

DePaul v NY Brush LLC
2013 NY Slip Op 30000(U)
January 2, 2013
Supreme Court, New York County
Docket Number: 113636/09
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X
WILLIAM DePAUL, JR. and KATHLEEN DePAUL,

Plaintiffs,

-against-

Index No. 113636/09

NY BRUSH LLC, PEPSI-COLA BOTTLING COMPANY
OF NEW YORK, INC., HOLT CONSTRUCTION CORP.
and RUTTURA & SONS CONSTRUCTION CO., INC.,

Defendants.

-----X

NY BRUSH LLC, PEPSI COLA BOTTLING COMPANY
OF NEW YORK and HOLT CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

Third-Party Index
No. 590772/10

FILED

JAN 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

COASTAL ELECTRIC CONSTRUCTION CORP. and
RUTTURA & SONS CONSTRUCTION CO., INC.,

Third-Party Defendants.

-----X

Joan M. Kenney, J.:

In this action which arises out of an accident at a construction site, plaintiffs William DePaul (plaintiff) and his wife, Kathleen DePaul, move, pursuant to CPLR 3212, for summary judgment on the issue of liability on their Labor Law § 241 (6) claim against defendants.¹ Defendants NY Brush LLC (NY Brush), Pepsi Cola Bottling Company of New York (Pepsi) and Holt Construction Corp. (Holt; together, defendants) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the amended

¹Plaintiffs' motion does not seek any relief from Ruttura & Sons Construction Co., Inc. (Sassower 6/26/12 Affirm., ¶ 5).

complaint and for summary judgment on their cross claims against defendant Ruttura & Sons Construction Co., Inc. (Ruttura) for common-law and contractual indemnification. Ruttura cross-moves for summary judgment dismissing the amended complaint and all cross claims asserted against it.

BACKGROUND

On March 4, 2009, the date of the accident, a new building was being erected at 650-666 Brush Avenue in the Bronx. The front of the building faced the Hutchinson River Parkway Service Road, and the back faced Brush Avenue, the entire six or seven acres of the site surrounded by a chain-link fence, with one gate facing the Hutchinson River Parkway side, and another facing the Brush Avenue side (Polner 9/12/12 Reply Affirm., Ex. E, Foti Depo., at 153-155; *id.*, Ex. F, Pross Depo., at 18-20). The Brush Avenue gate was kept chained unless, for example, there was a fuel delivery during the cold weather (Pross Depo., at 20-21 ["because they didn't want to cover flammable material through the entire project to get there"]). It is uncontested that the gate was open on the day of the accident.

NY Brush was the owner/lessor of the property, and Pepsi was the lessee (Lombardo 8/9/12 Affirm. in Opp. to Plaintiffs' Motion, ¶ 3). Pepsi was constructing the building, and hired Holt as the general contractor for the project (Foti Depo., at 8-9). As such, Pepsi can also be considered an "owner" of the premises (see e.g.

Guclu v 900 Eighth Ave. Condominium, LLC, 81 AD3d 592, 593 [2d Dept 2011] ["Lessees who hire a contractor and have the right to control the work being done are considered 'owners' within the meaning of (Labor Law §§ 240 [1] and 241 [6])," citing *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008]; see also *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008] ["The applicability of Labor Law § 241 (6) encompasses lessees who fulfill the role of owner by contracting to have work performed"]). Ruttura was the concrete subcontractor, and plaintiff was an electrician employed by third-party defendant Coastal Electric Construction Corp. (Coastal),² the electrical subcontractor (Foti Depo., at 14-15).

On the date of the accident, the construction project was approximately 90% to 95% finished (*id.* at 23). One thing that remained was the concrete pour over the area of the parking lot, driveways, sidewalks and curbs on the Brush Avenue side of the building. Ruttura had already graded the ground and installed the rebar prior to the pour (*id.* at 24-30, 250-251). Since the weather was cold, Ruttura had covered the rebar with insulated blankets or tarps to prevent the ground from freezing (*id.* at 35, 148-149), and had placed rebar on the blankets to keep them from blowing away (Polner 9/12/12 Reply Affirm., Ex. G, Domenick Ruttura Depo., at

²Coastal has filed for bankruptcy. All proceedings against it are stayed (Sassower 6/26/12 Affirm., ¶ 9).

81-82). Once the rebar and blankets were in place, "nobody should be on it. It was fenced off. Nobody should have been using it" (*id.* at 82; see also Pross Depo., at 70 [once the rebar and blankets were in place, personnel "wouldn't be allowed in the area"]; Foti Depo., at 84 ["They wouldn't be allowed to walk on it at that point"]; see also Domenick Ruttura Depo., at 127 ["It was a restricted area. ... You weren't supposed to use that area"]; Foti Depo., at 83 ["There was no reason for anybody to walk on it"])).

Domenick Ruttura, Ruttura's principal, testified that Ruttura did not place the planks in that area (Domenick Ruttura Depo., at 149, 151, 286), and Foti attested that Holt did not place the planks there (Foti Depo., at 63; but see Johnson 7/19/09 Statement, Sworn 2/4/12, at 2 [Holt placed wooden planks to serve as passageway for workers who had to cross the area]; Nuzzi 9/29/09 Statement, Sworn 2/7/12, at 1-2 [Holt placed planks on ground to form passageway]; see also Plaintiff's Depo., at 62-63 ["I guess" walkway was provided by Holt]). Foti averred that Holt would have no reason to place the planks there (Foti Depo., at 63-64). "It looks like, to me, these planks were placed to hold the blankets down in case the wind blows. If it was placed to walk on, they would be lined up, like a walkway" (*id.* at 63-64; see also *id.* at 288 [the way the planks were laid out "doesn't make any sense ... for a walkway"])).

Although the parties dispute how the planks got there, and what they were doing there, it is uncontested that, on the day of the accident, there were three pieces of wooden planks on the rebar and blankets in the area between the garage where electricians had been working and the Brush Avenue gate. The planks were two by eights, approximately 10 feet long, one and three-quarters inches thick, and eight inches wide (Polner 9/12/12 Reply Affirm., Ex. A, Plaintiff's Depo., at 72-74). The planks were lined up end-to-end (*id.* at 73), and have been described as "old, wet and contracted" (*id.* at 243), "rotten" or "rotted" (Foti Depo., at 136, 262), and "cracked and broken" (Sassower 6/26/12 Affirm., Ex. U, 3/4/09 C-2 Accident Report). The planks were wet because one of the hoses used to pump water out of a manhole had a leak in it and the water was spraying (Plaintiff's Depo., at 256-257).

The accident happened around noon, when plaintiff and three co-workers were walking back, through the area with the rebar and blankets, from a coffee truck across the street from the Brush Avenue gate, where plaintiff had bought some soda. The four men, plaintiff, Carl Johnson, Jason Sambolin and Angelo Nuzzi, were walking on three planks, with plaintiff in the lead, when the middle plank broke, plaintiff's right foot went through it, and he fell to his right, hitting his right elbow on a manhole cover (Plaintiff's Depo., at 75-77). The Foreman's 24 Hour Incident Report describes the incident as "fell walking on planks provided

to Brush Ave gate" (Polner 9/6/12 Affirm., Ex. E, Foreman's 3/4/09 24 Hour Incident Report; see also Sassower 6/26/12 Affirm., Ex. U, 3/4/09 C-2 Accident Report: plaintiff was "walking in to jobsite off Brush Ave when plank cracked and man fell"; injury occurred when plaintiff "fell off GC provided planks"; plaintiff's description was: "walking in [...]"³ from coffee truck approx 12:01 pm. GC provided planks that were cracked and broken. One split when I was walking on it and I fell on rt [sic] elbow").

During the morning coffee break, between 9 and 9:30 a.m., a coffee truck could be found at the main entrance, on the Hutchinson River Parkway side of the property, but that coffee truck was not there during the 12 to 12:30 p.m. lunch break (Foti Depo., at 244-246, 273-274). Rather, there was a coffee truck across the street from the Brush Avenue gate during the lunch break (*id.* at 245-246), but Foti never saw anyone go there (*id.* at 245).

According to plaintiff, at the weekly safety meetings, Coastal's general foreman and foreman "suggested" to the electricians that they should enter the property by the Brush Avenue gate (Plaintiff's Depo., at 69). Plaintiff attests that the rotten plank that broke beneath him had been there for approximately three weeks before his accident (*id.* at 70), and had been the subject of maybe two safety meetings prior to the accident (*id.* at 243).

³The word is illegible.

However, Holt's job superintendent on the project, Michael Foti, attests that the Brush Avenue gate "was only for material and equipment to access the site. It was never for personnel" (Foti Depo., at 59). The gate was "the entranceway for material and equipment, if needed" (*id.* at 60). The gate was kept locked and was opened "only if there was a delivery of materials in that area" (*id.* at 85). It was used to bring material in to develop the parking area and driveway, material such as rebar, subgrade material that went below the rebar, and blankets (*id.* at 76). Instead of the Brush Avenue gate, the gate on the Hutchinson River Parkway Service Road side "was our main entrance for all personnel, deliveries, material" (*id.* at 69). It was a designated entrance for personnel, and once they were through the gate, there was a stone pathway for people to use (*id.* at 127). "Nobody ever used [the Brush Avenue] entrance. We all used the east entrance off the expressway. That was the entrance" (Domenick Ruttura Depo., at 122).

THE PLEADINGS

Plaintiffs' amended complaint alleges causes of action for negligence, violation of Labor Law §§ 200 and 241 (6), and plaintiff's wife's derivative claim for loss of services. Defendants' answer asserts cross claims against Ruttura for contribution or common-law indemnification, contractual indemnification, and breach of contract by failure to procure

insurance. Ruttura's answer brings cross claims against defendants sounding in breach of contract by failure to procure insurance and breach of contract by failure to name Ruttura as a beneficiary or third-party beneficiary of the policy, contractual or common-law indemnification, and contribution.

Defendants' third-party complaint asserts four causes of action against Coastal, sounding in contractual indemnification, breach of contract by failure to procure insurance, and common-law indemnification or contribution. The third-party complaint alleges the same causes of action against Ruttura. Coastal's third-party answer alleges one cross claim against defendants and Ruttura, sounding in common-law indemnification or contribution.

DISCUSSION

Summary Judgment Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Shapiro v 350 E. 78th St. Tenants Corp.*, 85 AD3d 601, 608 [1st Dept 2011], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in

admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

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 codifies the common-law duty to maintain a safe work site" (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046 [2d Dept 2012]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: whether the injuries resulted from a dangerous condition, or from the means and methods by which the work was done (see e.g. *Raffa v City of New York*, ___ AD3d ___, 2012 NY Slip Op 08071, *1 [1st Dept 2012]). This matter involves an allegedly dangerous condition on the construction site. "Where a premises condition is

at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident [interior quotation marks and citations omitted]" (*Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1195 [2d Dept 2012]). "To provide constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it" (*Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 686 [2d Dept 2011]; see also *White v Village of Port Chester*, 92 AD3d 872, 876 [2d Dept 2012] [owner liable if "had actual or constructive notice of (dangerous or defective condition), and failed to remedy the condition within a reasonable amount of time"]). In addition, "constructive notice of the allegedly unsafe condition that caused the accident ... must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]).

Here, there are questions of fact concerning whether plaintiff brought his accident upon himself, and whether defendants had notice of the planks prior to the accident. Although plaintiff's testimony that the planks had been on the blanketed rebar for three weeks prior to the accident is uncontradicted, other testimony

establishes that once the area was prepared for the cement pour, no one was supposed to be there. No one was supposed to be walking on the rebar. The only time anyone should have been on the rebar was when they were installing it or covering it with blankets, and Coastal's electricians were not engaged in either activity. Coastal's "suggestion" that its electricians cross the rebar to get to the coffee truck across the street from the Brush Avenue gate does not justify their ignoring the general contractor's designation of the Hutchinson River Parkway Service Road gate as the proper entrance and exit for personnel.

Although Holt was responsible for locking and unlocking the gates, and the Brush Avenue gate was open on the day of the accident, the inference that Holt was somehow negligent because the gate was open is without merit. There is no evidence before the court that no delivery was received through the Brush Avenue gate that day. Rather, the evidence indicates that the only time the gate was opened was when a delivery was taking place.

No one knows who placed the planks on the rebar or why they placed them there. The evidence is inconclusive with respect to whether the planks were put on the rebar to hold the blankets down or for some other reason.

Nevertheless, there is no evidence that defendants created the allegedly hazardous condition. As for notice, although defendants' employees made numerous walk-throughs each day, inspecting the

entire site for safety problems, not one of them saw the planks prior to the accident. Thus, there is a question of fact whether defendants' employees conducted their inspections in a negligent way.

However, each of defendants' deponents attested that, if he had seen the planks, he would have immediately had the planks removed because the planks would have constituted a safety hazard. The facts that so many inspections were made, and that defendants' employees recognized that rotted wood planks would constitute a safety hazard if someone walked on them, raise questions as to whether the planks were "visible and apparent," and whether planks in an area where no one was supposed to be would constitute a hazard in that "specific location," such that corrective action would be required.

Therefore, the part of defendants' cross motion that seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against them is denied.

With respect to Ruttura, the concrete subcontractor, there is no evidence that it created or had any notice of the allegedly hazardous condition. Summary judgment dismissing plaintiffs' claims in Labor Law § 200 and common-law negligence as against Ruttura is granted.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

All contractors and owners and their agents ... when constructing ... buildings ... shall comply with the following requirements:

6. All areas in which construction ... is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23.

"Labor Law § 241 (6) imposes a *nondelegable duty* ... upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers] [internal quotation marks and citations omitted]" (*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]). "To recover under Labor Law § 241 (6), a plaintiff must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific applicable safety standards" (*Ventimiglia*, 96 AD3d at 1047).

Plaintiffs allege that defendants violated sections 23-1.7 (e) (1) and 23-1.11 (a) of the Industrial Code.

Section 23-1.7 (e) (1) governs tripping and other hazards in passageways:

All passageways shall be kept free from accumulations of dirt and debris and from any

other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

This provision is inapplicable in this case, for several reasons. First, the planks were not a passageway. No one was supposed to be on the blanket-covered rebar once it had been installed because walking on rebar is hazardous. Providing a passageway across an area where no one was supposed to be would be counterproductive, to say the least.

In addition, plaintiff did not trip on anything. There was no dirt or debris that could have caused him to trip. And he was not cut or punctured by a sharp projection.

Section 23-1.7 (e) (1) is inapplicable.

The same can be said for section 23-1.11 (a):

The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.

No one can seriously contend that old, wet, rotten wood is acceptable for the construction of anything. Moreover, it cannot be said that planks left in an area where no one was supposed to be constituted equipment or a temporary structure. The court has already found that the planks were not a pathway or walkway, makeshift or otherwise. Section 23-1.11 (a) is inapplicable.

Therefore, plaintiffs' motion for summary judgment on the

issue of defendants' liability under Labor Law § 241 (6) is denied. The parts of defendants' and Ruttura's cross motions which seek summary judgment dismissing this claim are granted.

In light of the above determinations, summary judgment dismissing the entire amended complaint as against Ruttura is granted.

Common-Law and Contractual Indemnification

Common-Law Indemnification

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; see also *Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 437 [1991] [party that has been held vicariously liable, without fault, can obtain common-law indemnification from party that was at fault in causing plaintiff's accident]).

In this matter, the court has already found Ruttura to be free from negligence. Thus, defendants' claim against Ruttura for common-law indemnification must fail. Therefore, the part of Ruttura's cross motion which seeks summary judgment dismissing defendants' cross claim for common-law indemnification is granted. The part of defendants' cross motion which seeks summary judgment

against Ruttura on their common-law indemnification claim must be denied.

Contractual Indemnification

[A] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. [A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor [internal quotation marks and citations omitted]

(*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]). “The right to contractual indemnification depends upon the specific language of the contract” (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]), and “indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed” (*Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Although defendants claim that section 8.7.1 of the Holt/Ruttura subcontract requires Ruttura to keep the premises free from debris and unsafe conditions resulting from its work (Lombardo 8/20/12 Affirm. in Opp. to Ruttura’s Cross Motion, ¶ 18, without quoting the actual words from the document), the court is unable to discover the language of the provision cited. The copy of the

subcontract submitted to the court is gray and grainy, with tiny little fuzzy letters, and the provision cited, section 8.7.1, is also almost totally obscured and obliterated by the binding used to attach the affirmation to its exhibits. Defendants have failed to quote the language of the provision, and the court has been unable to read it. Defendants have failed to meet their burden for summary judgment by tendering evidence that eliminates material issues of fact. Thus, defendants' cross motion for summary judgment against Ruttura on this cross claim, as based on section 8.7.1 is denied. No basis for this claim against Ruttura has been established. Thus, Ruttura's cross motion for summary judgment dismissing this cross claim, as based on section 8.7.1, is granted.

Section 12.1 of the subcontract, the indemnification provision, follows:

Subcontractor's Performance. To the fullest extent permitted by law, the Subcontractor [Ruttura] shall indemnify and hold harmless the Owner [NY Brush and Pepsi] ... the General Contractor [Holt] ... from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that

a) any such claim, damage, loss or expense is attributable to bodily injury ... to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor ... regardless of whether it is caused in part by a Party indemnified hereunder.

Further, to the fullest extent permitted by law, by acceptance of this Contract, the contractor agrees to indemnify and hold the Owner or General Contractor from and against all claims, damages, losses and expenses including but not limited to attorney's fees arising out of or in connection with the work provided that any such claim, damage, loss or expense is based upon or imposed under any obligation of the Owner and General Contractor under the Labor Law relating to the Subcontractor's Work.

Domenick Ruttura has testified that Ruttura did not use planks in its work, and that Ruttura had not placed the planks in the area of the blanketed rebar (Domenick Ruttura Depo., at 283-284, 286). Pross has testified that only the brick masons worked with planks or had planks like those in the photographs (Pross Depo., at 84, 108). In addition, the court has found Ruttura to be free from negligence or fault in the causation of plaintiff's accident. Thus, it is established that the accident did not arise out of or result from the performance of Ruttura's work, and was not caused in whole or in part by Ruttura's negligence. Thus, Ruttura's obligation to indemnify defendants has not been triggered.

Accordingly, the part of defendants' cross motion which seeks contractual indemnification against Ruttura based upon section 12.1 of the Holt/Ruttura subcontract is denied; the part of Ruttura's cross motion which seeks dismissal of defendants' contractual indemnification claim on the basis of section 12.1 of the subcontract is granted.

Accordingly, it is

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that the part of NY Brush LLC, Pepsi Cola Bottling Company of New York, Inc. and Holt Construction Corp.'s cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against them is denied; and it is further

ORDERED that the part of NY Brush LLC, Pepsi Cola Bottling Company of New York, Inc. and Holt Construction Corp.'s cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is granted; and it is further

ORDERED that the part of NY Brush LLC, Pepsi Cola Bottling Company of New York, Inc. and Holt Construction Corp.'s cross motion which seeks summary judgment against Ruttura & Sons Construction Co., Inc. on defendants' common-law indemnification claim is denied; and it is further

ORDERED that the part of NY Brush LLC, Pepsi Cola Bottling Company of New York, Inc. and Holt Construction Corp.'s cross motion which seeks summary judgment against Ruttura & Sons Construction Co., Inc. on their contractual indemnification cross claim is denied; and it is further

ORDERED that the part of Ruttura & Sons Construction Co., Inc.'s cross motion which seeks summary judgment dismissing plaintiffs' amended complaint is granted; and it is further

ORDERED that the part of Ruttura & Sons Construction Co., Inc.'s cross motion which seeks summary judgment dismissing defendants' cross claim for common-law indemnification is granted; and it is further

ORDERED that the part of Ruttura & Sons Construction Co., Inc.'s cross motion which seeks summary judgment dismissing defendants' contractual indemnification cross claim is denied to the extent that it is based on section 8.7.1 of the Holt/Ruttura subcontract, but is otherwise granted; and it is further

ORDERED that the amended complaint is dismissed in its entirety as against Ruttura & Sons Construction Co., Inc., with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the parties appear for mediation and proceed to trial forthwith if applicable.

Dated: December 20, 2012

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 NEW YORK Joan M. Kenney, J.S.C.
 COUNTY CLERK'S OFFICE