

Falkenberg v Racanelli Constr. Co., Inc.

2009 NY Slip Op 33398(U)

April 24, 2009

Supreme Court, New York County

Docket Number: 105060/05

Judge: Shirley Werner Kornreich

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

-----X

KRISTIAN FALKENBERG,

Plaintiff,

-against-

Index No.: 105060/05

RACANELLI CONSTRUCTION COMPANY, INC.,
HILTON HOTELS CORPORATION and HILTON
INNS, INC.,

Defendants.

-----X

RACANELLI CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

Third-Party Index No.:
590627/06

COOL SHEET METAL, INC. and PYRAMID AIR
CONDITIONING, INC.,

Third-Party Defendants.

-----X

COOL SHEET METAL, INC.,

Second Third-Party Plaintiff,

-against-

FILED
APR 29 2009
NEW YORK
COUNTY CLERK'S OFFICE
Second Third-Party
Index No.: 590547/07

ASA ASSOCIATES OF NEW YORK, INC.,

Second Third-Party Defendant.

-----X

COOL SHEET METAL, INC.,

Third Third-Party Plaintiff,

-against-

Third Third-Party
Index No.: 590709/07

EVOLUTION PIPING CORP., and LINCHRIS HOTEL
PARTNERS OF L.I., LLC.,

Third Third-Party Defendants.

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**[AMENDED] DECISION
AND ORDER**

KORNREICH, SHIRLEY WERNER, J.:

This is an action under Labor Law §§ 200 and 241(6) arising from a 2003 accident involving plaintiff Kristian Falkenberg, a sheet metal mechanic, on a construction site in Ronkonkoma, New York, allegedly owned by the Hilton defendants. Plaintiff sued defendants Racanelli Construction Company, Inc. (“Racanelli”), Hilton Hotels Corp. and Hilton Inns, Inc. (collectively “Hilton”). Racanelli, the general contractor on the site, in turn impleaded Pyramid Air Conditioning, Inc. (“Pyramid”) and its subcontractor, plaintiff’s employer COOL Sheetmetal, Inc. (“COOL”) as third-party defendants, claiming common law and contractual indemnity, as well as breach of agreement to secure liability insurance. Pyramid cross-claimed for contractual and common law indemnity, and for failure to procure insurance. COOL then impleaded plumbers Asa Associates of New York, Inc. (“Asa”) as a second third-party defendant, then Evolution Piping Corp. (“Evolution”) and Linchris Hotel Partners of L.I., LLC. (“Linchris”), the owner of the property, as third third-party defendants.

Pyramid seeks summary judgment against Racanelli. In the alternative, Pyramid seeks summary judgment against its co-third-party defendant COOL for contractual indemnification. COOL, in turn, seeks summary judgment dismissing the complaint, the third party complaint and Pyramid’s cross-claims. Hilton and Linchris seek summary judgment dismissing the original complaint, the third third-party complaint and the cross-claims of Pyramid and COOL.

I. Summary of Facts

In this action, plaintiff claims that he injured his back on January 2, 2003, while he was working in the ground floor kitchen area of the Hilton Garden Inn under construction in Ronkonkoma, New York. He attributes the alleged injuries (herniated discs) to his tripping over

a piece of pipe while carrying a 200 pound acetylene tank with his foreman, in an area he describes as being strewn with rubbish. Pyramid, an air conditioning company, had subcontracted out the sheet metal duct work on the job to COOL, plaintiff's employer. COOL owned the tanks and hand trucks, which were present at the site. Plaintiff moved the tank with the foreman, COOL's designated safety person, and they did not use a hand truck. At the time, there were trenches for piping dug into the dirt floor. None of COOL's work involved the placement of piping in the kitchen floor.

