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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 109497/2006

BRENNAN, RICHARD P.

VS.

DORMITORY AUTHORITY

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by first Sunday Mountain Inc is decided per attached

FILED
OCT 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/07/10

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

RICHARD P. BRENNAN and PATRICIA BRENNAN,

Plaintiffs,

-against-

Index No. 109497/06

THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, F.I.T. STUDENT HOUSING CORPORATION, c/o FASHION INSTITUTE OF TECHNOLOGY, SKANSKA USA INC. and KOCH SKANSKA, INC.,

Defendants.

----------X

SKANSKA USA BUILDING, INC., F.I.T. STUDENT HOUSING CORPORATION and THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590182/07

ADAMS MANAGEMENT and FLEET BUILDING MAINTENANCE, INC.,

Third-Party Defendants.

Emily Jane Goodman, J.S.C.:

This action arises out of an accident at a construction site. Motions with sequence numbers 006, 007, and 008 are hereby consolidated for disposition.

In motion sequence number 006, third-party defendant Fleet Building Maintenance, Inc. (Fleet) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross claims asserted against it.

Third-party defendant Adams Management (Adams), in motion sequence number 007, moves for summary judgment dismissing plaintiffs' complaint, the third-party complaint, and Fleet's cross claims against it.

In motion sequence number 008, defendants The Dormitory Authority of the State of New York (DASNY), F.I.T. Student Housing Corporation (FIT) and Skanska USA Building, Inc., s/h/a Skanska USA Inc. (Skanska; the three together, defendants) move for summary judgment dismissing all claims asserted as against FIT, dismissing plaintiffs' complaint, and for summary judgment in their favor on their claim against Adams for contractual indemnification.

BACKGROUND

On November 29, 2005, plaintiff Richard P. Brennan (plaintiff), then a carpenter employed by Adams, was working on the seventh floor of a building undergoing renovations at 406 West 31st Street in Manhattan. He and another carpenter, each working alone, were installing welded door bucks/door frames on that floor (Plaintiff's Depo., at 63-64). Plaintiff had finished his work there, and was about to go to the eighth floor to install door bucks there, too, when he noticed another doorway, up against a column, where the door buck was not yet installed (*id.* at 80). Plaintiff cleaned the area so he could see his marks on the floor ("I move other pieces of Sheetrock out of the

way and you know, I just took a board and just went over the floor with it and just moved it out of the way" [*id.* at 82, 166]), made the preparations to install the door buck, and attempted to install it. When he lifted the door buck to get it in the proper position, his right leg slipped to his right, and he fell on his left knee, experiencing "a twinge type of feeling in my groin area" (*id.* at 80-81, 86-87, 90-91, 92). Plaintiff described what caused his fall as, "It was water, like a little bit like a thin layer of mud type of water mixed with Sheetrock dust" (*id.* at 93, 162) that "was part of everything that was around there that I picked up and just scraped over to get out of the way" before he made his preparations to hang the door buck (*id.* at 95).

The debris that plaintiff scraped away was "[b]asically sheet rocks [*sic*]" (*id.* at 83), and plaintiff did not think it was a problem or a big enough mess that he would complain to his foreman about it (*id.* at 95-96; *see also* Lume Depo., at 22-23 [Adams employees would not call labor foreman to have sheetrock dust swept or mopped clean because "Sheetrock dust is minor"]). In fact, "[i]t became ... whatever kind of mess from, you know, walking through it by working in the area. It wasn't ... like that when I got there" (Plaintiff's Depo., at 163-164).

Following his accident on November 29, 2005, plaintiff continued to work until January 12, 2006 (*id.* at 67).

The project for which plaintiff's work was a part was the conversion of a building into new offices and dorm rooms for the Fashion Institute of Technology. According to counsel for defendants, FIT bought the building in 2004, but due to certain financial and legal circumstances, FIT contracted with DASNY to facilitate the renovations, by which agreement DASNY, in effect, assumed ownership of the premises solely for the period of the renovations. When the project was completed, ownership reverted back to FIT. Thus, according to defendants, during the time of the renovations, FIT was neither an owner nor a contractor, nor an agent of either such as to be subject to possible liability under the Labor Law.

