Dennehy v 340 Madison Owner, LLC

2011 NY Slip Op 30532(U)

February 9, 2011

Supreme Court, New York County

Docket Number: 108732/05

Judge: Debra A. James

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SCANNED ON 2/10/2011
[* 1]

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

SIOBHAN DENNEHY, as Administratrix of the Estate of VICTOR PAUTA, deceased,
Plaintiff,

- v -

340 MADISON OWNER, LLC, and McGRAW HUDSON CONSTRUCTION CORPORATION,
Defendants.

Index No.: 108732/05
Motion Date: 02/22/10
Motion Seq. No.: 02
Motion Cal. No.:

340 MADISON OWNER, LLC, and McGRAW HUDSON CONSTRUCTION CORPORATION,
Third-Party Plaintiffs,

- v -

ALL STATE INTERIOR DEMOLITION, INC., and HIGHRISE HOISTING AND SCAFFOLDING, INC.,
Third-Party Defendants.

Third-Party Index No.: 591269/05

340 MADISON OWNER, LLC, and McGRAW HUDSON CONSTRUCTION CORPORATION,
Second Third-Party Plaintiffs,

- v -

SITE SAFETY, LLC,
Second Third-Party Defendants.

Second Third-Party Index No.: 590379/06

FILED
FEB 10 2011
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5, 6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this negligence/wrongful death action, the second third-party defendant seeks summary judgment dismissing the second

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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third-party complaint (Motion Seq. No. 2), the defendants seek partial summary judgment dismissing a portion of the original complaint and partial summary judgment on a portion of the first third-party complaint (Motion Seq. No. 3), and one of the first third-party defendants seeks summary judgment dismissing the first third-party complaint as against it (Motion Seq. No. 4). For the following reasons, the first motion is granted, the second motion is granted in part and denied in part, and the third motion is denied.

On June 21, 2005, plaintiff's decedent, Victor Pauta (Pauta), a construction worker then living in Queens County, suffered severe injuries to his neck and back when he fell from a scaffold on which he was standing while performing demolition work on the facade of a building (the Building) located at 340 Madison Avenue in midtown Manhattan. Pauta later died as a result of his injuries on March 26, 2007. Defendant 340 Madison Owner, LLC (340 Madison) is the owner of the Building. Defendant McGraw Hudson Construction Corporation (McGraw Hudson), a licensed New York State corporation, was the general contractor that 340 Madison had hired to perform the work at the Building. Third-party defendant All State Interior Demolition, Inc. (All State), also a licensed New York State corporation, was a subcontractor that McGraw Hudson had hired to perform demolition work at the Building, and was Pauta's employer. Third-party

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defendant Highrise Hoisting and Scaffolding, Inc. (Highrise), also a licensed New York State corporation, was a subcontractor that McGraw Hudson had hired to provide and erect the pipe scaffold that the demolition workers were using at the Building. Second third-party defendant Site Safety, LLC (Site Safety), a licensed New York State limited liability corporation, was a subcontractor that McGraw Hudson had hired to perform safety inspections at the Building.

At his deposition on August 8, 2006, Pauta stated that he only received instructions about how to perform his job from his supervisors at All State.[1] Pauta also stated that he was not wearing a safety harness at the time he was injured, that he had not been issued any safety equipment on that day, and that he had never been instructed to use any such safety equipment. Pauta further noted that the scaffold that he fell from was not, itself, equipped with any safety features, and stated that he and his fellow All State employees had set up the planking on the scaffold that they were standing on. As to the circumstances of his accident, Pauta stated that he had climbed down from one level of the scaffold to a lower level in order to push a large piece of rock facing (that his co-workers were lowering with ropes) into a disposal chute, when he slipped on loose rocks and

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[1] Pauta was deposed with the assistance of a Spanish interpreter, since he did not speak English.

debris and fell between the scaffold and the building's wall to the floor below. As to his family circumstances, Pauta admitted that he was not legally married, but stated that "I feel like [I am] married" to Fabiola Hidalgo, with whom he had lived since 1997 and whom he referred to as "my wife," and with whom he had three children, the paternity of which he acknowledged and whom he referred to as "my babies."

McGraw Hudson was deposed on December 19, 2006 via its superintendent, Robert Avitabile (Avitabile). Avitabile stated that, although he had the authority to stop work at the job site if he observed a subcontractor's workers engaged in an unsafe practice, he did not otherwise direct their work. Avitabile also stated that All State, not McGraw Hudson, was responsible for furnishing its employees with safety harnesses and other safety equipment, and that he had observed that All State kept such equipment in a "shanty" at the work site.

McGraw Hudson hired Highrise pursuant to a contract (the Highrise contract) that provided, in pertinent part, as follows:

> 7. Indemnity ...
> Personal Injuries - Employees
>
> ***
>
> (c) The Contractor [i.e., Highrise] shall properly guard its work and [the] area affected by its work to prevent any person or persons from being injured by it or by the condition of the site, and shall in all respects comply with any and all provisions of the law and of local ordinances relating to the maintenance of ... hoists, openings, scaffolding ... and other parts

of the work and adjacent areas where the same are required. The Contractor agrees to indemnify and save harmless the Indemnitees [i.e., McGraw Hudson and 340 Madison] (such indemnity to include the cost of the defense of any action or claim, including attorney's fees) against loss and expense by reason of the liability imposed by law upon the Indemnitees for damages because of bodily injuries, including death at any time resulting therefrom, or loss of services, sustained by any person or persons other than employees of the Contractor, whether or not the Indemnitees are negligent in such event.

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8. Insurance

(a) Until completion and final acceptance of the work, the Contractor [i.e., Highrise] shall maintain Workmen's Compensation Insurance as required by law, Direct Liability for Contractor's own actions, Contingent Liability for the operation of Subcontractors, and Contractual Liability to insure the indemnifying portions of this contract, such insurance to include Bodily Injury Liability and Property Damage Liability. Certificates of such insurance shall be filed with the Owner and shall be subject to its approval for adequacy of protection and the satisfactory character of the insurer, but in no case shall they be less than the following limits:

> [Direct, Contingent and Contractual Bodily Injury Liability, and Direct, Contingent and Contractual Property Damage Liability in accordance with Appendix E.]

Such insurance, where permissible, shall include the Indemnitees [i.e., McGraw Hudson and 340 Madison] as assureds. If such insurance is not permissible or obtainable on behalf of Indemnitees, Contractor shall notify Indemnitees of such fact in writing. ...

The Contractor shall list ... McGraw Hudson [and] 340 Madison [on the insurance policies].

(b) The Owner [i.e., 340 Madison] shall purchase "Builder's Risk" insurance for the Project to the extent of the full insurable value thereof. The Insurance Policy shall name [McGraw Hudson] and Subcontractors [i.e., Site Safety, Highrise and All State] as additional insureds as their interest shall appear.

Highrise's president, Michael Eggers (Eggers), noted that the Highrise contract only required Highrise to construct and install the scaffold at the work site, and to provide the planking used thereon, but did not require Highrise to equip the scaffold with any safety equipment. Eggers further stated that the individual subcontractors whose workers used the scaffold were responsible for laying down the planking as needed, and supplying their own safety harnesses and other equipment. Eggers explained that Highrise did not install planking all over the scaffold because that would have made the entire structure too heavy and put it in danger of collapse. Eggers did claim, however, that Highrise had built safety railings onto the scaffold.

McGraw Hudson hired Site Safety pursuant to a letter agreement dated January 6, 2003 (the Site Safety contract). Site Safety's president, Peter Amato (Amato), noted that the Site Safety contract does not contain an indemnification clause, and does not authorize Site Safety to stop work at the Building. Amato asserts that Site Safety's authority only extended to the "implementation of a safety plan," the "monitoring of safety" at the Building, "providing reports to" defendants and "conducting safety meetings at the jobsite" for the workers.

Site Safety was deposed on April 23, 2008 via one of its former managers, Ashraf Omran (Omran). Omran stated that, at approximately 8:30 A.M. on the day Pauta was injured, he had

observed Pauta and several other All State workers standing on the subject scaffold without any "fall protection" safety equipment. Omran also stated that the scaffold was not fully planked and had no safety railings. Omran further stated that he called to the All State foreman, Matteo Ferrara (Ferrara), and ordered that Pauta and the other All State workers leave the scaffold, and that he waited until the scaffold had been fully planked and the workers (including Pauta) had put on safety harnesses and attached them to a "safety line." Omran next stated that he saw Pauta a second time approximately 15 minutes before his accident (approximately 10:30 A.M.), that Pauta was no longer wearing a safety harness, and that he again told Pauta (through a Spanish speaking co-worker) to leave the scaffold. Omran stated that he had observed All State workers violating scaffold safety equipment guidelines on many occasions, that he had noted these occurrences in his daily reports, and that he had advised 340 Madison to issue a stop work order to All State for its repeated failures to comply with safety regulations. Omran finally stated that he had complained to 340 Madison on several occasions that "McGraw Hudson never enforced any safety procedures on the job."

340 Madison hired All State pursuant to a contract (the All State contract) that provided, in pertinent part, as follows:

2. Duties of Contractor

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> The Contractor [i.e., All State] recognizes the relationship of trust and confidence established between it and the Owner [i.e., 340 Madison] by this contract. The Contractor covenants and agrees with the Owner to furnish its best skill and judgment and to cooperate with the Owner and Construction Manager [i.e., McGraw Hudson] in forwarding the best interests of the Owner. The Owner and Construction Manager shall have the right to exercise complete supervision and control over the work to be done by the Contractor, but such supervision and control shall not in any way limit the obligations of the Contractor.
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> ***
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> 7. Indemnity, Violation of Law
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> ***
>
> (d) Personal Injuries - Employees. The Contractor agrees to indemnify and save harmless the Indemnitees [i.e., 340 Madison and McGraw Hudson] against loss and expense by reason of the liability imposed by law upon the Indemnitees (such indemnity to include the cost of the defense of any action or claim, including attorney's fees) for damages because of bodily injuries, including death at any time resulting therefrom, sustained by any employee of the Contractor while at the site where work under this contract is conducted, or elsewhere, while engaged in the performance of work under this contract, however such injuries may be caused, including, but not limited to, such injuries as are caused by the sole or concurrent negligence of the Indemnitees, whether attributable to a breach of statutory duty or otherwise, and such injuries for which liability is imputed to the Indemnitees.

Ferrara was deposed on behalf of All State on March 26 and October 22, 2007. He stated that he and the other All State foremen directed Pauta and the other All State workers in the performance of their work, and that All State provided the

workers with all of their safety equipment. However, Ferrara also stated that Omran would sometimes address the All State workers, but that he would do so through him (i.e., Ferrara), because Omran did not speak Spanish. Ferrara further stated that All State employees were solely responsible for cleaning the portions of the scaffold on which they were working, and that he had inspected the scaffold shortly before Pauta was injured and found it to be clean.

Site Safety has also submitted the January 12, 2009 deposition testimony of All State employee William Hernandez (Hernandez), who stated that, shortly before Pauta was injured, Omran had instructed him to tell Pauta (in Spanish) to put on a safety harness.

Pauta initially commenced this action on June 23, 2005, by filing a summons and complaint that set forth one cause of action for negligence. After Pauta's death, an amended complaint (dated November 13, 2007) was filed that substituted his estate as the plaintiff of record, and added a cause of action for wrongful death on behalf of Pauta's surviving family. On December 14, 2007, defendants filed an answer to the amended complaint that includes nine affirmative defenses. Previously, on December 22, 2005, defendants had commenced the first third-party action herein against All State and Highrise by filing a third-party complaint that sets forth causes of action for: 1) contribution

(against All State); 2) common-law indemnification (against All State); 3) contractual indemnification (against All State); 4) breach of contract by failing to obtain insurance (against All State); 5) contribution (against Highrise); 6) common-law indemnification (against Highrise); 7) contractual indemnification (against Highrise); and 8) breach of contract by failing to obtain insurance (against Highrise). All State and Highrise each filed separate answers to that third-party complaint on March 2, 2006, both of which answers set forth one counterclaim (against defendants) and one cross claim (against the other third-party defendant) for contribution.Defendants had also previously commenced, on April 18, 2006, the second third-party action herein against Site Safety by filing a third-party complaint that sets forth causes of action for: 1) contribution; 2) common-law indemnification; 3) contractual indemnification; and 4) breach of contract by failing to obtain insurance. On June 9, 2006, Site Safety filed an answer to that third-party complaint that includes one counterclaim (against defendants) and one cross claim (against All State and Highrise) for contribution.

Pauta's bill of particulars identifies as bases for his negligence claims Labor Law §§ 200, 240 (1) & (2) and 241 (6), as well as several provisions of the Industrial Code. In this current series of motions, defendants request partial summary

judgment 1) dismissing so much of the complaint as seeks to impose liability for negligence under Labor Law § 200; 2) dismissing Pauta's wrongful death claim; and 3) on the third-party claims against All State, for contractual and common-law indemnity (Motion Seq. No. 3). Site Safety and Highrise each request summary judgment dismissing the respective third-party complaints and all of the cross claims that are asserted against them herein (Motion Seq. Nos. 2 & 4, respectively).

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should be employed only when there is no doubt as to the absence of such triable issues. See e.g. Andre v Pomeroy, 35 NY2d 361 (1974); Pirrelli v Long Is. R.R., 226 AD2d 166 (1st Dept 1996). However, the court's

reluctance to employ summary judgment "'only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.'" Blechman v Peiser's and Sons, 186 AD2d 50, 51 (1st Dept 1992), quoting Andre v Pomeroy, 35 NY2d at 364.

Defendants' second third-party complaint asserts four causes of action against Site Safety. In its motion (Motion Seq. No. 2), Site Safety first argues that defendants' third cause of action against it, for contractual indemnification, must be dismissed because there is no indemnity clause in the Site Safety contract. Defendants completely fail to address this argument in their opposition papers. The court finds that Site Safety's assertion is demonstrated by the plain terms of the agreement which does not include an indemnity provision. It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 (1st Dept 2001), quoting Lake Constr. & Dev. Corp. v City of New York, 211 AD2d 514, 515 (1st Dept 1995). Further, as the Appellate Division, First Department, recently noted in Martins v Little 40 Worth Associates, Inc. (72 AD3d 483,

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484 [1st Dept 2010]), "[e]ntitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify." Here, in the absence of any evidence to the contrary, no such "expression or implication" can be found to exist. Therefore, the court finds that Site Safety's motion should be granted with respect to the third cause of action in defendants' second third-party complaint.

The fourth cause of action in defendants' second third-party complaint alleges "breach of contract," in that Site Safety "was obligated to procure insurance for the benefit of [defendants] and name [defendants] as additional insureds," but that Site Safety "failed to procure the requisite insurance coverage." Site Safety's motion does not raise any argument specific to this cause of action, nor do defendants' opposition papers mention it at all. However, CPLR 3212 (b) empowers a court presented with a motion for summary judgment to search the record and grant summary judgment to any party, including a non-moving party, that is entitled to such relief. See e.g. Levin v 117 Ltd., 291 AD2d 304 (1st Dept 2002) citing Merritt Hill Vineyards v Windy Heights Vineyard, 61 NY2d 106 (1984). The Site Safety contract does not contain any provision requiring Site Safety to obtain insurance for the benefit of defendants. The Appellate Division, First

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Department, has held that "'the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.'" Eden Temporary Servs. v House of Excellence, 270 AD2d 66, 67 (1st Dept 2000), quoting Paz v Singer Co., 151 AD2d 234, 235 (1st Dept 1989). Here, the court finds that the absence of an insurance procurement provision in the Site Safety contract precludes defendants from establishing their breach of contract claim against Site Safety. Therefore, the court finds that Site Safety's motion should be granted with respect to the fourth cause of action in defendants' second third-party complaint.

Defendants' first and second causes of action against Site Safety allege the right to recover pursuant to theories of contribution and common-law indemnification, respectively. As the Appellate Division observed in the Martins decision, "[c]ommon-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence." 72 AD3d at 484 supra citing Correia v Professional Data Mgt., 259 AD2d 60, 65 (1st Dept 1999). Here, Site Safety argues that it cannot be found to have been negligent, as a matter of law, because it did not exercise supervision and control over Pauta's work. Defendants counter that the deposition testimony of Omran, Hernandez and Avitabile affords ample evidence that Site Safety did, in fact, exercise

supervision and control over Pauta's work, since that testimony clearly states that Site Safety had the authority to stop work at the Building if its inspectors observed safety violations. Site Safety replies that the authority to stop work, by itself, is insufficient evidence of supervision and control, and argues that Omran never directed Pauta regarding how to do his job, but merely directed him and the other workers to abide by safety regulations.

In Hughes v Tishman Constr. Corp. (40 AD3d 305, 309 [1st Dept 2007]), the Appellate Division, First Department, concluded that "the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [defendant] exercised the requisite degree of supervision and control over the work being performed to sustain a claim ... for common-law negligence." Here, the court's review of the instant deposition testimony reveals only that Site Safety's inspectors could stop work at the Building if they observed safety violations. There is no evidence presented that indicates they could direct the workmen about how to perform their jobs. This is the only evidence that defendants rely on to prove "supervision and control" by Site Safety. Because the court finds that it is insufficient, as a matter of law, the court also finds that defendants have failed to establish that Site Safety was negligent. Without evidence of Site Safety's negligence,

defendants' claims for contribution and common-law indemnification cannot withstand summary judgment. Therefore, the court finds that Site Safety's motion should be granted with respect to the first and second causes of action in defendants' second third-party complaint. Accordingly, the court finds that Site Safety's motion for summary judgment dismissing the second third party complaint should be granted in full.

The complaint alleges several theories of recovery against 340 Madison and McGraw Hudson. In the first branch of their motion, defendants seek partial summary judgment dismissing so much of that complaint as relies on Labor Law § 200. It is well-settled that Labor Law § 200 is the statutory codification of the common-law duty that is imposed on owners and/or general contractors to provide construction workers with a safe work site. See e.g. Perrino v Entergy Nuclear Indian Point 3, LLC, 48 AD3d 229, 230 (1st Dept 2008) citing Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993). It is also well-settled that liability may attach pursuant to Labor Law § 200 either where a worker's injury arises from a condition at the workplace that was created by or known to the owner (see e.g. Griffin v New York City Tr. Auth., 16 AD3d 202 [1st Dept 2005]), or where the worker's injury was caused by a defect or dangerous condition that arose from the general contractor's methods, and the contractor supervised or controlled the manner of the injured

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party's work. See e.g. Roppolo v Mitsubishi Motor Sales of Am., 278 AD2d 149 (1st Dept 2000). Defendants argue that no liability attaches to them under either of the foregoing theories.

Defendants first argue that there is no evidence of the existence of a dangerous or defective condition in either the Building or on the scaffold where Pauta was injured. Defendants specifically argue that there is no evidence that they had either actual or constructive notice of the presence of the rocks and debris on the scaffold upon which Pauta tripped. Defendants also argue that Pauta's employer, All State, was the party with sole responsibility for cleaning and maintaining the scaffold's platforms. Pauta responds that, as a matter of law, defendants bear the initial burden of proving that they neither created the allegedly dangerous condition, nor had actual or constructive notice of it, and argues that defendants' conclusory arguments do not satisfy this burden of proof. Pauta's contention regarding the burden of proof is a correct statement of the law. See e.g. Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655, 656 (2d Dept 2009) ("[a] defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it").

However, in their reply papers, defendants cite Ferrara's deposition testimony that he had inspected the scaffold immediately prior to Pauta's accident and found it to be debris-free, and argue that this evidence satisfies their burden of proof. The court agrees. Pauta has failed to present any factual evidence to counter defendants' claim that they neither created the dangerous condition (i.e., debris) on the scaffold, nor had actual or constructive knowledge thereof. Therefore, the court must reject Pauta's argument, and find that he may not rely on the "dangerous condition created by or known to the owner" theory to establish defendants' liability herein under Labor Law § 200.

Defendants next argue that there is no evidence that they exercised supervision and control over the manner of Pauta's work. They cite a number of cases to support the proposition that "general supervisory authority" and/or "general awareness of unsafe methods" is insufficient to establish supervision and control. In their respective reply papers, both Pauta and All State refer to the final sentence of section 2 of the All State contract that states that "[t]he Owner and Construction Manager shall have the right to exercise complete supervision and control over the work to be done by the Contractor ... ." In the court's view this contractual provision is insufficient to create an issue of fact as to defendants' supervision and control over

Pauta's work, and is, therefore, fatal to Pauta's Labor Law § 200 claim. See Reilly v Newireen Associates, 303 AD2d 214, 221 (1st Dept 2003) (it cannot be be inferred solely from the general contractor's contractual duties alone that the general contractor had the requisite supervision and control under Labor Law 200). Therefore, the court grants that branch of defendants' motion that seeks summary judgment dismissing so much of Pauta's complaint as relies on Labor Law § 200.

The next branch of defendants' motion seeks summary judgment dismissing the cause of action for wrongful death that is asserted on behalf of Pauta's common-law wife and children. Defendants assert that "there is no evidence as to Mr. Pauta's relationship with his three children or the financial support he provided to them." Pauta's estate replies that EPTL 5-4.1 creates the wrongful death cause of action, and asserts that, by operation of EPTL 4-1.2, "non-marital children" are permitted to recover under this cause of action provided that: 1) a court has issued an order of filiation; 2) the father's name appears on the child(ren)'s birth certificate(s); 3) the father has filed an acknowledgment of paternity; 4) DNA testing has established paternity; or 5) the father has "openly and notoriously acknowledged the child(ren) as his own." The estate presents copies of the birth certificates of all three of Pauta's children (all of which name Pauta as the father) and of the portion of

Pauta's deposition testimony wherein he acknowledges his paternity of his three children. The court finds this constitutes prima facie proof that Pauta's children are entitled to raise a wrongful death claim under the EPTL. Here, defendants have raised no more than a conclusory statement in the face of the estate's documentary evidence. Therefore, the court rejects defendants' argument, and denies that branch of their motion that seeks summary judgment dismissing the wrongful death claim.

The final branch of defendants' motion seeks summary judgment on their third-party claims against All State for contractual and common-law indemnity. With respect to the former, defendants refer to the indemnity provision set forth in section 7 (d) of the All State contract, and argue that All State is liable to them under it because there is no evidence that they were affirmatively negligent toward Pauta. All State responds that the subject indemnity provision is unenforceable because it violates General Obligations Law (GOL) § 5-322.1, because it purports to indemnify defendants against their own acts of negligence. All State particularly refers to the final sentence of the indemnity clause, which provides that All State shall indemnify defendants against liability for personal injury and wrongful death claims by All State employees:

> including, but not limited to, such injuries as are caused by the sole or concurrent negligence of the Indemnitees, whether attributable to a breach of

> statutory duty or otherwise, and such injuries for which liability is imputed to the Indemnitees.

GOL § 5-322.1 (1) states that:

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

The Court of Appeals has voided indemnity clauses that violate this statute. See e.g. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 (1997).

Defendants counter that the prohibition set forth in GOL § 5-322.1 does not apply where the instance of liability that a given indemnity clause is being applied against did not result from a finding of negligence. Defendants argue that the considerations of GOL § 5-322.1 do not apply where liability for negligence is sought to be imposed pursuant to a statute (e.g., Labor Law §§ 240 [1], 241 [6]) rather than a factual finding (i.e., Labor Law § 200, common-law negligence). The court agrees with defendants' argument. Reilly v Newireen Associates, supra, 303 AD2d at 224 (1st Dept 2003) (the Court's holding that neither the owner or general contractor is liable under section 200 or the common law means that the indemnification clause at issue is

not being invoked to indemnify owner/general contractor for their own negligence and therefore summary judgment was properly granted).

Accordingly, the court shall grant defendants partial summary judgment to on their claim of contractual indemnity against All State.