Plaintiff continued to work after the claimed accident, and did not file an accident report until three months later, after losing his job. He also submitted a claim for Worker's Compensation. In the accident report, and at the Worker's Compensation hearing, he made no mention of tripping over a piece of pipe. Instead, plaintiff alleged that he had injured his back while carrying an oxygen tank, an assertion repeated by his foreman. These tanks were used to weld the duct work for the kitchen exhaust. It was not until plaintiff's 2006 Bill of Particulars in this action that he alleged his fall was due to an accumulation of "dirt, debris and/or other foreign objects" located in his path. Exh. B, Pyramid Mot. Thereafter, during his first EBT in 2006, he added the allegation of tripping over a piece of pipe. Exh. B, pg. 60, COOL Cross-Motion.

The pipe plaintiff allegedly tripped over was not used by COOL in the HVAC work delegated to it by Pyramid, or in the air conditioning work in general as delegated to Pyramid by Racanelli, the General Contractor. The black, cast iron pipe was of a type used by plumbers. ASA Plumbing had earlier laid black pipe (albeit slightly larger in diameter) in the kitchen floor trenches prior to the alleged accident. Falkenberg EBT, pp. 75-76, Exh. C; 2007 Riha EBT, pp. 21-28, Exh. F, Pyramid Mot..

Racanelli, the general contractor, was required to employ general laborers to do daily clean up at the site, but failed to do so after December 13, 2002 and through January 2, 2003, the day plaintiff fell. Racanelli supervised the cleanup laborers. When no laborers were on site, each trade contractor was responsible for consolidating their debris in a central location, but not for cleanup. 2006 Riha EBT, pp. 29-30; Exh. E, Pyramid Mot.. The contractors discussed safety with Racanelli's job superintendent. Racanelli's project supervisor was on site daily to coordinate construction, scheduling and work performance between the trades. 2006 Riha EBT, p. 6, Exh. E, Pyramid Mot..

II. Discussion and Rulings

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court, as a matter of law based on undisputed material facts, in directing judgment in its favor. CPLR 3212(b); *see Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285 (1st Dep't 2008) (summary judgment denied for plaintiff on Labor Law § 240(1) claim, and granted for defendant on negligence claim). A movant must support its cause with evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 560-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. *Id.* at 560; CPLR. 3212(b). *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 967-968 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties'

competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v. Depew & Schetter Agency*, 154 A.D.2d 513, 515 (2d Dept. 1989).

A. Pyramid's Motion.

(I) Common Law Indemnity

Labor Law § 200 and Negligence

The key element of a common law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is "a separate duty owed the indemnitee by the indemnitor." *Raquet v. Braun*, 90 N.Y.2d 177, 183 (1997), quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690 (1990). The duty that forms the basis for the liability arises from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled ... to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." *Id.*, quoting *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 468 (1892).

Pyramid has presented sufficient evidence to sustain its burden for summary judgment. Labor Law § 200 (1) codifies the common-law duty of landowners and general contractors to maintain a safe workplace. Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998) (emphasis in original), quoting *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993). General supervisory authority is insufficient to constitute supervisory control. *O'Sullivan v. IDI Constr. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dept.

2006). This concept of *general vs. specific* supervisory authority is key. In the *O'Sullivan* case, the First Department found that although the contractor's on-site safety manager may have had overall responsibility for the safety of the work done by the subcontractors, his "duty to supervise and enforce general safety standards at the work site was insufficient to raise a question of fact as to its negligence." *Id.*

Here, Pyramid, serving in the capacity as general contractor with respect to the HVAC work, did not control the manner in which the plaintiff performed his or her work. The undisputed material facts established by Pyramid's evidence show that the injury producing work undertaken by plaintiff was his moving a 200 pound acetylene tank. Although there remain disputed issues as to the actual cause of the alleged accident (tripping on pipe vs. lifting strain) and the extent to which plaintiff's negligence might have contributed to his own injury, the undisputed fact remains that plaintiff was moving the tank, which his work required. Pyramid did not provide COOL with the tank. Rather, COOL provided its mechanics with the tanks and "all other tools and equipment needed to do the job." Melillo Affid. ¶4, Exh. L. Nor did Pyramid provide COOL with hand carts. COOL owned the handcarts and COOL's Field Supervisor oversaw plaintiff's work. Plaintiff took no direction from Pyramid regarding the means and methods of COOL's work. Rammelkamp EBT, pp. 51-52, 55, Exh. I.

