone are entitled to contractual indemnification from Flooring.

Flooring's argument that the purchase order at issue violates General Obligations Law § 5-322.1 is without merit. Because the indemnification provision contains the language, "To the fullest

extent permitted by Law," the indemnification provision does not violate General Obligations Law § 5-322.1. Brooks v Judlau Contr. Inc., 11 NY3d 204, 210 (2008). In any event, where there is no negligence on the part of the proposed indemnitee, as in the instant case, that statute does not apply (see Brown v Two Exch. Plaza Partners, 76 NY2d at 177).

The branch of Gucci and Structure Tone's motion for summary judgment in their favor on cross claims against Consolidated for common-law indemnity and against Flooring for common-law indemnification, contribution and apportionment is denied. Because Gucci and Structure Tone did not address those claims in their papers, they did not sustain their burden on those claims. Thus, that part of defendants' motion seeking summary judgment in their favor on these cross claims for common-law indemnification, contribution and apportionment are denied.

The branch of Gucci and Structure Tone's motion for summary judgment dismissing all cross claims against them is granted. Because plaintiff's common-law negligence and Labor Law § 200 claims against Gucci and Structure Tone are dismissed, they are entitled to summary judgment dismissing the cross claims against them for common-law indemnification and contribution. Therefore, Flooring's counterclaim against Gucci and Structure Tone in the second third-party answer is dismissed; Consolidated's cross claims in the fourth party answer are dismissed as against Gucci and Structure Tone.

Flooring's Motion for Summary Judgment dismissing third-party claims and cross claims against Flooring (Motion Seq. No. 006)

Flooring moves for summary judgment dismissing Gucci's and Structure Tone's second third-party claims for common-law indemnification, contractual indemnification and contribution.

As discussed above, Flooring is liable to defendants for contractual indemnification based upon the indemnification provision in the purchase order between Structure Tone and Flooring. Thus, this branch of Flooring's motion for summary judgment in its favor is denied.

"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 Enters., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; Priestly v Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493, 495 [1st Dept 2004]).

Defendants assert that, even if it is determined that Flooring exercised no supervisory control over plaintiff's work and did not create or have actual or constructive notice of the unsafe condition, Flooring is still subject to negligence liability because it employed an independent contractor to do work which it knew or had reason to know to be inherently dangerous (see Klein v Beta I LLC, 10 AD3d 509, 510 [1st Dept 2004]; Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 669-670 [1992]). "Although, as a general rule, an employer who hires an independent contractor is not liable for the negligent acts or omissions of the independent contractor, there are exceptions to that general rule" (Reid v Styco of Rochester, 214 AD2d 955, 956 [4th Dept 1995]).

"One exception involves a situation where an independent contractor is hired to do work that the employer knows or has reason to know involves special dangers inherent in the work or dangers that should have been anticipated by the employer" (id.; see Farnsworth v Brookside Constr. Co., Inc., 31 AD3d 1149, 1150 [4th Dept 2006] [court noted that the construction of a home is not inherently dangerous]). "Thus, before the exception applies, it must appear not only that the work

involves a risk of harm inherent in the nature of the work itself, but also that the employer recognizes, or should recognize, that risk in advance of the contract" (Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d at 669).

"Whether work is inherently dangerous, thereby constituting an exception to the general rule, is ordinarily a question of fact to be determined by the trier of fact" (Reid v Styco of Rochester, 214 AD2d at 956 [issue of fact as to whether the exception applied where independent contractor retained by defendant was in the process of installing new carpeting when the plaintiff slipped and fell on a fresh layer of mastic, a form of cement applied before applying the carpet to the floor]; Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d at 668). However, although "whether the work is inherently dangerous is normally a question of fact to be determined by the jury, it can, in certain circumstances, be decided as a question of law [internal quotation marks and citation omitted]" (Klein v Beta I LLC, 10 AD3d at 510 [excavation work next to a thoroughfare obviously presented inherent dangers to those who had to use the thoroughfare]; Christie v Ranieri & Sons, 194 AD2d 453, 454 [1st Dept 1993]).

In this matter, Flooring is not liable for the alleged negligence of its subcontractor, Consolidated, as defendants failed to demonstrate that the danger in this case was inherent in the nature of the work, i.e., the installation of the carpeting, and not just merely the result of negligence on the part of the entity who created the unsafe condition in this case (see Saini v Tonju Assoc., 299 AD2d 244, 246 [1st Dept 2002]). Thus, as Flooring has sufficiently established that plaintiff's accident was not caused as a result of its negligence, Flooring is entitled to summary judgment dismissing all claims and cross claims against it for common-law indemnification and contribution. Therefore, the first and second causes of action of defendants' second third-party complaint against

Flooring are dismissed. Consolidated's cross claims for contribution in the fourth-party answer are dismissed as against Flooring.

