[* 1]

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

PRESENT: JOAN A. MADDEN Justice PART 11

Victor Munoz

Plaintiff,

- v -

Hilton Hotels, et al.

Defendant.

INDEX NO. 110826/07

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the annexed Memorandum Decision/Order.

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

Dated: July 19, 2010

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

VICTOR MUNOZ and ELVIA MUNOZ,

Plaintiffs,

-against-

Index No. 110826/07
Action No. 1

HILTON HOTELS CORPORATION, FC 42 HOTEL LLC, SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Defendants.

----------X

FC HOTEL LLC,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590086/08

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Third-Party Defendant.

----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE, HILTON HOTELS CORPORATION, SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Fourth-Party Plaintiffs,

-against-

Fourth-Party
Index No. 590617/09

FIRST NEW YORK PARTNERS and FC 42ND STREET ASSOCIATES, L.P.,

Fourth-Party Defendants.

----------X

SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

VICTOR MUNOZ and ELVIA MUNOZ,

Plaintiffs,

-against-

Index No. 110826/07
Action No. 1

HILTON HOTELS CORPORATION, FC 42 HOTEL LLC, SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Defendants.

----------X

FC HOTEL LLC,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590086/08

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Third-Party Defendant.

----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE, HILTON HOTELS CORPORATION, SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Fourth-Party Plaintiffs,

-against-

Fourth-Party
Index No. 590617/09

FIRST NEW YORK PARTNERS and FC 42ND STREET ASSOCIATES, L.P.,

Fourth-Party Defendants.

----------X

SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Fifth-Party Plaintiffs,

-against-

SUNSTONE HOTEL PROPERTIES, INC., FIRST NEW YORK PARTNERS MANAGEMENT, LLC and FC 42ND STREET ASSOCIATES, LP,

Fifth-Party Defendants.

Fifth-Party
Index No. 590690/09

----------X

VICTOR MUNOZ and ELVIA MUNOZ,

Plaintiffs,

-against-

EMPIRE STATE DEVELOPMENT CORPORATION, 42ND STREET DEVELOPMENT PROJECT, INC., and NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Defendants.

Index No. 116174/07
Action No. 2

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EMPIRE STATE DEVELOPMENT CORPORATION, 42ND STREET DEVELOPMENT PROJECT, INC. and NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Third-Party Plaintiffs,

-against-

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Third-Party Defendant.

Third-Party
Index No. 590617/08

----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Fourth-Party Plaintiff,

-against-

Fourth-Party
Index No. 590618/09

FIRST NEW YORK PARTNERS and FC 42ND STREET ASSOCIATES, L.P.,

Fourth-Party Defendants.
----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Fifth-Party Plaintiff,

-against-

Fifth-Party
Index No. 590847/09

SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Fifth-Party Defendants.
----------X

JOAN A. MADDEN, J.:

In these actions arising out of a construction site accident, plaintiffs Victor and Elvia Munoz (plaintiffs) move for an order: (1) pursuant to CPLR 602, consolidating *Munoz v Hilton Hotels Corp.*, Index No. 110826/07 ("Action 1") and *Munoz v Empire State Dev. Corp.*, Index No. 116174/07 ("Action 2") under Index No. 110826/07; and (2) pursuant to CPLR 3212, granting them summary judgment on the issue of liability under Labor Law § 240 (1) against defendants Empire State Development Corporation (ESDC), 42nd Street Development Project, Inc. (42nd Street), and "FC 42nd Street Hotel, LLC" (motion seq. no. 004).

Defendant/third-party plaintiff in Action 1, FC 42 Hotel, LLC (FC 42), and defendants/third-party plaintiffs in Action 2, ESDC, 42nd Street and New York State Urban Development Corporation d/b/a Empire State Development Corporation (NYSUDC)

(collectively, ESDC/42nd Street) cross-move, pursuant to CPLR 3212, for an order: (1) dismissing plaintiffs' cause of action under Labor Law § 240 (1) as against them; (2) dismissing the action as against FC 42; (3) dismissing plaintiffs' causes of action under Labor Law §§ 200 and 241 (6) as against them; (4) declaring that defendants Sunstone 42nd Street, LLC (Sunstone LLC) and Sunstone 42nd Street Lessee, Inc. (Sunstone Lessee) are liable to ESDC/42nd Street for full contribution and common-law indemnification; (5) declaring that Sunstone LLC is obligated to defend and indemnify 42nd Street, pursuant to contract; and (6) declaring that third-party defendant Sunstone Hotel Properties, Inc. d/b/a Hilton Times Square (SHP) is liable to ESDC/42nd Street for full contribution and common-law indemnification, pursuant to Workers' Compensation Law § 11.

Third-party defendant/fourth-party plaintiff/fifth-party defendant in Action 1 and third-party defendant/fourth-party plaintiff/fifth-party plaintiff in Action 2, SHP cross-moves, pursuant to CPLR 3212, for an order: (1) dismissing the third-, fourth-, and fifth-party complaints on the ground that they are barred by Workers' Compensation Law § 11; and (2) granting it contractual indemnification against Sunstone LLC and Sunstone Lessee.

Fourth-party defendants/fifth-party defendants in Action 1 and fourth-party defendants in Action 2, First New York Partners Management, LLC (First New York) and FC 42nd Street Associates, L.P. (FC 42nd Street) (together hereinafter, First New York/FC 42nd Street) also cross-move, pursuant to CPLR 3212, for an order: (1) dismissing plaintiffs' cause of action under Labor Law § 240 (1); (2) dismissing plaintiffs' causes of action under Labor Law §§ 200 and 241 (6); (3) declaring that Sunstone LLC and Sunstone Lessee are liable to First New York/FC 42nd Street for full contribution and common-law indemnification; (4) declaring that Sunstone LLC is

obligated to defend and indemnify First New York/FC 42nd Street, pursuant to contract; and (5) declaring that SHP is liable to First New York/FC 42nd Street for full contribution and common-law indemnification, pursuant to Workers' Compensation Law § 11.

BACKGROUND

The Parties

Plaintiff was injured on June 16, 2007, when he fell off a ladder while performing painting work at a loading dock at the Hilton Times Square Hotel located at 234 West 42nd Street, New York, New York. Plaintiff struck his head on the concrete sidewalk, sustaining a traumatic brain injury. ESDC and 42nd Street are the fee owners of the land. The building is divided into two units: a Hotel unit and an Entertainment/Retail unit. The owner and lessee of the Hotel unit are Sunstone LLC and Sunstone Lessee, respectively. FC 42nd Street and First New York are the owner and managing agent of the Entertainment/Retail unit. The loading docks are owned by the Entertainment/Retail unit. Plaintiff was an employee of SHP, the managing agent of the Hotel unit. FC 42 is a former owner of the Hotel unit.

The DEOA and HMA Agreements

There was an easement that allowed the Hotel unit to use portions of the building owned by the Entertainment/Retail unit, including the loading docks. On November 5, 1998, the City of New York and 42nd Street entered into a Declaration of Easement and Operating Agreement (DEOA) for the subject premises (Foersch Affirm., Exh. M). Article I, section 1.1 of the DEOA defines the term "owner(s)" as a "collective reference to the Hotel Property Owner and the Entertainment/Retail Property Owner or either of them" (*id.*). The DEOA states in article II, section 2.19 that "[t]he Fee Owner hereby grants to and declares for the benefit of the Hotel

Property Owner a non-exclusive easement for the use of the loading docks located in Entertainment/Retail Building as shown on the Attached Plans" (*id.*). However, that section also provides that the "Entertainment/Retail Owner shall be responsible for the Maintenance of the loading docks, provided, however, that the Hotel Owner shall bear a share of such Maintenance costs based on the Owner Building Area Ratio" (*id.*). Article V, section 5.8 of the DEOA states that "[t]he Owners shall have the right to retain a building manager" and that the building manager is to "[m]aintain the sidewalks, building security, the Service Elevator, shared Easement areas located in the cellar of the Entertainment/Retail unit, the loading docks (as well as administer the use thereof as contemplated by Section 2.19 hereof) . . . as the Owners shall desire. . . ." (*id.*). It further states that "[t]he parties hereto agree that First New York Management Corporation shall serve as initial building manager" (*id.*).

By purchase agreement dated January 24, 2006, FC 42 sold the Hotel unit to Sunstone LLC. Subsequently, on March 17, 2006, FC 42 assigned all of its rights in and under the DEOA, including all such rights associated with the "Hotel Property Owner" designee, to Sunstone LLC, as assignee (*id.*, Exh. N).

Also on March 17, 2006, Sunstone Lessee and SHP entered into a Hotel Management Agreement (HMA) whereby Sunstone Lessee, identified therein as the "Owner," retained SHP, referred to therein as the "Operator," "to manage and operate the Hotel and all of its facilities and activities . . . ." (Berger Affirm., Exh. R, § 3.3). Pursuant to article 3.8 (l) of the HMA, SHP was charged with causing "all needed repairs and maintenance to the Hotel of which Operator is aware to be made" (*id.*). Both the DEOA and HMA contain indemnification provisions.

The Accident

Leonard Zagara was employed by SHP as a helper at the hotel on the date of the accident (Zagara EBT, at 6). On the morning of the accident, Zagara was standing near the west loading dock, smoking a cigarette (*id.* at 9). Plaintiff was in the east loading dock at the time, over 100 feet away (*id.* at 11, 13). He was using an extension ladder (*id.* at 22). According to Zagara, plaintiff had placed the ladder on metal grating (*id.* at 26). He observed plaintiff falling from the ladder, and then striking the concrete sidewalk (*id.* at 10, 11). Zagara and the doorman ran to plaintiff, and found plaintiff, lying face down, the extension ladder, a rope, a bucket, and spilled paint on the sidewalk (*id.* at 12, 13, 20, 27, 54). Plaintiff had a large gash in the back of his head (*id.* at 16). Zagara took off his shirt, and covered plaintiff (*id.*). When asked whether plaintiff was working with anyone, Zagara stated, "No" (*id.* at 13). Zagara called for help and an ambulance, stating that "Victor was down" (*id.* at 16). Zagara stated that, after a little while, plaintiff started to revive and to moan in pain and yell in Spanish (*id.* at 17). According to Zagara, the building had a Genie hydraulic lift and a mechanical boom for employees working at heights (*id.* at 43). Zagara stated that his supervisor, Guido Tamayo, gave him instructions on a daily basis; "he would tell us what he wanted to be done" (*id.* at 36).

Plaintiff Victor Munoz testified at his deposition that he could not recall the accident (Plaintiff Victor Munoz EBT, at 115, 116, 118). He stated that he injured his head, resulting in pain, memory loss, dizziness, loss of concentration and impulsiveness, and pain in his shoulders, hips, and knees (*id.* at 110, 136, 138). Plaintiff stated that he walks with a cane, and that he cannot walk alone (*id.* at 25-26, 61). Plaintiff's doctors told him that he should not drive because he experiences dizziness (*id.* at 26). Plaintiff testified that he has a home attendant three days per

week, five hours per day from 12:00 noon to 5:00 P.M. (*id.* at 59). Plaintiff stated that he only received instructions from SHP's chief engineer, Guido Tamayo (Plaintiff Victor Munoz Continued EBT, at 113, 118-119). Plaintiff testified that he did see that there was a work lift in the hotel garages (*id.* at 93). However, plaintiff always used small ladders to perform his work (*id.* at 104). According to plaintiff, he always worked alone, and never received any safety instructions (*id.* at 110, 117).

Plaintiff Elvia Munoz testified that after the accident, her husband was in intensive care for two months, and later was transferred to JFK Rehabilitation Institute in New Jersey (Plaintiff Elvia Munoz EBT, at 58-59). In total, his hospitalization and rehabilitation lasted about one year (*id.*). After about four months, her husband regained partial memory (*id.* at 61, 63-64). According to Mrs. Munoz, Mr. Munoz has problems with concentration, memory, depression, and temperament (*id.* at 64-67, 92). Mr. Munoz cannot leave the house unaccompanied because of balance problems (*id.* at 68-69, 71).

Guido Tamayo was employed by SHP as Chief Engineer, and was plaintiff's supervisor (Tamayo EBT, at 5-8). Tamayo oversaw a crew of approximately 11 workers, including plaintiff (*id.* at 7). On the Wednesday or Thursday before the accident, Tamayo instructed plaintiff to perform the painting work, which entailed painting the exterior of the building on 41st Street, including the doors, frames, and a portion of the loading dock area (*id.* at 9-11). He stated that, "[w]hen I told him we had to paint the outside perimeter, basically we paint the doors, the frames, the steel that is rusted" (*id.* at 12). Tamayo did not give plaintiff any other instructions (*id.* at 14). Plaintiff was to work alone (*id.* at 10). Plaintiff only received instructions on how to do his work from Tamayo (*id.* at 9, 49-50). Tamayo learned of plaintiff's accident when Zagara

called him around 10:45 that morning (*id.* at 17).

Jaime Chavez, an assistant manager employed by First New York, testified that there were two Genie lifts available at the site (Chavez EBT, at 7, 82-83). Chavez did not have the authority to supervise the daily activities or work of plaintiff (*id.* at 67-68). As part of the easement, the maintenance and repair of the loading docks were shared by the Hotel and Entertainment/Retail units (*id.* at 103). When the exterior of the building needed to be painted, Chavez contacted Tamayo (*id.* at 84-86). The actual maintenance/repair work was performed by SHP and the costs were shared (*id.* at 105-108).

Procedural History

On August 8, 2007, plaintiffs commenced Action 1 against Hilton Hotels Corporation,[1] FC 42, Sunstone LLC, and Sunstone Lessee. The complaint asserts causes of action for negligence and violation of Labor Law §§ 200, 240, and 241 (6). Additionally, plaintiff Elvia Munoz seeks recovery for loss of services, society, and consortium. Subsequently, FC 42 commenced a third-party action against SHP. On July 8, 2009, Sunstone LLC, Sunstone Lessee, and SHP filed a fourth-party action against First New York and FC 42nd Street. In July 2009, Sunstone LLC and Sunstone Lessee commenced a fifth-party action against SHP, First New York, and FC 42nd Street.

On December 6, 2007, plaintiffs commenced Action 2 against ESDC, 42nd Street, and NYSUDC. Like Action 1, plaintiffs seek damages under theories of negligence and under Labor Law §§ 200, 240, and 241 (6). On July 11, 2008, ESDC, 42nd Street and NYSUDC brought a

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[1]By stipulation dated August 18, 2009, the parties agreed to discontinue all claims and cross claims against this defendant.

third-party action against SHP. SHP later initiated a fourth-party action against First New York and FC 42nd Street. SHP commenced a fifth-party action against Sunstone LLC and Sunstone Lessee.

DISCUSSION

I. Consolidation

Plaintiffs move to consolidate Action 1 and Action 2. "Where common questions of law or fact exist, a motion pursuant to CPLR 602 (a) to consolidate or for a joint trial should be granted absent a showing of prejudice to a substantial right of the party opposing the motion" (*Whiteman v Parsons Transp. Group of N.Y., Inc.*, 72 AD3d 677, 678 [2d Dept 2010]). Consolidation is proper "where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts" (*Horn Constr. Co. v City of New York*, 100 AD2d 824, 825 [1st Dept 1984]). Here, none of the parties oppose consolidation. Given that Action 1 and Action 2 arise out of the same workplace accident, and involve common questions of law, the court consolidates Actions 1 and 2 under Index No. 110826/07.

II. The Motions for Summary Judgment

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its evidentiary proof and establish the existence of a genuine, triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Labor Law § 240

In support of their motion, plaintiffs argue that ESDC and 42nd Street are subject to liability under Labor Law § 240 as the fee owners of the land. Plaintiffs also argue that "FC 42nd Street Hotel, LLC" is also considered an owner under the statute because it was a tenant that hired SHP. According to plaintiffs, they are entitled to summary judgment under the statute because plaintiff Victor Munoz fell from an unsecured ladder while painting. As argued by plaintiffs, that plaintiff does not remember the accident does not alter the result.

In their cross motions, ESDC/42nd Street and First New York/FC 42nd Street argue that plaintiff was the sole proximate cause of his injuries as a matter of law. ESDC/42nd Street and First New York/FC 42nd Street point out that plaintiff decided upon the tools/equipment to perform his work. Plaintiff placed the ladder himself, did not ask for assistance, and did not use either of two lifting devices available for engineering employees when working at heights.

SHP similarly contends, in opposition to plaintiffs' motion, that plaintiff was the sole proximate cause of his injuries. According to SHP, there is evidence that plaintiff chose to use the wrong safety device (a ladder that could not be properly be secured on the surface of the metal grating), and that a proper safety device was available (a lift). Plaintiffs' own expert states that a ladder was not an appropriate device, yet plaintiff selected it over a lift that was available at the premises. Moreover, there is no evidence of a defect in the ladder that plaintiff used.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, *painting*, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor,

> scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

(emphasis supplied).

The purpose of the statute is "to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991] [internal quotation marks and citations omitted]). The statute imposes a nondelegable duty and absolute liability on owners and contractors for failing to provide adequate safety devices to workers who sustain gravity-related injuries (*Jock v Fien*, 80 NY2d 965, 967 [1992]; *Rocovich*, 78 NY2d at 513).

Generally, Labor Law § 240 (1) applies to "risks related to elevation differentials," including "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level . . . ." (*Rocovich*, 78 NY2d at 514). To impose liability under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Proximate cause is demonstrated based upon a showing that the defendant's act or failure to act was a "substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). Nonetheless, where a plaintiff is the sole proximate cause of the injury, a defendant cannot be liable under the statute (*Blake*, 1

NY3d at 290).

To show that a plaintiff was the sole proximate cause of his injuries under the statute, the defendant must establish that the plaintiff "'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he made that choice he would not have been injured'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, "[t]he mere presence of ladders or safety belts somewhere at the work site does not establish 'proper protection'" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054 [1985]).

In ladder cases, "'[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [1st Dept 2008], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). As noted by the First Department in *Montalvo v J. Petrocelli Constr., Inc.* (8 AD3d 173, 174 [1st Dept 2004]), "[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection" and the "failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (internal quotation marks and citation omitted). The plaintiff is not required to show that the ladder is somehow defective (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008]; *Orellano*, 292 AD2d at 290-291).

In *Vega v Rotner Mgt. Corp.* (40 AD3d 473 [1st Dept 2007]), the First Department

reasoned that "[w]ith respect to the section 240 (1) claim, plaintiff satisfied his prima facie burden on the motion with his testimony that he fell to the ground when the unsecured 8-to-10-foot ladder on which he was standing shifted. It does not avail defendants to argue that the manner in which plaintiff set up and stood on the ladder was the sole cause of the accident, where there is no dispute that the ladder was unsecured and no other safety devices were provided" (*id.* at 473-474 [citations omitted]).

In *Velasco v Green-Wood Cemetery* (8 AD3d 88 [1st Dept 2004]), the plaintiff was injured when he fell from a ladder. In affirming the trial court, the First Department stated that "Defendants argue that the ladder was in no way defective, and that the only cause of the accident was plaintiff's own negligence in helping to set up the ladder in soil and then using it even though he knew that his coworker was not holding it. The argument overlooks plaintiff's evidence that no safety devices were provided to protect him in the event the ladder slipped. Given an unsecured ladder and no other safety devices, plaintiff cannot be solely to blame for his injuries" (*id.* at 89).

In *Roman v Hudson Tel. Assoc.* (11 AD3d 346 [1st Dept 2004]), the First Department stated that "[t]he ladder used by plaintiff, which was owned by his employer, failed in its 'core objective' of preventing him from falling to the cement floor below" (citation omitted).

In view of these principles, plaintiffs are entitled to summary judgment on the issue of liability under Labor Law § 240 (1). First, plaintiff was engaged in a specifically-enumerated activity at the time of his accident, painting (Labor Law § 240 [1]). ESDC and 42nd Street have not disputed that they are the fee owners of the land, and as such, are "owners" within the meaning of the statute (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340-341

[2008]; *Coleman v City of New York*, 91 NY2d 821, 823 [1997]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993] ["Liability rests upon the fact of ownership and whether (the owner) had contracted for the work or benefitted from it are legally irrelevant"]). However, given that FC 42 had no ownership interest in the subject property or other responsibilities with respect to the building at the time of the accident, it cannot be liable under the Labor Law. On January 24, 2006, FC 42 sold its interest in the Hotel unit to Sunstone LLC (Foersch Affirm., Exh. N; Foersch Reply Affirm., Exh. A).[2]

Second, plaintiffs have established that Mr. Munoz was not given adequate safety devices to prevent him from falling, and the record does not show that plaintiff was the sole proximate cause of his injuries. According to the only eyewitness to the accident, Leonard Zagara, plaintiff was working alone, and no one was holding the ladder (Zagara EBT, at 13, 14). There is no evidence that plaintiff knew that other safety devices (including the Genie lifts) were available, that he was expected to use them, and that he chose not to use them for no good reason (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010] [ironworker not sole proximate cause of his injuries where nothing indicated that he was expected to use safety devices]; *Kosavick*, 50 AD3d at 288-289 [plaintiff not sole proximate cause of his injuries when A-frame ladder he was standing on was struck by a section of pipe he cut; there was no evidence that plaintiff was told to use a chain to secure the pipe and that he had "no good reason not to do so"]). Plaintiff's supervisor, Guido Tamayo, testified that he told plaintiff that he "had to paint the outside

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[2]To the extent that plaintiffs also seek summary judgment against "FC 42nd Street Hotel, LLC," their motion is denied. Plaintiffs allege that "FC 42nd Street Hotel, LLC" was a ground lessor that hired SHP to perform the work that gave rise to the accident. The evidence shows that Sunstone Lessee hired SHP (Berger Affirm., Exh. R).

perimeter [of the building]" over the weekend (Tamayo EBT, at 12). Tamayo did not give plaintiff any other instructions, including directions about using the Genie lifts (*id.* at 14). Even if plaintiff was negligent in placing the ladder on the metal grating, plaintiff's comparative negligence is not a defense to liability under the statute (*see Vega*, 40 AD3d at 474). Under such circumstances, the "[n]egligence, if any, of the injured worker is of no consequence" (*Rocovich*, 78 NY2d at 513). Contrary to SHP's contention, plaintiffs are not required to prove that the ladder was defective (*see Orellano*, 292 AD2d at 290-291).

Defendants and SHP's reliance on several "sole proximate cause" cases is misplaced. In *Robinson v East Med. Ctr., LP* (6 NY3d 550 [2006]), the plaintiff was injured when he used a six-foot ladder for a job that he knew required an eight-foot ladder. The plaintiff was also aware that there were eight-foot ladders available at the job site. The Court of Appeals held that the plaintiff was the sole cause of his injuries as a matter of law, stating that "[p]laintiff's own negligent actions – choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work – were, as a matter of law, the sole proximate cause of his injuries" (*id.* at 555). In *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]), the plaintiff was found to be the sole proximate cause of his injuries where he used a bucket instead of a ladder to gain access to a motor room. The Court of Appeals stated that "since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law § 240 (1)" (*id.* at 806). In *Blake* (1 NY3d at 291, *supra*), the Court of Appeals held that the plaintiff was the sole proximate cause of his injuries when he neglected to lock extension

clips in place on an extension ladder. Here, in contrast, there is no evidence that plaintiff chose to use an inadequate device to perform his work or misused the ladder.

Accordingly, the part of plaintiffs' motion which seeks summary judgment on the Labor Law § 240 (1) claim is granted to the extent that plaintiffs are granted summary judgment on the issue of liability as against ESDC and 42nd Street, the fee owners of the land where plaintiff was injured. The part of ESDC, 42nd Street, and NYSUDC's cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim as against them is denied. That part of First New York/FC 42nd Street's cross motion for the same relief is similarly denied. FC 42 is dismissed from the action since it did not have an interest in the subject premises at the time of the accident.

Labor Law § 200/Common-law Negligence and Labor Law § 241 (6)

Plaintiffs have not opposed dismissal of Labor Law § 200/negligence and Labor Law § 241 (6). Therefore, these causes of action are dismissed.

Motions by ESDC/42nd Street and First New York/FC 42nd Street for Common-law Indemnification and Contribution against Sunstone LLC and Sunstone Lessee

ESDC/42nd Street and First New York/FC 42nd Street seek full contribution and common-law indemnification from Sunstone 42nd LLC and Sunstone Lessee. ESDC/42nd Street and First New York/FC 42nd Street contend that Sunstone LLC and Sunstone Lessee are the admitted owner and lessee of the Hotel unit of the premises. They further argue that Sunstone LLC and Sunstone Lessee did, in fact, have the authority to control and use the loading dock area pursuant to their easement, and exercised that authority by having workers use or perform services at the loading docks.

In response, Sunstone LLC and Sunstone Lessee contend that the cross motions improperly seek affirmative relief against them, even though they are not moving parties. Sunstone LLC and Sunstone Lessee further argue that ESDC/42nd Street and First New York/FC 42nd Street are not entitled to common-law indemnification or contribution against them at this juncture. According to Sunstone LLC and Sunstone Lessee, these parties have failed to show their freedom from negligence, and have not presented any evidence that Sunstone LLC or Sunstone Lessee were actively negligent and somehow caused or contributed to plaintiff's accident. Sunstone LLC and Sunstone Lessee also point out that neither cross motion is supported by an affidavit, as required by CPLR 3212 (b).

The court recognizes that "[a] cross motion is an improper vehicle for seeking affirmative relief against a nonmoving party" (*Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003] [internal quotation marks and citation omitted]; *see also* CPLR 2215). However, given that Sunstone LLC and Sunstone Lessee have had adequate time to respond, the court shall consider this portion of the cross motion. Moreover, even though defendants do not submit an affidavit from an individual with knowledge of the facts in support of their cross motion (CPLR 3212 [b]), the affirmation from defendants' counsel may properly "serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts" (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *see also Adam v Cutner & Rathkopf*, 238 AD2d 234, 240 [1st Dept 1997]).

"A party seeking contribution must show that the party from whom contribution is sought owes a duty either to him or to the injured party and that a breach of this duty has contributed to the alleged injuries" (*Crimi v Black*, 219 AD2d 610, 611 [2d Dept 1995]). The predicate for

common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and thus, a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]). "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]; *see also Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]).

In this case, the evidence shows that plaintiff's accident arose out of the means and methods of the work, not a dangerous or defective condition on the premises. Significantly, the evidence shows that plaintiff was only supervised by his supervisor, Guido Tamayo (Plaintiff Continued EBT, at 116, 118-119; Tamayo EBT, at 9, 49-50; Chavez EBT, at 67).

Here, although ESDC and 42nd Street are liable under Labor Law § 240 (1), and have shown that they did not supervise plaintiff's work, they have failed to show that either Sunstone LLC or Sunstone Lessee were guilty of some negligence that caused or contributed to plaintiff's accident. Thus, ESDC/42nd Street and First New York/FC 42nd Street are not entitled to common-law indemnification and contribution (*see Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010] [given issues of fact as to carpet company's negligence, flooring company's motion seeking common-law indemnification against carpet company was not ripe for adjudication]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 685 [2d Dept 2005] [although owner's liability was purely vicarious, owner was not entitled to common-law indemnification on motion for summary judgment because it was unclear whether proposed indemnitor was

negligent or exclusively supervised and controlled plaintiff's work]). In sum, the part of ESDC/42nd Street and First New York/FC 42nd Street's cross motions for common-law indemnification and contribution are denied.

Motions by ESDC/42nd Street and First New York/FC 42nd Street for Contractual Indemnification and Defense against Sunstone LLC

ESDC/42nd Street and First New York/FC 42nd Street further contend that, pursuant to the DEOA, Sunstone LLC, as the owner of the Hotel unit, is required to defend and indemnify the "fee owner" and the "other owner."

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [internal quotation marks and citations omitted]). It is well settled that "'[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Article VI, section 6.1 of the DEOA provides as follows:

> "Without limiting any other provision hereof (except 5.1(B) and 5.1(D)), *each Owner* (hereinafter in this Section 6.1, the "Indemnifying Owner") *covenants and agrees*, at its sole expense, *to indemnify, defend and hold harmless the other Owner* and, notwithstanding any designation made pursuant to Section 20.15 hereof, *the Fee Owner* . . . and such other Owner's partners, members, beneficiaries . . . (hereinafter in this Section 6.1, collectively the "Indemnitee") *for losses, liabilities*, damages (excluding consequential damages) . . . *arising out of* (I) the Indemnifying Owner's or its Permittees' use, possession, Maintenance, or operation of the Indemnifying

> Owner's portion of the Property or the Indemnifying Owner's Owned facilities, or activities therein (except as otherwise expressly provided herein), (ii) *the Indemnifying Owner's use, exercise or enjoyment of an Easement or Facility* (shared or otherwise, except as expressly provided herein), irrespective of whether Operational Control of such Easement or Facility has been granted or (iii) the Indemnifying Owner's failure to perform its Maintenance or other obligations hereunder. . . ."

(Foersch Affirm., Exh. M, at 50 [emphasis added]). However, this section also provides four circumstances where no indemnification is triggered, as follows:

> "In no event shall the Indemnifying Owner have any indemnification obligation to the Indemnitee (a) to the extent occasioned by the negligent or wrongful acts or omissions of any Indemnitee or its Permittees, (b) for any casualty loss to property to the extent of any insurance proceeds available under any insurance policy carried by the Indemnitee, (c) for any consequential damages or (d) *anything for which the building manager at the time is responsible*"

(*id.* [emphasis supplied]).

Citing subsection (ii) of section 6.1, ESDC/42nd Street and First New York/FC 42nd Street contend that the accident took place during the course of the Hotel unit's use and exercise of the easement involving the loading dock. Moreover, ESDC/42nd Street and First New York/FC 42nd Street did not have the authority to supervise plaintiff's work, and had no notice of any defective condition or misuse of equipment.

In opposition, Sunstone LLC and Sunstone Lessee contend that ESDC/42nd Street and First New York/FC 42nd Street are not entitled to contractual indemnification under the plain terms of the DEOA. Although ESDC/42nd Street argue that indemnification is triggered by "use, exercise or enjoyment of an Easement or Facility," the DEOA specifically exempts maintenance from that subsection. Additionally, the DEOA expressly states that in no event shall the Indemnifying Owner have any indemnification obligation for anything for which the building

manager at the time is responsible. Sunstone LLC and Sunstone Lessee further contend, only in response to First New York/FC 42nd Street's motion, that even if an indemnification obligation is triggered, the DEOA expressly provides for reciprocal indemnification obligations. Finally, Sunstone LLC and Sunstone Lessee argue that the indemnification provision violates General Obligations Law § 5-322.1.

In reply, ESDC/42nd Street and First New York/FC 42nd Street point out that, when the DEOA was entered into in November 1998, there was only one building manager at the premises: First New York. However, at the time of the accident, there was an additional building agent at the complex, SHP. SHP was responsible for maintenance of the loading dock and was, in fact, performing the work on the loading dock as part of the easement.

The court first considers whether the provision violates the General Obligations Law. Pursuant to General Obligations Law § 5-322.1 (1),

> "A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable . . . ."

Under this section of the General Obligations Law, an agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification clause which provides for partial indemnification to the

extent that the party to be indemnified was not negligent does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008] [allowing indemnification "to the fullest extent permitted by law"]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003] [allowing indemnification "to the fullest extent permitted by applicable law"]). Even if the clause does not contain this limiting language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]). In the instant case, even though the DEOA does not contain the limiting language "to the fullest extent permitted by law," it is enforceable. As noted above, ESDC/42nd Street and First New York/FC 42nd Street have shown that they were not negligent.

The DEOA provides for indemnification arising out of "the Indemnifying Owner's use, exercise or enjoyment of an Easement or Facility" (Foersch Affirm., Exh. M, at 50). However, the DEOA also states that in no event shall the "Indemnifying Owner" have any indemnification obligation to the indemnitee for "anything for which the building manager at the time is responsible" (*id.*). Pursuant to the DEOA, the "building manager" was responsible for maintaining the loading docks (*id.*). ESDC/42nd Street and First New York/FC 42nd Street have not disputed that SHP was a "building manager" at the time of the accident, or that the maintenance work was actually performed by SHP (Chavez EBT, at 105-108). That ESDC/42nd Street and First New York/FC 42nd Street were not responsible for this work does not change the result. Thus, the court finds that the exception applies and Sunstone LLC has no indemnification or defense obligation here.

Therefore, the part of ESDC/42nd Street and First New York/FC 42nd Street's motions seeking contractual indemnification and defense from Sunstone LLC is denied.

Motions by ESDC/42nd Street and First New York/FC 42nd Street for Indemnification and Contribution against SHP/ SHP's Motion for Dismissal of the Third-, Fourth-, and Fifth-Party Complaints

ESDC/42nd Street and First New York/FC 42nd Street argue that plaintiff's brain injury qualifies as a "grave injury" within the meaning of Workers' Compensation Law § 11, and therefore, they are entitled to indemnification and contribution from SHP, plaintiff's employer. Specifically, ESDC/42nd Street and First New York/FC 42nd Street claim that plaintiff has sustained a right open comminuted depressed skull fracture, multiple temporal lobe contusions and a subdural hematoma, multiple fractures of the right temporal bone, which extend into the vestibule, coclea, jugular and carotid canals, and a right upper and lower lobe hemothorax. They further argue that plaintiff has suffered brain damage, vision loss in the right eye, hearing loss in the right ear, and psychological impairment.

ESDC/42nd Street and First New York/FC 42nd Street rely upon a narrative medical report dated April 16, 2009 from Joseph DeMattia, M.D., a neurologist and plaintiff's treating physician (Foersch Affirm., Exh. S [DeMattia Report]). According to Dr. DeMattia, when he saw plaintiff last on March 5, 2009, plaintiff reported to have headaches almost daily and pain on the right side of his head (*id.* at 2). Plaintiff's family informed Dr. DeMattia that plaintiff had "frequent mood swings, as well as difficulty with concentration, memory, and attention" (*id.*). Upon examination of plaintiff, Dr. DeMattia noted that plaintiff had "significant difficulty with concentration and attention and frequently repeated himself" (*id.*). Additionally, plaintiff had difficulty following complex commands and answering questions (*id.*). Dr. DeMattia reports that

plaintiff continues to suffer from significant cognitive difficulties, including with memory and attention, and also has difficulty with balance and coordination (*id.*). Dr. DeMattia states that plaintiff walks with a cane (*id.*). Dr. DeMattia concludes that plaintiff's "cognitive and physical disabilities will be permanent," and that plaintiff will never be able to return to the work force (*id.*). ESDC/42nd Street and First New York/FC 42nd Street also point out that plaintiff is a recipient of Social Security disability benefits (Plaintiff EBT, at 149).

In opposition and in support of its own cross motion, SHP argues that there are many activities of daily living in which plaintiff engages. For example, plaintiff is able to eat on his own, shower and dress himself, and use the bathroom (Plaintiff Continued EBT, at 361, 362, 365). Plaintiff watches television and knows how to use the remote (*id.* at 365, 366). Plaintiff has a cell phone and knows how to use it (*id.* at 367-368). Plaintiff reads *El Diario*, a Spanish language newspaper (*id.* at 376). Plaintiff is able to go to the laundromat, the bank, grocery stores, and the gym with his health attendant (*id.* at 316, 370-372, 373-374, 375).

SHP submits an affirmed report dated June 30, 2009 from Barry Jordan, M.D., a neurologist who examined plaintiff. Dr. Jordan stated that plaintiff has right 7th nerve palsy, but stated that "[t]he exact extent of his cognitive impairment is difficult to ascertain because of so many inconsistencies on his examination and history" (Berger Affirm., Exh. T [Jordan Report, at 3]). For example, plaintiff could not remember his own age but could remember the ages of his children and other family members (*id.*). Additionally, plaintiff could not remember any of his past medical history, but remembered that he was not driving on the day of the accident (*id.*). Dr. Jordan noted another inconsistency in his examination, which strongly raised a question of embellishment – the fact that he had decreased vibratory sensation on the right side of his

forehead as compared to the left side of his forehead (*id.*). According to Dr. Jordan, this is physiologically impossible (*id.*). In conclusion, Dr. Jordan states that plaintiff did sustain some traumatic brain injury and probably does exhibit some cognitive impairment, but has made a relatively good recovery, and is thus capable of doing remedial work, including dishwashing, ticket collection, and manual labor on unelevated heights (*id.*).

In addition, SHP submits an affirmed report dated August 27, 2009 from Alvin Katz, M.D., an otorhinolaryngologist who reviewed plaintiff's medical records and the deposition testimony in this action and also examined plaintiff. Dr. Katz concludes that plaintiff is capable of performing sedentary activities, including weightlifting and pushing 10 pounds (*id.*, Exh. U [Katz Report, at 27]). Dr. Katz states that plaintiff is "probably capable of performing sedentary work activities with a small amount of pushing or weightlifting" (*id.*). According to Dr. Katz, plaintiff can sort and distribute documents, and write checks and keep a log of when bills are to be paid (*id.*).

SHP provides a sworn report dated September 3, 2009 from Laurence Abelove, Ph.D., a neuropsychologist who examined plaintiff. Dr. Abelove reviewed plaintiff's background and administered neuropsychological tests, including the Wechsler Adult Intelligence Scale, to plaintiff. According to Dr. Abelove, "[plaintiff] has clearly not provided a full effort on his tests and has supplied information that is consistent with an individual who is exaggerating/malingering such as his claim to have no memory of his entire childhood. This is not consistent with his TBI" (*id.*, Exh. V [Abelove Report, at 22]). Dr. Abelove continues, stating that "[t]here were instances during the examination when [plaintiff] displayed excellent cognitive functioning and it is my opinion that he currently does not have any significant

neuropsychological or psychological problems in terms of his accident" (*id.*).

SHP also submits a sworn report from Sonya Mocarski, a vocational rehabilitation specialist, who conducted a vocational evaluation of plaintiff. Mocarski reviewed the reports of Dr. Jordan, Dr. Katz, and Dr. Abelove, and found that plaintiff is able to perform work at the sedentary to light exertional level with a restriction to avoid heights (*id.*, Exh. W, at 12). Mocarski found that plaintiff has the residual functional capacity to perform the following jobs: security guard, ticket taker, locker room attendant, counter-rental clerk, machine operator-tender, parking lot cashier, and production assembler (*id.*, Exh. W, at 13). According to Mocarski, with computer retraining and English classes, plaintiff would be a candidate for the following sedentary to light jobs: order clerk, procurement clerk, shipping/receiving clerk, information clerk, dispatcher (non-emergency), and human services assistant (*id.*).

In opposition to SHP's cross motion, Sunstone LLC and Sunstone Lessee and ESDC/42nd Street submit additional affidavits from two physicians, a certified rehabilitation counselor, and a neuropsychologist, who essentially disagree with SHP's evidence, and conclude that, as a result of plaintiff's cognitive deficits, plaintiff is not capable of performing any work-related activities, including sedentary work activities. In an affirmed report dated November 3, 2009, Robert B. Goldberg, D.O., states, based upon his review of plaintiff's medical records and his examination of plaintiff, that he suffers from constant headaches, persistent dizziness, and balance problems (Schirripa Affirm. in Opp., Exh. A [Goldberg Affirm., at 4]). Dr. Goldberg states that plaintiff has deficits in memory, hearing, and vision, and suffers from depression (*id.*). Dr. Goldberg concludes that plaintiff is not employable in any meaningful capacity, explaining that "the cumulative impact of the factors with which [plaintiff] deals on a daily basis as a consequence of

his physical, cognitive and mental health disabilities prevents him from achieving and maintaining the demands of every day [*sic*] employment" (*id.*). Additionally, Dr. Goldberg notes that plaintiff was evaluated for and accepted into a three day per week TBI rehabilitation program, and is still eligible for a homecare attendant (*id.*).

Workers' Compensation Law § 11 provides that:

> "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*"

(emphasis added).

In *Rubeis v Aqua Club, Inc.* (3 NY3d 408, 413, 417 [2004]), the Court of Appeals considered whether a brain injury that rendered the worker unemployable, but did not render the worker unable to perform day-to-day functions, constituted a "permanent total disability" under the statute. The Court held that a brain injury results in "permanent total disability" under the statute when the evidence establishes that the plaintiff is "no longer employable in any capacity" (*id.* at 413). The Court of Appeals reached this conclusion in view of the fact that: (1) none of the other listed "grave" injuries had the effect of preventing the worker from caring for himself or herself; and (2) the Workers' Compensation Law is generally about "workers and their work," and the term "disability" as used throughout the Workers' Compensation Law generally refers to inability to work (*id.* at 417). "'In any capacity' is in keeping with legislative intent and sets a

more objectively ascertainable test than equivalent, or competitive, employment" (*id.*).

In the instant matter, the experts disagree over the extent of plaintiff's cognitive and neurological impairments and, therefore, whether he is capable of performing sedentary work, including jobs such as a dishwasher, security guard, and ticket collector. Further, the experts do not agree as to whether plaintiff is malingering. In view of the conflicting evidence, there are issues of fact as to whether plaintiff is unemployable in any capacity (*Galindo v Dorchester Tower Condominium*, 56 AD3d 285, 286 [1st Dept 2008] [employer failed to meet its burden that worker did not suffer "grave injury"; record supported court's conclusion that worker suffered traumatic brain injury which left him unemployable in any capacity]; *Mendez v Union Theol. Seminary in City of N.Y.*, 26 AD3d 260, 261 [1st Dept 2006] [triable issue of fact as to whether plaintiff suffered a "grave injury"; plaintiff's physicians concurred that he suffered a traumatic brain injury resulting in permanent disabilities, including memory loss, diminished intellect, and traumatic seizure disorder]; *Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001] [plaintiff's showing that he suffered from postconcussive syndrome, which permanently disabled him from competitive employment in even the most menial tasks, and that he had been awarded Social Security disability benefits, was sufficient to raise an issue of fact]). The court notes, however, that SHP's evidence that plaintiff is able to care for himself is not pertinent to the inquiry, because the statute only addresses whether the worker is "[un]employable in any capacity," not whether the worker is able to perform day-to-day functions (*see Rubeis*, 3 NY3d at 413).

Accordingly, the part of ESDC/42nd Street and First New York/FC 42nd Street's cross motions seeking indemnification and contribution from SHP are denied. The part of SHP's cross motion seeking dismissal of the third, fourth, and fifth-party complaints is also denied.

Motion by SHP for Contractual Indemnification against Sunstone Lessee and Sunstone LLC

SHP argues that it is entitled to contractual indemnification and a defense and to be held harmless from Sunstone Lessee, pursuant to the indemnification clause in the HMA. SHP contends that plaintiff's accident arises out of SHP's performance of services under the HMA. In addition, SHP maintains that Sunstone LLC is a third-party beneficiary of the HMA, and that Sunstone LLC is therefore subject to the same contractual obligations as Sunstone Lessee. Although Sunstone Lessee acted as the "Owner" under the HMA, argues SHP, it did so on behalf of Sunstone LLC, the owner of the Hotel unit.

In opposition, Sunstone LLC and Sunstone Lessee argue that the HMA lacks explicit language unequivocally showing an intent to indemnify SHP for its own negligence. In any event, Sunstone LLC and Sunstone Lessee contend that no indemnification obligation has been triggered under the plain terms of the HMA. The loading docks were not part of SHP's responsibilities pursuant to the plain language of the HMA.

In pertinent part, article 22.2 of the HMA states, as follows:

> "Except as provided in Section 22.1, Owner hereby agrees to indemnify, defend and hold Operator (and Operator's agents, principals, shareholders, partners, members, officers, directors and employees) harmless from and against all liabilities, losses, claims, damages, costs and expenses (including, but not limited to, reasonable attorneys' fees and expenses) that may be incurred by or asserted against such party and that arise from or in connection with . . . (b) *the performance of Operator's services under this Agreement (including compliance with Section 3.3 hereof)*, (c) any act or omission (whether or not willful, tortious, or negligent) of Owner or any third party or (d) or any other occurrence related to the Hotel (including but not limited to environmental or life-safety matters) and/or Operator's duties under this Agreement whether arising before, during or after the Term"

(Berger Affirm., Exh. R, at 30 [emphasis supplied]).

[*33]

Both parties agree that the court should apply Maryland law in interpreting the HMA. Pursuant to article 24.6 of the HMA, the HMA is to be "construed, both as to its validity and as to the performance of the parties, in accordance with the laws of the State of Maryland, without reference to its conflict of laws provisions" (*id.*, Exh. R, at 33). Under Maryland law, "a covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure . . . *purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable*" (Maryland Code, Courts & Judicial Proceedings § 5-401 [a] [emphasis supplied]).

In *Crockett v Crothers* (264 Md 222, 227, 285 A2d 612, 615 [1972]), the Maryland Court of Appeals held that, in general, "contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms."[3] In *Heat & Power Corp. v Air Prods. & Chemicals, Inc.* (320 Md 584, 588, 578 A2d 1202, 1204 [1990]), a contractor and a property owner entered into a construction contract which required the contractor to indemnify the owner for any liability "resulting from or arising out of or in connection with the performance of this contract by Contractor." In that case,

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[3]The indemnification provision at issue in *Crockett* stated that the contractor would "indemnify the owner and the engineer from all claims, damages and losses arising out of or resulting from the performance of the work" (*Crockett*, 264 Md at 228, 285 A2d at 615). The Maryland Court of Appeals ruled that the contract did not obligate the contractor to indemnify the engineer against the engineer's own negligence in preparing plans and specifications (*id.* at 228, 285 A2d at 615).

the owner's *sole* negligence caused the contractor's employee's injury (*id.*). The Court held that the indemnification clause could not be construed as indemnifying the owner against its sole negligence, because such a construction would violate public policy (*id.* at 592, 285 A2d at 1206). As noted by the Court, "[s]ince the contract did not expressly or unequivocally indemnify Owner against its own negligence, the circuit court judge was correct in ruling as a matter of law that Contractor had no contractual duty to indemnify Owner" (*id.* at 593, 285 A2d at 1206-1207).

Here, article 22.2 of the HMA provides that Sunstone Lessee agrees to indemnify, defend and hold harmless SHP for claims arising out of "the performance of [SHP's] services under this Agreement" (Berger Affirm., Exh. R, at 30). The court notes that the indemnification clause at issue is virtually identical to the clause at issue in *Heat & Power*, where the Maryland Court of Appeals ruled as a matter of law that there was no contractual duty to indemnify. The HMA does not expressly or unequivocally provide that Sunstone Lessee agrees to indemnify SHP against its own negligence (*compare Mass Transit Admin. v CSX Transp., Inc.*, 349 Md 299, 301, 708 A2d 298, 300 [1998] [indemnification provision requiring indemnification for "liability of every kind arising out of the Contract Service" included railroad's own negligence]; *see also Lopez v Louro*, 2002 WL 91273, *2, 2002 US Dist LEXIS 1020, *4 [SD NY 2002] [applying Maryland law; indemnification clause requiring "any and all claims, suits, loss, damage or liability" for bodily injury, death and/or property damage arising out of or related to motor carrier's use or maintenance of equipment included claims for indemnitee's own negligence]).[4] Therefore, Sunstone Lessee is not obligated to defend or indemnify SHP as a matter of law.

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[4]The fact that subsection (c) states that Sunstone Lessee agrees to indemnify SHP for "any act or omission (whether or not willful, tortious or *negligent*) of [Sunstone Lessee]" also indicates that the parties did not intend this to be the case for subsection (b).

While SHP contends that it is entitled to enforce the HMA indemnification provision against Sunstone LLC, it is well established that a contract cannot be enforced against one not a party to it (*Residential Warranty Corp. v Bancroft Homes Greenspring Val., Inc.*, 126 Md App 294, 316, 728 A2d 783, 794 [1998], *cert denied* 355 Md 613, 735 A2d 1107 [1999]). One who is not a party to a contract may be become bound by the contract by later accepting or adopting the contract (*id.*; *Snider Bros., Inc. v Heft*, 271 Md 409, 414, 317 A2d 848, 851 [1974]). Sunstone LLC was not a party to the HMA, and SHP points to no evidence indicating that Sunstone LLC ratified the contract such that it could be enforced against it. Although SHP notes that a third-party beneficiary of a contract takes subject to the same defenses against enforcement of the contract as exist between the original promisor and promisee (*Shillman v Hobstetter*, 249 Md 678, 690, 241 A2d 570, 577 [1968]), that does not show that a contract may be enforced against a third-party beneficiary, pursuant to Maryland law.

SHP's Motion for Dismissal of Sunstone LLC and Sunstone Lessee's Common-law Indemnification Claims

Finally, SHP is not entitled to summary judgment dismissing Sunstone LLC and Sunstone Lessee's common-law indemnification claims based on waiver. A waiver is the "intentional relinquishment of a known right" (*Taylor v Mandel*, 402 Md 109, 135, 935 A2d 671, 686 [2007]), or conduct that warrants such an inference (*Myers v Kayhoe*, 391 Md 188, 205, 892 A2d 520, 530 [2006]). SHP has not pointed to any provision of the HMA or any other evidence which shows that they waived their rights to seek indemnification from SHP.

CONCLUSION

In view of the above, it is hereby

ORDERED that the motion by plaintiffs Victor and Elvia Munoz for consolidation is granted and the action captioned *Munoz v Hilton Hotels Corp.*, Index No. 110826/07 is consolidated with the action captioned as *Munoz v Empire State Dev. Corp.*, Index No. 116174/07 under Index No. 110826/07, and the consolidated action shall bear the following caption, under Index No. 110826/07:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
VICTOR MUNOZ and ELVIA MUNOZ,

Plaintiffs,

-against-

HILTON HOTELS CORPORATION, FC 42 HOTEL LLC, SUNSTONE 42ND STREET, LLC, SUNSTONE 42ND STREET LESSEE, INC., EMPIRE STATE DEVELOPMENT CORPORATION, 42ND STREET DEVELOPMENT PROJECT, INC. and NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Defendants.
----------X

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the

Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the motion (seq. no. 004) by plaintiffs for summary judgment is granted on the issue of liability under Labor Law § 240 (1) against defendants Empire State Development Corporation and 42nd Street Development Project, Inc., and is otherwise denied; and it is further

ORDERED that the cross motion by defendants/third-party plaintiffs FC 42 Hotel LLC, Empire State Development Corporation, 42nd Street Development Project, Inc., and New York State Urban Development Corporation d/b/a Empire State Development Corporation is granted to the extent of dismissing plaintiffs' Labor Law §§ 200/negligence and 241 (6) claims and dismissing FC 42 Hotel, LLC from the action and the complaint is dismissed in its entirety as against said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and is otherwise denied; and it is further

ORDERED that the cross motion by third-party defendant/fourth-party plaintiff/fifth-party defendant in Action 1 and third-party defendant/fourth-party plaintiff/fifth-party plaintiff in Action 2, Sunstone Hotel Properties, Inc. d/b/a Hilton Times Square is denied; and it is further

ORDERED that the cross motion by fourth-party defendants/fifth-party defendants in Action 1 and fourth-party defendants in Action 2, First New York Partners Management, LLC and FC 42nd Street Associates, L.P. is granted to the extent of dismissing plaintiffs' Labor Law §§ 200/negligence and 241 (6) claims, and is otherwise denied; and it is further

ORDERED that the remaining parties shall appear for a pre-trial conference in Part 11, room 351 on July 29, 2010 at 3:00 pm..

Dated: July 19, 2010

J.S.C.