Defendant/third-party plaintiff Racanelli's evidence showing that Pyramid had general supervisory control over the HVAC project and workplace safety is not enough to defeat summary judgment on this issue. Pyramid was responsible for coordinating and scheduling of COOL's work. Its construction project manager Richard Melillo discussed shop drawings with COOL, visited the site twice a week, and determined after consultation with COOL's foreman

that a stop work order was not necessitated by there being a dirt floor in the kitchen area, the area where plaintiff allegedly hurt himself. Melillo Affid., Exh. L. *See e.g. Carney v. Allied Craftsman Gen. Contrs., Inc.*, 9 A.D.3d 823, 825 (3d Dep't 2004) (finding no liability where general contractor "did not specifically direct [subcontractor's] method or manner of work . . . [and its] involvement was limited to brief visits to the work site from time to time to ensure that [subcontractor] had the materials it needed and that the work was being done according to the plans"). Without proof that Pyramid controlled plaintiff's actual work and that its representatives were present on the day in question, Pyramid's proof showing lack of control and supervision remains unrebutted. *See Kazmierczak v. Town of Clarence*, 286 A.D.2d 955 (4th Dep't 2001) (finding no liability under § 200 where, "although . . . [defendants] exercised general supervisory control over the project and had authority to direct the correction of safety violations, [there was] no evidence that defendants were actually supervising plaintiff's actions on the day of the accident") (citations omitted); *Fairchild v. Servidone Constr. Corp.*, 288 A.D.2d 665 (3d Dep't 2001) (finding no liability under § 200 or common-law negligence where, *inter alia*, "none of the . . . defendants had representatives at the site [on the day of the accident] to exercise any supervisory control over the manner or method that plaintiff performed his work"); *Gonzalez v. Turner Constr. Co.*, 21 A.D.3d 832 (1st Dep't 2005) (no liability under § 200 or common law negligence where, *inter alia*, "no one from [general contractor] was present at the time of the accident"); *Martucci v. Tirro Constr. Corp.*, 192 Misc.2d 22 672 (Sup. Ct. Richmond County 2002) (finding no liability under § 200 where, *inter alia*, "[the general contractor's] employees were [not] present at the time of the accident").

Even where direct supervision or control is absent, a subcontractor's employee may still

recover against a general contractor under § 200 or common-law negligence principles "where . . . [the] plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises," provided that the general contractor "ha[d] control over the work site and actual or constructive notice of the dangerous condition." *Keating v. Nanuet Bd. of Educ.*, 40 A.D.3d 706 (2d Dep't 2007) (citations omitted). The condition must be inherently dangerous and not in plain view. *See DeLong v. State St. Assocs. L.P.*, 211 A.D.2d 891, 893 (3d Dept. 1995) (finding no liability under § 200 where "the 'defect' [elevation differential between terraces] . . . was obvious and readily observable by anyone" [citation omitted]); *see Cotto v. N.Y. City Hous. Auth.*, 17 A.D.2d 621 (2d Dept. 2005) (court dismissed case where the plaintiff fell over a garbage bag). Here, tripping over a piece of pipe is an obvious danger readily apparent to anyone working at a construction site. Pyramid has met its burden to show it lacks liability under the principles of Labor Law § 200 and negligence, and Racanelli has failed to come forward with admissible evidence raising disputed material facts.

