

<b>Betancur v Lincoln Ctr. for Performing Arts</b>
2012 NY Slip Op 30033(U)
January 6, 2012
Supreme Court, New York County
Docket Number: 108912/2008
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**DORIS LING-COHAN**

PRESENT: \_\_\_\_\_  
Justice

PART 36

*Retancor*

INDEX NO. 108912/2009

*Lincoln Center for the Performing Arts, Inc et al*

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

MOTION SEQ. NO. 000

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for Summary Judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1, 2  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 3, 4  
Repeating Affidavits \_\_\_\_\_ | No(s) 5, 6

Upon the foregoing papers, it is ordered that this motion ~~is~~ <sup>summary judgment</sup> for Summary Judgment by third-party defendant Star Delta Electric LLC is granted in accordance with the attached memorandum decision.

*(Consolidated for disposition with motion sequence # 6, 7 + 8)*

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

**FILED**  
JAN 11 2012  
NEW YORK COUNTY CLERK'S OFFICE

Dated: 1-9-2012

  
\_\_\_\_\_, J.S.C.  
**DORIS LING-COHAN**

- 1. CHECK ONE: .....  CASE-DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X

CELENE BETANCUR,

Plaintiff,

-against-

LINCOLN CENTER FOR THE PERFORMING ARTS,  
INC., LINCOLN CENTER DEVELOPMENT PROJECT,  
INC., INTEGRATED BUILDING CONTROLS, INC.,  
and THE CITY OF NEW YORK, and JDP  
MECHANICAL, INC.,

Defendants.

-----X

LINCOLN CENTER FOR THE PERFORMING ARTS,  
INC., LINCOLN CENTER DEVELOPMENT PROJECT,  
INC., INTEGRATED BUILDING CONTROLS, INC.  
and THE CITY OF NEW YORK,

Third-Party Plaintiffs,

-against-

STAR-DELTA ELECTRIC, LLC,

Third-Party Defendant.

-----X

LINCOLN CENTER FOR THE PERFORMING ARTS,  
INC., LINCOLN CENTER DEVELOPMENT PROJECT,  
INC., INTEGRATED BUILDING CONTROLS, INC.  
and THE CITY OF NEW YORK,

Second Third-Party Plaintiffs,

-against-

JDP MECHANICAL, INC.,

Second Third-Party Defendant.

-----X

Index No. 108912/08

Motion Seq. No.:  
003, 006, 007 and  
008

Third-Party Index  
No. 590259/09

**FILED**

**JAN 11 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Second Third-Party  
Index No. 590635/09

JDP MECHANICAL, INC.,

Third Third-Party Plaintiff,

-against-

PAR SPECIALTY CONTRACTING CORP.,

Third Third-Party Defendant.

-----X

Doris Ling-Cohan, J.:

Third Third-Party  
Index No. 590538/10

**FILED**

**JAN 11 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Motions with sequence numbers 003, 006, 007 and 008 are consolidated for disposition. Because the analyses and determinations in some of the later motions will impact the discussion and conclusions of earlier ones, the court will consider the motion sequences out of order.

On April 3, 2007, plaintiff, then an electrician employed by Star-Delta Electric, LLC (Star-Delta), was injured when she fell from a ladder while installing overhead electrical conduit in the water cooling area of the third-floor roof of the building that houses the Metropolitan Opera. Lincoln Center for the Performing Arts, Inc. (Performing Arts) owns the building, and Lincoln Center Development Project, Inc. (Development Project) was formed to manage certain redevelopment projects at the site.

In motion sequence number 003, third-party defendant Star-Delta moves, pursuant to CPLR 3212, for summary judgment dismissing all claims asserted as against it. In motion sequence

number 006, defendant/second third-party defendant/third third-party plaintiff JDP Mechanical, Inc. (JDP) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it, as well as for summary judgment in its favor on its contractual indemnification claim against third third-party defendant PAR Specialty Contracting Corporation s/h/a PAR Specialty Contracting Corp. (PAR). In their cross motion, Performing Arts, Development Project, Integrated Building Controls, Inc. (Integrated Building) and the City of New York (together, defendants) move, pursuant to CPLR 3212, for summary judgment in their favor against JDP. In motion sequence number 007, PAR moves for summary judgment dismissing the third third-party complaint and all cross claims and Labor Law causes of action asserted as against it. Plaintiff moves, in motion sequence number 008, for summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

#### **BACKGROUND**

By Construction Agreement dated October 18, 2006, Development Project, as Manager, and JDP, as Contractor, entered into an agreement pertaining to Central Mechanical Plant Upgrades and Improvements (Central Mechanical). Pursuant to this contract, JDP agreed to perform a Scope of Work involving the categories of general/logistics, mechanical, electrical, plumbing and structural/architectural (see Exhibit A of Development

Project/JDP Contract).

By Construction Agreement dated October 29, 2006, Development Project, as Manager, and Integrated Building, as Contractor, entered into an agreement pertaining to the Central Mechanical Plant Building Management System (Building Management System) Upgrade Project. Pursuant to this agreement, Integrated Building agreed to perform the Scope of Work, which included establishing direct digital control for energy management, equipment monitoring, control and integration of various enumerated systems (see Exhibit A of Development Project/Integrated Building Contract).

JDP retained PAR to install temporary protection for the roof on the third floor during construction, and to perform site cleanup.

On October 25, 2006, Integrated Building entered into a one-page purchase order agreement with Star-Delta, an electrical subcontractor. Plaintiff was an employee of Star-Delta.

At the time of her accident, plaintiff was standing on a six-foot wooden A-frame ladder while attempting to install overhead electrical conduit on the third-floor roof. The ladder had been put in position by her foreman, with all four feet of the ladder resting on a single piece of plywood. Plaintiff alleges that the protective plywood flooring that PAR had installed on the third-floor roof was unstable, shifted, and

caused her ladder and herself to fall to the floor.

#### DISCUSSION

"It has long been settled that the 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once the movant has met its burden, "the party opposing such motion must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]) 'by producing evidentiary proof in admissible form'" (*Meridian Management Corp.*, 70 AD3d at 510, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens*, 70 AD3d 563, 565 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility [interior citations omitted]" (*Meridian Management Corp.*, 70 AD3d at 510-511). "When there is any doubt as to the existence of triable issues, summary judgment should not be granted" (*Udoh*, 70 AD3d at 565).

**Plaintiff's Motion for Summary Judgment on the Issue of Defendants' and JDP's Liability Under Labor Law § 240 (1) (motion sequence number 008)**

Labor Law § 240 (1) provides, in pertinent part:

All contractors and owners and their agents ... in the erection ... altering ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, ... ladders ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices" (*Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]).

"The duties articulated in Labor Law § 240 are nondelegable, and liability is absolute as to the ... owner when its breach of the statute proximately causes injuries" (*ibid.*). In order "[t]o establish liability on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mechanical of N.Y. Corp.*, 80 AD3d 564, 564-565 [2d Dept 2011]).

Plaintiff here has met that burden. The evidence is clear that, regardless of the condition of the plywood flooring on which her six-foot A-frame ladder was placed, whether it shifted, was unstable or warped, the ladder was not secured in any way, and no one was holding the ladder to prevent its movement and fall. That failure to secure the ladder was a

proximate cause of plaintiff's fall and injuries (see *Raynor v Quality Plaza Realty, LLC*, 84 AD3d 774 [2d Dept 2011] [unsecured extension ladder slipped]; *Ordonez v C.G. Plumbing Supply Corp.*, 83 AD3d 1021, 1022 [2d Dept 2011] [unsecured extension ladder; "the failure to secure the ladder proximately caused his injuries"]; *Herrera v Union Mechanical of N.Y. Corp.*, 80 AD3d at 565 [plaintiff established his prima facie entitlement to judgment "by demonstrating that he was engaged in ... work covered by Labor Law § 240 (1) ... when he fell from an unsecured ladder that moved"])).

Labor Law §240(1) requires that safety devices be "so constructed, placed and operated as to give proper protection to a person so employed." Plaintiff need not demonstrate that the ladder was defective in some way (*Montalvo v J. Petrocelli Construction, Inc.*, 8 AD3d 173, 174 [1st Dept 2004]; *Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002] ["contention that plaintiff was required to show that the ladder from which he fell was defective ... is not the law"])). Moreover, section 240 (1) "'does not require a plaintiff to have acted in a manner that is completely free from negligence'" (*Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008], quoting *Hernandez v Bethel United Methodist Church of New York*, 49 AD3d 251, 253 [1st Dept 2008]). Indeed, it is well-settled that "[e]ven if the plaintiff was partially at fault, a

worker's contributory negligence is not a defense to a Labor Law § 240 (1) claim" (*Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 639 [2d Dept 2005]).

The fact that plaintiff does not know what caused the ladder to move and fall is not determinative (see e.g. *Klapa v O & Y Liberty Plaza Co.*, 218 AD2d 635, 636 [1st Dept 1995] ["plaintiff's testimony that he did not know exactly what caused him to fall did not diminish the probative effect of his uncontradicted testimony" that he would not have fallen if an adequate safety device had been provided]).

Further, because the duty set forth in the statute is nondelegable, liability under Labor Law § 240 (1) "does not require that the owner exercise supervision or control over the worksite before liability attaches" (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 560 [1993]).

It is clear that Performing Arts was the owner of the building, and that Development Project was Performing Art's agent. Thus, the court having determined that plaintiff was not provided with adequate safety devices, and that this failure was a proximate cause of plaintiff's accident, both of these parties are absolutely liable to plaintiff under section 240 (1) (see e.g. *Auremma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011] [plaintiff may recover under section 240 (1) if he worked at an activity covered by the statute and was exposed to an

elevation-related hazard without being provided with an appropriate safety device]).

In considering whether JDP and/or Integrated Building were agents of Performing Arts and Development Project, the court notes that Development Project used the same General Conditions for Supervision and Construction Procedures in contracting with both JDP and Integrated Building for the two concurrent projects (Central Mechanical and Building Management System) on the third-floor roof, "[o]ne under mechanical and one under the control side of it" (Garrison Depo., at 47). Development Project contracted with JDP for the mechanical work (Central Mechanical), and Development Project entered into a separate, but "equal" contract with Integrated Building (Building Management System) (*id.* at 48-49).

#### **Agency**

It is well settled that

[a]n agency relationship for purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute

(*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 293 [2003]; see also *Walls v Turner Construction Co.*, 4 NY3d 861, 864 [2005]).

**JDP**

JDP correctly maintains that it is not a proper Labor Law defendant in this action. The Development Project/JDP contract covered a completely different project than the one covered by the Development Project/Integrated Building contract. Integrated Building subcontracted with Star-Delta, plaintiff's employer; JDP did not. There is no contractual nexus between Integrated Building or Star-Delta and JDP, and there is no evidence that workers from one project crossed over to work on the other. The fact that work on both projects was being performed concomitantly on the third-floor roof is no basis for holding JDP liable as an agent of Performing Arts or Development Project under Labor Law § 240 (1) for plaintiff's work.

Moreover, JDP did not have any authority to supervise and control any facet of the Building Management System project. Development Project did not delegate the performance of the Building Management System project to JDP. Thus, JDP was not responsible for plaintiff's activity, and there is no agency liability under the statute.

Therefore, the part of plaintiff's motion which seeks summary judgment on her section 240 (1) claim as against JDP is denied.

## Role of Integrated Building in the Building Management

### System Project

Section 3.4 (Supervision and Construction Procedures) of the General Conditions part of the Development Project/Integrated Building contract provides, in relevant part:

3.4.1 Contractor [Integrated Building] shall supervise and direct the Work, using Contractor's best skill and attention. Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work of the Subcontractors under the Contract Documents.

In his August 5, 2010 affidavit, Randy D'Amico, Star-Delta's vice president, affirmed that Integrated Building "was the prime contractor on a project at Lincoln Center" (D'Amico 8/5/10 Aff., ¶ 2). According to Integrated Building's co-owner, Scot Stickle, IBC was retained to, among other things, install a computerized electronic building management system which "manages, optimizes, monitors, generates alarms" (Stickle Depo., at 21). Integrated Building subcontracted the wire installation work to Star-Delta (*id.* at 19-20), and Integrated Building's project manager "would inspect their work and check on progress and workmanship" (*id.* at 101). If Integrated Building noticed that Star-Delta was not performing the work in accordance with the terms of the contract, Integrated Building had the right to tell Star-Delta's employees to stop work (*id.* at 69-70). In

addition, if Integrated Building became aware of an unsafe condition, it would tell Star-Delta's foreman (*id.* at 98-99).

James Marino, Star-Delta's foreman at the site, asserted that it was Integrated Building's Mario who told him "which chillers or which pumps needed to be done at a certain time," and Mario had "to approve ... how we install our conduit and boxes and stuff like that," but Mario "wouldn't watch us, no" (Marino Depo., at 147-148, 154-155). Still, Mario "would have to make sure [that the work was performed] in a manner that wasn't in the way of anything or it was, you know, installed parallel, level and just installed in a good work like manner" (*id.*).

The evidence set forth above indicates that Integrated Building was an agent of Development Project and Performing Arts for purposes of liability under Labor Law § 240 (1). As such, because plaintiff was not provided with safety devices which would have given her proper protection under the statute, Integrated Building is liable to plaintiff pursuant to section 240 (1).