Flooring's Motion for Summary Judgment for Common-law Indemnification Against Consolidated (Motion Seq. No. 006)

In light of factual issues concerning the extent to which Consolidated might liable, the issue of Flooring's cause of action for common-law indemnification against Consolidated is not yet ripe for adjudication (Murphy v WFP 245 Park Co. LP, 8 AD3d 161, 162 (1st Dept 2004]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment by fourth-party defendant Consolidated Carpet Trade Workroom, Inc., Consolidated Carpet Systems, LTD, and Consolidated Carpet Workroom, LLC (together, Consolidated) (Motion Seq. No. 004) is granted as follows:

1) the part of plaintiff's first cause and second causes of action against Gucci America, Inc., a/k/a Gucci Shops, Inc. and Structure Tone, Inc., respectively, alleging common-law negligence and the failure to comply with Labor Law §§ 200 and 240 (1) is dismissed;

2) so much of plaintiff's first and second causes of action against defendant alleging a failure to comply with Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.2 (a), (d), (e); 12 NYCRR 23-1.5 (a), (c) 12 NYCRR 23-1.21, 12 NYCRR 23-1.23, and 12 NYCRR 23-1.28 are dismissed;

and the motion is otherwise denied, with leave to renew with respect to plaintiff's claims under Labor Law § 241 (6) after completion of discovery; and it is further

ORDERED that the motion for summary judgment by defendants Gucci America, Inc., a/k/a

Gucci Shops, Inc. and Structure Tone, Inc. (Motion Seq. No. 005) is granted in part as follows:

1) the part of plaintiff's first cause and second causes of action against Gucci America, Inc., a/k/a Gucci Shops, Inc. and Structure Tone, Inc., respectively, alleging common-law negligence and the failure to comply with Labor Law §§ 200 and 240 (1) is dismissed;

2) so much of plaintiff's first and second causes of action against defendant alleging a failure to comply with Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.2 (a), (d), (e); 12 NYCRR 23-1.5 (a), (c) 12 NYCRR 23-1.21, 12 NYCRR 23-1.23, and 12 NYCRR 23-1.28 are dismissed;

3) defendants are granted summary judgment in their favor as to liability on the third cause of action of the second third-party complaint against Flooring Solutions, Inc. for contractual indemnification;

4) Flooring Solution Inc.'s counterclaim against defendants in the second third-party answer is dismissed;

5) Consolidated's cross claims in the fourth-party answer are dismissed as against defendants; and the motion is otherwise denied, with leave to renew with respect to plaintiff's claims under Labor Law § 241 (6) after completion of discovery; and it is further

ORDERED that the motion for summary judgment by second-third party defendant and fourth-party plaintiff Flooring (Motion Seq. No. 006) is granted in part, as follows:

1) the part of plaintiff's first cause and second causes of action against Gucci America, Inc., a/k/a Gucci Shops, Inc. and Structure Tone, Inc., respectively, alleging common-law negligence and the failure to comply with Labor Law §§ 200 and 240 (1) is dismissed;

2) so much of plaintiff's first and second causes of action against defendant alleging a failure

to comply with Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.2 (a), (d), (e); 12 NYCRR 23-1.5 (a), (c) 12 NYCRR 23-1.21, 12 NYCRR 23-1.23, and 12 NYCRR 23-1.28 are dismissed;

3) the first and second causes of action of the second third-party complaint against Flooring Solutions, Inc. are dismissed;

4) Consolidated's cross claims for contribution in the fourth-party answer are dismissed as against Flooring Solutions, Inc.;

and the motion is otherwise denied, with leave to renew with respect to plaintiff's claims under Labor Law § 241 (6) after completion of discovery; and it is further

ORDERED that plaintiff's motion (Motion Seq. No. 007) for leave to supplement and amend the bill of particulars and to compel acceptance of a disclosure pursuant to CPLR 3101 (d) as timely is granted; and it is further

ORDERED that the note of issue is vacated <u>sua sponte</u>, and the parties are directed to appear before the court for a compliance conference on February 20, 2009 at 10 AM in IAS Part 7, 111 Centre Street Room 949, New York, New York to set a schedule for discovery pertinent to plaintiff's Labor Law § 241 (6) claim against defendants and for filing the note of issue; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 15, 2009
New York, New York

ENTER:

J.S.C.

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK