[* 1]

SHORT FORM ORDER

INDEX No. 08-33287
CAL. No. 11-01896OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-27-12 (#004)
MOTION DATE 10-9-12 (#005)
MOTION DATE 11-13-12 (#006)
MOTION DATE 1-8-13 (#007)
MOTION DATE 1-29-13 (#008)
ADJ. DATE 2-5-13
Mot. Seq. # 004 - MD
005 - XMotD
006 - XMD
007 - MD
008 - XMotD

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THOMAS AVENI and LORI AVENI,

Plaintiffs,

- against -

CONTINENTAL RESIDENTIAL HOLDINGS, LLC, QUINN CONSTRUCTION CONSULTING CORP., REGIONAL SCAFFOLD, J.E. LEVINE BUILDER, INC. and BREEZE NATIONAL, INC.,

Defendants.

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Upon the following papers numbered 1 to 91 read on these motions and cross motions for summary judgment and dismissal ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 63 - 66 ; Notice of Cross Motion and supporting papers 30 - 39; 51 - 57; 77 - 86 ; Answering Affidavits and supporting papers 18 - 19; 40 - 42; 58 - 60; 67 - 74; 87 - 89; 90 - 91 ; Replying Affidavits and supporting papers 20 - 29; 43 - 46; 47 - 50; 61 - 62; 75 - 76 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

7-9-13

ORDERED that this motion (004) by defendant Quinn Construction Consulting Corp. for summary judgment and this motion (007) by defendant Quinn Construction Consulting Corp. for conditional summary judgment are consolidated for the purposes of this determination and are decided together with the cross motion (005) by defendants Continental Residential Holdings, LLC and J.E. Levine Builder, Inc. for summary judgment, the cross motion (006) by defendant Regional Scaffolding & Hoisting Co., Inc. s/h/a Regional Scaffold for summary judgment and the cross motion (008) by plaintiffs to dismiss; and it is further

ORDERED that this motion (004) by defendant Quinn Construction Consulting Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is denied; and it is further

ORDERED that this cross motion (005) by defendants Continental Residential Holdings, LLC and J.E. Levine Builder, Inc. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint or, in the alternative, denying the motion by defendant Quinn Construction Consulting Corp. for summary judgment dismissing their cross claims is determined herein; and it is further

ORDERED that this cross motion (006) by defendant Regional Scaffolding & Hoisting Co., Inc. s/h/a Regional Scaffold for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it and denying the cross motion by defendants Continental Residential Holdings, LLC and J.E. Levine Builder, Inc. for summary judgment is denied; and it is further

ORDERED that this motion (007) by defendant Quinn Construction Consulting Corp. for an order pursuant to CPLR 3212 granting conditional summary judgment on its cross claim against its co-defendants Continental Residential Holdings, LLC and J.E. Levine Builder, Inc. for contractual indemnification is denied; and it is further

ORDERED that this cross motion (008) by plaintiffs for an order dismissing the motions of defendants Continental Residential Holdings, LLC, J.E. Levine Builder, Inc., and Regional Scaffolding & Hoisting Co., Inc. s/h/a Regional Scaffold for summary judgment as untimely is determined herein.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Thomas Aveni on November 11, 2005 at approximately 3 p.m. when he fell from a "broken low ramp" on which he was walking at a construction site where a 40-story, 250-unit luxury condominium building was being constructed between 32nd and 33rd Streets. At the time of the accident, plaintiff was employed as a union steward. The accident occurred on premises known as 325 Fifth Avenue, New York, New York. Defendant Continental Residential Holdings, LLC (Continental) was the owner of the premises and defendant J.E. Levine Builder, Inc. (Levine) was the construction manager. Defendant Quinn Construction Consulting Corp. (Quinn) was a contractor hired by defendant Levine to monitor site safety and defendant Regional Scaffolding & Hoisting Co., Inc. s/h/a Regional Scaffold (Regional) was a hoist and scaffold contractor hired by defendant Levine. By his complaint, plaintiff alleges a first cause of action for negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), and a second, derivative, cause of action on behalf of his wife for loss of services. Defendants Continental, Levine, Quinn and Regional assert cross claims in their answers against their co-defendants for indemnification and contribution. The Court's

computerized records indicate that the note of issue in this action was filed on September 19, 2011 and that a stipulation of discontinuance of the action solely as against defendant Breeze National, Inc. dated July 27, 2010 was filed on January 26, 2011.