DASNY contracted with Skanska for it to be the construction manager of the project. In turn, Skanska hired Fleet to provide labor for clean-up and maintenance work at the premises. Skanska also retained non-party Component Assembly Systems (CAS) to perform rough carpentry, drywall and ceilings. CAS sub-subcontracted with Adams to install interior framing, walls, ceilings, and door frames.

PLEADINGS

Plaintiffs' amended complaint asserts two causes of action: (1) plaintiff's claims for common-law negligence, and violations of Labor Law §§ 200, 240, and 241 (6); and (2) his wife's claim for loss of consortium. Plaintiff has withdrawn his

Labor Law § 240 (1) claim (*see* Khashmati 6/18/10 Affirm. in Opp. to Defendants' Motions, ¶ 6).

Defendants' third-party complaint alleges eight causes of action, asserting claims for contribution, common-law and contractual indemnification, and breach of contract by failure to procure insurance against Fleet and Adams separately. By December 8, 2008 Stipulation of Partial Discontinuance, defendants discontinued the common-law claims in their third-party complaint as against Adams, plaintiff's employer, leaving only the contractual claims to be litigated as against that third-party defendant.

Fleet brings two cross claims against Adams in its third-party answer, sounding in contribution and common-law indemnification. Adams, in its third-party answer, brings a counterclaim against defendants, and a cross claim against Fleet, both for contribution, common-law and contractual indemnification.

DISCUSSION

The Summary Judgment Standard

"It has long been settled that 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'" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70

AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; *see also Penava Mechanical Corp. v Afgo Mechanical Services*, 71 AD3d 493, 495-496 [1st Dept 2010] [proponent of motion "bears the initial burden of coming forward with evidence showing prima facie entitlement to judgment as a matter of law, and, unless that burden is met, the opponent need not come forward with any evidence at all"]). Once the movant has met its burden, "the party opposing such motion must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]) 'by producing evidentiary proof in admissible form'" (*Meridian Management Corp.*, 70 AD3d at 510, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens*, 70 AD3d 563, 565 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility [interior citations omitted]" (*Meridian Management Corp.*, 70 AD3d at 510-511). "When there is any doubt as to the existence of triable

issues, summary judgment should not be granted" (*Udoh*, 70 AD3d at 565).

Defendants'[1] Motion for Summary Judgment (Motion Sequence No. 008)

(1) To Dismiss All Claims As Against FIT

Defendants contend that all claims should be dismissed as against FIT because, as a result of an agreement with DASNY, it was not the owner of the premises during the renovations. However, the evidence paints a different picture. According to Jeffrey Slonim, FIT's Secretary, who asserts that he is "familiar with the renovation project undertaken in 2005 and 2006 at 406 West 31st Street, New York, New York":

> [FIT] became the owner of the subject premises in June 2004. Prior to November 29, 2005, [FIT] net-leased the premises to [DASNY], in part so that DASNY could facilitate the renovation of the premises for [FIT's] benefit.
>
> ***
>
> [R]epresentatives of [FIT] monitored the general progress of the renovation project ...

(Slonim 4/9/10 Aff., ¶¶ 1, 3, 5).

Mario Rodriguez, Skanska's project manager for the project, who, "[a]s the Project Manager, was involved with the day-to-date [*sic*] construction-related operations at the

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[1]Although Koch Skanska, Inc. is shown as a defendant in this matter, no indication whatsoever has been given of its identity or role in this litigation. Therefore, no relief either for or against it may be granted on these motions.

project," attests that "[p]ursuant to an agreement between FIT and DASNY, DASNY stepped in place of FIT and assumed the role as the 'owner' of the premises during the pendency of the FIT project and for the purposes of facilitating the work" (Rodriguez 4/9/10 Aff., ¶¶ 1, 4). However, Rodriguez gives no factual basis for his assertions, and he does not claim to have any personal knowledge of the "agreement between FIT and DASNY." Thus, the court discounts his testimony on this issue.

Counsel for defendants avers that

> [d]ue to certain financial and legal constraints involved with the planned renovation project ..., FIT entered into a series of agreements with DASNY to facilitate the renovation, the net effect being that DASNY assumed ownership of the premises during the pendency of the subject renovation project. It was only after the project was completed, well after the subject accident, that ownership reverted to FIT

(Paradeis 4/12/10 Affirm., ¶ 12, referring to Slonim's affidavit). However, defendants' counsel also fails to state a factual basis for his assertions, and he does not claim to have personal knowledge of the "series of agreements with DASNY" that FIT allegedly entered into, which allegedly produced the "net effect" of FIT relinquishing its ownership during the pendency of the project. Thus, the court discounts the statements made by defendants' counsel on this issue.

In addition, the court notes that a net lease does not transfer ownership of property to the net lessee. Rather, a net

lease is only "[a] lease in which the lessee pays rent plus property expenses (such as taxes and insurance)" (Black's Law Dictionary [8th ed 2004]).

Thus, the court concludes that FIT was an owner of the premises at the time of plaintiff's accident, and, as such, falls within the provisions of the Labor Law.

(2) To Dismiss the Complaint

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Cambizaca v New York City Transit Authority*, 57 AD3d 701, 701 [2d Dept 2008]). There are three types of circumstances under which a defendant may face liability under these claims: where the accident was caused by "'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work' (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965])" (*id.* at 701-702); where the accident arose from a dangerous condition (*Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 555 [1st Dept 2009]); or where the accident may have arisen as a result of both situations (*Gallello v MARJ Distributors*, 50 AD3d 734 [2d Dept 2008]).

This case involves both a dangerous condition and the means and methods of the subcontractor's work (*see e.g. Romeo v*

Property Owner [USA] LLC, 61 AD3d 491, 491 [1st Dept 2009] [plaintiff's section 200 and common-law negligence claims "were unsupported by evidence to indicate that the owner and general contractor either had notice of the alleged hazardous ... condition or that they directly controlled and supervised the electrical work in question"]; *Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009] [questions of fact "both as to whether appellant had the authority to control the activity that brought about plaintiff's alleged injury, and as to whether appellant had actual or constructive notice of the alleged dangerous condition"]).

> Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work [citation omitted]. ... General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed [citations omitted]

(*Hughes v Tishman Construction Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Fischetto v LB 745 LLC, York*, 43 AD3d 810, 810 [1st Dept 2007]).

Plaintiff attests that he received all his instructions from his Adams foreman (Plaintiff's Depo., at 70). There is no evidence that FIT or DASNY exercised any form of supervision or

control over plaintiff's work. According to Mario Rodriguez, Skanska's project manager, Skanska, as construction manager, was responsible for site safety (Rodriguez Depo., at 22), and had five supervisors who walked the site to check for unsafe conditions and to notify trade foremen if there was a safety problem (*id.* at 61). However, there is no evidence that Skanska exercised any supervision or control over "*the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes v Tishman Construction Corp.*, 40 AD3d at 306). Thus, plaintiff's claim under the standard for the means and methods of work fails.

> Where ... the plaintiffs' injuries arose not from the manner in which the work was being performed but, rather, from an allegedly dangerous condition on the property, a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, "when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" [citation omitted]

(*Bridges v Wyandanch Community Development Corp.*, 66 AD3d 938, 940 [2d Dept 2009]).

Here, there is no evidence that defendants either created or had notice of the water/sheetrock dust condition. Nothing but speculation has been offered with respect to how the water came to be on the seventh floor, or how long it might have been there. Plaintiff, himself, testified that he had not seen

"that thin layer before [he] fell" (Plaintiff's Depo., at 162), and that it was not there when he got there, but "became whatever kind of mess from, you know, walking through it by working in the area" (*id.* at 163-164). He testified that he noticed the "mud and dust and the water" while he was prepping the area, scraping the area with a board before his accident, but that he "didn't think it was a problem" and did not complain to anyone about it (*id.* at 95). In these circumstances, it cannot be said that defendants were negligent in failing to remedy a situation that may have appeared only moments before the accident and which was not perceived as a hazardous condition.

Accordingly, the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

Labor Law § 241 (6)

Labor Law § 241 (6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]). The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23. "[T]he duty imposed on owners by the Labor Law is nondelegable, and supervision or control are not necessary to impose liability for statutory violations under

Labor Law § 240 (1) and Labor Law § 241 (6) [interior citations omitted]" (*Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1273 [3d Dept 2010]; *see also Mugavero v Windows By Hart*, 69 AD3d 694, 695 [2d Dept 2010]). "In order to support a claim under section 241 (6), ... the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009], citing *Ross*, 81 NY2d at 504-505; *see also Pereira v Quogue Field Club of Quogue, Long Island*, 71 AD3d 1104, 1105 [2d Dept 2010]). By its very terms, the statute applies only to work involving "constructing or demolishing buildings or doing any excavating in connection therewith" (Labor Law § 241; *Singh v City of New York*, 68 AD3d 1095, 1096 [2d Dept 2009] ["To recover under Labor Law § 241 (6), a plaintiff must establish the violation, in connection with construction, demolition, or excavation, of an Industrial Code provision which sets forth specific, applicable safety standards"]). Moreover, "'[T]o establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of the accident' [citation omitted]" (*Ramos v Patchogue-Medford School District*, 73 AD3d 1010, 1012 [2d Dept 2010]).

The renovation of the building involved both demolition and construction. As set forth above, FIT was the owner of the

premises. In addition, it is uncontested that DASNY acted in the role of an owner of the property during the project. Thus, both FIT and DASNY are subject to the Labor Law in this matter.

Skanska, the construction manager, was hired by DASNY. With respect to whether Skanska may be liable as either a general contractor or as an agent of FIT or DASNY under the Labor Law, counsel for defendants states that "Skanska does not argue it is not a statutory defendant. It is conceded that if the Court finds that Labor Law § 241 (6) was violated, Skanska, as the construction manager, would be found liable" (Paradeis 6/30/10 Affirm. in Reply to Plaintiffs' Affirm. in Opp., ¶ 35).

Thus, all three defendants are subject to Labor Law § 241 (6).

While plaintiff alleges violations of multiple sections of the Industrial Code in his September 29, 2006 bill of particulars, the only sections which he briefs are sections 23-1.7 (d), (e) (1) and (e) (2), and 23-1.30. All the other sections are deemed abandoned, and summary judgment dismissing the section 241 (6) claim based on the abandoned Industrial Code sections is granted.

Sections 23-1.7 (e) (1) and (e) (2) pertain to "Tripping and other hazards" in passageways and working areas. Since plaintiff slipped, not tripped, these sections are inapplicable.

Section 23-1.30 requires that sufficient illumination be provided, "in no case ... less than 10 foot candles in any area where persons are required to work." Plaintiff, himself, attested that there was temporary lighting in the area, and that, even though it was not the "brightest" lighting, "in general I could see" (Plaintiff's Depo., at 184-185; *see also* Lume Depo., at 93, 99 [lighting was "decent," enough to see the floor]). With no evidence to the contrary, the court concludes that this section was not violated.

Section 23-1.7 (d), in pertinent part, follows:

> (d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway ... which is in a slippery condition. ... [W]ater ... and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

This section is sufficiently specific that it can support a Labor Law § 241 (6) claim (*see e.g. Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 350-351 [1998]; *Lopez v City of New York*, 21 AD3d 259 [1st Dept 2005]).

Defendants concede that the section might apply, but aver that it does not, because plaintiff created the mess he slipped on, and thus, was the sole proximate cause of his injuries (it "became whatever kind of mess from, you know, walking through it by working in the area" [Plaintiff's Depo., at 163-164]). This argument usually accompanies evidence that a

plaintiff acted rashly or irresponsibly, or misused or failed to use proper safety devices, which is not the case here.

However, it is a question of fact whether the slippery condition was a foreseeable consequence of plaintiff working in the area (*see e.g. Fresco v 157 East 72nd Street Condominium*, 2 AD3d 326, 328 [1st Dept 2003] [jury question whether activity involved a foreseeable risk of injury]; *Dennis v City of New York*, 304 AD2d 611, 611 [2d Dept 2003] [triable issue of fact whether accident was foreseeable]; *Giacomazzo v Exxon Corp.*, 185 AD2d 145, 146 [1st Dept 1992] ["Any issues as to causation and foreseeability must ... await determination by the trier of fact"]).

Moreover, there is no question that water and sheetrock dust were present at the site, and combined into a slippery, muddy slurry which was a proximate cause of plaintiff's accident. Such a condition is explicitly proscribed by Industrial Code § 23-1.7 (d). Even though this court found no negligence on defendants' parts under Labor Law § 200 and common-law negligence, "[i]n contrast to section 200, section 241 (6) of the Labor Law imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Comes v New York State Electric and Gas Corp.*, 82 NY2d 876, 878 [1993]; *see also Ross*, 81 NY2d at 503 ["important legal consequences have been made to depend upon

whether the statutory provision in question sets forth a specific requirement or standard of conduct or instead does no more than broadly require that the work area provide reasonable and adequate protection and safety [interior quotation marks and citations omitted]"). Because "the history of Labor Law § 241 (6) 'clearly manifests the legislative intent to place the ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs on the owner and general contractor' (1969 NY Legis Ann at 407-408)" (*Torres v City of New York*, 12 Misc 3d 1109[A], 2008 NY Slip Op 52021[U], *10 [Sup Ct, Bronx County 2008]; *see also McCoy v Metropolitan Transportation Authority*, 75 AD3d 428 [1st Dept 2010] [statutory and regulatory purposes behind section 241 (6) are "to protect construction workers against hazards in the work place"]), and a slippery condition went uncorrected, in violation of Industrial Code § 23-1.7 (d), the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, as based on section 23-1.7 (d), must be denied.

(3) To Obtain Summary Judgment in Defendants' Favor on Their Claim for Contractual Indemnification Against Adams

Contractual Indemnification

> "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose

> of the entire agreement and the surrounding facts and circumstances" [citations omitted]

(*Great Northern Insurance Co. v Interior Construction Corp.*, 7 NY3d 412, 417 [2006]).

There is no contract between any of the defendants and Adams. It was non-party CAS that sub-subcontracted with Adams for the carpentry work. However, defendants contend that the indemnification provisions in their subcontract with CAS have been incorporated into the CAS/Adams sub-subcontract, so that Adams owes them the same indemnification that it would owe to CAS. Defendants are mistaken.

Paragraphs (d) and (e) on page 3 of the CAS/Adams sub-subcontract provide, in pertinent part:

> (d) All requirements, terms and conditions specified in the Principal Contract [the Skanska/CAS subcontract], Plans and Specifications are incorporated by reference as though fully set forth at length herein and shall be applicable to this Subcontract. Subcontractor [Adams] agrees that it has read and is familiar with the Principal Contract, which is expressly made a part hereof, and performance of this Subcontract shall be subject thereto and in accordance therewith.
> ...
> (e) You [Adams] assume all such obligations toward us [CAS] as we assume toward the G.C. [Skanska] under the Principal Contract relating to your work.

Page 9 of the CAS/Adams sub-subcontract, "Indemnification," provides, in relevant part:

> To the fullest extent permitted by law, Subcontractor [Adams] shall indemnify, hold

> harmless and defend Contractor [CAS] and all of its agents and employees from and against all claims, damages, losses, and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the Agreement, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury ... and (b) is caused in whole or in part by any act or omission of Subcontractor ... regardless of whether it is caused in part by the negligent act or omission of Contractor ... . Notwithstanding the foregoing, Subcontractor's obligation to indemnify Contractor ... shall extend only to the percentage of negligence of Subcontractor in contributing to such claim, damage, loss and expense.

In addition, paragraph G of the Insurance Rider (Exhibit B) on page 13 provides:

> The principal contract as entered into by [CAS] is incorporated herein and all insurance requirements imposed upon [CAS] are herewith imposed upon the Subcontractor [Adams]. Further, the same insurance coverage requirements must be maintained by all lower tier Contractors and Subcontractors.

Schedule J, Article I ("Insurance"), paragraph 1 of the Skanska/CAS subcontract requires CAS, in certain circumstances, to indemnify "Skanska, the Owner [FIT and DASNY], its lender, partners and/or subsidiaries, the Architect, and their respective agents, officers and employees." Schedule J, Article II ("Indemnification"), paragraph 1 of the same subcontract requires indemnification, in certain circumstances, of "Skanska, the Owner [FIT and DASNY], the Owner's lenders, partners, subsidiaries and

associates, the Architect/Engineer and all [additional insureds] and their respective agents and employees." The additional insureds listed in paragraph 8 of Schedule J include the defendants.

While defendants argue that Adams owes them indemnification because the CAS/Adams sub-subcontract incorporates by reference the indemnification provisions of the Skanska/CAS subcontract, it is very well-settled that "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 East 55th Street Tenants*, 282 AD2d 243, 244 [1st Dept 2001]; *see also Navillus Tile v Bovis Lend Lease LMB*, 74 AD3d 1299, 1302 [2d Dept 2010]; *Matter of Wonder Works Construction Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513 [1st Dept 2010]; *Waitkus v Metropolitan Housing Partners*, 50 AD3d 260, 261 [1st Dept 2008]; *Adams v Boston Properties Limited Partnership*, 41 AD3d 112, 112 [1st Dept 2007]; *Goncalves v 515 Park Avenue Condominium*, 39 AD3d 262, 262 [1st Dept 2007], all quoting or citing *Bussanich*). "'Provisions other than scope, quality, character and manner of the work must be specifically incorporated to be effective against the subcontractor' (2 NY

PJI2d 635 [2005])" (*CooperVision, Inc. v Intek Integration Technologies*, 7 Misc 3d 592, 600 [Sup Ct, Monroe County 2005]; *see also New York Telephone Co. v Alvord & Swift*, 49 AD2d 726, 726 [1st Dept 1975] [party not obligated to arbitrate because "their contract did not specifically incorporate by reference ... the arbitration clause of the main contract"]).

No such specific incorporation of the indemnification provisions of the Skanska/CAS subcontract into the CAS/Adams sub-subcontract appears.

In addition, even if the indemnification provisions of the subcontract were incorporated into the sub-subcontract, the scope of Adams's obligations would be vastly extended beyond the limited indemnification provisions of the CAS/Adams sub-subcontract, which absent intent, cannot be done. The sub-subcontract requires Adams, under certain circumstances, to indemnify only CAS "and all of its agents and employees" ("Indemnification," page 9 of CAS/Adams sub-subcontract). As set forth above, Schedule J of the Skanska/CAS subcontract requires indemnification of a vastly expanded list of possible indemnitees. "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). The CAS/Adams sub-subcontract requires indemnification of a very limited number of entities, and this court will not expand that obligation without a clear

and specific incorporation by reference of the provisions of the subcontract.

Accordingly, the part of defendants' motion which seeks summary judgment on their contractual indemnification claim against Adams is denied.

Fleet's Motion for Summary Judgment (Motion Sequence Number 006)

As an initial matter, the court notes that Fleet "formally dissolved several years ago and no longer has any employees" (Silvergleid 4/15/10 Affirm., unnumbered paragraph on unnumbered page 10).

(1) To Dismiss the Complaint

The disposition of the part of Fleet's motion which seeks summary judgment dismissing the complaint is decided as set forth above.

(2) To Dismiss the Third-Party Complaint

Although some of Fleet's papers request this relief, Fleet's notice of motion does not seek summary judgment dismissing the third-party complaint, and in the papers submitted by all parties on these motions, the matter is barely mentioned, let alone briefed. Therefore, the court declines to consider this request.

(3) To Dismiss All Cross Claims Against It

The only cross claim brought against Fleet is the one for contribution, and common-law or contractual indemnification

which Adams alleges.

Contribution

"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' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *see also Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990]). As no showing or finding has yet been made with respect to Fleet and/or Adams's fault in this matter, the part of Fleet's motion which seeks summary judgment dismissing this claim must be denied.

Common-Law Indemnification

"Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" (*Storms v Dominican College of Blauvelt*, 308 AD2d 575, 577 [2d Dept 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' [citations omitted]" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]).

Adams argues that there is a question of fact

concerning whether Fleet was negligent in failing to clean and inspect the site. The evidence indicates that Fleet was responsible for clean-up at the site, but it is not clear what the scope of that responsibility was, i.e., whether Fleet was only responsible for disposing of the center-piled debris, or whether it was also responsible for removing water and dust.

According to Lume, the carpenters would "only center pile debris that you can pick up with your hands" (Lume Depo., at 22). Yet he also testified that, although Adams provided brooms for its employees "to sweep the area so they could see the lines to do the work," the carpenters would sweep "just in the area where you were performing the work, not the whole floor" (*id.* at 84).

Rodriguez testified that he did not recall a carpenter having a broom, but he did see Fleet's laborers cleaning up "green dust" ("It is a substance you throw so it picks up the dust and doesn't create dust in the air") (Rodriguez Depo., at 123). In addition to its duty to perform "just general clean up," Fleet was also responsible "for cleaning up the dust" (*id.* at 124), and "[t]hey would sweep all day long" (Lume Depo., at 87).

Because it is unclear from the evidence concerning what entity was responsible for cleaning up the dust and water at the site, summary judgment on this common-law indemnification claim

must be denied.

Contractual Indemnification

There is no contractual relationship between Fleet and Adams. Skanska hired Fleet, and CAS retained Adams. There is nothing in either contract that requires Fleet to indemnify Adams or vice versa. This claim must also be denied.

In sum, the part of Fleet's motion which seeks summary judgment dismissing Adams's cross claim against it is denied.

Adams's Motion For Summary Judgment Dismissing the Complaint, the Third-Party Complaint, and Fleet's Cross Claim Against It (Motion Sequence Number 007)

(1) To Dismiss Plaintiff's Complaint

Plaintiff's complaint is dismissed as set forth above.

(2) To Dismiss the Third-Party Complaint

Defendants assert four claims as against Adams in their third-party complaint: for contribution, common-law and contractual indemnification, and breach of contract to procure insurance.

Adams was plaintiff's employer, and it is uncontested that plaintiff did not suffer a "grave injury," as that is defined in Workers' Compensation Law § 11. As a consequence, pursuant to Stipulation of Partial Discontinuance dated December 8, 2008, Skanska discontinued its common-law claims for contribution and indemnification as against Adams (Rolle 4/26/10 Affirm., Ex. I).

Contractual Indemnification

For the reasons set forth above, the part of Adams's motion which seeks summary judgment dismissing defendants' contractual indemnification claim is granted.

Breach of Contract to Procure Insurance

Exhibit B of the CAS/Adams sub-subcontract provides that Adams would procure and maintain certain insurance for its own benefit, and for the benefit of CAS, FIT, DASNY, Skanska and their agents. These parties were to be additional insureds under the policy (CAS/Adams Sub-Subcontract, Ex. B, at 12).

Adams procured a commercial general liability policy from Illinois Union Insurance Company for the policy period July 27, 2005 through July 27, 2006. Under endorsement CG 20 10 11 85, "Additional Insured - Owners, Lessees or Contractors - (Form B)," additional insured coverage under the policy was extended to those "[a]s required by contract, provided the contract is executed prior to loss" (Rolle 4/26/10 Affirm., Ex. L, Adams's Insurance Policy, Endorsement CG 20 10 11 85, at page 1 of 1). Adams fulfilled this obligation, as indicated by the certificate of insurance, which lists defendants among the additional insureds under the policy (*see id.*, Ex. M, Certificate of Insurance).

Accordingly, that part of Adams's motion which seeks dismissal of defendants' claim for breach of contract by failure

to procure insurance is granted.

(3) To Dismiss Fleet's Cross Claims

In its answer to the third-party complaint, Fleet asserts two cross claims against Adams, sounding in contribution and common-law indemnification. Because Workers' Compensation Law § 11 protects employers from tort-based claims in the absence of a "grave injury" or a pre-existing contract which contains express indemnification language, summary judgment dismissing these claims is granted. Plaintiff did not suffer a grave injury, and there was no contract between Fleet and Adams.

CONCLUSION

Accordingly, it is

ORDERED that the part of Fleet Building Maintenance, Inc.'s motion (motion sequence number 006) which seeks summary judgment dismissing the complaint is granted only with respect to plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims, and those parts of the Labor Law § 241 (6) claim which are supported by the alleged Industrial Code sections, except section 23-1.7 (d), and is otherwise denied; and it is further

ORDERED that the part of Fleet Building Maintenance, Inc.'s motion (motion sequence number 006) which seeks summary judgment dismissing Adams Management's cross claim against it is denied; and it is further

ORDERED that the part of Adams Management's motion (motion sequence number 007) which seeks summary judgment dismissing the complaint is granted only with respect to plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims, and those parts of the Labor Law § 241 (6) claim which are supported by the alleged Industrial Code sections, except section 23-1.7 (d), and is otherwise denied; and it is further

ORDERED that the part of Adams Management's motion (motion sequence number 007) which seeks summary judgment dismissing the third-party complaint is granted, with the exception of the claims for contribution and common-law indemnification, which have already been discontinued by stipulation; and it is further

ORDERED that the part of Adams Management's motion (motion sequence number 007) which seeks summary judgment dismissing Fleet Building Maintenance, Inc.'s cross claims against it is granted; and it is further

ORDERED that the third-party complaint is dismissed in its entirety as against Adams Management, with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant; and it is further

ORDERED that the third-party action is severed and continued against the remaining third-party defendant; and it is further

ORDERED that the part of The Dormitory Authority of the State of New York, F.I.T. Student Housing Corporation, c/o Fashion Institute of Technology, and Skanska USA Building, Inc.'s motion (motion sequence number 008) which seeks summary judgment dismissing all claims as against F.I.T. Student Housing Corporation is denied; and it is further

ORDERED that the part of The Dormitory Authority of the State of New York, F.I.T. Student Housing Corporation, c/o Fashion Institute of Technology, and Skanska USA Building, Inc.'s motion (motion sequence number 008) which seeks summary judgment dismissing the complaint is granted only with respect to plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims, and those parts of the Labor Law § 241 (6) claim which are supported by the alleged Industrial Code sections, except section 23-1.7 (d), and is otherwise denied; and it is further

ORDERED that the part of The Dormitory Authority of the State of New York, F.I.T. Student Housing Corporation, c/o Fashion Institute of Technology, and Skanska USA Building, Inc.'s motion (motion sequence number 008) which seeks summary judgment on their contractual indemnification claim as against Adams

Management is denied.

This Constitutes the Decision and Order of the Court.

Dated: October 7, 2010

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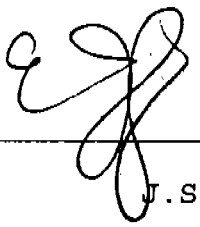

J.S.C.