Finally, defendants also seek summary judgment on their second third-party cause of action against All State for common-law indemnity. Defendants' sole argument is that they are entitled to common-law indemnification from All State because "defendants' liability, if any, [to Pauta] would only be vicarious." The court agrees. "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. Where, as here, an issue of fact remains only as to the cause of action based on Labor Law § 241 (6) . . . any liability on the part of [the owner or general contractor] would therefore be purely vicarious." Balladares v Southgate Owners Corp., 40 AD3d 667, 671 (2d Dept 2007) (citations omitted). Therefore the court shall grant summary judgment to defendants on their third-party cause of action against All State for common-law indemnity.

Highrise seeks dismissal of the third-party cause of action seeking contractual indemnification. Highrise contends that the

subject indemnity provision violates GOL § 5-322.1, because it purports to indemnify defendants against their own acts of negligence, and does not contain any "saving language" which would permit the court to construe the provision as enforceable. The subject provision states that:

> [Highrise] agrees to indemnify and save harmless [McGraw Hudson and 340 Madison] ... against loss and expense by reason of the liability imposed by law upon [McGraw Hudson and 340 Madison] for damages because of bodily injuries, including death at any time resulting therefrom ... sustained by any person or persons other than employees of [Highrise], whether or not [McGraw Hudson and 340 Madison] are negligent in such event.

The Court of Appeals has also construed indemnity provisions that contain "limiting language" (i.e., which can be reasonably read as contemplating that the promising party has agreed to provide partial indemnification in the event of its own negligence) as not violating the statute. See e.g. Brooks v Judlau Contr., 11 NY3d 204 (2008). "Nonetheless, even where a contract purports to indemnify a promisee, such as an owner or a contractor, for its own negligence, the statutory prohibition against indemnifying that promisee is inapplicable and the terms of the indemnification agreement are valid to the extent that the liability giving rise to the indemnification is not predicated upon a finding of negligence." Delaney v Spiegel Associates 225 AD2d 1102, 1104 (4th Dept 1996) citing Brown v Two Exch. Plaza Partners, 76 NY2d 172 (1990).

As was the case with the indemnification clause in the All State contract, the defendants are entitled to summary judgment against Highrise for contractual indemnification because the court has determined that any liability of the defendants can only be vicarious. See Delaney v Spiegel Assoc., 225 AD2d 1102, supra.

With respect to defendants' fourth third-party claim, which alleges breach of contract via Highrise's failure to obtain required insurance, Highrise argues for dismissal on the ground that it did, in fact, procure the required insurance. Highrise claims to have annexed copies of the insurance policies as "Exhibit X" to its moving papers, however, the exhibits attached to Highrise's moving papers stop at the letter "P." Further, defendants' opposition papers (which include a copy of the Highrise contract) do not include copies of the alleged policies. Thus, from the evidence submitted on this motion the court is unable to determine, at this juncture, whether or not Highrise met its contractual obligation to procure insurance for defendants' benefit. At the oral argument of this motion, the court reiterated to counsel its rules regarding the timely submission of supporting evidence. Because Highrise has failed to submit that evidence, the court is cannot grant its application for summary judgment dismissing defendants' breach of contract claim at this juncture.

[* 25]

The balance of Highrise's motion requests summary judgment dismissing defendants' first and second third-party claims, which seek recovery on theories of contribution and common-law indemnification, respectively. Highrise argues that there is no evidence that it was negligent with respect to Pauta's accident, firstly, because it did not supervise or control Pauta's work, and secondly, because there is no evidence of any defect or malfunction inuring to the scaffold. The court though has noted the factual discrepancy in the evidence as to whether the scaffold that Pauta fell from had the necessary safety railings, and this discrepancy creates an issue of fact as to whether or not Highrise might have been negligent. Therefore, the court shall deny dismissal of defendants' first and second third-party claims against Highrise.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion of second third-party defendant Site Safety, LLC for summary judgment dismissing the second third-party complaint is GRANTED and the second third-party complaint bearing Index No. 590379/06 is severed and dismissed with costs and disbursements to the second third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

[* 26]

ORDERED that the Clerk is directed to enter judgment as aforesaid.

This is the decision and order of the court.

Dated: February 9, 2011 ENTER:

[signature] J.S.C.

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NEW YORK
COUNTY CLERK'S OFFICE