[* 1]

COPY

SHORT FORM ORDER

INDEX No. 06-15387

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-15-11 (#006)
MOTION DATE 3-15-12 (#007)
ADJ. DATE 2-1-12 (#006)
ADJ. DATE 4-25-12 (#007)
Mot. Seq. # 006 - MG
007 - MG

JOSEPH LOUIS RANDOLPH, JR., Plaintiff, -against- RECKSON CONSTRUCTION GROUP NEW YORK, INC. and FIRST DATA REAL ESTATE HOLDING, LLC., Defendants.	EDMOND C. CHAKMAKIAN, P.C. Attorney for Plaintiff 200 Motor Parkway, Suite A-3 Hauppauge, New York 11788
	BRODY, O'CONNOR & O'CONNOR Attorney for Reckson Construction Group New York, Inc. & First Data Real Estate Holding, LLC 7 Bayview Avenue Northport, New York 11768
	ANDREA G. SAWYERS, ESQ. Attorney for Pabco Construction Corp. 3 Huntington Quadrangle, Suite 102S P.O. Box 9028 Melville, New York 11747
RECKSON CONSTRUCTION GROUP NEW YORK, INC. and FIRST DATA REAL ESTATE HOLDING, LLC., Third-Party Plaintiffs, -against- PABCO CONSTRUCTION CORP., BOVE INDUSTRIES, INC. and ISLAND CONCRETE CONSTRUCTION, CORP., Third-Party Defendants.	SOBEL & SCHLEIER, LLC Attorney for Bove Industries, Inc. 464 New York Avenue, Suite 100 Huntington, New York 11743
	O'CONNOR, O'CONNOR, HINTZ & DEVENEY Attorney for Island Concrete Construction, Corp. One Huntington Quadrangle, Suite 3C01 Melville, New York 11747-4415

Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 33, 34 - 38; Replying Affidavits and supporting papers 41 - 42; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by third-party defendant Island Concrete Construction Corp. and the motion by third-party defendant PABCO Construction Corp. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by third-party defendant Island Concrete Construction Corp. for summary judgment dismissing the third-party complaint and all cross claims against it is granted; and it is

ORDERED that the motion by third-party defendant PABCO Construction Corp. for summary judgment dismissing the third-party complaint and all cross claims against it is granted.

Plaintiff Joseph Randolph commenced this action to recover damages for personal injuries he allegedly sustained on August 25, 2003, while working at a construction site for a new building located on Walt Whitman Road, Huntington, New York. Plaintiff allegedly was injured when he tripped over debris on the surface of the ground floor of the unfinished building. The owner of the construction site was defendant First Data Real Estate Holdings, LLC. ("First Data"), which hired defendant Reckson Construction Group of New York, Inc. ("Reckson") as the project's construction manager. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence, and for violations of Labor Law §§ 200 and 240 (1). The complaint also alleges a cause of action under Labor Law §241(6) based on the alleged violation of Industrial Code 12 NYCRR 12-1.7(e)(2) (Tripping Hazards in Work Areas).

Defendants Reckson and First Data joined issue in July and September 2006 respectively, asserting general denials and affirmative defenses to the action. First Data also asserted cross claims against Reckson for common law and contractual indemnification, contribution, and for breach of its contractual obligation to obtain insurance naming First Data as an additional insured. On January 11, 2008, Reckson and First Data commenced a third-party action alleging identical causes of action against various subcontractors at the construction site. The third-party defendants include plaintiff's employer, PABCO Construction Corp. ("PABCO"), the general contractor for the project, Bove Industries, Inc. ("BOVE"), and Island Concrete Construction Corp. ("Island"), which allegedly performed concrete paving services at the construction site. In their answers to the third-party complaint, PABCO and BOVE assert cross claims against Island for contribution and common law indemnification.

Island now moves for summary judgment dismissing the third-party complaint and all cross claims against it on the grounds that it did not direct or control plaintiff's work, did not create the alleged defective condition, and that the accident did not arise from the performance of its work. Island also asserts that it cannot be held liable for breach of contract based upon its alleged failure to procure insurance naming Reckson as an additional insured, as the accident did not arise out of the work it was required to perform under the agreement. Reckson and First Data oppose the motion, arguing that a triable issue exists as to whether the accident occurred on the exterior of the building, and if so, whether Island's acts or omissions caused the accident.

