STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

STEVEN SPALLANE and
WANDA SPALLANE, his wife,

Plaintiffs,

-against-

CLARKSTOWN HOLDINGS LLC c/o ILY PROPERTIES INC., OLORI CRANE SERVICE, INC., HULL CONSTRUCTION & RESTORATION, INC., FRAN CORP. d/b/a ALL BRIGHT ELECTRIC, TRI-STATE EQUIPMENT CORP., M.V.M. ASPHALT CORP., E.W. HOWELL CO, LLC f/k/a E.W. HOWELL CO., INC., and LOWE'S HOME CENTERS, INC.,

Defendants.

CLARKSTOWN HOLDINGS LLC,

Third Party Plaintiff,

-against-

ORANGE STEEL ERECTORS, INC., OLORI CRANE SERVICE, INC., HULL CONSTRUCTION & RESTORATION, INC., M.V.M. ASPHALT CORP., FRAN CORP. d/b/a ALL BRIGHT ELECTRIC, and TRI-STATE EQUIPMENT CORP.,

Third Party Defendants.

E.W. HOWELL CO, LLC f/k/a E.W. HOWELL CO., INC., and LOWE'S HOME CENTERS, INC,

Second Third Party Plaintiffs,

-against-

ORANGE STEEL ERECTORS, INC., OLORI CRANE SERVICE, INC., HULL CONSTRUCTION & RESTORATION, INC., and M.V.M. ASPHALT CORP.,

Second Third Party Defendants.

DECISION and ORDER
RJI NO. 19-10-4818
INDEX NO. 09-1085

Supreme Court Greene County All Purpose Term, August 15, 2012
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

On August 5, 2008, Steven Spallane (hereinafter "Spallane") injured his right shoulder while working on a Lowe's[1] Home Improvement Store construction project. At that time, the site was owned by Clarkstown[2] and leased to Lowe's. Howell[3] was the general contractor, who subcontracted the site work to MVM[4] and roof installation to Orange Steel.[5]

Spallane worked for Orange Steel as an ironworker. He worked with five others, including Orange Steel's supervisor Jerry Kenison (hereinafter "Kenison"), to erect the steel roof. The two ground crew members hooked the trusses to the crane, which then lifted each truss to roof level. The crane was owned by Olori[6] and operated by Stanley Machnicki (hereinafter "Machnicki") an Olori employee. Spallane and his partner, Richard Kempton (hereinafter "Kempton"), were the "connectors." They each worked off of a man lift at roof level, and connected the trusses into the roof system.

Spallane was injured while in the process of connecting a truss. As Kempton continued to connect a prior truss into the roof system, Spallane was receiving the next truss from Machnicki operating the crane. According to Spallane, he was guiding the truss by holding it

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[1] "Lowe's" will hereinafter refer to Lowe's Home Centers, Inc.

[2] "Clarkstown" will hereinafter refer to Clarkstown Holdings LLC.

[3] "Howell" will hereinafter refer to E. W. Howell Co, LLC f/k/a E.W. Howell Co., Inc.

[4] "MVM" will hereinafter refer to M.V.M. Asphalt Corp.

[5] "Orange Steel" will hereinafter refer to Orange Steel Erectors, Inc.

[6] "Olori" will hereinafter refer to Olori Crane Services, Inc.

with his right hand when it quickly jerked upwards. Spallane did not immediately let go. Rather, he was lifted up with the truss as high as his safety harness would allow (approximately three feet off of the lift). When the harness stretched taut, he could go no higher and fell back into the lift. Spallane alleges that his right shoulder was injured as a result.

To recover for his injuries, Spallane and his wife derivatively commenced this action. Issue was joined, additional defendants were added and two third party actions were brought. Discovery is now complete, a note of issue has been filed, and a trial date certain is set.

Howell, Lowe's and Clarkstown[7], along with Olori and MVM all move for summary judgment dismissing Plaintiffs' complaint. HLC also moves for summary judgment: dismissing all indemnification/indemnity claims made against it, granting their contractual and common law indemnification causes of action, and granting their breach of contract claims. Olori similarly moves for summary judgment on its contractual and common law indemnification claims against Orange Steel. Additionally, MVM moves for summary judgment dismissing the indemnification claims HLC made against it. Plaintiffs oppose the motions and the parties oppose each others' motions, each of which will be addressed below.

SUMMARY JUDGMENT STANDARD

It is well established that "[t]he 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 demonstrate the absence of any material issues of fact, and [t]he evidence produced by the

[7] These three parties brought their summary judgment motion together, and are referred to therein collectively. As such, these parties will hereinafter be collectively referred to as "HLC."

movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference." (Rought v Price Chopper Operating Co., Inc., 73 AD3d 1414 [3d Dept 2010], quoting Walton v Albany Community Dev. Agency, 279 AD2d 93 [3d Dept 2001] [internal quotation marks omitted]). Only if the movant establishes its right to judgment as a matter of law will the burden shift. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

TIMELINESS OF HLC'S SUMMARY JUDGMENT MOTION

CPLR §3212(a) states, in pertinent part, that "the court may set a date after which no [summary judgment] motion may be made... except with leave of court on good cause shown." (Brill v City of New York, 2 NY3d 648, 652 [2004]; Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]). However, an untimely cross motion may be considered where it seeks relief on the same issues that are raised in a timely summary judgment motion. (Conklin v Triborough Bridge and Tunnel Auth., 49 AD3d 320 [1st Dept 2008]; Altschuler v. Gramatan Mgt., Inc., 27 AD3d 304 [1st Dept 2006]; Alexander v Gordon, 95 AD3d 1245 [2d Dept 2012]).

On this record, HLC provided sufficient good cause to excuse their untimely filing. On June 11, 2012 this Court ordered the parties to make all dispositive motions returnable on or before August 15, 2012, on thirty days notice. Although HLC's motion's return date conformed to such Order, their notice complied only with CPLR §2214(b)'s provision but not this Court's thirty day directive. As such, HLC's motion was technically untimely. However, their motion against Olori and MVM is effectively a cross motion, its consideration is consented to by Orange Steel, and their arguments for dismissing the complaint are similar to Olori and MVM's timely motions. Moreover, discovery has continued post-note of issue filing. (Gonzalez ex rel.

Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124, 129 [2000]). Because HLC's delay was slight, discovery was ongoing and the arguments proffered are similar to those raised in Olori and MVM's timely motions, HLC demonstrated good cause to excuse their delay. In addition, because substantially similar cross motions are currently pending and being decided herewith, this Court will search the record to consider HLC's summary judgment motion. (Dickson v Slezak, 73 AD3d 1249 [3d Dept 2010]; Perkins v Kapsokefalos, 57 AD3d 1189 [3d Dept 2008]).

HLC'S SUMMARY JUDGMENT MOTION FOR DISMISSAL OF PLAINTIFFS' LABOR LAW §200 / COMMON LAW NEGLIGENCE CAUSE OF ACTION

On this record, although Howell did not establish its entitlement to summary judgment dismissing Plaintiffs' Labor Law §200 / common law negligence cause of action, Lowe's and Clarkstown made such showing.

"Labor Law § 200 [represents] 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." (Edick v General Electric Company, __AD3d__ [3d Dept 2012], quoting Weinberg v Alpine Improvements, LLC, 48 AD3d 915 [3d Dept 2008]). In an action such as this, liability depends upon a showing that the owner or general contractor "both exercised supervisory control over the operation and had actual or constructive knowledge of the unsafe manner in which the work was being performed." (Van Hoesen v Dolen, 94 AD3d 1264, 1265 [3d Dept 2012] lv to appeal denied, 19 NY3d 809 [2012], quoting Rought v Price Chopper Operating Co., Inc., supra 1416, quoting Lyon v Kuhn, 279 AD2d 760 [3d Dept 2001]).

In support of their motion, HLC submitted Spallane's deposition testimony along with the deposition testimony of each of their representatives.[8] While Spallane unambiguously testified that he only received instruction from Orange Steel's foreman Kenison, such testimony alone is insufficient. It does not demonstrate, as a matter of law, that HLC exercised no authority or control over the activity bringing about the injury, i.e. the truss installation described above. Lowe's representative's deposition testimony, however, established that it exercised no such control. He stated that Lowe's had a representative on site only "once a month, maybe bi-monthly" and had no employee assigned to the project's safety. Similarly, Clarkstown's representative denied any involvement in this construction project. Such testimony established that both Lowe's and Clarkstown lacked the requisite control or knowledge necessary for Labor Law §200 / common law negligence liability.

With the burden shifted on Clarkstown and Lowe's motion, Plaintiffs proffered no proof or argument in opposition. As such, their motions are granted.

Howell's representative's testimony, however, failed to demonstrate that it exercised no control or knowledge as a matter of law. Howell's supervisor, Nicholas McAree (hereinafter "McAree"), stated that its job was to coordinate and schedule the construction project. He specifically acknowledged that he coordinated Orange Steel's work and kept daily reports. McAree also stated that he conducted and had the subcontractors conduct weekly safety meetings. He would participate in the subcontractor's safety meetings. By such allegations he implicitly acknowledged that Howell had actual knowledge of the alleged unsafe manner in

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[8] HLC also supported their motion with their attorney's affirmation. However, because he has no "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392, 1395 [3d Dept 2009]).

which the work was being performed. Moreover, McAree did not specifically and unequivocally deny controlling the "activity bringing about the injury." At most he stated that he didn't "really deal with hand signals [for crane operation]. Usually the means and methods is up to the contractor..." This ambiguous statement is insufficient to establish, as a matter of law, Howell's lack of Labor Law §200 control. Such deficiency was not cured by Kenison's deposition testimony. Although Kenison stated that Howell did not instruct him on the means and methods of Orange Steel's work, he did acknowledge that Howell required his roof installation crew to take "a little class." Additionally, Orange Steel had to go through Howell to alleviate any site problems or other coordination issues. As such, Howell failed to establish its entitlement to summary judgment dismissing Spallane's Labor Law §200 / common law negligence cause of action against it.

Accordingly, although Howell's motion for summary judgment dismissing Plaintiffs' Labor Law §200 / common law negligence cause of action is denied, Clarkstown and Lowe's motion is granted.

MVM AND OLORI'S SUMMARY JUDGMENT MOTIONS SEEKING DISMISSAL OF PLAINTIFFS' LABOR LAW §200 / COMMON LAW NEGLIGENCE CAUSE OF ACTION

MVM and Olori both established their entitlement to judgment as a matter of law dismissing Plaintiffs' Labor Law §200 / common law negligence cause of action.

"Labor Law §200 is expressly limited in its scope to the duty of care to be exercised on a work site by owners and general contractors, it will impose liability against a subcontractor only in the rare case where that party is in effect standing in the shoes of an owner or contractor

through the conferral of authority upon it to supervise and control the activity that produced the plaintiff's injury." (Ryder v Mount Loretto Nursing Home Inc., 290 AD2d 892, 894 [3d Dept 2002]). Similarly, "no negligence liability will attach to a subcontractor where, as here, there is no showing of authority to control the injury-producing activity in which plaintiff was engaged under the direction and supervision of his employer." (Rice v City of Cortland, 262 AD2d 770, 773 [3d Dept 1999]). Only "[w]here a subcontractor creates a condition on the premises that results in an unreasonable risk of harm and that condition is a proximate cause of a worker's injuries, then common-law negligence may be implicated." (Frisbee v 156 R.R. Ave. Corp., 85 AD3d 1258, 1259 [3d Dept 2011]; Bell v Bengomo Realty, Inc., 36 AD3d 479 [1st Dept 2007]; Ryder v Mount Loretto Nursing Home Inc., supra; Oakes v Wal-Mart Real Estate Bus. Trust, 948 NYS2d 748 [3d Dept 2012]; Ortiz v I.B.K. Enterprises, Inc., 85 AD3d 1139 [2d Dept 2011]).

On this record, Olori established its entitlement to summary judgement of Spallane's Labor Law §200 / common law negligence cause of action. Olori properly submitted the contract under which Orange Steel rented the crane used at the time of Spallane's injury. The contract specifically states that "[Orange Steel] agrees that the equipment [i.e. the crane] and all persons operating such equipment, including [Olori's] employees, are under [Orange Steel's] exclusive jurisdiction, supervision and control." Machnicki testified that Orange Steel directed the crane placement and gave him all of his instructions. Spallane similarly admitted that he received all of his instructions from Orange Steel. From the contract and this testimony, Olori demonstrated that it neither supervised nor controlled the activity that caused Spallane's injury. In addition, it is uncontested that Olori created no dangerous condition on the premises. Accordingly, Olori demonstrated its entitlement to summary judgement dismissing Plaintiffs' Labor Law §200 and

common law negligence cause of action. (Rice v City of Cortland, supra; Jaeger v Costanzi Crane Inc., 280 AD2d 743 [3d Dept 2001]).