Labor Law § 241(6)

Racanelli does not oppose Pyramid's motion insofar as common law indemnity is based on violation of Labor Law § 241(6). *Holmes-Nelson Affirm.*, p. 6. Pyramid's evidence is also sufficient to establish its lack of liability for § 241(6), which is based on violation of a New York Industrial Code regulation that "constitute[s] a specific, positive command" and does not "merely reiterate[] the common law standard of negligence." *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 271 (1st Dept. 2007) (*citing Ross*, 81 N.Y.2d at 502-04). The alleged statutory violation must "be the proximate cause of the plaintiff's injury." *Id.*

Plaintiff alleges violations of Industrial Code §§ 23-1.5(a), (c); 23-1.7(b), (d), (e); 23-

1.15, and 23-4.2(a). Exh. B. Industrial Code § 23-1.5(a) is a general safety standard, and therefore does not give rise to a non-delegable duty under § 241(6). *See Hassett v. Celtic Holdings, LLC*, 7 A.D.3d 364 (1st Dept. 2004). Subsection (b) of Industrial Code § 23-1.7 does not apply because plaintiff did not fall into a “hazardous opening.” Subsection (d) of § 23-1.7 does not apply because plaintiff was not injured by a “slippery condition” or exposed to “the hazard of falling into water.” Section 23-1.15 is entirely off base as it refers to “safety railings,” and Section 23-4.2 is not applicable as it applies to “Trench and Area Type Excavations” and there is no allegation or evidence that the small trenches in the kitchen floor caused plaintiff’s injury. Finally, Subsection (e)(1) of Section 23-1.7 does not apply because plaintiff was allegedly injured in an open work area and not in a “passageway.”

The allegation that plaintiff tripped over a piece of pipe does, however, support finding a “tripping hazard” under subsection (e) (2), which provides: “Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.” A piece of pipe could be considered either “debris” or “scattered ... material[,]” but undisputed evidence shows that the pipe plaintiff allegedly tripped over was not used by COOL in the HVAC work delegated to it by Pyramid, or in the air conditioning work in general as delegated to Pyramid by Racanelli, the General Contractor. The black, cast iron pipe was instead used by plumbers, and in fact ASA Plumbing had earlier laid black pipe (albeit slightly larger in diameter) in the kitchen floor trenches prior to the alleged accident. Falkenberg EBT, pp. 75-76, Exh. C; Riha EBT, pp. 21-28, Exh. F. Racanelli, as the general contractor, was required to employ general laborers to do daily clean up

at the site, but failed to do so after December 13, 2002 and through January 2, 2003, the day plaintiff fell. When no laborers were on site, each trade contractor was responsible for consolidating their debris in a central location, but not for cleanup. Riha EBT, pp. 29-30; Exh. E. Pyramid was not obligated under the Code to consolidate pieces of black cast iron pipe or other “debris” that it did not generate through its work. None of the opposing parties has submitted anything to controvert this finding. Pyramid is thus not liable under Section 241(6).

(ii) Contribution

Racanelli has alternatively claimed contribution against Pyramid. CPLR 1401 provides, in pertinent part, that “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.” The undisputed evidence shows that Pyramid is not subject to liability for the tortious and statutory violations claimed by plaintiff, only for contractual indemnification to Racanelli (discussed below). There is no basis for contribution against Pyramid. *See e.g. Klinger v. Dudley*, 41 N.Y.2d 362, 367-368 (1977) (discussing principles of contribution).

(iii) Contractual Indemnity

Pyramid’s and Racanelli’s contract includes the following pertinent language of indemnity:

To the fullest extent permitted by law, the Subcontractor [Pyramid] shall defend, indemnify and hold harmless the Owner, Architect, General Contractor [Racanelli] and all additional insurers referred to in the “Insurance Coverage” provisions hereof ... from and against any and all claims, losses, costs, injuries, damages and expenses, including reasonable attorney’s fees for counsel of their choice, that may be incurred by any of them as a result of, or in any way arising

out of the performance or breach of contract by Subcontractor and/or any errors or omissions of Subcontractor. However, this agreement to indemnify does not cover liability of the Indemnities for damages and injuries, to the extent that such damages and injuries are contributed to, caused by, or result from the sole or partial negligence of the Indemnities.

Exh. P(A), ¶ 23. This language is broad and on its face covers plaintiff's claim insofar as it concerns the performance, breach of contract, error or omission of *Pyramid*. The undisputed evidence submitted by Pyramid shows that Racanelli, as the general contractor, was required to employ general laborers to do daily clean up at the site, but failed to do so after December 13, 2002 and through January 2, 2003, the day plaintiff allegedly tripped. When no laborers were on site, each trade contractor was responsible for consolidating their debris in a central location, but not for cleanup. Riha EBT, pp. 29-30; Exh. E. The only subcontractor at the site using the kind of black pipe plaintiff claims he tripped over was ASA Plumbing, which was not a subcontractor to Pyramid. Melillo EBT, pp.160-161, Exh. G. If plaintiff's tripping story is believed, then either Racanelli or ASA or both, could possibly be found liable. Pyramid did not have any duty to consolidate ASA's debris or to "clean up," and Racanelli's failure to keep the area clean [in potential violation of Labor Law §§ 200 and 241(6)], would preclude it from recovery under the terms of the indemnification clause, so summary judgment on this issue is appropriate. If, however, plaintiff hurt himself just by lifting the acetylene tank, then arguably COOL might be responsible for lax safety measures. Pyramid agreed to indemnify Racanelli for "damages and expenses... that may be incurred ...as a result of, or in any way arising out of the performance or breach of contract by Subcontractor and/or any errors or omissions of Subcontractor." The court finds that this language is broad enough to include costs or damages incurred by Racanelli as a result of actions by Pyramid's subcontractor COOL. Summary judgment on this issue is

premature.

(iv) Breach of Contract

Pyramid's motion for summary judgment and dismissal of the third party complaint requires review of all the claims pled by Racanelli against Pyramid, which includes breach of its agreement to secure liability insurance in favor of or for the benefit of Racanelli. Pyramid has not, however, submitted any evidence that it did in fact secure the agreed-upon insurance. Pyramid has failed to meet its burden to support judgment as to this claim.

B. Pyramid's Motion as to COOL

Pyramid seeks summary judgment on its cross-claim against COOL for contractual indemnification. Pyramid's evidence establishes that COOL and Pyramid had a longstanding business relationship. In keeping with their standard practice, Pyramid provided COOL with a Purchase Order, and COOL furnished Pyramid with a Certificate of Insurance and Hold Harmless Agreement. The agreement provides,

TO THE FULLEST EXTENT PERMITTED BY LAW, THE
SUBCONTRACTOR AGREES TO INDEMNIFY & SAVE HARMLESS THE
OWNER & PYRAMID AIR CONDITIONING INC., ITS OFFICERS, AGENTS
AND EMPLOYEES AGAINST AND FROM CLAIMS FOR BODILY INJURY
OR PROPERTY DAMAGE ARISING OUT OF THE WORK PERFORMED BY
THE SUBCONTRACTOR FOR THE OWNER AND PYRAMID AIR
CONDITIONING INC.

Exh. M. The Hold Harmless Agreement was not signed by either Pyramid or COOL. Exhs. G, N. The May 13, 2002 Purchase Order was executed by Pyramid but not by COOL. Exh. G. COOL added Pyramid as an additional insured to its general liability coverage per the Purchase Order terms. Exh. N. COOL performed the work described in the Purchase Order and in all subsequent Change Orders. COOL kept asking Pyramid for a corrected Purchase Order. Kern EBT, pp. 61-

63, Exh. H. During the course of the project, COOL generated approximately 24 change orders for additional work on site. Melillo EBT, pp. 79, 82-83, Exh. G.

The undisputed evidence submitted by Pyramid is sufficient to establish its right to contractual indemnification as a matter of law. Regardless of the Workers' Compensation Law shield of employers from liability as joint tortfeasors, a third party may recover against an employer under an indemnification clause in a contract. *Rodrigues v. N & S Bldg. Contrs., Inc.*, 5 N.Y.3d 427, 433 (2005); see *Mantovani v. Whiting-Turner Contr. Co.*, 55 A.D.3d 799 (2d Dep't 2008) (exception to Worker's Compensation law restriction of liability exists where employer expressly agrees to indemnify). Worker's Compensation Law § 11 requires indemnification agreements to be written and entered into before the accident occurs.

Although neither the Clause nor the Certificate of Insurance adding Pyramid as an additional insured specifically identify the Hilton project, Pyramid submitted testimony that these documents were prepared in conjunction with the purchase order document prepared by Pyramid and submitted to COOL for the project *before the work began*, as well as all the subsequent change orders, which referred back to the purchase order. The parties' course of conduct in general and specifically with respect to this project, establish COOL's agreement to indemnify Pyramid against claims for bodily injury or property damage arising out of COOL's work. The fact that COOL's President did not sign the purchase order or that neither party signed the hold harmless clause is not dispositive where, as here, the other evidence indisputably establishes the parties' agreement as to all material contractual terms prior to the start of the job. See *Flores v. Lower E. Side Serv. Ctr.*, 4 N.Y.3d 363 (2005) (unsigned indemnification clause valid under Worker's Compensation Law § 11); *Matter of Municipal Consultants & Publishers, Inc. v. Town*

of *Ramapo*, 47 N.Y.2d 144 (1979) (contract effective at the time parties agree to all contractual terms).

C. COOL's Motion as to Racanelli and Pyramid

COOL seeks summary judgment against Racanelli on the Third Party Complaint, and as to Pyramid on the latter's cross-claims. Racanelli's claims against COOL include contractual indemnification and breach of agreement to secure liability insurance. Pyramid's cross-claims include common law indemnification/contribution, contractual indemnification and breach of agreement to secure liability insurance. At the outset, there was no contract between COOL and Racanelli, and the third-party complaint does not allege that Racanelli was a third-party beneficiary of the Pyramid-COOL contract. Nor does the language in the latter contract identify Racanelli as a beneficiary. It refers to Pyramid and the "owner." Racanelli was the general contractor, not the owner. Summary judgment is appropriate as to COOL on Racanelli's third-party complaint. *See Pile Found. Constr. Co. v Berger, Lehman Assoc.*, 253 A.D.2d 484, 486 (2d Dept. 1998) (breach of contract claim properly dismissed where no evidence of contract between plaintiff and defendants or of language in defendants' contract with third party, or otherwise, manifesting mutual intent to confer contract benefit on plaintiff).

As to the cross-claims by Pyramid against COOL, the claims for common law indemnification/contribution are precluded by Worker's Compensation Law § 11, which limits an employer's liability "to any third person ... unless such third person proves through competent medical evidence that such employee has sustained a "grave injury." Neither plaintiff nor Pyramid has pled or alleged that plaintiff sustained a "grave injury," and there is no evidence in the record before the court to sustain a finding of such an injury, which is narrowly defined under

the statute. Plaintiff claims a back injury, the extent of which remains in dispute, but the claimed injury is not included in the statutory definition.

As discussed above, Pyramid's cross-claim against COOL for contractual indemnification is not precluded by the Worker's Compensation Law, and the agreement is enforceable. The fact that Pyramid's potential liability is now limited to Racanelli's claim for contractual indemnification does not preclude COOL's liability to Pyramid under the hold-harmless clause. If Pyramid is found liable and must contractually indemnify Racanelli for "damages and expenses... that may be incurred ...as a result of, or in any way arising out of the performance ... by Subcontractor [COOL] and/or any errors or omissions of Subcontractor [COOL]," those damages will arise from plaintiff's claims for "bodily injury." COOL agreed to hold Pyramid harmless against claims for "bodily injury. Summary judgment against Pyramid on this claim is denied. COOL's motion for summary judgment against Pyramid on its cross-claim for breach of agreement to secure liability insurance is, for the reasons discussed above, is granted; COOL did add Pyramid as an additional insured.

D. Hilton's and Linchris' Cross-Motion

The only parties sued directly by plaintiff are Racanelli and the Hilton defendants. The latter cross-move for summary judgment against plaintiff and dismissal of the complaint and the cross-claim by Pyramid. Linchris was brought in by COOL as a third third-party defendant and moves for summary judgment against COOL and dismissal of the third third-party complaint, and against Pyramid and dismissal of the latter's cross-claim..

Only Pyramid has submitted written opposition, initially arguing that Hilton's and Linchris' joint motion should be denied as untimely because it was filed four weeks after the

court's deadline for filing summary judgment motions. Hilton and Linchris argue that they had filed their motion earlier but withdrew it because Pyramid and COOL sought additional discovery, and because it was their understanding that the motion would be unopposed. The court must deny a late-filed summary judgment motion unless the moving party establishes good cause. *See Brill v City of New York*, 2 N.Y.3d 648, 652-653 (2004). The motion is, however, a cross-motion addressing some of the issues raised by Pyramid's original motion. As the Second Department explained in *Ellman v. Village of Rhinebeck*, 41 A.D.3d 635 (2d Dep't 2007), *appeal dismissed by* 9 N.Y.3d 812 (2007),

[A]n untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" because "the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212[a]) to review the untimely motion or cross motion on the merits" (*Grande v Peteroy*, 39 AD3d 590, 591-592, 833 N.Y.S.2d 615; *see Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497, 793 N.Y.S.2d 176; *Boehme v. A.P.P.L.E.*, 298 A.D.2d 540, 749 N.Y.S.2d 49; *Miranda v Devlin*, 260 A.D.2d 451, 688 N.Y.S.2d 578). "Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see* CPLR 3212[b])" (*Grande v Peteroy, supra* at 592).

Id. at 643. The court will review the cross-motion on the merits, in light of the confluence of issues, the fact that this cross-motion was filed within 120 days of the note of issue as required by CPLR 3212, and that it is not opposed by any party other than Pyramid.

Hilton argues that it is not the owner of the property where the construction project took place and, alternatively, that it did not direct, supervise or exercise any control over the worksite or the work being performed by plaintiff. Hilton has presented undisputed evidence that it does not own either the hotel or the property on which it was built. Linchris, its franchisee, owns the hotel and leases the property. Hilton is not liable to plaintiff for the injuries he claims occurred at

the worksite. *See Wendel v. Pillsbury Corp.*, 205 A.D.2d 527, 528 (2d Dept. 1994) (franchisor did not function as owner or contractor or as agent of them). (*See also* discussion above as to Pyramid and Labor Law §§ 200, 241(6) [liability of owners and general contractors].)

As to Linchris, although there is some evidence that it maintained general supervisory control over safety at the site, there is *no* evidence that it had “the *authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.*” *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998) (emphasis in original), *quoting Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). As discussed in detail above, general supervisory authority of an owner or general contractor is insufficient to constitute the supervisory control necessary for liability under the common law of negligence or Labor Law § 200. *See O’Sullivan v. IDI Constr. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dept. 2006). As to Labor Law § 241(6), however, there is a disputed issue of fact regarding the alleged violation of Industrial Code § 23-1.7 (e)(1) (tripping hazards from accumulated debris or scattered materials). Since this is a nondelegable duty and there is no requirement of specific control over the plaintiff’s work, Linchris could be found liable to Pyramid under a theory of common law indemnity if Pyramid is found liable.

E. Plaintiff’s Complaint and Non-Moving Parties

All of the moving parties have, to some degree, sought summary judgment against and dismissal of plaintiff’s complaint. The existence and scope of the injuries plaintiff claims he sustained, and the manner in which he sustained them, are of course the key issues underlying this entire litigation. If plaintiff’s complaint fails, then the subsidiary third-party complaint, cross-claims and third third-party complaint will in turn fail as to the substantive claims (leaving

aside issues of indemnification for legal and defense costs). See *Nickerson v. City of New York*, 309 A.D.2d 588 (1st Dept. 2003) (third party complaint dismissed on summary judgment where complaint has no merit). For plaintiff to establish liability at all, he must show that he was injured and that breach of either a duty of care or of a pertinent Industrial Code proximately caused his injury. The undisputed evidence establishes that Racanelli, as general contractor, had a duty to keep the work site clean. If a jury finds that plaintiff is being truthful about tripping over a piece of black pipe, to find Racanelli negligent they will also have to find that the pipe was there because Racanelli violated its duty in some way, thereby causing the pipe to be present, *and* that plaintiff's negligence was not the sole proximate cause of the accident.

A jury could find that plaintiff's story about tripping over a piece of black pipe is a recent fabrication. Plaintiff did not mention tripping over this pipe either in the accident report (filed three months after the accident), or during testimony at his Worker's Compensation hearing. Nor did plaintiff's foreman mention it during his testimony at that same hearing. The story then was that plaintiff had injured his back when he and his foreman went to set down an oxygen tank they had been moving. Exhs. C, D. Years later at his EBT plaintiff mentioned tripping on the pipe and testified that pieces of pipe and rubbish were strewn around the kitchen floor. Although this testimony does not explicitly contradict plaintiff's prior testimony, it does constitute a material factual change that arguably expands the potential sources of liability beyond plaintiff's immediate employer and the constraints of the Worker's Compensation law, which renders the later testimony suspect. Cf. *Harty v. Lenci*, 294 A.D.2d 296, 298 (1st Dept. 2002) (party's affidavit that contradicts prior sworn testimony creates a feigned issue of fact insufficient to defeat summary judgment).

Regardless, plaintiff's credibility is an issue of material fact. The court will, however, dismiss plaintiff's claims under Labor Law § 241(6) except for the claim of violating Industrial Code § 23-1.7(e)(2). The court, in the interest of judicial economy, has also searched the record and dismisses COOL's third third-party complaint against Evolution Piping Corp. *See Dunham v. Hilco Construction Company*, 89 N.Y.2d 425 (1996) (under CPLR 3212(b) the court can "search the record" and grant summary judgment for non-moving party on any cause of action or issue that is subject of motion before court). There is undisputed evidence that Evolution was not a subcontractor of Pyramid, did not use the type of pipe plaintiff claims he tripped over, and exercised no authority or control over COOL, plaintiff or the work in question. *See Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998).

Accordingly, it is

ORDERED that Pyramid's motion for summary judgment as to Racanelli's third-party complaint is granted in part; as to the first cause of action for common law indemnity and as to the second cause of action for contribution, which are dismissed; and the motion is denied as to the third cause of action for contractual indemnity and the sixth cause of action for breach of contract, which are severed and shall continue; and it is further

ORDERED that Pyramid's motion for summary judgment on its cross-claim against COOL for contractual indemnification is granted; and it is further

ORDERED that COOL's cross-motion for summary judgment against Racanelli on its third-party complaint is granted as to the third cause of action for contractual indemnification and the fifth cause of action for breach of contract, which are dismissed; and it is further

ORDERED that COOL's cross-motion for summary judgment against Pyramid on its

cross-claims is granted in part as to the claims for common law indemnification/contribution and for breach of contract, which claims are dismissed, and denied as to the claim for contractual indemnification, which shall be severed and continue; and it is further

ORDERED that Hilton's cross-motion for summary judgment against plaintiff on the complaint and against Pyramid on its cross-claim are granted and those claims are dismissed as to Hilton; and it is further

ORDERED that Linchris' cross-motion for summary judgment against COOL on the third third-party complaint is granted in part and the claim for common law indemnity is dismissed, but is denied as to the Labor Law § 241(6) claim based on violation of New York Industrial Code § 23-1.7(e)(2), which claim shall be severed and shall continue; and it is further

ORDERED that summary judgment is granted *sua sponte* as to COOL's third third-party complaint against Evolution Piping Corp, which is dismissed.; and it is further

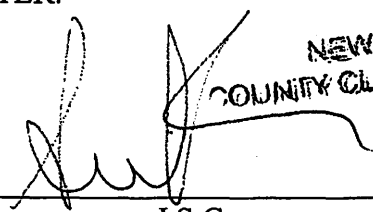
ORDERED that the Clerk shall enter Judgment accordingly.

FILED

APR 29 2009

NEW YORK
COUNTY CLERKS OFFICE

ENTER:



J.S.C.

Date: April 24, 2009
New York, N. Y.