Amendola v Rheedlen 125th St., L.L.C.
2012 NY Slip Op 30103(U)
January 11, 2012
Sup Ct, NY County
Docket Number: 102189/2007
Judge: Saliann Scarpulla
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SCANNED ON 1/18/2012

[* 1]

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

PRESENT: SALIANN SCARPULLA — PART 9

Index Number : 102189/2007

AMENDOLA, LUIS

VS

RHEEDLEN 125TH STREET

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C
1/17/12
aC

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 1/11/12 which disposes of motion sequence(s) no. 002, 003 and 004.

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/11/12

Saliann Scarpulla J.S.C.

SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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LUIS AMENDOLA,

Plaintiff, Index No.: 102189/2007

-against-

RHEEDLEN 125TH STREET, L.L.C., HARLEM CHILDREN'S ZONE, INC., TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN, HELLMAN CONSTRUCTION CO., INC.,

Defendants.

----------X

HELLMAN CONSTRUCTION CO., INC.,

Third-Party Plaintiff, Index No.: 590190/2008

-against-

CITY VIEW BLINDS OF N.Y. INC., ABALENE DECORATING INC., and THE TRAVELERS INDEMNITY COMPANY,

Third-Party Defendants.

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RHEEDLEN 125TH STREET, L.L.C., and HARLEM CHILDREN'S ZONE, INC.,

Third-Party Plaintiffs, Index No.: 590694/2009

-against-

FILED
JAN 18 2012
COUNTY CLERK'S OFFICE NEW YORK

CITY VIEW BLINDS OF N.Y. INC., and
ABALENE DECORATING INC.,

Third-Party Defendants.
----------X

For Plaintiff:
Fields & Levy, LLP
112 Route 109
West Babylon, New York 11704

For Defendants/Second Third-Party Plaintiffs Rheedlen 125th Street, LLC and Harlem Children's Zone:
Shearman & Sterling, LLP
599 Lexington Avenue
New York, NY 10022-6069

For Defendants Tishman Construction Corporation, Tishman Construction Corporation of New York, and Tishman Corporation of Manhattan:
Burns, Russo, Tamigi & Reardon, LLP
390 Old Country Road
Garden City, NY 11530

For Second Third-Party defendants City View Blinds of N.Y., Inc. And Abalene Decorating, Inc.:
Aboulafia Law Firm, LLP
60 East 42nd Street, Suite 2231
New York, NY 10165

HON. SALIANN SCARPULLA, J.:

This personal injury and Labor Law action arises out of plaintiff Luis Amendola's ("Amendola") fall as he was hanging a window shade in a building owned by defendant Rheedlen 125th Street, L.L.C. ("Rheedlen") and leased by defendant Harlem Children's Zone, Inc., ("HCZ") (together, "HCZ"). In February 2007, Amendola commenced an action against HCZ, defendants Tishman Construction Corporation, Tishman Construction Corporation of New York, Tishman Construction Corporation of Manhattan (collectively, "Tishman"), and Hellman Construction Co., Inc.[1] Thereafter, HCZ commenced a third-party action against City View Blinds of N.Y., Inc. and Abalene

[1] In 2009, all claims against Hellman Construction Co., Inc. and its third-party action, were discontinued.

Decorating Inc. (together, "City View").[2] Amendola's claims include violations of Labor Law §§ 200, 240 (1), 241 (6), and several provisions of the Industrial Code. Motions with sequence numbers 002, 003 and 004 are hereby consolidated for disposition.

In motion sequence number 002, HCZ moves, pursuant to CPLR 3212, for an order granting summary judgment on its cross claims against Tishman and on its third-party claims against City View.

In motion sequence number 003, HCZ moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all of Amendola's claims.

In motion sequence number 004, Tishman moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing Amendola's claims, as well as any cross claims alleged as against Tishman.

BACKGROUND AND FACTUAL ALLEGATIONS

Amendola alleges that on April 20, 2006, he sustained personal injuries when he fell from a height of approximately 25 feet off of a ladder as he was installing a window shade at HCZ's premises. Rheedlen is the deeded owner of the property located at 35 East 125th Street, New York, New York. HCZ, the lessee, is a not-for-profit organization that supports charter schools and administers social services programs in underserved neighborhoods.

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[2] City View owns Abalene and, although they have different names, they operate as the same entity.

In 2003, HCZ retained Tishman as a construction manager for the purpose of constructing a new charter school and community center. Pursuant to the agreement between HCZ and Tishman, Tishman was completely responsible for planning the project, which included budgeting as well as overall site and building planning. Tishman was also charged with retaining the independent contractors and ensuring that they were following acceptable labor practices. Tishman provided personnel to supervise the trade contractors and paid the contractors directly. The indemnification provision in the contract provides in pertinent part:

> To the fullest extent permitted by law . . . [Tishman] will indemnify defendant and hold the other harmless from and against all claims, damages, judgments, fines, penalties, costs of any nature (including, but not limited to, counsel fees and expenses) (collectively, "Claims") arising out of, or in connection with, the Services of this Agreement to the extent the Claims arise as a result of the negligence or breach of contract by [Tishman]. This indemnification shall survive termination or expiration of this Agreement.

In July 2004, Tishman contracted with City View to hang window shades after construction was complete. Pursuant to this Trade Contract, City View was to install manually operated window shades on floors 1, 2 and 6. There were five amendments to this 2004 agreement, and these change orders were dated September 1, 2004, January 26, 2005, August 3, 2005, October 5, 2005 and March 22, 2006. The Trade Contract and the subsequent change orders included shades for most of the building, including the six floors, the gymnasium and library; however, they did not include the installation of shades

for the security lobby. The total cost for the window shades was $67,022, paid for in five checks by Tishman.

These shades are described as being easily removable without damaging surfaces.[3] They were mounted onto a pre-installed metal pan on the wall. These metal pans are part of the structure of the wall and were not installed by City View. City View would attach a bracket to the metal pan and then drop the shade into the bracket.

The Trade Contract provided that, although Tishman was responsible to provide City View with assistance and direction, City View was responsible for the construction means, methods, techniques and safety precautions with respect to the shades. Pursuant to the Trade Contract, HCZ and Tishman were named as indemnitees, and City View was required to indemnify them if claims arose out of City View's negligence.

According to HCZ, by January 2005, the construction on the cellar, first, second and sixth floors was complete and the students, teachers and others began to occupy those portions of the building. By early 2006, construction of the third, fourth and fifth floors was complete and HCZ began operating out of those floors as well. HCZ then states that, after construction was complete, Tishman entered the "close-out" phase, where any remaining furnishings work was completed as well as anything on the "punch lists." Although Tishman was still present on the property, its presence was on a limited basis.

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[3] Amendola opposes the portion of HCZ's record which includes the shade manufacturer's installation graphics, however the court sees no reason to remove this evidence.

[* 7]

Tishman claims that there were only two phases to the project and that by April 2006, the time of Amendola's accident, phase two of the project was complete. Over the course of the project, construction meetings took place between Tishman, HCZ and various contractors to discuss the project. The last meeting took place on March 20, 2006. HCZ concedes that March 15, 2006 was the conclusion of the "second and final construction phase of the preceding project."

Regardless, by early 2006, HCZ states that construction was complete in the lobby area and that there were no other trade contractors working in the area, and that students and teachers had been using the lobby area of the school for more than fifteen months.

In 2006, HCZ began receiving complaints about the excessive afternoon glare and heat that came through the windows in the security lobby. As a result, HCZ decided that it would have to install window shades in this area. Installation of window shades in this area was not something that had been planned for or anticipated by either HCZ or Tishman. HCZ consulted with Tishman, who recommended that HCZ contact City View directly to set up the installation of these shades in the security lobby. HCZ avers that Tishman suggested this so that Tishman could avoid paperwork.

HCZ then contracted directly with City View for the installation of the window shades in the lobby. The events that led up to this transaction, and whether Tishman was still HCZ's agent for this specific work, are in dispute.

According to HCZ, during a February 14, 2006 meeting to discuss the close-out of the project, HCZ and Tishman initially discussed the proposed lobby window shades. HCZ presents an e-mail from Katherine Shoemaker ("Shoemaker"), HCZ's Director of Policy and Special Projects, to several people, including Tishman, consisting of a to-do list from this meeting. The list included as number ten on the list, "Cityview to price a shade for end of hallways over security desk (Tishman/HCZ-measured and waiting for price)."

HCZ then claims that Tishman collaborated with HCZ to measure the lobby shades and then Tishman contacted City View to arrange pricing. James Adamec ("Adamec"), HCZ's Facilities Director, testified that it would have been either he or Shoemaker who would speak to Tishman about additional work during one of the construction meetings. Adamec claims that Tishman kept minutes of all of the meetings. Adamec testified that "any and all communications" that he had with City View were done through Tishman.

However, after the alleged initial call to City View, it is undisputed that Adamec spoke to City View to confirm pricing and the timing of the installation. It is undisputed that City View then sent the proposal dated March 22, 2006, to HCZ directly, and not to Tishman. The proposal states that City View was to "[f]urnish and install (3) chain operated solar shades to match building standard fabric, at lobby windows as per field inspection, for the sum of $675.00."

There was a proposal dated March 20, 2006 to Tishman directly for three corridor windows, priced at $1,100. Subsequent to this, HCZ received a proposal from City View on June 19, 2006, which states the following:

> (3) shades at security lobby: $675.00 (already installed)
> (4) additional shades at lobby: $900.00
> (3) shades at corridor windows $1,100.00
> (2) units of film $375.00
> In the sum of ... $3,070.00.

HCZ then sent City View a check directly for the amount of $3,070.00.[4]

Ralph More ("More"), the sales manager at City View, testified that he spoke directly to Adamec about installing shades in the lobby. More stated that this new contract had nothing to do with the original contract with Tishman. When asked if the March 20, 2006 proposal to Tishman referred to the same corridor windows as in the June 19, 2006 proposal, More responded that he did not know. He believed that probably a proposal was sent to Tishman, who asked that it be redirected to HCZ, probably since it was the end of the job and this would accelerate the process. HCZ notes that More also testified that Tishman may have had the proposal redirected so that Tishman could "avoid paperwork."

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[4] There are actually two checks in the record from HCZ to City View in the amount of $3,070.00, but this discrepancy is irrelevant for purposes of this motion.

Shoemaker testified that Adamec had spoken with City View directly to arrange for this specific lobby work. However, she was not sure if Tishman was still the construction manager since she knew that Tishman was still in the building..

Nancy Czesak ("Czesak"), a vice president at Tishman, testified that she discussed the proposed lobby shades with HCZ and states that "[Tishman was] substantially complete with the work and we were not on site so we asked [HCZ] if they would like to just directly contract to City View to do any additional work." Czesak testified that after Adamec approached her asking for advice about the glare issues, she advised him to speak directly to City View. She maintains that Tishman was not actively involved at all in making the arrangements for the lobby shades.

Czesak continued that Tishman's construction superintendent, Daniel Ekus ("Ekus"), had been transferred off the site as of March 15, 2006. However, he did return intermittently for the "punch list" items. The lobby shades were not a punch list item. She testified that the contract between Tishman and HCZ was still in effect as of April 20, 2006.

Ekus confirmed that "Tishman's job was completed" before City View hung the window shades in the lobby. Ekus testified that he did not receive any notice about City View hanging shades in the lobby. He continued that, to his knowledge, no one from Tishman was on site the day of Amendola's accident.

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Amendola worked for Abalene, which is the installation portion of the City View company and is owned by City View. His title was a "journeyman carpenter." Amendola's job on April 20, 2006, the date of the accident, was to hang the lobby shades at HCZ. It was the only time he had ever been to HCZ.

Amendola testified that he was asked to hang shades on April 20, 2006 and that he went to HCZ with his foreman, Tony Rucereto ("Rucereto"). He claims that Rucereto selected the equipment for the job. Amendola further testified that Rucereto set up the ladders against the glass wall where they were to hang the shade. He explained that there was also a "non-moveable" reception desk against the wall. Amendola described how he and Rucereto were both on ladders, about 20 feet away from each other. Next, Rucereto would "hoist" up his end of the shade and pocket it into a bracket. Amendola claims that "we" attached the bracket before the shade was to be pocketed. Amendola testified that when it was his turn to "pocket" the other end of the shade into the bracket, he started slipping and went right down. The ladder started to move as well. He stated that "[n]ext thing I know, I woke up, and there was blood all over the floor." Amendola testified that he fell back away from the window and his head hit the reception desk.

Rucereto testified that he had previously hung two of the shades in the lobby without Amendola and had taken Amendola to HCZ on another day to hang the third shade. He stated that there was no one else in the lobby except for the security guard. Rucereto testified that he was hanging the window shade and he saw Amendola up on the

window mullion. He claimed that he did not know what Amendola was doing up there and that Amendola had no reason to be there. Rucereto then stated that he put the bracket in himself and that he hung up the shade himself. Afterwards, he told Amendola to stay right there and that he would come over with the ladder to help Amendola get down. According to Rucereto, Amendola then "leaps on top of the counter–security desk." Amendola either "[f]ell or tried to jump off" before Rucereto could get there with the ladder.

Norman Parker ("Parker"), the security guard who was working the day of Amendola's accident, testified that he saw Amendola fall off of a ladder. He continued that the ladder was still standing up when Amendola fell. Parker claimed that both Amendola and Rucereto were talking and laughing with him and then as Amendola was about to respond to something, he turned around and slipped off the ladder.

Amendola filed a complaint in February 2007 against HCZ and Tishman, alleging that the defendants failed to comply with Labor Law §§ 200, 240(1), 241(6) and portions of the New York State Industrial Code, provisions of the Occupational Safety and Health Administration of the Labor Department ("OSHA") and the Rules of the Board of the Standards and Appeals of the Department of Labor ("RBSA") and the statutes, codes, rules and regulations of the State of New York. Amendola further seeks to recover on the basis of common-law negligence. In his complaint, Amendola alleges that defendants

failed to provide him with a safe place to work and that they were careless with respect to the equipment he was given, particularly with the ladder.

DISCUSSION

I. Labor Law § 200 (HCZ and Tishman's motions)

Labor Law § 200(1) provides the following:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Labor Law § 200 is the "codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site." *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352 (1998); *see also Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 272 (1st Dept 2007) ("Labor Law § 200, the codification of the common-law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work").

Claims brought pursuant to Labor Law § 200 either involve situations in which a worker was injured as a result of a defective or dangerous condition at a work site, or involve the "'manner in which work was performed.'" *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dept 2008). In the present case, a defective condition at the work site is not alleged, only the "manner in which work was performed" is being challenged. *Ortega*, 57

A.D.3d at 61. Specifically, Amendola alleges that defendants failed to provide him with a skid-proof ladder, that they did not provide him with other safety equipment, that they did not move the desk from where he was working, and that they did not properly supervise the worksite, among other allegations.

A. Labor Law § 200 Claims As Against HCZ

Amendola does not address his Labor Law § 200 or common-law negligence claim in his memorandum of law. Regardless, HCZ has no liability to Amendola as owner as HCZ did not devise the method by which Amendola would perform his job, nor did it exert supervisory control over the operation. *See Comes v. New York State Electric and Gas Corporation,* 82 N.Y.2d 876, 877 (1993) ("[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 common law or under Labor Law § 200"). Moreover, City View supplied Amendola with his ladder.

Accordingly, HCZ's motion for summary judgment is granted with respect to Amendola's claims under Labor Law § 200 and common-law negligence.

B. Labor Law § 200 Claims As Against Tishman:

Amendola cannot sustain a Labor Law § 200 claim or common- law negligence claim against Tishman because there is no evidence to show that Tishman had control or supervision over Amendola's work. *Pirrotta v. EklecCo*, 292 A.D.2d 362, 364 (2d Dep't 2002) ("A property owner may be held liable under Labor Law § 200 'only where the

plaintiff's injuries were sustained as a result of a dangerous condition at the work site, rather than as a result of the manner in which the work was performed, and then only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the [dangerous] condition'") (quoting *Giambalvo v. Chemical Bank*, 260 A.D.2d 432, 433 (2d Dep't 1999)).

II. Labor Law § 240(1) Claims (HCZ and Tishman's motions)

Labor Law § 240(1) imposes requirements on owners, contractors, and their agents to provide protective devices to workers, but only if the workers are involved in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.

Activities that are considered decorative modifications fall outside of the statute. *Broggy v. Rockefeller Group, Inc.*, 30 A.D.3d 204, 206 (1st Dept 2006), *affd* 8 N.Y.3d 675 (2007). In general, for work to be defined as an alteration, versus cosmetic changes, the work must make a "significant physical change to the configuration or composition of the building or structure." *Panek v. County of Albany*, 99 N.Y.2d 452, 457-458 (2003), citing *Joblon v Solow*, 91 N.Y.2d 457, 465 (1998). Defendants also cite to *Wormuth v. Freeman Interiors, Ltd.*, 34 A.D.3d 1329, 1330 (4th Dept 2006), in which the Court held that installing window treatments did not constitute an alteration within the Labor Law. Moreover, the Court has held that not every work done involving "falls off ladders" is a

protected activity under Labor Law § 240 (1). *LaFontaine v. Albany Management, Inc.*, 257 A.D.2d 319, 322 (3d Dept 1999) (citations omitted).

The Court of Appeals has held that "[t]he critical inquiry in determining coverage under the statute is what type of work the plaintiff was performing at the time of injury." *Panek v. County of Albany*, 99 N.Y.2d at 457 (internal quotation marks and citation omitted). Here, Amendola was sent to hang a shade pursuant to a contract between City View and HCZ. Amendola had not performed any work on this contract previously, and his only job on the day of the accident was, in his own testimony, to try to grab the shade and "pocket" it into the bracket. This was the first and only time that Amendola had been to HCZ. Amendola himself even concedes that his work was not an alteration, and states that, "in general," the installation of a "window curtain or drapery in a domestic setting does not implicate the protections of Labor Law § 240 (1)."

Accordingly, because Amendola's activities consisted of only cosmetic changes, and there is no evidence that Amendola's project involved a "significant or permanent physical change" to the building, he is not protected under Labor Law § 240 (1). *Maes v. 408 W. 39 LLC*, 24 A.D.3d 298, 300 (1st Dept 2005) (holding that plaintiff's "loosening nuts and sliding the temporary [advertising] banner off the bolts attached to the building," while being hoisted up approximately 35 feet, was not an alteration).

At oral argument on these motions, Amendola asserted that *Fox v. H&M Hennes & Mauritz, L.P.*, 83 A.D.3d 889, 890 (2d Dept 2011) is comparable to Amendola's situation.

The Court disagrees. *Fox* dealt with whether work constituted a repair or routine maintenance. In this matter, the issue is whether Amendola's work constituted an alteration, an issue that was not addressed in *Fox*.

As no issues of fact remain with respect to whether Amendola's work was covered by Labor Law § 240(1), HCZ and Tishman are granted summary judgment dismissing Amendola's Labor Law § 240(1) claim.

III. Labor Law § 241(6) Claims (HCZ and Tishman's motions)

Labor Law § 241(6) provides protection for plaintiffs involved in "construction, excavation and demolition." *Toro v. Plaza Construction Corp.*, 82 A.D.3d 505, 505 (1st Dept 2011) (internal quotation marks and citations omitted). The statute is meant to protect workers involved in the hazardous work that is inherent in construction, excavation and demolition. *Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 101 (2002).

Although Amendola concedes that "Labor Law does not apply where the construction work is already complete," he argues that he was performing "site preparation," or other broad tasks which would be covered as construction work. However, construction on the building had been completed by the time Amendola arrived at the building. In fact, people occupied the first floor where Amendola was working for more than a year prior to Amendola's accident. As such, it is difficult to imagine what "site preparation" in which Amendola was involved. Instead, Amendola's work was a

separate activity which was "easily distinguishable" from the construction project and he was not intended to be protected under the statute. *Toro*, 82 A.D.3d at 506.

Accordingly, as no questions of fact remain, HCZ and Tishman are granted summary judgment dismissing Amendola's Labor Law § 241 (6) claim. Moreover, even if Amendola was engaged in a protected activity, Tishman would not be held liable to Amendola under Labor Law § § 240 (1) or 241 (6), because Amendola's work did not arise out of the contract between Tishman and HCZ or the contract between Tishman and City View.

IV. Industrial Code Violations

Amendola's complaint alleges that HCZ and Tishman violated certain provisions of the Industrial Code, OSHA, RSBA and other general statutes. Violations of the Industrial Code provisions form the basis for Labor Law § 241(6) liability but do not constitute a cause of action in and of themselves. Moreover, violations of the Industrial Code are the only provisions which may serve as a basis for a Labor Law § 241(6) claim; the other statutes cannot support such a cause of action. *See e.g. Cun-En Lin v. Holy Family Monuments*, 18 A.D.3d 800, 802 (2d Dept 2005) (violations of OSHA do not provide a basis for Labor Law § 241(6) liability). Therefore, HCZ and Tishman are granted summary judgment dismissing these causes of action.

V. Indemnification

As explained above, Tishman was hired by HCZ to be the construction manager on a project. Tishman was completely responsible for the project as contemplated by the parties, and its duties included hiring the trade contractors, supervising them, and paying them directly.

For purposes of Amendola's Labor Law arguments, HCZ contends that the lobby shade work was not part of the original construction project. For instance, in its memorandum of law, HCZ adamantly states that Amendola's work was distinguishable from the preceding project. Specifically, HCZ states, "all evidence shows . . . that the 2006 lobby shades were not part of the larger project." HCZ continues, "the lobby shades work was unanticipated . . . the shades also did not appear in the contracts for the preceding project."

Then, for the purposes of the indemnification claims, HCZ maintains that the preceding building-wide project is instructive. Among other things, HCZ argues that Tishman's "course of conduct" implied a duty to act as HCZ's agent and that Tishman facilitated the lobby shades work. HCZ even states that the lobby shades agreement was merely an oral contract and was never "memorialized into an integrated writing."

HCZ's arguments are unpersuasive. The evidence demonstrates that there was a separate, binding contract between HCZ and City View for the lobby shades and that Tishman was not acting as the construction manager, or agent, for HCZ, for Amendola's

work. The construction had been completed prior to Amendola's accident, and the superintendent had been moved off-site as of March 15, 2006, only returning to complete punch list items. Construction had been completed in the lobby for over a year. A problem arose with the glare in the lobby, and Tishman advised HCZ to retain City View to hang three shades in the lobby. The lobby shades were not a punch list item, nor were they something contemplated in the original construction project. Moreover, the lobby shades were not included in the Trade Contract between Tishman and City View, nor were they included in any of the five change orders.

HCZ independently spoke to City View on the phone and when the parties agreed on a price for the shades, an oral contract was formed. Then a written proposal was sent directly to HCZ on March 22, 2006 for the three shades, memorializing the conversation. On April 20, 2006, Amendola was sent to HCZ to finish installing the three shades. On June 19, 2006, HCZ, again, directly received a proposal from City View, which incorporated pricing from the three shades already completed in the lobby and also for additional shade work. HCZ sent payment directly to City View for the lobby shades and this additional work. An e-mail in the record indicates that Tishman or HCZ measured the lobby windows. However, it is undisputed that HCZ was advised to contact City View directly for this specific job of hanging the lobby window shades.

Tishman was not a party to the contract which was entered into directly between HCZ and City View. The fact that Tishman may have had other dealings with City View

is irrelevant. As Tishman was not a party to the contract between City View and HCZ, it cannot be bound to any contractual indemnification provision within that contract. *See e.g. Leiner v. Schumacher & Co.*, 78 A.D.3d 1131, 1132 (2d Dept 2010) ("Since there was no contract between GVA Williams and Schumacher, . . . we award summary judgment to Schumacher dismissing GVA Williams's cross claim for contractual indemnification asserted against it"). There is no basis for HCZ to seek contractual indemnification from Tishman, as Tishman was not a party to the contract between HCZ and City View.

In addition to moving for summary judgment and seeking contractual indemnification from Tishman, HCZ is seeking summary judgment on its cross claims against Tishman and is seeking common-law indemnification, and contribution. However "[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 A.D.2d 245, 246 (1st Dept 1998).

Accordingly, HCZ's motion for summary judgment on its cross claims against Tishman is denied.

VI. HCZ's Third-Party Action Against City View

HCZ brought a third-party action against City View for common-law and contractual indemnification, contribution and breach of contract. However, as previously mentioned, because the complaint has been dismissed in its entirety, all third-party actions are also dismissed. *Turchioe*, 256 A.D.2d at 246.

Nevertheless, HCZ argues that it has viable claims against City View because there was a trade contract in place between Tishman and City View which named HCZ as one of the indemnitees and also required City View to procure insurance. Amendola's accident did not arise from work being done pursuant to this trade contract, so this contract is not controlling. The contract between HCZ and City View did not obligate City View to obtain insurance and does not require City View to contractually indemnify HCZ for any legal fees which may arise out of City View's possible negligence.

Accordingly, HCZ's motion for summary judgment on its third-party complaint is denied.

In accordance with the foregoing it is

ORDERED that Harlem Children's Zone, Inc.'s and Rheedlen 125th Street, L.L.C.'s motion (motion sequence number 002) for summary judgment on their cross claims against Tishman Construction Corporation, Tishman Construction Corporation of New York, Tishman Construction Corporation of Manhattan and on their third-party claims against City View Blinds of N.Y., Inc. and Abalene Decorating, Inc. is denied; and it is further

ORDERED that Harlem Children's Zone, Inc.'s and Rheedlen 125th Street, L.L.C.'s motion (motion sequence number 003) for summary judgment dismissing Luis Amendola's complaint is granted and the complaint is hereby severed and dismissed in its entirety as against Harlem Children's Zone, Inc. and Rheedlen 125th Street, L.L.C., with

costs and disbursements to Harlem Children's Zone, Inc. and Rheedlen 125th Street, L.L.C., as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, as a necessary consequence of the dismissal of the complaint as against Harlem Children's Zone, Inc. and Rheedlen 125th Street, L.L.C., the third-party action and all cross claims involving these two parties are dismissed; and it is further

ORDERED that Tishman Construction Corporation, Tishman Construction Corporation of New York, Tishman Construction Corporation of Manhattan's motion (motion sequence 004) for summary judgment dismissing Luis Amendola's complaint is granted and the complaint is hereby severed and dismissed in its entirety as against Tishman Construction Corporation, Tishman Construction Corporation of New York, Tishman Construction Corporation of Manhattan, with costs and disbursements to Tishman Construction Corporation, Tishman Construction Corporation of New York, Tishman Construction Corporation of Manhattan, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

FILED
JAN 18 2012
COUNTY CLERK'S OFFICE
NEW YORK

This constitutes the decision and order of the Court.

Dated: New York, New York
January 11, 2012

ENTER:

Saliann Scarpulla, J.S.C.