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

PRESENT: SALIANN SCARPULLA PART 19

Justice

Index Number : 111972/2007
GARCIA, SEGUNDO F.
vs
160 FRONT STREET ASSOCIATES,
Sequence Number : 007
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 and motion sequence no. 008 are decided in accordance with the accompanying memorandum decision.

FILED

JUN 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/19/12

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

----------X

SEGUNDO F. GARCIA,

Plaintiff,

Index No.: 111972/2007

-against-

155 WATER STREET ASSOCIATES, LLC,

Defendant.

----------X

155 WATER STREET ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

EFI CONSTRUCTION CORP.,

Third-Party Defendant.

----------X

SALIANN SCARPULLA, J.:

This Labor Law action arises out of a workplace accident sustained by plaintiff Segundo F. Garcia ("Garcia") as he was performing demolition work in a building owned by defendant 155 Water Street Associates, LLC ("155 Water Street"). In his complaint, Garcia alleges that 155 Water Street was negligent in its ownership and supervision of the premises. Specifically, Garcia contends in his first cause of action that 155 Water Street was negligent and also that it had actual and/or constructive notice of the dangerous and defective conditions at the work site. In his second cause of action, Garcia alleges that 155 Water Street violated Labor Law § 200. In his third and fourth causes of action

Garcia claims that 155 Water Street failed to comply with Labor Law §§ 240 (1) and 241 (6). In his bill of particulars, Garcia elaborates that 155 Water Street failed to provide him with a safe place to work, that it failed to supervise his work, that it failed to provide Garcia with proper safety equipment including "safety nets, guard rails, safety harnesses, safety lines, tethers or lanyards, scaffolding, ropes, hard hats," and that 155 Water Street violated portions of the New York State Industrial Code and provisions of the Occupational Safety and Health Administration Act (OSHA).

155 Water Street denied the material allegations of the complaint and brought a third-party action against plaintiff's employer, third-party defendant EFI Construction Corp. ("EFI), alleging four causes of action grounded in indemnification and failure to procure insurance.

Background and Factual Allegations

Garcia alleges that, on April 13, 2007, a piece of Sheetrock fell on him and he then fell off a ladder as he was performing demolition work at 155 Water Street in Brooklyn. EFI was hired by 155 Water Street to perform all of the renovations in the building and did not utilize any subcontractors. The most recent renovations proposal between EFI and 155 Water Street, dated October 20, 2006, indicated that EFI was to remove the interior non-bearing partitions throughout the building. It was signed by Joshua Guttman, who is a member of 155 Water Street, and Ephraim Herskovitz ("Herskovitz"), the president of EFI. Guttman is the father-in-law of Herskovitz.

In addition to the proposal, a separate indemnification agreement, dated April 26, 2001, was signed by the parties, and states:

> Dear Mr. Herskovits:
> I agree to give you construction work for your company EFI Construction from the real estate companies I own. Because we understand that I am going to give you a lot of business I need you to sign this letter at the bottom agreeing that EFI will have insurance for the work it does at my properties and that if anyone sues one of my companies for a claim caused by EFI and my company is found responsible to pay the claim for a claim [*sic*] that EFI will indemnify that company that hired it from any damage or loss.
> Instead of writing a new letter each time EFI does work for my company you agree that this agreement will apply to each project EFI works on for any of my companies.

Garcia testified twice as to the circumstances surrounding his accident. In his first deposition, on October 19, 2009, Garcia testified that he was working for a company called Guma Construction and reported to a supervisor named Mr. George. He testified that Mr. George owned 155 Water Street and that Mr. George told Garcia what to do every day when he arrived at the building. Garcia continued that Mr. George's son, Mr. Seven, also worked at the site with Garcia.

Garcia stated that he was asked to break down walls at 155 Water Street. To perform this job, he used a hammer and scissors to cut the wires in the ceiling. Garcia testified that he was never given any safety equipment, such as protective gear, safety goggles or a hard hat. Garcia was working on the third floor at the time of the accident. He had been working for approximately two months on the other floors before the accident.

