

Rey v W2001 Metropolitan Hotel Realty, L.L.C.
2012 NY Slip Op 30676(U)
March 15, 2012
Supreme Court, New York County
Docket Number: 106555/2010
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

Index Number : 106555/2010

LOUIS B. YORK
J.S.C.

PRESEN

REY, JUAN PABLO

VS.

W2001 METROPOLITAN HOTEL

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

PART 2

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, It is ordered that this motion is

**IN ACCORDANCE WITH THE DECISION OF THE COURT
WITH ACCOMPANYING MEMORANDUM DECISION.**

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAR 21 2012

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/15/12

Rey, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED **LOUIS B. YORK** ☒ 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: PART 2

-----x
JUAN PABLO REY,

Plaintiff,

Index No.: 106555/10

-against-

DECISION

W2001 METROPOLITAN HOTEL REALTY, L.L.C.
and W2001 METROPOLITAN HOTEL OPERATING
LESSEE, LLC and OMNIBUILD LLC,

Defendants.

-----x
OMNIBUILD LLC,

Third-Party Plaintiff,

-against-

T.F. NUGENT, INC.,

Third-Party Defendant.

-----x
LOUIS B. YORK, J.:

Motion sequence numbers 002 and 004 are consolidated for disposition.

In motion sequence number 002, defendants W2001 Metropolitan Hotel Realty, L.L.C. and W2001 Metropolitan Hotel Operating Lessee (together, Metropolitan), and Omnibuild LLC (Omnibuild) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against them, and Omnibuild moves, pursuant to CPLR 3212, for summary judgment on its third-party action for contractual and common-law

indemnification claims asserted against third-party defendant T.F. Nugent, Inc. (Nugent).

In motion sequence number 004, Nugent moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's and third-party plaintiff's complaints and all cross claims asserted as against it, and granting summary judgment in its favor on Omnibuild's claims for contractual and common-law indemnification.

BACKGROUND

Plaintiff is a laborer who alleges that he was injured while working at a job site on April 1, 2010. Specifically, plaintiff says that, at the time of the occurrence, he was standing on a rolling Baker scaffold and fell, sustaining injuries to his head and foot.

According to the complaint, Metropolitan was the owner of the premises where the accident occurred, Omnibuild was the general contractor for the project, and Nugent was a subcontractor.

At the time of the accident, plaintiff was employed as a foreman by third-party defendant Nugent, and had been so employed for eight years. On the day of the accident, plaintiff was working as a foreman/painter at the job site, where two other Nugent laborers were also working; there was also a "main foreman" employed by Nugent who was not present at the time of

the accident and did not visit the job site on a daily basis. According to plaintiff, this main foreman kept the time sheets for the Nugent employees who worked at various locations each day.

The job that plaintiff was performing involved using a double Baker scaffold, as well as a regular brush, rollers, pan, paint pan, spackle knives and plaster compound, but he did not use a hard hat, nor was a hard hat provided for him. His footwear consisted of basketball sneakers. The ceiling that plaintiff was painting at the time of the incident was approximately 10-12 feet high, reaching a height of 20-22 feet in the inside cove.

At the time of the accident, both vertical sections of the scaffold were connected, and the top of the platform was 10-12 feet in height. Plaintiff was painting the inside of the cove ceiling, which he was able to reach by standing on the platform, and he testified that he did not need any other device to reach the ceiling. Plaintiff stated that he would ride the rolling scaffold while his coworker pushed the scaffold to move him to another area of the lobby.

The Baker scaffold that plaintiff was using was not the one provided by Nugent, but was another one that was stored in the basement of the building where the work was being performed. Plaintiff and his coworker retrieved the disassembled scaffold

from the basement and assembled it themselves. Plaintiff said that he obtained permission to use the scaffold from the Omnibuild assistant project manager/field supervisor, "Danny." Plaintiff said that he wanted to use the non-Nugent scaffold because it was longer than the one provided by Nugent. Plaintiff also said that the Nugent scaffold was assembled differently from the non-Nugent scaffold that he used, and he believed that the non-Nugent scaffold was safer.

