Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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APRIL J. LEAK, as Administratrix for the Estate of GEORGE LEAK, deceased,

Plaintiff,

-against-

THE HOME DEPOT, INC., RIV CONSTRUCTION GROUP, INC. and EZ ERECTING CORP.,

Defendants.

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EZ ERECTING CORP.,

Third-Party Plaintiff,

-against-

LEADING EDGE CONTRACTING, INC.,

Third-Party Defendant.

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INDEX NO.: 10456/2008
CALENDAR NO.: 20100155OT
MOTION DATE: 12/2/2010
MOTION SEQ. NO.: 002 MOT D;
003 XMOT D; 004 XMG; 005 XMOT D

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Upon the following papers numbered 1 to 72 read on this motion and cross-motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-24 ; Notice of Cross Motion and supporting papers 25-39; 40-51; 52-57 ; Answering Affidavits and supporting papers 58-60; 61-62; 63-64 ; Replying Affidavits and supporting papers 65-66; 67-68; 69-70 ; 71-72 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) of the plaintiff is granted to the extent that it seeks partial summary judgment on the issue of the defendants' liability pursuant to Labor Law §240(1), and is otherwise denied; and it is further

ORDERED that the cross-motion (motion sequence no. 003) of defendant/third-party-plaintiff EZ Erecting Corp. is granted to the extent that it seeks (1) summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action pursuant to Labor Law §§200 and 241(6) and common-law negligence asserted against it, (2) summary judgment dismissing the cross claims against it for common-law indemnification, and (3) summary judgment in its favor and against third-party defendant Leading Edge Contracting, Inc. on the third-party cause of action for common-law indemnification, and is otherwise denied; and it is further

ORDERED that the cross-motion (motion sequence no. 004) of third-party defendant Leading Edge Contracting, Inc. for summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action pursuant to Labor Law §§200 and 241(6) and common-law negligence is granted; and it is further

ORDERED that the cross-motion motion sequence no. 005) of defendants The Home Depot, Inc. and RIV Construction Group, Inc. is granted to the extent that it seeks (1) summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action pursuant to Labor Law §§200 and 241(6) and common-law negligence asserted against them, (2) summary judgment dismissing the cross claims against them for common-law indemnification, and (3) summary judgment in their favor and against defendant EZ Erecting Corp. on their cross claim for contractual indemnification, and is otherwise denied.

The plaintiff's decedent fell approximately 24 feet to his death while he was working on the construction of a new Home Depot store located in Pelham Manor, New York. Defendant The Home Depot, Inc. (hereinafter Home Depot) leased the property pursuant to a ground lease with a non-party developer. Home Depot retained defendant RIV Construction Group, Inc. (hereinafter RIV) to act as the general contractor on the project. RIV contracted with defendant/third-party plaintiff EZ Erecting Corp. (hereinafter EZ Erecting) to perform the structural steel work on the project. EZ Erecting contracted a portion of this work, which included the installation of the steel roof decking, to the third-party defendant Leading Edge Contracting, Inc. (hereinafter Leading Edge). The decedent, an employee of Leading Edge, was installing steel roof decking at the time of the accident. It is undisputed that the decedent was not protected by any safety devices to prevent his fall.

The plaintiff commenced this action for personal injuries and wrongful death against the defendants asserting causes of action to recover damages for, *inter alia*, violations of Labor Law §§200, 240(1) and 241(6), and common-law negligence. RIV and Home Dept asserted cross claims against EZ Erecting for common-law indemnification, contractual indemnification, and failure to procure insurance. EZ Erecting asserted cross claims against Home Depot and RIV for common-law and contractual indemnification. EZ Erecting also commenced a third-party action against Leading Edge for common-law indemnification and contribution.

The plaintiff now moves for summary judgment on the issue of the defendants' liability pursuant to Labor Law §§240(1) and 241(6). EZ Erecting cross-moves for summary judgment (1) dismissing so much of the plaintiff's complaint as seeks to recover damages pursuant to Labor Law §241(6) and negligence as against it, (2) dismissing all cross claims asserted against it, and (3) in its favor and against Leading Edge on the third-party complaint. Leading Edge cross-moves for summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action pursuant to Labor Law §241(6) and negligence. Lastly, RIV and Home Depot cross-move for summary judgment dismissing the complaint and all cross claims asserted against it. In the alternative, RIV and Home Depot seek contractual indemnification against EZ Erecting and common-law indemnification against Leading Edge.

Turning first to the plaintiff's cause of action seeking to recover damages pursuant to Labor Law §240(1), this provision imposes a nondelegable duty upon owners, contractors, and their agents to "furnish or erect or cause to be furnished or erected safety devices which shall be so constructed, placed and operated as to give proper protection" (*see*, *Auriemma v Biltmore Theatre*, ___AD3d___, 2011 NY Slip Op 439 [1st Dept, Jan. 27, 2011]; *Martinez v Ashley Apts Co.*, ___ AD3d ___, 2011 NY Slip Op 491 [2d Dept, Jan. 25, 2011]). An owner, contractor or agent who breaches this duty may be held liable in damages regardless of whether it had actually exercised any supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49

[1993]). In order to prevail upon a claim pursuant to Labor Law §240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see*, *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]; *see also*, *Martinez v Ashley Apts Co.*, *supra*; *Ramsey v Leon D. DeMatteis Constr. Corp.*, ___ AD3d ___, 912 NYS2d 654 [2d Dept 2010]; *Balzer v City of New York*, 61 AD3d 796, 877 NYS2d 435 [2d Dept 2009]). It is not a defense to liability pursuant to Labor Law §240(1) that the plaintiff's fault contributed to the accident, unless it can be said that the plaintiff's conduct was the sole proximate cause of the accident as a matter of law (*see*, *Balzer v City of New York*, *supra*; *see also*, *Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

The evidence submitted by the plaintiff on the motion established a *prima facie* entitlement to summary judgment on the issue of the defendants' liability pursuant to Labor Law §240(1). At the outset, and contrary to the defendants' contentions, the evidence submitted demonstrates that Home Depot, RIV, and EZ Erecting were all parties responsible for compliance with the statutory mandate of Labor Law §240(1). In this regard, it is undisputed that Labor Law §240(1) is applicable to RIV by virtue of its role as "general contractor" at the subject work site. The evidence established that the statute is applicable to Home Depot by virtue of its position as an "owner" of the subject work site (*see*, *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 858 NYS2d 293 [2d Dept 2008]; *cf.*, *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879 [2009]). An "owner" within the meaning of the Labor Law is not limited to the titleholder of the property but also includes one who "has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit" (*Lacey v Long Island Lighting Co.*, 293 AD2d 718, 741 NYS2d 558 [2d Dept 2002]; *Copertino v Ward*, 100 AD2d 565, 473 NYS2d 494 [2d Dept 1984]; *see*, *Mooney v PCM Dev. Co.*, 238 AD2d 487, 656 NYS2d 655 [2d Dept 1997]). The evidence submitted also established that the statute is applicable to EZ Erecting by virtue of its position as an "agent" of the general contractor. "A prime contractor hired for a specific project is subject to liability under Labor Law §240 as a statutory agent of the owner or general contractor only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (*Nasuro v PI Assoc.*, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; *Coque v Wildflower Estates Dev.*, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; *see*, *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; *cf.*, *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]). In this case, the contract between RIV and EZ Erecting expressly delegated the performance of the structural steel work and the responsibility "to supervise and direct" such work to EZ Erecting. Since EZ Erecting was the prime contractor for the steel work on the project, and thereby delegated the authority to supervise and control the particular work in which the decedent was engaged at the time of the incident, it is liable under Labor Law §240(1) as a statutory agent of the general contractor (*see, Weber v Baccarat, Inc.*, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]; *Inga v EBS N. Hills*, 69 AD3d 568, 893 NYS2d 562 [2d Dept 2010]; *Pacheco v Kew Garden Hills Apt. Owners*, 73 AD3d 578, 906 NYS2d 3 [1st Dept 2010]; *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; *see also, Kilmetis v Creative Pool & Spa*, 74 AD3d 1289, 904 NYS2d 495 [2d Dept 2010]; *Domino v Professional Consulting, Inc.*, 57 AD3d 713, 869 NYS2d 224 [2d Dept 2008]). Moreover, "[o]nce an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity" (*McGlynn v Brooklyn Hosp.-Caledonian Hosp.*, 209 AD2d 486, 619 NYS2d 54 [2d Dept 1994]; *see*, *Tomyuk v Junefield*

Assoc., *supra*; *Nasuro v PI Assoc.*, *supra*). Thus, EZ Erecting remains statutorily liable despite the fact that it had contracted the metal decking work in which the decedent was engaged at the time of the incident to Leading Edge.

The evidence submitted further establishes that the decedent was subjected to an elevation-related risk while working, and that the failure to provide him with adequate safety devices was a proximate cause of his injuries and death (*see*, *Balzer v City of New York*, *supra*; *Dzieran v 1800 Boston Rd.*, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]). In this regard, it is undisputed that at the time of his fall the decedent was working at a height of approximately 24 feet without the protection of any safety device. The representatives from Home Depot, RIV and EZ Erecting each testified that they did not provide the decedent with safety equipment because it was not their responsibility to do so. The decedent's foreman from Leading Edge testified, *inter alia*, that he did not provide the plaintiff with any safety devices or require the use of any safety devices because they were working below the height at which the Occupational Safety and Health Standards requires fall protection.

Contrary to the defendants' contentions, the evidence submitted does not raise an issue of fact as to whether the decedent's own negligence was the sole proximate cause of his injuries and death. The defendants rely on the deposition testimony of Leading Edge foreman Glen Smith, who testified that at the time of the incident, safety equipment was available in Leading Edge's truck for the decedent's use, including harnesses, lanyards, and beam clamps. The failure to use available safety equipment will not be deemed the sole proximate cause of a worker's injuries unless there were adequate safety devices available, the worker knew both that they were available and that he was expected to use them, and he chose for no good reason not to do so (*see*, *Gallagher v New York Post*, *supra*; *Auriemma v Biltmore Theatre*, *supra*; *Ortiz v 164 Atl. Ave.*, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 871 NYS2d 26 [1st Dept 2008]). Assuming *arguendo* that the evidence submitted established that adequate safety devices were available at the job site, the record is nonetheless devoid of any evidence that the decedent knew that he was expected to use such safety devices and that he chose for no good reason not to do so (*see*, *Tounkara v Fernicola*, ___ AD3d___, 914 NYS2d 161 [1st Dept 2011]; *Murray v Arts Ctr. & Theater of Schenectady*, 77 AD3d 1155, 910 NYS2d 187 [3d Dept 2010]; *see also*, *Guaman v New Sprout Presbyt. Church of N. Y.*, 33 AD3d 758, 822 NYS2d 635 [2d Dept 2006]; *Moniuszko v Chatham Green*, 24 AD3d 638, 808 NYS2d 696 [2d Dept 2005]). Indeed, Leading Edge foreman Smith testified that the decedent was not instructed to wear a safety harness or use any other safety devices on the date of the accident. He testified that Leading Edge did not instruct employees to use safety equipment and did not require them to use any such equipment where, as here, they were working below the 30-foot height where fall protection is required pursuant to OSHA guidelines.

Based on the foregoing, the motion by the plaintiff is granted to the extent that it seeks partial summary judgment on the issue of the defendants' liability under Labor Law §240(1) and the cross motion by RIV and Home Depot is denied to the extent that it seeks summary judgment dismissing the plaintiff's cause of action under that section.

With respect to the plaintiff's cause of action to recover damages pursuant to Labor Law §241 (6), such provision requires owners and general 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 (*Rizzuto v L.A. Wenger*

Contr. Co., 91 NY2d 343, 348, 670 NYS2d 816 [1998]; *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). In order to recover damages on a cause of action alleging a violation of Labor Law §241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see*, *Rizzuto v L.A. Wenger Contr. Co.*, *supra*; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Hricus v Aurora Contrs.*, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; *Fitzgerald v New York City School Constr. Auth.*, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see*, *Forschner v Jucca Co.*, *supra*; *Cun-En Lin v Holy Family Monuments*, *supra*).