Initially, the Court notes that Labor Law §240 (1) is inapplicable under the circumstances of this case, as it is undisputed that the subject accident, which occurred as a result of a ground level tripping hazard, is not among the type of perils Labor Law §240 (1) was designed to prevent (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Favreau v Barnett & Barnett, LLC***, 47 AD3d 996, 849 NYS2d 691 [3d Dept 2008]). Additionally, where, as here, plaintiff's work required him to remove construction debris from the interior of the unfinished building, he is precluded from asserting a Labor Law §241(6) claim based upon the alleged violation of 12 NYCRR23-1.7(e)(2), since he tripped over the very debris that he was hired to remove (*see* ***Cody v State of New York***, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; ***Smith v New York City Hous. Auth.***, 71 AD3d 985, 897 NYS2d 232 [2d Dept 2010]; ***Marinaccio v Arlington Cent. School Dist.***, 40 AD3d 714, 836 NYS2d 232 [2d Dept 2007]). Therefore, the branches of Island's motion seeking dismissal of the third-party claim and cross claims for contribution, and contractual and common law indemnification based upon the alleged violations of Labor Law §§240 (1) and 241(6), are granted.

As to the third-party claim against Island seeking contractual indemnification based upon its alleged breach of common law negligence and violation of Labor Law § 200, paragraph H of the contract between Island and Reckson states in pertinent part, as follows:

> [T]he Contractor agrees to indemnify and hold harmless the Purchaser, the owner, the ground lesee or any third-party, by law and by the contract documents, arising from the work because of bodily injuries including death at any time resulting thereform, sustained by any person or persons, and injuries to or destruction of property due to any act or omission of the Contractor, its Subcontractors, their employees or agents.

Paragraph 6 of Rider A to the agreement further provides that:

> To the fullest extent permitted by law, the Contractors shall indemnify and hold harmless the Purchaser, the Owner, Owner's consultants, and agents and employees of any of them from and against claims, damages . . . arising out of or resulting from [ ] performance of the Work . . . only to the extent [such damage was] caused in whole or part by negligent acts or omissions of the contractor, anyone directly or indirectly employed by the Contractor or anyone for whose acts the Contractor may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder

It is well established that "[t]he right to contractual indemnification depends upon the specific language of the contract" (***Kader v City of N.Y. Hous. Preserv. & Dev.***, 16 AD3d 461, 463, 791 NYS2d 634 [2d Dept 2005], *quoting* ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Although an indemnification agreement that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such an agreement does not violate the General Obligations Law where it authorizes indemnification "to the fullest extent permitted by law" (***Cabrera v Board of Educ. of City of N.Y.***, 33 AD3d 641, 643, 823 NYS2d 419 [2d Dept 2006]; *see* ***Bink v F.C. Queens Place Assoc., LLC***, 27 AD3d 408, 813 NYS2d 94 [2d Dept 2006]). However, the language "to the fullest extent permitted by law" in General Obligations Law § 5-322.1 contemplates

partial indemnification and is intended to limit a subcontractor's contractual indemnity obligation solely to its own negligence (*see generally* ***Brooks v Judlau Contr. Inc.***, 11 NY3d 204, 869 NYS2d 366 [2008]). Similarly, common law indemnification may only be imposed against those parties who are either actively at fault, or who exercised actual supervision over the work giving rise to the alleged injury (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]; ***Nelson v Chelsea GCA Realty, Inc.***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner or contractor may be held liable in common-law negligence and under Labor Law §200 if they had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Russin v Louis N. Piccado & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]).

Here, Island established its prima facie entitlement to summary judgment dismissing the third-party negligence and Labor Law §200 claims against it for contractual indemnification by submitting evidence that the alleged accident did not arise out of its work, and did not result from any negligent acts or omissions by its employees, agents, or anyone for whose acts it may be held liable (*see* ***Lopez v Consolidated Edison Co. of N.Y.***, 40 NY2d 605, 389 NYS2d 295 [1976]; ***Guinter v I. Park Success, LL***, 67 AD3d 406, 886 NYS2d 880 [1st Dept 2009]; ***Yondt v Blvd. Mall Co.***, 306 AD2d 882, 760 NYS2d 914 [4th Dept 2003]; ***Brown v Two Exchange Plaza Partners***, 146 AD2d 129, 539 NYS2d 889 [1st Dept 1996]; ***Martinez v Tishman Constr. Corp.***, 227 AD2d 298,, 642 NYS2d 675 [1st Dept 1996]). Significantly, plaintiff testified that he was not supervised or controlled by Island, and that he tripped over debris consisting of rocks, wire and conduit piping while he was walking within the interior of the unfinished building. Island's president further testified that Island never performed any work inside the unfinished building, as its work was exclusively limited to the installation of concrete sidewalks and curbs on the exterior of the building.

Island further demonstrated its prima facie entitlement to dismissal of the common law indemnification claims against it, as the adduced evidence indicates that Island was not actively negligent since it did not have authority or control of plaintiff's work or the area of the construction site where he was injured, and it neither created nor had actual or constructive notice of the alleged defective condition (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Russin v Louis N. Piccado & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Cahn v Ward Trucking, Inc.***, __AD3d__, 944 NYS2d 501 [1st Dept 2012]; ***Torres v LPE Land Dev. & Constr.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]).

In opposition, Reckson failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). In particular, the deposition testimony by Reckson's Project Manager that the Union Shop foreman stated that plaintiff injured himself in the parking lot of the construction site after stepping on a rock, constitutes hearsay and is insufficient to raise a triable issue challenging plaintiff's version of the accident (*see* ***Raux v City of Utica***, 59 AD3d 984, 873 NYS2d 812 [4th Dept 2009]; ***Masiello v Belcastro***, 237 AD2d 335, 655 NYS2d 57 [2d Dept 1997]; ***De Rocha v Old Spaghetti Warehouse***, 207 AD2d 978, 617 NYS2d 89 [4th Dept 1994]). Furthermore, the copies of accident reports prepared by Reckson and PABCO were not signed by plaintiff, failed to describe the location of the alleged accident, and merely state that plaintiff twisted his ankle when he stepped on a rock. Even assuming arguendo, that plaintiff did injure himself when he stepped on a rock in the parking lot of the construction site, Reckson submitted no evidence that Island performed any work in the parking lot, supervised plaintiff's work, or that it created or had actual or constructive notice of the alleged defective condition. Accordingly, the branch of the motion by Island for summary judgment dismissing the third-party claim and cross claims against it for contractual and common law indemnification based upon common law negligence and the alleged violation of Labor Law §200 is granted.

Furthermore, Island established its entitlement to summary judgment dismissing the claims by Reckson and First Data for breach of contract based upon Island's alleged failure to procure insurance naming them as additional insureds (*see generally* ***Kinney v G.W. Lisk Co.***, 76 NY2d 215, 557 NYS2d 283 [1990]; ***Rodriguez v Savoy Boro Park Assocs. Ltd. Partnership***, 304 AD2d 738, 759 NYS2d 107 [2d Dept 2003]). A review of the agreement between Island and Reckson reveals that the agreement did not require Island to purchase insurance naming either Reckson or First Data as additional insureds. Paragraph "H" of the agreement, which required Island to furnish various certificates of insurance, did not include any such requirement. Indeed, the alleged requirement to procure such insurance also is conspicuously absent from "Rider A" to the agreement which amended and/or detailed a number of requirements contained in the contract. Even assuming, arguendo, that such a requirement existed, Island cannot be held liable for failing to procure such insurance since the subject accident did not arise out of the work it was required to perform under the agreement (*see* ***Yondt v Blvd. Mall Co.***, 306 AD2d 882, 760 NYS2d 914 [4th Dept 2003]; ***Ceron v Rector Church Wardens & Vestry Members of Trinity Church***, 224 AD2d 475, 686 NYS2d 476 [2d Dept 1996]). Reckson's opposition, which does not address this issue, failed to raise any triable issue warranting denial of this branch of the motion. Thus, the branch of Island's motion seeking summary judgment dismissing the third-party claim by Reckson and First Data for breach of contract based upon Island's alleged failure to procure insurance naming them as additional insureds is granted.

Additionally, where, as here, Island demonstrated that it played no part in causing or augmenting plaintiff's alleged injuries, the unopposed branch of its motion for summary judgment dismissing the third-party claims and cross claims by PABCO and BOVE for contribution is granted (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 71 NY2d 599, 528 NYS2d 516 [1988]; ***DiMarco v New York City Health & Hosps. Corp.***, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]).

PABCO moves for identical relief dismissing the third-party complaint and cross claims against it, asserting that it merely paid plaintiff's wages, that it did not control, direct or supervise his work, and that it neither caused, created, or had actual or constructive notice of the alleged defective condition. Reckson submitted no opposition to PABCO's motion. However, BOVE opposes the branch of the motion seeking to dismiss its cross claim for common law indemnification on the basis that the motion is premature since triable issues remain as to the respective fault, if any, of the parties in causing plaintiff's accident.

Having determined that Labor Law §240 (1) and §241 (6) are inapplicable to plaintiff's accident, the branches of PABCO's motion seeking dismissal of the third-party claim and cross claims against it for contribution, and contractual and common law indemnification based upon the alleged violation of those sections of the Labor Law, are granted.

With respect to the third-party contractual indemnification claim against PABCO based upon common law negligence and the alleged violation of Labor Law §200, PABCO entered into an indemnification agreement requiring it to indemnify Reckson to the "fullest extent of the law" for accidents which arose out of its work, and which were caused in whole or part by the negligent acts or omissions of anyone directly or indirectly in its employ, or anyone for whose acts it may be held liable.

New York's Worker's Compensation Law §11 permits third-party indemnification claims against employers where such claims are based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see* ***Rodrigues v N&S Blg. Contrs. Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Moreover, such an agreement does not violate the General Obligations Law where it authorizes indemnification "to the fullest extent permitted by law" (***Cabrera v Board of Educ. of City of N.Y.***, 33 AD3d 641, 643, 823 NYS2d 419 [2d Dept 2006]), thereby, limiting a subcontractor's contractual indemnity obligation solely to liability for damages caused by its own negligence (*see generally* ***Brooks v Judlau Contr. Inc.***, 11 NY3d 204, 869 NYS2d 366 [2008]).

Here, PABCO established its prima facie entitlement to summary judgment dismissing the third-party claims for contractual indemnification against it based upon the alleged violation of common law negligence and Labor Law §200 by submitting evidence that the alleged accident did not arise out of its work, and was not the result of any negligent acts or omissions by its employees, agents, or anyone for whose acts it may be held liable (*see* ***Lopez v Consolidated Edison Co. of N.Y.***, *supra*; ***Guinter v I. Park Success, LL***, *supra*; ***Yondt v Blvd. Mall Co.***, *supra*; ***Brown v Two Exchange Plaza Partners***, *supra*; ***Martinez v Tishman Constr. Corp.***, *supra*). Notably, Reckson's project manger testified that PABCO, which was hired to perform carpentry work, entered a separate agreement with Reckson whereby it hired union laborers such as plaintiff to perform general clean up duties at the construction site. Reckson's project manager testified that the union laborers were hired on a per diem basis, and were exclusively under Reckson's control. He further testified that while all the subcontractors were required to pile debris at the center of their work area for removal by the laborers, PABCO had no authority or control over the removal of the debris to dumpsters located elsewhere at the construction site. Indeed, he testified that the "man-power" report generated on the day of the alleged accident indicates that none of PABCO's employees were at the construction site at that time. Accordingly, the unopposed branch of

PABCO's motion seeking summary judgment dismissing the third-party claim against it for contractual indemnification based upon common law negligence and the alleged violation of Labor Law §200 is granted.

Based upon the foregoing, PABCO also established its prima facie entitlement to summary judgment dismissing the third-party claim and cross claims against it for common law indemnification, as the adduced evidence indicates that it was not actively negligent and neither had actual or constructive notice of the alleged defective condition (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Russin v Louis N. Piccado & Son***, *supra*; ***Cahn v Ward Trucking, Inc.***, *supra*; ***Torres v LPE Land Dev. & Constr.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]). In opposition, BOVE failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*), as its mere assertion that judgment in PABCO's favor would be premature is conclusory and unsubstantiated. Significantly, BOVE failed to adduce any evidence that PABCO was actively negligent, or that it had actual or constructive notice of the alleged defective condition. Reckson, which did not submit an opposition to the motion, also failed to raise a triable issue. Accordingly, the branch of PABCO's motion seeking summary judgment dismissing the third-party claim and cross claims against it for common law indemnification based upon common law negligence and the alleged violation of Labor Law §200 is granted.

The branch of PABCO's motion for summary judgment dismissing the third-party claims and cross claims against it for contribution also is granted, as PABCO demonstrated that it played no part in causing or augmenting plaintiff's alleged injuries (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***,*supra*; ***DiMarco v New York City Health & Hosps. Corp***., *supra*). It is further noted, that a review of the agreement between PABCO and Reckson reveals that the agreement did not require PABCO to purchase insurance naming either Reckson or First Data as additional insureds. No such requirement was specified in the insurance clause of the agreement or the rider to the agreement. Furthermore, PABCO cannot be held liable for failing to procure such insurance since the subject accident did not arise out of the work it was required to perform under the agreement (*see* ***Yondt v Blvd. Mall Co.***, 306 AD2d 882, 760 NYS2d 914 [4th Dept 2003]; ***Ceron v Rector Church Wardens & Vestry Members of Trinity Church***, 224 AD2d 475, 686 NYS2d 476 [2d Dept 1996]). Therefore, the unopposed branch of PABCO's motion seeking summary judgment dismissing the third-party breach of contract claim against it based on its alleged failure to obtain insurance naming Reckson or First Data as additional insureds, is granted (*see generally* ***Kinney v G.W. Lisk Co.***, *supra*; ***Rodriguez v Savoy Boro Park Assocs. Ltd. Partnership***, *supra*).

Dated: 5 July 2012

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**