Garcia testified that he would stand on a ladder as he performed his work and that he had never had a problem with his ladder in the past. He would stand on a ladder, and then use the sledgehammer to break the Sheetrock in the walls. Garcia testified that there were cables behind the walls, but the electricity was turned off. He would then cut the wires to take them out.

Garcia testified that, on the day of the accident, "Mr. Seven" told Garcia that he would be breaking down the entire ceiling on the third floor. The ceiling was about eight feet high. Garcia stated that he climbed up to the next to the last step on the ladder and then used his sledgehammer to knock down the ceiling. He had removed about half of the ceiling, which he believed was made of wood and Sheetrock, prior to his accident.

Garcia claimed that Mr. George or Mr. Seven would not tell him how to take down the ceiling, but that they would come by and check on Garcia every once in a while to see how he was doing. Garcia testified that he just learned how to do the job by himself.

On October 19, 2009 Garcia described his accident as following: "I was working and the ceiling came on top of me and threw me down to the floor. And after that I don't remember anything else because I was like, dreaming. I don't know why it came down because I was working." *Garcia Dep., October 19, 2009* at 50. He had swung the sledgehammer over his head to hit the ceiling and then the ceiling came down, hitting him on his leg and back. The ladder and his tools also fell down. Garcia continued that the

ceiling had never fallen on his head before this time, that when it fell, it would fall to the side of the ladder.

Garcia claimed that he told Mr. Seven what had happened and that Mr. Seven told him to go to the hospital. Garcia went home and then went to the hospital about twelve hours later. Garcia then testified that his employer filed for worker's compensation benefits and that Garcia began to receive those benefits.

Garcia testified a second time on May 5, 2011. When Garcia testified for the second time, he stated that he had been working for Mr. George for 15 years, but that Mr. Seven was the one in charge at the work site. However, Garcia also testified that Mr. George "was the only guy that used to pay our salary ... he never said that he was the owner, but he was in charge of everything that we were doing. And he was giving instructions about how to do the work." *Garcia Dep., May 5, 2011* at 44-45. He also stated that his checks had the company name "Guma Construction" written on them.[1]

Garcia stated that, on the date of the accident, prior to the ceiling coming down, he was "pulling some wires, the power wires." *Id.* at 125. He was pulling them for three to four minutes, and then, "after that I pulled again and then the whole thing fell down. And then everything fell down on me." *Id.* In contrast to his October, 2009 testimony, in May, 2001 Garcia claimed that he had thrown the sledgehammer to the ground, and was using both hands to pull at the wires. The ceiling, which was directly on top of his head,

[1] In his complaint Garcia alleged that he was employed by EFI, and pay stubs in the record confirm that Garcia was employed by EFI.

had been already broken apart by his hammer. Then he said that he was ready to "pull down whatever was up there." *Id.* at 126. Garcia had scissors to cut the wires but chose not to use them. Garcia claimed that it was "his decision" to knock down the ceiling the way that he did.

When Garcia was asked if he ever thought that the ceiling would come down on his head after pulling at the wires, he testified "I didn't think that. I didn't think about that. I pulled down and then I fell. And the ladder fell down and the rest of the stuff up there fell down too." He continued that not only did the portions of the ceiling hit his leg and back, but his head too. No one had told him to pull on the wires; he just did so because he "had been doing it in other parts of the building." *Id.* at 131. Garcia then told Mr. Seven what happened, who said "no problem, go home." *Id.* at 136.

Regarding safety equipment, in May, 2011 Garcia testified that his company did provide him with a hard hat, although he left it behind at a prior job. He continued that, at the current job, although there were safety hats in the equipment storage area, he was never provided with one.

Herskovitz testified that he used to be the president of EFI, a construction company, which hired laborers, painters and masonry workers. He continued that he had known Garcia since approximately 2000, when Garcia started working for EFI. Herskovitz testified that he would be the one to tell the EFI workers what work they

would be doing every day, and that there was no foreman. He had never heard of Mr. Seven or Mr. George.

Herskovitz stated that he instructed his employees to pull down Sheetrock ceilings either with the crowbar or with two hands. He continued that "[y]ou don't pull something down that's right above your head, over your head." *Id.* at 24. Herskovitz also testified that once the Sheetrock was down, if the worker was removing metal studs and there were wires in the way, he would tell him to pull the wires out. *Id.* at 30.

With respect to safety equipment, Herskovitz testified that every EFI employee was given a hard hat for the job. He continued, "Every morning, I gave each employee a hard hat and they wrote with magic marker their name on it and it was their responsibility to wear it. On a given day, if I saw a person not wearing it, I would say 'casco'. That's Spanish for hard hat." *Id.* at 24. He also stated that the employees were required to wear safety goggles.[2]

Herskovitz testified that Guttman never instructed any of the workers on how to do their job. He continued that he personally saw Garcia taking down Sheetrock partitions. Herskovitz also stated that scaffolds were not used for this particular job because from the six-foot ladder, you can comfortably reach the job. *Id.* at 35.

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[2] Herskovitz testified that he would never assign any other worker to work with Garcia because Garcia was a "drunk." *Id.* at 34. He continued that if Garcia showed up at work drunk, he would send him home.

Herskovitz only learned about Garcia's accident when he was served with the lawsuit papers. He testified that Garcia never told him that he had been in an accident. Herskovitz was also not aware of a worker's compensation claim that had been made until the bookkeeper told him about it. Finally, Herskovitz stated that the only service Guma Construction performed at the work site was to remove garbage.

Guttman confirmed that he is a member of Guma Construction and that it is a garbage hauling company. Guttman testified that he did not ever remember meeting Garcia and that Garcia never worked for Guma Construction. Guttman also testified that he does not know a Mr. George or a Mr. Seven.

In his affidavit submitted on these motion Guttman states the following with respect to 155 Water Street's involvement in the construction project:

> Finally, I never performed any work, supervised or instructed any workers or otherwise had any control over the renovation work performed at 155 Water Street. All work was performed by EFI who provided all of the materials and tools and supervised all of their workers. Worker safety was also the responsibility of EFI. I merely visited the building on occasion to review work progress. Other than ownership of the property, 155 Water Street Associates LLC had no involvement with the renovation work performed at the building.

Affidavit of Joshua Guttman, ¶ 7.

Now that discovery is complete 155 Water Street moves for partial summary judgment dismissing Garcia's Labor Law § 200 cause of action, and for judgment on its third-party contractual indemnification claims against EFI (motion sequence no. 7). In motion sequence no. 8, EFI moves for an order dismissing all of Garcia's claims and the

third-party claims. Garcia cross-moves for summary judgment in his favor on his Labor Law § 240(1) cause of action.

Discussion

Garcia's Cross Motion is Not Untimely:

Both 155 Water Street and EFI oppose Garcia's cross motion as being untimely. They argue that, pursuant to the part rules of this court, summary judgment motions were to be made within 60 days after the note of issue was filed. Garcia claims that his cross motion was not untimely. Regardless, "[a] cross motion for summary judgment ... may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion [internal quotation marks and citations omitted]." *Filannino v Triborough Bridge & Tunnel Authority*, 34 AD3d 280, 281 (1st Dept 2006). Garcia's cross motion for summary judgment on his Labor Law § 240 (1) claim will be considered by the court since it addresses the same Labor Law cause of action that is the subject of EFI's timely motion.

Garcia's Labor Law § 200 and Common Law Negligence Claims:

Labor Law § 200 provides the following:

> 1. 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 Construction Co.*, 91 NY2d 343, 352 (1998).

Claims brought pursuant to Labor Law § 200 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 the work is performed." *Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008).

In his complaint, Garcia contends generally in the first cause of action that 155 Water Street had notice of a defective condition at the work site. However, Garcia has abandoned this claim, as he argues on this motion that his accident was allegedly caused by the manner in which the work was performed. As Garcia's first cause of action is predicated on an alleged dangerous and defective condition at the worksite and that claim has now been abandoned, Garcia's first cause of action is dismissed.

Garcia does not oppose 155 Water Street's motion for summary judgment as "it pertains to Labor Law § 200 as Water Street did not supervise the work." Affirmation of Ian Asch, ¶ 145. Accordingly, Garcia's second cause of action, based on an alleged Labor Law § 200 violation, is also dismissed.

Garcia's Labor Law § 240 (1) Claim:

Labor Law § 240 (1) was designed to protect workers against elevation-related risks and states the following:

> 1. All contractors and owners and their agents ... 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.

Labor Law 240 (1) "provides that the statutory duty is nondelegable. It 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 a strict liability statute where, if an accident is caused by a violation of the statute, plaintiff's comparative negligence is not a defense. *Cahill v Triborough Bridge and Tunnel Authority,* 4 NY3d 35, 39 (2004).

With respect to Labor Law § 240 (1), the Court of Appeals has concluded that "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 (2009). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection [internal quotation marks and citation omitted]." *Montalvo v J. Petrocelli Construction, Inc.*, 8 AD3d 173, 174 (1st Dept 2004).

Here, EFI argues that because Garcia's actions were the sole proximate cause of his injury, Garcia's Labor Law § 240 (1) claim should be dismissed. There will be no liability under Labor Law § 240 (1) if a jury finds that Garcia's actions were the sole proximate cause of his injuries. *See e.g. Cahill v Triborough Bridge & Tunnel Authority,* 4 NY3d at 39 ("[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability").

EFI contends that Garcia testified that he chose to pull out the wires in the ceiling, despite being provided with wire cutters, and that he was not instructed to perform the demolition in this manner. According to EFI, had Garcia removed the Sheetrock first before pulling on the wires, there would have been no debris that could have fallen on him.

EFI further argues that, even if Garcia was not the sole proximate cause of his injuries, Garcia has not pointed to any statutory violation which could have caused his accident. EFI notes that the ladder is not alleged to have been defective and that scaffolds were not used because from a six-foot ladder, a worker can comfortably reach the ceiling.

Garcia maintains that he should be granted summary judgment with respect to his Labor Law § 240 (1) claim because, regardless of whether Garcia was injured from the falling debris or his fall, 155 Water Street should have provided him proper safety devices such as scaffolding or netting. Garcia states that he was provided with "an exposed ladder" and nothing else and that the ladder itself does not have to be defective.

With respect to proximate cause, Garcia claims that Herskovitz never told the employees not to remove the entire Sheetrock before the wires were to come out. And, despite conflict within Garcia's testimony, even if Garcia did pull on the wires, the act of pulling on the wires that were part of the ceiling he was demolishing would not be so extraordinary as to sever the connection between Garcia's accident and 155 Water Street's statutory violation. Garcia continues that this failure to provide more than a ladder as a safety device was the proximate cause of the accident, regardless of what method Garcia used to remove the Sheetrock.

Garcia's conflicting deposition testimony raise questions of fact with respect to sole proximate cause which cannot be determined on a motion for summary judgment. For example, Garcia first testified that he solely used his sledgehammer to knock down the Sheetrock, and that the Sheetrock came down on his legs and back, causing him to fall off the ladder.

In his second deposition, Garcia testified that he pulled on power wires in the ceiling, and then the ceiling came down on his body and head. He claims that he was never told how to perform demolition work and that he did everything on his own. Garcia did not even know that he worked for EFI at the time of his accident. He said that he told Mr. Seven that he had been in an accident and, in the first deposition, Mr. Seven had told him to go to the hospital. In the second deposition, Mr. Seven had told him to go home.

Additionally, Garcia testified at his first deposition that he was never given any sort of safety equipment, and then he testified in his second deposition that he was given a safety hat but left it at a previous job. Regardless, he had been at the current job for at least two months and had not been wearing a safety hat.

Herskovitz's testimony directly contradicts Garcia's testimony with respect to the safety protocols used by EFI. For example, Herskovitz testified that it was standard protocol for each EFI employee to be given a safety hat before starting work that morning. Herskovitz also claimed that he would instruct EFI employees, including Garcia, on how to remove the Sheetrock. Herskovitz testified that he did not instruct Garcia to pull on the wires if there was Sheetrock still directly above his head.

No one was present at the time of Garcia's accident except for Garcia. Garcia apparently did not tell anyone in detail what had happened. Garcia did testify that the ladder also fell, along with the debris. Accordingly, whether or not Garcia was the sole proximate cause of his accident is a sharply disputed factual issue which must be decided at trial. Credibility issues are "properly left for the trier of fact." *Yaziciyan v Blancato*, 267 AD2d 152, 152 (1st Dept 1999).

With respect to whether or not there has been a statutory violation, as EFI argues, Garcia "was obligated to show that the violation [of section 240 (1)] was a contributing cause of his fall [internal quotation marks and citation omitted]." *Blake v Neighborhood Housing services of New York City, Inc.*, 1 NY3d 280, 289 (2003). Here, Garcia alleges

that he was not given protective devices, yet does not identify how any other device would have prevented his accident. Common sense dictates that Garcia cannot be given protective devices to prevent the ceiling from falling, because that was the goal of his work. Garcia has stated that his safety device of the ladder was inadequate, yet he had been using it for at least 15 days prior to the accident without incident. In *Wilinski v 334 East 92nd Housing Development Fund Corp.* (18 NY3d 1, 11 [2011]), the Court held that whether or not plaintiff's injuries were proximately caused by the lack of a safety device, as required by the statute, was an issue for the trier of fact when the plaintiff "asserts, but does not demonstrate, that protective devices such as blocks or ropes could have been used ... Defendants assert, but fail to demonstrate, that no protective devices were called for."

Likewise, Garcia claims that he was not provided with proper protection, yet he does not explain how additional devices would have prevented his accident. EFI too, has not demonstrated with sufficient evidence how Garcia's ladder as the sole safety device was adequate in this situation. Accordingly, if Garcia is not found to be the sole proximate cause of his accident, questions of fact still remain as to whether or not he was given appropriate safety devices by EFI. Garcia's cross motion for summary judgment on his Labor Law § 240 (1) claim is therefore denied and EFI's motion for summary judgment dismissing Garcia's cause of action for violation of Labor Law § 240 (1) is also denied.

Garcia's Labor Law § 241 (6) Claim:

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to "'provide reasonable and adequate protection and safety' for workers [involved in construction, excavation or demolition] and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501-502 (1993), quoting Labor Law § 241 (6). For a plaintiff to support a claim under Labor Law § 241 (6), "the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles." *Misicki v Caradonna*, 12 NY3d 511, 515 (2009).

In his bill of particulars, Garcia set forth a litany of alleged Industrial Code violations. However, on these motions he has abandoned most of these violations, as well as any purported OSHA violations, and now solely alleges that 155 Water Street violated sections 23-1.7 (a) and 23-3.3 © of the Industrial Code (12 NYCRR Part 23). Section 23-1.7 (a) of the Industrial Code provides the following:

> (a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

The Court of Appeals has held that "Labor Law § 240 (1) should be construed with a common sense approach to the realities of the workplace at issue ... ." *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 140 (2011). In *Salazar v Novalex Contracting Corp.*, *supra*, defendants were granted summary judgment dismissing both the Labor Law §§ 240 (1) and 241 (6) claims as against them, when the violations in question could not be reasonably interpreted to apply to the accident in question. Applying those regulations would have been inconsistent with an integral part of the job.

Here, Garcia was involved in a job where the purpose of the job was to have the ceiling fall down. Providing the type of overhead protection or planking as set forth in the Industrial Code would defeat the purpose of removing the ceiling. Accordingly, Garcia cannot sustain an allegation of a violation of Section 23-1.7 (a) of the Industrial Code.

Section 23-3.3 © of the Industrial Code states the following:

> © Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

Similar to the claim above, Garcia's allegation that section 23-3.3 © of the Industrial Code has been violated cannot be maintained. Providing someone to inspect the ceilings to make sure that they did not fall down, or providing shoring or bracing, when the purpose of the job was the make the ceiling fall down, would serve no purpose.

Because Garcia has not shown that any violations of the Industrial Code have occurred, Garcia's claims under Labor Law § 241 (6) are dismissed.

155 Water Street's Claim for Contractual Indemnification:

The indemnification agreement between 155 Water Street and EFI states that EFI is to indemnify 155 Water Street "if anyone sues one of my companies for a claim caused by EFI." 155 Water Street concedes that a "claim caused by EFI" translates to an indemnification by EFI only if EFI is found to be negligent at trial. 155 Water Street thus concedes that "unless the Court finds some issue exists as to the Garcia's own fault, EFI will owe 155 Water Street contractual indemnification under the agreement at issue." Affirmation of Eric Cooper, ¶ 17.

Because the Court is dismissing Garcia's common law negligence cause of action and the causes of action relating to alleged violations of Labor Law §§ 200 and 241(6), any possible liability imposed on 155 Water Street would be statutory and vicarious, and only imposed under Labor Law 240 § (1). No determination has yet been made with respect to Garcia's or EFI's possible negligence. As such, issues of fact remain with respect to these parties' negligence which require a judicial determination. Accordingly, 155 Water Street's motion for summary judgment on its third cause of action for contractual indemnification from EFI is granted, conditioned on a finding of negligence by EFI. *See e.g. Rivera v Urban Health Plan, Inc.*, 9 AD3d 322, 323 (1st Dept 2004)(holding that the owner was "entitled to summary judgment on the issue of

contractual indemnification, conditioned on a finding of negligence on the part of [contractor].")

155 Water Street's Common Law Indemnification and Contribution Claims:

In its first and second third-party causes of action, 155 Water Street seeks contribution and common-law indemnification from EFI. Besides not opposing EFI's motion for summary judgment dismissing these causes of action, 155 Water Street is not entitled to pursue these claims because EFI was Garcia's employer and 155 Water Street has not demonstrated that a grave injury has occurred. *See e.g. Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 (2005). Accordingly, EFI is granted summary judgment dismissing these causes of action.

In its fourth cause of action, 155 Water Street alleges that EFI failed to procure insurance for the benefit of 155 Water Street. EFI has shown that it fulfilled its obligation to procure insurance on the date of Garcia's accident. 155 Water Street does not submit any evidence to the contrary. As such, EFI is granted summary judgment dismissing the fourth cause of action.

155 Water Street's request for attorneys' fees is denied.

In accordance with the foregoing, it is

ORDERED that 155 Water Street Associates, LLC's motion (motion sequence number 007) for partial summary judgment dismissing Garcia's Labor Law § 200 and common law negligence claims is granted, and its motion for summary judgment on its

third-party claim for contractual indemnification as against EFI Construction Corp. is conditionally granted in the event that a finding of liability against EFI Construction Corp. is made; and it is further

ORDERED that EFI Construction Corp.'s motion (motion sequence number 008) for summary judgment dismissing Garcia's complaint and the third-party complaint is granted with respect to Garcia's first, second and fourth causes of action, and 155 Water Street's first, second and fourth causes of action in the third-party complaint, and the motion is otherwise denied; and it is further

ORDERED that Garcia's cross motion for summary judgment on his Labor Law § 240 (1) claim is denied.

This constitutes the decision and order of the Court.

FILED

JUN 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
June 19, 2012

ENTER:

J.S.C.
SALIANN SCARPULLA