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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOHN SCHAEFER and DARLENE SCHAEFER,

Plaintiffs,

-against-

SEVEN THIRTY ONE LIMITED PARTNERSHIP, BOVIS LEND LEASE LMB, INC., RAISED COMPUTER FLOORS, INC., STRUCTURE TONE, INC. and DELTA PLUMBING, INC.,

Defendants.

Index No.: 109340/04

SEQ #005

SEVEN THIRTY ONE LIMITED PARTNERSHIP and BOVIS LEND LEASE LMB, INC.,

Third-Party Plaintiffs,

-against-

RAISED COMPUTER FLOORS INC.,

Third-Party Defendant.

Index No. 591096/05

The following papers were read on this motion for summary judgment by third-party defendant

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

BACKGROUND

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, defendant Structure Tone, Inc. (Structure Tone) and defendant/third-party defendant Raised Computer Floors, Inc. (Raised Computer) move,

pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against them.

In motion sequence number 005, defendant/third-party plaintiff Seven Thirty One Limited Partnership (731) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it; defendant/third-party plaintiff Bovis Lend Lease LMB, Inc (Bovis) and 731 move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' causes of action asserted as against them based on violations of common-law negligence and Labor Law §§ 200 and 241 (6), as well as dismissing all cross claims asserted as against them by Structure Tone and Raised Computer for common-law indemnification and contribution; and 731 and Bovis move, pursuant to CPLR 3212, for summary judgment on their cross claims asserted as against Structure Tone and Raised Computer for contractual indemnification.

Plaintiffs John Schaefer (Schaefer) and Darlene Schaefer (together, plaintiffs) cross move, pursuant to CPLR 3212, seeking summary judgment on their causes of action based on violations of Labor Law §§ 240 (1) and 241 (6).

This action arises out of an accident at a construction site on June 1, 2004. At the time of the occurrence, Schaefer was employed by nonparty Heritage Mandell (Heritage) as a steam fitter, engaged to install all kinds of piping at the job site located at 731 Lexington Avenue, New York, New York. 731 is alleged to have been the owner of the premises at which the accident took place; Bovis was the general contractor for the "core and shell"; Structure Tone was the construction manager for interior finishing of a tenant's space at the premises; and Raised Computer was a subcontractor of Structure Tone that installed raised computer tiles on the floor of the tenant's space. The tenant who leased the portion of the premises at which the accident took place was nonparty Bloomberg LP (Bloomberg).

The amended complaint alleges two causes of action: (1) a cause of action based on

common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), as well as violations of various provisions of the Industrial Code on behalf of Schaefer; and (2) a derivative action on behalf of Darlene Schaefer.

In its answer, Structure Tone asserts cross claims for contribution and/or indemnification against all the co-defendants.

In the answer filed on behalf of 731 and Bovis, 731 and Bovis assert cross claims based on common-law indemnification, common-law contribution, contractual indemnification, and breach of contract in not procuring liability insurance as against all of the co-defendants.

In its answer, Raised Computer asserts a cross claim for contribution and indemnification as against all of the co-defendants.

In the third-party complaint, 731 and Bovis seek common-law indemnity and contribution against Raised Computer.

Defendant Delta Plumbing, Inc. never filed an answer, and a default judgment was previously entered as against it.

At his examination before trial (EBT), Schaefer testified that he was supervised at the job site by Heritage employees Kenny O'Kieff (O'Kieff), who was replaced by Al Davis (Davis), during the course of his employment with Heritage. Schaefer EBT, at 25-26. Schaefer stated that only his Heritage supervisor told him what to do on the job. *Id.* at 28.

The accident occurred on the west side of the third floor of the premises that is the subject of this litigation. *Id.* at 31. After reporting for work, Schaefer's foreman told him to go to the third floor to install water riser pipes. *Id.* at 66. When he arrived at the third floor, Schaefer said that he observed that the raised tile floor was level, and that other trades were working on the third floor, using A-frame ladders that were set up on top of the raised tile floor. *Id.* at 58, 66.