Plaintiff maintains that he inspected the scaffold after he and his coworker assembled it to ensure that all of the latches were secure, that all of the teeth were properly inserted into the vertical member, and that the screws were properly fastened.

Plaintiff further averred that, as he was assembling the scaffold, he inspected each of the parts and that none was broken or defective. Further, the wheels were steady, and plaintiff noticed no defects in the wheels.

At the time of the accident, plaintiff was standing up, riding the rolling scaffold, while his co-worker pushed the scaffold to another area. Plaintiff was not holding on to any part of the scaffold, but was holding on to the cove of the ceiling. After the scaffold was rolled a few feet, plaintiff alleges that one of the scaffold's four wheels came off, the scaffold tipped to one side, and plaintiff fell to the ground.

For the two days prior to the accident, plaintiff had used

this particular scaffold without incident, and he did not have any problem with the movement of the scaffold. In addition, there were no complaints made about the scaffold.

Plaintiff testified that "Danny" was present at the job site on the day of the accident, but that he did not spend much time in the area where plaintiff and his coworkers were working. Danny did not give any instructions to plaintiff or his fellow Nugent workers, nor did he instruct them on how to assemble the scaffold. During the three days that plaintiff was at the job site prior to the accident, he stated that no safety meetings were held, nor were the scaffolds inspected by OSHA or representatives from the New York City Department of Buildings.

Dionysios Neofitidis (Neofitidis), the assistant project manager and field supervisor at the project for Omnibuild, was deposed in this matter and testified that Omnibuild was the construction manager for the multi-phase renovation of the Double Tree Metropolitan Hotel, and that Omnibuild's responsibilities involved refinishing work throughout the lobby, bar and restaurant of the hotel. According to Neofitidis, Omnibuild hired Nugent to perform wall preparation, wall painting and installation of wall coverings. As part of his function, Neofitidis would be at the job site whenever work was being done and when any subcontractors were working.

Neofitidis stated that it was expected that Nugent would

provide the scaffolding and other equipment for its workers. Neofitidis averred that there were two Baker scaffolds in the hotel's basement, one belonging to Nugent, but that he did not know who owned the second Baker scaffold. The workers were free to use whichever scaffold that they preferred, and the decision as to which scaffold to use was left up to the worker.

Neofitidis said that he recalled that all of the component parts for the non-Nugent scaffold were present, that the wheels for that scaffold were already assembled, and that he did not notice anything unusual about the wheels. The scaffold used by plaintiff was assembled by plaintiff and other Nugent workers.

Neofitidis was not present when the accident occurred, but when he learned of the accident, he immediately went to the scene and observed the Baker scaffold on the ground, lying on its side, with a couple of paint cans kicked over, and plaintiff lying on the ground. Neofitidis opined that it is a violation of OSHA standards for a worker to remain on a scaffold while the scaffold is being moved.

Neofitidis averred that Nugent instructed its own workers on how the work was to be performed, and that the means and methods employed were left up to the subcontractors; at no point did anyone from Omnibuild direct the manner of plaintiff's work.

Defendants have provided a copy of a code of safe practices developed by the Scaffold Industry Association, Inc. and the

Scaffold, Shoring & Forming Institute, which states that riding a rolling scaffold is very hazardous.

In the complaint, plaintiff alleges common-law negligence, violations of Labor Law §§ 200, 240 (1) and 241 (6), violations of Industrial Code sections 23-15, 23-17, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.28, 23-2.1, 23-2.6, 23-2.8, 23-5.1, 23-5.2, 23-5.3, 23-5.4, 23-5.6, 23-5.7, 23-5.8, 23-5.9, 23-5.10, 23-5.12, 23-5.13, 23-5.14, 23-5.15, 23-5.16, 23-5.17, 23-5.18 and 23-5.19, as well as violations of OSHA regulations.