**JDP's Motion for Summary Judgment (motion sequence number 006)  
and Defendants' Cross Motion for Summary Judgment**

JDP first moves for summary judgment dismissing the complaint and all cross claims asserted against it.<sup>1</sup> Second, it moves for summary judgment in its favor on its contractual

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<sup>1</sup>The only cross claims asserted against JDP are those set forth in defendants' answer to plaintiff's amended complaint.

indemnification claim against PAR.

Plaintiff's complaint consists of one cause of action, encompassing claims for common-law negligence and violation of Labor Law §§ 200, 240, and 241. This court has already denied plaintiff's motion for summary judgment on her Labor Law § 240 (1) claim as against JDP. JDP has submitted adequate evidence, set forth above, to grant its motion with respect to dismissing plaintiff's section 240 (1) claim as against it. In addition, JDP is entitled to the dismissal of plaintiff's Labor Law § 241 (6) claim as against it because JDP had nothing to do with the work plaintiff was performing. It was not an owner, contractor or agent of the owner or contractor that could be held liable for the conditions surrounding plaintiff's work.

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Cambizaca v New York City Transit Authority*, 57 AD3d 701, 701 [2d Dept 2008]). Where, as here, the claims are based on the alleged means and methods of a plaintiff's work, "liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work. ... [I]t must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed [citations omitted]" (*Hughes v Tishman Construction*

Corp., 40 AD3d 305, 306 [1st Dept 2007]). As JDP had nothing to do with plaintiff's work, dismissal of plaintiff's common-law negligence and Labor Law § 200 claims is granted.

Thus, the part of JDP's motion that seeks summary judgment dismissing plaintiff's complaint as against it is granted.

When a complaint against a party is dismissed in its entirety, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety" (*Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]). Thus, defendants' cross claims against JDP are dismissed, as well as defendants' second third-party action, and JDP's third third-party action against.

#### **Defendants' Cross Motion for Summary Judgment**

As a result of the granting of summary judgment in favor of JDP, defendants' cross motion for summary judgment in their favor against JDP is denied as moot.

#### **PAR's Motion for Summary Judgment (motion sequence number 007)**

As a consequence of the dismissal of JDP from the complaint, JDP's third third-party action is dismissed. The parts of PAR's motion which seek summary judgment dismissing all cross claims and Labor Law claims as against PAR<sup>2</sup> are denied as

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<sup>2</sup>There are no cross claims or Labor Law claims asserted as against PAR.

moot.

**Star-Delta's Motion for Summary Judgment (motion sequence number 003)**

In addition to seeking summary dismissal of defendants' third-party complaint, which consists of claims sounding in contractual indemnification, contribution or common-law indemnification, and breach of contract to procure insurance, Star-Delta seeks summary judgment dismissing JDP's cross claims against it for common-law indemnification.

The part of the motion which seeks dismissal of JDP's cross claims for common-law indemnification against Star-Delta is denied as moot.

Defendants' third-party complaint brings causes of action sounding in common-law and contractual indemnification, contribution (denominated "partial contractual indemnification"), and breach of contract to procure insurance.

Star-Delta was plaintiff's employer. "Workers' Compensation Law § 11 prohibits a third-party action for common-law indemnification or contribution against an employer except in the case where, inter alia, the employee has sustained a grave injury" (*Cocom-Tambriz v Surita Demolition Contracting*, 84 AD3d 1300, 1301, 2011 NY Slip Op 04622, \*1 [2d Dept 2011]; see also *Cullin v Makely*, 80 AD3d 1042, 1043 [3d Dept 2011] ["An employer generally may not be held liable to any third party for injuries

sustained by an employee acting within the scope of employment unless the third party 'proves through competent medical evidence that such employee has sustained a "grave injury"' [Workers' Compensation Law § 11]), or when "the employer has entered into a written contract to indemnify the owner [citations omitted]" (*Bush v Mechanicville Warehouse Corp.*, 79 AD3d 1327, 1328 [3d Dept 2010]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010] [same]).

Here, none of the parties allege that plaintiff suffered a "grave injury" as defined in Workers' Compensation Law § 11 (*Cullin v Makely*, 80 AD3d at 1043 ["The Legislature narrowly defined 'grave injury' by creating an extremely limited list of injuries ..."]). Thus, defendants' claims for contribution and common-law indemnification, upon this basis, cannot survive as against Star-Delta.

"The right to contractual indemnification depends upon the specific language of the contract" (*Sherry v Wal-Mart Stores East, L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). The "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [citation omitted]" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]); see also *M & V*

*Concrete Contracting Corp. v Modica*, 76 AD3d 614, 615-616 [2d Dept 2010]; *Eversfield v Brush Hollow Realty, LLC*, 75 AD3d 492, 493 [2d Dept 2010)].

"[I]ndemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed" (*Mikulski v Adam R. West, Inc.*, 78 AD3d at 911). Star-Delta maintains that the IBC/Star-Delta subcontract does not contain any "express terms or conditions accompanying the single-sided agreement which required that [Star-Delta] indemnify any company" (D'Amico August 5, 2010 Aff., ¶ 2). Defendants cite to the first paragraph of the subcontract, where it states that "conditions [illegible] contract with Lincoln Center are hereby made part of this agreement," and to the second paragraph, which provides that the Contract Documents "consist of this Subcontract, all higher tier contracts (including, but not limited to the [illegible] between the Owner & General Contractor) all General & Supplementary Conditions."

Defendants contend that there is no language in the subcontract indicating that the terms and conditions of the LCDP/IBC contract are incorporated by reference in the subcontract. Rather, defendants maintain that the Development Project/Integrated Building contract is specifically named as part of the Contract Documents, and thus, that Star-Delta is subject to the indemnification obligations set forth in the

Development Project/Integrated Building contract.

However, there is no reference to the words, i.e., "incorporated by reference," which distinguish incorporation by reference from listing a contract as one of the contract documents; it is a distinction without substance.

It is well-settled that "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 East 55th Street Tenants*, 282 AD2d 243, 244 [1st Dept 2001]; see also *Matter of Wonder Works Construction Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513 [1st Dept 2010]; *Waitkus v Metropolitan Housing Partners*, 50 AD3d 260, 261 [1st Dept 2008], quoting *Bussanich*). "'Provisions other than scope, quality, character and manner of the work must be specifically incorporated to be effective against the subcontractor' (2 NY PJI2d 635 [2005])" (*CooperVision, Inc. v Intek Integration Technologies, Inc.*, 7 Misc 3d 592, 600 [Sup Ct, Monroe County 2005]; see also *New York Telephone Co. v Alvord & Swift*, 49 AD2d 726, 726 [1st Dept 1975] [party not obligated to arbitrate because "their contract did not specifically incorporate by reference ... the arbitration clause of the main contract ..."])).

No specific incorporation of the indemnification provision in the Development Project/Integrated Building contract is found in the Integrated Building/Star-Delta subcontract. Therefore, Star-Delta is not bound by that provision, and does not owe defendants indemnification for any act or omission attributable to Star-Delta in the performance of its work. For this reason, defendants' claim against Star-Delta for breach of contract for failure to defend and indemnify must fail.

#### CONCLUSION

Accordingly, it is

ORDERED that the part of the motion of Star-Delta Electric, LLC (motion sequence number 003) that seeks summary judgment dismissing JDP Mechanical, Inc.'s cross claims against it is denied as moot; and it is further

ORDERED that the part of the motion of Star-Delta Electric, LLC (motion sequence number 003) that seeks summary judgment dismissing defendants' third-party action is granted, and the third-party complaint is dismissed in its entirety, with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant; and it is further

ORDERED that the motion of defendant/second third-party

defendant/third third-party plaintiff JDP Mechanical, Inc. (motion sequence number 006) for summary judgment dismissing the complaint and cross claims asserted as against it is granted, and the complaint and cross claims are dismissed against JDP Mechanical, Inc. in their entirety, with costs and disbursements to JDP Mechanical, Inc. as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of JDP Mechanical, Inc.; and it is further

ORDERED that, as a consequence of the dismissal of JDP Mechanical, Inc. from the complaint, JDP Mechanical, Inc.'s third third-party action is dismissed; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that defendants' cross motion (motion sequence number 006) is denied as moot; and it is further


ORDERED that PAR Specialty Contracting Corp.'s motion (motion sequence number 007) is denied as moot; and it is further

ORDERED that the part of plaintiff's motion (motion sequence number 008) which seeks summary judgment as against JDP Mechanical, Inc. is denied; and it is further

ORDERED that the part of plaintiff's motion (motion sequence number 008) which seeks summary judgment under Labor Law § 240 (1) as against Lincoln Center for the Performing Arts, Inc., Lincoln Center Development Project, Inc. and Integrated

Building Controls, Inc. is granted, with the amount of damages to be determined at trial.

DATED 1/6/12

  
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Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Betancur\_1.bunyar.wpd

**FILED**

**JAN 11 2012**

**NEW YORK  
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