MVM similarly demonstrated that it had no "authority to control the activity bringing about the injury." (Rice v City of Cortland, supra 773). MVM's representative's deposition testimony established that it performed only excavation and site work on this project, in accord with the plans it was provided. Moreover, all of the deposition testimony established that MVM neither supervised nor controlled truss installation. As such, MVM demonstrated its entitlement to summary judgment of Plaintiffs' Labor Law §200.

MVM also established its entitlement to summary judgment of Plaintiffs' common law negligence cause of action. According to Plaintiffs' bill of particulars, they alleged that MVM's excavation and site work was negligent and created a dangerous site condition. However, at his deposition Spallane admittedly had "no information that at the time of [his] accident that the crane shifted in the mud." He instead speculated that the crane "could have shifted in the mud." He also conceded that no one ever told him that the crane shifted in the mud at the time of his accident. Additionally, according to Orange Steel and Howell's representatives, the crane had no stability problems. From this testimony, MVM demonstrated that Spallane's injury was not caused by a dangerous condition that it created.

Because MVM established that it neither controlled the injury producing activity nor created a dangerous site condition, it demonstrated its entitlement to dismissal of Plaintiffs' Labor Law §200 / common law negligence cause of action.

With the burden shifted, Plaintiffs failed to raise a triable issue of material fact. Although Plaintiffs' attorney's affirmation addresses both Olori and MVM's motions, because it is of no

probative value it fails to establish supervision, control, a dangerous site condition or a triable issue of material fact. (2 North Street Corp. v Getty Saugerties Corp., supra 1395). Nor did Spallane's affidavit. He neither addressed the supervision and control issue nor alleged that Olori created a dangerous condition. Although Spallane stated that the site conditions were muddy and unstable, at no point did he proffer any proof or testimony to connect these allegedly dangerous site conditions to the injury causing activity. Moreover, he failed to explain or even address his prior "no information... that the crane shifted" admission. Accordingly, Plaintiffs raised no material issue of fact in opposition to Olori or MVM's prima facie showings, and their motions are granted.

HLC, MVM AND OLORI'S SUMMARY JUDGMENT MOTIONS SEEKING DISMISSAL OF PLAINTIFFS' LABOR LAW §240(1) CAUSE OF ACTION

HLC, MVM and Olori all established their entitlement to judgment dismissing Plaintiffs' Labor Law §240(1) cause of action, and Plaintiffs raised no material issues of fact.

It is well established that "Labor Law §240(1) requires that contractors and owners provide adequate safety devices to protect workers against elevation-related safety risks." (Davis v Wyeth Pharmaceuticals, Inc., 86 AD3d 907, 908 [3d Dept 2011]). "[T]he 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 Exch., Inc., 13 NY3d 599, 603 [2009]; Sereno v Hong Kong Chinese Rest., 79 AD3d 1414 [3d Dept 2010]; Oakes v Wal-Mart Real Estate Bus. Trust, 948 NYS2d 748, 751 [3d Dept 2012]).

Here, HLC, MVM and Olori all established that Spallane's injury was not caused by inadequate protection against an elevation related risk. It is uncontested that while Spallane was working at a height of over twenty feet, he was secured in his man lift by a safety harness. These elevation related safety devices performed as designed, they prevented Spallane's fall to the ground below. Spallane even admitted, at his deposition, that the man lift and harness were the standard safety equipment for this type of work and that there was nothing wrong with either piece of equipment. On such proof, HLC, MVM and Olori all demonstrated their entitlement to judgment as a matter of law.

In opposition, Plaintiffs proffered neither admissible proof nor legal argument and raised no triable issue of fact.

Accordingly, HLC, MVM and Olori's motions for summary judgment dismissing Plaintiffs' Labor Law §240(1) cause of action are granted.

HLC, MVM AND OLORI'S SUMMARY JUDGMENT MOTIONS SEEKING DISMISSAL OF PLAINTIFFS' LABOR LAW §241(6) CAUSE OF ACTION

HLC, MVM and Olori also established their entitlement to summary judgment of Plaintiffs' Labor Law §241(6) cause of action, except to the extent that it is based upon alleged violations of IC §§23-8.1(f)(2) or 23-8.2(c)(3) as set forth against HLC.

"In order to state a claim under section 241(6), a plaintiff must allege that the property owners [and contractors] violated a regulation that sets forth a specific standard of conduct and not simply a recitation of common-law safety principles." (St. Louis v Town of N. Elba, 16 NY3d 411, 414 [2011]; Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). Only

Industrial Code[9] provisions that "mandate compliance with concrete specifications" will support a Labor Law §241(6) cause of action. (Misicki v Caradonna, 12 NY3d 511, 515 [2009]).