Defendants assert that they cannot be held liable for plaintiff's injuries pursuant to his causes of action for common-law negligence and violations of Labor Law § 200 because they did not control plaintiff's activities, nor did they direct or instruct him in the manner in which he was to work. Defendants point out that plaintiff has not claimed that he received any instructions from defendants. Moreover, there is no evidence that defendants had any notice, actual or constructive, of any defect in the Baker scaffold that plaintiff alleges caused his accident.

Defendants also claim that they cannot be held liable for plaintiff's injuries pursuant to Labor Law § 240 (1) because plaintiff, by riding the scaffold while it was moving, was the sole proximate cause of his injuries.

Defendants argue that plaintiff's cause of action based on a

violation of Labor Law § 241 (6) must also be dismissed because the Industrial Code provisions relied upon by plaintiff in his bill of particulars to support this Labor Law claim are either insufficient to support such cause of action or inapplicable because they do not relate to the type of scaffold that plaintiff was using.

Lastly, Omnibuild contends that it is entitled to common-law and contractual indemnification from Nugent, should it be held liable to plaintiff, because, pursuant to its contract with Nugent, Nugent is bound to so indemnify Omnibuild for any liability occasioned by Nugent's performance. Motion, Ex. O.

In opposition to the instant motion, plaintiff asserts that it is undisputed that the scaffold was inadequate and defective, since the wheel came off. Plaintiff states that the surveillance footage of the accident, annexed as defendants' Ex. L, clearly shows that a wheel dislodged from the scaffold. The court has viewed the surveillance tape and notes that, after the scaffold tipped over, a wheel was missing, and also notes that plaintiff was riding the scaffold as his coworker moved it.

It is plaintiff's contention that, since the wheel fell off the scaffold, his riding the scaffold cannot be deemed to be the sole proximate cause of the accident and, hence, he is entitled to judgment, as a matter of law, on his cause of action based on a violation of Labor Law § 240 (1).

Finally, plaintiff argues that he has established a prima facie Labor Law § 241 (6) case based on a violation of Industrial Code § 23-5.1. Since this is the only Industrial Code provision argued by plaintiff, the court deems that plaintiff has abandoned his claims based on the other above-referenced Industrial Code sections and OSHA regulations.

Nugent has provided partial opposition to defendants' motion, in which it contends that the contractual provision upon which Omnibuild bases its third-party claim is ambiguous and unenforceable. The contract provision states, in pertinent part:

To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless Contractor ... from and against any loss, cost, expense, damage, injury, liability, claim, demand, penalty or cause of action (including attorney's fees) directly or indirectly arising out of, resulting from or related to (in whole or in part), (1) the Work performed hereunder ... or (b) for whose acts or omissions Subcontractor may be liable. The obligations of Subcontractor under this indemnification shall apply to all matters except those arising solely from the wanton and willful negligence or the legal proceeding or investigation as to which this indemnification may apply, and Subcontractor at Subcontractor's expense, shall assume on behalf of Contractor and conduct with diligence and in good faith the defense thereof with counsel satisfactory to Contractors; ...

Nugent maintains that the above-quoted clause is ambiguous and, therefore, must be construed against Omnibuild as the drafter. In the alternative, Nugent argues that, should the clause not be found to be ambiguous, it violates New York General Obligations Law (GOL) § 5-322.1, since it provides for

indemnification for the contractor's own negligence.

Lastly, Nugent asserts that any common-law indemnification claim asserted as against it must be dismissed since, as plaintiff's employer, it cannot indemnify third parties for its own employee's injuries unless those injuries are "grave injuries." The injuries alleged by plaintiff are: severely comminuted, intra-articular fracture of the right calcaneus; compression and anterior rotation of the calcaneal tuberosity; fracture of anterior process. Nugent claims that none of these injuries constitutes "grave injuries."

In reply to plaintiff's opposition, defendants state that there is no evidence that the scaffold would have failed had plaintiff been using it correctly. Defendants maintain that the scaffold tipped over because of the weight of plaintiff on the top of the scaffold as it was being moved. Further, defendants point out that the surveillance video only shows a wheel missing after the scaffold tipped over, but does not show the wheel coming off the scaffold prior to the tipping.

