

**White v Newmark Constr. Servs., LLC**

2011 NY Slip Op 32059(U)

July 25, 2011

Sup Ct, NY County

Docket Number: 110224/2007

Judge: Marcy S. Friedman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Justice

Index Number : 110224/2007

**WHITE, JOHN**

vs.

**NEWMARK CONSTRUCTION**

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

n this motion ~~is~~ for summary judgment

*and cross-motions*

PAPERS NUMBERED

1, 2, 3

4-7

8-10

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*Memo of Law M1*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motions* are

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

JUL 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/25/11

*M S Friedman*  
**MARCY S. FRIEDMAN** v.s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
JOHN WHITE and LAURA WHITE, x

*Plaintiffs,*

Index No.:110224/2007

- against -

NEWMARK CONSTRUCTION SERVICES, LLC,  
NEWMARK & COMPANY REAL ESTATE,  
INC., RBNB 67 WALL STREET OWNER, LLC,  
NB 67 WALL DEVELOPERS, LLC, and  
SKYLINE WINDOWS, LLC,

DECISION/ORDER

*Defendants,*

**FILED**

\_\_\_\_\_  
NEWMARK CONSTRUCTION SERVICES,  
L.L.C., s/h/a NEWMARK CONSTRUCTION,  
SERVICES, LLC, and NEWMARK & COMPANY  
REAL ESTATE, INC., x

**JUL 26 2011**

*Third-Party Plaintiffs,*

NEW YORK  
COUNTY CLERK'S OFFICE

- against -

NB 67 WALL DEVELOPERS LLC and SKYLINE  
WINDOWS, LLC

*Third-Party Defendants,*

\_\_\_\_\_  
SKYLINE WINDOWS, LLC x

*Second Third-Party Plaintiff,*

- against -

G.J.D. CONSTRUCTION CORPORATION and  
THREE-D ERECTORS, INC.,

*Second Third-Party Defendants.*

\_\_\_\_\_  
x

In this Labor Law action, plaintiff John White sues to recover for personal injuries allegedly sustained when he stepped on a piece of concrete debris while working at a construction site located at 67 Wall Street. In Motion Sequence No. 5, defendant Skyline Windows, LLC (Skyline) moves for summary judgment dismissing plaintiff's complaint, the first third-party complaint, and all cross-claims against it. Plaintiff cross-moves for partial summary judgment as to liability against Skyline on his claims under Labor Law §§ 241(6) and 200, and for common law negligence. Defendants/first third-party plaintiffs Newmark Construction Services, L.L.C. and Newmark & Company Real Estate, Inc. (collectively Newmark) cross-move for summary judgment against Skyline on their contractual indemnification claim against it. In Motion Sequence No. 6, Skyline moves for summary judgment against second third-party defendants G.J.D. Construction Corporation (GJD) and Three-D Erectors, Inc. (collectively GJD/3-D) on its contractual indemnification claim against them. Plaintiff cross-moves for partial summary judgment as to liability against defendants RBNB 67 Wall Street Owner LLC (RBNB Owner), NB 67 Wall Developers, LLC (NB Developers), Newmark, and Skyline on his claims under Labor Law §§ 241(6) and 200, and for common law negligence. In Motion Sequence No. 7, RBNB Owner and NB Developers move for summary judgment dismissing plaintiff's claims under Labor Law § 200 and for common law negligence against them, and for summary judgment on their contractual defense and indemnification claim against Skyline.<sup>1</sup>

The following relevant facts are undisputed: RBNB Owner was the owner of the premises, and NB Developers was the general contractor. (See Dep. Of Nathan Berman

---

<sup>1</sup> The court disapproves the parties' failure to serve a single summary judgment motion against all parties as to which summary judgment is sought. However, the court will hear all of the motions on the merits as they raise the same issues of fact and law.

[Member of RBNB Owner] at 8, 11-12 [Skyline's Opp. to P.'s Cross-Motion, MS# 005, Ex. A].) By contract dated December 1, 2004, RBNB Owner hired Newmark Construction Services, L.L.C. as construction manager for the project. (Newmark's Aff. in Opp. to P.'s Cross-Motion, MS# 006, Ex. 1.) NB Developers hired Skyline as a subcontractor for the installation of windows at the project. Skyline, in turn, hired second third-party defendant GJD/3-D to install the windows at the site. (Aff. of William DeVito, Esq. In Support of Skyline's Motion, ¶ 5.) Plaintiff was employed by GJD/3-D.

On the date of the accident, January 11, 2006, plaintiff was unloading windows and placing them against columns in preparation for installation. As plaintiff testified, "I stepped on something which was concrete . . . , and my foot wobbled. It was underneath the arch of my right foot. My foot wobbled, gave out, and I felt a very sharp electrical pain." Plaintiff then fell. (P.'s Dep. at 49-50.) The concrete that caused plaintiff's fall was "grayish in color, it was irregular in shape," approximately "two to three inches long, and maybe an inch-and-a-half high." (Id. at 54-55.) The parties dispute the origin of the concrete that caused plaintiff to fall.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact.'" (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law § 241(6)

Labor Law § 241(6) provides:

All contractors and owners and their agents \* \* \* shall comply with the following requirements:

6. 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.

It is well settled that this statute requires owners and contractors and their agents “to provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law § 241(6), plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with “concrete specifications,” as opposed to a provision that “establish[es] general safety standards.” (Id. at 505.) “The former give rise to a nondelegable duty, while the latter do not.” (Id.)

Plaintiff relies solely on Industrial Code § 23-1.7(e)(2) (12 NYCRR) in support of his claim under § 241(6).<sup>2</sup> (See Aff. of Thomas Humbach, Esq. In Support of P.’s Cross-Motion, ¶ 4.) It is well settled that § 23-1.7(e)(2) is sufficiently specific to support a claim under § 241(6). (See Smith v McCluer Corp., 22 AD3d 369 [1st Dept 2005].) However, if the debris claimed to

---

<sup>2</sup> 23-1.7 provides:

(e) Tripping and other hazards.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

have caused the accident was “an integral part of the work being performed by the plaintiff at the time of the accident,” § 23-1.7(e)(2) does not apply. (See Tighe v Hennegan Constr. Co., 48 AD3d 201, 202 [1<sup>st</sup> Dept 2008]; Collins v Switzer Const. Group, Inc., 69 AD3d 407, 408 [1<sup>st</sup> Dept 2010]; Quinn v Whitehall Props., II, LLC, 69 AD3d 599, 600 [2<sup>nd</sup> Dept 2010].)

Here, plaintiff and defendants dispute whether the debris was caused by plaintiff's employer or by some other trade. In support of his claim that the debris was created by another trade, plaintiff submits his deposition testimony that after the accident, “I looked directly above me, and I saw pipes going through the floor, and around the pipe right at the ceiling there was chunks of concrete missing, like somebody had been hammering away to make the hole larger.” (P.'s Dep. at 56.) Plaintiff also cites the testimony of his supervisor, John Danzo, that he saw the debris after plaintiff's accident, and that the color of the concrete matched the color of the ceiling. (See Danzo Dep. at 40.) In addition, plaintiff relies on his accident report which states that he “stepped on some debri[s] (from other trades) while turning to place the sash into position.” (C2 Form, § 18 [Skyline's Motion, MS# 005, Ex. C].)

In opposition, defendants submit evidence that the work of GJD/3-D in installing windows generated debris. It is undisputed that part of GJD/3-D's work at the site was to remove old windows, including the “the removal of one of the horizontal beams between the window and the transom.” (See P.'s Cross-Motion, MS# 005, Ex. H [Skyline's Revised Pricing].) Carlos Huezo, Newmark's Assistant Project Manager at the time of the accident, testified that concrete debris could be generated as part of the replacement of the windows at the site. (See Huezo Dep. at 50 [RBNB Owner's Opp. to Skyline's Motion, MS# 005, Ex. C].) In particular, he testified that he observed “small amounts of rubble, concrete pieces, or brick

pieces, whatever it is that the window was attached to” during window removal. (Id. at 50-51.) Huezo also testified, inconsistently with plaintiff, that the debris he saw was “pebble size” and would “fit in the palm of your hand.” (Id. at 85.)

The court finds that defendants raise a triable issue of fact as to whether GJD/3-D, as opposed to another trade, created the debris that caused plaintiff’s fall. The court notes, however, that defendants appear to assume that if the debris was generated by plaintiff’s employer, then it was “integral” to plaintiff’s work. Defendants cite no authority in support of this proposition. Nor have the parties cited, or discussed, the numerous cases that consider the circumstances under which debris will be found integral. A line of cases holds that debris may be integral where it is generated at the time of plaintiff’s work. (See Salinas v Barney Skanska Constr. Co., 2 AD3d 619 [2d Dept 2003] [demolition debris created by plaintiff and coworkers was integral]; Riley v J.A. Jones Contr., Inc., 54 AD3d 744 [2d Dept 2008] [triable issue found as to whether debris, consisting of bricks, was integral to bricklayers work where brick wall was demolished but area was not cleared before replacement wall was constructed]. See also Cody v State of New York, 82 AD3d 925 [1<sup>st</sup> Dept 2011] [holding, under Labor Law § 200, that accident was caused by manner in which ongoing work was being performed, where debris on which plaintiff stepped was a piece of lumber that was one of the materials being used by plaintiff’s coworkers].) However, other cases hold that accumulated debris is not integral to the work. (See Tighe v Hennegan Constr. Co., 48 AD3d 201, supra [accumulated demolition debris not integral to work of electrician]; Singh v Young Manor, Inc., 23 AD3d 249 [1<sup>st</sup> Dept 2005] [debris permitted to accumulate for several days not integral].)

As discussed below with respect to plaintiff’s Labor Law § 200 and negligence claims,

there is evidence in the record that there was accumulated debris in the area where plaintiff's accident occurred. However, given the parties' focus on whether the debris was caused by plaintiff's trade rather than whether it was accumulated, and their failure to discuss the applicability of the cases on accumulated debris, the court declines to reach the issue of whether the evidence is sufficient to support summary judgment in plaintiff's favor.

The court is unpersuaded by defendants' further contention that § 23-1.7(e)(2) is inapplicable because plaintiff testified that he stepped, rather than tripped, on debris. Section 23-1.7(e)(2) is broad enough to encompass an accident that occurs in such a manner. (See e.g. Ramsey v Leon D. DeMatteis Const. Corp., 79 AD3d 720 [2d Dept 2010].) The authority submitted by Newmark is not to the contrary, as none of the cases involved an accident that occurred when the plaintiff stepped or tripped on debris. (See e.g. Farrell v Blue Circle Cement, 13 AD3d 1178, 1178 [4th Dept 2004], lv denied 4 NY3d 708 [2005] [accident caused by rain and powder covered surface]; Madir v 21-23 Maiden Lane Realty, LLC, 9 AD3d 450, 452 [2nd Dept 2004] [object that plaintiff was moving fell on his foot].)

The court holds that defendants RBNB Owner and NB Developers otherwise fail to establish a defense to plaintiff's § 241(6) claim. As the owner and general contractor, respectively, their duty to conform to the requirements of this section was non-delegable. (Russin v Picciano & Son, 54 NY2d 311, 317-318 [1981]. See Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993].)

Defendant Newmark contends that as the "construction manager" for the project, it cannot be liable to plaintiff under § 241(6). The standards for imposition of liability on a construction manager are well settled. "Although a construction manager of a work site is generally not

responsible for injuries” under the Labor Law, a construction manager

“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 the work giving rise to [the duty to conform to the requirements of the Labor Law] 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.”

(Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005] [internal quotation marks and citations omitted] [decided under Labor Law § 240 [1]].)

Newmark demonstrates that its contract with RBNB Owner does not obligate it, or confer authority upon it, to supervise and control the work at the premises. The contract by its terms provides that “[t]he term ‘Contractor’ [Newmark] shall mean ‘Construction Manager’ unless otherwise noted.” (Rider § 1.2.) In claiming that Newmark functioned as the general contractor, plaintiff cites § 1.2 of the contract, which provides that the “General Conditions of the Contract” shall be a specified AIA Document “which is incorporated herein by reference.” Section 3.3.1 of the General Conditions provides that “[t]he Contractor shall supervise and direct the Work.” However, as Newmark points out, this paragraph goes on to eliminate the form provision that the Contractor “shall be solely responsible for and have control over construction, means, methods, techniques, sequences and procedures.” Instead, it provides: “The Contractor shall be responsible for coordinating all portions of the Work under the Contract.” Moreover, the contract as a whole contemplates that the Contractor shall perform “construction administration and management services” typical of a construction manager (Contract, § 1.1), including causing the work to be performed in accordance with the Contract Documents (General Conditions, § 3.1.2), and

preparation of a construction schedule. (Id., § 3.10.1.) In addition, while the contract provides generally that “[t]he Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: .1 employees on the Work” (id., § 10.2.1), it specifically provides that the general contractor, not Newmark, shall be responsible for clean up. General Conditions § 3.15.1 thus provides: “The Owner shall cause NB67 Developers and the Subcontractors to keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Owner shall cause NB67 Developers to remove from and about the Project waste materials, rubbish, the Contractor’s tools, construction equipment, machinery and surplus materials.” Similarly, the Contract provides not that the Contractor shall designate its own site safety representative, but that it shall designate an employee of the general contractor to serve in that capacity. Section 10.2.6 of the General Conditions thus provides: “The Contractor shall designate a responsible member of NB67 Developers’ organization at the site whose duty shall be the prevention of accidents. This person shall be NB67 Developers superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.”

Under settled principles of contract interpretation, “[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.” (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, “where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.” (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1<sup>st</sup> Dept 2001][internal quotation marks and citations omitted].)

Here, the provisions requiring Newmark to supervise the work and to provide reasonable

precautions for worker safety must be read in light of the elimination of any provision authorizing Newmark to exercise supervision and control over the means and methods of the work, and in light of the specific provision making the general contractor and the subcontractors responsible for keeping the job site free of rubbish caused by work under the contract. The court accordingly holds that the contract does not support plaintiff's or RBNB Owner's or NB Developers' claim that Newmark is an agent of the owner or general contractor for purposes of the imposition of liability upon Newmark under Labor Law § 241(6).

Nor do the parties otherwise raise a triable issue of fact as to Newmark's liability under this statute. The parties cite the testimony of Nathan Berman, a member of RBNB Owner and the sole member of NB Developers, that the latter did not have employees at the site, and that Newmark was "in charge of selecting, negotiating, and overseeing every contractor or subcontractor on the job." (Berman Dep. at 8, 12-13.) This wholly conclusory testimony is plainly insufficient, in the face of the unambiguous provisions of the contract imposing responsibility for clean up on the general contractor and subcontractors, to raise a triable issue of fact as to Newmark's liability under § 241(6).

The court reaches a different result as to Skyline, which contends that as a subcontractor, it is not liable under the Labor Law. The standards for imposition of liability upon a subcontractor are also well settled:

"Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties 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. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having

nondelegable liability as an ‘agent’ under sections 240 and 241.”

(Russin, 54 NY2d at 317-318 [citations omitted].) Thus, “[a] subcontractor can be deemed an ‘agent’ under this statute, and be held liable, if to it is delegated the supervision and control either over the specific work area involved or the work which gives rise to the injury.” (Headen v. Progressive Painting Corp., 160 AD2d 319, 320 [1st Dept 1990] [decided under § 240 [1]].) The delegation of supervision of the work to the subcontractor, rather than the actual supervision over the work, is sufficient to impose liability under Labor Law § 241(6). (See Burke v Hilton Resorts Corp., \_\_\_ AD3d \_\_\_, 2011 NY Slip Op 04602 [1<sup>st</sup> Dept 2011] [§ 240[1]]; Rizzo v Hellman Elec. Corp., 281 AD2d 258, 259 [1st Dept 2001] [§§ 240[1] and 241[6]]; Herrel v West, 82 AD3d 933 [2d Dept 2011] [same].) The standards for determining whether a subcontractor is an agent of an owner or general contractor are the same under Labor Law §§ 240 and 241. (Russin, 54 NY2d at 318.)

Skyline first argues that its contract with NB Developers (RBNB Owner’s Opp. to Skyline’s Motion, MS# 005, Ex. A) cannot serve to show that it was a statutory agent because the contract was not signed until June 2, 2006, several months after plaintiff’s accident on January 11, 2006. This argument is unavailing.

Under settled law, “an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound.” (Flores v Lower East Side Serv. Ctr., Inc. 4 NY3d 363, 369 [2005].) This precept applies to an indemnification agreement subject to Workers’ Compensation Law § 11. (See id. at 369-370; Podhaskie v Seventh Chelsea Assocs., 3 AD3d 361, 363 [1st Dept 2004].)

Skyline does not dispute that it ultimately signed the subject contract after plaintiff’s

accident. Nor does it dispute that it hired plaintiff's employer, GJD/3-D, to install windows at the site prior to the execution of the contract. Indeed, Skyline submits no evidence in support of its contention that the parties did not intend the contract to be enforced as of the date of plaintiff's accident. Skyline "cannot obtain summary judgment by pointing to gaps in [defendants'] proof. Rather, [it] must adduce affirmative evidence" that it did not intend to perform pursuant to the contract until it was executed by Skyline. (See Torres v Industrial Container, 305 AD2d 136, supra.)

In any event, defendants submit sufficient evidence to make a prima facie showing that the parties intended to be bound by the contract. The contract was dated October 12, 2005, prior to plaintiff's accident, and Skyline's bid was accepted prior to Skyline's performance of any of the work. (Dep. of James Jackson [Skyline's Sales Manager], at 23, [P.'s Cross-Motion, MS# 006, Ex. E].) Defendants also produce the Certificate of Insurance (RBNB Owner's Opp. to Skyline's Motion, MS# 005, Ex. B). Although dated May 18, 2006, after plaintiff's accident, it shows coverage of defendants for the time period from November 1, 2005, shortly after the date of the contract, through November 1, 2006. On this record, the court finds as a matter of law that Skyline was acting in conformity with the contract at the time of plaintiff's accident, and that the parties agreed to be bound according to its terms.

Skyline's contract with NB Developers names Skyline as the Subcontractor, and obligates Skyline to supervise the work of its subcontractors. Thus, the contract provides: "The Work shall be supervised by . . . "Subcontractor's Supervisors" (Art. 4[c] [parentheses omitted]); that "Subcontractor shall be responsible for the removal and center piling of all debris associated with this trade's work" (Schedule A, § D [17]); and that "[t]he Subcontractor shall at all times keep

the Site free from accumulation of waste materials or rubbish caused by its employees or Work and, at the completion of the Work, it shall remove all its tools, scaffolding and surplus materials and shall leave its Work area in a broom clean condition.” (Art. 17.) The contract also expressly provides that “Subcontractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: (i) employees on the Site.” (Art. 8.) The first rider to the contract similarly states that Skyline “agrees that the prevention of accidents to workers engaged in the work under this Contract is the responsibility of the Second Party [Skyline].” (Rider 1, § Y.) The contract thus confers authority and responsibility on Skyline to take responsible safety precautions, and to remove debris caused by its work, the installation of windows. Accordingly, the court holds that Skyline was the agent of the general contractor for the window installation work.

Contrary to Skyline’s contention, it is not insulated from liability by the fact that it designated John and Gary Danzo, the principals of plaintiff’s employer, GJD/3-D, as its “Supervisors” for the Project under its contract with the general contractor. (See Contract, Schedule C.) As held above, it is the authority to supervise, not the actual exercise of supervision over the work, that is the basis for holding a subcontractor liable as an “agent” of the owner or general contractor. (See Russin, 54 NY2d at 317-318.) Moreover, the fact that NB Developers maintained general authority over the entire worksite does not negate Skyline’s authority to supervise and control the installation of the windows. (See Weber v Baccarat, Inc., 70 AD3d 487 [3d Dept 2010].) Skyline’s motion for summary judgment will accordingly be denied.

### Labor Law § 200 and Common Law Negligence Claims

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes, 82 NY2d at 877.) An implicit precondition to this duty “is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” (See Russin, 54 NY2d at 317). Thus, “[w]here the alleged defect or dangerous condition arises from the contractor’s methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200.” (Comes, 82 NY2d at 877. See also Ross, 81 NY2d at 505 [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.) Neither a “general right to supervise” nor retention of contractual inspection privileges amounts to the control necessary to impose liability under Labor Law §200 or a common law negligence claim. (Brown v New York City Economic Dev. Corp., 234 AD2d 33 [1<sup>st</sup> Dept 1996]. See Gonzalez v United Parcel Serv., 249 AD2d 210 [1st Dept 1998].) An owner or general contractor thus will not be liable under section 200 where the evidence demonstrates that the plaintiff’s employer, and not the owner or general contractor, specifically controlled the methods by which the plaintiff’s work was performed. (See Reilly, 303 AD2d at 215.)

Where, however, the injury arises out of “a dangerous condition on the site” rather than “the methods or materials” used by the worker or his employer, it is “not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury-producing work,” only that it “had notice of the condition.” (Minorczyk v Dormitory Auth. of State of New York, 74 AD3d 675 [1st Dept 2010]; Seda v Epstein, 72 AD3d

455 [1st Dept 2010]; Murphy v Columbia Univ., 4 AD3d 200 [1<sup>st</sup> Dept 2004].) “General awareness” that a dangerous condition may be present is insufficient. (See Gordon v American Museum of Natural History, 67 NY2d 836, 838 [1986].) “The notice must call attention to the specific defect or hazardous condition and its specific location.” (Mitchell v New York Univ., 12 AD3d 200, 201 [1<sup>st</sup> Dept 2004].) Furthermore, constructive notice of a defect requires that the “defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” (Gordon, 67 NY2d at 837.)

Where debris causes an accident, an issue arises as to whether the debris is a dangerous condition on the work site, requiring an inquiry into whether the defendants created the condition or had notice of it, or whether the accident was the result of the means and manner in which the work was performed, requiring an inquiry into whether the defendants had authority to supervise and control the work. (Cody v State of New York, 82 AD3d 925, 926-927 [2d Dept 2011].)

Where the debris is part of the construction materials being used by the workers in ongoing construction, the accident will be found to have resulted from the means and manner in which the work was performed. (Id. at 926 [trip on piece of lumber – “one of the materials being used by the claimant’s coworkers”]; Gomez v City of New York, 56 AD3d 522 [2d Dept 2008] [trip on wire mesh into which concrete would be poured as part of construction of floor]; Mas v Kohen, 283 AD2d 616 [2d Dept 2001] [injury due to hole in floor dug by plumbers or electricians].) In contrast, debris left after construction work has been found to constitute a dangerous condition. (See Murphy v Columbia Univ., 4 AD3d 200, supra [trip over debris left by electricians or tile workers who had last worked in the area two days earlier]; Aguilera v Pistilli Constr. & Dev.

Corp., 63 AD3d 763 [2d Dept 2009] [slip on debris left on stairway on work site]; Keating v Nanuet Bd. of Educ., 40 AD3d 706 [2d Dept 2007] [accident caused by slippery rocks and unprotected skylight on roof].)

In the instant case, plaintiff testified that from the first day he arrived at the site, the work area was strewn with debris and dirt. (P.'s Dep. at 47.) Nicholas Auert, plaintiff's co-worker at GJD/3-D, who was working nearby at the time of plaintiff's accident, attests that while he was working at the site, "the floors where we worked were littered with debris, concrete and other tripping hazards, and were never swept clean." (Auert Aff. in Support of P.'s Cross-Motion, ¶ 7.) Plaintiff's foreperson, John Danzo, testified, and defendants do not dispute, that GJD/3-D's window installation work at the project took at least a few months. (Danzo Dep. at 62.) Plaintiff also testified that while GJD/3-D had worked previously on the floor where he had his accident, his accident occurred in a "whole new area" in which they had not worked before. (See P.'s Dep. at 43.) None of the defendants disputes the condition of the floor where plaintiff had his accident although, as discussed below, certain of the defendants dispute prior notice of such condition.

It is thus undisputed that the debris on which plaintiff stepped was not material that was being used in ongoing construction but, rather, was debris left after completion of construction – whether by his own or another trade. The court accordingly holds as a matter of law that the accident was caused by a dangerous condition on the work site.

Defendants RBNB Owner and NB Developers contend that plaintiff's § 200 claim should nevertheless be dismissed on the ground that they had neither actual nor constructive notice of the condition that caused plaintiff's accident. Berman, a member of both defendants, testified that

NB Developers did not provide any services at the site, had no employees there, and merely entered into agreements with subcontractors. (Berman Dep. at 16, 19.) He also testified that as the “owner’s representative” for the project, he “engage[d] Newmark Construction to act as a construction manager in every capacity to effect the conversion.” (See id. at 33-34.) Berman performed site visits three or four times a week, doing 15 or 20 minute walk-throughs. (Id. at 30-31.) However, this general supervisory authority is insufficient to raise a triable issue of fact as to whether RBNB Owner and NB Developers had supervision or control of plaintiff’s work (see Hughes v Tishman Constr. Corp., 40 AD3d 305 [1<sup>st</sup> Dept 2007]), or to show that they had actual or constructive notice of the condition.

In opposition, neither plaintiff nor any of the co-defendants adduces evidence that RBNB Owner or NB Developers had notice of debris on the site. The branch of plaintiff’s cross-motion for summary judgment on its common law negligence and Labor Law § 200 claims as against RBNB Owner and NB Developers should accordingly be denied, and the branch of RBNB Owner and NB Developers’s motion for dismissal of these claims should be granted.

In contrast, plaintiff’s claims are maintainable against Newmark and Skyline. As noted above, plaintiff and his co-worker testified to a debris problem at the site from the outset of their work there which, according to plaintiff’s foreperson, John Danzo, took a few months. Plaintiff also testified that he complained about the “filthy floors” to Danzo. (P.’s Dep. at 47.) Danzo testified that Newmark had laborers on the site who cleaned up after GJD/3-D finished removing old windows. (Id. at 59-60.) In addition, he testified that he complained to the Newmark super a few times about debris and about “cleaning up in front of us.” (Id. at 62-63.)

Newmark’s Huezo did not recall any discussions with any contractors about debris.

(Huezo Dep. at 27.) Nor did he recall receiving any complaints from Skyline or GJD/3-D about debris. (Id. at 38.) He also denied that there were laborers at the site (id. at 27, 51), and claimed either that he did not know which entity was responsible for general cleanup (id.), or that the window installer would be responsible for cleaning up its own debris. (Id. at 51.) However, Huezo acknowledged having observed concrete and other debris from window installation. (See id. at 50-51.) Significantly, moreover, Huezo authored an email, dated January 5, 2006, informing the building manager of the site that he had “advise[d] the window subcontractor to begin the cleanup and discarding of all debris caused by them.” (See RBNB Owner’s Opp., MS# 005, Ex. F.)

The evidence in the record accordingly raises a triable issue of fact as to whether Newmark had notice of a dangerous debris condition at the site for a sufficient length of time to take corrective action. Newmark’s claim that the § 200 and common law causes of action should be dismissed because it did not supervise or control plaintiff’s work is without merit. As held above, given that a dangerous condition was the cause of plaintiff’s accident, the issue is whether Newmark had notice, not whether it had authority to supervise and control plaintiff’s work.

As to Skyline, the court holds that a triable issue of fact also exists as to whether it had notice of a dangerous debris condition. Skyline argues that it did not have notice because it was not present at the work site. However, as discussed above, under its contract with NB Developers, Skyline named GJD/3-D’s Danzo as its supervisor at the site. Moreover, Danzo’s own testimony was that he knew of the debris problem. (See supra at 17.) Skyline accordingly fails to eliminate triable issues of fact as to whether it had actual or constructive notice of the debris through its agent, Danzo.

Indemnification/Failure to Procure Insurance

Newmark, RBNB Owner and NB Developers move for summary judgment on their cross-claims for contractual indemnity against Skyline based on the indemnification provision of Skyline's contract with NB Developers. This provision identifies the Contractor (NB Developers), Owner (RBNB Owner), Construction Manager (Newmark) and others as Indemnitees. (Art. 1[g].) Article 9 of the parties' contract provides:

“(a) The Subcontractor [Skyline] will defend, protect, indemnify and save the Indemnitees harmless from and against any and all Loss-and-Expense, resulting from or in any manner arising out of, in connection with or on account of: (i) the performance of the Work set forth in Schedule A, (ii) any act, omission, fault or neglect of Subcontractor, or any sub-subcontractor or anyone employed by any of them in connection with the Work set forth in Schedule A, or any of their respective agents, employees, invitees or licensees in connection with the Work . . . , (iii) claims of injury to or disease, sickness or death of persons or damage to property . . . occurring or resulting directly or indirectly from the Work set forth in Schedule A or the activities of Subcontractor, or any sub-subcontractor or anyone employed by any of them in connection with the Work. . . .”

(RBNB Owner's Opp. to Skyline's Motion, MS# 005, Ex. A.) Thus, the contract provides for indemnification when a claim arises out of Skyline's work, even if Skyline has not been negligent. (See Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990]; Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co., 74 AD3d 21 [1<sup>st</sup> Dept 2010]; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1<sup>st</sup> Dept 1999].) Where such a contract is in effect, the party “seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant.” (Correia, 259 AD2d at 65, citing Brown, 76 NY2d 172.)

As held above, the court rejects Skyline's contention that the indemnification clause is not enforceable because the contract was not signed until after the date of the accident. The court

also rejects Skyline's contention that the indemnification provision is unenforceable pursuant to GOL 5-322.1(1), because it allegedly indemnifies RBNB Owner, NB Developers Developers, and Newmark for their own negligence. It is well settled that even where an indemnification provision is found to violate GOL 5-322.1(1), it is enforceable if the party seeking indemnity is found to be free of negligence. (Brown, 76 NY2d at 179; Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 [1997].)

As held above, RBNB Owner and NB Developers demonstrate their freedom from negligence. As their liability, if any, is merely vicarious, they are entitled to a defense and conditional contractual indemnification from Skyline in the event they are held liable at trial for violation of the Labor Law.

As also held above, Newmark fails to show that it is free from negligence, as triable issues of fact exist as to whether it had actual or constructive notice of the debris condition. To the extent that Newmark seeks partial indemnification from Skyline, it is premature, "since no allocation could be made until the factual issue as to whether [Newmark] was negligent, and if so, to what extent, has been determined." (Correia, 259 AD2d at 64.) Accordingly, Newmark's cross-motion for contractual indemnification against Skyline should be denied.

Finally, Skyline's motion for contractual indemnification against GJD/3-D should be denied. The indemnification provision in the alleged contract between Skyline and GJD provides, in pertinent part:

"G.J.D. Construction Corp. shall indemnify, defend and hold harmless Skyline Windows . . . , from and against any and all claims and demands of any nature whatsoever . . . including costs, litigation expenses, counsel fees and liabilities incurred in connection therewith, arising out of injury to, or death of, any person whatsoever or damage to property of any kind by whomsoever owned, caused in whole or in part by the acts omissions of G.J.D. Construction Corp. and

subcontractor[,] material men, or any other person directly or indirectly employed by them, or any of them, while engaged in the performance of the work or any activity associated therewith or relative thereto.”

(GJD/3-D's Opp. to Skyline's Motion, MS# 006, Ex. A.) This provision provides for indemnification even if GJD/3-D has not been negligent. However, as held above, triable issues of fact exist as to Skyline's negligence.<sup>3</sup>

It is accordingly hereby ORDERED that the motions of Skyline for summary judgment under Sequence Nos. 5 and 6 are denied; and it is further

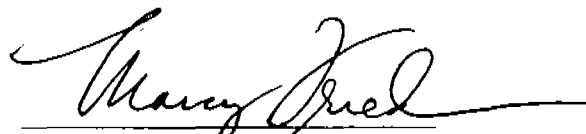
ORDERED that the cross-motions of plaintiff for summary judgment under Sequence Nos. 5 and 6 are denied; and it is further

ORDERED that the cross-motion of Newmark for summary judgment under Sequence No. 5 is denied; and it is further

ORDERED that the motion of RBNB Owner and NB Developers for summary judgment under Sequence No. 7 is granted to the extent of 1) dismissing plaintiff's claims against them under Labor Law § 200 and for common law negligence; 2) awarding said defendants a judgment as to liability on their claim against Skyline for contractual indemnification. Provided that: With respect to the claim for indemnification, as opposed to defense costs, the judgment should be conditioned upon a finding at trial that RBNB Owner and NB Developers violated Labor Law § 241(6); and 3) holding an assessment of damages at the time of or at an underlying disposition of the action.

This constitutes the decision and order of the court.

Dated: New York, New York  
July 25, 2011

  
MARCY FRIEDMAN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

FILED  
JUL 26 2011

<sup>3</sup> In light of the court's holding, the court need not address GJD/3-G's additional contention that the alleged indemnification agreement is not enforceable.