Preliminarily, Plaintiffs abandoned numerous violations that had supported their Labor Law §241(6) cause of action. Plaintiffs' bill of particulars claimed that their Labor Law §241(6) claim was based upon over fifty IC violations. In opposition to HLC, MVM and Olori's motions, which challenge each of the bill of particulars' violations, Plaintiffs proffer only twelve IC violations underpinning their Labor Law §241(6) claim. To the extent that HLC, MVM and Olori's motions were unopposed, Plaintiffs abandoned such IC subdivisions. (Musillo v Marist Coll., 306 AD2d 782 [3d Dept 2003]; Fassett v Wegmans Food Markets, Inc., 66 AD3d 1274 [3d Dept 2009]). As such, the only remaining IC violations supporting Plaintiffs Labor Law §241(6) claim are: IC §§23-6.1(c), 23-6(e), 23-6.1(e)(1), 23-6.1(e)(2), 23-6.1(h), 23-8.1(a), 23-8.1(c), 23-8.1(f)(2), 23-8.1(f)(5), 23-8.1(f)(6), 23-8.2(c)(3) and 23-9.2(b)(1).

Now, considering the remaining violations, Olori and MVM both demonstrated that they are not subject to Labor Law §241(6) liability. "Subcontractors may be held liable as agents under Labor Law §241(6) when they have been specifically contractually delegated the duty or obligation to correct unsafe conditions or maintain work site safety." (Musillo v Marist Coll., 306 AD2d 782, 784 [3d Dept 2003]; Rice v City of Cortland, 262 AD2d 770, supra). Here, as discussed above, both Olori and MVM were subcontractors but neither exercised "control" of this work site. Nor, as is uncontested, did either have any safety obligations. As such, both Olori and MVM demonstrated their entitlement to summary judgment dismissing Plaintiffs' Labor

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[9] The Industrial Code is set forth at 22 NYCRR Chapter I, Subchapter A, and will hereinafter be referred to as "IC" followed by the applicable section.

Law §241(6) claim against them.

HLC similarly demonstrated their entitlement to judgment dismissing Plaintiffs' Labor Law §241(6) claims that are premised upon IC §§23-6.1(c), 23-6(e), 23-6.1(e)(1), 23-6.1(e)(2), 23-6.1(h) and 23-9.2(b)(1). According to IC §§23-6.1(a) "[t]he general requirements of this Subpart shall apply to all material hoisting equipment except cranes." (Locicero v Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept 2006]). Similarly, "[c]ranes... are explicitly excluded from the coverage of 12 NYCRR subpart 23-9." (Kropp v Town of Shandaken, 91 AD3d 1087, 1091 [3d Dept 2012]) Because it is uncontested that Spallane's injury involved the use of a crane, which is specifically exempt from the mandates of either IC §23-6 or IC §23-9, these portions of Plaintiffs' Labor Law §241(6) claim are dismissed.

HLC also established their entitlement to summary judgment on Plaintiffs' Labor Law §241(6) claim that is based upon IC §23-8.1(a). "[IC §]23-8.1(a), is a general safety standard that does not support a Labor Law §241(6) claim." (Goss v State Univ. Const. Fund, 261 AD2d 860, 861 [4th Dept 1999]). As such, no issue of fact is raised and this portion of Plaintiffs' Labor Law §241(6) claim is dismissed.

IC §§ 23-8.1(f)(5), 23-8.1(f)(6) and §23-8.1(c) likewise fail to properly support Plaintiffs' Labor Law §241(6) claim. These rules prohibit cranes from hoisting or lowering "while any person is located on the load" (IC § 23-8.1[f][5]), or from carrying "any load over and above any person" (IC §23-8.1[f][6]). Although Spallane was injured by holding onto a truss (the load) and being lifted upwards, no allegation was made that he was improperly "located on the load" when injured. Nor was Spallane injured by the load traveling over himself or his partner. Rather, he was injured by the truss' sudden upward movement. IC §23-8.1(c) is similarly inapplicable. As

set forth above, despite Plaintiffs' poor site conditions allegations, Plaintiffs failed to raise a material issue of fact that Spallane was injured due to the lack of "[a] firm footing... for [the] mobile crane." As such, these rules were not "implicated in this case." (Desharnais v Jefferson Concrete Co., Inc., 35 AD3d 1059, 1061 [3d Dept 2006]).

HLC failed to demonstrate, however, their entitlement to summary judgment on Plaintiffs' Labor Law §241(6) cause of action to the extent it is premised upon 23-8.1(f)(2) or 23-8.2(c)(3). Although HLC proffered deposition testimony that there was "no sudden acceleration... of the moving load" (IC §23-8.1[f][2][I]), this proof merely raised an issue of fact when contrasted with Spallane's assertions. HLC also failed to demonstrate that IC §23-8.2(c)(3), which requires a "tag or restraint line [to] be used," is inapplicable. Rather, HLC merely raised an issue of fact with proof refuting Spallane's inadequate tag line claim. Moreover, HLC failed to demonstrate, as a matter law, that Spallane's conduct was the sole proximate cause of his injury.

Accordingly, Plaintiffs' Labor Law §241(6) cause of action is dismissed, except to the extent that it is based upon violations of IC §§23-8.1(f)(2) or 23-8.2(c)(3) and set forth against HLC.

HLC AND MVM'S COMMON LAW AND CONTRACTUAL INDEMNIFICATION SUMMARY JUDGMENT MOTIONS

While Clarkstown and Lowe's established their entitlement to judgment as a matter of law on their common law and contractual indemnification causes of action against Orange Steel, Howell did not. Additionally, HLC failed to establish their entitlement to summary judgment on

their common law or contractual indemnification cause of action against MVM, but MVM demonstrated its entitlement to summary judgment dismissing such claims.

Here, the indemnity provisions in the HLC - MVM contract and the HLC - Orange Steel contract are identical. Both provide that "[t]o the maximum extent permitted by law, [MVM and Orange Steel] hereby assume[] entire responsibility and liability (which includes the indemnification of Contractor [Howell] and all of its indemnities [Lowe's and Clarkstown]) for any and all damages and expenses or injury of any kind or nature whatsoever... to all persons, whether employees of [MVM or Orange Steel] whose injuries occurred while working at the jobsite or otherwise,... caused by, resulting from, arising out of, or in any way occurring directly or indirectly or in any manner connected with [MVM or Orange Steel's] work or that of its sub-subcontractors... If any person...shall make a claim for any... injury... [MVM and Orange Steel] agree[] to indemnify and save harmless the Owner [Lowe's] and the Contractor [Howell], all additional insured and indemnities [Clarkstown]... from and against any and all loss... but only to the extent that such claim... is not caused by the negligence of the Owner [Lowe's] and/or Contractor [Howell]."[10] This provision in no way violates General Obligations Law §5-322.1, and is fully enforceable. (Brooks v Judlau Contr., Inc., 11 NY3d 204 [2008]).

"Unless the proposed indemnitee is found to be free from active negligence, conditional summary judgment for either common-law or contractual indemnification against a proposed indemnitor is premature." (Miranda v Norstar Bldg. Corp., 79 AD3d 42, 50 [3d Dept 2010], quoting Husted v Central N.Y. Oil & Gas Co., LLC, 68 AD3d 1220 [3d Dept 2009]; Squires v

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[10] As interpreted by HLC, these contracts included Clarkstown within their indemnification provisions. As no party objected to such interpretation nor proffered an alternative reading, such interpretation is accepted as unopposed.

Robert Marini Builders Inc., 293 AD2d 808 [3d Dept 2002]).

On this record and in accord with the above contractual indemnity provision, Clarkstown and Lowe's established that they are entitled to contractual indemnification from Orange Steel. As set forth above, Clarkstown and Lowe's demonstrated their entitlement to summary judgment dismissing all common law negligence / Labor Law §200 and Labor Law §240(1) claims against them. Such showing demonstrated their freedom from active negligence. Moreover, it is uncontested that Orange Steel supervised the injury causing activity. Thus, in accord with the indemnity provision, Spallane's injury was "connected with [Orange Steel's] work." By such showing, Clarkstown and Lowe's established that they are entitled to contractual indemnification from Orange Steel for their potential Labor Law §241(6) vicarious liability. (Biance v Columbia Washington Ventures, LLC, 12 AD3d 926 [3d Dept 2004]; Cunha v City of New York, 12 NY3d 504 [2009]). Orange Steel raised no material issue of fact in opposition. As such, Clarkstown and Lowe's motion for summary judgment on their contractual indemnification claim against Orange Steel is granted.

Similarly, Clarkstown and Lowe's demonstrated their entitlement to common law indemnity from Orange Steel. "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part... Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision." (McCarthy v Turner Const., Inc., 17 NY3d 369, 377-78 [2011]). Again as set forth above, Clarkstown and Lowe's duly established that they were neither negligent nor actually supervising the project and that Orange Steel was actually supervising the truss installation. Accordingly, Clarkstown and Lowe's motion for summary

judgment on their common law indemnity claim against Orange Steel is granted.

Howell, however, failed to establish its entitlement to summary judgment on its contractual or common law indemnification claims against Orange Steel or MVM. Because Plaintiffs' common law negligence / Labor Law §200 claims against Howell remain viable, Howell has failed to demonstrate its freedom from active negligence. As such, Howell established its entitlement to neither contractual nor common law indemnification. (Miranda v Norstar Bldg. Corp., supra). Accordingly, this portion of Howell's motion is denied.

Clarkstown and Lowe's likewise failed to demonstrate their entitlement to summary judgment on their common law or contractual indemnity claims against MVM; but MVM demonstrated its entitlement to summary judgment dismissing both. On this record, because it is uncontested that MVM exercised no "actual supervision" over the injury causing truss raising it cannot be held liable for common law indemnification. (McCarthy v Turner Const., Inc., supra). Similarly, MVM demonstrated that Spallane's injury was not "caused by, resulting from, arising out of, or in any way occurring directly or indirectly or in any manner connected with [MVM's] work." As such, MVM is not contractually obligated to indemnify HLC.

Accordingly, MVM's motion for summary judgment dismissing HLC's indemnification claims are granted.

HLC'S MOTION SEEKING SUMMARY JUDGMENT ON THEIR COMMON LAW INDEMNIFICATION CLAIM AGAINST OLORI

On this record, HLC failed to demonstrate their entitlement to summary judgment on their common law indemnification claim against Olori.

"Under this equitable principle [of common law indemnity], a party obligated to compensate another for a loss by operation of law may pursue reimbursement against the party who more properly should be held accountable for that loss." (State v J.D. Posillico Inc., 277 AD2d 753, 754 [3d Dept 2000], Mas v Two Bridges Assoc. by Nat. Kinney Corp., 75 NY2d 680, 690 [1990]). Here, because Olori established that it did not control the injury producing activity, HLC failed to demonstrate that Olori is more properly accountable for Spallane's injury.

Accordingly, this portion of HLC's motion is denied.

HLC'S MOTION SEEKING SUMMARY JUDGMENT DISMISSING OLORI, MVM AND ORANGE STEEL'S CONTRIBUTION CLAIMS[11]

HLC failed to establish their entitlement to summary judgment of the contribution claims (CPLR §1402) made against them.

"[T]wo or more persons who are subject to liability for damages for the same personal injury... may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." (Wheeler v Citizens Telecom. Co. of New York, Inc., 71 AD3d 1218, 1219 [3d Dept 2010], quoting CPLR §1401; Burgos v 213 W. 23rd St. Group LLC, 48 AD3d 283 [1st Dept 2008]). To the extent that Olori, MVM or Orange Steel's contribution claims remain viable, HLC failed to demonstrate their entitlement to summary judgment because they did not establish their complete freedom from negligence or liability.

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[11] Within this portion of their motion, HLC also demonstrated their entitlement to summary judgment of Olori's breach of contract claim. HLC alleged, and Olori failed to dispute, that no contract exists between these two entities. As such, Olori's breach of contract claim against HLC is dismissed.

HLC'S MOTION FOR SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CAUSE OF ACTION AGAINST MVM AND ORANGE STEEL

HLC failed to demonstrate their entitlement to summary judgement on their breach of contract claims against MVM or Orange Steel.

"The elements of a cause of action for breach of contract are (1) formation... (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage." (Clearmont Prop., LLC v Eisner, 58 AD3d 1052, 1055 [3d Dept 2009]).

On this record, HLC failed to demonstrate the requisite elements of their breach of contract cause of action. Again the HLC - MVM and HLC - Orange Steel contracts are identical, both requiring MVM and Orange Steel to provide five million dollars of commercial general liability coverage. HLC attached to their motion the insurance certificates proffered by both MVM and Orange Steel, and made no objection to the amount of coverage provided therein. Instead, HLC claims that MVM and Orange Steel's insurance companies are wrongfully refusing to provide all of the required insurance. This proof, however, wholly fails to demonstrate MVM or Orange Steel's failure to perform or HLC's damages.

Accordingly, HLC's motion for summary judgment on their breach of contract claims against MVM and Orange Steel are denied.

OLORI'S MOTION FOR SUMMARY JUDGMENT GRANTING ITS COMMON LAW AND CONTRACTUAL INDEMNIFICATION CLAIMS AGAINST ORANGE STEEL

Although Olori demonstrated its entitlement to summary judgment on its contractual indemnification claim against Orange Steel, it failed to do so on its common law indemnification cause of action.

On this record, Olori demonstrated its entitlement to contractual indemnification from Orange Steel. Their indemnification agreement reads: "[Orange Steel]... agrees to indemnify and save [Olori]... harmless from all claims for... injury to persons... arising in any manner out of [Orange Steel's] operation." It is uncontested that Spallane's injury arises out of Orange Steel's truss installation. The crane operator and the crane's operation were, according to the Olori - Orange Steel indemnification agreement, under the "exclusive jurisdiction, supervision and control" of Orange Steel. Moreover, as set forth above, Olori established its freedom from active negligence. (Miranda v Norstar Bldg. Corp., supra). As such, Olori demonstrated its prima facie entitlement to judgment as a matter of law on its contractual indemnification claim.

In opposition, Orange Steel raised no triable issue of material fact. Because Olori established its freedom from active negligence above, it necessarily cannot be indemnified for its own negligence. As such, contrary to Orange Steel's contention, the Olori - Orange Steel indemnification agreement is not rendered "void under General Obligations Law § 5-322.1 on the ground that it would indemnify [Olori] for its own negligence." (Mahoney v Turner Const. Co., 37 AD3d 377, 380 [1st Dept 2007]; Davis v All State Assoc., 23 AD3d 607 [2d Dept 2005]). Orange Steel similarly raised no issue of fact with Machnicki's testimony about Olori's owner visiting the construction site "at one point" when the crane was delivered. Rather than showing control, the statement taken in context evinces Olori's limited involvement. Especially since the balance of Machnicki's deposition testimony unambiguously established that he took all of his direction from Orange Steel personnel. As no triable issue of fact was raised, Olori's motion for summary judgement on its contractual indemnification claim against Orange Steel is granted.

Turning to Olori's common law indemnification claim against Orange Steel, it failed to

demonstrate its entitlement to summary judgment. "Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer." (McCarthy v Turner Const., Inc., supra 375, quoting Mas v Two Bridges Assoc. by Nat. Kinney Corp., supra). In this action, as set forth above, there is no basis to hold Olori "responsible." As such, Olori demonstrated no equitable basis to shift this loss. Accordingly, its motion for summary judgment on its common law indemnification claim is denied.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for MVM. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 9, 2012
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 27, 2012; Affirmation of Kenneth Kutner, dated July 27, 2012, with attached Exhibits A-CC.
2. Affirmation of Michael Kozoriz, dated August 6, 2012.
3. Affidavit of Sean Tomko, dated August 2, 2012.
4. Affidavit of Aaron Carbone, dated August 3, 2012, with attached Exhibits A-C.
5. Affirmation of Derek Spada, dated August 3, 2012; Affidavit of Steven Spallane, dated August 2, 2012, with attached Exhibits A-E; Affidavit of Jeffrey Ketchman, dated August 2, 2012, with attached August 2, 2012 report, Exhibit A, and Exhibits 1-8; Affirmation of John DeGasperis, dated August 14, 2012, with attached Exhibits A-C.
6. Affirmation of Kenneth Kutner, dated August 14, 2012, with attached Exhibits A-B; Affirmation of Kenneth Kutner, dated August 14, 2012, with attached Exhibits A-B; Affirmation of Kenneth Kutner, dated August 14, 2012, with attached Exhibits A-B.
7. Notice of Motion, dated May 29, 2012; Affidavit of Aaron Carbone, dated May 29, 2012, with Exhibits A-CC; Affidavit of Lisa Bruno, dated May 18, 2012, with attached Exhibit A.
8. Affirmation of Kenneth Kutner, dated August 1, 2012.
9. Affirmation of Michael Kozoriz, dated August 6, 2012.
10. Notice of Motion, dated July 16, 2012; Affidavit of Sean Tomko, dated July 16, 2012; with attached Exhibits A-KK.
11. Affirmation of Kenneth Kutner, dated August 1, 2012.
12. Affidavit of Sean Tomko, dated August 7, 2012.