Prior to the day in question, a number of hot water riser pipes had been installed on the

third floor, but there were none within a five-foot radius of where Schaefer was working. *Id.* at 58, 70. At the place where Schaefer was working, there was a 10-inch wide opening in the raised tiles next to the wall, which ran approximately 25 feet, and the pipe that Schaefer was installing was within an open column in the wall. *Id.* at 70-72, 110.

Schaefer climbed up an A-frame ladder to install the pipe. Schaefer said that the ladder was steady and that it did not wobble, and that the raised floor upon which the ladder was resting was dry and level. *Id.* at 122. Before ascending the ladder, Schaefer testified that he checked to see that the ladder's legs were situated completely on the raised flooring. *Id.* at 154. After climbing the ladder, Schaefer was handed the pipe by his son, who was working as his partner that day, and he then raised the pipe up through an opening in the ceiling above him. *Id.* at 126. As he was screwing the pipe into the existing pipe, Schaefer averred that the ladder suddenly shifted, and the ladder hit the window. *Id.* at 131, 136. Schaefer inferred that the ladder's legs must have gone into the 10-inch wide hole, but admitted that he did not see the legs go into the void, but assumed that that is what happened to cause the ladder to hit the window. *Id.* at 136. When the ladder hit the window, Schaefer fell off the ladder and landed on the raised tile floor, thereby sustaining injuries. *Id.* at 141.

According to John Schaefer, Jr., Schaefer's son and partner on the day of the accident and an eyewitness to the occurrence, all direction for their work was given to them by a Heritage supervisor, and Heritage provided them with all their tools and equipment. Schaefer, Jr. EBT, at 11-14. This witness also stated that he believed that the ladder that his father used, which was in place when they arrived at the third floor, was a Heritage ladder. *Id.* at 15. Prior to the accident, neither Schaefer nor his son made any complaints about the equipment provided by Heritage (*id.* at 27), and the witness did not notice any hole in the floor before the occurrence. *Id.* at 33.

David McGrath (McGrath), Bovis' mechanical superintendent, was deposed on behalf of

Bovis in this matter. McGrath held the position of mechanical superintendent for Bovis at the job site. McGrath EBT, at 10. According to McGrath, Bovis was the construction manager for the project. *Id.* at 12. McGrath said that Ken Kyle (Kyle) was the site safety person for Bovis, whose responsibilities included giving safety meetings to all foreman engaged on the project. *Id.* at 22. Two of the subcontractors hired by Bovis that fell directly under McGrath's jurisdiction as mechanical superintendent were Heritage, engaged to install heating, air conditioning and piping (*id.* at 38), and Par Plumbing. *Id.* at 58. As mechanical superintendent, McGrath was at the job site on a daily basis. *Id.* at 30.

According to McGrath, Structure Tone was hired by Bloomberg for interior fit-out on floors three through 10. *Id.* at 33. McGrath stated that Structure Tone's work consisted of taking the space that was constructed, called the core and shell, and completing the flooring. *Id.* at 34. McGrath was uncertain as to whether Raised Computer was employed at the job site. *Id.* at 34. McGrath also said that there were no safety meetings given by Bovis which Structure Tone attended. *Id.* at 35.

McGrath stated that, if he observed an unsafe condition, he would contact Kyle to check out the area, and he further stated that he had the authority to stop work if he saw a worker of a subcontractor doing something unsafe. *Id.* at 42-44.

McGrath testified that, if a riser pipe was to be connected, it would be connected to a "T" connection located approximately six-to-eight inches off the floor and, if there was to be a raised floor, the "T" connection would normally be located beneath it. *Id.* at 57-58. McGrath said that if a hot water riser had to be installed under a raised tile floor, the trade who would remove the raised tile floor would depend on the type of floor used, and that he has seen steam fitters remove a raised tile floor to make the connection to the "T". *Id.* at 60-61.

Richard Cunningham (Cunningham), Structure Tone's site safety manager, was deposed on July 10, 2009. Cunningham began working on the project approximately four

months prior to the date of the accident. Cunningham EBT, at 11. Cunningham said that he thought that Structure Tone was hired for the project by Bloomberg. *Id.* at 12. One of the subcontractors hired by Structure Tone was Raised Computer. *Id.* at 26. According to Cunningham, Structure Tone was the general contractor for the build-out of the interior floors for Bloomberg's office space, which occupied floors two through 14. *Id.* at 27. Cunningham ran safety meetings at the job site on a regular basis for Structure Tone's superintendents and representatives from all of Structure Tone's subcontractors. *Id.* at 33.

Cunningham averred that Raised Computer was the contractor that installed the raised floors that were used to provide space for power, wiring, and so forth. *Id.* at 35. The tiles that Raised Computer used at the project were made of metal, approximately two feet square, and were quite heavy, weighing approximately 50 pounds each. *Id.* at 36. The tiles are installed by placing them on pedestals, or metal legs, that are glued on to the existing floor, with each tile screwed into a pedestal on each of its corners. *Id.*

Before Structure Tone began its work, the base of the building had to be finished, a job for which Bovis was engaged. *Id.* at 39. According to Cunningham, typically, when Structure Tone and its subcontractors came onto a floor, most of the piping would have already been laid. *Id.* at 43. However, sometimes, pipes would be installed after Structure Tone began its work. *Id.* at 43. Cunningham said that the original installation of the computer floor tiles was done by Raised Computer employees. *Id.* at 44.

Cunningham explained the procedure that Structure Tone followed if computer floor tiles had been installed but had to be removed by a Structure Tone subcontractor as follows: Structure Tone would be notified by a subcontractor that it needed access beneath the raised floor; notification would have been given to the Structure Tone superintendent assigned to the particular floor; if subcontractors of Bovis, rather than of Structure Tone, needed access, they would notify Structure Tone of what they intended to do, and when they would need to do the

work. *Id.* at 44-46. Cunningham said that, when computer tiles were removed by subcontractors of Structure Tone, they were required to place cones or caution tape around the area where the floor tiles were removed. *Id.* at 47. Cunningham stated that he was unaware of the procedures used by Bovis if floor tiles were removed. *Id.* at 48. Cunningham also said that Heritage was a Bovis subcontractor that did not perform any work for Structure Tone. *Id.* at 52.

Prior to the date of the accident, the third floor had been turned over to Structure Tone by Bovis. *Id.* at 70. However, on the day of the accident, Bovis subcontractors were still working inside and on the outside of the third floor, along with Structure Tone subcontractors. *Id.* at 74. Cunningham said that he saw Kyle on the floors which had been turned over to Structure Tone when Bovis' subcontractors were performing punch list work. *Id.* at 76.

The pipes that extended from a riser valve and extended around the perimeter wall of a floor were located under the raised computer tiles, and if a contractor needed access to those pipes he would have to remove the computer tiles. *Id.* at 81. Cunningham said that the contractor that installed the heating elements at the perimeter windows was the steam fitter from Bovis. *Id.* at 87.

Structure Tone and Raised Computer aver that the transcript of the deposition of the Raised Computer witness was never provided to them and, therefore, they contend, it may not be used by any party to oppose their motion (motion sequence number 004).[1]

Structure Tone and Raised Computer argue that they are not the statutory agents of the owner of the property and, therefore, cannot be subject to liability under Labor Law §§ 240 (1) and 241 (6). Further Structure Tone and Raised Computer contend that, since they had no supervisory authority over Schaefer, they cannot be held liable under Labor Law § 200. As an alternative argument, Structure Tone and Raised Computer state that Schaefer was provided

[1] Without addressing the merits of this argument, the court finds it unnecessary to use those transcripts to make its determination.

with proper safety protection, and that the sections of the Industrial Code cited by Schaefer do not support a Labor Law § 241 (6) cause of action or are just inapplicable to the facts of the instant case.

In opposition to the motion made by Structure Tone and Raised Computer, 731 and Bovis argue that, even if Structure Tone and Raised Computer are entitled to dismissal of Schaefer's claims based on violations of Labor Law §§ 240 (1) and 241 (6), Structure Tone and Raised Computer are still to be held liable to plaintiffs for common-law negligence and violation of Labor Law § 200. Moreover, according to 731 and Bovis, there is no evidence of any negligence on their part which contributed to Schaefer's injuries and, therefore, they are entitled to contractual indemnification from Structure Tone and Raised Computer, and their cross claims for contractual and common-law indemnification and contribution should not be dismissed.

731 maintains that it owned the building where the accident took place only until July 3, 2002, two years before the occurrence, at which time it sold or transferred its interest to 731 Commercial Holding LLC. Opp. Ex. A., Bargain and Sale Deed. Bloomberg, the tenant of the property, hired Structure Tone as the construction manager for interior work at the premises. Motion, Ex. E. Structure Tone, in turn, hired Raised Computer to install raised computer tile flooring. Motion, Ex. D.

The accident report filed by Bovis at the time of the accident states:

> "Mr. Schaefer was standing on a ladder installing a hot water riser pipe. The perimeter computer floor tile tipped because it was cantilevered from the inside pedestal and the ladder slipped off the computer floor tile. The ladder leaned into the glass curtainwall and Mr. Schaefer's partner (his son) pulled him from the ladder in fear that he would go through the glass curtainwall. He cut his hand on a piece of 1½" black iron that he had previously cut and bruised his shoulder and hip when he struck the computer floor after his partner pulled back on the ladder."

Opp., Ex. C.

Pursuant to the contract between Structure Tone and Bloomberg, Structure Tone agreed to indemnify the landlord and its construction manager or agent "against all liability, claims, losses, damages and expenses, including attorneys' fees and disbursements ... on account of injury ... to any person ... occurring in, arising out of, or in any way relating to the performance of this contract." Opp., Ex. F.

Raised Computer's work was performed pursuant to a Purchase Order with Structure Tone. Opp., Ex. G. According to the terms and conditions of the Purchase Order, Raised Computer agreed to indemnify, hold harmless and defend the owner and its agents and employees from all claims arising in connection with the performance of any work pursuant to the Purchase Order.

731 and Bovis' main opposition to motion sequence number 004 is that Structure Tone and Raised Computer are not entitled to dismissal of the cross claims asserted as against them for common-law and contractual indemnification because Structure Tone and Raised Computer are not seeking dismissal of plaintiffs' common-law and Labor Law § 200 causes of action. Therefore, maintain 731 and Bovis, Structure Tone and Raised Computer could be found to have acted negligently, which would entitle 731 and Bovis to common-law and contractual indemnification from them. The court notes, however, that Structure Tone and Raised Computer have, in fact, moved for dismissal of the entire complaint asserted as against them.

In their reply to 731 and Bovis' opposition, Structure Tone and Raised Computer state that Schaefer's accident did not occur in connection with the performance of their work, nor was it occasioned by any act or omission of either of them. Moreover, argue Structure Tone and Raised Computer, the accident report appearing in the opposition papers, which infers that the accident was caused by cantilevered tiles, is inadmissible because no proper foundation was laid for it. In addition, according to Structure Tone and Raised Computer, the accident report, prepared by Bovis, contradicts the testimony of Schaefer and his son, who stated that there

was nothing wrong with the floor immediately prior to the accident.

In motion sequence number 005, 731 seeks dismissal of the complaint and all cross claims asserted as against it because it allegedly was not the owner of the property at the time of the occurrence. Motion, Ex. K, Bargain and Sale Deed. Further, 731 joins Bovis in seeking dismissal of plaintiffs' claims for common-law negligence and violation of Labor Law § 200 because neither defendant controlled the means and methods of Schaefer's work, and dismissal of plaintiffs' claim based on violations of Labor Law § 241 (6), claiming that plaintiffs have failed to allege violations of the Industrial Code that would support such a cause of action or are inapplicable to the case at bar. Lastly, both defendants request summary judgment as against Structure Tone and Raised Computer for contractual indemnification, for the reasons discussed above with respect to their opposition to motion sequence number 004.

In opposition to motion sequence number 005, Structure Tone and Raised Computer contend that 731 and Bovis' motion is untimely, based on a compliance conference order, dated January 21, 2010, that provides, in relevant part:

> "Motion for SJ motion [*sic*] can be made 120 days from filing NOI."

Opp., Ex. A.

The note of issue was filed on January 28, 2010, and motion sequence number 005 was mailed on May 28, 2010, to an incorrect address. Opp., Ex. C. Structure Tone and Raised Computer have provided a Notice of Address Change, indicating their attorney's correct address, with an affidavit of service on the parties' attorneys dated August 7, 2008, almost two years prior to service of motion sequence number 005.

Substantively, Structure Tone and Raised Computer argue that Schaefer's accident did not arise in connection with the performance of work by either Structure Tone or Raised Computer.

In response, in addition to the arguments posited above, 731 and Bovis admit that their

motion was mailed to the wrong address, due to clerical error, but say that five days later they mailed another copy of the motion to the correct address and, subsequently, counsel for Structure Tone and Raised Computer contacted the attorney for 731 and Bovis, inquiring why he received two copies of the motion. The position of 731 and Bovis is that the error was de minimis, and Structure Tone and Raised Computer, in fact, received the motion.

Plaintiffs' cross motion opposes both motions that are the subject of this decision, and seeks summary judgment as against Bovis and Structure Tone only on their Labor Law §§ 240 (1) and 241 (6) causes of action. In the motion, plaintiffs concede that they have no viable claim as against Raised Computer or 731.

In opposition to the cross motion, Structure Tone asserts that it was not the owner, general contractor or agent of either, with supervisory control over Schaefer's work so as to be held liable under Labor Law § 240 (1) and 241 (6), and that there is insufficient evidence to support plaintiffs' contention that an opening in the raised floor was the cause of Schaefer's accident.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Based on plaintiffs' concession that they have no viable cause of action as against 731

and Raised Computer, the complaint is dismissed as against those defendants.

731 and Bovis' motion for summary judgment is denied as untimely.

> "CPLR 3212 (a) provides that the 'court may set a date after which no [dispositive] motion may be made,' and '[i]f no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.' In *Brill v City of New York* [citation omitted], the Court of Appeals made clear that the statutory deadline should be strictly enforced, in order to prevent the filing of '[e]leventh-hour summary judgment motions,' a practice that 'ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice'. It concluded that the 'good cause' called for by CPLR 3212 (a) requires a 'satisfactory explanation for the untimeliness — rather than simply permitting meritorious, nonprejudicial filings, however tardy.' This Court has subsequently observed that 'courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure' [internal citations omitted]."

Fofana v 41 West 34th Street, LLC, 71 AD3d 445, 447-448 (1st Dept 2010)(Court found in that case that a timely motion was made).

Service of a motion is made when it is mailed to the attorney for the opposing side. *Rivera v Glen Oaks Village Owners, Inc.,* 29 AD3d 560 (2d Dept 2006). In the case at bar, Bovis and 731 admit that their motion was mailed to the incorrect address of opposing counsel on the 120th day, and was only mailed to the correct address several days later, despite the fact that they had been given notice of opposing counsel's new address almost two years previously. Under these circumstances, when the only reason proffered for the delay is "clerical error," the court finds that the motion is untimely. Since the same arguments appearing in this motion are posited as the opposition to motion sequence number 004, the court finds that Bovis and 731 will not be prejudiced by this ruling, since their position is clearly made in the opposition and will be considered as part of the court's determination with respect to motion sequence number 004.

Based on the foregoing, the only issues remaining for the court's determination are that part of the motion by Structure Tone for summary judgment dismissing the complaint as against it, that part of the motion made by Structure Tone and Raised Computer dismissing all cross claims and counterclaims asserted as against them, and plaintiffs' cross motion for summary judgment as against Structure Tone and Bovis on their causes of action based on violations of Labor Law §§ 240 (1) and 241 (6).

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company,* 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. *See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints,* 41 AD3d 796 (2d Dept 2007).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant either created the unsafe condition, or that it had actual or constructive knowledge of the unsafe condition that caused the accident. *See Murphy v Columbia University,* 4 AD3d 200 (1st Dept 2004). Moreover, to constitute constructive notice, the alleged defect must be visible and apparent for a sufficient length of time before the accident in order to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History,* 67 NY2d 836 (1986).

Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.,* 82 NY2d 876 (1993); *McFadden v Lee,* 62 AD3d 966 (2d Dept 2009).

In the case at bar, it appears that plaintiffs are arguing both that there was a dangerous condition, the 10-inch hole in the floor, as well as unsafe means and methods, i.e., the failure to secure the ladder, that caused Schaefer's accident and resultant injuries. However, no evidence has been submitted to indicate that Structure Tone either created an allegedly unsafe condition, had actual or constructive notice of an unsafe condition, or exercised any supervision or control over Schaefer's work.

Both Schaefer and his son stated that they were only supervised by Heritage, and that they themselves did not notice any problem with the flooring prior to the accident. *See Gordon v American Museum of Natural History,* 67 NY2d 836, *supra.*

> "[T]here is no evidence in the record that [Structure Tone] actually directed, controlled or supervised plaintiff's work or was responsible for doing so. Nor was there any proof that [Structure Tone] was on notice of any dangerous condition regarding the use of the [floor] or ladder or that it supplied the ladder in question. Rather, the record shows that [Heritage] was contractually obligated to supply the necessary equipment for the ... work and it was plaintiff's employer ... that actually directed [him] [internal citations omitted]."

Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 (1st Dept 2005).

Further,

> "The Labor Law § 200 and common-law negligence claims [are] properly dismissed as against [Structure Tone], because the evidence that [Structure Tone] coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if [it] observed an unsafe condition is insufficient to raise a triable issue whether [it] exercised the requisite degree of supervision and control over the work to sustain those claims. Moreover, there is no evidence that [Structure Tone] had actual notice of the unsafe condition [internal citations omitted]."

Geonie v OD & P NY Limited, 50 AD3d 444, 445 (1st Dept 2008).

In addition, the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability ... in the absence of proof of ... *actual* control." *Brown v New York City Economic Development Corp.,* 234 AD2d 33, 33 (1st Dept 1996).

Therefore, based on the foregoing, plaintiffs' causes of action based on common-law

negligence and violations of Labor Law § 200 are dismissed as against Structure Tone.

That portion of Structure Tone's motion seeking to dismiss plaintiffs' cause of action based on a violation of Labor Law § 240 (1) is granted, and the portion of plaintiffs' cross motion seeking summary judgment as against Structure Tone on their cause of action based on a violation of Labor Law § 240 (1) is denied. However, that portion of plaintiffs' cross motion seeking summary judgment as against Bovis on their cause of action based on a violation of Labor Law § 240 (1) is granted.

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

As stated by the Court in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Labor Law § 240 (1) was designed to protect workers against elevation-related risks. There is no question that Schaefer's accident was the result of an elevation-related risk, his

falling off a ladder while performing work at a job site. Further, Schaefer has made out a prima facie case for entitlement for judgment by demonstrating, by uncontradicted evidence, that he fell off the unsecured ladder when it moved. *Peralta v American Telephone and Telegraph Co.*, 29 AD3d 493 (1st Dept 2006). However, the liability for such occurrence is different for Structure Tone and Bovis.

According to its contract with Bloomberg, Structure Tone was hired as the construction manager for the project, with its area of responsibility being the interior finishing of the space once Bovis, the general contractor, had completed its work on the core and shell.

> "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. 'When work giving rise to [the duty to conform to the requirements of section 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.' Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law [internal citations omitted]."

Walls v Turner Construction Company, 4 NY3d 861, 863-864 (2005).

"[T]he critical question is whether the construction manager was delegated supervisory control and authority over the work being done when the plaintiff was injured." *Barrios v City of New York,* 75 AD3d 517, 519 (2d Dept 2010). In the case at bar, there is no evidence that Structure Tone was given any supervisory control or authority over Schaefer's work. Hence, Structure Tone, the construction manager for the interior work for the premises, cannot be held liable for Schaefer's injuries under Labor Law § 240 (1).

The court notes that Structure Tone's attorney says that Structure Tone may be termed the general contractor for interior work, distinguishing Structure Tone from Bovis, which is the

general contractor for the core and shell. It is also noted that the contract between Bloomberg and Structure Tone styles Structure Tone as a construction manager, and requires Structure Tone to work in harmony with Bloomberg's other employees, consultants and agents. However, even assuming that Structure Tone is deemed to be the general contractor for interior work, and Bovis is deemed to be the general contractor for the core and shell, each would then be considered a prime contractor, and the above reasoning would still hold true.

> "As a general rule, a separate prime contractor is not liable under Labor Law § 240 or § 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker. However, where a separate prime contractor has been delegated the authority to supervise and control the plaintiff's work, the contractor 'becomes a statutory "agent" of the owner or general contractor' [internal citations omitted]."

Barrios v City of New York, 75 AD3d at 518.

As the evidence discussed above indicates, Structure Tone took over the interior work only when Bovis completed the core and shell work, although both may have had subcontractors working at the same location so that the Bovis subcontractors could finish off some punch list items. Hence, Structure Tone had no control over Schaefer, as the employee of Bovis' subcontractor, and was not in privity of contract with Schaefer's employer, thereby negating any claim that it would be liable for Schaefer's injuries under Labor Law § 240 (1).

Conversely, since Bovis was the general contractor for the project and engaged Heritage, Schaefer's employer as its subcontractor for the installation of piping as part of the core and shell for the project, Bovis is held to be strictly liable for Schaefer's injuries as the general contractor for the project. *Rocovich v Consolidated Edison Company,* 78 NY2d 509.

That portion of Structure Tone's motion seeking summary judgment dismissing plaintiffs' cause of action asserted as against it based on a violation of Labor Law § 241 (6) is granted,

and that portion of plaintiffs' cross motion seeking summary judgment as against Structure Tone on their cause of action based on a violation of Labor Law § 241 (6) is denied. That portion of plaintiffs' cross motion seeking summary judgment as against Bovis on their cause of action based on a violation of Labor Law § 241 (6) is granted.

Labor Law § 241 (6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998).

In their cross motion, plaintiffs assert that sections 23-1.21 (b) (4) (iv) and 23-1.21 (e) (3) of the Industrial Code were violated. All of the other Industrial Code provisions cited in the amended complaint and bill of particulars are therefore deemed abandoned.

Section 23-1.21 (b) (4) (iv) of the Industrial Code mandates that, when work is being performed on a ladder, the ladder is to be secured either by a person standing at the foot of the ladder to hold it in place or secured by mechanical means. Section 23-1.21 (e) (3) of the Industrial Code similarly provides that a ladder should be secured by a person steadying it or by mechanical means. In the case at bar, the evidence indicates that the A-frame ladder upon

which Schaefer was working was neither steadied by a person standing at the foot of the ladder nor secured by mechanical means. Hence, these two provisions of the Industrial Code were violated, are applicable to the facts of the case, and are sufficient to support a cause of action based on a violation of Labor Law § 241 (6). *Hunter v R.J.L. Development, LLC,* 44 AD3d 822 (2d Dept 2007); *Enderlin v Hebert Industrial Insulation, Inc.,* 224 AD2d 1020 (4th Dept 1996).

For the same reasons discussed above, with respect to plaintiffs' cause of action based on a violation of Labor Law § 240 (1), Structure Tone is not liable, because it lacked the authority to supervise or control Schaefer's work, and Bovis is liable, because it was the general contractor that engaged Heritage, Schaefer's employer, as its subcontractor. *Russin v Louis N. Picciano & Son,* 54 NY2d 311 (1981).

That portion of Structure Tone and Raised Computer's motion seeking summary judgment dismissing the cross claims asserted as against them is granted.

The cross claims asserted by Bovis as against Structure Tone and Raised Computer[2] seek contribution and/or indemnification.

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [internal citation omitted]." *Godoy v Abamaster of Miami,* 302 AD2d 57, 61 (2d Dept 2003). Since the complaint has been dismissed as against both Structure Tone and Raised Computer, neither one may be deemed a tortfeasor with respect to Schaefer's injuries and, therefore, a cause of action seeking contribution cannot be maintained.

> "'It is well settled that "an owner or general contractor who is held strictly liable under Labor Law § 240 (1) is entitled to full indemnification from the party actually responsible for the incident." The principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer' [internal citations omitted]."

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[2]This is also the basis for the third-party action as against Raised Computer.

Frank v Meadowlakes Development Corp., 6 NY3d 687, 691 (2006).

Similarly, to maintain a cause of action based on contractual indemnification, the party seeking to enforce the contractual provision must evidence some actual negligence on the part of the indemnitor. *Brown v Two Exchange Plaza Partners,* 76 NY2d 172 (1990). For the reasons stated above, neither Structure Tone nor Raised Computer were negligent or engaged in any wrongdoing that resulted in Schaefer's injuries.

Finally, the court dismisses the third-party action asserted against Raised Computer. Even if plaintiffs had not conceded that they had no cause of action as against Raised Computer, the only evidence submitted that could infer negligence on the part of Raised Computer was the accident report prepared by Bovis, which states that the cause of the accident was a cantilevered tile, such tiles having been installed by Raised Computer. However, this accident report fails to meet the admissibility requirements of CPLR 4518, which mandate that the report be made in the regular course of business by a person so authorized, and the report contradicts the sworn statements of Schaefer and his son, who was present at the time of the occurrence. *Reed v New York City Transit Authority,* 299 AD2d 330 (2d Dept 2002). Therefore, this accident report is insufficient to support Bovis' third-party action.

Moreover, without even addressing the merits of the arguments, once the complaint is dismissed against Structure Tone and Raised Computer, as a natural consequence thereof, all cross claims and third-party actions are similarly dismissed. *Turchioe v AT & T Communications, Inc.*, 256 AD2d 245 (1st Dept 1998).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Structure Tone, Inc. and Raised Computer Floors Inc.'s motion for summary judgment dismissing the complaint and all cross claims asserted as against them

(motion sequence number 004) is granted, and the complaint and all cross claims are dismissed as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Seven Thirty One Limited Partnership and Bovis Lend Lease LMB, Inc.'s motion for summary judgment (motion sequence number 005) is denied as untimely; and it is further

ORDERED that the complaint is dismissed as against Seven Thirty One Limited Partnership with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of plaintiffs' cross motion seeking summary judgment as against Structure Tone, Inc., Raised Computer Floors, Inc. and Seven Thirty One Limited Partnership is denied; and it is further

ORDERED that the portion of plaintiffs' cross motion seeking summary judgment on their causes of action based on violations of Labor Law §§ 240 (1) and 241 (6) asserted as against Bovis Lend Lease LMB, Inc. is granted; and it is further

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

ORDERED that the remainder of the action shall continue.

Dated: February 3, 2011

FILED

FEB 16 2011

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PAUL WOOTEN J.S.C.

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