Defendants also claim that, since Nugent provided plaintiff with a scaffold that he chose not to use in favor of one not provided by Nugent, plaintiff's actions define him as a recalcitrant worker, thereby precluding his maintaining a cause of action based on a violation of Labor Law § 240 (1).

Lastly, defendants reiterate their position regarding the

insufficiency of the cited Industrial Code provisions to sustain plaintiff's Labor Law § 241 (6) cause of action.

In motion sequence number 004, Nugent seeks dismissal of the complaint and third-party action; however, its arguments only relate to the third-party action and it states the same arguments that it posited in its partial opposition to defendants' motion (motion sequence number 002).

In partial opposition to Nugent's motion, Omnibuild contends that it is entitled to common-law and contractual indemnification from Nugent for the reasons stated above in defendants' motion (motion sequence number 002).

In reply to Nugent's partial opposition to its motion, Omnibuild contends that the alleged ambiguity is merely a de minimis typographical error and does not render the indemnification provision void. Moreover, the provision is not violative of GOL § 5-322.1.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to

raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That branch of defendants' motion (motion sequence number 002) seeking to dismiss plaintiff's causes of action based on common-law negligence and a violation of Labor Law § 200 is granted.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. See e.g. *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 (2d Dept 2007).

In the instant matter, plaintiff argues that the accident occurred because of the means and methods of operation, i.e., the wheel falling off the rolling scaffold, causing the scaffold to tip over. In such circumstances, in order to hold the owner and

general contractor liable under Labor Law § 200, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009).

"[T]here is no evidence in the record that [defendants] actually directed, controlled or supervised plaintiff's work or [were] responsible for doing so. ... Rather, the record shows that ... it was plaintiff's employer ... that actually directed [plaintiff's work] [internal citations omitted]."

Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 (1st Dept 2005).

Defendants are entitled to "judgment as a matter of law by demonstrating that the plaintiff's accident arose from the means and methods of his work, that the plaintiff's work was directed and controlled exclusively by his employer, and that they had no authority to exercise supervisory control over his work."

Robinson v County of Nassau, 84 AD3d 919, 920 (2d Dept 2011); *Persichilli v Triborough Bridge & Tunnel Authority*, 16 NY2d 136 (1965); *Cambizaca v New York City Transit Authority*, 57 AD3d 701 (2d Dept 2008).

Furthermore, the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability ... in the absence of proof of ... actual control." *Brown v New York City Economic Development Corp.*, 234 AD2d 33, 33 (1st Dept 1996).

That branch of defendants' motion (motion sequence number 002) seeking to dismiss plaintiff's cause of action based on a violation of Labor Law § 241 (6) is granted.

Labor Law § 241 (6) states:

"Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241 (6), such proof does not establish liability, and is merely evidence of negligence. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, *supra*.

Not only has section 23-5.1 (b) of the Industrial Code been held to be insufficiently specific to support a claim based on a

violation of Labor Law § 241 (6) (*Schiulaz v Arnell Construction Corp.*, 261 AD2d 247 [1st Dept 1999]) it is inapplicable to the case at bar. Section 23-5.1 of the Industrial Code states:

"Scaffold footing or anchorage. The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used."

Since the scaffold that plaintiff was using was specifically designed to be rolling, the regulation is inapplicable because it refers to a different kind of scaffold. Therefore, plaintiff's cause of action based on a violation of Labor Law § 241 (6) is dismissed.

That branch of defendants' motion (motion sequence number 002) seeking to dismiss plaintiff's cause of action based on a violation of Labor Law § 240 (1) is denied.

Section 240 (1) of the New York Labor Law states, in pertinent part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

As stated by the Court in *Rocovich v Consolidated Edison*

Company (78 NY2d 509, 513 [1991]),

"It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Contrary to plaintiff's assertions, the surveillance video does not conclusively establish that a wheel dislodged from the scaffold, causing plaintiff's accident. A piece of plastic, used to protect the area of the building not being painted and plastered, obscures the bottom of the scaffold at the time that it tipped over. The only facts ascertainable from the video are that plaintiff remained on the top of the scaffold as his coworker moved it, and, after the scaffold fell over, one of the wheels was missing. Therefore, a question of fact remains as to whether plaintiff's remaining on the scaffold when it was in motion was the sole proximate cause of his accident or whether the scaffold's wheel was defective, causing the scaffold to tip over. See *Ramirez v Shoats*, 78 AD3d 515 (1st Dept 2010).

Further, even if plaintiff were found to be negligent, unless his negligence was the sole proximate cause of the accident, defendants' liability, pursuant to Labor Law § 240 (1)

would not be diminished. *Miraglia v H & L Holding Corp.*, 36 AD3d 456 (1st Dept 2007).

The court is not persuaded by defendants' argument that plaintiff was a recalcitrant worker, thereby precluding a claim under Labor Law § 240 (1). To be considered a recalcitrant worker, there must be "proof that a plaintiff disobeyed an 'immediate specific instruction to use an actually available safety device or to avoid using a particular unsafe device'." *Santo v Scro*, 43 AD3d 897, 898-899 (2d Dept 2007). No such proof or allegation has been presented in this case.

Based on the foregoing, that portion of defendants' motion seeking to dismiss plaintiff's cause of action based on a violation of Labor Law § 240 (1) is denied.

That branch of Nugent's motion (motion sequence number 004) seeking summary judgment dismissing Omnibuild's third-party complaint for common-law indemnification is granted.

To hold an employer vicariously liable to third persons for injuries sustained by its employee, it must be shown that the employee suffered a grave injury. *Rubeis v Acqua Club, Inc.*, 3 NY3d 408 (2004); *Barbieri v Mount Sinai Hospital*, 264 AD2d 1 (1st Dept 2000). There is no claim or allegation that plaintiff suffered a grave injury so as to render Nugent liable to defendants, nor that there was a prior agreement between the parties to hold Nugent so liable.

That branch of Nugent's motion seeking to dismiss that portion of Omnibuild's third-party complaint seeking contractual indemnification is denied.

The court agrees with defendants that the alleged ambiguity in the above-quoted indemnification provision is a mere de minimis typographical error and, furthermore, relates to the defense portion of the clause which is not in issue at this time.

The court disagrees with Nugent's argument that the provision violates GOL § 5-322.1, because it contains the recognized savings provision "to the fullest extent permitted by law." *Williams v City of New York*, 74 AD3d 479 (1st Dept 2010).

However, the court declines to grant without prejudice that portion of defendants' motion (motion sequence number 002) seeking summary judgment in favor of Omnibuild for its contractual indemnification claim against Nugent because, since liability has yet to be established, it would be premature to render a decision on this issue at this time.¹ *D'Angelo v Builders Group*, 45 AD3d 522 (2d Dept 2007).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of defendants' motion (motion

¹The court notes that Omnibuild did not ask for a conditional finding of indemnification.

sequence number 002) seeking summary judgment dismissing plaintiff's causes of action asserted as against them for common-law negligence and violations of Labor Law §§ 200 and 241 (6) is granted and those causes of action are hereby dismissed; and it is further

ORDERED that the portion of defendants' motion (motion sequence number 002) seeking summary judgment dismissing plaintiff's cause of action asserted as against them for a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that the portion of defendants' motion (motion sequence number 002) seeking summary judgment in favor of Omnibuild LLC on its cause of action for common-law and contractual indemnification asserted as against T.F. Nugent, Inc. is denied; and it is further

ORDERED that the portion of T.F. Nugent, Inc.'s motion (motion sequence number 004) seeking summary judgment dismissing plaintiff's complaint and Omnibuild LLC's third-party cause of action asserted as against it for contractual indemnification is denied; and it is further

ORDERED that the portion of T.F. Nugent, Inc.'s motion (motion sequence number 004) seeking summary judgment dismissing Omnibuild LLC's third-party cause of action asserted against it

for common-law indemnification is granted and said cause of action is hereby dismissed.

Dated: 3/15/12

ENTER:

Luy

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAR 21 2012
COUNTY CLERK'S OFFICE
NEW YORK