

Adams v Boston Props. Ltd. Partnership

2009 NY Slip Op 30534(U)

March 10, 2009

Supreme Court, New York County

Docket Number: 106409/04

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 106409/2004

ADAMS, IVAN

vs

BOSTON PROPERTIES LTD.

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ s 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

Motion sequence 007 and 008 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 007) of defendant/third-party plaintiff Ritter Contracting, Inc. for summary judgment is granted to the extent that the complaint is severed and dismissed as against it with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and is otherwise denied; and it is further

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

ORDERED that the cross claims for common-law indemnification and contribution as against defendant/third-party plaintiff Ritter Contracting, Inc. are severed and dismissed against it; and it is further

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

ORDERED that the cross motion of plaintiff Ivan Adams for partial summary judgment is granted as to liability on Labor Law § 240 (1) insofar as against defendants 42nd Street Development Inc., No. 1 Times Square Development LLC, and Turner Construction Company, and is otherwise denied; and it is further

ORDERED that the cross motion of defendants/third-party plaintiffs Boston Properties Limited Partnership, Boston Properties, Inc., Turner Construction Company, Turner Construction-International, LLC, 42nd Street Development Project Inc., No. 1 Times Square Development LLC, and Permasteelisa Cladding Technologies, Ltd. for summary judgment is granted insofar as dismissing the Labor Law §§ 200 and 241 (6) claims except as to 12 NYCRR 23-1.21 (b) (4) (iv), and is otherwise denied; and it is further

ORDERED that the cross motion of defendants 42nd Street Development Project Inc. and No. 1 Times Square Development LLC for leave to renew the court's decision and order dated April 28, 2006 is granted, and upon renewal, the court adheres to its original determination; and it is further

ORDERED that the cross motion of defendant Permasteelisa Cladding Technologies, Ltd. for contractual defense and indemnification as against defendant Ritter Contracting, Inc. is denied; and it is further

ORDERED that the motion (sequence number 008) of third-party defendants/second third-party defendants Masco Services Group Corp., Masco Contractor Services East, Inc., and Superior Contracting Corporation d/b/a Insulation Contractors is granted to the extent that the common-law indemnification and contribution claims are dismissed as against Superior Contracting Corporation d/b/a Insulation Contractors, and Masco Services Group Corp. and Masco Contractor Services East, Inc. are severed and dismissed from the third-party and second third-party complaints with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that plaintiff is directed to provide a response to the demand for authorizations dated October 19, 2007 within 30 days of the date of this order; and it is further

ORDERED that counsel for Ritter shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated 3/10/09

ENTER:

HON. CAROL EDMOND

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
IVAN ADAMS,

Plaintiff,

-against-

BOSTON PROPERTIES LIMITED PARTNERSHIP,
BOSTON PROPERTIES, INC., TURNER
CONSTRUCTION COMPANY, TURNER
CONSTRUCTION-INTERNATIONAL, LLC, 42ND
STREET DEVELOPMENT PROJECT INC., NO. 1
TIMES SQUARE DEVELOPMENT LLC,
PERMASTEELISA CLADDING TECHNOLOGIES,
LTD. and RITTER CONTRACTING, INC.,

Index No. 106409/04

Defendants.

-----X
BOSTON PROPERTIES LIMITED PARTNERSHIP,
BOSTON PROPERTIES, INC., TURNER
CONSTRUCTION COMPANY, TURNER
CONSTRUCTION-INTERNATIONAL, LLC, 42ND
STREET DEVELOPMENT PROJECT INC., NO. 1
TIMES SQUARE DEVELOPMENT LLC,
PERMASTEELISA CLADDING TECHNOLOGIES,
LTD and RITTER CONTRACTING, INC.,

Third-Party Plaintiffs,

-against-

MASCO CONTRACTOR SERVICES EAST, INC. and
SUPERIOR CONTRACTING CORPORATION
d/b/a INSULATION CONTRACTORS,

Third-Party
Index No. 590692/05

Third-Party Defendants.

-----X
RITTER CONTRACTING, INC.,

Second Third-Party Plaintiff,

-against-

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COUNTY CLERK'S OFFICE
NEW YORK

SUPERIOR CONTRACTING CORPORATION
 d/b/a INSULATION CONTRACTORS, MASCO
 SERVICES GROUP CORP. and MASCO
 CONTRACTOR SERVICES EAST, INC.,

Second Third-Party
 Index No. 590522/06

Second Third-Party Defendants.

-----X
 HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Motion sequence numbers 007 and 008 are consolidated for disposition.

On January 29, 2004, plaintiff, Ivan Adams, fell off a ladder while installing fireproofing

at a construction site at 1 Times Square in Manhattan. Plaintiff then commenced this action against, *inter alia*, 42nd Street Development Project Inc., the building owner, No. 1 Times Square Development LLC, the tenant, and Turner Construction Company, the general contractor, seeking damages for alleged violations of the Labor Law and common-law negligence.

