[* 1]

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

PRESENT: Carol Edmead Justice

PART 35

Index Number : 120453/2003

BELL, RAYMOND

VS.

KANDLER, CHARLES

SEQUENCE NUMBER : 011

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

I on this motion to/for _____

PAPERS NUMBERED

- Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequences 011, 012, 013 and 014 are decided in accordance with the Memorandum Decision annexed to motion sequence 011. It is hereby

ORDERED that the motion (motion sequence number 011) by third-party defendant Hart Sharp Entertainment, Inc. for summary judgment dismissing the third-party complaint and all cross claims asserted against it is granted and the third-party complaint and cross claims are severed and dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the motion (motion sequence number 012) by second third-party defendant/third third-party plaintiff Mannix, a Division of Interstate Window Corporation, for summary judgment dismissing the second third-party complaint is granted to the extent of dismissing the breach of contract cause of action, and said cause of action is severed and dismissed and is otherwise denied; and it is further

ORDERED that the motion (motion sequence number 013) by third-party defendant Baltz & Company, Inc. for summary judgment dismissing the third-party complaint and all cross claims asserted against it is granted and the third-party complaint and cross claims are severed and dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

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

Dated: _____

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the motion (motion sequence number 014) by third-party defendant Hart Sharp Entertainment, Inc. for an order compelling plaintiff and third third-party defendant Rios Corp. d/b/a Nationwide Windows to respond to its notice of discovery and inspection and combined discovery demands dated March 3, 2010 is denied as moot; and it is further

ORDERED that the cross motion by defendants Charles Kandler, Bernard Kandler, Edward Kandler, Del Realty Co., and Del Realty Partner, LLC for summary judgment dismissing the complaint is granted to the extent of dismissing the Labor Law §§ 202 and 241 (6) causes of action, and said causes of action are severed and dismissed and is otherwise denied; and it is further

ORDERED that the cross motion by third third-party defendant Rios Corp. d/b/a Nationwide Windows for summary judgment dismissing the third third-party complaint is denied; and it is further

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

ORDERED that counsel for third-party defendant Hart Sharp Entertainment shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the remainder of the action shall continue.

Dated 9.14.10 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

Check one: ❑ **FINAL DISPOSITION** ❑ **NON-FINAL DISPOSITION**

Check if appropriate: ❑ **DO NOT POST** ❑ **REFERENCE**

[* 3]

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

----------X

RAYMOND BELL,

Plaintiff,

-against-

Index No. 120453/03

CHARLES KANDLER, BERNARD KANDLER, EDWARD KANDLER, DEL REALTY CO., and DEL REALTY PARTNER, LLC,

Defendants.

----------X

CHARLES KANDLER, BERNARD KANDLER, EDWARD KANDLER, DEL REALTY CO., and DEL REALTY PARTNER, LLC,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 590995/04

BALTZ & COMPANY, INC. and HART SHARP ENTERTAINMENT, INC.,

Third-Party Defendants.

----------X

DEL REALTY CO. and DEL REALTY PARTNER, LLC,

Second Third-Party Plaintiffs,

-against-

Second Third-Party
Index No. 590530/06

MANNIX, A DIVISION OF INTERSTATE WINDOW CORPORATION,

Second Third-Party Defendant.

----------X

MANNIX, A DIVISION OF INTERSTATE WINDOW CORPORATION,

Third Third-Party Plaintiff,

-against-

Third Third-Party
Index No. 590713/06

RIOS CORP. d/b/a NATIONWIDE WINDOWS and NATIONWIDE WINDOW SYSTEM CORP.,

Third Third-Party Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Motion sequence numbers 011, 012, 013, and 014 are consolidated for disposition.

In this action alleging violations of the Labor Law and common-law negligence, plaintiff Raymond Bell, a self-employed window washer, alleges that he fell while cleaning the windows of the premises located at 380 Lafayette Street, New York, New York (the premises).

In motion sequence number 011, third-party defendant Hart Sharp Entertainment, Inc. (Hart Sharp) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims asserted against it. In motion sequence number 012, second third-party defendant/third third-party plaintiff Mannix, a Division of Interstate Window Corporation (Mannix) moves, pursuant to CPLR 3212, for an order dismissing the second third-party complaint and all cross claims against it. In motion sequence number 013, third-party defendant Baltz & Company, Inc. (Baltz) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party claims for contractual indemnification, failure to procure insurance, and common-law indemnification/contribution, and all cross claims asserted against it. In motion sequence number 014, Hart Sharp moves, pursuant to CPLR 3124, for an order compelling plaintiff and third third-party defendant Rios Corp. d/b/a Nationwide Windows (Nationwide) to respond to its notice of discovery and inspection and combined discovery

demands dated March 3, 2010. Defendants/third-party plaintiffs Charles Kandler, Bernard Kandler, Edward Kandler, Del Realty Co., and Del Realty Partner, LLC (hereinafter, Del Realty) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims asserted against them. Third third-party defendant Nationwide also cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third third-party complaint.

BACKGROUND

The Parties

Plaintiff was injured on December 7, 2000 when he fell from the third floor of the premises. The building is owned by Del Realty, a partnership. Three brothers, Charles Kandler, Bernard Kandler, and Edward Kandler, are partners in the partnership. Hart Sharp was a tenant in the building, which subsequently subleased its space to Baltz. Baltz hired plaintiff to clean the windows on the date of the accident.

Prior to the accident, Mannix was hired by Del Realty to install new windows at the premises. Nationwide was retained by Mannix, as a subcontractor, to perform the actual removal and installation of the windows.

The Agreements

Pursuant to a lease agreement dated November 1, 1996, Del Realty leased 1,524 square feet on the northwest corner of the third floor of the premises to Hart Sharp. The lease contains the following provisions:

> 4. Owner shall maintain and repair the exterior of and the public portions of the building. . . .

***

5. Tenant will not clean nor require, permit, suffer or allow any window in the demised premises to be cleaned from the outside in violation of Section 202 of the New York State Labor Law or any other applicable law or of the Rules of the Board of Standards and Appeals, or of any other Board or body having or asserting jurisdiction.

***

11. Tenant, for itself, its heirs, distributees, executors, administrators, legal representatives, successors, and assigns, expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Owner in each instance. . . .

***

31. Tenant shall, at Tenant's expense, keep the demised premises, including the windows, clean and in order, to the satisfaction of Owner, and for that purpose shall employ the person or persons, or corporation approved by the Owner. . . .

(Mastellone Affirm., Exh. I). The lease agreement also contains an indemnification provision.

Hart Sharp subsequently subleased the space to Baltz. By letter dated December 21, 1999, Phillip Baltz wrote to Jeffrey Sharp and John Hart of Hart Sharp, stating that "[t]his letter confirms my commitment to lease the corner office we discussed for a monthly rent of $2450.00. It's my understanding that electricity, trash pickup (from the loading dock) is included in that price" (*id.*, Exh. N).

In a proposal dated May 28, 1998, Mannix proposed to "furnish and install into existing openings the Mannix Series 1600 'Landmark' Double Hung Tilt and Aluminum Windows" (Herrmann Affirm., Exh. F). "Windows to be installed into existing frames with interior trim" (*id.*). By purchase order dated March 8, 1999, Del Realty hired Mannix to furnish and install the

windows. The purchase order states that "[a] total of 96 windows are to be furnished and installed by Mannix; this includes the replacement of the pilot unit installed 10/30/98. 33 units are to have true curved tops, 18 rectangular units are to be installed behind the curved masonry" (*id.*).

Mannix subsequently entered into a written subcontract dated January 19, 2000 with Nationwide to perform "all work necessary or incidental to complete the removal and disposal of existing aluminum windows and to install new Mannix windows" (*id.*, Exh. G, Art. 2). The subcontract required Nationwide to purchase insurance naming Mannix as an additional insured. Additionally, the subcontract contains an indemnification provision.

The Accident

Plaintiff testified that he arrived at the building around noon on the date of his accident (Plaintiff EBT, at 41). He was working alone (*id.* at 66). Plaintiff brought his cleaning materials, which included his pail, squeegee, and safety belt, which is worn around the waist (*id.* at 37). He went to the third floor because he had been doing Phillip Baltz's windows for about a year prior to the accident (*id.* at 42). According to plaintiff, he did Baltz's windows about every month or month and a half (*id.* at 43). On each occasion, plaintiff would stop by Baltz's office, and asked if Mr. Baltz wanted the windows done again (*id.*). On December 7th, Mr. Baltz replied, "yes, go ahead and do it," like in the past (*id.*). Plaintiff stated that there were three sets of windows on the third floor: a set of windows facing Great Jones Street, and two sets of windows facing Lafayette Street (*id.* at 43-44). Plaintiff did the Great Jones side first (*id.* at 44). Plaintiff explained that, "[e]ach window has the hooks built [in] for a window cleaning. What you do, you reach out, you hook up, you hook up the other one, climb out, then you cross over, go back

in and do the other one" (*id.*). Plaintiff stated that, at the time of the accident, the windows did not tilt in; the windows were subsequently replaced with windows that tilted inward (*id.* at 45, 46). Plaintiff's accident occurred when he was washing the set of windows facing Lafayette Street (*id.* at 59). According to plaintiff, "[s]omebody removed the bolts from the inside of the frame and [he] wasn't told, so when [he] climbed out and hooked up, when [he] put weight on it the hooks came out" (*id.* at 58). As soon as he leaned back, both hooks "came out" (*id.* at 65). Plaintiff remembered waking up on the sidewalk "all beat up" and in pain, but then passed out and was in a coma for over a month (*id.* at 66, 67). Baltz did not instruct him how to do his work, or provide him with any equipment to do the cleaning (*id.* at 117).

Phillip Baltz testified that he is the president of Baltz, a public relations agency (Baltz EBT, at 5). Baltz subleased the space on the third floor of the building from Hart Sharp (*id.* at 9). Mr. Baltz said that the only obligations that his company had as a subtenant were to take the trash to the end of the hall and to keep the bathrooms clean (*id.* at 17). Mr. Baltz stated that plaintiff had washed his windows on two occasions prior to the accident (*id.* at 20). However, on those occasions, he had not obtained Del Realty's permission for plaintiff to wash the windows (Baltz Continued EBT, at 14). He did not know that any of the windows could be tilted inward (Baltz EBT, at 26). On December 7th, plaintiff came to his office, and asked if Mr. Baltz wanted his windows to be cleaned (*id.* at 34). Mr. Baltz agreed (*id.*). At some point after plaintiff started washing the windows, someone in his office told him that plaintiff had fallen (*id.* at 39). Mr. Baltz stated that he saw plaintiff on the sidewalk moving a little; plaintiff looked traumatized and in bad shape (*id.* at 41, 43). According to Mr. Baltz, a detective pulled plaintiff's window washing belt off one of the pegs on the window after the accident (*id.* at 48). Mr. Baltz noticed

that there was duct tape on the belt (*id.* at 51). The belt had ripped in the area where the duct tape was (*id.* at 52).

Michael Hogan, the chief operating officer of Hart Sharp, testified that Hart Sharp subleased its space to Baltz in or around December 1999 or the beginning of 2000 (Hogan EBT, at 6, 24). The premises were subleased to Baltz pursuant to an acknowledgment letter sent by Mr. Baltz to Hart Sharp (*id.* at 22; Mastellone Affirm., Exh. N). Hogan testified that Hart Sharp did not notify Del Realty about the sublease between Hart Sharp and Baltz (*id.* at 41). The building did not advise him how to wash the windows (*id.* at 14).

Bernard Kandler testified that Del Realty owned the premises (Bernard Kandler EBT, at 7-9). The building is a landmarked building (*id.* at 21). There was no building manager or superintendent (*id.* at 12). According to Bernard Kandler, the windows in the building had never been cleaned (*id.* at 14). Bernard Kandler did not recall consenting to the sublease of Hart Sharp's space (*id.* at 17). Del Realty had the windows replaced in 1995 or 1996 and again in 1998 or 1999 (*id.* at 35, 42). A company called Bari Construction installed the windows in 1995 or 1996 (*id.* at 36). Del Realty was required to replace the windows installed by Bari Construction because of the sight lines and color of the windows (*id.* at 40). Bernard Kandler testified that when Bari Construction performed its work, it left the window washing hooks in place (*id.* at 41). Bari Construction was not required to remove the hooks in order to install the windows (*id.*). Mannix installed new tilt-in windows in 1998 or 1999 (*id.* at 42). According to Bernard Kandler, Mannix removed the window washing hooks (*id.*). He understood that the hooks were to be removed (*id.* at 47). With tilt-in windows, there is no need to clean the windows from the outside (*id.*). Bernard Kandler noticed that the hooks had been removed on

his floor, the fourth floor, and on other floors (*id.* at 48).

Bernard Kandler further testified that, on the date of the accident, someone came up to his office to tell him that there had been an accident (*id.* at 54). He opened his windows, and saw a crowd of people on the sidewalk in front of the building (*id.*). Bernard Kandler went downstairs, and saw plaintiff wearing half of a belt (*id.* at 56). He recalled that the other half of the belt was hanging on the hook, and was patched together with duct tape (*id.* at 56, 60). There were no hooks on the ground (*id.* at 56). Bernard Kandler asked Phillip Baltz why plaintiff was washing the windows from the building exterior, since the windows tilted down and in for easy cleaning (*id.* at 59). Bernard Kandler testified that either the police or EMS took plaintiff's belt (*id.* at 60). When he looked up at the window, he saw hooks on the windows (*id.* at 67). Bernard Kandler testified that after the accident, Mannix came and removed the rest of the hooks (*id.* at 69). Del Realty did not pay for the removal (*id.* at 75). According to Bernard Kandler, the window frame did not have to be removed in order to remove the hooks (*id.* at 76).

Edward Kandler testified that, on the day of the accident, he saw plaintiff lying on the sidewalk, and observed that his belt had "split apart" (Edward Kandler EBT, at 21). He stated that after the windows were replaced, Del Realty showed the tenants of the building how to open them (*id.* at 60).

Procedural History

On October 16, 2003, plaintiff commenced the instant action against the Kandlers and Del Realty, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 202, 240 (1), and 241 (6). On September 20, 2004, Del Realty commenced a third-party action against Baltz and Hart Sharp, asserting claims for defense and indemnification, contribution, and

failure to procure insurance. Thereafter, Del Realty brought a second third-party action against Mannix for indemnification, contribution, and breach of contract. On July 21, 2006, Mannix filed a third third-party action against Nationwide, seeking common-law indemnification, contribution, and damages for breach of contract.

DISCUSSION

I. The Motions for Summary Judgment

The summary judgment standards are well settled. On a motion for summary judgment, the proponent of the motion must establish its claim or defense "sufficiently to warrant the court as a matter of law in directing judgment in [its] favor" (CPLR 3212 [b]). "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. 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] [citations omitted]). Once the proponent of the motion has made a *prima facie* showing, the burden shifts to the party opposing the motion to demonstrate, through admissible evidence, the existence of a factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 553 [1st Dept 2003], *affd* 3 NY3d 295 [2004]). "[I]ssue finding, rather than issue determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010], citing *Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]).

Del Realty's Motion for Summary Judgment Dismissing Plaintiff's Claims

A. *Labor Law § 240 (1)*

Del Realty contends that Labor Law § 240 (1) does not apply to plaintiff's accident, because he was not hired in conjunction with any building construction, demolition or repair work. According to Del Realty, plaintiff's work was synonymous with domestic window washing, and therefore is not subject to protection under the statute.

In opposition, plaintiff contends that the statute applies because plaintiff was subject to an elevation-related hazard. Specifically, plaintiff argues that he was suspended in the air from the third floor of Del Realty's commercial building.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, that:

> 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 added].

The Scaffold Law "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992]). To prevail 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];

Bland v Manocherian, 66 NY2d 452, 459 [1985]). 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" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). As a result, the statute "'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'" (*Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339 [2008], quoting *Panek v County of Albany*, 99 NY2d 452, 457 [2003]).

"The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'" (*Panek*, 99 NY2d at 457, quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]). "Cleaning" is an expressly-enumerated activity under Labor Law § 240 (1). In *Brown v Christopher St. Owners Corp.* (87 NY2d 938, 939, *rearg denied* 88 NY2d 875 [1996]), the plaintiff window washer was hired by a cooperative apartment owner to wash the outside of her windows. The Court of Appeals held that the "'cleaning' encompassed under the statute does not include the routine, *household* window washing at issue here" (emphasis added). "[T]he routine cleaning of the five windows of a single cooperative apartment by an individual engaged by the apartment owner is not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240" (*id.*; *see also Connors v Boorstein*, 4 NY2d 172, 175 [1958] [excluding cleaning of a private residence's windows from the ambit of section 240 (1)]).

More recently, in *Broggy v Rockefeller Group, Inc.* (8 NY3d 675, 680 [2007]), the Court

of Appeals noted that "'cleaning' is expressly afforded protection under section 240 (1) whether or not incidental to any other enumerated activity." The plaintiff in *Broggy* was instructed to wash the inside of a building's eighth-floor windows (*id.* at 677). The *Broggy* Court held that:

> [t]he crucial consideration under section 240 (1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240 (1); or whether a window's exterior or interior is being cleaned. Rather, *liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against.*
>
> The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff

(*id.* at 681 [emphasis supplied]). The Court, therefore, concluded that the plaintiff was not exposed to an elevation-related risk because he was not "obliged to work at an elevation to wash the interior of the windows" (*id.*). Although the plaintiff testified that he had to stand on a desk, he provided no evidence that he was required to work at an elevation to clean the interior of the windows (*id.*). In fact, on prior occasions, the plaintiff had cleaned windows that were the same height without a ladder or other safety device (*id.* at 682). In *Swiderska v New York Univ.* (10 NY3d 792, 793 [2008]), the plaintiff was injured while cleaning windows as part of a commercial window cleaning contract. The plaintiff asked for a ladder so she could reach the tops of the windows, but was told to climb on furniture instead (*id.*). Therefore, the Court held that the plaintiff was entitled to summary judgment on the issue of liability because she was required to climb on pieces of furniture in order to complete her work, and was not given a ladder, scaffold or other safety device of the kind contemplated by the statute (*id.*).

Contrary to Del Realty's contention, plaintiff was performing a covered activity at the time of his accident. Plaintiff was not engaged in routine, household window washing at the time

of his accident. Rather, plaintiff was washing the windows of the third floor of a commercial building (*see Broggy*, 8 NY3d at 680). Moreover, plaintiff was subject to an elevation-related risk while he was suspended from the anchors attached to the building facade (*see DeKenipp v Rockefeller Ctr., Inc.*, 60 AD3d 550 [1st Dept 2009] [commercial window cleaning activity was covered by section 240 (1); plaintiff was "effectively instructed to stand on the convector covers to get the job done, a practice established by record evidence as being routinely used by workers to access the building's windows and ceilings"]). Plaintiff testified that while cleaning Baltz's windows on the third floor of the building, both hooks "came out" (Plaintiff EBT, at 65). According to plaintiff, his task required him to work at an elevation, because the windows did not tilt in at the time of his accident (*id.* at 45). Therefore, the part of Del Realty's motion seeking dismissal of the Labor Law § 240 (1) cause of action is denied.

B. *Labor Law § 202*

Relying upon *Homin v Cleveland & Whitehill Co.* (281 NY 484 [1939]), Del Realty contends that it cannot be liable under Labor Law § 202, since plaintiff was hired by Baltz, and it had no knowledge that plaintiff was performing the work. Del Realty also points out that the tenant was responsible for window cleaning pursuant to the lease agreement.

In response, plaintiff argues that Del Realty is pointing to a 70-year old case that was interpreting a prior version of the statute. Plaintiff contends that the version of the statute that applied on the date of the accident makes no reference to the owner being "in charge" of the building. According to plaintiff, the current version of the statute requires that the "owner" provide "such safe means for the cleaning of the windows." Further, plaintiff argues that Del Realty permitted, suffered, and allowed the windows to be cleaned because window cleaning is

specifically referred to in the lease agreement. Plaintiff also submits an affidavit from his purported expert, Scott M. Silberman, P.E., who opines that Del Realty violated the following sections of the Industrial Code: 12 NYCRR 21.3 (b), (d), and (i), and 21.6 (a) (1), (c), and (k).

Labor Law § 202 states that:

> The owner, lessee, agent and manager of every public building and every contractor involved shall provide such safe means for the cleaning of the windows and of exterior surfaces of such building as may be required and approved by the board of standards and appeals. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved shall not require, permit, suffer or allow any window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter and the rules of the board of standards and appeals.

Before the statute was amended in 1970, the statute required owners, lessees and others responsible for public buildings to install and maintain anchors on all windows (*Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 452 [2002], citing Labor Law § 202, L. 1955, ch. 379). The statute was amended in 1970 so that it referred exclusively to the requirements of the Board of Standards and Appeals (*id.* at 452-453). Therefore, in order to properly plead a Labor Law § 202 claim, the plaintiff must point to the violation of a specific rule of the Industrial Code (*Brown v Christopher St. Owners Corp.*, 2 AD3d 172, 173 [1st Dept 2003], *lv dismissed* 1 NY3d 622 [2004]), which constitutes "some evidence of negligence" (*id.* [internal quotation marks and citation omitted]).

In *Homin* (281 NY 484, *supra*), the decedent fell while washing the outside of a window of a building owned by the defendant. The entire building had been leased and was in possession and control of the tenants (*id.* at 488). The decedent was retained by a tenant (*id.* at 489). The

version of the statute in effect at the time of the accident read as follows: "'The owner, lessee, agent, manager or superintendent in charge of a public building shall not require nor permit any window in such building to be cleaned from the outside unless means are provided to enable such work to be done in a safe manner'" (*id.* at 487).[1] The Court of Appeals held that "[t]here was no evidence that the defendant was in charge of the building within the meaning of the statute. Mere reservation by the landlord of the right to inspect the building or to make repairs, if necessary, did not operate to place it in charge of the particular premises where the accident happened nor impose upon it any obligation to the deceased" (*id.* at 489 [citation omitted]). Additionally, the Court stated that "[t]here was no evidence in this case that defendant required or permitted the window to be cleaned or that its officers or agents had any knowledge or information that work was to be or was being done. On the contrary, the undisputed evidence was the other way" (*id.*).[2]

Although plaintiff attempts to distinguish *Homin*, the court finds that this case controls and that it requires dismissal of plaintiff's Labor Law § 202 cause of action. Both the version of the statute at issue in *Homin* and the current version state that the owner shall not "require" or "permit" any window to be cleaned unless "means are provided to enable such work to be done in a safe manner." Further, *Homin* has also been cited by the First Department in dismissing a Labor Law § 202 cause of action, pursuant to the amended statute, where the owner did not

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[1]However, after *Homin* was decided, the statute was amended to delete the words "in charge of" a public building (Labor Law § 202, L. 1942, ch. 824). The legislative intent in changing the statute by deleting the words "in charge of" a public building was to broaden the scope of the statute so as to include owners, lessees, agents and managers of every public building irrespective of whether they were in charge of the premises (*see Schneier v Owen Realty Co.*, 188 Misc 611, 613 [Sup Ct, Kings County 1946], *affd* 271 App Div 983 [2d Dept 1947]).

[2]The sole statute at issue in *Homin* was Labor Law § 202 (*Homin*, 281 NY at 486).

require or permit the window to be cleaned, and had no knowledge that the work was to be done or was being done. In *Brown v Christopher St. Owners Corp.* (211 AD2d 441, 442 [1st Dept 1995], *affd* 87 NY2d 938, *rearg denied* 88 NY2d 875 [1996]), the plaintiff window washer was hired by a cooperative apartment owner, without the knowledge of either the cooperative corporation or the managing agent. The plaintiff sued the cooperative corporation and managing agent of the building (*id.* at 441). In affirming the dismissal of the plaintiff's Labor Law § 202 cause of action, the First Department relied upon *Homin*, stating that "there is no evidence to suggest that either defendant 'required or permitted the window to be cleaned or that its officers or agents had any knowledge or information that work was to be or was being done'" (*id.* at 443, quoting *Homin*, 281 NY at 489). In this case, plaintiff was hired by Baltz, Hart Sharp's subtenant, immediately before the accident. Thus, as in *Brown*, there is no evidence that Del Realty required or permitted the windows to be cleaned or that it had any knowledge or information that the work was to be or was being done. Consequently, plaintiff's Labor Law § 202 cause of action is dismissed.

C. *Labor Law § 241 (6)*

Del Realty argues that this statute does not apply because neither the building nor the leased space was under renovation, construction or excavation.

In opposition to the motion, plaintiff contends that, although the Court of Appeals' decision in *Broggy* does not specifically discuss Labor Law § 241 (6), there is no reason that its reasoning would not equally apply under section 241 (6). Plaintiff argues that the Industrial Code specifically refers to the cleaning of exterior surfaces, including windows.

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors, and their

agents to ensure that construction, demolition, and excavation operations at construction sites are conducted so as to provide for the reasonable and adequate protection of construction workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). By its terms, the statute applies to construction, demolition, and excavation operations (Labor Law § 241 [6]). However, the Court of Appeals has held that the statute and regulations encompass any work "in connection with" or "in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 102, 103 [2002]; *see also Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Mata v Park Here Garage Corp.*, 71 AD3d 423, 424 [1st Dept 2010]; *Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639, 640 [1st Dept 2009]; *Donnelly v Treeline Cos.*, 13 AD3d 143 [1st Dept 2004]).

Given that plaintiff was washing windows at the time of his accident, the statute does not apply (*Jamison v GSL Enters.*, 274 AD2d 356, 359 [1st Dept 2000] [section 241 (6) does not apply to routine maintenance such as window cleaning]; *Retamal v Osborne Mem. Home Assn.*, 256 AD2d 506, 507 [2d Dept 1998] [section 241 (6) claim properly dismissed where window washer was not involved in any construction, demolition or excavation work]). Accordingly, the part of Del Realty's motion seeking dismissal of the Labor Law 241 (6) cause of action is granted.

D. *Labor Law § 200 and Common-law Negligence*

Del Realty moves for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims. In support, Del Realty argues that it did not hire or supervise the manner or methods of plaintiff's work.

In response, plaintiff contends that the fact that Del Realty did not hire plaintiff or

supervise the manner or method of plaintiff's work is irrelevant. According to plaintiff, Del Realty not only owned the building but managed it. Plaintiff argues that Del Realty supervised, inspected, and approved of the work performed as part of the window renovation project. The lease agreement, plaintiff argues, establishes that Del Realty was responsible for structural repairs. Plaintiff also points out that there is considerable testimony that the building facade was in terrible condition. Additionally, plaintiff contends that it is Del Realty's burden to establish a lack of actual or constructive notice and that its motion fails to do so.

In its reply, Del Realty contends that plaintiff has failed to establish that it was on notice of the condition of the hooks at the time of the accident. Del Realty reasonably concluded that all of the hooks had been removed from the building in 1999, and had no reason to believe that any of the hooks were left on the facade of the building.

Labor Law § 200[3] is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Rizzuto*, 91 NY2d at 352), and therefore, the same standards apply to both Labor Law § 200 and common-law negligence theories of recovery. To prevail on a claim under Labor Law § 200 and common-law negligence, where the injury arises out of the means or methods of the work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury (*Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]).

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[3]Labor Law § 200 (1) provides that "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. The board may make rules to carry into effect the provisions of this section."

However, general supervision over the work is insufficient to impose liability under either theory (*Geonie*, 50 AD3d at 445; *Hughes*, 40 AD3d at 306).

Initially, the court notes that Del Realty's moving papers only sought summary judgment based upon its lack of supervision and control over plaintiff. There is some support in the record that the accident was caused by plaintiff's means and methods – Bernard Kandler observed after the accident that plaintiff's window washing belt had ripped in half (Bernard Kandler EBT, at 56). Del Realty has shown that it did not supervise or control plaintiff's work. Plaintiff was a self-employed window washer (Plaintiff EBT, at 13). He provided his own equipment to wash windows, which included a belt that was required to be replaced every three to four years (*id.* at 15). Further, Bernard Kandler testified that Del Realty never hired plaintiff (Bernard Kandler EBT, at 84).

Plaintiff also alleges that his accident arose out of a dangerous or defective condition on the premises, i.e., the loose window washer hooks or pegs. At plaintiff's deposition, he testified that he fell when both window washing hooks "came out" (Plaintiff EBT, at 65).

To succeed on a Labor Law § 200 or common-law negligence claim arising from a defective or dangerous condition, the plaintiff must show that the defendant either created or had actual or constructive notice of the condition (*see Seda v Epstein*, 72 AD3d 455 [1st Dept 2010] [where window washer alleged that storm window frame broke or dislodged, causing him to fall, the issue was whether defendants created or had notice of the defective condition of the window frame]; *see also Padovano v Teddy's Realty Assoc., Ltd.*, 56 AD3d 444, 447 [2d Dept 2008]). "The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d 200,

201 [1st Dept 2004]). It is well settled that a defendant seeking to dismiss a complaint for lack of notice must establish the absence of notice as a matter of law (*Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]; *DeMatteis v Sears, Roebuck & Co.*, 11 AD3d 207 [1st Dept 2004]; *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]).

Here, Del Realty's attempt to demonstrate that it had no notice of a structural defect, for the first time in its reply papers, is unavailing. Indeed, plaintiff has not had an opportunity to respond to this argument. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Therefore, the court denies Del Realty's motion as to the common-law negligence and Labor Law § 200 claims.

Hart Sharp's Motion Seeking Dismissal of the Third-Party Complaint and Cross Claims as Against it

Hart Sharp requests summary judgment dismissing the third-party complaint and all cross claims asserted against it. Hart Sharp argues that the Labor Law claims asserted against it must fail because it did not hire plaintiff or supervise his work. Hart Sharp also contends that the negligence claims should be dismissed, because it did not owe plaintiff a duty of care as to the accident site, and that it did not cause or create any defect on the premises. According to Hart Sharp, it has no obligation to indemnify Del Realty pursuant to the lease agreement, in view of the conclusive deposition testimony that the accident was caused by a structural defect, which is the responsibility of the owner, Del Realty. Further, Hart Sharp argues that there is no merit to the common-law indemnification and contribution claims because it did not cause or contribute

to plaintiff's accident.

Del Realty counters that there is a question of fact as to the precise cause of plaintiff's accident. Specifically, Del Realty contends that the accident may have been the result of plaintiff's window washing belt ripping in half, rather than the lack or insufficiency of hooks or pegs on the outside of the building. Additionally, Del Realty argues that, pursuant to the terms of the lease agreement, Hart Sharp must indemnify Del Realty for any accident arising out of or occurring on the premises resulting from its acts or the acts of its subtenant. Del Realty points out that plaintiff was hired by Baltz, Hart Sharp's subtenant.

In reply, Hart Sharp further contends that the indemnification provision in the lease agreement violates General Obligations Law § 5-322.1. Hart Sharp also takes the position that, if plaintiff's accident was caused by the inadequacy of his safety belt, plaintiff would be the sole proximate cause of his accident.

In this case, plaintiff has not asserted any direct claims against Hart Sharp. Therefore, Hart Sharp's sole potential liability is for indemnification and contribution.

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1st Dept 1985]). "Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept], *lv dismissed* 7 NY3d 864 [2006], quoting *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895

[1st Dept], *lv denied* 1 NY3d 504 [2003]). "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] [internal quotation marks and citation omitted]).

"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" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them. . . ." "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Here, there is no evidence that Hart Sharp, an out-of-possession lessee, was an active tortfeasor. Although Del Realty argues that plaintiff's accident may have been caused by plaintiff's inadequate equipment, i.e., the fact that his window washing belt ripped in half, Hart Sharp did not supervise or control the means and methods of the cleaning work. Additionally, pursuant to the lease agreement, Del Realty was responsible for maintaining the exterior of the building (Kalman Affirm., Exh. B, ¶ 4). Therefore, Hart Sharp is entitled to summary judgment

dismissing Hart Sharp's claims for common-law indemnification and contribution (*see Uribe v Fairfax, L.L.C.*, 48 AD3d 336, 337 [1st Dept 2008] [tenant's alleged violation of lease was not relevant to issue of common-law indemnification in light of the lack of evidence that the accident was attributable to negligence on the tenant's part]; *Arteaga v 231/249 W 39 St. Corp.*, 45 AD3d 320, 321 [1st Dept 2007] [owners were not entitled to common-law indemnification from tenant, where tenant did not supervise or control the work]; *Landgraff v 1579 Bronx Riv. Ave., LLC*, 18 AD3d 385, 387 [1st Dept 2005] [building owner was not entitled to common-law indemnification from tenant, where tenant was not an active tortfeasor and did not exercise any actual supervision or control over the work]).

The court, thus, turns to Del Realty's contractual indemnification claim against Hart Sharp. "A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] 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" (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003] [internal quotation marks and citation omitted]). It is well established 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]).

The lease agreement between Del Realty and Hart Sharp contains the following indemnification provision:

Subject to any statutory provisions which prohibit same, Tenant covenants and

> agrees, irrespective of whether Tenant shall be negligent, to indemnify, defend and save harmless, Owner . . . from and against any and all liability (statutory or otherwise) claims, suits, demands, judgments, costs, fines, penalties, interest and expenses (including reasonable counsel fees and disbursements incurred in any action or proceeding), to which Owner . . . may be subject or suffer arising from, or in connection with (i) *any liability or claim for any injury to, or death of, any person or persons . . . arising out of, or occurring in, the Demised Premises if from the acts or omissions of Tenant or its agents, licensees, invitees, employees or permitted subtenants or assigns, during the Term of this Lease* . . . .

(Kalman Affirm., Exh. B, ¶ 51 [emphasis added]).

Thus, Hart Sharp is obligated to indemnify Del Realty for any liability "arising out of . . . the acts or omissions of Tenant . . . or permitted subtenants" (*id.*). Here, plaintiff's accident did not arise out of any act or omission by Hart Sharp. Furthermore, plaintiff's accident did not arise out of any act or omission by any *permitted* subtenant. Del Realty has not disputed that, pursuant to paragraph 11 of the lease, Hart Sharp was required to obtain Del Realty's written consent in order to sublease its space, and that it never received that consent (Mastellone Affirm. in Support of Cross Motion and in Opposition to Hart Sharp's Motion for Summary Judgment, at 22). Hart Sharp's chief operating officer, Michael Hogan, testified that it did not contact Del Realty with regard to the sublease (Hogan EBT, at 41). Therefore, the court concludes that Del Realty's contractual indemnification claim must be dismissed (*see Loiek v 1133 Fifth Ave. Corp.*, 46 AD3d 766, 767 [2d Dept 2007] [subcontractor could not be held liable under indemnification agreement, given evidence that plaintiff's injuries did not arise out of, or result from, subcontractor's work under subcontract]; *cf. Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990] [agreement by subcontractor to assume liability incurred by contractor arising out of, in connection with or as a consequence of the work and/or any acts or omission of any of the sub-subcontractors required subcontractor to indemnify contractor, even though there was no

evidence of negligence on the subcontractor's part]).

Baltz's Motion for Summary Judgment Dismissing the Third-Party Complaint as Against It

In moving for summary judgment, Baltz contends that Del Realty's contractual indemnification and failure to procure insurance claims must fail because there was no written contract or obligation between Hart Sharp and Del Realty. Further, Baltz argues that the common-law indemnification and contribution claims are without merit. Baltz maintains that there is no obligation on the part of a subtenant as to maintenance or control of a structural part of the building's exterior.

Del Realty opposes Baltz's motion, contending that Baltz, as the subtenant, is bound to the terms of the lease agreement between Del Realty and Hart Sharp. Del Realty also maintains that there is an issue of fact as to Baltz's "active negligence."

In addition, Hart Sharp, in opposing Baltz's summary judgment motion, contends that Baltz had the authority to direct and control plaintiff's work. Hart Sharp points out that Phillip Baltz testified that he opened the windows plaintiff was cleaning on the date of the accident, and thus, claims that there is an issue of fact as to whether he knew that the windows tilted inwards and whether he negligently failed to advise plaintiff that the windows tilted inward for cleaning.

The court first considers Del Realty's contractual indemnification and failure to procure insurance claims against Baltz. Generally, a subtenant is not liable to the landlord under the original lease unless the sublease specifically obligates the subtenant to assume the prime tenant's duties (*Chow v Anew XCVIII, Inc.*, 21 AD3d 813, 813-814 [1st Dept 2005], *lv denied* 6 NY3d 711 [2006]; *Nineteen N.Y. Props. Ltd. Partnership v 535 5th Operating*, 211 AD2d 411,

413 [1st Dept 1995]; *Tamco Enters. v Mitsubishi Elec. Am.*, 190 AD2d 623, 623-624 [1st Dept], *lv denied* 82 NY2d 659 [1993]; *La Vack v National Shoes*, 124 AD2d 352 [3d Dept 1986]). In *La Vack* (124 AD2d at 353), the Third Department noted that:

> The Rotundos contend that Baker is a sublessee of Ames and thus bound by the indemnity clause of the original lease. Baker and National contend that Baker's status is that of a mere licensee. However, even assuming, arguendo, that Baker is a sublessee of Ames, we find no merit to the Rotundos' contention that Baker is thus obligated to indemnify it. A sublessee is not in privity of contract with the paramount landlord and thus is not liable to the paramount landlord for the terms of the original lease. Here, the Ames-Baker agreement does not incorporate any part of the lease between the Rotundos and their assignees, nor does it obligate Baker to assume Ames' duties to the Rotundos. Hence, we conclude that Baker, and its parent company National, are not obligated to indemnify the Rotundos [citation omitted].

Although Del Realty asserts that Baltz, the subtenant, is bound by the terms of the lease agreement with Hart Sharp, there is no privity of contract between Del Realty and Baltz. Moreover, there is no evidence that Hart Sharp and Baltz agreed to incorporate any part of the lease agreement into the sublease agreement. Accordingly, Del Realty's contractual indemnification and failure to procure insurance claims against Baltz are dismissed.

As noted above, common-law indemnification requires proof "not only that [the indemnitee] was not guilty of any negligence beyond the statutory liability but . . . also [proof] that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Perri*, 14 AD3d at 684-685 [internal quotation marks and citation omitted]). Contribution lies where the contributing party "had a part in causing or augmenting the injury for which contribution is sought" (*Raquet*, 90 NY2d at 183 [internal quotation marks and citation omitted]). In the instant matter, there is no evidence that Baltz was affirmatively negligent, or had the authority to direct or control plaintiff's work. Plaintiff testified that no one at Baltz ever

told him how to go about doing his window washing work (Plaintiff EBT, at 117). No one at Baltz ever provided plaintiff with any equipment to do his work (*id.*). Although Hart Sharp points out that Baltz's president, Phillip Baltz, testified that he opened the windows of his office at some point prior to the accident (*id.* at 25-27), that did not cause or contribute to plaintiff's accident. Phillip Baltz also testified that there was no written sublease between Baltz and Hart Sharp, and that Baltz's only obligations were to take out the trash and keep the bathrooms clean (*id.* at 17). Mr. Baltz stated that he did not know that the windows tilted inward (*id.* at 26). Accordingly, Baltz is entitled to summary judgment dismissing the common-law indemnification and contribution claims asserted against it (*see Linares v United Mgt. Corp.*, 16 AD3d 382, 385 [2d Dept 2005] [common-law indemnification and contribution claims were dismissed where seller demonstrated that it merely hired plaintiff's employer, provided no instructions to plaintiff as to how to perform work, exercised no supervision or control over the work, and provided no materials or tools]).

Mannix and Nationwide's Motions for Summary Judgment Dismissing the Second and Third Third-Party Complaints

Mannix moves for summary judgment dismissing the second third-party complaint. With respect to the breach of contract claim, Mannix contends that its contract with Del Realty did not obligate it to remove the window washer hooks located on the exterior facade of the building. Mannix maintains that the self-serving testimony of Bernard Kandler cannot rewrite the clear language of the contract which specifically described the work to be performed. Furthermore, Mannix argues that plaintiff's injury did not result from any acts or omissions by Mannix as there was no agreement to remove the window washer hooks.

Nationwide cross-moves for summary judgment dismissing the third third-party complaint. In support, Nationwide adopts the arguments and evidence submitted by Mannix. Additionally, Nationwide posits that there is no evidentiary proof that it was negligent or that the work it performed loosened or modified the hooks or pegs that were involved in plaintiff's accident.

In opposition to the motions, Del Realty argues that there are questions of fact as to whether Mannix and/or Nationwide negligently failed to remove all of the window washing hooks from the building. Del Realty contends that there are issues of fact on its breach of contract claim, because Bernard Kandler testified that Mannix was required to remove the window washing hooks on the exterior of the building. As further argued by Del Realty, Nationwide, in fact, removed window washing hooks both before and subsequent to plaintiff's accident.

In the second third-party complaint, Del Realty alleges that Mannix breached its contract by "failing to remove all window anchorage devices or pins when it replaced the existing windows at 380 Lafayette Street . . ." (Second Third-Party Complaint, ¶ 13).

To establish a breach of contract, a party must allege: (1) the existence of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document, and the court must enforce it without recourse to parol evidence" (*ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1st Dept 2003]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162

[1990]).

In the proposal dated May 28, 1998, Mannix proposed "to furnish and install into existing openings the Mannix Series 1600 'Landmark' Double Hung Tilt and Aluminum Windows" (Herrmann, Affirm., Exh. F), noting that the windows were "to be installed into existing frames with interior trim" (*id.*). In the purchase order dated March 8, 1999, Mannix wrote that "[a] total of 96 windows are to be furnished and installed by Mannix; this includes the replacement of the pilot unit installed 10/30/98. 33 units are to have true curved tops, 18 rectangular units are to be installed behind the curved masonry" (*id.*). The purchase order detailed the product, glazing, finish, and price (*id.*). While the purchase order required Mannix to furnish and install windows, it did not obligate Mannix to remove all of the window washing hooks located on the exterior of the building. Therefore, Del Realty's breach of contract cause of action against Mannix is dismissed.

As for common-law indemnification and contribution, Mannix has not shown that it was not negligent, or that it did not create or have notice of any defective condition with the window washing hooks (*see Mendelsohn v Goodman*, 67 AD3d 753, 754 [2d Dept 2009] ["an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties"]). There is evidence in the record that Mannix's subcontractor, Nationwide, removed window washing hooks. Andriotis testified that Nationwide did remove window washing hooks when it was unable to "retrofit the new window without the removal of these bolts" (Andriotis EBT, at 23). Additionally, Andriotis stated that Nationwide was required to perform some construction on the existing window frames when installing the new windows (*id.*). He stated that Nationwide "cut

them, took them out and put the two by fours right up to the brick opening, secured them to the brick and then we put the new windows into the pocket" (*id.* at 26). Nationwide only removed the hooks that interfered with installation (*id.* at 45). Therefore, summary judgment dismissing the common-law indemnification and contribution claims against Mannix is unwarranted (*see Perri*, 14 AD3d at 684-685; *Lyons v Schenectady Intl.*, 299 AD2d 906 [4th Dept 2002] [summary judgment was properly denied on common-law indemnification claim, where contractor failed to establish that it did not create or have notice of a dangerous condition at work site]).

For the same reasons, Nationwide's motion for summary judgment must fail. "A subcontractor may be obligated to indemnify under the common law upon proof that its actual negligence contributed to an accident, or, in the absence of any negligence, where it had the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2d Dept 2003]; *see also Rodriguez v Metropolitan Life Ins. Co.*, 234 AD2d 156, 157 [1st Dept 1996]; *Terranova v City of New York*, 197 AD2d 402 [1st Dept 1993]). Nationwide has failed to show that its work did not loosen or modify the window washing hook involved in plaintiff's accident. Therefore, Nationwide's motion for summary judgment is denied.

As pointed out by Mannix, Nationwide has not addressed Mannix's contractual indemnification and failure to procure insurance claims in its moving papers. Articles 6 and 7 of the subcontract provide that:

> Prior to the start of Subcontractor's Work, Subcontractor shall procure and maintain in force for the duration of the Work, Worker's Compensation Insurance, Employer's Liability Insurance, Comprehensive General Liability Insurance and all Insurance required of Contractor under the Contract Documents. Contractor, Owner, and Architect shall be named as additional insureds on each of these policies, except for

Worker's Compensation.

***

> To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Architect, Architect's consultants, and Contractor from all damages, losses or expenses, including attorneys fees, from any claims or damages for bodily injury, sickness, disease or death, or from claims for damage to tangible property, other than the Work itself. This indemnification shall extend to claims resulting from performance of this Subcontract and shall apply only to the extent that the claim or loss is caused in whole or in part by any negligent act or omission of Subcontractor or any of its agents, employees, or subcontractors. This indemnity shall be effective regardless of whether the claim or loss is caused in some part by a party to be indemnified. The obligation of Subcontractor under this Article shall not extend to claims or losses that are primarily caused by the Architect, or Architect's consultant's performance or failure to perform professional responsibilities

(Herrmann Affirm., Exh. G). Thus, Nationwide is not entitled to summary judgment dismissing the third-party claims for contractual indemnification and breach of contract for failure to procure insurance.

II. Hart Sharp's Motion to Compel

In view of the fact that Hart Sharp has been awarded summary judgment, Hart Sharp's motion to compel is denied as moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (motion sequence number 011) by third-party defendant Hart Sharp Entertainment, Inc. for summary judgment dismissing the third-party complaint and all cross claims asserted against it is granted and the third-party complaint and cross claims are severed and dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the motion (motion sequence number 012) by second third-party defendant/third third-party plaintiff Mannix, a Division of Interstate Window Corporation, for summary judgment dismissing the second third-party complaint is granted to the extent of dismissing the breach of contract cause of action, and said cause of action is severed and dismissed and is otherwise denied; and it is further

ORDERED that the motion (motion sequence number 013) by third-party defendant Baltz & Company, Inc. for summary judgment dismissing the third-party complaint and all cross claims asserted against it is granted and the third-party complaint and cross claims are severed and dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the motion (motion sequence number 014) by third-party defendant Hart Sharp Entertainment, Inc. for an order compelling plaintiff and third third-party defendant Rios Corp. d/b/a Nationwide Windows to respond to its notice of discovery and inspection and combined discovery demands dated March 3, 2010 is denied as moot; and it is further

ORDERED that the cross motion by defendants Charles Kandler, Bernard Kandler, Edward Kandler, Del Realty Co., and Del Realty Partner, LLC for summary judgment dismissing the complaint is granted to the extent of dismissing the Labor Law §§ 202 and 241 (6) causes of action, and said causes of action are severed and dismissed and is otherwise denied; and it is further

ORDERED that the cross motion by third third-party defendant Rios Corp. d/b/a Nationwide Windows for summary judgment dismissing the third third-party complaint is denied; and it is further

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

ORDERED that counsel for third-party defendant Hart Sharp Entertainment shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 14, 2010

ENTER:

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

HON. CAROL EDMEAD

FILED

SEP 16 2010

NEW YORK
COUNTY CLERK'S OFFICE