Here, the plaintiff alleges that the defendants violated the regulations found at 12 NYCRR §§23-1.7, 23-1.16, 23-1.17, 23-1.21 and 23-1.24. The plaintiff further alleges violations of various Occupational Safety and Health Administration regulations. The regulations set forth at 12 NYCRR 23-1.16, 23-1.17 and 23-1.21 which set standards for safety belts, life nets and ladders, respectively, are inapplicable here because the plaintiff was not provided with any such devices (*see*, *Clavijo v Universal Baptist Church*, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]; *Forschner v Jucca Co.*, *supra*; *Ferluckaj v Goldman Sachs & Co.*, *supra*; *Dzieran v 1800 Boston Rd., LLC*, *supra*). In addition, 12 NYCRR 23-1.7 (b) (1) is not applicable to the facts of this case, as that regulation applies to safety devices for hazardous openings, and not to an elevated hazard (*see*, *Forschner v Jucca Co.*, *supra*). Similarly, 12 NYCRR 23-1.24 (b) is not applicable to the facts of the case, as that regulation governs the use of safety devices on roofs having a slope steeper than one inch in four inches (*cf.*, *Amirr v Calcagno Constr. Co.*, 257 AD2d 585, 684 NYS2d 280 [2d Dept 1999]). The plaintiff's reliance on alleged violations of regulations promulgated by the Occupational Safety and Health Administration was likewise misplaced as it is well settled that these regulations do not provide a basis for liability under Labor Law §241(6) (*see*, *Rizzuto v L.A. Wenger Contr. Co.*, *supra* at 351; *Shaw v RPA Assoc.*, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, *supra*; *Fisher v WNY Bus Parts,* 12 AD3d 1138, 1140, 785 NYS2d 229 [4th Dept 2004]).

Accordingly, the branch of the plaintiff's motion which seeks summary judgment on the issue of defendants' liability pursuant to Labor Law §241(6) is denied, and the branches of the cross motions by EZ Erecting, Leading Edge, and RIV and Home Depot which seek summary judgment dismissing the plaintiff's causes of action for violation of Labor Law §241(6) are granted.

With respect to the Labor Law §200 and common-law negligence causes of action, Labor Law §200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see*, *Rizzuto v L.A. Wenger Contr. Co.*, *supra* at 352; *Gasques v State of New York*, 59 AD3d 666, 873 NYS2d 717 [2d Dept 2009]; *Dooley v Peerless Importers*, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). The accident here stems not from a dangerous condition on the premises, but from the manner in which the work was being performed. To be held liable under Labor Law §200 and for common-law negligence when the method and manner of the work is at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see, Mancuso v MTA N.Y. City Tr.*, ___ AD3d ___, 914 NYS2d 283 [2d Dept 2011]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; *Gasques v State of New*

York, *supra*; *Orellana v Dutcher Ave. Bldrs.*, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; *Dooley v Peerless Importers*, *supra*). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see*, *La Veglia v St. Francis Hosp.*, *supra*; *Orellana v Dutcher Ave. Bldrs.*, *supra*; *Perri v Gilbert Johnson Enters.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see*, *Austin v Consolidated Edison*, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; *Capolino v Judlau Contr.*, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; *Perri v Gilbert Johnson Enters.*, *supra*; *compare*, *Mancuso v MTA N.Y. City Tr.*, *supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work is performed (*see*, *La Veglia v St. Francis Hosp.*, *supra*; *cf.*, *Rizzuto v L.A. Wenger Contr. Co.*, *supra*; *Dooley v Peerless Importers*, *supra*; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007])

The defendants in this matter, Home Depot, RIV and EZ Erecting, all established a *prima facie* entitlement to summary judgment dismissing the plaintiff's causes of action to recover damages for common-law negligence and violation of Labor Law §200. The defendants established *prima facie* that they did not control the means or methods by which the decedent performed his work (*see*, *Gurung v Arnav Retirement Trust*, ___ AD3d ___, 2010 NY Slip Op 9471 [2d Dept 2010]; *La Veglia v St. Francis Hosp.*, *supra*; *Rivera v 15 Broad St.*, 76 AD3d 621, 906 NYS2d 333 [2d Dept 2010]; *Ramos v Patchogue-Medford School Dist.*, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; *Dooley v Peerless Importers*, *supra*; *Blessinger v Estee Lauder Cos.*, 271 AD2d 343, 707 NYS2d 78 [1st Dept 2000]). In this regard, the evidence established that the only personnel who supervised the decedent's work were employed by the decedent's employer Leading Edge, and not the defendants (*see*, *McKee v Great Atl. & Pac. Tea Co.*, ___ AD3d ___, 2010 NY Slip Op 4153 [2d Dept 2010]; *Wade v Atlantic Cooling Tower Servs.*, 56 AD3d 547, 867 NYS2d 489 [2d Dept 2008]; *Capolino v Judlau Contr.*, *supra*; *Hughes v Tishman Constr. Corp.*, *supra*; *Mohammed v Islip Food Corp.*, 24 AD3d 634, 808 NYS2d 389 [2d Dept 2005]; *compare*, *Fassett v Wegmans Food Mkts.*, 66 AD3d 1274, 888 NYS2d 635 [3d Dept 2009]). Indeed, Leading Edge foreman Smith testified that the decking work was completely Leading Edge's responsibility, that only Leading Edge employees directed or supervised Leading Edge's work, and that no one gave Leading Edge equipment or checked to see that Leading Edge had the requisite safety equipment. Smith testified he supervised the decedent and that the decedent answered only to him. The day of the accident was Leading Edge's first day on the job.

Further evidence supporting a finding that Home Depot did not have the requisite control of the decedent's work includes the deposition testimony of Home Depot construction manager Bruce Talvy. Talvy testified that no one from Home Depot was present at the site on the date of the accident, that it was typical that no one from Home Depot was present at the site, that he never met the decedent or was even aware that EZ Erecting was working at the site prior to the incident, and that he only visited the site approximately one time per week to do a general site inspection.

Further evidence supporting a finding that RIV did not have the requisite control of the decedent's work includes the deposition testimony of RIV project manager Carl Corso. Corso testified that RIV performed safety inspections to ensure that everyone on the site was working safely

and complying with OSHA guidelines and that RIV was authorized to tell workers to stop work if they were not complying with safety regulations. However, Corso testified that he did not instruct the steel workers on how to do their work because he was not a steel worker and did not know how to do the work, including the specifics on how to install metal decking. Corso also testified that RIV did not have any safety equipment available to the steel workers for use and that it was the responsibility of the subcontractor to provide a safety plan for its employees, to hold safety meetings, and to provide safety equipment and protection to its employees. He testified that he would not tell EZ Erecting how to protect its employees. RIV just required that they follow OSHA guidelines in doing so. Corso testified that he did not know that metal decking was to be installed on the date of the incident and did not see the decedent prior to the accident.

Further evidence supporting a finding that EZ Erecting did not have the requisite control of the decedent's work includes the deposition testimony and affidavit of EZ Erecting supervisor Thomas Kelly. Kelly avers that EZ Erecting contracted with Leading Edge to perform the metal decking work and this work was to be the complete responsibility of Leading Edge. He avers that EZ Erecting did not direct or control or have direction, supervision or control over Leading Edge employees. He avers that Leading Edge employees only answered to Leading Edge. He asserts that EZ Erecting did not supervise, direct or control the manner, methods or means of Leading Edge work. He asserts that Leading Edge supplied all of the tools and equipment needed for the work and that it was not the responsibility of EZ Erecting to provide any equipment. He testified that he was not at the site at the time of the accident and that no EZ Erecting employees were in the vicinity of where the decedent was working at that time. He testified that he did not instruct Leading Edge on how to perform the contract. In addition, the evidence submitted includes the contract between Leading Edge and EZ Erecting which provides that Leading Edge was responsible to provide all labor necessary for the installation of the roof decking and to provide such work in a "good and workmanlike manner" and in accordance with standard building practice of the trade.

In opposition to the defendants' *prima facie* showing, the plaintiff failed to raise a triable issue of fact as to the liability of defendants Home Depot, RIV and EZ Erecting pursuant to common-law negligence and Labor Law §200. Contrary to the plaintiff's contention, the contents of EZ Erecting's safety manual fails to raise a triable issue of fact as to its liability. The manual merely indicates that EZ Erecting had the general authority to supervise the safety of subcontractors to ensure that they were complying with safety guidelines (*see*, *Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 723 NYS2d 4 [1st Dept 2001]). Accordingly, the cross motions by EZ Erecting, Leading Edge, and Home Depot and RIV are granted to the extent that they seek summary judgment dismissing the plaintiff's causes of action for Labor Law §200 violations and negligence.

In light of the determination that Home Depot, RIV and EZ Erecting were not negligent, did not have the authority to control the injury-producing work, and that their only liability to the plaintiff is statutory in nature, the cross claims against these respective parties seeking common-law indemnification must be dismissed (*see*, *Torres v LPE Land Dev. & Constr.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; *Mid-Valley Oil Co. v Hughes Network Sys.*, 54 AD3d 394, 863 NYS2d 244 [2d Dept 2008]; *Markey v C.F.M.M. Owners*, *supra*; *Delahaye v Saint Anns School*, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; *Mohammed v Islip Food Corp.*, *supra*).

Additionally, EZ Erecting established its entitlement to summary judgment imposing liability over Leading Edge on the third-party complaint for common-law indemnification (*see*, *Cunha v City*

of New York, 45 AD3d 624, 850 NYS2d 119 [2d Dept 2007]). In order to establish a claim for common-law indemnification, a party is required to prove not only that it was not negligent (*see, Coque v Wildflower Estates Devs., supra*), but also that the proposed indemnitor was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury (*see, Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]; *Mid-Valley Oil Co. v Hughes Network Sys., supra*; *see also, Nelson v Chelsea GCA Realty*, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). Here, the evidence demonstrates that Leading Edge controlled and directed the performance of the decedent's work and failed to protect him from the foreseeable risks of the accident which occurred (*see, Kirkby v Chautauqua Inst.*, 178 AD2d 929, 578 NYS2d 797 [4th Dept 1991]). In opposition, Leading Edge failed to submit proof from which it could be determined that EZ Erecting's liability to plaintiff was anything but vicarious.

To the extent that Home Depot and RIV purport to seek common-law indemnification against Leading Edge, the Court notes that they have not pleaded such a claim against Leading Edge on which to grant such relief.

Home Depot and RIV have, however, established a *prima facie* entitlement to summary judgment on their cross claim against EZ Erecting for contractual indemnification. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (*see, Torres v LPE Land Dev. & Constr., supra* ; *Canela v TLH 140 Perry St.*, 47 AD3d 743, 849 NYS2d 658 [2008]). The contractual indemnification provision at issue here is contained in a contract between Home Depot as Owner, RIV as Contractor, and EZ Erecting as Subcontractor. It provides, in pertinent part that "the subcontractor shall indemnify and hold harmless the Owner [and] Contractor... from and against claims, damages, losses and expenses arising out of or resulting from performance of the Subcontractor's work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death ... but only to the extent caused, in whole or in part, by the negligent acts or omissions of the Subcontractor, the Subcontractor's sub-subcontractors, or anyone directly or indirectly employed by them." Here, the decedent's accident arose out of the performance of the subcontracted work and was caused, at least in part, by the negligent acts or omissions of the subcontractor's sub-subcontractor Leading Edge (*see, Tapia v Mario Genovesi & Sons, Inc., supra*; *Baginski v Queen Grand Realty, LLC, supra*). Thus, Home Depot and RIV established their entitlement to summary judgment on their contractual indemnification cross claim against EZ Erecting based on the plain language of the indemnity provision. In opposition, EZ Erecting has not raised a triable issue of fact. Accordingly, the branch of the motion by Home Depot and RIV which seeks summary judgment on its cross claim against EZ Erecting for contractual indemnification is granted.

Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part calendar for May 4, 2011 at 9:30 a.m.

Dated: March 31, 2011

PAUL J. BAISLEY, JR.

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION