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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

McGlone

INDEX NO. 115808/06

MOTION DATE

- v -

MOTION SEQ. NO. 002

B.R. Fries & Assocs., Inc. et al.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
JUL 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/9/10

MARCY S. FRIEDMAN J.S.C.

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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PAUL MCGLONE and TRICIA MCGLONE, Index No.: 115808/06

Plaintiffs,

-against-

B.R. FRIES & ASSOCIATES, INC., HOME DEPOT U.S.A., INC., 168TH STREET JAMAICA LLC and 166-28 JAMAICA AVENUE LLC,

Defendants.

---x

B.R. FRIES & ASSOCIATES, LLC, incorrectly s/h/a B.R. FRIES & ASSOCIATES, Index No.: 590124/07

Third-Party Plaintiff,

-against-

ATLAS CONCRETE CONSTRUCTION CORP. and J.C. STEEL CORP.,

Third-Party Defendants.

B.R. FRIES & ASSOCIATES, LLC, Index No.: 590007/06

Second Third-Party Plaintiff,

-against-

ATC ASSOCIATES, INC.,

Second Third-Party Defendant.

---x

Motion sequence numbers 002, 003, 004, 005, 006, 007 and 008 are hereby consolidated for disposition.

In this Labor Law Action, plaintiff Paul McGlone sues for damages he sustained when he fell from a box beam while erecting the frame of a building located at 92-20 168th Street, Jamaica, New York (the premises) on October 13, 2006.

In motion sequence number 002, defendant 168th Street Jamaica LLC moves for conditional summary judgment against defendant Home Depot U.S.A., Inc. (Home Depot) on its cross claim for contractual indemnification.

In motion sequence number 003, Home Depot moves for summary judgment dismissing plaintiff Paul McGlone's common law negligence and Labor Law §§ 200 and 241 (6) claims against it, and for summary judgment on its cross claims for indemnity or, in the alternative, conditional summary judgment on the cross claims, and dismissing all cross claims against it.

In motion sequence number 004, plaintiff moves for partial summary judgment against defendants Jamaica, Home Depot and B.R. Fries & Associates, LLC (Fries) on his Labor Law § 240 (1) claim.

In motion sequence number 005, second third-party defendant ATC Associates, Inc. (ATC) moves for summary judgment dismissing Fries' second third-party complaint and all cross claims against it.

In motion sequence number 006, third-party defendant J.C. Steel Corp. (Steel) moves for summary judgment dismissing (1) plaintiff's common law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims; (2) all claims and/or cross claims for contribution and/or common law indemnification against it, on the ground that plaintiff did not sustain a "grave injury"; (3) all claims and/or cross claims for contractual indemnification asserted against it, with the exception of Fries' cross claim for the same; and (4) all claims for breach of contract and failure to procure insurance asserted against it.

In motion sequence number 007, third-party defendant Atlas Concrete Construction Corp. (Atlas) moves for summary judgment dismissing Fries' third-party complaint and all cross claims

against it.

In motion sequence number 008, Fries moves for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200 and 241 (6) claims, and all counter-claims and cross claims against it, and for summary judgment against Steel for contractual indemnification.

BACKGROUND

On the date of the accident, defendant Jamaica owned the premises. Prior to the accident, Jamaica leased the premises to Home Depot. Thereafter, Home Depot contracted with Fries to serve as the general contractor for a project for construction of a new Home Depot store (the store) at the premises. Fries then subcontracted with Atlas to perform the concrete work, and with Steel to perform the steel erection work. In December of 2005, Home Depot contracted with ATC to serve as a consultant for quality control and material testing at the site. Plaintiff was employed by Steel as an ironworker.

Plaintiff testified that he received all of his instructions and directions for his work from his supervisor, Chris Arnold, a Steel foreman. (P.'s Dep. at 20-21.) On the day of the accident, plaintiff was working with a crew consisting of Steel employees Dave Motl, John Brace, John Garofulo and Arnold. Plaintiff and Motl were in the process of attaching a box beam of approximately 30 feet to two vertical columns. The north column was approximately 50 feet high, and the south column was approximately 20 feet high. The two columns were attached to concrete foundations by anchor bolts. (P.'s Dep. at 35-39.) The columns were not braced. A crane held the box beam by two steel chokers.

At the time of the accident, plaintiff was sitting on the south end of the box beam, at a

height of 20 feet or less (id. at 37),[1] attempting to connect the box beam to the south column. (Motl Dep. at 78.) The box beam had already been temporarily attached to the north column (P.'s Dep. at 36), and plaintiff and his co-worker were trying to push or pry the box beam so that it would fall into place in the south column. (Motl Dep. at 79.) As they did so, the north column fell over. (Id.) As a result, the end of the box beam on which plaintiff was sitting rose quickly and plaintiff "went up and back," falling to the ground. (P.'s Dep. at 65-68.)

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])" (Zuckerman, 49 NY2d at 562).

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON HIS LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS JAMAICA, HOME DEPOT AND FRIES (motion sequence number 004)

Labor Law § 240 (1) provides:

> 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

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[1] Plaintiff testified that he was working approximately 20 feet above ground level (P.'s Dep. at 37), and his co-worker, Motl, testified that he and plaintiff were approximately 10 to 12 feet above the ground. (Motl Dep. at 66-67.) This testimony was uncontradicted.

> 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries. (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe Coll., 12 AD3d 261, 262 [1st Dept 2004]).

Initially, it should be noted that defendant Jamaica, as owner of the premises, and defendant Fries, as general contractor, fall within the purview of Labor Law § 240 (1). In addition, defendant Home Depot, as a lessee who fulfilled the role of owner by contracting for the work, also falls within the purview of Labor Law § 240 (1). (See Crespo v Triad, Inc., 294 AD2d 145, 146 [1st Dept 2002].)

Plaintiff argues that defendants are liable for his injuries under Labor Law § 240 (1), because they did not protect him from the collapse of the north column, which was not supported or braced, and did not provide him with a proper safety device, such as a lift, static line, or a functional fall system.

As it is undisputed that the north column and the box beam on which plaintiff was

working collapsed, plaintiff makes a prima facie showing that the safety devices provided were insufficient to provide him with protection, and therefore that defendants' violation of section 240 (1) was a proximate cause of his injuries. (See Blake, 1 NY3d at 289 n 8; see Panek v County of Albany, 99 NY2d 452, 458 [2003]; Loreto v 376 St. Johns Condominium, Inc., 15 AD3d 454, 455 [2d Dept 2005]; Cosban v New York City Tr. Auth., 227 AD2d 160, 161 [1st Dept 1996]; Aragon v 233 West 21st Str., 201 AD2d 353, 354 [1st Dept 1994].)

In opposition to plaintiff's motion, Steel acknowledges that it provided all safety equipment for its workers at the site. (Adams Dep. at 29.) However, it argues that, under OSHA regulations, it was not required to provide fall protection for workers working less than 30 feet from the ground. (See Steel Motion, Aff. in Support at 19; Adams Dep. at 148.) Contrary to Steel's contention, compliance with OSHA regulations is not a bar to liability under the Labor Law. "[W]here an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage." (Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 523 [1985].)

Defendants further contend that plaintiff was a recalcitrant worker. "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident." (Gallagher v New York Post, 14 NY3d 83, 88 [2010]; Cahill, 4 NY3d at 40 [2004]; Cherry v Time Warner, Inc., 66 AD3d 233 [1st Dept 2009].) Nor does liability attach in circumstances where plaintiff "disregarded specific safety instructions." (Tonaj v ABC Carpet

Co., 43 AD3d 337, 338 [1st Dept 2007]; Allen v New York City Tr. Auth., 35 AD3d 231 [1st Dept 2006]. See Cahill, 4 NY3d at 39.)

In seeking to raise a triable issue of fact as to whether plaintiff was recalcitrant, Home Depot relies on a provision in the contract between Fries and Steel that "[a]ny area where there is a 6-foot or more change in elevation will be safeguarded with a barricade, railing or wire rope. Any worker exposed to an unprotected fall of 6 foot or greater will wear a body harness connected to a secure anchorage point." (See Fries' Motion, Ex. Q, Fries/Steel Contract, Rider A.) This provision cannot serve to raise a triable issue of fact as to whether plaintiff was recalcitrant because the issue under the recalcitrant worker doctrine is not whether Steel was contractually obligated to provide safety devices but, rather, whether plaintiff knew he was expected to use available safety devices and chose not to do so.

In this regard, plaintiff testified that at the time of the accident, he was wearing a harness and a lanyard, but that he could not tie off the harness because there was no place to do so. (P.'s Dep. at 60, 128-130.) In particular, he testified that he could not tie off to the chokers (which held the box beam) because they were "too far away," and that he could not tie off to the box beam because there was "nothing there" to tie off to. (Id. at 130.) While defendants contend that plaintiff should have tied off, the testimony they submit in support of this contention does not show that plaintiff was able to do so at the location where he was working. Thus, Home Depot contends that plaintiff could have tied off using a "yo-yo." (Home Depot Aff. in Opp., at 4.) However, Steel's project manager, James Adams, testified that "yo-yo's" would be provided when the ironworker was working more than 30 feet above the ground. (See Adams Dep. at 150.) It is undisputed that plaintiff was working below that height at the time of his accident.

Nor does the evidence show that plaintiff was directed to tie off, or that he failed to use any additional, available safety devices. James Adams testified that it was discretionary for a worker to tie off when working at levels below 30 feet and only mandatory to tie off above 30 feet, and that it was not accepted procedure for the worker to tie off on the actual beam that he was installing. (Adams Dep. at 148.) It is undisputed that there was no static line in the area where plaintiff was working to which plaintiff's lanyard could have been connected. (Snell [Fries' Field Superintendent] Dep. at 60, 88.) While it is also undisputed that safety, including tie-off rules, were discussed at job site meetings (P.'s Dep. at 142-143; Motl Dep. at 29), there is nothing in the record showing that Steel directed ironworkers to install static lines. Nor could plaintiff have utilized a lift, as there were debris and steel at the base of the column on which he was working that prevented a lift from being placed there. (Motl Dep. at 136-137.)

There is thus no evidence in this record showing that plaintiff misused his harness or lanyard, disregarded a specific instruction to tie off, or chose not to use an available safety device, such as a second lift. Defendants accordingly fail to raise a triable issue of fact as to whether plaintiff was a recalcitrant worker.

Defendants further argue that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because plaintiff was the sole proximate cause of his accident. (Home Depot Aff. in Opp., ¶ 7; Steel Motion Aff. in Support, at 16.) Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1). (See Robinson v East Med. Ctr., LP, 6 NY3d 550, 554-555 [2006]; Montgomery v Federal Express Corp., 4 NY3d 805, 806 [2005]; Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004]; Blake, 1 NY3d at 290). However, it is well settled that comparative negligence is not a

defense to a Labor Law § 240 (1) cause of action once a violation is shown. (See Bland v Manocherian, 66 NY2d 452, 460 [1985]; Jamison v GSL Enters., Inc., 274 AD2d 356, 361 [1st Dept 2000].) Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence." (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002] [emphasis in original] [internal citation, quotation marks and brackets omitted]; Ranieri v Holt Constr. Corp., 33 AD3d 425, 425 [1st Dept 2006]; Lopez v Melidis, 31 AD3d 351, 351 [1st Dept 2006]; Orellano v 29 East 37th Str. Realty Corp., 292 AD2d 289, 291 [1st Dept 2002].)

Here, as discussed in connection with defendants' recalcitrant worker defense, there is no evidence that plaintiff misused his harness, ignored a safety directive, or failed to use an available safety device. Defendants also argue that plaintiff should have taken it upon himself to erect his own fall arrest system by installing a static line so that he could tie off, and that his "choice" not to do so renders him the sole proximate cause of his accident. (See Home Depot Aff. in Opp, ¶ 7; Steel Aff. In Support, at 16.) This argument is unavailing under these circumstances in which, as noted above, neither Steel nor Fries provided safety devices for plaintiff to tie off in his work area, and in which Steel itself took the position that it was not mandatory for a worker to tie off below 30 feet. Accordingly, plaintiff should be awarded judgment as to liability on his Labor Law § 240 (1) claim against Jamaica, Home Depot, and Fries.

PLAINTIFF'S COMMON LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS AGAINST HOME DEPOT AND FRIES (motion sequence numbers 003 and 008)

Defendants Home Depot and Fries move for summary judgment dismissing plaintiff's claims under Labor Law § 200 and for common law negligence against them. It is settled that Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]." (Cruz v Toscano, 269 AD2d 122 [1st Dept 2000].) Labor Law § 200 (1) provides, in pertinent part, as follows:

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

Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed. (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]. See also Vital v City of New York, 43 AD3d 309 [1st Dept 2007]; Kinirons v Teachers Ins. & Annuity Assn. of Am., 34 AD3d 237 [1st Dept 2006].)

In order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent had the authority to exercise, or exercised, some supervisory control over the injury-producing work. (See Rizzutto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]; Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993].)

Moreover, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff

performed his or her work." (Hughes v Tishman Const. Corp., 40 AD3d 305, 306 [1st Dept 2007] [emphasis in original]; Burkoski v Structure Tone, Inc., 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work].) "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." (Ortega v Puccia, 57 AD3d at 62.)

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and the plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed. (See Murphy v Columbia Univ., 4 AD3d 200, 202 [1st Dept 2004].) With respect to common law claims of negligence, constructive notice of a defect requires that the "defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986].)

On this record, defendants Home Depot and Fries demonstrate that they did not supervise or control plaintiff's work. Pursuant to its subcontract with Fries, Steel performed all of the steel erection work at the site. Plaintiff testified that he received all of his instructions from his foreperson, and that on the day of the accident, no one from Home Depot or Fries directed his work. (P.'s Dep. at 27, 124, 193-194.) The testimony of Fries' field superintendent, Beau Snell, that he performed daily walk-throughs of the site and had authority to stop work and correct dangerous conditions (see Snell Dep. at 54-59) is insufficient to raise a triable issue of fact as to

whether Fries supervised plaintiff's work under Labor Law § 200. (Hughes, 40 AD3d at 311.) Moreover, the record is devoid of any evidence that either Fries or Home Depot had actual or constructive notice of the defective condition of the north column prior to the accident. Accordingly, Fries and Home Depot are entitled to summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against them.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIM AGAINST HOME DEPOT AND FRIES (motion sequence numbers 003 and 008)

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners and contractors and their agents " 'to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law §241(6), however, the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code § 23-1.16 (b) (12 NYCRR), plaintiff does not address these Industrial Code violations in his opposition papers and, thus, they are deemed abandoned. (See Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003]; Musillo v Marist Coll., 306 AD2d

782, 784 n 1 [3d Dept 2003]). Accordingly, defendants Home Depot and Fries are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim to the extent that plaintiff relies upon these provisions.

As to Industrial Code 12 NYCRR 23-1.16 (b),[2] it is sufficiently specific to support a cause of action under Labor Law § 241 (6). (See Farmer v Central Hudson Gas & Elec. Corp., 299 AD2d 856, 857 [4th Dept 2002], lv denied 100 NY2d 501 [2003]; Mills v Niagara Mohawk Power Corp., 262 AD2d 901, 902 [3d Dept 1999].) However, Industrial Code 12 NYCRR 23-1.16(b) does not apply to the facts of this case. This provision, which establishes requirements for the use of safety belts and harnesses, is not applicable here, as there was no evidence that plaintiff was tied off or, as held above, that plaintiff was directed to tie off at the height at which he was working. Accordingly, defendants Home Depot and Fries are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

ATLAS' MOTION FOR SUMMARY JUDGMENT DISMISSING FRIES' THIRD-PARTY COMPLAINT AND ALL CROSS CLAIMS AGAINST IT (motion sequence number 007)

As to the branch of Atlas' motion seeking dismissal of Fries' third-party complaint against it, Fries, in its affidavit in response to Atlas' motion, states that it "agrees with Atlas Concrete that discovery has not, to its knowledge, produced any evidence that either the concrete, or Atlas Concrete's installation of the anchor bolts in the concrete caused or contributed to the

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[2] 12 NYCRR 23-1.16 (b) provides that:

Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

column's failure." (Fries' Aff. in Response to Motions, at ¶23.) While Fries reserved the right to oppose Altas' motion based on new evidence produced by another party in response to the motion (id. at ¶ 24), as discussed below, none of the parties has produced evidence sufficient to raise a triable issue of fact as to Atlas' negligence. Accordingly, Atlas is entitled to summary judgment dismissing Fries' third-party complaint against it.

Atlas also moves to dismiss all cross claims asserted against it. With the exception of ATC's cross claim for contractual indemnification against Atlas, all cross claims asserted against Atlas sound in common law indemnification and contribution. The branch of Atlas' motion seeking dismissal of ATC's cross claim against Atlas for contractual indemnification is unopposed and should therefore be granted.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; Priestly v Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493, 495 [1st Dept 2004]). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]." (Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 61-62 [2d Dept 2003], lv dismissed 100 NY2d 614.)

Here, Atlas submits sufficient evidence to make a prima facie showing that it was not negligent in pouring the concrete and installing the anchor bolts that held the north column. Atlas' carpenter foreman, Antonio Rodrigues, testified that he was not aware that any concrete

failed ATC's testing prior to the accident. (Rodrigues Dep. at 91.) He further testified that the anchor bolts were pull tested by non-party Soil Mechanics prior to the installation of the column, and that he was not aware of any failures. (Id. at 66.) The anchor bolts were tested again after the accident, and none failed. (Snell Dep. at 137-138.) After the accident, Fries hired non-party Thorton Tomasetti, a structural engineering firm, to investigate the accident. By its report dated October 30, 2006, it found that the "anchor bolts as placed exceeded the stipulated building design loads." (See Atlas Motion, Ex. AA.) The report further found that "the lack of adequate bracing during the erection of this column caused the column to become unstable due to dynamic horizontal movements of the beam while being fit up to the column connections. The instability caused eccentric loads on the anchor bolts for which they were not designed. The bolts bent and pulled out of the concrete pier as both the column and beam fell." (See id.) Thus, the evidence submitted by Atlas shows that the cause of plaintiff's accident was the failure to brace or guy the north column, rather than Atlas' work on the concrete and anchor bolts.

In opposition, Home Depot and Steel contend that triable issues of fact exist as to whether Atlas' negligence contributed to the collapse of the north column. Home Depot relies principally on the conclusory assertion that Atlas was negligent "because the anchor bolts for the subject column pulled out of the concrete" when the column collapsed. (Home Depot Opp. to Atlas, at ¶ 3.) While it is undisputed that the bolts did pull out of the concrete, this fact cannot serve, without more, to raise a triable issue of fact as to Atlas' negligence. Moreover, Home Depot fails to submit competent evidence of such negligence. The testimony of plaintiff that Steel's foreman told him that Atlas' drilling of holes for the anchor bolts was not deep enough (see P.'s Dep. at 74-75), is based solely on hearsay. Similarly, the testimony of plaintiff's co-worker and foreman that insufficient epoxy was used with the anchor bolts (Motl Dep. at 93), or that the installation

was not done properly (Adams Dep. at 156-160) is based on speculation by deponents who were not shown to have the experience with or the qualifications necessary to assess the performance of anchor bolt installation work.

Steel also fails to raise a triable issue of fact as to Atlas' negligence. In so holding, the court rejects the affidavit of Steel's expert, Stuart Sokoloff, a professional engineer. (See Steel's Opp. to Atlas, Ex. B.) Sokoloff did not inspect the concrete, the anchor bolts, or the epoxy which held the anchor bolts. Rather, his affidavit is based solely on deposition testimony and review of photographs and documents in the record. (See id., at ¶ 4.) Sokoloff opines that "[t]he failure to place the adhesive up to the top of the concrete pier within the entire annular space between the [anchor] bolt and the drilled hole was a proximate cause of the column falling." (Id., at ¶ 13.) In reaching this conclusion, Sokoloff relies heavily on photographs taken of the bolts shortly after the accident, which showed that epoxy was missing from a portion of the bolt beneath the shim plate. He asserts that if the adhesive had been properly applied, there would have been no area under the shim plate that was not covered with epoxy. (See id., at ¶ 9.) Defendants do not dispute that it is necessary to apply the epoxy so that it comes up above the top of the concrete footing or pier. (See Rodrigues Dep. at 58, 106.) However, they correctly contend that there is no evidence to support Sokoloff's contention that the epoxy did not reach the correct level. Significantly, Sokoloff fails to make any showing that the anchor bolt was not covered with epoxy to the depth of 6 5/8 inches, as required by the shop drawings. (See Atlas Motion, Ex. S.) Put another way, the photographs taken after the fall of the column cannot serve to show that there was an area of the anchor bolt that was not fully covered with epoxy while it was still embedded in the concrete pier, prior to the fall of the column. Under these circumstances, Sokoloff's conclusion that improper application of the epoxy was a proximate cause of the fall of

the column is based solely on speculation which is insufficient to raise a triable issue of fact. (See Campanella v Marstan Pizza Corp., 280 AD2d 418 [1st Dept 2001]; Fireman's Fund Ins. Co. v County of Nassau, 66 AD3d 823 [2d Dept 2009].) Thus, in the absence of evidence showing that Atlas' performance of its work caused or contributed to the column's collapse, Atlas is entitled to summary judgment dismissing all cross claims against it.

ATC'S MOTION FOR SUMMARY JUDGMENT DISMISSING FRIES' SECOND THIRD-PARTY COMPLAINT AND ALL CROSS CLAIMS AGAINST IT (motion sequence number 005)

As to the branch of ATC's motion seeking dismissal of Fries' second third-party complaint against it, Fries states that it "agrees that discovery has not produced any evidence that there was anything wrong with either the concrete, or the installation of the anchor bolts in that concrete, let alone with ATC's monitoring and testing of said work." (Fries' Aff. in Response to Motions, at ¶ 26.) Thus, ATC is entitled to summary judgment dismissing Fries' second third-party complaint against it.

As to the branch of ATC's motion seeking dismissal of the cross claims against it, only Home Depot and Steel oppose dismissal of their cross claims. It is undisputed that ATC performed testing and monitoring of the concrete, and monitored the installation of the anchor bolts which held the steel columns to the concrete piers. (Dep. of William Carty [ATC's Department Manager] at 36-37, 73-77.) In support of its motion, ATC submits evidence showing that none of the concrete it tested failed inspection (see id. at 99; ATC's Inspection Reports, ATC Motion, Ex. M), and that none of the anchor bolts it inspected was installed improperly. (Id. at 70-76.)

In opposition, Home Depot and Steel fail to raise a trial issue of fact as to whether ATC negligently monitored the concrete or the installation of the anchor bolts. Home Depot's

conclusory assertion that ATC was negligent because the concrete pier under the north column was cracked after the column collapsed is insufficient to raise a triable issue of fact, as there is no evidence showing that the crack was due to a failure of the concrete or ATC's testing of the concrete. As discussed above on Atlas' motion, Home Depot relies upon hearsay testimony and speculative testimony that is insufficient to raise a triable issue of fact as to ATC's negligence.

For the reasons discussed above, Steel also fails to raise a triable issue of fact based on the Sokoloff affidavit. Thus, in the absence of evidence showing that ATC negligently caused or contributed to the column's collapse, ATC is entitled to summary judgment dismissing all cross claims sounding in common law indemnification and contribution asserted against it.

As to Home Depot's cross claim for contractual indemnification against ATC, section 18 of the ATC/Home Depot agreement states that:

> ATC shall indemnify and hold harmless Client, its employees ... and agents against claims, demands, and lawsuits, including reasonable attorney's fees to the extent arising out of or caused by the negligence or willful misconduct of ATC or its subcontractors in connection with all activities conducted in the performance of Services under this Agreement.

(Home Depot's Motion, Ex. 3.) This provision unambiguously requires indemnification by ATC only where ATC is negligent. (Colby Zeigler-Bonds v Structure Tone, Inc., 245 AD2d 80 [1st Dept 1997].) As held above, there is no showing that ATC was negligent, and, thus, ATC is entitled to summary judgment dismissing Home Depot's cross claim for contractual indemnification against it. Accordingly, ATC is entitled to dismissal of all claims and cross claims asserted against it.

JAMAICA'S MOTION FOR CONDITIONAL SUMMARY JUDGMENT ON ITS CROSS CLAIM FOR CONTRACTUAL INDEMNIFICATION AGAINST HOME DEPOT (motion sequence number 002).

Article 9.4 of the sublease agreement between Jamaica and Home Depot states in

pertinent part that:

> [T]enant [Home Depot] covenants and agrees to indemnify, defend, protect and hold the other [Jamaica] harmless against and from any and all damages, losses, liabilities ... judgments, suits, proceedings, costs, disbursements or expenses of any kind or of any nature whatsoever ... arising from or in connection with the loss of life, personal injury, and/or damage to property arising from or out of any occurrence in or upon the Premises, unless caused by any negligent or willful act or omission of Landlord or its agents, contractors, servants or employees.

(Jamaica's Motion, Ex. C.)

Thus, the sublease provides for indemnification when a claim arises out of any occurrence at the premises, even if Home Depot has not been negligent. (See Brown v Two Exchange Plaza Partners, 76 NY2d 172 [1990]; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1st Dept 1999].)

Home Depot argues that Jamaica's motion should be denied because of the anti-subrogation rule, which precludes an insurer from stepping into its insured's shoes and suing a third party if that third party qualifies as an insured under the same policy. (See Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, 468 [1986]). Here, it is undisputed that Fries' insurer, non-party Zurich American, has tendered a defense to both Home Depot and Jamaica. (See Home Depot Opp. to Jamaica, Ex. A.) In reply, Jamaica concedes that the anti-subrogation rule bars indemnification by Home Depot to the extent that plaintiff obtains a verdict up to the agreed-upon limits in the Zurich American policy. (See Jamaica Reply, at ¶ 5; Kim v Herbert Constr. Co., 275 AD2d 709 [2d Dept 2000].) .) Jamaica is thus entitled to summary judgment against Home Depot for contractual indemnification conditioned upon findings at trial that Jamaica is vicariously liable, and that plaintiff's damages exceed the policy limits of insurance provided by Zurich American.

STEEL'S MOTION FOR SUMMARY JUDGMENT DISMISSING ALL CLAIMS AND

CROSS CLAIMS AGAINST IT (motion sequence number 006)

Steel moves for summary judgment dismissing all claims and cross claims against it for common law indemnification and contribution on the ground that the claims against it are barred as a matter of law under Workers' Compensation Law § 11. Section 2 of the Omnibus Workers' Compensation Reform Act amended Workers' Compensation Law § 11 by restricting third-party contribution claims against employers. The amended statute provides in pertinent part as follows:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, 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.

"[T] he burden falls on the third party seeking contribution or indemnification against an employer to establish a 'grave injury.' " (Ibarra v Equipment Control, Inc., 268 AD2d 13, 17 [2d Dept 2000].)

Plaintiff's bill of particulars states that as a result of his fall, he "suffered severe multiple traumatic injuries to his entire body, including injuries to his back, spinal cord, head, right knee, left ankle and internal organs." (Bill of Particulars, at 2.) None of these injuries, though severe, rises to the level of "grave injury." " 'The grave injuries listed [in the amended statute] are deliberately both narrowly and completely described. The list is exhaustive, not illustrative.' " (Castro v. United Container Mach. Group, Inc., 96 NY2d 398, 402 [approvingly quoting Governor's Mem approving L 1996, ch 635, 1996 NY Legs Ann].) Thus, Steel is entitled to

summary judgment dismissing all claims for common law indemnification and/or contribution against it.

Steel did not move for summary judgment dismissing Fries' claim for contractual indemnification against it. Fries' motion for summary judgment on this claim is discussed below. Atlas did not assert a contractual indemnification claim against Steel. The branch of Steel's motion to dismiss ATC's cross claim against Steel for contractual indemnification is unopposed and should be granted. Home Depot's claim against Steel for contractual indemnification is discussed below in connection with Home Depot's motion.

As to Fries' claim against Steel for failure to procure insurance, Fries argues that Steel does not show that the insurance it obtained complies with Steel's obligations under their contract, which provides in pertinent part, that:

> Contractor [Fries], Owner [Home Depot] and all other parties required of Contractor [defined by reference to the contract between Home Depot and Fries], shall be included as insureds on the CGL, using ISO Additional Insured Endorsement CG 20 11 85 or an endorsement providing equivalent coverage to the additional insureds.

(Fries' Motion, Ex. R, Fries/Steel Subcontract, ¶ 12 [b] [iii].)

On this record, Steel demonstrates as a matter of law that it procured the insurance coverage required under the Fries/Steel subcontract. Steel submits copies of letters, dated March 2, 2007 and July 6, 2007, from ACE Westchester Specialty Group to Zurich North America whereby Illinois Union Insurance Company acknowledged the existence of a commercial general liability policy affording primary insurance coverage of $1 million per occurrence, and $2 million in the aggregate, and expressly agreed to defend and indemnify Home Depot and Fries according to the terms and conditions of said policy. (See Steel Reply, Ex. A.) Accordingly, Steel is

entitled to summary judgment dismissing Fries' claim for breach of contract/failure to procure insurance against it.

FRIES' MOTION FOR SUMMARY JUDGMENT ON ITS CONTRACTUAL INDEMNIFICATION CLAIM AGAINST STEEL (motion sequence number 008)

Paragraph 11 of the subcontract between Fries and Steel provides that:

> To the extent permitted by law, Subcontractor shall indemnify, hold harmless Owner, Contractor, Architect, ... agents and employees of any of them from and against all claims, damages, losses and expenses including but not limited to attorney's fees arising out of or resulting from the performance of the work, provided that any such claim ... is caused in whole or in part by any act or omission of Subcontractor or anyone directly or indirectly employed by it ... , regardless of whether or not it is caused in part by a party indemnified hereunder. Notwithstanding the foregoing, Subcontractor's obligation to indemnify Owner ... shall extend only to the percentage of negligence of Subcontractor or anyone directly or indirectly employed by it.

(Fries' Motion, Ex. R.)

As a threshold matter, the indemnity provision contained in the agreement between Fries and Steel does not violate General Obligations Law [GOL] § 5-322.1 (1), notwithstanding the language which purports to indemnify Fries for its own negligence. Under GOL § 5-322.1 (1), a contract or agreement, relative to the construction or repair of a building, purporting to "indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons" caused by the negligence of the promisee, his agents or employees, "whether such negligence be in whole or in part, is against public policy and is void and unenforceable." (See Carriere v Whiting Turner Contr., 299 AD2d 509, 511 [2d Dept 2002]; Castrogiovanni v Corporate Prop. Invs., 276 AD2d 660, 661 [2d Dept 2000].) However, as the indemnification provision here includes the language "to the extent permitted by law," the provision does not violate GOL 5-322.1. (See Landgraff v 1579 Bronx Riv. Ave., LLC, 18 AD3d 385, 387 [1st Dept

2005]; Mannino v J.A. Jones Constr. Group, LLC, 16 AD3d 235, 236-237 [1st Dept 2005]; Dutton v Charles Pankow Bldrs., Ltd., 296 AD2d 321, 322 [1st Dept 2002], lv denied 99 NY2d 511.) Even assuming arguendo that the provision provides for indemnification for Fries' negligence, it is settled that such a provision is enforceable where the evidence at trial shows that the contractor was not negligent. (See Hawthorne v South Bronx Community Corp., 78 NY2d 433 [1991]; Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990].)

The contractual indemnification provision at issue requires Steel to indemnify Fries for damages arising out of the performance of its work, without regard to Steel's negligence. The accident clearly arose out of Steel's work at the site. Moreover, as held above, Fries is not liable for negligence. Accordingly, the branch of Fries' motion seeking summary judgment against Steel for contractual indemnification should be granted.

HOME DEPOT'S MOTION FOR SUMMARY JUDGMENT ON ITS CROSS CLAIMS FOR BREACH OF CONTRACT AND INDEMNIFICATION AGAINST FRIES, ATLAS, ATC and STEEL (motion sequence number 007)

As held above, plaintiff's accident was not caused as a result of any negligence on the part of Atlas, ATC, or Fries and, thus, Home Depot's claims against them for common law indemnification and contribution should be dismissed. As also held, ATC is entitled to dismissal of Home Depot's cross claim for contractual indemnification against it. As the court has further determined that plaintiff did not suffer a "grave injury," Home Depot's cross claims against Steel for common law indemnification and contribution should be dismissed.

Home Depot also moves for summary judgment on its contractual indemnification claim against Fries. Paragraph 4.17.1 of the contract between Fries and Home Depot states that:

To the fullest extent permitted by law the Contractor shall indemnify and defend

> ... Owner, Architect, Owner's landlord if any, Owner's developer if any, and their agents and employees, against and shall hold harmless Owner, Architect, Landlord, developer and their agents and employees from all claims, losses, damages, costs, and expenses of any type arising from all claims of Subcontractors, Sub-subcontractors, suppliers, or others, including but not limited to all claims for personal or bodily injury ... occurring wholly or in part, as a result of the Work done or omitted to be done by, or contracted to be done but not done by, the Contractor or his Subcontractors, Sub-subcontractors, or the employees, agents, or anyone for whose acts any of them may be liable, except for claims caused by or resulting from the sole negligence of the indemnitee.

(Home Depot Motion, Ex. Z.) Thus, the indemnification provision requires Fries to indemnify Home Depot for any claims for bodily injury caused as a result of work done by Fries or its subcontractors, except claims caused by Home Depot's sole negligence. As the record is devoid of evidence that Home Depot negligently caused or contributed to plaintiff's accident, Home Depot is entitled to summary judgment against Fries on its contractual indemnification claim.

As to Home Depot's failure to procure insurance claim, Home Depot contends that Fries was contractually obligated to procure insurance and list Home Depot, its landlord and developer, on the insurance policy for any loss due to claims for personal injury in an amount of no less than $3 million per occurrence, but that the Certificate of Insurance provided by Fries only provides for $1 million per occurrence. (Home Depot Aff. in Support, ¶ 61.) Here, the record shows that in addition to the $1 million per occurrence coverage that Fries obtained from its primary insurance carrier, Zurich American, Fries also obtained an excess policy with Navigators Insurance Company for additional insured coverage in the amount of $10 million. (Home Depot Motion, Ex. Z, Bates No. 1-00077.) In reply, Home Depot does not dispute that the $10 million in excess coverage obtained by Fries complies with Fries' obligations under the contract. Accordingly, Home Depot's failure to procure insurance claim against Fries should be

dismissed.

Home Depot also moves for summary judgment in its favor on its cross claims for contractual indemnification and for failure to procure insurance against Steel. Home Depot does not plead these cross claims against Steel. (See Steel Motion, Ex. H.) However, Home Depot asserts the cross claims on this motion, and Steel addresses the claims on the merits. In the absence of any showing of prejudice to Steel, the court will consider the claims. (See Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., 73 AD3d 604 [1st Dept 2010]; Costello Assocs., Inc. v Standard Metals Corp., 99 AD2d 227 [1st Dept 1984]; appeal dismissed 62 NY2d 942.)

As held above, paragraph 11 of the Steel/Fries contract provides for Steel to indemnify Home Depot as the owner for claims arising out of the performance of its work. Home Depot and Steel do not dispute that the indemnification provision also limits Steel's obligation to indemnify Home Depot "only to the percentage of negligence of Subcontractor [Steel] or anyone directly or indirectly employed by it." (See Home Depot Motion, Ex. 2.) Accordingly, Home Depot is entitled to contractual indemnification from Steel conditioned upon a finding at trial that Steel negligently caused plaintiff's accident, and upon a finding as to the percentage of Steel's negligence.

As to Home Depot's claim against Steel for failure to procure insurance, as held above, Steel demonstrates as a matter of law that it procured insurance as required under its contract with Fries. Accordingly, Home Depot's claim for failure to procure insurance against Steel should be dismissed.

Home Depot also seeks summary judgment against Atlas based on unpleaded cross claims for contractual indemnification and failure to procure insurance. As Atlas, unlike Steel,

did not address these unpleaded claims, they are not properly considered by the court. This branch of Home Depot's motion will accordingly be denied.

HOME DEPOT'S MOTION FOR SUMMARY JUDGMENT DISMISSING ALL CROSS CLAIMS AGAINST IT

As held above, the record is devoid of evidence that Home Depot negligently caused or contributed to plaintiff's accident. Accordingly, Home Depot is entitled to summary judgment dismissing all cross claims for common law indemnification and contribution asserted against it. The branch of Home Depot's motion for dismissal of ATC's cross claim for contractual indemnification against it is unopposed, and should be granted. As held above, Jamaica is entitled to contractual indemnification against Home Depot, and accordingly, the branch of Home Depot's motion seeking dismissal of that claim should be denied. Home Depot has not set forth any basis in its motion for dismissal of Jamaica's cross claim for indemnification under an insurance policy. Home Depot's motion will accordingly be denied as to this claim.

FRIES' MOTION FOR SUMMARY JUDGMENT DISMISSING ALL COUNTER-CLAIMS AND CROSS CLAIMS AGAINST IT (motion sequence number 008)

The branch of Fries' motion for dismissal of claims for common law indemnification or contribution against it should be granted based on this court's finding, in connection with the determination of plaintiff's motion, that Fries did not exercise supervisory authority sufficient to render it liable under Labor Law § 200 or for common law negligence.

Home Depot is entitled to contractual indemnification against Fries to the extent held above. The branch of Fries' motion for dismissal of ATC's cross claim for contractual indemnification is unopposed. Accordingly, the branch of Fries' motion to dismiss the contractual indemnification claims against it is denied as to Home Depot, and granted as to ATC.

Fries has not set forth any basis in its motion for dismissal of Jamaica's cross claims for contractual indemnification and indemnification under an insurance policy. Fries' motion will accordingly be denied as to these claims.

ORDER

It is hereby ORDERED that the motion of defendant 168th Street Jamaica LLC (motion sequence number 002) for conditional summary judgment is granted to the extent that 168th Street Jamaica LLC is awarded judgment as to liability against Home Depot U.S.A., Inc. on its cross claim for contractual indemnification, conditioned upon findings at trial that Jamaica is vicariously liable, and that plaintiff's damages exceed the policy limits of insurance provided by Zurich American; and it is further

ORDERED that the branch of the motion of defendant Home Depot U.S.A., Inc. (motion sequence number 003) for summary judgment dismissing all claims and cross claims against it is granted to the extent that (1) the cross claim of second third-party defendant ATC Associates, Inc. for contractual indemnification is dismissed as against it; (2) all cross claims for common law indemnification and contribution are dismissed as against it; and (3) plaintiff's claims under Labor Law §§ 241(6) and 200, and his claim for common law negligence are dismissed as against it; and it is further

ORDERED that the branch of the motion of defendant Home Depot U.S.A., Inc. for summary judgment on its claims is granted to the extent that Home Depot U.S.A., Inc. is awarded judgment as to liability against B.R. Fries & Associates, LLC and J.C. Steel Corp. on its claims for contractual indemnification, with an assessment of damages to be held at the time of trial. Provided that: Home Depot's cross claim against J.C. Steel Corp. for contractual

indemnification is conditioned upon findings at trial that Home Depot is vicariously liable; and that J.C. Steel Corp. negligently caused plaintiff's accident, and upon a finding as to the percentage of Steel's negligence; and it is further

ORDERED that the motion of plaintiff (motion sequence 004) for partial summary judgment is granted to the extent that plaintiff is awarded judgment as to liability on his Labor Law § 240(1) claims against defendants 168th Street Jamaica LLC, 166-28 Jamaica Avenue LLC, Home Depot U.S.A., Inc., and B.R. Fries & Associates, LLC, with an assessment of damages to be held at the time of trial; and it is further

ORDERED that the motion of second third-party defendant ATC Associates, Inc. (motion sequence number 005) for summary judgment is granted to the extent that Fries' second third-party complaint and all cross claims are dismissed as against it; and it is further

ORDERED that the motion of third-party defendant J.C. Steel Corp. (motion sequence number 006) for summary judgment is granted to the extent that (1) all cross claims for contribution and common law indemnification are dismissed as against it; (2) the claim of ATC Associates, Inc. for contractual indemnification is dismissed as against it; (3) the claims of defendants B.R. Fries & Associates, LLC and Home Depot U.S.A., Inc. for breach of contract/failure to procure insurance are dismissed as against it; and it is further

ORDERED that the motion of third-party defendant Atlas Concrete Construction Corp. motion (motion sequence number 007) for summary judgment is granted to the extent that Fries' third-party complaint and all cross claims are dismissed as against it; and it is further

ORDERED that the branch of the motion of defendant B.R. Fries & Associates, LLC (motion sequence number 008) for summary judgment dismissing the claims and cross claims

against it is granted to the extent that (1) all cross claims for contribution and common law indemnification are dismissed as against it; (2) the cross claim of ATC Associates, Inc. for contractual indemnification is dismissed as against it; (3) the cross claim of Home Depot U.S.A., Inc. for breach of contract/failure to procure insurance is dismissed as against it; (4) plaintiff's claims under Labor Law §§ 241(6) and 200, and his claim for common law negligence are dismissed as against it; and it further

ORDERED that the branch of the motion of defendant B.R. Fries & Associates, LLC for summary judgment on its indemnification claim is granted to the extent that B.R. Fries & Associates, LLC is awarded judgment as to liability against J.C. Steel Corp. on its claim for contractual indemnification, with an assessment of damages to be held at the time of trial; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
July 7, 2010

MARCY FRIEDMAN, J.S.C.

MARCY S. FRIEDMAN, J.S.C.