Defendant/second third-party plaintiff Ritter Contracting, Inc. (Ritter) now moves (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. Ritter also seeks summary judgment granting full, complete, and unconditional indemnification for costs and fees against second third-party defendants. Plaintiff cross-moves for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) as against defendants 42nd Street Development Inc. (42nd Street), No. 1 Times Square Development LLC (No. 1 Times Square), Turner Construction Company (Turner), and Permasteelisa Cladding Technologies, Ltd. (Permasteelisa). Defendants/third-party plaintiffs Boston Properties Limited Partnership (BPL), Boston Properties, Inc. (BPI), Turner, Turner Construction-International, LLC (Turner International),

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No. 1 Times Square, and Permasteelisa cross-move for: (1) summary judgment dismissing the complaint; (2) leave to renew, pursuant to CPLR 2221, the court's decision and order dated April 28, 2006; and (3) summary judgment granting defense and indemnification as against Ritter. By separate cross motion, Permasteelisa cross-moves for defense and indemnification as against Ritter. Third-party defendants/second third-party defendants Masco Contractor Services East, Inc., Masco Services Group Corp. (collectively, Masco), and Superior Contracting Corporation d/b/a Insulation Contractors (ICI) move (motion sequence number 008) for summary judgment dismissing the third-party complaint and second third-party complaint.

BACKGROUND

Prior to plaintiff's accident, 42nd Street, the owner of the premises, entered into a lease agreement with No. 1 Times Square as tenant for the subject premises. BPI was a general partner in BPL. BPL is a member of the limited liability company No. 1 Times Square. No. 1 Times Square subsequently leased the property for the purposes of developing the site.

No. 1 Times Square retained Turner as the general contractor for the construction project, which, in turn, hired Permasteelisa as a primary subcontractor to fabricate the building's exterior "curtain wall" – an aluminum and glass building enclosure system (Guarrara Affirm., Exh. E, at 1, 3B). Permasteelisa hired Ritter, as a secondary subcontractor, to install fireproofing (also known as fire safing) "wraps for the entire building and along the columns up to level 22" (*id.*, Exh. F, at 3). Thereafter, Ritter retained ICI, also a secondary subcontractor, in order to perform the actual installation of the fire safing (*id.*, Exh. G, at 10).

Plaintiff was employed as an ornamental ironworker by third-party defendant ICI. At plaintiff's deposition, he testified that he was assigned to the Times Square Towers jobsite in

February 2003 to install fireproofing (Plaintiff Dep., at 32, 33). According to plaintiff, his foreman was Jimmy Hayes until a few days before the accident, when Chris Mazzarelli was assigned to be his foreman (*id.* at 36, 48). Plaintiff stated that ICI workers used ladders in order to apply fireproofing to the ceilings (*id.* at 53).

Plaintiff testified that, after arriving at the job site that day, he went to the 17th floor to start work with Mazzarelli (*id.* at 66, 69, 71). Mazzarelli instructed plaintiff to install fire safing at the ceiling level (*id.* at 91). According to plaintiff, Mazzarelli told him to use the top portion of an extension ladder lying on the floor, which was approximately 12 feet long and had no rubber footings (*id.* at 93-94, 95). Although plaintiff told Mazzarelli that it was the top half of an extension ladder, Mazzarelli instructed him to use it anyway because there was nothing wrong with it (*id.* at 98). Plaintiff then set up the ladder, placing it at an angle against the wall, with the bottom about two feet from the wall, and carried a piece of fiberglass insulation up the ladder (*id.* at 99-103). When plaintiff reached the eighth rung of the ladder, the ladder collapsed (*id.* at 116). Plaintiff testified that “the bottom came out” and “the front [came] down,” causing him to fall on top of the ladder (*id.* at 121).

By summons and complaint dated February 9, 2004, plaintiff commenced the instant action, seeking recovery pursuant to Labor Law §§ 200, 240, 241 (6), and common-law negligence. Thereafter, BPL, BPI, Turner, Turner International, 42nd Street, No. 1 Times Square, and Permasteelisa impleaded Masco and ICI. Ritter subsequently brought another third-party action against Masco and ICI.

Previously, Masco and ICI moved to dismiss the third-party complaint. By decision and order dated April 28, 2006, the court, *inter alia*, dismissed the claims for failure to procure

insurance and contractual indemnification asserted against them by 42nd Street and No. 1 Times Square. Additionally, the court awarded conditional indemnification to Ritter and “Boston Properties” over and against ICI. Following an appeal by third-party plaintiffs, the First Department affirmed the court’s decision dismissing the failure to procure insurance and contractual indemnification claims (*see Adams v Boston Props. Ltd. Partnership*, 41 AD3d 112 [1st Dept 2007]). 42nd Street and No. 1 Times Square now seek leave to renew the court’s April 2006 decision and order.