Plaintiffs now move (008) to dismiss the motions of defendants Continental, Levine and Regional for summary judgment as untimely. Plaintiffs concede that the first motion by defendant Quinn was timely but argue that the subsequent motion by Continental and Levine and the later motion by Regional, all improperly labeled as cross motions, were untimely. They further argue that defendants failed to address the untimeliness of their motions in their motion papers, failed to provide good cause for the delay, and improperly labeled their motions as cross motions when their motions do not seek the identical relief sought by defendant Quinn inasmuch as defendants' roles and responsibilities at the job site were different.

In opposition, defendants Continental and Levine contend that inasmuch as the original timely motion by defendant Quinn seeks dismissal of their cross claims and they, in response, cross-moved for exactly the same relief, dismissal of defendant Quinn's cross claims, their application for relief is clearly a cross motion. They further contend that their cross motion falls within the exception to the rule in Brill v City of New York, 2 NY3d 648, 781 NYS2d 261 (2004) and must be considered on its merits and that plaintiffs have failed to demonstrate any prejudice by the delay. Defendant Regional contends in opposition that inasmuch as its cross motion is based on nearly identical grounds as the motion of defendant Quinn, it must be considered on the merits.

The Court's computerized records indicate that the 120-day deadline after the filing of the note of issue in this action is January 17, 2012. The motion by defendant Quinn for summary judgment in its favor dismissing the complaint and all cross claims as against it is timely as the affidavit of service of the motion indicates that it was served on December 27, 2011. However, the cross motion by defendants Continental and Levine for summary judgment is untimely as the affidavit of service indicates that the cross motion was served on September 24, 2012, eight months after the 120-day deadline, and the cross motion by defendant Regional for summary judgment is untimely based on its affidavit of service indicating that it was served on October 4, 2012, almost nine months after the 120-day deadline.

An untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds (*see* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***Boehme v A.P.P.L.E.***, 298 AD2d 540, 749 NYS2d 49 [2d Dept 2002]). Under said circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the untimely motion or cross motion on the merits (*see* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615). It is to be noted that the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see* CPLR 3212 [b]; ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615).

Defendant Quinn's timely motion seeks summary judgment dismissing plaintiffs' complaint as against it on the grounds that it was not the owner or general contractor nor an agent of either, and that it did not have supervisory control over plaintiff or the manner in which he performed his duties as union steward.

In contrast, the cross motion of defendants Continental and Levine seeks summary judgment dismissing plaintiffs' complaint as against them on the grounds that defendant Quinn, the on-site safety manager of the project, was their statutory agent and that if plaintiffs' claims against defendant Quinn cannot be maintained as against their agent, then plaintiffs' claims cannot be maintained as against them. Defendant Regional seeks summary judgment on the ground that it did not construct the subject plywood ramp or otherwise have any involvement with it.

Here, defendants Continental and Levine and Regional failed to demonstrate good cause for their delay in making their respective motions (*see* CPLR 3212 [a]; ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Chechile v Magee***, 66 AD3d 625, 885 NYS2d 641[2d Dept 2009]). However, the timely motion seeks dismissal of plaintiffs' complaint on the ground that defendant Quinn was not a statutory agent of defendants Continental and Levine and the cross motion by defendants Continental and Levine seeks summary judgment on the converse ground that defendant Quinn was their statutory agent. Thus, the cross motion of defendants Continental and Levine is in response to the timely motion, the issue of whether defendant Quinn was the statutory agent of defendants Continental and Levine is properly before the Court, and the cross motion of defendants Continental and Levine may be considered (*see* ***Step-Murphy, LLC v B & B Bros. Real Estate Corp.***, 60 AD3d 841, 875 NYS2d 535 [2d Dept 2009]; *compare* ***Giambona v Hines***, 104 AD3d 811, 961 NYS2d 303 [2d Dept 2013]). In contrast, the cross motion of Regional seeks summary judgment on a completely different ground, lack of any involvement with the ramp that allegedly caused plaintiff's fall. Thus, the issues to be considered on the cross motion of Regional are not nearly identical to those of the timely motion by defendant Quinn (*see* ***Tapia v Prudential Richard Albert Realtors***, 79 AD3d 735, 911 NYS2d 919 [2d Dept 2010]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 873 NYS2d 109 [2d Dept 2009]). Therefore, plaintiffs' cross motion is granted solely with respect to dismissal of the cross motion (006) for summary judgment by defendant Regional as untimely.

Defendant Quinn moves (004) for summary judgment dismissing plaintiffs' complaint as against it on the grounds that it was not the owner or general contractor nor an agent of either, and that it did not have supervisory control over plaintiff or the manner in which he performed his duties as union steward. Defendant Quinn asserts that pursuant to its contract with defendant Levine and the proffered deposition testimony, its role was limited to that of a consultant site safety manager, maintaining a presence at the job site merely to perform ongoing reviews of site safety procedures and possible hazardous conditions on the site, and that it had no notice of the alleged condition that caused plaintiff's accident. In addition, defendant Quinn asserts that it lacked any powers to revise the procedures or correct the conditions at the job site, that it was only required to report any noted deficiencies to defendant Levine, which possessed the requisite authority to make any necessary changes. In support of its motion, defendant Quinn submits, among other things, the summons and complaint, its answer, plaintiff's bill of particulars, the deposition transcripts of plaintiffs, of defendant Quinn by John Murphy, and of defendant Regional by Greg Blinn, and a portion of the contract between defendant Quinn and defendant Levine entitled "scope of work."

In opposition to the motion, plaintiffs contend that defendant Quinn is liable inasmuch as it had proper prior notice of the defective ramp and was negligent in providing precautionary advice and negligent in its duties as safety advisor in failing to report to the proper party that had the power to repair the defect so as to ensure that the workers at the site were protected from the ramp's hazards. In addition, plaintiffs

contend that defendant Quinn was a supervisor of safety. Moreover, they argue that there is conflicting testimony and issues of fact as to whether Mr. Rizzo was informed of the potentially defective ramp.

In reply, defendant Quinn argues that it exercised no control over the work sufficient to impose any liability under Labor Law or the common law, had no authority to stop the work or control the workers, and even if Mr. Rizzo was informed of a problem with the ramp, it did not create a duty on his part.

Defendants Continental and Levine cross-move (005) for summary judgment in their favor dismissing plaintiffs' Labor Law §§ 200, 240 (1) and 241 (6) and common-law negligence claims on the grounds that defendant Quinn was their statutory agent under the Labor Law and that if plaintiffs' Labor Law and common-law claims cannot be maintained against defendant Quinn, then said claims cannot also be maintained against defendants Continental and Levine. In the alternative, they assert that the portion of defendant Quinn's motion for dismissal of their cross claims be denied inasmuch as issues of fact exist as to the liability of defendant Quinn since defendant Quinn assumed a duty to inspect the site for hazardous conditions as the on-site safety manager, had actual notice from plaintiff and constructive notice of the alleged defect, failed to provide notice of the alleged defect to defendant Levine pursuant to the contract, and failed to stop plaintiff from using the subject ramp. In support of their cross motion, defendants Continental and Levine submit their answer and discovery demands and the answer of defendant Quinn and its notice for discovery and inspection, a copy of the agreement between defendants Continental and Levine, the agreement between defendant Levine and plaintiff's employer, SMEG Corporation, and the agreement between defendants Levine and Regional.

In opposition, plaintiffs contend that defendants Continental and Levine are liable regardless of defendant Quinn's liability inasmuch as they are the landowner and construction manager whose duties and responsibilities toward workers at the job site are entirely different from defendant Quinn, they supervised and controlled the work site, defendant Levine was responsible for replacing damaged plywood, and they had actual notice of the defect through their agent defendant Quinn.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Plaintiff's deposition testimony reveals that on the date of his accident he was an on-site union steward, that he had been at the subject site for a year and a half, that he would check to see if a union driver was making deliveries of building materials, then back the deliveries into the dock and help unload them, and that at the time of his accident he was helping a subcontractor's employee unload a truck for a tool

delivery. According to plaintiff, on that day there had been approximately 30 to 40 deliveries made in the same manner in the same area. Plaintiff explained that he had been carrying "two-by-two" boxes from the truck parked at a curb to the esplanade, or courtyard, 30 feet away and that his accident occurred as he was carrying a 50 or 60 pound box and walking on a ramp, between the sidewalk and the courtyard, which gave way and he fell. He described the height differential as approximately one and a half feet, that the sidewalk was higher than the courtyard, and that the only way to access the courtyard was by use of the ramp. Plaintiff testified that the ramp was a wooden ramp, made of plywood, approximately three feet wide but that he was unsure of its length, possibly 10 feet, or its thickness. In addition, plaintiff testified that the ramp appeared to be old, that he and the other workers had used said ramp daily for approximately one year, and that he did not know who placed it at said location. According to plaintiff, he did not have any problems the previous times that he had walked over said ramp but that within a week prior to his accident he felt that there was a small section of the ramp that was soft or sinking and he notified Larry Rizzo, the safety manager on the job, who responded that it required fixing but did not instruct him not to use the ramp or tell him to take any precautions. Plaintiff explained that at the time of his accident, the ramp cracked, deflected in, his left foot went through a hole in it, and he fell forward into the courtyard face down onto a concrete floor. He also testified that the ramp was attached with a brace to the pole for the sidewalk bridge but that the ramp was not attached to any hoists or scaffolds or loading docks. Plaintiff stated that he did not know of anyone making any complaints concerning said ramp or if any repairs had been made to it prior to his accident.

John Murphy, president of defendant Quinn, testified that Quinn was a construction safety consulting firm that had approximately five employees in 2005. He explained that defendant Levine hired defendant Quinn to provide one full-time site safety manager, Larry Rizzo, at the subject job site. In addition, Mr. Murphy testified that defendant's exhibit C entitled "scope of work," a portion of the contract between defendant Quinn and defendant Levine for the subject project, was a fair and accurate representation of the scope of work that was to be provided by defendant Quinn. Mr. Murphy also testified that Mr. Rizzo's scope of work included performing daily inspections of the site throughout the course of a day. He explained that Mr. Rizzo did not have the authority to shut down the job site if he observed any unsafe practices, instead he would bring it to the attention of the responsible party or controlling contractor, in this case defendant Levine. Mr. Murphy added that one of Mr. Rizzo's responsibilities would have been to make sure that the ramps at the job site complied with particular codes, rules and regulations, specifically, the Building Code of the City of New York and the Federal Occupational Safety and Health Act (OSHA). According to Mr. Murphy, if Mr. Rizzo observed or was aware of a cracked or broken ramp, he would either inform the contractor who may have caused the damage or was responsible for maintaining the ramp or bring it to the attention of the general contractor or construction manager, and it would be memorialized in Quinn's site safety manager logs, which would be in the field office of the general contractor. He was unaware of any other entity hired to perform site safety management.

Paul Signorelli testified on behalf of defendant Levine stating at his deposition that he is a superintendent of defendant Levine, the construction manager of the subject project, that defendant Levine did not employ any laborers at said site, and that as superintendent he coordinated the subcontractors and supervised the construction. In addition, he testified that he could not recall if the site safety manager, Larry Rizzo of defendant Quinn, informed him of plaintiff's accident. According to Mr. Signorelli, Mr. Rizzo did have the authority to stop the work immediately if he saw an unsafe condition, and any dangerous condition would be noted in the site safety manager's log. He also testified that there were two ramps on the site, that

the subject ramp was installed by defendant Regional, and that either he or the site safety manager or the labor foreman would periodically inspect them.

Greg Blinn, vice president of defendant Regional testified at his deposition that his company does not build plywood ramps, instead it builds steel sidewalk bridges.

Defendant's exhibit C entitled "scope of work" from the contract between defendant Quinn and defendant Levine provides

> 6) Under no circumstances will the Site Safety Manager/Alternate Site Safety Manager have authority over decisions or actions affecting the project production, scheduling, quality, workmanship or the correction of hazardous conditions. The responsibility of production and related functions and correction of hazards will always be that of the project superintendent, project manager or appropriate contractor or subcontractor personnel and the Site Safety Manager shall only have the authority to advise and make recommendations.
>
> 8) (f) The following is intended to be a guideline of the areas and items to be inspected: ...
>
> In the event that the Site Safety Manager discovers any violations of the Site Safety Program, the Site Safety Manager shall notify the person or persons responsible for creating the violations and make recommendations necessary to obtain the correction of the violations ...
>
> With the assistance, guidance and support from the Construction Manager's Superintendent: ...
>
> Recommend necessary action to correct approved substandard safety conditions reported or observed.
>
> 20) Report to Project Superintendent any discovered unsafe conditions or practices or violations of job security.

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law §§ 200 [1], 240 [1], 241). A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; ***Damiani v Federated Dept. Stores, Inc.***, 23 AD3d 329, 331-332, 804 NYS2d 103 [2d Dept 2005]). The determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right" (***Williams v Dover Home Improvement***, 276 AD2d 626, 626, 714 NYS2d 318 [2d Dept 2000]; *see* ***Bakhtadze v Riddle***, 56 AD3d 589, 590, 868 NYS2d 684 [2d Dept 2008]). The authority to review safety at the site, ensure compliance with safety regulations and contract specification, and to stop work for observed safety

violations is insufficient to impose liability (*see* ***Torres v Perry St. Dev. Corp.***, 104 AD3d 672, 960 NYS2d 450 [2d Dept 2013]; ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; ***McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.***, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; *compare* ***Mancuso v MTA New York City Tr.***, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]).

The Court notes that Mr. Murphy's testimony on behalf of defendant Quinn concerning the accident and the condition of the ramp lacked probative value inasmuch as he had no personal knowledge concerning Mr. Rizzo's activities and interactions with plaintiff prior to or at the time of the accident (*see* ***Madalinski v Structure-Tone, Inc.***, 47 AD3d 687, 850 NYS2d 505 [2d Dept 2008]). Notably, no deposition testimony or affidavit was submitted from Mr. Rizzo who did have personal knowledge. Without said proof, defendant Quinn cannot establish that Mr. Rizzo rendered services solely pursuant to the contract between defendant Quinn and defendant Levine, that he did not control, supervise or direct the work at the site and had no power or authority to correct an unsafe condition, that he had no notice of the alleged defect from plaintiff or otherwise, and that if he had prior notice from plaintiff he informed responsible parties and told plaintiff to avoid using the ramp (*compare* ***Martinez v 342 Property LLC***, 89 AD3d 468, 932 NYS2d 454 [1st Dept 2011]; ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684). Therefore, defendant Quinn is not entitled to dismissal of plaintiffs' complaint as against it. In addition, defendant Quinn is not entitled to dismissal of the cross claims for contribution and indemnification inasmuch as there remain issues of fact as to whether Mr. Rizzo notified the person or persons responsible for the allegedly defective ramp and made the necessary recommendations to correct the defect. Therefore, the motion (004) of defendant Quinn for summary judgment is denied in its entirety.

With respect to their cross motion, notably, defendant Continental and Levine fail to cite any case law supporting their position that if the statutory agent of the owner and construction manager is found not to be liable under Labor Law and the common-law then the owner and construction manager are automatically not liable.

Although a construction manager such as defendant Levine is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 200 and 241(6), it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 798 NYS2d 351 [2005]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; *see also* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 878, 609 NYS2d 168 [1993]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 950-951, 919 NYS2d 40 [2d Dept 2011]). In addition, where, as here, the injured plaintiff's accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 and common-law negligence will be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time (*see* ***White v Village of Port Chester***, 92 AD3d 872, 876, 940 NYS2d 94 [2d Dept 2012]; ***Slikas v Cyclone Realty, LLC***, 78 AD3d 144, 147, 908 NYS2d 117 [2d Dept 2010]; ***Aragona v State of New York***, 74 AD3d 1260, 1260-1261, 905 NYS2d 237 [2d Dept 2010]; ***Bridges v Wyandanch Community Dev. Corp.***, 66 AD3d 938, 940, 888 NYS2d 142 [2d Dept 2009]). Thus, defendant Levine as construction manager and defendant Continental as owner may be liable, independently from defendant Quinn, if they had actual or

constructive notice of the alleged defective condition of the subject ramp. Defendants Continental and Levine failed to demonstrate that they had no actual or constructive notice of the alleged defect inasmuch as they failed to submit an affidavit or deposition testimony from anyone from defendant Continental who had personal knowledge of the conditions of the work site and Mr. Signorelli's testimony was not probative concerning lack of notice of the condition of the subject alleged defect by defendant Levine (*see* ***Sotomayer v Metropolitan Transp. Auth.***, 92 AD3d 862, 938 NYS2d 640 [2d Dept 2012]). Thus, defendants Continental and Levine failed to establish that they are not liable under the common-law and Labor Law § 200. Inasmuch as defendants Continental and Levine did not specifically address plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, they failed to demonstrate their entitlement to summary judgment dismissing said claims. Therefore, the cross motion (005) of defendants Continental and Levine is granted solely with respect to the denial of dismissal of their cross claims against defendant Quinn.

Finally, defendant Quinn moves (007) for conditional summary judgment on its cross claim against defendants Continental and Levine for contractual indemnification. In support of its motion its submits the portion of the contract providing that "To the extent permitted by law, the Owner, Construction Manager and their agents shall indemnify and hold harmless the Safety Professional against any and all claims of property damage or personal injury, including death, caused by, resulting from, arising out, or occurring in connection with work performed, or intended to be performed in connection with the contract, such indemnity shall cover all losses, costs, expenses and liability including, without limitation, legal fees and disbursements, that the Safety Professional may sustain, suffer, incur or be charged with, and such defense and indemnification is to be full ..."

Although defendants Continental and Levine expressly agreed to provide indemnification pursuant to the contract, defendant Quinn is not entitled at this juncture to summary judgment or even conditional summary judgment on its cross-claim for contractual indemnification against defendants Continental and Levine inasmuch as there are issues of fact as to whether defendant Quinn breached the contract through the failure of Mr. Rizzo to notify the proper parties of the alleged defect (*see generally* ***Williams v 461 Eighth Ave. Associates***, 277 AD2d 181, 716 NYS2d 656 [1st Dept 2000]).

Dated: July 5, 2013

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION