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

PRESENT: Hon. Shlomo S. Hagler *Justice* PART: 17

ANDREW ARNER,

Plaintiff,

-against-

RREEF AMERICA, L.L.C., 56 7TH AVENUE, LLC, NORTHBROOK MANAGEMENT LLC, individually and d/b/a NORTHBROOK MANAGEMENT, NORTHBROOK PARTNERS, LLC, individually and d/b/a NORTHBROOK MANAGEMENT, and NORTHBROOK MANAGEMENT, individually,

Defendants.

INDEX NO.: 105347/2010

FILED
JUN 25 2013
NEW YORK
COUNTY CLERK'S OFFICE

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RREEF AMERICA, L.L.C., 56 7TH AVENUE, LLC, NORTHBROOK PARTNERS, LLC, and NORTHBROOK MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

SWEET CONSTRUCTION CORPORATION, ADELPHI RESTORATION CORP., EMPRISE CONSTRUCTION, INC., LEGACY BUILDERS/DEVELOPERS CORP., and CODA INTERIORS,

Third-Party Defendants.

THIRD PARTY INDEX NO.: 590831/2010

DECISION and ORDER

Motion Sequence No.: 006

Motion by Third-Party Defendant Coda Interiors for summary judgment dismissing the Third-Party Complaint and all cross-claims.

| | Papers Numbered |
|---|---|
| Notice of Motion, with Affirmation of Movant's Counsel & Exhibits "A" through "N" | 1, 2, 3 |
| Affirmation of Counsel Defendants/Third-Party Plaintiffs in Opposition to Motion | 4 |
| Reply Affirmation of Movant's Counsel in Further Support of the Motion & Exhibit "A" | 5, 6 |
| Transcript of Oral Argument of September 10, 2012 | 7 |

**Cross-Motion:** ☑ No ☐ Yes **Number of Cross-Motions:** 0

**Upon the foregoing papers, it is hereby ordered that this Motion is granted only to the extent of dismissing third-party plaintiff's third cause of action and is otherwise denied as set forth in the attached separate written Decision and Order.**

Dated: June 19, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

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|---|---|---|---|---|
| Check one: | ☐ **Final Disposition** | | ☑ **Non-Final Disposition** | |
| Motion is: | ☐ Granted | ☐ Denied | ☑ Granted in Part | ☐ Other |
| Check if Appropriate: | ☐ SETTLE ORDER | | ☐ SUBMIT ORDER | |
| | ☐ DO NOT POST | | ☐ REFERENCE | |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ANDREW ARNER,

Plaintiff,

Index No. 105347/2010

-against-

RREEF AMERICA, L.L.C., 56 7TH AVENUE, LLC, NORTHBROOK MANAGEMENT LLC, individually and doing business as NORTHBROOK MANAGEMENT, NORTHBROOK PARTNERS, LLC, individually and doing business as NORTHBROOK MANAGEMENT, and NORTHBROOK MANAGEMENT, individually,

Defendants.

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RREEF AMERICA, L.L.C., 56 7TH AVENUE, LLC, NORTHBROOK PARTNERS, LLC, and NORTHBROOK MANAGEMENT, LLC,

Third-Party Plaintiffs,

Third Party Index No.: 590831/2010

-against-



SWEET CONSTRUCTION CORPORATION, ADELPHI RESTORATION CORP., EMPRISE CONSTRUCTION, INC., LEGACY BUILDERS/DEVELOPERS CORP. and CODA INTERIORS,

DECISION & ORDER

Third-Party Defendants.

Motion Sequence Nos.: 006, 007, 008, 009, 010, & 011

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Hon. Shlomo S. Hagler, J.S.C.:

In this personal injury action, third-party defendants, Coda Interiors ("Coda") (motion seq. no.006), Sweet Construction Corporation ("Sweet") (motion seq. nos. 007 and 008), Adelphi Restoration Corp. ("Adelphi") (motion seq. no 009), Legacy Builders/Developers Corp. ("Legacy")

(motion seq. no. 010), and Emprise Construction, Inc. ("Emprise") (motion seq. no. 011), all move for orders, pursuant to CPLR § 3212(a), granting each one of them summary judgment dismissing the third-party complaint by defendants/third-party plaintiffs, RREEF America, L.L.C. ("RREEF"), 56 7th Avenue, LLC ("56 7th Avenue"), Northbrook Partners, LLC, ("Northbrook Partners"), and Northbrook Management, LLC ("Northbrook Management") (collectively "the owners/managers" or "third-party plaintiffs"), which asserts claims against each third-party defendant for contractual indemnification, common-law contribution and/or indemnification,[1] and breach of contract to procure and maintain insurance naming the third-party plaintiffs as additional insureds. The third-party defendants also move for an order granting them summary judgment dismissing any cross-claims.

Motion sequence numbers 006 through 011 are consolidated for disposition.

**Background**

On Saturday, October 10, 2009, plaintiff Andrew Arner ("plaintiff" or "Arner"), on his way to the mailroom of his apartment building located at 56 Seventh Avenue, New York, New York ("the building"), was injured when he allegedly tripped on a raised edge of a Masonite[2] board which had been placed on the corridor floor outside of the mailroom near the service entrance and service elevator. The edge of the offending Masonite board was not taped down at the time of the accident.

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1. The third-party complaint asserts, against each third-party defendant, a cause of action which seeks "contribution as indemnitor or tortfeasor," apparently an effort to assert separate causes of action for common-law indemnity and contribution. *See, e.g.,* Third-Party Complaint, ¶ 95.

2. Masonite is a type of hardboard with at least one smooth surface, often used in construction and by contractors to protect walls and floors from damage.

The hallway where the fall occurred was off the main lobby and connected the building's service entrance to its service elevator. Arner testified that he used the service corridor approximately twice a week and had no recollection of ever seeing the Masonite in that area prior to the day on which he fell (Examination Before Trial of Andrew Arner ["Arner EBT"], at 27, 48, 73). In addition, third-party defendant Emprise's president, Wei Hong Liu ("Liu"), who testified that he was at the building almost every day and appears only to have used the service entrance, also claimed that he never observed Masonite on that floor prior to October 10, 2009 (Examination Before Trial of Wei Hong Lui ["Liu EBT"], at 18-19, 22-23, 28, 30). However, various other persons testified that they had seen the Masonite in that area at various times prior to Arner's accident. For example, a building resident, Peter Levin ("Levin"), who came upon the accident scene shortly after Arner's fall, testified that the Masonite board in issue had been at that location for about a year before the fall, and had previously been secured with blue tape, but, at the time of the accident, the board's edge was bowed upward and the tape had been absent for "[a]bout three days" (Examination Before Trial of Peter Levin ["Levin EBT"], at 15-18). In addition, Shahid Taylor ["Taylor"], employed by Northbrook as the property manager for the building, testified that he would visit the building once or twice a week while the construction was going on (Examination Before Trial of Shahid Taylor ["Taylor EBT"] at 50) and that he had observed the Masonite in the service area leading up to the service elevator and mailboxes (*id.* at 66), but he had never observed that Masonite unsecured by tape (*id.* at 72).

Approximately a year and a half before the accident, the building had been purchased by defendant/third party plaintiff 56 7th Avenue which, thereafter, began a series of building-wide improvements. The contractors for those improvements were engaged on 56 7th Avenue's behalf

by Northbrook Partners.[3] Among the contractors which Northbrook Partners directly retained on behalf of 56 7th Avenue were the third-party defendants, as well as an elevator contractor, which was hired to modernize the elevators, an electrical contractor, which was retained to submeter the basement, hallways, and apartments, and an entity retained to install a new boiler in the basement. Coda, Legacy, and Emprise were hired to renovate various apartments in the building. Sweet was hired to renovate the common areas, including the corridors, the lobby, and the hallway where the accident occurred, including changing its terra cotta tile flooring to granite, and to move the mailboxes so that the room where the mailboxes were originally located could be used to enlarge the superintendent's apartment.[4] Adelphi was retained to perform outside work on the roof, facade, terraces, and courtyard.

According to property manager Taylor, all of the contractors and subcontractors were required to use the service entrance and service elevator when entering the building and to place Masonite boards to protect the floors of the building. Northbrook Partners also employed Joanna McGinn ("McGinn") and Gerald Rivera ("Rivera") as construction managers in connection with the

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3. The relationship between Northbrook Partners and Northbrook Management is not entirely clear on the instant applications, but it appears that they both shared the same address and were to some extent involved in the building's management. RREEF's relationship to the ownership/management is also unclear on this motion, except to the extent that a Northbrook Management property manager, Shahid Taylor ("Taylor"), testified that RREEF was an "asset manager" (Examination Before Trial of Shahid Taylor ["Taylor EBT"] at 20-21), and Adelphi's counsel asserted that RREEF was an owner of the building (Affirmation of Susan Jackson ["Jackson Aff."], at ¶ 3).

4. According to both Arner and Frank Locantore, the project manager for Sweet, the mailboxes were moved after Arner's accident (Arner EBT at 43-44; Examination Before Trial of Frank Locantore ["Locantore EBT"] at 28, 31).

construction, and it seems that each of them would work with a particular contractor or contractors. (Taylor EBT at 47-48, 79, 87-88, 120-122)

Arner commenced this action against the owners/managers asserting a variety of causes of action, including one for negligence. Arner's bill of particulars alleges, among other things, that the defendants, their agents, and employees were negligent in causing and creating the dangerous condition, in failing to remedy a dangerous and defective condition, in failing to tape down the Masonite, and in failing to maintain or remove the unsecured piece of Masonite from the lobby. The owners/managers then commenced a third-party action against some, but not all, of the contractors which Northbrook Partners hired on behalf of 56 7th Avenue. The third-party defendants, Coda and Emprise, asserted cross-claims for contractual and common-law indemnification and for contribution, and Adelphi, Sweet, and Legacy also asserted cross-claims which appear to sound in contribution and common-law indemnification.

During discovery, Taylor was the only individual deposed on behalf of the owners/managers. Taylor managed ten (10) properties for Northbrook Management, including the building at issue here, but he was not involved in negotiating the contracts and did not know what was in them (Taylor EBT at 78-79). McGinn, who was not deposed and whose affidavit was not presented on these motions, negotiated the contracts (*id.* at 79). McGinn also oversaw the construction projects, while Rivera oversaw the apartment renovations (*id.* at 87-88, 120-122). Taylor would go to the building about once or perhaps twice a week during the construction work and would attend weekly meetings at the building with the contractors' representatives and McGinn (*id.* at 50-51). Taylor recalled seeing Masonite in the service hallway, but could not recall whether he had seen it before or after Arner's accident (*id.* at 65-66). However, Taylor stated that when he saw the Masonite, it

was taped down with silver colored tape (*id.* at 69, 71). Taylor neither knew who placed the Masonite in the service corridor nor when it was placed (*id.* at 78). Taylor testified that the owners/managers did not own Masonite boards (*id.* at 82-83). Taylor also testified that there was Masonite outside of the apartments which were being renovated, that the companies working on apartments would be required to place the Masonite there, and that in October 2009 about seven to ten apartments were being renovated (*id.* at 92, 94).

According to Taylor, the building had a live-in superintendent, Fernando Orochena ("Orochena"), who worked "Monday to Friday, 8:00 to 5:00" (Taylor EBT at 31). After the accident, Taylor called Orochena to see if he or any other st aff member had knowledge of the incident, but they could provide no information. Taylor testified that the purpose of the tape was to secure the Masonite to the floor to keep it from moving and that, if he had seen it untaped, he would have told the superintendent that "the Masonite needed to be secured to the floor" (*id.* at 72). When asked directly whether it would be the superintendent's responsibility to ensure that the Masonite was secured to the floor, Taylor answered affirmatively (*id.* at 86). Asked whether the superintendent performed routine building inspections, Taylor indicated that "[m]aybe a walk-through, yeah," but he did not know whether the superintendent made daily walk-throughs in the area where Arner fell (*id.* at 86).

**Discussion**

The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing that party's entitlement to the requested relief, by eliminating all material allegations raised by the pleadings (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 [2d Dept 2007]). The failure to do so mandates the

denial of the application, "regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). (*See also Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492-493 [1st Dept 2012] [movant in accident case has burden of demonstrating beyond a material issue of fact that it did not bear any responsibility for plaintiff's accident and that, "to the extent that the accident arose out of a dangerous condition on the premises, it was not liable for the condition"].) Only after a moving party makes its required showing does the burden shift to the opposing party to demonstrate the existence of a material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987] [internal citations omitted]). A movant does not meet its prima facie burden on a summary judgment motion by simply pointing to gaps in the other side's case (*Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]; *see also Plotits v Houaphing D. Chaou, LLC*, 81 AD3d 620, 621 [2d Dept 2011] [defendants do not meet their prima facie burden by pointing to gaps in plaintiff's case; they must show that they did not negligently create dangerous condition or have notice of it]).

While a property owner is required to maintain the premises in a condition which is reasonably safe under the circumstances (*Basso v Miller*, 40 NY2d 233, 241 [1976]), generally speaking a contractual duty alone to maintain premises will "not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Nonetheless, a duty of care to a third party will arise: (1) where the contracting party has entirely displaced another's duty to safely maintain the premises; (2) where the third party has relied to his/her detriment on the

contracting party's continued performance of its duties; or (3) where the contracting party has negligently "launche[d] a force or instrument of harm" (*id.* at 141 [internal citation and quotation marks omitted]).

In these motions by the third party defendants for summary judgment dismissing the third-party complaint, it is not sufficient for the movants to argue that the third-party plaintiffs have not proven at this stage of the litigation that the third-party defendants are liable for the plaintiff's accident. On the contrary, it is the movants' burden on their summary judgment motions to show that they were not negligent and did not cause or create the dangerous condition which resulted in the plaintiff's accident as a matter of law and that there are no questions of fact regarding the movants' possible liability.

**Coda Motion (MS#006)**

One part of Coda's motion seeks an order granting it summary judgment dismissing the owners/managers' third cause of action which alleged that Coda breached its contract by not procuring and maintaining insurance naming the third-party plaintiffs as additional insureds. Coda asserts that it procured that insurance, as demonstrated by the copy of the policy appended as Exhibit "K" to its moving papers, which contains an endorsement for persons and entities to be added as additional insureds, as required by the construction contracts. In response, the owners/managers neither dispute this assertion nor oppose this branch of Coda's motion. Therefore, the branch of Coda's motion which seeks an order granting it summary judgment dismissing the owners/managers' third cause of action is granted, and that cause of action against Coda is dismissed. (*See Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [claim of breach of contract to procure

insurance untenable where record showed that party that was obligated to procure insurance purchased policy with "blanket endorsement for contractually designated additional insureds"].)

Regarding the remainder of Coda's motion for summary judgment to dismiss the third party complaint, Coda relies, among other things, on the testimony of Roger Dardis ("Dardis") (Examination Before Trial of Roger Dardis ["Dardis EBT"], attached as Exhibit "A" to the Reply Affirmation of Coda's counsel Michael T. Reagan, Esq.) and Dardis' Affidavit in Support ("Dardis Aff." attached as Exhibit "I" to Coda's Motion).

Dardis, a co-owner and corporate officer of Coda, admitted that Coda started a renovation of apartment 16K beginning at the end of August 2009 and was still working there on October 10, 2009. The renovation involved installing a new kitchen and bath and performing electrical work and painting in the apartment. Coda also retained a subcontractor to perform the carpentry work. Dardis, who used the service entrance when he visited the building on average three times per week, testified that he had no recollection of seeing a Masonite board in the service hallway before Arner's accident. He also testified that Coda purchased Masonite boards, but that they were only used immediately outside of the apartment Coda was renovating (Dardis EBT at 10, 12-13). Coda did not retain a supervisor on the job site, but Dardis said he communicated daily with Rivera. According to Dardis, Coda was told to use and did use the service entrance when performing its work or bringing in equipment and materials, but claimed Coda was neither told of any requirement nor was asked to put down Masonite boards in the service hallway. Dardis also claimed that Coda and its employees neither placed Masonite in the service area nor placed or removed any tape on the edge of the Masonite.

Dardis asserts that at no time prior to October 10, 2009, did Coda place or utilize any type of boards, Masonite or otherwise upon any portion of the floor in the lobby area of the premises (Dardis Aff. at ¶ 4 & 5; Dardis EBT at p. 13), did not remove any tape - duct tape or otherwise - from any boards, Masonite or otherwise, which was being used to secure the board, had no duty of care with respect to maintaining the premises, had no authority to direct or control any other entities' work in the building, and was free of negligence. As a result, Coda asserts that it has prima facie established that it committed no negligent act or omission, and argues that it cannot be held liable for Arner's accident or subject to common-law indemnification. *(See Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010] ["Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence."]). Coda further claims that because it established its lack of negligence, the third-party plaintiffs' contribution claim must be dismissed. (*See Smith v Sapienza*, 52 NY2d 82, 87 [1981] [contribution claim only exists when at least two "tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person"].) Additionally, Coda asserts that it cannot be liable to the third-party plaintiffs for contractual indemnification since the third-party plaintiffs' liability did not arise out of Coda's performance of its work and/or its acts or omissions, which are predicates for contractual indemnification under paragraph 11 of the Construction Contract Agreement. (*See Lesisz v Salvation Army*, 40 AD3d 1050, 1051-1052 [2d Dept 2007] ["right to contractual indemnification depends upon the specific language of the contract" (internal quotation marks and citation omitted)].)

In opposition to Coda's motion, the owners/managers assert that, since Dardis was not at the site on a daily basis, but only visited on average three times a week, he lacked personal knowledge

In opposition to Coda's motion, the owners/managers assert that, since Dardis was not at the site on a daily basis, but only visited on average three times a week, he lacked personal knowledge as to whether Coda placed Masonite boards, which it concededly purchased, in the area where Arner fell, and as to whether its workers, or its subcontractor, while transporting tools and materials through the service hallway, dislodged or removed the tape which had secured the Masonite board. The owners/managers maintain that, in order to establish its prima facie case, Coda had to provide testimony from its on-site personnel or other evidence such as daily log reports.

The third-party plaintiffs further posit that, because there are two indemnity provisions in "the contract" appended to Coda's motion, there is an issue of fact as to which provision is controlling (*see* affidavit of third-party plaintiffs' counsel Vanessa Keegan-Natola, Esq. in opposition to Coda's Motion ["Keegan-Natola Aff. in Opp. to Coda's Motion"] at ¶ 14). Specifically, the third-party plaintiffs point to an indemnification provision in a document denominated the "REEF Agreement for Services," which was executed on the same day as the "Construction Contract Agreement" and was evidently an exhibit to the latter document, and was, thus, considered part of that agreement as per language which indicates that such agreement "includ[es] all Exhibits attached thereto" (*see* Exhibit "A" to the Construction Contract Agreement). The third-party plaintiffs' counsel observes, without any explanation of its significance[5] or any assertion as to which provision applies, that the RREEF Agreement for Services requires Coda to indemnify them for, among other things, any property damage or injury arising from or caused by "the act, neglect, fault or omission by or of Contractor or any of its agents, employees or subcontractors to meet any standards imposed

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5. In opposition to other third-party defendants' motions, the owners/managers made it clear that they were claiming that this provision imposed liability on the third-party defendants for their acts and omissions, irrespective of whether those acts and omissions were negligent.

by any duty with respect to the injury or damage or the conduct or management of any work **or thing whatsoever done by them in or about the Building."** (Keegan-Natola Aff. in Opp. to Coda's Motion, ¶ 14 [emphasis in the affirmation].) The third-party plaintiffs assert that since there is an issue of fact as to which indemnity provision applies and whether Coda or its subcontractor caused or contributed to the accident, Coda's motion must be denied.

In reply, Coda relies on case law which applies the principle of contract construction which gives precedence to a specific over a conflicting general contractual clause *(see, e.g., Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept 2000]). Coda argues that the indemnification provision upon which it relies is controlling, because it is more specific, in that it relates to "damages and/or liability arising out of Coda's work," while the other provision, according to Coda, relates to damages and/or liability caused by "repairs, improvements and replacements of and additions to the building" (Reply Affirmation of Michael T. Reagan in Further Support of Coda's Motion ["Reagan Reply Aff."], at ¶ 8, citing RREEF Agreement for Services ¶ 6.) Coda also claims that it is immaterial which indemnification clause applies since it would change nothing, because it has demonstrated that the third-party plaintiffs' alleged damages did not arise out of Coda's work. Coda also notes that, if anything, the indemnification provision set forth in the RREEF Agreement for Services is more favorable to it, because that provision allegedly contains "a negligence trigger," in that Coda must indemnify the third-party plaintiffs for damages and liabilities which result from Coda's "act, neglect, fault or omission . . . [concerning] any work or thing whatsoever done by them in or about the building" (*id.*).

This portion of Coda's motion for summary judgment to dismiss the third-party complaint must be denied. Under its contract with 56 7th Avenue, Coda was required to "minimize and if

possible, avoid . . . injury to persons or property." (RREEF Agreement for Service at ¶ 3.) Irrespective of whether Coda was told to, or did, put the Masonite board down to protect the service hallway's floor, Coda has failed to meet its prima facie burden to demonstrate that its workers or subcontractor did not cause the tape to become dislodged or removed or cause the edge of the board to become bent while they were transporting its equipment and materials to the apartment they were renovating. Dardis does not purport to have been there at all times when such activities were conducted and, therefore, lacks personal knowledge of the relevant facts. Notwithstanding that Coda was sued within about a year of the accident and its completion of the job, Coda destroyed much of the information about what it did on a daily basis at the building, even though under normal circumstances, Coda retained, "[f]or a couple of years; at least a year," daily job reports that contained the people on the job and the work performed each day (Dardis EBT 10-11).

Moreover, Dardis conceded that Coda subcontracted the carpentry work, and did not specifically mention subcontractors in his supporting affidavit. Since Coda's contract work was finished in approximately mid-October and the accident occurred on October 10, 2009, that means that Coda and its subcontractor performed work on or before the date of Arner's accident. Under the contract, Coda was responsible for its subcontractors. (*See* RREEF Agreement for Services at ¶ 9; Construction Contract Agreement at ¶¶ 11, 23.) Coda has also failed to provide any affidavit from its carpentry subcontractor indicating that it neither placed the subject Masonite board in the service area nor caused or contributed to the board to become untaped or raised.

Since Coda has failed to meet its prima facie burden to eliminate its own or its subcontractor's acts or omissions as a contributing cause of Arner's accident, a finding which would give rise to liability under either indemnity provision, it is irrelevant for purposes of Coda's motion

which indemnification provision governs.[6] It should be further noted that the Construction Contract Agreement at ¶ 1, provides that, if there is a conflict between the body of the agreement and any of the exhibits attached to it, the "more stringent provision or requirement shall control," a provision which neither side raises and should be addressed before it is determined which indemnification provision governs. Thus, the branch of Coda's motion which seeks an order granting it summary judgment dismissing the owners/managers' claims sounding in contractual indemnification must be denied, as must the branches seeking dismissal of their contribution and common-law indemnification claims.

Since there is an issue of fact as to whether Coda was negligent, the branch of its motion which seeks dismissal of the cross-claims for contribution is also denied at this time. In addition, while reciting the law on indemnification, Coda did not specifically assert that it was entitled to dismissal of the other third-party defendants' cross-claims for contractual and common-law indemnification on the grounds that it did not have contracts with them, or that they are vicariously liable for Coda's acts and omissions. Accordingly, at this juncture, this Court cannot grant Coda, or any other third-party defendant which has not moved on the above grounds, any relief on those cross-claims. (*Frank v City of New York*, 211 AD2d 478, 479 [1st Dept 1995] ["A motion for summary judgment addressed to one claim or defense does not provide a basis for the court to search the record to grant summary judgment on an unrelated claim or defense"]; [*cf. Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996] ["court may search the record and grant summary

6. As contrasted with other movants, Coda does not urge the applicability of General Obligations Law ("GOL") § 5-322.1 or that the third-party plaintiffs were negligent as a bar to contractual or common-law indemnification.

judgment in favor of non-moving party only with respect to a cause of action or issue that is the subject of the motions before the court" (citing *Frank v City of New York* among other cases)].)

**Sweet**

Initially, it should be noted that motion sequence no. 007, Sweet's motion for summary judgment, has been superceded by motion sequence no. 008, Sweet's amended notice of motion. Accordingly, motion sequence no. 007 is marked as withdrawn.

As to motion sequence no. 008, Sweet's counsel, relying on the AIA standard form contract, executed on August 4, 2009, between it and 56 7th Avenue, various pleadings, and the deposition testimony of Arner, Taylor, and Sweet's project manager, Frank Locantore ("Locantore"), asserts that Sweet is entitled to summary judgment dismissing the third-party complaint, as well as all cross-claims, on the ground that the evidence demonstrates that Sweet was not negligent. Sweet does not delve into the cross-claims of the other third-party defendants and simply claims that under section 8.12 of the aforementioned AIA contract the owners/managers would be entitled to contractual indemnification only if Sweet, its employees, or its subcontractors were negligent, also a predicate in this case for common-law indemnification and contribution.

As to its lack of negligence, Sweet relies on Locantore's deposition testimony that, prior to Sweet's commencement of work in the building in July 2009, the service corridor already had Masonite installed, that Locantore did not know who had placed the Masonite in that area, and that other renovations were already underway, such as in the apartments and elevators (Locantore EBT at 36-37). Locantore asserted that the Masonite remained in the service corridor area until April 2010, and that he believed that the Masonite was there to protect the flooring, since that was the primary area used to bring materials into the service elevator (*id.* at 37). At the time Locantore first

saw the Masonite, it was secured by duct tape (*id.* at 38). Sweet also relies on Locantore's testimony that Sweet's work in the "mailbox area" did not commence until about April 2010 (*id.* at 27-28), and that, in October 2009, Sweet was performing work in the front elevator lobby, was renovating the basement laundry room, creating a fitness center in the basement, and was working in the basement elevator corridor and in most of the lobby corridors on the second through the 20th floors (*id.* at 17-18). Based on the foregoing, Sweet asserts that it is entitled to summary judgment. Sweet is silent on the issue of the third-party plaintiffs' claims against it for breach of a contract to procure and maintain insurance.

The owners/managers oppose Sweet's motion. They point to a provision in a scope of work document from their interior decorator that is applicable to Sweet's work. That document provided that the contractor was "to protect Vestibule or lobby floor at all times while performing any work in these areas or bringing material through the lobby." (Keegan-Natola Aff. in Opp. to Sweet's Motion, at Exhibit 1.) The owners/managers assert that, because Taylor testified that he had a conversation with Locantore about using Masonite, the jury could conclude that the conversation was about placing it in the vestibule. The owners/managers further note that Locantore testified that Sweet's materials would be brought in through the service corridor, and that if the materials were dirty or greasy Sweet would lay down Masonite, cardboard or paper to protect the floor (Locantore EBT at 23-24). Additionally, Locantore testified that he was unsure whether the piece of Masonite that he saw when he first visited the building was the same piece that remained in the service corridor (*id.* at 49). The owners/managers maintain that, because Locantore only visited the building once or twice a week and was not Sweet's field supervisor, who was the person who kept track of the work being performed each day and was present at the building (*id.* at 21-22), Locantore

lacks sufficient personal knowledge as to whether Sweet, its employees or those for whom it was responsible caused or created the dangerous condition.

The owners/managers also claim that the aforementioned contractual indemnification provision, which was contained in the RREEF Agreement for Services (at ¶ 6) allegedly provides for contractual indemnification, not only if Sweet or its subcontractors were negligent, but also if their actions simply caused the accident. The owners/managers argue that there is an issue of fact as to which contract indemnity provision governs, and that, since Sweet failed to establish that it was not negligent or that it did not cause the accident, its motion for summary judgment must be denied.

In reply, Sweet did not append or rely on Levin's deposition testimony or seek to demonstrate that the third-party plaintiffs were negligent, other than by its counsel's bald and conclusory statement that "the only negligence in the facts of this case is completely on the part of the third-party [p]laintiffs." (Haynes Reply Aff., ¶ 25.) Sweet's counsel adds that the contractual indemnification provision set forth in the RREEF Agreement for Services at ¶ 6 is unenforceable because it purports to require Sweet to indemnify the owners/managers for their own negligence in violation of General Obligations Law § 5-322.1. Sweet, citing *Syed v Normel Constr. Corp.*, (4 AD3d 303 [1st Dept 2004]), also maintains that such a provision should be deemed unenforceable because it is inconsistent with the other indemnification provision set forth in the AIA contract and, therefore, should be construed against the third-party plaintiffs. Furthermore, Sweet's witness Locantore himself raised an issue at his deposition as to the meaning of the floor protection provision in the interior designer's scope of work document, by testifying that it meant that it was not referring to the service corridor, but to a vestibule inside the front doors and to the lobby floor (Locantore EBT at 27).

Sweet failed to meet its burden to prima facie establish that it did not create or exacerbate the condition which caused the accident, namely the loosening, dislocation or removal of the tape holding down the edge of the Masonite board. Sweet was performing extensive work which required it to carry in equipment and materials through the service area. Moreover, Locantore testified that Sweet used the services of five subcontractors which interacted with Sweet's field supervisor (*id.* at 50-51). While Locantore asserted that the subcontractors did not lay down Masonite (*id.*), he was at the site on a limited basis and did not purport to have personal knowledge, nor did he offer evidence or claim to have knowledge on the issue of whether the subcontractors or anyone from Sweet caused or contributed to the Masonite becoming untaped or bent. As with Coda, Sweet was responsible for its subcontractors under it contracts (*See* AIA Agreement, § 8.12; RREEF Service Agreement, ¶¶ 6, 9).

To the extent that Sweet seeks to invalidate the indemnification clause of the RREEF Agreement for Service simply because it is inconsistent with the AIA contract's indemnification clause, the *Syed v Normel* case upon which Sweet relies does not stand for such a proposition. That case, which did not deal with conflicting contractual provisions, only held that an ambiguous contract provision should be construed against the drafter (4 AD3d at 304). Neither Sweet, nor the third-party plaintiffs, offer any information regarding the negotiations leading up to the drafting and signing of the two documents, and Sweet does not even argue that both provisions were drafted by the third-party plaintiffs. Furthermore, assuming for argument's sake that the RREEF Agreement for Services governs and that it provides for the indemnification of the third-party plaintiffs for their own negligence in contravention of General Obligations Law § 5-322.1, Sweet has failed to demonstrate, other than by bald and conclusory allegations, that the third-party plaintiffs were

negligent and that, therefore, the indemnification provision in that document must be invalidated. (*See Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 175 [1990] [indemnification provision, which required subcontractor to indemnify general contractor for its negligence, is enforceable where "there has been no finding of negligence on the part of the general contractor"]; *see also Sosa*, 101 AD3d at 496, [Catterson, J., dissenting] ["a subcontractor seeking to avoid enforcement of an indemnity agreement has the burden of proving that the indemnitee general contractor was 'negligent to some degree' "]). Since Sweet has failed to demonstrate that the RREEF Agreement must be invalidated, it is irrelevant which provision governs, since Sweet has failed to demonstrate that it was free of negligence, a basis for indemnification under both indemnification provisions.

Accordingly, the branch of Sweet's summary judgment motion seeking dismissal of the third-party complaint is denied, and Sweet's application to dismiss the cross-claims is denied for the same reasons that Coda's application to dismiss such cross-claims was denied.

**Adelphi's Motion (MS#009)**

Adelphi moves for an order granting it summary judgment dismissing the third-party complaint and all cross-claims. It also maintains that it is entitled to dismissal of the alleged breach of its obligation to procure insurance cause of action, since it procured the requisite insurance which "list[ed]" "Northbrook" (Adelphi's collective name for the third-party plaintiffs), as evidenced by a certificate of insurance appended to Exhibit "S" to Adelphi's moving papers. Adelphi further asserts in its initial moving papers that the applicable indemnity provision, RREEF Service Agreement, section 6, only requires it to contractually indemnify the owners/managers in the event that Adelphi, or those for whom it is responsible, were negligent. (Affirmation of Adelphi's counsel Susan M. Jackson, Esq. [Jackson Aff.], at ¶ 92; Adelphi Memorandum of Law in Support of its

Motion, at 3, 9.) Arguing that it owed plaintiff no duty with respect to the Masonite boards and alleging that it was free of negligence and did not cause or create the allegedly dangerous condition, Adelphi maintains that it is entitled to summary judgment dismissing the balance of the claims asserted against it (Adelphi Memorandum of Law in Support of its Motion, at 2).

In this regard, Adelphi, whose work consisted of exterior building construction and renovation work, primarily to the facade of the building, and constructing a terrace, relies principally on the affidavit of its owner, Anna Theodorou ("Theodorou") ("Theadorou Aff."), attached as Exhibit"S" to its motion, and her deposition testimony (Examination Before Trial of Anna Theodorou ["Theodorou EBT"]) attached as Exhibit "T" to its motion. Theodorou, who stated that she visited the building at "at least once a week" (Theodorou EBT at 20), asserts that Adelphi was neither asked by a Northbrook or RREEF representative to place Masonite in the service corridor area, nor used Masonite boards in the service corridor area when transporting its work materials (*id.*). Theodorou also claimed that Adelphi neither purchased Masonite for this project nor used them at the building for any reason or at any time during the performance of its work at the building (Theodorou Aff., ¶ 6). Theodorou also averred that "[i]t is not Adelphi's custom and practice to own, maintain, rent or place any Masonite or other interior floor coverings in connection with its exterior work at any jobs including the work performed at the Building" (*id.*). Theodorou also asserted that "Adelphi did not supervise, direct or control the installation, maintenance or repair of the subject Masonite board inside the building" and "is unaware of who installed the Masonite board at the site, or when it was installed" (Theodorou Aff., ¶ 8; Theodorou EBT at 19-20, 23, 28-29).

Theodorou admitted that Adelphi workers would occasionally enter the building and would bring work materials in through the service entrance and service elevator (Theodorou EBT at 18-

19). Theodorou, who was not at the building every day, did not indicate that she had spoken to the Adelphi workers at the building or indicate the basis or source of her assertion in her affidavit that "[a]t no time did any of Adelphi's workers damage or create the alleged dangerous condition regarding the subject Masonite board in the performance of their work at the Building" (Theodorou Aff., ¶ 9). Furthermore, when the question was specifically put to Theodorou whether she ever had any conversations with any of Adelphi's employees regarding the Masonite boards at the building, her response was "No" (Theodorou EBT at 24). As a result, Theodorou's assertion in ¶ 9 of her affidavit that "[a]t no time did any of Adelphi's workers damage or create the alleged dangerous condition regarding the subject Masonite board in the performance of their work at the Building" is nothing more than a bald and conclusory assertion, unsupported by any evidence or first hand knowledge and, therefore, is without sufficient probative value to grant Adelphi summary judgment. (*See Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175, 186 [1st Dept 1984] ["unsupported allegations in affidavits are no substitute for proof"].)

In addition, Theodorou acknowledged that Adelphi hired and paid a subcontractor at the building but did not recall the name of the subcontractor at her deposition (*id.* at 25-26). There was also a company called ALR which did asbestos removal from the areas where Adelphi was working and with which Theodorou believed Adelphi had a contract, but was not sure" (*id.* at 17-18). Thus, under the terms of its contractual provisions, Adelphi would be liable for any actions of its subcontractors, whose liability for creating or contributing to a dangerous condition regarding the taping down of the Masonite board in the service corridor has not be sufficiently eliminated or even addressed. Therefore, Adelphi has failed to meet its burden of showing that it is entitled to summary judgment on that portion of its motion.

Further, while its initial moving papers are not entirely clear, it appears that Adelphi claims that the owners/managers are not entitled to indemnification because they, rather than Adelphi, had the duty to ensure that the Masonite board was safe, which duty they breached. In this latter regard, Adelphi maintains that Levin testified that the Masonite board was untaped for about three days and that Taylor testified that the building's superintendent was required to conduct daily walk-throughs to ensure that the Masonite boards were taped down. Therefore, Adelphi argues that the third-party plaintiffs had actual and constructive knowledge of the untaped boards based on the daily walk-throughs that were allegedly required to have been conducted, and were negligent in failing to have taken remedial steps (Jackson Aff., in Support, ¶ 89).

In response, the owners/managers assert that Adelphi failed to establish that it procured the requisite insurance, since the contract required it to name RREEF Management Company[7] (RREEF Agreement for Services, ¶ 7 [A], [B]) as one of several additional insureds, but the certificate of insurance appended to Adelphi's motion, while reciting that 56 7th Avenue and Northbrook Partners were among the additional insureds, did not indicate that RREEF Management Company was covered. Further, the third-party plaintiffs observe that Adelphi's insurer declined to provide coverage for them in this matter. In addition, the third-party plaintiffs assert that Theodorou lacks first-hand knowledge of the facts and note that she conceded that, despite the fact that her company did outside work, it used the service entrance and elevator in addition to its hoist, and performed work at the building before the accident occurred. The third-party plaintiffs also dispute that Adelphi has established, as a matter of law, that they (third-party plaintiffs) were negligent, and urge that

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7. None of the parties mentions that the contract required Adelphi to procure insurance for an entity named RREEF America, LLC, or claims that this entity is different than RREEF Management Company.

there is a question of fact as to whether they had constructive notice of the alleged defect. Additionally, the third-party plaintiffs maintain that, even if Adelphi has established such negligence, they would be entitled to partial contractual indemnification. (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008] [where indemnification provision does not require indemnitor to indemnify indemnitee for its own negligence, partial contractual indemnification is permissible for that portion of liability attributable to the indemnitor's fault, even though indemnitee was also partially at fault].) Finally, the owners/managers argue that there is an issue of fact as to whether the contract requires a finding of Adelphi's negligence to trigger an obligation to provide contractual indemnification or whether it only need be shown that plaintiff's injuries were caused by Adelphi's actions.

In reply, Adelphi asserts that it did procure the requisite insurance, and appends, for the first time, a copy of the insurance contract which contains an additional insured endorsement for those "[a]s required by written contract signed by both parties prior to loss" arising out of injury caused by Adelphi's work "at the location designated and described in the schedule of this endorsement" (Jackson Reply Aff., Exhibit Y, at 30). However, the location box in the schedule is blank. (*Id.*) Adelphi claims that its insurance carrier declined to cover RREEF and the other third-party plaintiffs, not because of their lack of additional insured status, but because there was no evidence provided to the carrier to support a claim that the accident arose out of Adelphi's acts or omissions. Adelphi claims that any issue which the third-party plaintiffs have regarding insurance coverage should be directed not at Adelphi but at its insurance carrier. Adelphi also argues for the first time in its reply papers that, to the extent the contract's indemnification clause (RREEF Agreement for Services, ¶ 6) purports to indemnify the third-party defendants for their own negligence, it is void under General Obligations Law § 5-322.1 (Jackson Reply Aff., ¶ 32).

The branch of Adelphi's motion, which seeks an order granting it summary judgment dismissing the third-party plaintiffs' claim for breach of a contract to procure and maintain insurance, is denied. The only evidence that Adelphi offered in its initial moving papers was Theodorou's affidavit asserting that the third-party plaintiffs were "listed" as additional insureds in the policy, as evidenced by the certificate of insurance (Theodorou Aff., ¶ 10 and accompanying Exhibit 2). However, the certificate of insurance states that it is "informational only, and confer[s] no rights upon the certificate holder." (*JT Queens Car Wash, Inc. v 88-16 Northern Blvd., LLC*, 101 AD3d 1089 [2d Dept 2012] [certificates of insurance which were informational only were insufficient to demonstrate that movant maintained the requisite insurance]; *see also Penske Truck Leasing Co. v Home Ins. Co.*, 251 AD2d 478, 479 [2d Dept 1998].) Moreover, the certificate of insurance did not list RREEF as an additional insured on the policy. Adelphi's reply papers appended the insurance contract for the first time, and relied on the additional insured language in that contract. However, the additional insured provision in Adelphi's insurance contract failed to designate the location and Adelphi's insurer also declined to cover the "RREEF America defendants" because no documents had been submitted that they qualified as additional named insureds (Jackson Reply Aff., Exhibit Z). Furthermore, it is well settled law that relief cannot be granted based on grounds or arguments raised for the first time in reply papers. (*See Dannasch v Bifulco*, 184 AD2d 415, 416-417 [1st Dept 1992].)

Similarly, Adelphi cannot seek dismissal of the third-party plaintiffs' contractual indemnification cause of action based on its assertion, raised for the first time in its reply papers, that the indemnification clause was void to the extent that it allegedly required Adelphi to indemnify the third-party defendants for their own negligence. In its initial moving papers Adelphi asserted that

the indemnification clause required it to indemnify the owners/managers only if Adelphi was negligent; Adelphi did not argue that such clause required Adelphi to indemnify the owners/managers for their own negligence.

The balance of Adelphi's motion as to the owners/managers is also denied, since Adelphi has failed to prima facie establish that it did not cause or contribute to the defective condition leading to Arner's accident, or that it was, as a matter of law, caused by the negligence of the third-party plaintiffs. As to the latter claim, whether under the circumstances the alleged defect was present for a sufficiently long period, so that, in the exercise of reasonable care, the superintendent or other building employee or agent should have discovered it, and how often the superintendent did or should have conducted building-wide inspections, should be left for the trier of fact.

Even if Adelphi established that the third-party plaintiffs had been negligent, that factor would not, on this motion, require the dismissal of the contractual indemnity cause of action, since, as just indicated, Adelphi's attack on the validity of the indemnification clause was raised too late. Therefore, the issue of whether the third-party plaintiffs would be entitled to partial contractual indemnification cannot be resolved at this point in the action, where Adelphi has failed to meet its burden to prima facie demonstrate that it did not cause or contribute to the allegedly dangerous condition which precipitated the accident.

Specifically, Theodorou admitted that Adelphi employees used the service entrance, the service corridor and service elevator to enter and move their materials into the building (Theodorou EBT at 18-19). Also, while Theodorou first testified that Adelphi did not perform any work in the building in 2009, she later conceded, after seeing an invoice dated November 5, 2009, that Adelphi or one of its subcontractors did or may have done work in the building before that date. (Theodorou

EBT at 12-16). Thus, Adelphi failed to eliminate the possibility that its employees or one of its subcontractors was present and did work in the building before Arner fell. Additionally, Theodorou admitted that she did not supervise Adelphi's day to day work, which was supervised by a foreman, Julio Minchala ("Minchala") who worked for a subcontractor of Adelphi (*id.* at 25). Adelphi has not provided any testimony or affidavit from Minchala, and Theodorou, who did not indicate that she had any conversations with any of Adelphi's employees about the Masonite boards at the building (*id.* at 24), lacks personal knowledge as to whether Adelphi's workers or those of Adelphi's subcontractors caused or contributed to the Masonite board's defective condition.

In addition, Theodorou testified that Adelphi's November 5, 2009 invoice reflected asbestos removal work performed at the building by an entity, ALR, and that Adelphi may have had a contract with ALR for that work (*id.* at 15-18). Thus, there is a significant possibility that ALR was Adelphi's subcontractor, for which Adelphi would have been responsible under the RREEF Agreement for Services, ¶¶ 6, 9. Theodorou has not submitted any affidavit or evidence from ALR or its other subcontractors indicating that it did not lay down the Masonite board or cause it to become bent or untaped. Adelphi's claim that it had no duty with respect to anything inside the building is without merit, since, aside from the fact that it used the service corridor and elevator, its contract required it to take all practicable steps to minimize injury to property or persons (RREEF Agreement for Services, ¶ 3). In view of the foregoing, the branch of Adelphi's motion, which seeks dismissal of the third-party complaint is denied since there are questions of fact regarding whether Adelphi's employees or subcontractors may have caused or contributed to dangerous condition concerning the Masonite board.

Furthermore, although Adelphi's Notice of Motion seeks dismissal of any and all cross-claims against it, neither the supporting affirmation nor Adelphi's memorandum of law addresses the issue of the cross-claims. As a result, Adelphi's application seeking dismissal of the cross-claims is also denied.

**Legacy's Motion (MS#009)**

Legacy, which renovated the building's penthouse apartment, moves for an order granting it summary judgment dismissing the third-party complaint and all cross-claims on the grounds that it did not place the offending Masonite board in the service corridor or begin to work in the building until November or December 2009, and that there is a lack of evidence that it caused the board's allegedly dangerous condition or had notice of that condition. Legacy maintains that it is entitled to dismissal of the common-law and contractual indemnification and contribution claims since it was not negligent and Arner's accident was not caused by and did not arise out of Legacy's work.

In opposition, the owners/managers assert that Legacy has failed to prima facie establish that it was not working in the building prior to Arner's accident, that it was free of negligence and, with respect to the contractual indemnity claim, that, even if there was insufficient evidence to establish negligence on the part of Legacy, the "Guarantees and Indemnities" clause of the contract would trigger Legacy's indemnification obligation if Legacy caused or contributed to the condition which caused the accident. In reply, Legacy claims that there is no evidence that it placed the Masonite board at issue, was aware of or had notice of any problem with the Masonite board with sufficient time to discovery or remedy the problem, or that it had or caused the allegedly dangerous condition.

Legacy's motion is denied. Although Nelson Flores ("Flores"), Legacy's supervisor on the job, testified that Legacy only placed Masonite in the service corridor after that area had been

renovated, i.e., after Arner's accident (Exhibit "O" to Legacy's Motion, Examination Before Trial of Nelson Flores ["Flores EBT"], at 16, 17-18, 21), Flores failed to prima facie establish that Legacy's work commenced after the accident. Aside from the fact that Flores testified that he was unfamiliar with Legacy's contract which, according to his deposition testimony,[8] provided that the work was to commence by September 21, 2009 and be completed by October 5, 2009 (*id.* at 11, 14), Flores testimony was completely equivocal about when Legacy actually commenced its work (*id.* at 10, 13, 19). In addition, Flores testified that Legacy kept daily records of the work it performed (*id.*, at 10-11, 12) yet, Legacy did not produce those records on its motion so as to establish when its work actually commenced.

Legacy does not dispute that it used the service corridor and elevators for its workers and to transport materials (*id.*, at 16-17). Flores, at the time Legacy commenced its work, could not remember if there were Masonite boards in the service area, but believed that they had to be there (*id.* at 19-20). Flores, however, failed to offer any testimony indicating that, during its work, its workers never dislodged the tape or caused the Masonite board to become bent. While Flores later testified that when he saw the Masonite, "as far as he remember[ed,]" it was taped, and had to have been taped with gray tape, because there was only one color tape (Flores EBT 22-23), Flores had previously testified that when he first started working he could not even remember if there were Masonite boards in the service corridor (*id.*, at 19-20). In light of the foregoing, Legacy has failed to prima facie establish that it or its employees did not cause or contribute to the dangerous condition of the Masonite board which caused Arner's accident. Thus, the branch of Legacy's motion for summary judgment seeking dismissal of the third-party complaint is denied.

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8. Legacy has not provided a copy of its contract on this motion.

Furthermore, Legacy's papers are silent with respect to the third-party plaintiff's cause of action for breach of contract to procure insurance. Accordingly, the branch of Legacy's summary judgment motion seeking dismissal of that cause of action is also denied.

Finally, although Legacy's Notice of Motion seeks dismissal of any and all cross-claims against it, its supporting papers do not even address the issue of the cross-claims. As a result, Legacy's application seeking dismissal of the cross-claims is also denied.

**Emprise's Motion (MS#011)**

Emprise contracted with Northbrook Partners, as agent for 56 7th Avenue, to renovate apartments 5C, 6K, and 12L. Emprise asserts that it is entitled to an order granting it summary judgment dismissing the defendants/third-party plaintiffs' complaint and all cross-claims.

Emprise asserts that it is entitled to dismissal of the owners/managers' contractual and common-law indemnification or contribution claims because there is no evidence that Emprise was negligent or that the accident arose out of, or was caused by, any work performed by it. In addition, Emprise maintains that the common-law indemnification claim must fail because the evidence shows that the owners/managers were negligent, since they had "at least three days" notice of the defective board (Affirmation of Emprise's Counsel Anthony P. Terranova, Esq. ["Terranova Aff.,"], ¶ 41) and the superintendent conducted inspections of the premises. As to contractual indemnification, relying on the indemnification clause set forth in the Construction Contract Agreement at ¶ 11, Emprise adds that, because the owners/managers were negligent, such claim must be dismissed, citing General Obligations Law § 5-322.1.

In opposition, the owners/managers assert that Emprise has failed to meet its burden of prima facie establishing that its personnel did not cause or contribute to the Masonite to become unsecured

while transporting their materials and equipment through the service corridor. The owners/managers also assert that there are issues of fact as to whether, in order for Emprise's contractual indemnity obligation to be triggered, Emprise must be shown to have been negligent. In this regard, the owners/managers note that Emprise only pointed to the indemnification clause in the Construction Contract Agreement, but failed to mention the indemnification clause set forth in paragraph six of the RREEF Agreement for Services, which was evidently an exhibit to the Construction Contract Agreement. According to the owners/managers' interpretation, in order to escape liability for contractual indemnification under the RREEF Agreement for Services provision, Emprise must show that it was free of negligence and that "its actions or omissions could not have contributed to the injury," a distinction which the owners/managers characterize as "subtle" (Keegan-Natola Aff. in Opp., ¶ 11). Thus, the owners/managers do not claim that, under this clause, Emprise would be required to contractually indemnify them for their own negligence. The owners/managers claim that there is an issue as to which indemnification clause governs, but offer no opinion or basis as to which contract clause is controlling. They further argue that, even if they are found to have been negligent, they would be entitled to partial contractual indemnification, so that this claim cannot be dismissed.

In reply, Emprise does not dispute that there is an issue of fact as to which indemnification clause governs, and does not indicate which indemnification clause governs, but simply states that, under paragraph six of the RREEF Agreement for Services, its contractual indemnification liability is triggered only when Emprise is negligent. (Terranova Reply Aff., ¶ 17.) Notwithstanding that position, which necessarily incorporates that such clause does not purport to indemnify the owners/managers for their negligence, Emprise takes the position that, if the owners/managers were found to have been negligent, then they would not be entitled to partial contractual indemnification,

because "[b]y definition and by statute [General Obligations Law § 5-322.1], a[] [contractual] indemnification claim requires 100% fault on the part of the indemnitee [sic]" (Terranova Reply Aff., ¶ 19).

Emprise has failed to prima facie establish that it was free of negligence with respect to the condition which was allegedly responsible for the accident. It does not dispute that it was working in the building at the time in issue. Further, its contracts indicate that its work was to be performed between August 3 and November 9, 2009. Also, Emprise's president, Wei Hong Liu ["Liu"], conceded that Emprise's workers used the service corridor (Exhibit "O" to Emprise's Motion, Examination Before Trial of Wei Hong Liu ["Liu EBT"], at 17-18).

While Emprise has offered Liu's deposition testimony and/or the affidavit asserting that Emprise was never asked to install Masonite in the area in question, and had no duty to install or maintain the Masonite, he offered no evidence indicating that Emprise's employees did not cause the tape to become dislodged or the board to become bent. Although Liu claims that he visited the building most days, he did not purport to be there at all times while Emprise's materials and equipment were transported through the service corridor and no affidavits from Emprise's employees or anyone else from Emprise with personal knowledge have been provided on this motion.

Furthermore, Liu admitted that he has a poor command of English, cannot read English, and did not read the contract with the owners/managers but had the information in the contract read to him by Emprise's manager, Bowen Wu ["Wu"], who did know how to read English (*id.* at 9, 11-12, 15-16). Wu, whose affidavit was not provided on this motion and apparently was not deposed in this action, handled all communications with the owners/managers (*id.*, at 20). While Liu testified that Emprise did not lay the Masonite in issue because it was never asked to do so (*id.* at 24), the fact that

he did not speak with the owners/managers means that he lacks first-hand knowledge on this issue. Although Liu testified that he when visited the building he would use the side service entrance and service elevator and that he never saw any Masonite in the service area floor (Liu EBT at 22-25), this observation is at odds with those of Levin, Taylor, Locantore, Theodorou and Flores, all of whom testified that they observed Masonite covering the service area corridor. In addition, Liu's testimony was contradictory about whether Emprise bought Masonite board for the project (*id.* at 19-20).

Additionally, the RREEF Agreement for Services at ¶ 3 required Emprise to minimize injury to the building and its occupants. Since Emprise has failed to meet its burden to show that it did not cause or contribute to the dangerous condition of the untaped Masonite board in the service area corridor and, at the very least has created a question of fact regarding its observations of the service area, the branch of its motion to dismiss the third-party plaintiffs' contribution claims and cross-claims is denied.

In addition, Emprise has not established as a matter of law that the owners/managers were actively negligent. Therefore, to the extent that Emprise seeks dismissal of the owners/managers' common-law and contractual indemnification claims on that ground, its motion is denied. The owners/managers assert that, even if they were negligent, there is still an issue of fact as to which indemnification provision applies, and Emprise does not dispute that assertion. Furthermore, where both the owners/managers and Emprise assert that only the acts and omissions of Emprise can trigger Emprise's obligation's under the RREEF Agreement for Services indemnification provision, and leaving aside the issue of whether such acts and omissions had to have been negligent, partial indemnification would still be permissible under such an interpretation.

Emprise's motion also seeks summary judgment dismissing the defendants/third-party plaintiffs' third cause of action sounding in breach of contract to procure and maintain insurance, on the ground that it procured the requisite insurance, as demonstrated by its additional insured endorsement attached as Exhibit "U" to its motion. The owners/managers do not oppose this branch of the motion. Accordingly, this branch of Emprise's motion is granted, and the third-party plaintiffs' third cause of action as to Emprise is dismissed.

Emprise also seeks an order granting it summary judgment dismissing any of the other third-party defendants' contractual indemnification cross-claims on the ground that Emprise had no contractual relationship with them. Since it appears that Coda is the only third-party co-defendant which asserted such a cross-claim, and neither Coda nor the other third-party co-defendants dispute this assertion or oppose this branch of Emprise's motion, Coda's contractual indemnity cross-claim is dismissed as to Emprise. Furthermore, since Emprise had no contractual relationship with any of the other third-party co-defendants, Emprise's contractual indemnity cross-claims against each of its third-party co-defendants are also dismissed. (*See* CPLR 3212 [b]; *A.C. Transp. v Board of Educ. of City of N.Y.*, 253 AD2d 330, 338 [1st Dept] *lv denied* 93 NY2d 808 [1999] [in deciding a summary judgment motion, court can search record and grant summary judgment to non-moving parties on any related claim].)

**CONCLUSION**

Based upon the foregoing discussion, it is hereby

ORDERED that Coda Interior's summary judgment motion (seq. no. 006) is granted solely to the extent that third-party plaintiffs' third cause of action as to Coda Interiors, sounding in breach

of an agreement to procure and maintain insurance, is dismissed as to it, but such motion is otherwise denied; and it is further

ORDERED that Sweet Construction Corporation's motion sequence number 007 is withdrawn; and it is further

ORDERED that Sweet Construction Corporation's motion for summary judgment (seq. no. 008) is denied in all respects; and it is further

ORDERED that Adelphi Restoration Corp.'s summary judgment motion (seq. no. 009) is denied in all respects; and it is further

ORDERED that Legacy Builders/Developers Corp.'s summary judgment motion (seq. no. 010) is denied in all respects; and it is further

ORDERED that the branch of Emprise Construction, Inc.'s summary judgment motion, which seeks an order granting it summary judgment dismissing the third-party plaintiffs' third cause of action as to Emprise Construction, Inc., sounding in breach of contract to procure and maintain insurance, is granted and that cause of action is dismissed as to Emprise Construction, Inc.; and it is further

ORDERED that the branch of Emprise Construction, Inc.'s summary judgment motion, which seeks an order granting it summary judgment dismissing any of its co-third-party defendants' contractual indemnification cross-claims is granted without opposition and Coda Interiors' cross-claim against Emprise Construction, Inc. for contractual indemnification is, therefore, dismissed; and it is further

ORDERED that, in searching the record, Emprise Construction, Inc.'s cross-claims, sounding in contractual indemnification, against its co-third-party defendants, Sweet Construction

Corporation, Adelphi Restoration Corp., Legacy Builders/Developers Corp., and Coda Interiors, are also dismissed; and it is further

ORDERED that the branch of Emprise Construction, Inc.'s summary judgment motion, which seeks an order granting it summary judgment dismissing the third-party plaintiffs owners/managers causes of action sounding in contractual and common-law indemnification and in contribution, and the co-third-party defendants' cross-claims for contribution and common-law indemnification, is denied.

The foregoing constitutes the decision and order of this Court. The clerk of the court is directed to enter this decision and order accordingly.

ENTER:

Dated: June 19, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.