A. **Motion by 42nd Street and No. 1 Times Square for Leave to Renew the Court’s April 2006 Decision**

42nd Street and No. 1 Times Square argue that there is new evidence requiring that the court’s April 2006 decision be modified. These defendants contend that when the Ritter/ICI contract was drafted, the parties believed that only Boston Properties had an ownership interest in the site and premises. However, the parties actually intended that all ownership entities would be indemnified pursuant to that agreement. They point out that the court previously granted conditional indemnification to “Boston Properties,” which was identified as the “Owner” under the Ritter/ICI contract. 42nd Street and No. 1 Times Square submit the deposition testimony of Steven Hay, an employee of ICI who drafted the contract between Ritter and ICI, and stated that “Boston Properties” appears on the subcontract “because that’s who [he] assumed the owner was who authored the contract from Permasteelisa to Ritter” (Hay Dep., at 27).

“A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]), and “shall

contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]). As noted by the Court in *Matter of Weinberg* (132 AD2d 190, 210 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]), “[r]enewal is granted sparingly” and is “not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.”

Mutual mistake exists when unbeknownst to either party, a signed writing does not reflect an oral agreement that the parties have previously reached (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). “[T]here is a ‘heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties’” (*id.* at 574, quoting *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). “The proponent of reformation must ‘show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties’” (*id.*). A party must prove his right to such relief by clear and convincing evidence (*Ribacoff v Chubb Group of Ins. Cos.*, 2 AD3d 153, 154 [1st Dept 2003]).

The general rule as to indemnification clauses is that “‘when a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed’” (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). The intention to indemnify must be “unmistakably clear from the language of the promise” (*Hooper Assoc.*, 74 NY2d at 492).

Although Masco and ICI contend that no new information has been presented, and that the application is untimely, the court grants leave to renew in light of the fact that 42nd Street and No. 1 Times Square have offered depositions which were subsequently conducted after the

court's decision was rendered (*see Metcalfe v City of New York*, 223 AD2d 410, 410-411 [1st Dept 1996]). A motion for leave to renew is not subject to the same time constraints as a motion for leave to reargue (*Luna v Port Auth. of N.Y. & N.J.*, 21 AD3d 324, 326 [1st Dept 2005]). However, 42nd Street and No. 1 Times Square have failed to establish that the parties intended that all ownership entities would be indemnified pursuant to the Ritter/ICI contract. They have offered no evidence that ICI was mistaken as to what entities would be indemnified. The record shows that a Permasteelisa representative, Carlos Eisner de Eisenhof, drafted the

Permasteelisa/Ritter contract, but did not negotiate it (Eisner Dep., at 16-17, 69-74). He drafted it based on instructions from a representative of Tower Insulation (*id.* at 70-74). Hay simply copied the wording of that contract in the Ritter/ICI contract (Hay Dep., at 27). At most, 42nd Street and No. 1 Times Square have established the existence of a unilateral mistake, which is insufficient to set aside or reform an agreement (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 [1st Dept 2007]). If the parties intended to cover 42nd Street and No. 1 Times Square as potential indemnitees, they had only to say so unambiguously (*Tonking*, 3 NY3d at 490). Accordingly, upon renewal, the court adheres to its original determination.

B. Motions for Summary Judgment

Initially, Masco and ICI urge the court not to consider plaintiff's cross motion for summary judgment, since it was made after the deadline for making summary judgment motions.

An order dated November 27, 2007 required that all summary judgment motions be made within 90 days of the last party deposition (Kern Affirm., Exh. R). Masco and ICI assert that the last deposition of a party to this action took place on March 5, 2008. It appears that plaintiff's

cross motion was untimely made, given that it was served on July 18, 2008. However, the court shall consider plaintiff's cross motion, since it was made in response to other pending and timely motions for summary judgment addressing the same issues (*Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]; cf. *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281-282 [1st Dept 2006] [court could not consider plaintiff's untimely motion for summary judgment on Labor Law § 240, where defendants moved for summary judgment on Labor Law §§ 241 and 200, absent a showing of "good cause"]).

"It is well settled that '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 demonstrate the absence of any material issues of fact'" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to meet this burden requires that the motion be denied, regardless of the sufficiency of the opposing papers (*id.*). If the proponent makes a *prima facie* showing, the burden shifts to the opposing party 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], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment" (*Zuckerman*, 49 NY2d at 562).

Labor Law § 240 (1)

Plaintiff contends that he is entitled to summary judgment under this statute, because his accident undisputedly occurred when the ladder kicked out and collapsed. Plaintiff maintains

that the evidence establishes that the ladder was not secured against slippage or collapse in any manner, and that no worker was assigned to hold the ladder. Moreover, as argued by plaintiff, defendants failed to provide additional safety devices, such as scaffolding, safety belts, and life lines, which would have prevented his fall.

BPL, BPI, Turner, Turner International, 42nd Street, No. 1 Times Square, and Permasteelisa contend that plaintiff was the sole proximate cause of his injuries as a matter of law. These defendants point out that plaintiff had been instructed specifically in safety meetings with ICI that the top halves of extension ladders were not to be used. They further maintain that plaintiff placed the ladder at an improper angle.

