

Iburg v WFP Tower A Co. L.P.

2010 NY Slip Op 32664(U)

September 20, 2010

Sup Ct, Kings County

Docket Number: 39556/04

Judge: Carolyn E. Demarest

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At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of September, 2010.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

-----X

THOMAS IBURG, ET ANO.,

Plaintiffs,

- against -

Index No. 39556/04

WFP TOWER A CO. L.P., ET AL.,

Defendants.

-----X

STRUCTURE TONE, INC. S/H/A STRUCTURE TONE
GLOBAL SERVICES, INC.,

Third-Party Plaintiff,

- against -

Index No. 75253/05

EMPIRE SHEET METAL, INC.,

Third-Party Defendant.

-----X

STRUCTURE TONE, INC. S/H/A STRUCTURE TONE
GLOBAL SERVICES, INC.,

Third-Party Plaintiff,

- against -

Index No. 75547/05

PENGUIN AIR CONDITIONING CORP.,

Third-Party Defendant.

-----X

The following papers numbered 1 to 28
read on these motions and this cross motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2 10-11 17-18</u>
Opposing Affidavits (Affirmations) _____	<u>3-5 12-14 19-21</u>
Reply Affidavits (Affirmations) _____	<u>6-7 15 22-24</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memoranda of Law</u> _____	<u>8-9 16 25-28</u>

Upon the foregoing papers, in this action by plaintiff Thomas Iburg (plaintiff) against defendants¹ Brookfield Financial Properties, L.P. (Brookfield) and Structure Tone, Inc. s/h/a Structure Tone Global Services, Inc. (Structure Tone) seeking to recover damages for personal injuries, plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim. Defendant Brookfield cross-moves for summary judgment dismissing plaintiff's claims pursuant to Labor Law § 240 (1) and § 200 as asserted against it. Defendant/third-party plaintiff Structure Tone and second third-party defendant Penguin Air Conditioning Corp. (Penguin) move, pursuant to CPLR 3212, for summary judgment: (1) dismissing plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6) claims, (2) declaring that third-party defendant Empire Sheet Metal, Inc. (Empire) must provide them

¹WFP Tower A Co. L.P.'s cross motion for summary judgment dismissing all claims asserted against it was granted, without opposition, at oral argument since it was the wrong party. Specifically, WFP Tower D Co., L.P., and not WFP Tower A Co. L.P., was the owner of 4 World Financial Center, where plaintiff's accident occurred. Although this fact was explicitly asserted in WFP Tower A Co. L.P.'s answer, plaintiff never timely moved to amend his complaint to assert a claim against WFP Tower D Co., L.P.

with a defense and indemnification, and reimburse them for all legal fees and expenses incurred by them, (3) declaring that Empire breached its insurance procurement obligation to them, and (4) dismissing Brookfield's cross claims against Structure Tone for common-law indemnification and contribution. Structure Tone and Penguin, by their motion, also seek an order: (1) pursuant to CPLR 3025 (b), granting Structure Tone leave to amend its answer to assert cross claims for common-law indemnification and contribution as against Brookfield, (2) summary judgment declaring that Brookfield owes them common-law indemnity, and (3) pursuant to CPLR 3217 (b), so-ordering Structure Tone's stipulation to voluntarily discontinue Structure Tone's second third-party action against Penguin.

Brookfield was the property manager for 250 Vesey Street, in Manhattan, also known as 4 World Financial Center. Structure Tone, a general contractor, was hired by Merrill Lynch, a tenant at 4 World Financial Center, to install duct work into the intake air duct down in a shaft below street level in front of 4 World Financial Center. Structure Tone then hired Penguin to install the duct work at the job site. Penguin subcontracted out its work to Empire.

Plaintiff was employed by Empire as a journeyman sheet metal worker, whose responsibilities were to hang and install duct work. Chris Hernandez, a sheet metal worker employed by Empire, was plaintiff's foreman. On November 9, 2004, plaintiff and Chris Hernandez went to 4 World Financial Center in order to install a large piece of prefabricated duct work, known as gooseneck duct, below street level. According to plaintiff, the

gooseneck duct was the size of a Volkswagen Beetle, and was approximately six feet long, six feet wide, and five feet tall, and weighed between 110 and 125 pounds. The site where the gooseneck duct was to be placed was located below a series of about 40 metal grates that were in place on the ground. Each grate measured approximately two feet by four feet, and this grating covered an area of the ground measuring approximately 12 feet by 8 feet. The vault below the grating was approximately 15 feet deep. In order to install the gooseneck duct below ground, the grating on the street level needed to be opened. The gooseneck duct was to be lowered through an opening in the grates in order to be installed below them.

Upon plaintiff and Chris Hernandez's arrival at the job site, they met with a representative from Structure Tone, Mike Shaddow, who showed them where the gooseneck duct was going to be installed in the area below the grates and told them to wait for representatives of the buildings to see how they would go about installing it. Carl Wolff, a mechanic, and Mike Napoli, an engineer, who were employees of Brookfield, met with plaintiff and Chris Hernandez. These Brookfield employees then told plaintiff and Chris Hernandez that the gooseneck duct was going to be lowered through the grating, and asked Chris Hernandez which grate was to be opened. Chris Hernandez told the Brookfield employees which grate to open, and then plaintiff and Chris Hernandez went back to their truck to unload the gooseneck duct. As plaintiff and Chris Hernandez were unloading the gooseneck duct off the truck, Carl Wolff removed the grate by unbolting four clips that held the grate down, lifting the grate up, and leaning it back against the building. However, Carl

Wolff did not open the grate that Chris Hernandez had requested him to open. Instead, Carl Wolff opened the grate in the far corner, creating an unprotected two feet by four feet hole.

In order to maneuver the gooseneck duct to the grating area, plaintiff and Chris Hernandez had to take the gooseneck duct around a rectangular billboard sign, which was attached to posts that were bolted to the ground over the grates. Chris Hernandez and plaintiff transported the gooseneck duct to the area of the billboard on a dolly, and, when they arrived at the billboard area, they removed the gooseneck duct from the dolly, and attempted to drag the gooseneck duct behind the billboard on the left side in the space between the billboard and the building. While the gooseneck duct was on the sidewalk over the grates and plaintiff was attempting to pull it into position, plaintiff let go of the gooseneck duct and fell backwards down approximately 15 feet into the hole created by the open grate.

Consequently, on December 6, 2004, plaintiff² filed this action against Brookfield and Structure Tone (and WFP Tower A Co. L.P, who, as noted above, was granted summary judgment dismissing it from this action), seeking to recover damages for the personal injuries sustained by him due to his fall. Plaintiff's complaint alleges claims of common-law negligence, and violations of Labor Law § 200, § 240 (1), and § 241 (6). Structure Tone interposed an answer dated February 17, 2005, and Brookfield interposed an answer dated March 17, 2005, and Brookfield asserted cross claims against Structure Tone. On March 10,

²By order dated January 7, 2010, plaintiff Natalie Iburg's claim (which was for loss of consortium, as plaintiff's wife) was discontinued as against all defendants.

2005, Structure Tone filed a third-party action against Empire. On May 2, 2005, Empire answered the third-party complaint. On May 31, 2005, Structure Tone filed a second third-party complaint against Penguin. Penguin interposed its answer dated August 17, 2005, and served cross claims dated November 1, 2005 against Empire. On October 26, 2009, Structure Tone sought to voluntarily discontinue its second third-party action against Penguin, but none of the parties, other than Structure Tone and Penguin, agreed to sign the stipulation of discontinuance, which was executed only by Structure Tone and Penguin. On February 24, 2010, plaintiff filed his note of issue upon the completion of discovery.

Plaintiff, in support of his motion for summary judgment, argues that he is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim. Labor Law § 240 (1) imposes liability upon owners and contractors and their agents who fail to provide or erect safety devices necessary to give reasonable and adequate protection and safety for workers engaged in construction work who are exposed to elevation-related hazards (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Balzer v City of New York*, 61 AD3d 796, 797 [2009]). “The legislative purpose behind this enactment 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 [an] accident” (*Rocovich*, 78 NY2d at 513 [internal quotation marks and citations omitted]). It is well settled that Labor Law §

240 (1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was . . . framed” (*Id.* [internal quotation marks and citations omitted]).

In opposition to plaintiff’s motion for summary judgment and in support of its motion insofar as it seeks summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim, Brookfield contends that Labor Law § 240 (1) is inapplicable to it because it was not the owner of the premises, a general contractor, or the agent of the owner or general contractor. However, while Brookfield was not the owner of the premises or a general contractor, a party can be deemed a statutory agent under the Labor Law § 240 (1), and may be held vicariously liable as an agent of the property owner for injuries sustained pursuant to Labor Law § 240 where it “had the ability to control the activity which brought about the injury” (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]).

“When the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor” (*Russin*, 54 NY2d at 318). Indeed, it has been held that a property manager can be held liable under Labor Law § 240 (1) as an agent of the owner (*see Enge v Ontario County Airport Mgt. Co.*, 26 AD3d 896, 897 [2006]).

Brookfield argues that although it served as the property manager for the premises, it had no contractual relationship to the construction work which plaintiff was performing.

Brookfield relies upon the fact that Structure Tone's contract for the project was with Merrill Lynch. However, it is unnecessary for Brookfield to have itself actually contracted for the work in order for it to be held liable under Labor Law § 240 (1) (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]; *Enge*, 26 AD3d at 897-898; *Spagnuolo v Port Auth. of N.Y. & N.J.*, 8 AD3d 64, 64 [2004]).

Brookfield also relies upon Carl Wolff's deposition testimony that his supervisor, Fred Anechino, had told him to go up to the street level and open a piece of the grating "for Merrill Lynch" (Carl Wolff's Dep. Transcript at 26-27). Such deposition testimony, however, only supports the argument that Brookfield was acting as an agent for the owner when its employee, Carl Wolff, opened the grate for plaintiff to install the gooseneck duct.

While Brookfield argues that it did not supervise or control plaintiff's work, (as noted above) Brookfield's employees, Carl Wolff and Mike Napoli, were present at the work site (*see Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 1131-1132 [2007]). Brookfield contends that the removal of the grate by Carl Wolff did not constitute supervision or control over plaintiff's work since it was Chris Hernandez who directed Carl Wolff to remove a particular grating. Chris Hernandez's direction as to which grate to open, however, did not negate any independent duties which Brookfield may have had under the Labor Law, or prevent Brookfield from assuming those duties and thereby becoming "vicariously liable as an agent of the property owner" (*Walls*, 4 NY3d at 863; *see also Pino*, 43 AD3d at 1132; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2007]).

With respect to the supervision and control of Brookfield over plaintiff's work, Chris Hernandez testified, at his deposition, that a representative from Structure Tone told him and plaintiff that they had to wait for somebody from the building to come and see how they were going to get the gooseneck duct into the building (Chris Hernandez's Dep. Transcript at 24-25). Chris Hernandez further testified, at his deposition, that the people from the building then told him and plaintiff that they should bring the gooseneck duct down through the grating (*Id.* at 25-26). Although according to Chris Hernandez, he told the people from the building which grate he wanted removed (*Id.* at 35), Carl Wolff decided to open a different grate because he thought it would be the safest one (Carl Wolff's Dep. Transcript at 27), and neither plaintiff nor Chris Hernandez was informed of this.

By opening the grating and thereby creating an open unprotected hole, Brookfield, through its employees, exercised sufficient supervision and control over plaintiff's work so as to render it liable under Labor Law § 240 (1) as an agent of the owner (*see Walls*, 4 NY3d at 863). While vigorously disputing the liability of defendant WFP, which is acknowledged to be an incorrect defendant and not the owner of the premises, Brookfield has acknowledged that it "served as the property manager for the subject premises." (Affirmation of Nicholas J. Marino in support of cross-motion of WFP and Brookfield at Paragraph 46). Thus, as the agent for the owner, Brookfield would be liable to plaintiff under Labor Law § 240(1). Thus, Brookfield's cross motion, insofar as it seeks dismissal of plaintiff's Labor Law § 240 (1) claim, must be denied.

In opposition to plaintiff's motion for summary judgment in his favor, Brookfield argues that plaintiff is not entitled to summary judgment because there is a question of fact as to whether plaintiff's acts were the sole proximate cause of his injuries. Specifically, Brookfield contends that plaintiff was aware of the necessity for a grate to be removed so that the job could be carried out, but did not pay attention to the work of the Brookfield employees. Brookfield asserts that plaintiff's failure to pay attention is a sufficient ground to deny plaintiff's motion for summary judgment.

Brookfield's argument is rejected. Where a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762 [2006]; *Brandl v Ram Bldrs., Inc.*, 7 AD3d 655, 656 [2004]). The law, in this regard, is clear: "contributory negligence will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (*Blake*, 1 NY3d at 286).

Structure Tone and Empire, in opposition to plaintiff's motion, argue that Labor Law § 240 (1) is inapplicable to this case because plaintiff was not involved in any work related to an elevation differential, but was, instead, merely moving the gooseneck duct from one location on the ground to another and not attempting to lower it. This argument is rejected. Although plaintiff was at ground level, the hole into which he fell was 15 feet deep, and, thus, there was an elevation differential (*see Salazar v Novalex Contr. Corp.*, 72 AD3d 418,

420 [2010]; *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 472-473 [2008]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [2005]; *Brandl*, 7 AD3d at 656). The purpose of plaintiff's actions, moreover, was to move the duct from ground level to the lower level through an opening in the grate pursuant to instruction. Traversing the ground where there was a 15 foot deep hole constituted an elevation-related risk covered by Labor Law § 240 (1) (see *Nasuro v PI Assoc., LLC*, 49 AD3d 829, 831 [2008]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2006]).

Structure Tone further argues that an opening created by the removal of a grate is akin to an opening created by the removal of a manhole cover. Structure Tone and Empire rely upon the case of *Masullo v City of New York* (253 AD2d 541, 542 [1998]), in which a plaintiff who was replacing certain sewer pipes located at a pumping station was injured when he fell down a manhole. The Appellate Division, Second Department, in *Masullo* (253 AD2d at 542), held that “[w]hile the manhole may have been negligently left uncovered, th[at wa]s not one of the gravity-related hazards or perils subject to the safeguards prescribed by Labor Law § 240 (1).” The Appellate Division, Second Department, in *Masullo* (253 AD2d at 542 [internal quotation marks and citations omitted]), found that, instead, “the fall was the type of ordinary and usual peril a worker is commonly exposed to at a construction site.” The Appellate Division, Second Department, in *Masullo* (253 AD2d at 542), in so holding, specifically noted that while Labor Law § 240 (1) is applicable to work performed at heights or where the work itself involves risks related to differentials in elevation, the work in which

the injured plaintiff was involved in that case “was wholly unrelated to an elevation-related hazard, the manhole in which he fell.” Thus, plaintiff’s injury was not, as here, a direct consequence of the performance of his work.

Structure Tone also relies upon *Fabrizio v City of New York* (2002 WL 34358047 [Sup Ct, NY County 2002]), in which a plaintiff, who had opened a manhole himself to gain access and had been in and out of it several times, fell 16 feet down into the open manhole, when he was talking to an employee of another trade with his back to the open manhole cover and took a step back. The Supreme Court, New York County, similarly held, in *Fabrizio* (2002 WL 34358047), that the plaintiff’s fall down an open manhole was not “one of the gravity-related hazards or perils subject to the safeguards prescribed by Labor Law § 240.”

This case is distinguishable from *Masullo* (253 AD2d at 542) and *Fabrizio* (2002 WL 34358047) because it does not involve an existing manhole, but an opening created by Brookfield by the removal of a grate. Plaintiff was unaware of that unprotected opening when he fell. In addition, unlike in *Masullo* (253 AD2d at 542), the work which plaintiff was to perform involved an elevation-related hazard since he needed to lower the gooseneck duct into the shaft, and an opening of the grate was necessary in order for him to do so.

This case more closely resembles *Klos v New York City Tr. Auth.* (240 AD2d 635, 636 [1997]), where a decedent died after a fall through a delivery opening in a sidewalk, which gave access to an electrical substation vault, when he and another employee were delivering

materials to the vault, which was under construction. The Appellate Division, Second Department, in *Klos* (240 AD2d at 637), held that the decedent's death resulted from an elevation-related hazard that Labor Law § 240 (1) was intended to obviate.

The case of *Klos* (240 AD2d at 637) was recently cited by the Appellate Division, Second Department, in *Valensisi* (33 AD3d at 695), wherein a decedent was performing work at a building under construction in close proximity to two openings covered only with unsecured plywood boards, which had been cut into the grating in order to provide access to an equalization tank more than 20 feet below ground, when he fell through one of the openings to the equalization tank. In *Valensisi* (33 AD3d at 695), the Appellate Division, Second Department, held that under these circumstances, the decedent's work exposed him to an elevation-related risk within the scope of Labor Law § 240 (1).

The case of *Valensisi* (33 AD3d at 695) was recently cited in *Johnson v Pinmark Contr. Co., LLC* (23 Misc 3d 1131[A] [Sup Ct, Kings County 2009]), in which a plaintiff's fall through a stairwell hole on the first floor of a construction site into the basement was held to be sufficiently gravity-related for purposes of Labor Law § 240(1). In *Salazar* (72 AD3d at 420), the Appellate Division, First Department, held that there was an elevation-related risk to which Labor Law § 240 (1) applied, and not just one of the usual and ordinary dangers associated with a construction site, when a plaintiff was injured while spreading freshly poured concrete in the basement of a building that was being renovated and fell into an open trench while walking backwards and using a tool to smooth out the concrete.

Structure Tone's attempt to distinguish *Salazar*, *Valensisi*, and *Johnson* on the basis that the openings in those cases were not, as here, created just moments before the plaintiff fell for the purpose of allowing the plaintiff access to the area below, is unavailing. The duration or reason for the hole does not obliterate the requirement of Labor Law § 240 (1) to provide plaintiff with adequate protection from falling into it. An unprotected hole present for only moments can result in injuries as severe as those resulting from a fall through one which is present for a long period of time. A hole that is opened to gain access to an area can fall within the requirements of Labor Law § 240 (1) (*see Klos*, 240 AD2d at 636-637).

Structure Tone argues that even if there was a violation of Labor Law § 240 (1), it was not the proximate cause of plaintiff's injuries. Specifically, Structure Tone contends that it was Brookfield's opening of the wrong grate that was the proximate cause of plaintiff's injuries, and not a failure to provide adequate protection against a risk arising from a significant elevation differential.

Structure Tone's argument must be rejected. While Brookfield's alleged opening of the wrong grate may have been a cause of the accident, it cannot be said to be the sole proximate cause since the violation of Labor Law § 240 (1) in failing to protect against injury from falling into the opening was also a cause of the accident (*see Blake*, 1 NY3d at 290). While Structure Tone claims that no type of protection would have prevented plaintiff's accident, Structure Tone has not shown why a protective device could not have been in place until plaintiff was aware of the opening and in position to lower the gooseneck duct though

the open grating. It is well-settled that strict or absolute liability will attach where it is demonstrated that a violation of Labor Law § 240(1) is a proximate cause of injury (*see Blake*, 1 NY3d at 286-289). The undisputed fact here is that plaintiff was injured as a result of a fall through a hole unprotected by any preventitive device as required by Labor Law § 240(1). Thus, plaintiff is entitled to summary judgment as to liability on its Labor Law § 240(1) claim as against both Brookfield and Structure Tone (*see Valensisi*, 33 AD3d at 695; *Klos*, 240 AD2d at 637).

Structure Tone and Penguin, in their motion, also seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. Labor Law § 241 (6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with specific safety rules promulgated by the Commissioner of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). The duty imposed by Labor Law § 241 (6) to comply with the Commissioner's regulations is nondelegable (*Id.* at 502). In order to impose liability under Labor Law § 241 (6), the Industrial Code regulation relied upon by the plaintiff must be a concrete specification, which is sufficiently specific (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998]).

Plaintiff relies upon a specific provision of the Industrial Code, i.e., 12 NYCRR 23-1.7 (b) (1), which provides:

“(b) Falling hazards.

(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

(ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.”

12 NYCRR 23-1.7 has been held to be sufficiently specific to maintain a Labor Law § 241 (6) claim (*see Salazar*, 72 AD3d at 423; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 [1999]; *Cunha v City of New York*, 18 Misc 3d 1104[A], 2007 NY Slip Op 52404, *6 [Sup Ct, NY County 2007]).

Structure Tone argues, however, that 12 NYCRR 23-1.7 is inapplicable to the case at bar because here, the opening was created in order to create a space to permit entry into the area below the grating in order to lower the gooseneck duct into it. Structure Tone contends that, therefore, the opening in the grating cannot be regarded as a hazardous opening since it was only created minutes prior to plaintiff falling into it, and that even if there had been

a railing and gate protecting the opening, plaintiff's accident would still have occurred since the gate would have been opened to allow plaintiff entry into the opening.

Structure Tone's argument is rejected. In *Cunha* (2007 NY Slip Op 52404, *6), it was held that "[a]lthough the part of [12 NYCRR] 23-1.7 (b) (1) (i) which requires the [hazardous opening] to have a 'substantial cover fastened in place' obviously cannot apply [when] the . . . cover had to be removed so the . . . workers could get in and out of it, the part of the provision which requires a safety railing may apply." It was also held, in *Cunha* (2007 NY Slip Op 52404, *6), that "[t]he requirement of [12 NYCRR] 23-1.7 (b) (1) (ii) that a safety rail be provided even when free access to the opening is needed may also apply."

Structure Tone argues that *Cunha* (2007 NY Slip Op 52404, *6) is distinguishable from the case at bar on the basis that in *Cunha* (2007 NY Slip Op 52404, *4), the manhole into which the plaintiff fell was left open to allow access for another trade on the work site rather than for the injured plaintiff, and, therefore, became a hazard to the injured plaintiff, whereas here, the opening was created specifically for plaintiff to allow him access to lower the gooseneck duct. Structure Tone's argument is unpersuasive. The opening was not any less hazardous because it was created for plaintiff since plaintiff was unaware of the location of the opening when he fell into the unprotected opening (*see Salazar*, 72 AD3d at 419).

Structure Tone further argues that 12 NYCRR 23-1.7 is inapplicable where a cover or railing would completely frustrate the purpose for which the opening is made, and that here, the use of a cover, railing, or some other device to barricade the opening created by the

removed grate would have prevented plaintiff and Chris Hernandez from performing the task which they were retained to perform. This argument is unavailing. Plaintiff was moving the gooseneck duct along the ground and was not using the opening when he fell into the unprotected opening. There is nothing in any of the deposition testimony to indicate that the work could only have been performed in such a manner as to permit no choice but to have that grate open at that specific location at the time plaintiff fell through the opening. The grate could have remained covered until it was time for plaintiff to descend below. Moreover, since a different grate was opened than expected, without informing plaintiff, a safety barrier, such as a railing, or a temporary obstruction around the open grate, should have been utilized to prevent plaintiff from falling into the open hole.

“In determining whether an owner or contractor complied with the Labor Law, the analysis should consider not only how the work was done but also whether it could reasonably have been done in a different way that would have better ensured the safety of the workers” (*Salazar*, 72 AD3d at 424). Thus, based upon the above, the court finds that there is a triable issue of fact as to whether Structure Tone violated Labor Law § 241 (6). Therefore, Structure Tone’s motion, insofar as it seeks summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim, must be denied.

Structure Tone, in its motion, and Brookfield, in its cross motion, also seek summary judgment dismissing plaintiff’s Labor Law § 200 claim as against them. “Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to

provide construction site workers with a safe place to work” (*Kretowski v Braender Condominium*, 57 AD3d 950, 952 [2008]; *see also Rizzuto*, 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]).

Structure Tone and Brookfield rely upon the principle that “when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work” (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see also Rizzuto*, 91 NY2d at 352; *Russin*, 54 NY2d at 317; *McGee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 874 [2010]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2008]; *Gomez v City of New York*, 56 AD3d 522, 523 [2008]; *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]; *Lazier v Strickland Ave. Corp.*, 50 AD3d 641, 642 [2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204 [2007]; *Guerra v Port Auth. of N.Y. & N.J.*, 35 AD3d 810, 811 [2006]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 683 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Reynolds v Brady & Co.*, 38 AD2d 746, 746-747 [1972]). “A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that

defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62).

Structure Tone argues that it had no involvement in the direction, supervision, or control of the means and methods of the movement of the gooseneck duct or the removal of the grate that created the opening into which plaintiff fell. Structure Tone contends that it, therefore, cannot be held liable for common-law negligence or pursuant to Labor Law § 200. Specifically, Structure Tone argues that it did not have any control over the manner in which Empire moved the gooseneck duct, the manner in which plaintiff performed his work, or the manner in which the grate was removed, which created the opening into which plaintiff fell. Structure Tone contends that its only involvement with the gooseneck duct was to meet Empire's workers in front of the building, introduce them to the Brookfield employees and show them where the gooseneck duct was eventually going to be installed. Structure Tone asserts that plaintiff was supervised only by his foreman, Chris Hernandez, who supervised and controlled the movement of the gooseneck duct at the site for Empire, and that plaintiff received no instructions from anyone else. Structure Tone further asserts that Brookfield's employee, Carl Wolff, removed the grate, and was instructed by his supervisor, and not by anyone from Structure Tone, to remove the grate.

In addition, Structure Tone claims that it was not in the area at the time of plaintiff's accident. Structure Tone points out that Chris Hernandez testified, at his deposition, that the guy from Structure Tone was not there when plaintiff fell (Chris Hernandez's Dep.

Transcript at 52), and that Carl Wolff also testified, at his deposition, that he did not see anyone from Structure Tone when plaintiff fell (Carl Wolff's Dep. Transcript at 39). Structure Tone states that its involvement ended when it showed plaintiff and Chris Hernandez the location where the gooseneck duct was to be installed and introduced them to the Brookfield employees who were to open the grating.

Brookfield argues that it cannot be held liable under Labor Law § 200 because it did not exercise supervision or control over plaintiff's work. Brookfield maintains that plaintiff's work was supervised entirely by Chris Hernandez, who, as previously noted, was an employee of Empire.

In addressing the above arguments, it is noted that "[c]ases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega*, 57 AD3d at 61). Where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a[n owner or] general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 703 [2007]; see also *Wynne v State of New York*, 53 AD3d 656, 657 [2008]; *Smith v Cari, LLC*, 50 AD3d 879, 880 [2008]; *Gallelo*, 50 AD3d at 735-736; *Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007]). It is unnecessary to prove an owner or general

contractor's supervision and control over an injured plaintiff where the injury arose from the condition of the work place created by or known to the owner or general contractor, rather than the method of plaintiff's work (*see Cromwell v Hess*, 63 AD3d 1651, 1652-1653 [2009]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 [2009]; *Wynne*, 53 AD3d at 657; *Smith*, 50 AD3d at 880; *Gallelo*, 50 AD3d at 735-736; *Azad*, 46 AD3d at 730; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]; *Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 589, 590 [2002]; *Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017 [2001]; *Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [2000]).

Structure Tone contends that the open hole created by the removal of the grate was not a dangerous condition because it was removed for Empire to perform its work. This contention is without merit. The reason for its removal does not render an open hole, which was left unprotected while plaintiff was moving the gooseneck duct and unaware of the opening, any less dangerous.

As the general contractor, Structure Tone had control over the work site at the time of the accident. Structure Tone's project manager, Robert Connors, testified, at his deposition, that Mike Shaddow, a supervisor for Structure Tone, was present at the time the gooseneck duct was delivered to the job site, and that he was responsible for coordinating the installation of the gooseneck duct (Robert Connors' Dep. Transcript at 15). Robert Connors further testified, at his deposition, that Structure Tone coordinated with Brookfield

to open the grate so that Empire could lower the gooseneck duct down into the shaft (*Id.* at 16).

As to notice, in conflict with the deposition testimony of Chris Hernandez and Carl Wolff, plaintiff testified, at his deposition, that the “Structure Tone guy” whose name might have been Mike or John, was in the area when he fell (Plaintiff’s Dep. Transcript at 45-46). Robert Connors testified, at his deposition, that he did not recall if Michael Shaddow was present during the entire installation of the gooseneck duct (Robert Connors’ Dep. Transcript at 15). However, Structure Tone filled out an accident report contemporaneously with the accident, which was completed by Michael Shaddow and signed by Robert Connors. The accident report stated that Michael Shaddow witnessed the accident, and that there was a panel of steel grating open. Thus, there is a triable issue of fact as to whether Structure Tone had actual or constructive notice of the dangerous condition which caused the accident. Consequently, Structure Tone’s motion, insofar as it seeks summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claim as against it, must be denied.

Brookfield’s argument that it cannot be held liable under Labor Law § 200 because it did not exercise supervision or control over plaintiff’s work, is rejected as completely inconsistent with undisputed facts. Since Brookfield’s employee, Carl Wolff, had removed the grate, it had control over the work site, and actual notice of the dangerous condition (*see Cromwell*, 63 AD3d at 1652-1653; *Murphy*, 4 AD3d at 201; *Perry*, 283 AD2d at 1017).

Moreover, liability under Labor Law § 200 may be imposed where a defendant affirmatively caused the dangerous condition (*see Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1421 [2009]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [2009]; *DiSalvio v Young Men's Christian Assn. of City of N.Y.*, 51 AD3d 711, 712 [2008]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008]; *Hill v Stahl*, 49 AD3d 438, 442 [2008]; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156 [2007]). Here, there is evidence that Carl Wolff removed the wrong grate, leaving plaintiff unaware of this unprotected hole, and causing plaintiff's fall. Thus, Brookfield's cross motion, insofar as it seeks summary judgment dismissing plaintiff's Labor Law § 200 claim as against it, must be denied.

Structure Tone and Penguin's motion, insofar as it seeks summary judgment declaring that Empire must provide them with a defense and indemnification and reimburse them for all legal fees and expenses incurred by them, relies upon section 5 of the Additional Terms and Conditions of Purchase Order #20899, which contains the following indemnity provision:

"To the fullest extent permitted by applicable law [Empire] shall defend, indemnify, and hold Penguin, the Owner, Tenant and General Contractor and the agents and employees of the foregoing harmless, of and from all claims, suits, losses or expenses whether direct or consequential (including legal fees and other expenses) arising out of or in consequence of the performance of the Work, including, without limitation,

wrongful death, bodily injury, property damage, and contractual and all other claims by any person, firm, or corporation, regardless of whether [Empire] is partially negligent excluding only liability created by the sole and exclusive negligence of Penguin, Tenant, Owner and General Contractor.”

Empire, in opposition to Structure Tone and Penguin’s motion, argues that the work performed by it on the date of the accident was not done pursuant to any written contract and that Purchase Order #20899 was inapplicable to this work. Empire notes that Purchase Order #20899 references the 24th floor and the P-2 level of the building, whereas the work was performed on the P-1 level. Empire also has submitted an invoice prepared by it dated April 20, 2004, which billed Penguin for \$3,500 for Purchase Order #20899, and an invoice prepared by it dated November 15, 2004, which states “Bob Perry” under the space for the purchase order number, and which billed Penguin for \$6,500 for the gooseneck duct. Empire argues that since the April 20, 2004 invoice references project 04-054 and the November 15, 2004 invoice references project 04-176, these different project numbers show that Purchase Order #20899 was inapplicable to the gooseneck duct work. Empire also notes that its president, John Callaghan, testified, at his deposition, that Penguin sent him a hold harmless agreement after the accident, which he signed (John Callaghan’s Dep. Transcript at 33), and that Callaghan did not state that it was to apply to work performed before that agreement was signed. The Court further notes that Purchase Order #20899, upon which movants rely, is not signed by Empire.

Although Empire's argument is inconclusive, as John Callaghan testified, at his deposition, that there was a purchase order for the job (*Id.* at 11), and admitted that Purchase Order #20899 appeared to be the purchase order for the job (*Id.* at 31), Callaghan also testified, at his deposition, that he did not think that he had Purchase Order #20899 when Empire did the job (*Id.* at 31), a question of fact has been raised regarding the terms of the Contract between Empire and Penguin regarding indemnification.

Empire further contends that the indemnification provision runs afoul of General Obligations Law § 5-322.1. This contention is without merit since this indemnification provision obligates Empire to indemnify Structure Tone and Penguin only “[t]o the fullest extent permitted by law.” This limiting language operates to insulate the clause from the ambit of General Obligations Law § 5-322.1 (1) (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 and n 4 [2008]; *Ostuni v Town of Inlet*, 64 AD3d 854, 856 [2009]; *Bink v F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409 [2006]). In addition, this indemnification provision excludes indemnification for liability created by the sole negligence of Penguin and Structure Tone, thus prohibiting indemnification to Penguin and Structure Tone for their own negligence. Such a partial indemnification agreement which does not indemnify the promisee for losses attributable to the promisee's own negligence is not void under General Obligations Law § 5-322.1 (*see Brooks*, 11 NY3d at 207-211 [2008]; *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772 [2010]; *Minorczyk v Dormitory Auth. of State of N.Y.*,

74 AD3d 675 [2010]; *Hayes v City of New York*, 279 AD2d 610, 610 [2001]; *Kowalewski v North Gen. Hosp.*, 266 AD2d 114, 114-115 [1999]).

However, while the indemnification agreement appears to be applicable to the work performed and is not void under General Obligations Law § 5-322.1, “a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Reisman*, 74 AD3d 772, quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; see also General Obligations Law § 5-322.1). Structure Tone has failed to meet its burden of establishing its entitlement to contractual indemnification because it has failed to establish as a matter of law that it was not itself negligent and that any liability on its part for the injuries sustained by plaintiff was vicarious only (see *State of New York v Santaro Indus., Inc.*, 48 AD3d 1101, 1102-1103 [2008]). Since a triable issue of fact exists as to Structure Tone’s negligence, summary judgment on its contractual indemnification claim as against Empire is premature (see *Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531 [2010]; *Husted v Central N.Y. Oil & Gas Co., LLC*, 68 AD3d 1220, 1223 [2009]; *Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1101 [2009]; *Hurley v Best Buy Stores, L.P.*, 57 AD3d 239, 240 [2008]). Furthermore, because there is an issue of fact raised as to the enforceability of the indemnification provision relied upon by Penguin, summary judgment on this contractual indemnification claim as against Empire must be denied notwithstanding the absence of any

factual dispute that Penguin was not negligent (*see Reisman*, 74 AD3d 772; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 802 [2010]).

Structure Tone and Penguin, in their motion, also argue that Empire breached its contractual obligation, pursuant to the purchase order between Penguin and Empire, to procure the requisite insurance coverage for them. Section 4 of the Additional Terms and Conditions of Purchase Order # 20899 required Empire to “purchase at [its] own expense, for Penguin . . . nam[ing] Penguin and such other entities as required by Contract Documents as additional insureds . . . (b) Commercial General Liability insurance with \$5,000,000 limit of liability for bodily injury and property damage (broad form) combined single limit per occurrence/aggregate.”

Empire provided Penguin with a certificate of insurance indicating that it had only procured commercial general liability insurance in the amount of \$1,000,000 per occurrence and \$2,000,000 in the aggregate. Structure Tone and Penguin note that this is well below the \$5,000,000 which Empire was required to procure pursuant to Section 4 of the Additional Terms and Conditions of Purchase Order #20899. Furthermore, the certificate of insurance indicates that Penguin was the only named insured, and that Empire did not name Structure Tone as an additional insured as required by Section 4 of the Additional Terms and Conditions of Purchase Order #20899.

By letter dated December 23, 2009, Empire’s insurer disclaimed coverage to Structure Tone on the ground that although the contract with Empire required that Structure Tone be

named as an additional insured, there was no certificate of insurance showing it as an additional insured prior to the execution of the contract, and it was, therefore, not an additional insured under the policy issued by it. Empire's insurer additionally disclaimed coverage on the ground that the tender by Structure Tone did not timely comply with the notice provision set forth in the policy. By letter dated April 4, 2006, Empire's insurer disclaimed coverage to Penguin based on, among other grounds, late notice.

“A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2009], quoting *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2003]; see also *Kinney v Lisk Co.*, 76 NY2d 215, 219 [1990]; *Town of Hempstead v East Coast Resource Group, LLC*, 67 AD3d 777, 778 [2009]; *Quilliams v Half Hollow Hills School Dist. [Candlewood School]*, 67 AD3d 763, 766 [2009]). Where there is a breach of an agreement to procure insurance naming a contractor as an additional insured, the contractor “is entitled to all damages resulting from the breach, including a defense in the underlying personal injury action, indemnification for its liability to the plaintiff, if any, and the costs it has incurred in defending the plaintiff's action” (*Tkacs v Dominion Constr. Corp.*, 278 AD2d 486, 487 [2000]; see also *Kinney*, 76 NY2d at 219; *Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [1999]; *Darowski v High Meadow Coop. No. 1*, 239 AD2d 541, 542 [1997]). However, as Empire has disputed the applicability of Purchase Order #20899 which imposed the obligation upon which Structure Tone and Penguin seek to recover, an issue of fact precludes summary judgment.

Structure Tone also seeks leave to amend its answer to assert a cross claim for common-law indemnity and contribution as against Brookfield. CPLR 3025(b) provides that leave to amend pleadings shall be “freely given.” Moreover, in the absence of prejudice, mere delay in seeking leave to amend a pleading does not bar an amendment (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Brookfield has not demonstrated that it would be prejudiced by the proposed amendment, and it cannot be said that the proposed amendment is devoid of merit. Consequently, Structure Tone should be granted leave to amend its answer to assert this cross claim against Brookfield (*see Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277 [2008]).

Structure Tone and Penguin,³ in their motion, also seek summary judgment on their respective cross claims as against Brookfield for common-law indemnification and contribution. “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*, 14 AD3d at 684-685, quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999]; *see also Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [2010]; *Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [2004]; *Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [2004]). Contribution also requires a showing that the one from whom contribution is sought was negligent (*see Martinez v City of New York*, 73 AD3d 999, 1000 [2010]). Since there are triable issues of

³Penguin asserted a cross claim for common-law indemnification and contribution as against Brookfield in its answer.

fact as to whether Structure Tone and Brookfield were negligent and their relative culpability, this precludes the granting of summary judgment in Structure Tone and Penguin's favor for common-law indemnity and contribution and similarly precludes the granting of summary judgment dismissing Brookfield's cross claims for common-law indemnity and contribution against Structure Tone since these issues are not yet ripe for adjudication (*see Francescon*, 71 AD3d at 529; *Priestly*, 10 AD3d at 495; *Murphy*, 8 AD3d at 162).

Structure Tone and Penguin's motion also seeks an order discontinuing Structure Tone's second third-party claims as against Penguin. Structure Tone and Penguin assert that while no other party has any direct claims or cross claims as against Penguin, none of the other parties would agree to sign the stipulation discontinuing Structure Tone's second third-party claims against Penguin, which Structure Tone faxed to them on October 26, 2009.

CPLR 3217(b) provides that, upon an order of the court, an action may be voluntarily discontinued "upon terms and conditions, as the court deems proper." "Absent a showing of special circumstances, including prejudice or other improper consequences, a motion for voluntary discontinuance is generally granted" (*Christensen v Gutman*, 249 AD2d 805, 806 [1998]; *see also Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *Mancinelli v Mancinelli*, 228 AD2d 747, 747 [1996]). "The authority to grant or deny a motion pursuant to CPLR 3217(b) is within the sound discretion of the trial court" (*Christensen*, 249 AD2d at 806; *see also Tucker*, 55 NY2d at 383; *Mancinelli*, 228 AD2d at 747). Here, none of the parties have opposed this branch of Structure Tone and Penguin's motion, and since there is no evidence of any prejudice to any party, such discontinuance may be granted (*see* CPLR 3217 [b]).

Accordingly, plaintiff's motion for summary judgment in his favor on his Labor Law § 240 (1) claim is granted as to liability as against Structure Tone and Brookfield. Brookfield's cross motion for summary judgment dismissing plaintiff's claims pursuant to Labor Law § 240 (1) and § 200 as against it, is denied. Structure Tone and Penguin's motion is denied insofar as it seeks: (1) summary judgment dismissing plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6) claims, (2) summary judgment declaring that Empire must provide Structure Tone and Penguin with a defense and indemnification, and reimbursement of all legal fees and expenses incurred by it, (3) summary judgment dismissing Brookfield's cross claims against Structure Tone for common-law indemnification, and (4) summary judgment declaring that Brookfield owes Structure Tone and Penguin common-law indemnity, and (5) summary judgment declaring that Empire breached its insurance procurement obligations to Structure Tone and Penguin. Structure Tone and Penguin's motion is granted insofar as it seeks (1) an order, pursuant to CPLR 3025 (b), granting Structure Tone leave to amend its answer to assert cross claims for common-law indemnification and contribution as against Brookfield, and (2) an order, pursuant to CPLR 3217(b), so-ordering Structure Tone's stipulation to voluntarily discontinue Structure Tone's second third-party action against Penguin.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'J. S. C.', written over the printed name 'J. S. C.' below it.

J. S. C.

HON. CAROLYN E. DEMAREST