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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 106795/2005
BRENGEL, JAMES
VS
PARK AVE PLAZA
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 106795/2005
MOTION DATE 2/11/09
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

Is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... See attached
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/20/09

Paul G. Feinman
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: CIVIL TERM: PART 12

---------- X

JAMES BRENGEL,

Plaintiff,

-against-

PARK AVENUE PLAZA COMPANY, PLAZA CONSTRUCTION CORPORATION, DELTA SHEET METAL, THE FISHER PARK AVENUE COMPANY, CLIPPER HOLDINGS, INC. and ANIDOL U.S., INC.,

Defendants.

----------X

PARK AVENUE PLAZA COMPANY, PLAZA CONSTRUCTION CORPORATION and THE FISHER PARK AVENUE COMPANY,

Third-Party Plaintiffs,

-against-

P.E. STONE, INC.,

Third-Party Defendant.

----------X

PARK AVENUE PLAZA COMPANY, PLAZA CONSTRUCTION CORPORATION and THE FISHER PARK AVENUE COMPANY,

Second Third-Party Plaintiffs,

-against-

P.J. AIR CONDITIONING CORP. AND P.J. MECHANICAL CORP.,

Second Third-Party Defendants.

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Index Number 106795/2005
Submission Date 2/11/09
Mot. Seq. No. 006

T.P. Index Number 590818/2005

2nd T.P. Index No. 590819/2006

FILED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECISION & ORDER

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Papers considered in review of this motion and cross-motions for summary judgment, together with oral argument on January 28, 2009 and February 11, 2009:

Papers	Numbered
Affid. in Supp. of Motion for Summary Judgment	1
Affirm. in Supp. of Cross-Motion & Opp. to Summ. Judg. Mot.	2
Affirm. in Supp. of Cross-Motion for Dismissal & Summ. Judg.	3
Affirm. in Supp. of Cross-Motion for Dismissal & Summ. Judg.	4
Affirm. in Opp. to Cross-Motions by PE and PJ	5
Affirm. in Opp. to Plaint. Motion for Summ. Judg.	6
Affirm. in Opp.	7
Reply Affidavit	8
Affirm. in Partial Opp.	9
Suppl. Affirm. in Opp. to Cross-Motions by PE and PJ	10
Sur Reply Affid. to Delta's Suppl. Affirm. in Opp.	11
Affirm. in Reply and in Opp.	12
Affirm. in Opp. to PE Cross-Motion for Summ. Judgment	13
Affirm. in Reply	14
Reply Affirm.	15

PAUL G. FEINMAN, J.:

This case arises out of a construction accident on November 10, 2004, in which plaintiff James Brengel was injured. Defendant Plaza Construction Corporation ("Plaza Construction") oversaw the entire project. Defendant Park Avenue Plaza Company ("Park Avenue ") is the fee owner of the premises on which Brengel's accident occurred. Third-Party defendant P.E. Stone, Inc. ("PE") was a subcontractor on the project and was Brengel's employer at the time of the accident. Third-Party defendants P.J. Air Conditioning Corp. and P.J. Mechanical Corp. (hereinafter, referred to collectively as "PJ") were subcontractors on the project, and their sub-subcontractor, defendant Delta Sheet Metal ("Delta"), is alleged to have at least been partially

responsible for causing the accident.

Plaintiff moves pursuant to CPLR 3212 for summary judgment on liability under New York Labor Law § 240[1] against both Park Avenue, the owner of the premises where the accident occurred and Plaza Construction, a construction manager, on the ground that they both failed to provide plaintiff with an adequate safety device to protect him from an elevation-related injury. Plaza Construction and Park Avenue, jointly cross-move for an order granting summary judgment as against plaintiff's employer, PE, in the first third-party action, and against PJ in the second third-party action, and dismissal of all claims brought against them. PE cross-moves for summary judgment on its cross-claim against Delta and for dismissal of the third-party complaint against it. PJ cross-moves for summary judgment against Delta and for dismissal of all claims against itself.

FACTS

(a) Brengel's Deposition Testimony

On November 10, 2004, Brengel, a journeyman electrician doing electrical work for PE, was working on either the 12th or an adjoining floor of the Park Avenue Plaza building, located at 55 East 52nd Street, New York, New York (Pl. Mot. Ex. F Brengel Dep. 22-24, 34-35). He worked alone, using an unsecured A-frame ladder, to take measurements and run electrical conduit in the ceiling. Brengel believes that on that day five or six sheet metal workers employed by Delta and some carpenters were also working in the area on the same floor (Brengel Dep. 36). The ceiling area had been previously demolished and had exposed black iron, pencil rods, and air ducts (Brengel Dep. 41). As he stood on the ladder, he placed a piece of conduit in a temporary position on top of the black iron. Brengel proceeded to take necessary measurements, using a

piece of old, dust-covered, non-shiny duct as a reference point, when a sheet metal worker asked him to cease his work so that they could remove a heavy piece of duct, probably an air handler, also known as commercial air conditioning unit, located 15-20 feet away (Brengel Dep. 54, 57). As Brengel stood waiting on the ladder, he heard a loud crash and a call to "look out." The metal sheet workers dropped the piece of duct, which then knocked the conduit resting on the black iron onto Brengel's face (Brengel Dep. 55, 57, 61, 62). Brengel was knocked down from the ladder and landed on the floor strewn with construction material (Brengel Dep. 63). Several sheet metal workers and electricians ran up to him, and he lay on the floor until the ambulance arrived (Brengel Dep. 66).

(b) Plaza Construction's Deposition Testimony

Carl Ericson, an assistant project manager for Plaza Construction, testified on its behalf (Pl. Mot. Ex. E Ericson Dep.). Plaza was contracted by Blackrock Financial, a tenant at 55 East 52nd Street, to oversee the construction renovation work for building office space on the 11th, 12th, and 14th floors in a building owned by Park Avenue (*see* Ericson Dep. 11, 12). Plaza Construction performed the duties of a general contractor, including obtaining subcontracts for the project (Ericson Dep. 12). Plaza Construction had a project manager, Michael Fitzmaurice, and a superintendent, Michael Coonan, overseeing the project on the job site and ensuring timeliness and safety (Ericson Dep. 25, 27, 28, 29). Plaza Construction subcontracted with PJ for the HVAC and metal work part of the project and with PE for all of the electrical work. Ericson has no clear knowledge of any other subcontractors that were doing work in the ceiling and is uncertain, for example, whether either PJ or PE subcontracted steamfitting work to a contractor named Panava and whether it had employees placed on the same floor with Brengel at the time of

his accident (Ericson Dep. 33). Ericson has no personal knowledge regarding Brengel's accident (Ericson Dep. 42), which workers were present at the site on November 10, 2004 (Ericson Dep. 22, 34), or the exact conditions of the premises, including whether there was old ductwork remaining (Dep. 42). However, according to Ericson, work was in progress on all three floors (Ericson Dep. 38). When responding to the questions of oversight of the project by Plaza Construction, Ericson indicated there were times when the subcontractors worked simultaneously on the same floor and could get in each other's way, but any friction between the trades would be brought to the attention of superintendent Coonan and resolved (Ericson Dep. 48-49).

(c) P.E. Stone's Deposition Testimony

James Hering, a foreman electrician, testified on behalf of P.E. Stone (Pl. Mot. Ex. D Hering Dep.). At or about the time of the accident, Hering was the first foreman on the job site. Hering did not personally witness the accident, but arrived at the scene when somebody requested his presence over a walkie-talkie (Hering Dep. 22-24, 36-39). Herring witnessed Brengel lying prostrate on the floor with a piece of conduit resting next to him. (Herring Dep. 24). Several employees from other trades, including sheet metal workers, surrounded plaintiff (Herring. Dep. 28, 29). Brengel was visibly in pain, and Hering did not talk to him. Hering stayed at the site until an ambulance arrived. Hering does not remember anything else about the accident, including on which floor the accident occurred (Herring Dep. 23, 28, 29, 36-39).

(d) P.J. Air Conditioning/P.J. Mechanical's Deposition Testimony

Paul Siamas, project director, testified on behalf of PJ (Delta Aff. in Opp. Ex. A Siamas Dep.). Siamas started work on the Park Avenue Plaza project in late October 2004 as a project

manager for the HVAC part of the contract (Siamas Dep. 11-12). PJ was solely responsible for the HVAC project (Siamas Dep. 11, 12, 30, 31, 45) and hired Delta for the sheet metal part of the HVAC project. Siamas did not witness Brengel's fall, but knows of the accident from his conversation with a Delta employee, Benjamin Franklin (Siamas Dep. 32-33). Shortly after the accident, Franklin showed Siamas a photo Franklin took with a cell phone of Brengel lying on the floor (Siamas Dep. 32-33). When Siamas asked whether it was one of "their guys," Franklin replied that it was an electrician and joked that "this [was] typical of all the electricians sleeping" (Siamas Dep. 32-33). Franklin told Siamas that he had been on the floor in order to pick up some material to return "back up" (Siamas Dep. 37) when he learned that Brengel had fallen off a ladder. (Siamas Dep 33).

Regarding PJ's defense that its employees and those of Delta could not possibly have been involved in the accident, Siamas testified that P.J. employees were working only on the 14th floor, which was located immediately above the 12th floor (Siamas Dep. 65), because that is where all of the sheet metal work was supposed to have been concentrated at that time (Siamas Dep. 26). Siamas stated, in addition, that there was no old sheet metal work or duct work left in the ceiling on any of the floors, because usually when PJ gets to a job site, the space has previously been gutted by a separate demolition company and because the sheet metal workers want to start from scratch and do not want to have to pull pieces out (Siamas Dep. 16, 43, 58, 59). Siamas has no information on what floor Brengel fell or the condition of the 12th floor on that day or where PJ and Delta employees actually were located on that day, or any records pertaining to the job site, and can neither confirm or deny that Delta or PJ employees were actually in the same area where Brengel was doing work on the day of the incident (Siamas Dep.

34-36).

(e) Delta's Deposition Testimony

Edward Harren, a draftsman, testified on behalf of Delta (PJ Cr-Mot. Ex. G Harren Dep.). As part of his job duties, he measured existing conditions and drafted work projects for the Park Avenue Plaza job site (Harren Dep. 8-9). Harren has no personal knowledge of the accident; any information he possesses about Brengel's fall, he obtained second-hand five days before the date of his deposition from conversations with Delta's counsel (Harren Dep.14, 24). Harren does not recall the condition of the job site at or near the time of Brengel's fall, but described in detail how Delta generally does its work and the usual condition of the premises at the project stage when Delta starts its work (Harren Dep. 24). Harren does not have any recollection regarding whether there was any old duct work left in the ceiling at or near the time of the accident (Harren Dep. 24). Harren's testimony is that all duct network was supposed to have been gutted prior to Delta's commencement of work, and Delta would not have been removing old metal tubing and duct work without a change to the contract terms (Harren. Dep. 13, 14). Harren does not currently possess any drawings or paperwork pertaining to the Park Avenue Plaza project (Harren Dep. 15, 16).

(f) The Accident Reports

The two accident reports prepared shortly after Brengel's accident describe the date, time, and place of the accident and include a description of the accident, with one referring to Delta workers being involved (Pl. Mot. Ex. C). The testimonial record, however, is silent as to the *source* of the report's description of the nature and the circumstances surrounding the accident. Even assuming the reports to be business records, without evidence of the source of the

information contained in them, it is impossible for the court to evaluate whether they contain inadmissible hearsay. Therefore, on the extant record, the reports have marginal evidentiary value and will not be considered.

ANALYSIS

(a) Brengel's Motion for Partial Summary Judgment on Labor Law § 240[1] Claim

New York Labor Law § 240[1], informally known as "the scaffold law," holds property fee owners, general contractors, and their respective agents liable for those types of accidents in which a scaffold or other protective device proves inadequate to shield the injured worker from harm flowing directly from the application of the force of gravity to an object or person (*see John v Baherstani*, 281 AD2d 114 [1st Dept 2001]). The purpose of the scaffold law is to provide exceptional protection for workers against special hazards that arise when the work site either is itself elevated or positioned below the level where materials or loads are hoisted, and includes events such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*see Zory v Consolidated Edison Co. of New York, Inc.*, 248 AD2d 708 [2nd Dept 1998]; *see also Kyle v City of New York*, 268 AD2d 192 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). The scaffold law claim imposes a greater burden on a defendant and precludes a comparative negligence defense (*see eg Kyle*, 268 AD2d at 196). However, the mere occurrence of an elevation-related accident does not conclusively establish a Labor Law § 240[1] violation or causation *(Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]).

As explained in the seminal case *Blake v Neighborhood Housing Services of New York City Inc.* (1 NY3d 280, 288 [2003]), and later reaffirmed in *Cahill*, once plaintiff makes a prima

facie showing of the lack of a requisite safety device and that it proximately caused a fall resulting in injury, plaintiff is entitled to partial summary judgment on liability, unless the defendant can counter that a plausible view of the evidence raises a factual issue as to whether there was a statutory violation and whether the plaintiff's own acts or omissions were the sole cause of the accident (*Id.* at 289). If, on the other hand, the record conclusively establishes that the accident was caused solely by the plaintiff's conduct, the defendant is entitled to summary judgment (*Id.*).

In *Blake* the Court of Appeals dismissed the Labor Law § 240[1] claim based on the sole proximate cause argument, noting that the extension ladder that plaintiff fell from was in proper working condition and not broken or defective. Although the plaintiff in *Blake* used the ladder with the extension clips unlocked causing the extension ladder to retract, the Court found that the "accident was not caused by the absence of (or defect in) the way the safety device was placed" (*Blake*, NY3d at 288). The *Blake* court concluded that plaintiff's failure to lock the clips constituted intentional misuse, thus warranting dismissal of the claim against the property owner.

In this case, plaintiff claims that he has made a prima facie showing of a Labor Law § 240[1] violation by establishing that his fall from a ladder was proximately caused by lack of a safety device that would adequately protect him from a falling conduit that he was installing at the time. The First Appellate Division has recently dealt with similar facts in *Kosavick v Tishman* (50 AD3d 287 [1st Dept 2008]) and in *Campuzano v Board of Education of New York City* (54 AD3d 268 [1st Dept 2008]). In *Kosavick*, the Court granted plaintiff summary judgment where both he and the unsecured A-frame ladder he was standing on were suddenly struck by a section of unsecured pipe he had cut, causing him to fall. In *Campuzano*, the Court found that plaintiff

made an uncontroverted prima facie showing of a Labor Law § 240[1] violation, entitling him to summary judgment, where a heavy duct fell on plaintiff and knocked him off of an A-frame ladder as he was doing asbestos removal work in the ceiling.

Defendants Plaza Construction and Park Avenue oppose plaintiff's motion for summary judgment on the basis that plaintiff caused his own injury by leaving an unsecured piece of conduit in place after he was made aware that sheet metal workers were performing work on a nearby air duct (Aff. in Supp. of Cross-Mot. Manger Aff. ¶32). The record is uncontroverted that plaintiff left the conduit unsecured because he was in the middle of taking proper measurements to determine the permanent position of the conduit when he was asked to cease work momentarily; the record is devoid of any evidence to suggest that his actions did not conform to the safety rules guiding the installation of electric conduit.

Plaza Construction and Park Avenue further argue that because Brengel was hit by the pipe while waiting on the metal sheet workers to remove an air duct, his staying on the ladder was not work-related, and thus there is no connection between Brengel's fall and the alleged violation of Labor Law § 240[1] (Aff. in Supp. of Cross-Mot. Manger Aff. ¶ 34). This argument rests on a view of the record that defies common sense and is not supported by a single citation to case law (see Aff. in Supp. Of Cross-Mot. Manger Aff. ¶¶ 34-35). The evidence shows only that when standing on the ladder, Brengel was at all times in the process of performing work and work-related activities. Therefore, plaintiff is entitled to partial summary judgment on his Labor Law § 240[1] claim against Plaza Construction and Park Avenue.[1]

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[1]As to plaintiff's Labor Law §§§ 200, 240[6], and 241[6] claims, the parties stipulated at the settlement conference, held on February 11, 2009, that they are withdrawn, subject to reinstatement in case of successful appeal of a grant of summary judgment on the Labor Law § 240[1] claim.

(b) Plaza's Cross-Motion for Summary Judgment on Its Claim for Contractual Indemnification and Defense

Plaza Construction is cross-moving on behalf of itself and Park Avenue for contractual indemnification. Indemnification is a right of one party to shift a loss to another and is either grounded in common law or based on a contractual obligation, or both may coexist (*Bellevue South Associates v HRH Const. Corp*, 78 NY2d 282, 296 [1991]; *see also Zurich Ins. Co. Lumbermen's Cas. Co.*, 233 AD2d 186 [1st Dept 1996]). A claim for contractual indemnification usually arises from an express agreement by which one party agrees to hold the other harmless for claims brought against it by a third party (28 NY Prac., Contract Law § 26:16).

In this case, Plaza Construction entered into separate subcontracts with PE and PJ on September 27, 2004 to perform work in connection with the construction of 11th, 12th, and 14th floors of the 55 East 52nd Street building. The subcontracts are identical in the parts relevant to the determination of the present issues (PE Affirm. in Supp. of Cr-Mot. Ex. E; PJ Affirm. in Supp. of Cr-Mot. Ex. D). Both P.E. Stone, Inc. and P.J. Air Conditioning Corp.[2] were designated subcontractors, and Plaza Construction was designated "'construction manager'...[which] entered into an agreement ...with Blackrock Financial Management ('Owner') to perform contracting services..[and] awarded [subcontract] subject to Owner's approval" (*Id.*). Article 9A of the addendum to both contracts sets out an indemnification provision, the relevant parts of which state:

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[2] While only P.J. Air Conditioning Corp. was a signatory to the subcontract, no party has raised any question that for the purposes of this action, P.J. Air Conditioning Corp. and P.J Mechanical Corp. are to be considered one and the same, an inference supported by the deposition testimony of PJ's project director Paul Siamas (PJ Aff. in Opp. Ex. A Siamas Dep. 9-10).

> To the extent permitted by law, Subcontractor shall indemnify, defend, save and hold the Owner, the Contractor, and Architect ...their respective partners, officers, employees and anyone acting for on behalf of any of them (herein collectively called 'Indemnitees') harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever **which arise out of or are connected with, or are claimed to arise out of or be connected with**:
>
> > 1. The performance of Work by the Subcontractor, or any of its Sub-Subcontractors, any act or omission of any of the foregoing;
> > 2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work, either directly or indirectly through a Subcontractor or material agreement, or (b) while any of the Subcontractor's property, equipment or personnel are in about such place or the vicinity thereof by reason of or as a result of the performance of the Work...

(*Id.* [emphasis added]).

Plaza Construction argues that under Article 9A, it is entitled to indemnification if the Court determines that the construction accident is related to PJ's or PE's work. It maintains that because the record is uncontroverted that Brengel's accident arose out of or is connected to the work conducted by PJ's sub-contractor Delta and PE's employee Brengel, Plaza Construction is entitled to summary judgment against PJ and PE on the issue of contractual indemnification. Both PE and PJ oppose granting PlazaConstruction summary judgment.

1. Indemnification clause coverage

PE opposes the cross-motion, arguing first that Park Avenue, the fee owner of the subject building, is not identified as "owner" in the subcontracts and is thus not covered by Article 9A of the subcontract. PE further points out that Plaza Construction is designated "construction manager," not "general contractor" and is not clearly subject to the indemnification clause.

New York law has firmly established that when the intent of a contractual provision must be gleaned from disputed evidence or from inferences outside the written words, it becomes a

question of fact which requires the resolution by trial (*see Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285 [1973]). While Park Avenue is the fee owner of the subject premises, the text of the agreements designates Park Avenue's tenant Blackrock Financial as the "owner" for whose benefit the subcontracts are acquired (PE Affirm. in Supp. of Cr-Mot. Ex. E, 1; PJ Affirm. in Supp. Of Cr-Mot. Ex. D, 1). The record does not elucidate if failure to correctly reflect the ownership status of the premises in the contracts was an ordinary drafting error and if all parties intended Park Avenue to be considered "owner" for the purpose of indemnification under Article 9A. Therefore, Park Avenue is not entitled to summary judgment and must establish its claim at trial.

As to Plaza Construction, there is no dispute that it is a signatory to both subcontracts. The mere fact that it is described as "construction manager," does not raise a question of fact as to the applicability of Article 9A of the subcontracts.[3] New York courts view exercising control and oversight over the project as tell-tale signs of a general contractor "masquerading" under the name "construction manager" (*see Havlin v City of New York*, 17 AD3d 172 [1st Dept 2005]). Here, the contract between Plaza Construction Corp. and Blackrock Financial designates Plaza Construction a "contractor" for the entire project (Aff. in Fur. Opp. Plaza Ex. A). In conformity with this contract, Plaza Construction was performing the duties routinely undertaken by general

[3]The issue of the distinction between general contractor and construction manager usually arises in the claims asserted under Labor Law § 200, § 241[6], and on occasion § 240[1]. A construction manager is often hired when there is no general contractor, and customarily functions as an agent of the owner in an advisory capacity only. Nevertheless, when the particular contract calls for the construction manager to enforce safety regulations and stop the work when unsafe practices occur, the courts have reasoned that the construction manager has the requisite supervision and control of the work so as to render the construction manager liable as a statutory agent under the Labor Law (*see Walls v Turner Constr. Co. et al.*, 4 NY3d 861 [2005]). Plaza Construction admitted at oral argument that it is representing, defending, and indemnifying Park Avenue, the building owner, therefore the Court need not address this issue in the context of Labor Law liability. However, the conclusion would be the same, that Plaza Construction in reality functioning as a general contractor.

contractors, which included awarding subcontracts for the performance of different renovation projects.[4] Plaza Construction kept the project manager, Fitzmaurice, and the superintendent, Coonan, at the job site to oversee the project and ensure timeliness and safety (Ericson Dep. 25, 27, 28, 29). Aside from the label "construction manager," PE has not offered any evidence to support its argument.[5] Therefore, the subcontracts' reference to Plaza Construction as "construction manager" does not preclude an award of summary judgment on Plaza Construction and Park Avenue's contractual indemnification claim under Article 9A of the subcontract.

2. Applicability of GOL § 5-322.1 to indemnification clause

PE also opposes the cross-motion by Plaza Construction and Park Avenue on the ground that GOL § 5-322.1 precludes contractual indemnification in this case. In the context of construction litigation, there are certain limitations on parties' ability to enforce contractual indemnity. New York General Obligations Law § 5-322.1 prevents an agreement or understanding to hold harmless a party involved in the construction, alteration, repair, or maintenance of a structure, from the consequences of its own whole or partial negligence. To invoke the statute, the party seeking to avoid the agreement must come forward with facts sufficient to infer actual negligence on the part of the party seeking indemnification (*Walsh v Morse Diesel, Inc.*, 143 AD2d 653, 655 [2nd Dept 1988]).

PE insists that it is entitled to a trial on its GOL § 5-322.1 defense, contending that there is evidence in the record that Brengel's accident was at least partially caused by Plaza's

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4 Plaza Construction admitted at oral argument that it acted as a *de facto* general contractor.

5 Plaza Construction in any event would be entitled to indemnification even as "construction manager." The express language of the contract, which states that Plaza Construction awarded subcontracts upon "owner's" approval and that it entered into an agreement with "owner" to perform contracting duties (*see also* Aff. in Fur. Opp. Plaza Ex. A), places Plaza Construction in the catchall category of "indemnitees" under Article 9A.

negligence in failing to properly coordinate the trades. PE relies on statements made by Carl Ericson, Plaza's project mangaer, and Paul Siamas, PJ's project director. Specifically, it points to the following deposition question and answer by Siamas:

> Q: Is there any talk directly between the trades about who gets to work where or is that done by someone else , general contractor perhaps?
> A: He's supposed to oversee everything, but that does not always happen –

(Siamas Dep. 56:6-11). P.E. also cites Ericson's deposition testimony:

> Q: If two subcontractors had to work on a specific location at the same time, who would determine who would go first?
> A: Really, that is a very generic question, what is happening with the two might not have anything to do with each other.
> Q: Were there times on the project when the subcontractors would get in each other's way?
> A: Sure, that happens on any project.
> Q: What happens in situations like that?
> A: Bring it to the superintendent's attention.
> Q: The super that they would address, would that super be employed by Plaza Construction?
> A: That is correct.

(Ericson Dep.49:3-23). A thorough reading of the above excerpts, in addition to a review of the entire record, lends no support to the broad argument PE advances. There is no evidence in the record that allowing several trades to work on the same project at the same time is, by definition, per se negligent. There is also no evidence that Plaza Construction negligently coordinated the work between the trades and, as a result, partially caused Brengel's accident. Therefore, GOL § 5-322.1 is not a bar to summary judgment on Plaza Construction's claim of contractual indemnification against PE and PJ.

3. Indemnification clause "arising out of or connected with" language

PE also opposes summary judgment on the ground that there is an issue as to whether

plaintiff's claims arise out of or are connected to his work for PE , because Brengel was injured while waiting on the sheet metal workers to finish their work. The Court has already rejected a similar argument made by Plaza Construction and Park Avenue in the context of applicability of Labor Law § 240[1]. The Court would have to stretch common sense to the breaking point to conclude that a reasonable juror could interpret the evidence to mean that Brengel was not performing work when he momentarily stopped installing conduit and remained on the ladder to wait for the sheet metal employees to remove the duct before resuming work. PE's argument is also unsupported by the case law (*see Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 136 [1st Dept. 1989], *affd* 76 NY2d 172 [1990] [finding the accident did not arise out of a subcontractor's work where the subcontractor's job was to build and hand over the scaffold for use by the plaintiff's employer, and the accident occurred a week after the scaffold was built and handed over, and the subcontractor had no control or oversight of the scaffold]). Therefore, Plaza Construction is entitled to summary judgment against PE on its claim of contractual indemnification and defense under Article 9A of the subcontract, as plaintiff Brengel's claims arise out of or are connected to his work for PE on the project.

4. No questions of fact as to Delta's presence

PJ argued at oral argument that summary judgment on Plaza Construction and Park Avenue's claim for indemnification was not appropriate, because Delta's assertion that its workers were nowhere near Brengel at the time of the accident raised a question of fact as to whether PJ, which hired Delta, is liable for indemnification under the Article 9A "arises out of or connected with" language. CPLR 3212(b) summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is

debatable (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Stone v Goodson*, 8 NY2d 8, 13 [1960]). However, when there is no genuine issue to be resolved at trial, unfounded reluctance to employ the remedy will only serve to swell the trial calendar, force the parties to incur unnecessary litigation expenses, and unduly prolong the resolution of the dispute (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Delineating a distinction between what the moving party has to show to earn a summary judgment and what the opposing party has to show to defeat the summary judgment is analogous to drawing a line in dry sand. The law, however, is settled that when a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that the defense is real and can be established at trial (Leventhal, Byer's Civil Motions § 72:06 [Rev. Ed. 1994], citing *Indig v Finkelstein*, 23 NY2d 728 [1968]; *see also Vogel v Blade Contr. Inc.*, 293 AD2d 376, 377 [1st Dept 2002]). Conclusory allegations or denials are insufficient to defeat summary judgment (*McGahee v Kennedy*, 48 NY2d 832, 834 [1979][finding that a conclusory defense of coercive influence to enforcement of separation agreement was not a bar to summary judgment]).

In establishing a prima facie case of entitlement to contractual indemnification against PJ, Plaza Construction relies on plaintiff Brengel's first-hand depiction of the accident to place Delta sheet metal workers directly at site of the accident, thereby triggering PJ's contractual indemnification for the actions of its subcontractor. PJ offers the deposition testimony of Edward Harren, draftsman for Delta, Paul Siamas, project director at PJ, and Carl Ericson, assistant project manager at Plaza Construction as evidence that no metal work was supposed to have been done in the ceiling on the 12th floor at the time of Brengel's accident and that no old

duct was supposed to have been remained in the ceiling. This, PJ argues, raises a question of fact as to Delta's presence at the site of the accident.

A painstaking review of the record[6] illuminates a fatal weakness in PJ's argument. None of the deponents it relies on has any personal, first-hand knowledge of the accident or of the actual condition of the ceiling at the time of the accident, and none of them knows who else worked, or did not work, in the same area as Brengel at the time of the accident. The deponents derive their conclusions from their overall construction work experience on similar projects and unsubstantiated assumptions as to the floor on which the sheet metal work was supposed to be concentrated at the time of the accident and where Brengel was performing his work. This evidence is insufficient to overcome a prima facie showing of entitlement to summary judgment because it does not contradict plaintiff Brengel's first-hand account of the accident.

Furthermore, the Court would find summary judgment appropriate even if PJ were successful in raising a question of fact as to Delta employees' presence at the site of the accident. According to the undisputed testimony of Carl Ericson, all of the HVAC work, which would include all of the sheet metal work in the ceiling, was subcontracted to PJ, which in turn

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[6]Without properly requesting leave of court, Delta attempted to submit Benjamin Franklin's surprise affidavit in its second supplemental affirmation, dated September 24, 2008. This was adamantly opposed by all the parties, because at the discovery stage, PJ's witness Siamas maintained that Franklin was nowhere to be found, which was implicitly affirmed by Delta. Franklin's affidavit is a facsimile duplicate, not an original and does not contain any contact information for him; Delta has not indicated that it has provided Franklin's contact information to any of the other parties. In addition, Franklin's affidavit was submitted nine days after the return date in the motion submission part, which was September 15, 2008. While Delta's counsel explained that Delta's private investigator had managed to find Franklin only days before Delta's second supplemental affirmation was submitted, he also admitted that Delta started conducting the investigation *only after* PJ filed its cross-motion for summary judgment against Delta. Delta's counsel omitted an explanation as to why Delta's investigation could not have been undertaken in over three years of litigation before the present motion was filed. Under such circumstances, it is within the Court's discretion, under CPLR 2214[b], [c], to not consider Franklin's affidavit (*see Foitl v G.A.F. Corp.*, 64 NY2d 911, 913 [1985] [the Court of Appeals affirming the trial court's decision not to consider a late affidavit, because the reason for the lateness was not an inadvertent omission, but the attorney's failure to realize the necessity for the affidavit until it was too late]).

subcontracted some part of the project to Delta (Ericson Dep. 33). Accordingly, if the workers removing the old duct work were not Delta employees, then it could only be PJ workers who were removing the old duct work. Therefore, the record is clear that Plaza Construction is entitled to contractual indemnification by PJ under the subcontract agreement, dated September 27, 2004, as a matter of law.

(c) PE's cross-motion for dismissal of first third-party complaint

PE cross-moves to dismiss Plaza Construction and Park Avenue's third-party complaint as against it; the first third-party complaint asserts causes of action sounding in common law contribution, common law indemnification, contractual indemnification and duty to defend, and a failure to procure insurance naming Plaza Construction and Park Avenue additional insureds. During oral argument, Plaza Construction and Park Avenue withdrew their claim of failure by PE to procure conforming insurance coverage, thereby warranting dismissal of the fourth cause of action in the first third-party complaint as against PE.

As to PE's cross-motion to dismiss Plaza Construction and Park Avenue's common law and contractual indemnification claims, PE argues that its status as plaintiff Brengel's employer renders it immune under the Workers' Compensation Law to any claims for contribution and indemnification arising out of work-related accidents. PE is only partially correct. PE is entitled to dismissal of Plaza's common-law indemnification and contribution claims under the Workers' Compensation Law § 11, because Brengel is not claiming damages for "grave injury," as defined by the Workers' Compensation Law. However, the Workers' Compensation Law does not shield PE from indemnification claims arising out of contract, as such are freely enforceable against the employer (*see Pena v Chateau Woodmere Corp.*, 304 AD2d 442 [1st Dept 2003] [Workers'

Compensation Law § 11 exclusive remedy provisions did not prohibit the enforcement of the AIA contractual indemnification provision against the contractor employer]). Therefore, the Court grants PE's cross-motion to dismiss Plaza Construction and Park Avenue's first and second causes of action in the first third-party complaint against PE, seeking common-law contribution and indemnification, but denies PE's cross-motion to dismiss the third cause of action for contractual indemnification and a defense.

(d) PJ's cross-motion for dismissal of second third-party complaint

In the second third-party complaint against PJ, Plaza Construction and Park Avenue assert four causes of action against P.J. Air, and four separate causes of action against P.J. Mechanical. The four causes of action against each entity are identical to the ones brought against PE. During oral argument, Plaza Construction and Park Avenue withdrew their claim of failure by PJ to procure conforming insurance coverage, thereby warranting dismissal of the fourth cause of action as against P.J. Air and the eighth cause of action as against P.J. Mechanical. As to the remaining, PJ fails to counter the second third-party plaintiffs' arguments with any factual or legal grounds that would warrant dismissal of causes of action number one through three and five through seven in the second third-party complaint against the two PJ entities. Therefore, PJ's cross-motion is granted only to the extent that the fourth and the eighth causes of action in the third-party complaint are dismissed as against PJ.

(e) PJ's and PE's Cross-Motions for Summary Judgment against Delta

PJ and PE cross-move for summary judgment as to their common-law indemnification claims against Delta. Common law indemnification applies only where the party seeking to shift

responsibility has been held liable solely on account of the negligence of another, who is actually and primarily at fault (*see D'Ambrosio v New York*, 55 NY2d 454, 460 [1982]). While the record establishes that Delta employees were present at the site of the accident, which triggers PJ's indemnification obligations under the "arising out of or connected with" language of Article 9A, the record is insufficient to establish as a matter of law that Delta workers were negligent. The issue of Delta's actual fault remains to be resolved at trial. Accordingly, the Court denies PE's and PJ's summary judgment cross-motions for common law indemnification and contribution from Delta.

It is therefore,

ORDERED that plaintiff James Brengel's motion for partial summary judgment on his Labor Law § 240 [1] claim is granted as against defendants Park Avenue Plaza Company and Plaza Construction Corporation; and it is further

ORDERED that, pursuant to agreement by the parties, plaintiff's remaining claims under Labor Law §§§ 200, 240[6], and 241[6] are discontinued, subject to reinstatement in the event of a successful appeal of the Court's ruling on the Labor Law § 240 [1] claim; and it is further

ORDERED that the action against Fisher Park Avenue Company is discontinued by stipulation of the parties; and it is further

ORDERED that the cross-motion brought on behalf of Park Avenue and Plaza Construction seeking summary judgment as to their claims in the first and second third-party actions that defendants P.E. Stone, Inc., P.J. Air Conditioning Corporation and P.J. Mechanical Corporation owe contractual indemnification is denied as to Park Avenue Plaza Company and is granted as to Plaza Construction Corporation; and it is further

ORDERED that the cross-motion by P.E. Stone, Inc. to dismiss the first third-party complaint is granted to the extent that the first cause of action for common law contribution, the second cause of action for common law indemnification, and the fourth cause of action for failure to procure insurance are severed and dismissed, and is otherwise denied; and it is further

ORDERED that the cross-motion by P.J. Air Conditioning Corporation and P.J. Mechanical Corporation to dismiss the second third-party complaint is granted to the extent that the fourth and eighth causes of action for failure to procure insurance are severed and dismissed, and is otherwise denied; and it is further

ORDERED that the cross-motions by P.E. Stone, Inc., P.J. Air Conditioning Corporation, and P.J. Mechanical Corporation for summary judgment against Delta Sheet Metal seeking common-law indemnification and contribution are denied in their entirety; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order upon all parties and third-parties and upon the Clerk of Court (60 Centre St., Basement) who shall enter judgment in accordance with the foregoing, and sever and continue the claims which are not dismissed and upon the Clerk of Trial Support (60 Centre St., Rm. 158) who shall schedule this matter forthwith for a date in Part 40 for jury selection and a trial.

This constitutes the decision and order of the court.

Dated: April 20, 2009
New York, New York

Paul G. Feinman
J.S.C.

HON. PAUL G. FEINMAN

(2009 Pt 12 D&O_106795_2005_006 ms)