Further, Masco and ICI argue that plaintiff is entirely responsible for his accident. Plaintiff decided to use the ladder and failed to make sure that the ladder was secure before using it.

Ritter contends that it cannot be considered an agent, since it did not direct, supervise or control how plaintiff performed his work.

Labor Law § 240 (1) provides as follows:

“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” (emphasis supplied).

The legislative purpose behind the statute is to place “ultimate responsibility for safety practices at building construction sites where such responsibility actually belongs, on the owner and general contractor” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, rearg

denied 65 NY2d 1054 [1985], quoting 1969 NY Legis Ann, at 407). The statute imposes absolute liability and a nondelegable duty on owners, contractors, and their agents for statutory violations regardless of their negligence or supervision of the work (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). To succeed on a cause of action under section 240 (1), the plaintiff need only prove: (1) a violation of the statute; and (2) that such statutory violation was a proximate cause, not the only cause, of the accident (*Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *aff'd* 11 NY3d 757 [2008]).

As is apparent from the language of the statute, section 240 (1) applies to owners, contractors, and their agents. There is no dispute that 42nd Street and Turner were the building owner and general contractor, respectively. Additionally, there is no dispute that No. 1 Times Square was the tenant, which hired Turner as the general contractor, and thus may also be liable as an “owner” under the statute (*see Walp v ACTS Testing Labs, Inc./Div. of Bur. Veritas*, 28 AD3d 1104, 1105 [4th Dept 2006]; *Kane v Coundourous*, 293 AD2d 309, 311 [1st Dept 2002] [“A lessee of property under construction is deemed to be an ‘owner’ for purposes of liability under article 10 of New York’s Labor Law”]; *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] [“owner” encompasses “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”]).

Plaintiff also seeks to hold Permasteelisa, a subcontractor, liable as an agent. “When the work giving rise to the [nondelegable duties imposed on the owner or contractor] has been 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” (*Russin v*

Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). To be liable as a statutory agent, the third party must have the authority to supervise or control the activity that the plaintiff was engaged in at the time of the injury (*Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 488 [2d Dept 2006]; *Velez v Tishman Foley Partners*, 245 AD2d 155, 156 [1st Dept 1997]). “[T]he determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed” (*Serpe v Eyriss Prods.*, 243 AD2d 375, 380 [1st Dept 1997] [internal

quotation marks and citation omitted]). In support of his motion, plaintiff takes the position that Permasteelisa should be considered a statutory agent because it was in contractual privity with both Turner and Ritter, received payment for its services, and facilitated the performance of the main contract. Nonetheless, plaintiff has not submitted any evidence to establish that Permasteelisa controlled how plaintiff’s work was done (*see Musselman v Gaetano Constr. Corp.*, 285 AD2d 868, 869 [3d Dept 2001] [“despite the contractual privity thereby traceable back to the owner, the record here fails to substantiate plaintiffs’ claim that [prime contractor] received authority to control the subcontractor’s work from the owner and, thus, was acting as the owner’s agent in supervising [plaintiff’s employer]”). As a result, it cannot be said, as a matter of law, that Permasteelisa was an agent for purposes of the Labor Law.

Ritter, another subcontractor, has established that it was not a statutory agent. Ritter submits an affidavit from its president, Judith A. Ritter, indicating that Ritter was retained because it was a woman-owned business enterprise, but performed no work on the project (Ritter Aff., ¶ 3). Indeed, plaintiff stated at his deposition that he did not know what Ritter was (Plaintiff Dep., at 82, 128). ICI employees also testified that Ritter did not supervise or control

any ICI employees, including plaintiff, and did not provide any equipment or employees on the project (Hay Dep., at 32; Hayes Dep., at 46-47; Mazzarella Dep., at 101-102). Although plaintiff has not opposed Ritter's motion, Permasteelisa maintains that Ritter may be held liable as an agent on the basis that it was in privity with Permasteelisa and ICI. Again, no evidence has been provided to demonstrate that Ritter directed or controlled plaintiff's activity (*see Musselman*, 285 AD2d at 869). Therefore, Ritter cannot be held liable as an agent under the Labor Law.

In support of their motion, Masco and ICI also contend that neither BPI nor BPL can be considered a statutory agent of either 42nd Street or Turner. BPL had no employees at the site (Seel Dep., at 15). BPI only had limited involvement on the project: it approved requisitions for work done at the jobsite, reviewed the work for the purpose of determining whether it was actually completed, attended meetings regarding the progress of the job, and had a shanty on site (Eisner Dep., at 104-106; Nolan Dep., at 102-106; Seel Dep., at 19-20, 22, 40). Significantly, neither BPI nor BPL supervised plaintiff's work or told plaintiff how to do his work (Seel Dep., at 40-42). In view of this evidence, and given that plaintiff has not provided any evidence to the contrary, Masco and ICI have established that BPI and BPL were not agents within the meaning of the Labor Law (*see Coque*, 31 AD3d at 488).

Turner International has not established that it is not a statutory agent. Counsel merely asserts in a footnote, without any support, that there is no basis for any claim against this defendant.

Having considered whether section 240 (1) applies to the defendants, the court, therefore, turns to the issue of liability under the statute. Where the plaintiff stands on an unsecured ladder and the ladder slips, collapses, or tips over, the plaintiff has established prima facie entitlement to

judgment under the statute. As explained by the Court of Appeals in *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 289 n 8 [2003]), in cases where ladders or scaffolds collapse for no apparent reason, the plaintiff is entitled to a “presumption that the ladder or scaffolding device was not good enough to afford proper protection.” The Court continued, stating that “[o]nce the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident” (*id.*; see also *Panek v County of Albany*, 99 NY2d 452, 458 [2003] [“Plaintiff’s allegation that the ladder ‘gave way’ or collapsed beneath him, causing him to fall, was uncontested. As such, defendants failed to create an issue of fact regarding proximate causation”]).

Cases have made clear that a plaintiff is not required to show any defect with the ladder. In *McCarthy v Turner Constr., Inc.* (52 AD3d 333 [1st Dept 2008]), the plaintiff stood on an unsecured ladder that tipped over, causing him to fall to the floor. In affirming the grant of summary judgment to the plaintiff under section 240 (1), the First Department stated that the plaintiff was not required to show that the ladder was somehow defective, and that “[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (*id.* at 334, quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]). In *Dasilva v A.J. Contr. Co.* (262 AD2d 214 [1st Dept 1999]), the Court similarly ruled that “[t]he failure to properly secure a ladder so as to hold it steady and erect during its use constitutes a violation of Labor Law § 240 (1).”

Here, plaintiff testified at his deposition that the ladder collapsed when the bottom of the ladder “kicked out” (Plaintiff Dep., at 116, 121). The ladder lacked rubber footings to prevent it from skidding, slipping, or sliding (*id.* at 112). According to plaintiff, there was also no one holding the ladder (*id.* at 113). As a result, plaintiff has met his burden of showing that the ladder was insufficient to afford him proper protection (*see Blake*, 1 NY3d at 289).

Although defendants contend that plaintiff was the sole proximate cause of his injuries, such contention is without merit. In order to defeat summary judgment based on sole proximate cause, the defendant must establish that plaintiff “had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured” (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412 [1st Dept 2008]). In the instant case, there is no dispute that plaintiff was directed by his foreman to use the ladder that he used (Plaintiff Dep., at 98). Thus, it cannot be said that he *chose* for no good reason not to obtain another more suitable ladder, or that he was expected to use other safety devices. And, even if plaintiff placed the ladder at an improper angle or placed it against a mullion, this would constitute at most negligence, which is not a defense to liability under the statute (*see McCarthy*, 52 AD3d at 334).

Accordingly, plaintiff’s motion for summary judgment is granted under this statute as against 42nd Street, No. 1 Times Square, and Turner.

Labor Law § 241 (6)

Plaintiff moves for summary judgment under section 241 (6), contending that defendants undisputedly violated four subsections of the Industrial Code provision relating to ladders (12 NYCRR 23-1.21 [b] [4] [i], [ii], [iv], and [v]). Arguing that plaintiff has failed to allege any applicable Industrial Code provision, BPL, BPI, Turner, Turner International, 42nd Street, No. 1 Times Square, and Permasteelisa seek summary judgment dismissing this cause of action. Ritter contends that it is not an agent under the statute. Masco and ICI also maintain that BPL, BPI, and Ritter were not statutory agents, and that plaintiff has failed to establish any violation of the Industrial Code.

Labor Law § 241 (6) provides:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

This statute is a “hybrid” provision “since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner’s rule-making authority” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]). In *Ross*, the Court of Appeals held that a plaintiff may prevail under this statute only where a “specific, positive command[]” of a regulation promulgated by the Commissioner of Labor has been violated (*id.* at 504, quoting *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 297 [1978]). Thus, a plaintiff may not rely upon general reiterations of common-law safety standards, i.e., where regulations use words such as “adequate,” “effective,” “proper,” “safe,” or

“suitable” (*Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]; see also *Field v New York Univ.*, 1 Misc 3d 559, 562 [Sup Ct, NY County 2003]). The Commissioner’s Rules, known as the State Industrial Code, are contained in Title 12 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 563 [2d Dept 2006]).

Initially, the court notes that Ritter has shown that it is not an agent, and therefore may not be held liable under section 241 (6) (see *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47 [1st Dept 2005]). Plaintiff has also not shown that Permasteelisa is a statutory agent such that it may be liable pursuant to the statute.

Plaintiff’s complaint and bill of particulars allege that defendants violated numerous Industrial Code regulations, to wit, 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.21, 23-1.30, 23-2.40, 23-2.7, 23-5.1, 23-5.2, and 23-5.3. Also, plaintiff alleges therein that defendants violated multiple articles of the Occupational Safety and Health Act (OSHA). In moving for summary judgment, plaintiff relies only upon 12 NYCRR 23-1.21 (b) (4) (i), (ii), (iv), and (v), and has not opposed dismissal of any of the remaining Industrial Code regulations. Therefore, the court shall consider only the alleged violation of 12 NYCRR 23-1.21, and the remaining regulations are dismissed.

12 NYCRR 23-1.21, entitled “Ladders and Ladderways,” states as follows:

- “(b) (4) Installation and use.
- (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the

upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.

- (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

- (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.
- (v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.”

In *Vargas v New York City Tr. Auth.* (54 AD3d 579, 581-582 [1st Dept 2008]), the First Department held that subdivision (iv) is sufficiently specific to support a cause of action pursuant to this statute. The court also finds that this subdivision applies here, in view of plaintiff's testimony that no one was holding the ladder (Plaintiff Dep., at 99-103). Plaintiff, however, is not entitled to summary judgment, since a jury may consider plaintiff's comparative negligence in placing the ladder against the wall (*see Spages v Gary Null Assoc.*, 14 AD3d 425, 426 [1st Dept 2005]).

The remaining cited subdivisions of this regulation do not apply here. First, subdivision (i) of this regulation does not apply, because plaintiff was not using a ladder “as a regular means of access between floors or other levels in any building or other structure” (12 NYCRR 23-1.21

[b] [4] [i]; *see also Arigo v Spencer*, 39 AD3d 1143, 1145 [4th Dept 2007]). Second, subdivision (ii) is inapplicable because the ladder at issue was not placed on a slippery or unstable object (*see Arigo*, 39 AD3d at 1145; *cf. Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]). Finally, there is no evidence that the upper end of the ladder slipped, and therefore, subdivision (v) does not apply to these facts (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]).

In summary, plaintiff's Labor Law § 241 (6) cause of action is dismissed except to the extent that it is predicated on the Industrial Code provision requiring that a worker hold a ladder in place (12 NYCRR 23-1.21 [b] [4] [iv]).

Labor Law § 200 and Common-Law Negligence

Defendants all move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action, contending that they did not have the authority to supervise or control his work.

Labor Law § 200 (1), codifying the common-law duty to maintain a safe workplace, requires that all workplaces be so equipped, operated, and conducted as to provide "reasonable and adequate protection" to workers employed there (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Where liability arises out of the means and methods of construction, the plaintiff must prove that the defendant supervised or controlled the activity that gave rise to the injury (*Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). "General supervisory authority is insufficient to constitute

supervisory control; it must be demonstrated that the [defendant] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed” (*Hughes*, 40 AD3d at 306 [emphasis in original]).

At his deposition, plaintiff testified that his ICI foreman directed him how to perform his work (Plaintiff Dep., at 338). According to plaintiff, no one else had the authority to give him instructions (*id.* at 133-134). Plaintiff further stated that if he had any problems with materials or equipment, he would go to his foreman for assistance (*id.* at 338).

While plaintiff points to deposition testimony indicating that Turner and its safety representative, Total Safety, had authority to stop work on the project, such authority is insufficient to constitute supervisory control. In *Hughes* (40 AD3d at 309), the First Department held that “the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [a defendant] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence” (*see also Geonie*, 50 AD3d at 445; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]). In this connection, the court notes that plaintiff’s reliance on *Brennan v 42nd St. Dev. Project, Inc.* (10 AD3d 302 [1st Dept 2004]) and *Bush v Gregory/Madison Ave.* (308 AD2d 360 [1st Dept 2003]), is misplaced, since these cases were overruled by the First Department in *Hughes*. As a result, plaintiff’s Labor Law § 200 and common-law negligence causes of action are dismissed.

Ritter’s Motion for Summary Judgment As to Common-law and Contractual Indemnification

Ritter moves for summary judgment dismissing the common-law indemnification and

contribution claims asserted against it. 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” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see also *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003] [“Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer”] [internal quotation marks and citations omitted]). “The ‘critical requirement’ for apportionment by contribution under CPLR article 14 is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought’” (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]). Given that there is no evidence that Ritter was in any way negligent, these claims are dismissed.

Ritter also moves for full and complete indemnification as against Masco and ICI, pursuant to the following indemnification provision contained within the contract between Ritter and ICI:

“To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor . . . , and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Subcontractor’s Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose*

acts they may be liable"

(Guarrara Affirm., Exh. G, ¶ 4.6.1 [emphasis supplied]). The court previously granted Ritter conditional indemnification as against ICI pursuant to this indemnification provision. In this case, Ritter is not entitled to full contractual indemnification for two reasons. First, Ritter has not presented any evidence of ICI's negligence, as required by the language of the provision.

Second, Ritter has not shown that Masco may be liable for ICI's torts, as an alleged subsequent purchaser of ICI's assets. "It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v Richards Schear Co.*, 59 NY2d 239, 244-245 [1983]). Nonetheless, there is an exception to this rule where there has been a "consolidation or merger of seller and purchaser" (*id.* at 245). "A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a 'de facto' merger, if the following factors are present:

(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation"

(*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]; *see also Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]).

Although Ritter asserts that there was a continuity of ownership and management, personnel, physical location, assets, and general business operation, it has not provided any evidence to support this contention. Indeed, Ritter only submits the deposition testimony of Steven Hay, an employee of ICI, who stated that he "was not quite sure of the whole structure," and that he did not know whether any Masco entity currently owns ICI (Hay Dep., at 9, 48). In

any event, Masco and ICI submit, in opposition, an affidavit from an employee of Masco Corporation, who states that neither Masco entity had any ownership interest in ICI at the time of plaintiff's accident, and that when these entities owned ICI, it was held as a wholly-owned subsidiary (Werner Aff., ¶¶ 2, 3). ICI is currently a wholly-owned subsidiary of Masco Contractor Services West, Inc. (*id.*, ¶ 5). Under these circumstances, the *de facto* merger doctrine would not apply (*see Fitzgerald*, 286 AD2d at 574 [*"de facto merger" doctrine "is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation"]*). Therefore, Ritter has not established its entitlement to full contractual indemnification at this juncture. The court notes that the cross claims for contractual indemnification and failure to procure insurance asserted against Ritter have already been dismissed.

Motion by Permasteelisa for Contractual Defense and Indemnification from Ritter

Permasteelisa argues that it is entitled to indemnification from Ritter, pursuant to the terms of a purchase order dated February 26, 2003, which was entered into after the Permasteelisa/Ritter contract was executed. Permasteelisa maintains that the purchase order was "attached and incorporated" into the main form contract. Furthermore, Permasteelisa contends that it was the "common experience" of the contracting parties that the terms of the purchase order were part of the main contract.

The doctrine of incorporation by reference requires that the document to be incorporated into the written agreement be referred to and described in the instrument as issued so as to

identify the referenced document "beyond all reasonable doubt" (*Kenner v Avis Rent A Car Sys.*, 254 AD2d 704 [4th Dept 1998]; *Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995]; *Chiacchia v National Westminster Bank*, 124 AD2d 626, 628 [2d Dept 1986]).

Here, the Permasteelisa/Ritter contract contains the following list of incorporated documents: "[(1)] R.C. letter dated 12/3/2; [(2)] R.C. letter dated 1/30/3; [(3)] 1 to 11 drawings showing scope of work; [(4)] bid documents (scope described description + elevations); and [(4)] specs. paragraph 2.08" (Guarrara Affirm., Exh. F, Appendix B to subcontract). However, there is no reference to a purchase order dated February 26, 2003. The terms of the purchase order were, therefore, not specifically incorporated into the terms of the main contract between Permasteelisa and Ritter. Furthermore, the indemnification provision contained within that purchase order pertains only to certain goods furnished pursuant to that agreement. Accordingly, Permasteelisa is not entitled to defense or indemnification from Ritter pursuant to the purchase order.

Motion by BPL, BPI, Turner, Turner International, 42nd Street, No. 1 Times Square, and Permasteelisa for Common-law Indemnification/Contribution

BPL, BPI, Turner, Turner International, 42nd Street, No. 1 Times Square, and Permasteelisa also seek an order granting them common-law indemnification and contribution as against Ritter. While there is no evidence that the movants were negligent, there is also no evidence that Ritter's negligence caused or contributed to plaintiff's accident – the basis for recovery on a theory of common-law indemnification or contribution. Accordingly, that part of their motion is denied.

Motion by Masco and ICI for Dismissal of Indemnification and Contribution Claims

Masco and ICI contend that the common-law indemnification and contribution claims against ICI should be dismissed, because there is no dispute that ICI was plaintiff's employer. Workers' Compensation Law § 11 prohibits third-party indemnification or contribution against employers, except (1) where the employee sustained a "grave injury" for common-law indemnification or contribution claims, or (2) where the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had

expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 430 [2005]). Section 11 further provides that a "grave injury" is one or more of the following:

"[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

The legislative history of the statute indicates that the above-quoted list of "grave injuries" is "exhaustive, not illustrative" (*Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001], quoting Governor's Mem. approving L 1996, ch 635, 1996 NY Legis Ann, at 460). In the instant case, there is no dispute that ICI is plaintiff's employer. Plaintiff's bill of particulars alleges that he sustained injuries to his jaw, cervical spine, lumbar spine, and left wrist (Kern Affirm., Exh. G). Such injuries do not qualify as "grave injuries" (*see e.g. Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006] [construction worker's alleged injuries to

his back did not fall within any enumerated categories]; *cf. Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1147 [4th Dept 2006] [triable issue of fact as to whether plaintiff sustained total loss of use of arm and hand]).

As noted above, the indemnification provision in the Ritter/ICI contract requires ICI to indemnify Boston Properties, and Ritter for “all claims, damages, losses, and expenses, including but not limited to attorney’s fees . . . but only to the extent caused by the negligent acts or omissions of [ICI]” (Guarrara Affirm., Exh. G, ¶ 4.6.1 [emphasis supplied]). In its April 2006 decision, the court awarded conditional contractual indemnification to Boston Properties and Ritter over and against ICI. ICI is not entitled to dismissal of these claims because it has not shown that it was not negligent.

Finally, there is no evidence that Masco had anything to do with plaintiff’s accident. Masco did not enter into any contract regarding the work at issue. Therefore, Masco is entitled to summary judgment.

C. Motion by Masco and ICI for Dismissal for Failure to Comply with Discovery and Compelling Discovery

Masco and ICI move for dismissal of the complaint on the basis that plaintiff has failed to provide authorizations relating to his uncontrolled high blood pressure. They claim that they will be prejudiced in proving their claim of failure to mitigate damages. Alternatively, Masco and ICI seek an order compelling plaintiff to provide all outstanding discovery.

CPLR 3126 permits the court to dismiss an action when a party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.” The drastic sanction of dismissal is warranted only where it is clearly shown that

non-compliance was willful, contumacious, or in bad faith (*Irizarry v Ashar Realty Corp.*, 14 AD3d 323, 324 [1st Dept 2005]; *Tsai v Hernandez*, 284 AD2d 116, 117 [1st Dept 2001]).

Willfulness can be inferred from repeated failures to comply with discovery orders (*Howe v Jeremiah*, 51 AD3d 975 [2d Dept 2008]).

On November 27, 2007, the court ordered plaintiff to provide a response to the demand for authorizations dated October 19, 2007 within 30 days. Plaintiff has not addressed this issue in his opposition papers. However, Masco and ICI have not shown that plaintiff's failure to provide a response was willful, contumacious, or in bad faith. Additionally, Masco and ICI have not submitted an affirmation of a good faith effort to resolve the dispute, as required by 22 NYCRR 202.7 (a) (2) (*see Reyes v Riverside Park Community [Stage I], Inc.*, 47 AD3d 599, 600 [1st Dept 2008]). While Masco and ICI seek an order compelling plaintiff to produce "all outstanding discovery," such request is overbroad. Plaintiff is directed to provide a response to the demand for authorizations within 30 days of the date of this order.

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby

ORDERED that the motion (sequence number 007) of defendant/third-party plaintiff Ritter Contracting, Inc. for summary judgment is granted to the extent that the complaint is severed and dismissed as against it with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and is otherwise denied; and it is further

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

ORDERED that the cross claims for common-law indemnification and contribution as

against defendant/third-party plaintiff Ritter Contracting, Inc. are severed and dismissed against it; and it is further

ORDERED that the cross motion of plaintiff Ivan Adams for partial summary judgment is granted as to liability on Labor Law § 240 (1) insofar as against defendants 42nd Street Development Inc., No. 1 Times Square Development LLC, and Turner Construction Company, and is otherwise denied; and it is further

ORDERED that the cross motion of defendants/third-party plaintiffs Boston Properties Limited Partnership, Boston Properties, Inc., Turner Construction Company, Turner Construction-International, LLC, 42nd Street Development Project Inc., No. 1 Times Square Development LLC, and Permasteelisa Cladding Technologies, Ltd. for summary judgment is granted insofar as dismissing the Labor Law §§ 200 and 241 (6) claims except as to 12 NYCRR 23-1.21 (b) (4) (iv), and is otherwise denied; and it is further

ORDERED that the cross motion of defendants 42nd Street Development Project Inc. and No. 1 Times Square Development LLC for leave to renew the court's decision and order dated April 28, 2006 is granted, and upon renewal, the court adheres to its original determination; and it is further

ORDERED that the cross motion of defendant Permasteelisa Cladding Technologies, Ltd. for contractual defense and indemnification as against defendant Ritter Contracting, Inc. is denied; and it is further

ORDERED that the motion (sequence number 008) of third-party defendants/second third-party defendants Masco Services Group Corp., Masco Contractor Services East, Inc., and Superior Contracting Corporation d/b/a Insulation Contractors is granted to the extent that the

common-law indemnification and contribution claims are dismissed as against Superior Contracting Corporation d/b/a Insulation Contractors, and Masco Services Group Corp. and Masco Contractor Services East, Inc. are severed and dismissed from the third-party and second third-party complaints with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

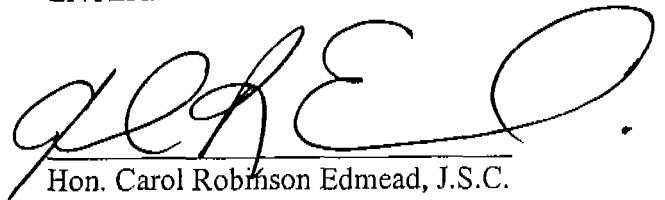
ORDERED that plaintiff is directed to provide a response to the demand for

authorizations dated October 19, 2007 within 30 days of the date of this order; and it is further

ORDERED that counsel for Ritter shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: March 10, 2009

ENTER:



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK