

<b>Fernandez v City of New York</b>
2013 NY Slip Op 31555(U)
July 12, 2013
Supreme Court, New York County
Docket Number: 105177/09
Judge: Michael D. Stallman
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

Index Number : 105177/2009  
FERNANDEZ, JOSE  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. 105177/09  
MOTION DATE 2/28/13  
MOTION SEQ. NO. 005

The following papers, numbered 1 to 19, were read on this motion for summary judgment

- Notice of Motion— Affirmation —Affidavit of Service — Exhibits 1 [Affidavit], 2; Exhibits A-O; Exhibit P; Exhibits Q-V; No(s). 1-4
- Amended Notice of Motion— Affirmation —Affidavit of Service — Exhibits 1 [Affidavit], 2-3; Exhibits A-G; Exhibits H-O; Exhibit P; Exhibits Q-V; 9-12
- Affirmation in Opposition — Exhibits 1-2 —Affidavit of Service; Affidavit in Opposition — Exhibit 1 —Affidavit of Service; No(s). 5-6; 7-8
- Affidavit in Opposition — Exhibit AA [Affidavit]—Exhibit 1 —Affidavit of Service; Affidavit in Opposition — Exhibits 1-4 —Affidavit of Service; 13-15; 16-17
- Affirmation in Further Support —Affidavit of Service— Exhibits A-F No(s). 18-19

Upon the foregoing papers, plaintiff's motion for summary judgment is decided in accordance with the annexed memorandum and decision.

## FILED

JUL 17 2013

HON. MICHAEL D. STALLMAN

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/12/13  
New York, New York

  
\_\_\_\_\_, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: .....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....
- CASE DISPOSED
  - NON-FINAL DISPOSITION
  - GRANTED
  - DENIED
  - GRANTED IN PART
  - OTHER
  - SETTLE ORDER
  - SUBMIT ORDER
  - DO NOT POST
  - FIDUCIARY APPOINTMENT
  - REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
JOSE FERNANDEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, MTA/NEW YORK CITY  
TRANSIT AUTHORITY, MANHATTAN AND  
BRONX SURFACE TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION  
AUTHORITY, MTA CAPITAL CONSTRUCTION  
COMPANY and FIVE STAR CONTRACTING CO.,

Defendants.

-----X  
THE CITY OF NEW YORK, THE NEW YORK CITY  
TRANSIT AUTHORITY, MANHATTAN AND  
BRONX SURFACE TRANSIT OPERATING  
AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY and MTA  
CAPITAL CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

-against-

JUDLAU CONTRACTING, INC.,

Third-Party Defendant.

-----X  
FIVE STAR ELECTRIC CORP.,

Second Third-Party Plaintiff,

-against-

EATON ELECTRIC, INC. and NUNEZ ELECTRIC,  
INC.,

Second Third-Party Defendants.

-----X

DECISION AND ORDER

Index No. 105177/09

Motion Seq. Nos.  
005, 006, 008, 010, and 011

**FILED**

JUL 17 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Third-Party  
Index No. 590275/11

Second Third-Party  
Index No. 590815/11

**HON. MICHAEL D. STALLMAN, J.:**

In this personal injury action alleging violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff Jose Fernandez (Fernandez) was allegedly injured on April 2, 2009 when he was struck by a conduit or pipe while working as a laborer on the South Ferry Subway Renovation Project. Fernandez was allegedly paralyzed as a result of the accident. Fernandez moves, pursuant to CPLR 3212, for an order: (1) granting partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) as against defendants City of New York (City), MTA/New York City Transit Authority (NYCTA), Manhattan and Bronx Surface Transit Authority (MABSTOA), Metropolitan Transportation Authority (MTA) (together, the Authorities), and MTA Capital Construction Company (MTACC) (collectively, the MTA defendants); and (2) setting this matter down for an immediate trial on damages (Motion Sequence No. 005).

Defendant/second third-party plaintiff Five Star Electric Corp. (Five Star) moves for an order: (1) dismissing the complaint as against it; (2) converting the cross claims of the MTA defendants into third-party claims; (3) dismissing the cross claims of third-party defendant Judlau Contracting, Inc. (Judlau) as against it; (4) granting it conditional summary judgment on its cross claim for common-law indemnification against third-party defendant Judlau; (5) dismissing all claims against second third-party defendant Nunez Electric, Inc. (Nunez) and deleting said second third-party defendant from the caption pursuant to a stipulation of discontinuance executed by all counsel; and (6) amending the caption accordingly (Motion Sequence No. 006).

Third-party defendant Judlau moves, pursuant to CPLR 3025 (b), for leave to amend its answer to the third-party complaint to assert additional cross claims against defendant/second

third-party plaintiff Five Star (Motion Sequence No. 008).

Second third-party defendant Eaton Electric, Inc. (Eaton) moves for an order dismissing the second third-party complaint and all claims and cross claims against it (Motion Sequence No. 010).

Defendant Five Star cross-moves, pursuant to CPLR 3212, for conditional contractual indemnification over and against second third-party defendant Eaton.

Defendants/third-party plaintiffs MTA defendants move, pursuant to CPLR 3212, for an order: (1) granting them summary judgment on their contractual indemnification claim against Judlau; (2) granting them summary judgment on their common-law indemnification claim against Judlau; and (3) dismissing the complaint as against defendant MABSTOA (Motion Sequence No. 011).

This decision addresses the five motions and the cross motion.

### **BACKGROUND**

The complaint alleges that, on April 2, 2009, Fernandez, a laborer employed by Judlau, was injured while clearing construction debris from an underground ventilation facility known as the “fan plant” at the South Ferry subway station.

Fernandez testified that, on the date of his accident, his foreman, Rubin Pousa, instructed him to report to the fan plant and clean it out (Milch Affirm., Exh. I [Plaintiff’s EBT], at 155, 157). The fan plant was an underground facility located approximately 30 feet below street level (Mahoney Affirm. in Opposition, Exh. 2 [Plaintiff’s 50-h Hearing], at 21). Workers could access the fan plant via a set of stairs leading from street level to an underground hallway area (*id.* at 26-27). Fernandez and his co-worker, Manuel San Martin, proceeded to the hallway area in the fan

plant (*id.* at 27, 29). In the hallway, Fernandez observed various materials and debris, including aluminum pipes of various lengths and diameters used as electrical conduit (*id.* at 31-32).

Fernandez carried all of the garbage up the stairs to the street, while his co-worker dragged all the pipes together in the hallway to get them ready for removal from the fan plant (*id.* at 33). Pousa came to the fan plant after Fernandez had removed the garbage, observed the pipes still lying in the hallway, and told Fernandez and San Martin that the pipes had to come out as well (*id.* at 33-34). Pousa brought a Judlau truck driver, Charles Tournabene, to the fan plant (*id.* at 36-37).

Pousa told Fernandez to tie a rope to the pipes one at a time and to tie the other end of the rope to a truck, so that the pipes would be pulled up with the rope through the hatch (*id.* at 37, 38-39).<sup>1</sup>

Fernandez testified that the workers had removed eight pipes prior to his accident (*id.* at 43).

Fernandez stated that he was struck by one of the pipes that they were removing from the fan plant; “[w]hen he stepped away to make sure everything was clear, all [he] [knew], all of a sudden, [he] was on the floor” (*id.* at 52). Fernandez testified that he was not given any ties, slings, chokers, fasteners or similar devices to secure the pipes (Milch Affirm., Exh. I [Fernandez EBT], at 248).

Manuel San Martin, Fernandez’s co-worker, testified that he stood at street level to signal the truck driver and receive the pipes at the hatchway (Milch Affirm., Exh. K [San Martin EBT], at 138). Fernandez rigged the rope to the pipes, signaled to San Martin, who then signaled to Judlau’s truck driver to move the truck (*id.* at 143-144). Four or five pipes were successfully removed from the fan plant using this method (*id.* at 48). San Martin saw the pipe fall and hit

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<sup>1</sup>Fernandez’s foreman denied that he directed the workers to use the rope. Pousa testified that the workers decided to use the rope, and that he approved of the decision to use the rope (Milch Affirm., Exh. J [Pousa EBT], at 153, 285).

Fernandez (*id.* at 141, 142). The pipe was about five or 10 feet from the top when it fell (*id.* at 142). San Martin did not know how the pipe dislodged from the rope (*id.* at 77).

On August 19, 2009, Fernandez commenced this action against the MTA defendants and Five Star, Judlau's subcontractor on the renovation project. Subsequently, the MTA defendants brought a third-party action against Judlau, the general contractor, seeking contractual and common-law indemnification, contribution, and damages for failure to procure insurance. Five Star commenced a second third-party action against Eaton and Nunez, its electrical subcontractors (i.e., sub-subcontractors), also asserting claims for contractual and common-law indemnification, contribution, and breach of contract. The MTA defendants and Judlau asserted cross claims against Eaton for common-law indemnification, contribution, contractual indemnification and failure to procure insurance. The MTA defendants asserted cross claims for contractual indemnification and failure to procure insurance against Five Star. In its answer to the third-party complaint, Judlau seeks common-law indemnification and contribution from Five Star. Five Star asserted a cross claim against Judlau for common-law indemnification.

In an interim decision dated September 19, 2012, after a conference call with the parties, the court permitted Fernandez to submit additional papers on the issue of defendants' ownership of the area where the accident occurred. The MTA defendants subsequently moved to vacate the court's September 19, 2012 decision, which was denied on January 18, 2013. Although the MTA defendants and Judlau contend that Fernandez's amended motion should not be considered, the court has already ruled on this issue.

Pursuant to a stipulation of discontinuance dated October 9, 2012, all claims were discontinued against second third-party defendant Nunez.

## DISCUSSION

It is well settled that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has made a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). “[M]ere conclusions, unsubstantiated allegations or expressions of hope are insufficient” to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### **Fernandez’s Motion for Partial Summary Judgment (Motion Sequence Number 005)**

#### **A. Labor Law § 240 (1)**

Labor Law § 240 (1), known as the Scaffold Law, provides, in relevant part that:

“All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

The duty imposed is “nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

Labor Law § 240 (1) was “designed to prevent those types of accidents in which the scaffold,

hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (*id.* at 501). To succeed under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or contractor failed to provide adequate safety devices); and (2) that the statutory violation was a proximate cause of the injuries sustained (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

In his original moving papers, Fernandez argues that “[t]he South Ferry Site is owned and operated by [the MTA defendants],” and that the MTA contracted with Judlau to serve as the general contractor for the project (Milch Affirm., ¶¶ 4, 11).

In his amended moving papers, Fernandez asserts that the City is strictly liable as fee owner of the site. Fernandez submits a response to a notice to admit in which the City admitted that it owned the fan plant (Milch Amended Affirm., Exh. 3).

#### City

“A notice to admit, pursuant to CPLR 3123 (a), is to be used only for disposing of uncontroverted questions of fact or those or that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial” (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]). Ownership is the proper subject of a notice to admit (*see Villa v New York City Hous. Auth.*, 107 AD2d 619, 620 [1st Dept 1985] [question of ownership was proper inquiry in notice to admit]). While Judlau argues that Fernandez did not attach the notice to admit, the question is clear from the response, and Fernandez submitted the notice to admit in reply (Milch Reply Affirm., Exh. A). Accordingly, Fernandez has shown that the City qualifies as an “owner”

within the meaning of the statute (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993] [“Liability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant”]; *Celestine v City of New York*, 86 AD2d 592 [2d Dept 1982], *affd for reasons stated below* 59 NY2d 938 [1983]).

#### The Authorities and MTACC

In his amended moving papers, Fernandez argues that the Authorities and MTACC qualify as owners because they had: (1) the power to hire contractors, (2) the right to exercise control over the work, and (3) the power to enforce safety standards and/or benefit from the work.

The MTA defendants and Judlau contend that plaintiff has failed to show that the Authorities and MTACC are owners under the Labor Law. Specifically, the MTA defendants and Judlau argue that plaintiff has not provided any evidence that any of these entities had any “interest” in the fan plant.

In reply, Fernandez concedes that “there is lack of evidence regarding MABSTOA” (Milch Reply Affirm., at 27 n 15).

“The meaning of ‘owners’ under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has ‘been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit’” (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). The key criterion is the “right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control” (*Sarigul v New York Tel. Co.*, 4 AD3d 168, 170 [1st Dept

2004], *lv denied* 3 NY3d 606 [2004] [internal quotation marks and citation omitted]).

Fernandez has failed to make a prima facie showing that the Authorities or MTACC are owners under the Labor Law.<sup>2</sup> Although Fernandez has submitted evidence that NYCTA contracted with Judlau for the renovation project (Milch Amended Affirm., Exhs. P, Q), he has failed to prove that it had any interest in the property, such as a lease or easement. NYCTA may be a statutory owner under a 1953 lease (*see McGuire v City of New York*, 211 AD2d 428, 429 [1st Dept 1995]), but the record is unclear. Moreover, Fernandez has failed to show that MTA or MTACC had an interest in the property and contracted for the work. Therefore, Fernandez's motion is denied as to these entities.

#### Violation of Labor Law § 240 (1) and Proximate Cause

The court turns to the issue of the City's liability. In a falling object case, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). The plaintiff must also show that then object fell "*because of the absence or inadequacy of a safety device of the kind enumerated in the statute*" (*Narducci*, 96 NY2d at 268).

In the falling object context, the risk to be guarded against is the "unchecked, or insufficiently checked, descent" of the object (*Runner v New York Stock Exch., Inc.*, 13 NY3d

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<sup>2</sup>In fact, Fernandez states that "the precise legal relationship between the fee owner the City of New York and the MTA Defendants is unclear because the defendants did not produce any documents or contracts on this issue in response to Plaintiff's demands. In other words the record is unclear whether the MTA Defendants were developing, constructing and operating the Site as an owner, lessee or even potentially under some type of easement" (Fernandez's Mem. of Law in Support, at 23 n 3).

599, 603 [2009]).

Fernandez has met his prima facie burden of establishing a violation of the statute, and that the violation was a proximate cause of his injuries. Fernandez's co-worker testified that he saw the pipe that Fernandez had rigged fall and hit him (Milch Affirm., Exh. K [San Martin EBT], at 54, 141, 142). Fernandez's safety expert, Tony Raimo, states that tying a rope without straps or a choker subjected the workers to the increased risk that the load would fall (*id.*, Exh. 1, ¶¶ 24-26). Thus, Fernandez has shown that the makeshift hoist proved inadequate to shield him from harm directly flowing from the application of the force of gravity to the pipe (*see Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] [worker made prima facie showing of entitlement to summary judgment under Labor Law § 240 (1) by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him]; *Arnaud v 140 Edgcomb LLC*, 83 AD3d 507, 508 [1st Dept 2011] [wood plank that struck worker, who had his hands outstretched through window to grab planks being lowered from fourth floor, was an object that required securing for the purposes of the undertaking, and thus worker's injuries were within the scope of Scaffold Law]).

The court rejects the MTA defendants' and Judlau's contention that there is an issue of fact as to whether the rope provided adequate protection in light of the elevation-related risks presented by Fernandez's work. Contrary to the MTA defendants' and Judlau's position, Fernandez is not required to prove that the hoist was defective (*see Orellano v 29 E. 37<sup>th</sup> St. Realty Corp.*, 292 AD2d 289, 290 [1st Dept 2002]). The cases relied upon by the MTA defendants and Judlau are inapposite. In *Quattrocchi v F.J. Sciame Constr. Corp.* (11 NY3d 757, 759 [2008], *affg* 44 AD3d 377 [1st Dept 2007]), the plaintiff was struck by falling planks

that had been placed over open doors as a makeshift shelf to facilitate the installation of an air conditioner above a doorway. The Court of Appeals, affirming the First Department, held that there were triable issues of fact as to whether the planks were adequately secured in light of the assembly and whether plaintiff caused the accident by jostling the doors after disregarding a warning not to enter the doorway area (*id.*).

In *Blake* (1 NY3d at 291), the Court of Appeals held that the plaintiff was the sole proximate cause of his injuries when he neglected to lock extension clips in place on an extension ladder.

In *Meade v Rock-McGraw, Inc.* (307 AD2d 156 [1st Dept 2003]), the plaintiff, after determining that a six-foot ladder provided to him was too big to use inside a closet, positioned a five-foot A-frame ladder against the closet wall in the closed position at a slight angle. The First Department held that the plaintiff was not entitled to partial summary judgment under the statute since a jury could have found that he was provided with a ladder so constructed to provide him with proper protection, and that his conduct in placing the A-frame ladder against the wall in a closed position (an improper use of the device) was the sole proximate cause of his injuries (*id.* at 159).

In *Weber v 1111 Park Ave. Realty Corp.* (253 AD2d 376 [1st Dept 1998]), the plaintiff fell from a ladder after he received an electric shock. On appeal, the Court held that the plaintiff was not entitled to partial summary judgment under section 240 (1) because there were questions of fact as to whether the ladder provided proper protection, and whether he should have been given additional safety devices (*id.* at 378).

Although the MTA defendants and Judlau contend that Fernandez failed to tie the rope

correctly to the pipe, his own “negligence, if any, . . . is of no consequence” (*Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013] [internal quotation marks and citation omitted]).

Therefore, Fernandez is entitled to partial summary judgment under Labor Law § 240 (1) against the City of New York, the fee owner of the fan plant.

B. Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents to “provide reasonable and adequate protection and safety” for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing “specific, positive commands,” rather than a provision reiterating common-law safety standards (*Ross*, 81 NY2d at 503-504). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

Fernandez moves for partial summary judgment under Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.2 and 23-1.5. Although Fernandez submits an affidavit from an expert indicating that the MTA defendants violated sections 23-1.2 and 23-1.5, “[t]he interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court” (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Here, section 23-1.2, entitled “Finding of fact,” does not constitute a specific standard of conduct (*Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]; *Gordineer v*

*County of Orange*, 205 AD2d 584 [2d Dept 1994]). Section 23-1.5 sets forth an employer's general responsibility for health and safety in the workplace, and has been held to be insufficiently specific to support a Labor Law § 241 (6) claim (*see Mouta v Essex Mkt. Dev., LLC*, 106 AD3d 549, 550 [1st Dept 2013]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]). Therefore, Fernandez's motion for partial summary judgment under Labor Law § 241 (6) is denied.

#### **Five Star's Motion for Summary Judgment (Motion Sequence Number 006)**

Five Star moves for summary judgment dismissing Fernandez's claims against it. As a subcontractor, Five Star is not liable under the Labor Law unless it had the authority to supervise and control the work (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011] [to hold a subcontractor liable as a statutory agent, "the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury"] [internal quotation marks and citation omitted]). Fernandez has not opposed Five Star's motion, and thus has not disputed that Five Star did not have the authority to supervise and control the work or otherwise cause Fernandez's injuries. Therefore, Fernandez's claims against Five Star are dismissed.

Five Star also moves for summary judgment dismissing Judlau's cross claims for indemnification and contribution against it. As noted above, Five Star maintains that it was free from negligence in this case, and did not cause or contribute to the happening of Fernandez's

accident.<sup>3</sup>

The right to contribution arises when “two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person” (*Garrett v Holiday Inns*, 58 NY2d 253, 258 [1983] [internal quotation marks and citation omitted]). ““The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought”” (*Charles v William Hird & Co., Inc.*, 102 AD3d 907, 908 [2d Dept 2013], quoting *Raquet v Braun*, 90 NY2d 177, 183 [1997]).

The predicate of common-law indemnification is “vicarious liability without actual fault” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006] [internal quotation marks and citation omitted]). In *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]), the Court of Appeals held that “a party’s . . . [contractual] authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification.” Thus, “[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision” (*id.*). “To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-

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<sup>3</sup>In reply, Five Star argues that Judlau should not be permitted to benefit from its spoliation of evidence. However, “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

In *Naughton, supra*, the plaintiff was injured when he fell 25 feet from the truck while unloading it. In that case, the general contractor retained a subcontractor to perform all curtain wall, glass, and stone work (*id.*). The subcontractor, in turn, subcontracted the unloading and installation of the curtain wall panels to plaintiff’s employer (*id.*). The First Department held that the general contractor’s common-law indemnification claim against its subcontractor was properly dismissed (*id.*). According to the Court, there was:

“no evidence in the record that [the subcontractor] was either negligent or actually supervised or controlled plaintiff’s work. It is undisputed that [the subcontractor] did not perform the installation of the curtain wall panels; that work was subcontracted out to [], plaintiff’s employer. On the day of the accident, the unloading of the panels from the truck was supervised and directed by [plaintiff’s employer’s] foreman”

(*id.*). In addition, although the subcontractor’s foreman was present that day, there was no proof that the subcontractor’s foreman “actually supervised or controlled plaintiff’s work” (*id.*).

Here, there is no evidence that Five Star was negligent or actually supervised Fernandez’s work. Michael Gelb, Five Star’s project manager, avers that Five Star subcontracted out all of the electrical work in the underground fan plant to Eaton, and that its other subcontractor, Nunez, did not perform any electrical work in the underground fan plant (Yanuck Affirm., Exh. A [Gelb Aff.], ¶ 7). According to Gelb, there were no Five Star employees in the underground fan plant at the time of the accident (*id.*, ¶ 17). Gelb testified at his deposition that Five Star did not do any work at the fan plant; Five Star “had a subcontractor [Eaton] that worked at the fan plant and it was part of [its] contract to oversee the paperwork for the subcontract” (Yanuck Affirm., Exh. P [Gelb EBT], at 13, 14). Gelb was at the fan plant “[m]aybe two or three times a month” before the accident (*id.* at 15). Five Star did not have any employees at the fan plant on April 2, 2009 or

prior to that date (*id.* at 15-16).

Judlau argues that Gelb's affidavit should be disregarded because it is not based on his personal knowledge. However, Gelb has sufficiently demonstrated his personal knowledge of the facts, since he was Five Star's project manager on the South Ferry renovation project (*see* CPLR 3212 [b]). Although Judlau also contends that there are issues of fact as to Eaton's involvement in the hoisting procedure, Judlau has failed to establish that Five Star was actively negligent or actually supervised or controlled the hoisting work (*see Naughton*, 94 AD3d at 10). Therefore, Judlau's cross claims for common-law indemnification and contribution against Five Star are dismissed.

Five Star also moves for conditional common-law indemnification against Judlau. As noted above, the court has dismissed Fernandez's claims against Five Star. "Absent liability, vicarious or otherwise, there is no basis for indemnification" (*Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012] [court erred in granting owner common-law indemnification against decedent's employer; prior to the grant of indemnification, the court granted owner's motion for summary judgment dismissing plaintiff's complaint on the ground that there was no non-speculative basis for liability]). Accordingly, Five Star's request for common-law indemnification against Judlau is denied.

Five Star's request to convert the MTA defendants' cross claims into a third-party action is granted. The MTA defendants have not opposed this request. Judlau's assertion that this would result in a "needless administrative burden upon the litigants and the Clerk" (Franklin Affirm., ¶ 8) is without merit. Where a complaint is dismissed as against one defendant, but the dismissal does not reach a co-defendant's cross claims against that defendant for indemnification

and contribution, the court should convert the cross claims for contribution and indemnification into third-party claims and amend the caption accordingly (*see Jones v New York City Hous. Auth.*, 293 AD2d 371, 372 [1st Dept 2002]).

Finally, Five Star has requested that the court dismiss all claims, including the second third-party claims, against Nunez, its subcontractor, and delete it from the caption. On October 12, 2012, the parties filed a stipulation of discontinuance discontinuing all claims against Nunez (Yanuck Affirm., Exh. F). Accordingly, the caption is amended to delete Nunez from the caption.

**Judlau's Motion for Leave to Amend its Answer (Motion Sequence Number 008)**

Judlau moves for leave to amend its answer to the third-party complaint to assert cross claims for contractual indemnification and failure to procure insurance against Five Star. Judlau asserts that there can be no prejudice to Five Star because it is not seeking any additional discovery with respect to these claims, and no additional discovery will be necessary for any party to defend these claims. As pointed out by Judlau, the MTA defendants have asserted cross claims for contractual indemnification and failure to procure insurance against Five Star based upon the same contractual provisions at issue in Judlau's proposed cross claims.

It is well settled that leave to amend the pleadings should be freely granted, provided that the proposed amendment does not prejudice the opposing party, is not patently devoid of merit, and is not palpably insufficient (CPLR 3025 [b]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]; *Solomon Holding Corp. v Golia*, 55 AD3d 507 [1st Dept 2008]). Prejudice requires "some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Cherebin v*

*Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [internal quotation marks and citation omitted]). Moreover, “[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]).

Five Star’s subcontract with Judlau provides the following:

“The Subcontractor [Five Star] shall, to the fullest extent permitted by law, hold the Contractor [Judlau] and the Owner, their agents, employees, and representatives harmless from any and all liability, costs, damages, attorneys’ fee, and expenses from any claims or causes of action of whatever nature arising from Subcontractor’s [Five Star’s] work, including all claims relating to its subcontractors, suppliers or employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by the Subcontractor [Five Star], its representatives, employees, subcontractors, or suppliers . . . As part of the Subcontractor’s [Five Star’s] overall obligation, the Subcontractor [Five Star] shall obtain, before commencement, and maintain until final acceptance of work under the General Contract, full insurance coverage as specified in Amendment ‘A’ to this Agreement”

(Franklin Affirm., Exh. B, ¶ 12). The insurance rider to Five Star’s subcontract provides that Five Star was required to purchase a commercial general liability policy naming Judlau as an additional insured (*id.*).

Five Star argues that it would be prejudiced if the court were to grant Judlau’s motion. According to Five Star, “[i]f the Court were to grant Five Star’s motion for summary judgment and dismiss Judlau’s cross-claims for contribution and common law indemnification and then grant Judlau’s motion to assert new cross-claims, the Court would dismiss defendant Five Star from the case on one hand and then bring Five Star back into the case on two new cross claims that it had no opportunity to address in its original motion for summary judgment” (Pillinger

Affirm. in Opposition, ¶ 26). In other words, Five Star argues, granting Judlau’s motion would allow Judlau to do a “procedural end-run around the rules and time constraints for summary judgment” (*id.*, ¶ 27).

Five Star has failed to establish that it has been “hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position” (*Cherebin*, 43 AD3d at 365). Five Star does not contend that it will require any further discovery from Judlau. Five Star did not move for summary judgment dismissing the MTA defendants’ cross claims for contractual indemnification and breach of contract claims against Five Star, and instead requested that the court convert the MTA defendants’ cross claims into a third-party action. “In the absence of prejudice, mere delay is insufficient to defeat the amendment” (*Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st Dept 2001]).

*Heller v Louis Provenzano, Inc.* (303 AD2d 20 [1st Dept 2003]), a case cited by Five Star, is distinguishable. In *Heller*, a plaintiff sought leave to amend the complaint to assert a punitive damages claim six years after the filing of the original complaint (*id.* at 21-22). The First Department held that defendants would be “significantly prejudiced by the amendment,” because the proposed amendment would “involve different elements and standards of proof and potentially subject defendants to a far greater and different dimension of liability than would otherwise have been the case” (*id.* at 23).

Five Star and Eaton also raise lengthy arguments as to the merit of Judlau’s proposed cross claims, including that Judlau’s proposed contractual indemnification claim would be barred by General Obligations Law § 5-322.1, that Five Star procured the required insurance, and that Judlau spoliated the pipe. On a motion for leave to amend, the movant need not establish the

merit of the proposed new allegation but must “simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012] [internal quotation marks and citation omitted]). Here, the proposed amendments are not “palpably insufficient” or “clearly devoid of merit.”

Accordingly, Judlau’s motion for leave to amend its answer is granted.

### **Eaton’s Motion for Summary Judgment (Motion Sequence Number 010)**

Eaton moves for summary judgment dismissing the contractual indemnification, common-law indemnification, and contribution claims against it, arguing that all of the evidence concerning the origin, age, and type of pipe involved in Fernandez’s accident is speculative.<sup>4</sup>

Contrary to Eaton’s assertion, viewing the evidence in the light most favorable to the non-moving parties (*see Sosa v 46<sup>th</sup> St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]), the record reveals issues of fact as to whether Eaton caused or contributed to Fernandez’s accident and whether the conduit resulted from the performance of its work.

First, it is undisputed that Eaton was working in the fan plant around the time of the accident. Judlau’s safety engineer testified that Eaton was performing punch list work on the project around the time of the accident (Camacho Affirm., Exh. V [Samuel EBT], at 294-296). According to Judlau’s superintendent, Gary Lattuga, “[t]he only trade working in that area was electricians” (*id.*, Exh. X [Lattuga EBT], at 106). Eaton’s daily field work reports indicate that

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<sup>4</sup>In reply, Eaton argues that Judlau’s opposition papers were untimely served pursuant to the briefing schedule set by the court. The court required opposition papers to be served by February 6, 2013. An affidavit of service annexed to Judlau’s opposition papers states that it was served on February 6, 2013 (Franklin Affirm. in Opposition, Aff. of Service dated 2/6/13). Therefore, the court has considered Judlau’s affirmation in opposition.

Eaton was still installing conduit in the fan plant in February 2009 (Mahoney Affirm. in Opposition, Exh. C).

Second, there is evidence in the record that the workers were removing electrical conduit from the fan plant. Eaton's subcontract required it to "[f]urnish and install all labor, materials, tools, equipment, etc. as per Plans, Specification and Addenda to furnish and install the following equipment include [sic] but not limited to *conduit*, boxes, devices and wire/cable etc. at the South Ferry Terminal Project" (Camacho Affirm., Exh. EE [emphasis added]). Manuel San Martin, Fernandez's co-worker, testified that, on the morning of the accident, he and Fernandez had initially been directed by Pousa only to clean up debris such as garbage and pieces of wood from the fan plant (*id.*, Exh. AA [San Martin EBT], at 29-33). However, while in the process of removing these materials, an electrician directed San Martin and Fernandez to remove electrical conduit from the fan plant (*id.* at 35-37, 119-121, 171). San Martin testified that the conduit being removed at the time of the accident was "new" electrical conduit (*id.* at 41, 177-178, 266).<sup>5</sup> San Martin believed that the particular section of conduit was not cut because the conduit was new and was potentially being saved for future use on the project (*id.* at 41, 148).

In addition, Elvi Bassignani, a safety consultant who investigated the accident, testified that the workers were removing 10-foot lengths of four-inch "electrical conduit" (Mahoney Affirm. in Opposition, Exh. B [Bassignani EBT], at 117-119). According to Bassignani, the conduit was "galvanized" and had a "silvery look" (*id.* at 337). Bassignani testified that the

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<sup>5</sup>Eaton argues that San Martin could not positively identify the electrical conduit involved in Fernandez's accident. However, San Martin only testified, when shown photographs of pipes at his deposition, that he could not remember whether they were the type of pipe involved in Fernandez's accident (Camacho Affirm., Exh. AA [San Martin EBT], at 185, 187). San Martin further stated that he "didn't really pay attention to the pipe" after the accident (*id.* at 202-203).

conduit “wasn’t an old pipe” (*id.* at 334). Albert Staffa, Eaton’s general foreman, testified that its work included the use of galvanized steel electrical conduit (Camacho Affirm., Exh. FF [Staffa EBT], at 55-58). According to Staffa, Eaton used four-inch diameter conduit, which was delivered in 10-foot sections (*id.* at 56-57, 59). Fernandez’s foreman, Ruben Pousa, also testified that the pipe that fell and struck Fernandez was an “electrician’s” (*id.*, Exh. Y [Pousa EBT], at 260).

The cases relied upon by Eaton are not to the contrary. In *Cohen v New York City Indus. Dev. Agency* (91 AD3d 416, 417 [1st Dept 2012]), “plaintiff’s testimony as to the source of the plastic debris on which he allegedly slipped was speculative and insufficient to raise a question of fact as to whether Giaquinto caused or contributed to plaintiff’s injuries.” In *Grullon v City of New York* (297 AD2d 261 [1st Dept 2002]), the plaintiff tripped and fell on a concrete stairway and sued, among other defendants, the New York City Housing Authority (NYCHA). NYCHA moved for summary judgment, arguing that it did not own the stairway (*id.*). The Court held that an affidavit submitted in opposition to the motion was inadmissible as to whether NYCHA owned the stairway where plaintiff fell (*id.*). In light of the foregoing evidence, the court cannot say that the only evidence as to the age and origin of the conduit or pipe is speculation.

Eaton next asserts that it has no contractual indemnification obligation, because Fernandez’s accident did not arise out of its work.<sup>6</sup>

Rider A to Eaton’s subcontract with Five Star states that:

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<sup>6</sup>In its moving papers, Eaton did not argue that Judlau is not an indemnitee under the indemnification provision of the subcontract between Five Star and Eaton. However, in reply, Eaton argues, for the first time, that Judlau is not a “Contractor and/or Owner and their agents, servants and employees.” Therefore, the court does not consider this argument (*see Dannasch*, 184 AD2d at 417).

*“To the extent permitted by law the Subcontractor [Eaton] hereby assumes entire responsibility and liability for any and all damage and injury of any kind or nature whatsoever to all persons, whether employees or otherwise, and to all property, arising out of, or resulting from the performance of this contract or occurring in connection therewith, and agrees to indemnify and save harmless the Contractor [Five Star] and/or Owner and their agents, servants and employees from and against any and all loss, expense, including legal fees and disbursements, damage or injury arising out of, or resulting there[ ]from or occurring in connection therewith. The Subcontractor shall procure and maintain, at its own expense, the following insurance: bodily injury and property damage, workers compensation and auto liability and covering the contractual liability, with the limits set forth in the Prime Contract and as detailed in Rider B”*

(Camacho Affirm., Exh. EE [emphases added]).

However, the court finds that there are issues of fact as to whether Fernandez’s accident “ar[ose] out of, or result[ed] from the performance of [Eaton’s] contract or occur[ed] in connection therewith” (*id.*). Eaton argues that it had no duty to remove debris from the site based upon paragraph 1 of Rider A to its subcontract, which states that: “[t]his order between Five Star Electric Corp., hereinafter called the Contractor, and the party to whom the order is addressed [Eaton], hereinafter called the Subcontractor, shall, when accepted by the Subcontractor, become the exclusive contract between the parties, and all prior representatives or agreements, whether written or oral, not incorporated, are superseded” (*id.*),<sup>7</sup> and boilerplate language in the contract requiring Eaton to “abide by the terms and conditions of Five Star Electric’s Contract with the General Contractor and the Prime Contract with New York City Transit Authority” (*id.*). Nevertheless, paragraph 8 of Rider A of Eaton’s subcontract with Five Star expressly states that

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<sup>7</sup>Contrary to Eaton’s contention, this language does not indicate that the prime contract and Five Star’s subcontract with Judlau claimed priority over, and superseded Five Star’s subcontract with Eaton. In any event, paragraph 10 of Five Star’s subcontract with Judlau states that “[t]he Subcontractor shall continuously maintain the Project free from all dirt, rubbish, debris and any other waste materials produced by his work” (Camacho Affirm., Exh. CC).

“Subcontractor [Eaton] shall clean up and remove from the premises all debris caused by the execution of the work or furnishing of materials. Upon failure to remove its debris, Contractor [Five Star] may remove it and charge the cost to the Subcontractor [Eaton]” (*id.* [emphasis added]).

There is also a dispute as to where Eaton was required to place its debris. Albert Staffa, Eaton’s general foreman, testified that the procedure for debris removal was for Eaton to pile its debris at a location in the fan plant hallway, after which it would be removed by Judlau’s laborers (*id.*, Exh. FF [Staffa EBT], at 39-40). However, Judlau’s safety engineer, Dennis Samuel, testified that the trade that was working with conduit was required to remove it (*id.*, Exh. V [Samuel EBT], at 327). When asked when subcontractors would remove their own debris, Judlau’s superintendent stated “I guess conduits, if it is the electrician, he will remove his own conduits” (*id.*, Exh. X [Lattuga EBT], at 167). Judlau’s project manager also testified that subcontractors at a minimum had an obligation to bring their debris from the underground fan plant to designated containers on the site which were located *at street level* (*id.*, Exh. U [Kastrati EBT], at 177-178, 181 [emphasis supplied]). Judlau’s project manager further testified that he told Mike Gelb of Five Star that the central location for debris placement was located at street level (*id.* at 185).

Eaton also argues that it was not required to remove the conduit or pipe because it was Judlau’s property, referencing paragraph 9 of Five Star’s subcontract with Judlau. Eaton omits the second part of this paragraph. This paragraph states that “[a]ll work done and material or equipment delivered shall become the property of the Contractor and shall not be removed from the site without the Contractor’s written consent; *when directed by the Contractor, the*

*Subcontractor shall forthwith remove all surplus material, scaffolding, apparatus, machinery, tools and equipment furnished by it*” (Camacho Affirm., Exh. CC [emphasis added]). There is also evidence that surplus materials remained the property of subcontractors if they were “usable.” Michael Gelb, Five Star’s project manager, testified that materials became the property of Judlau if they were not “usable” (*id.*, Exh. BB [Gelb EBT], at 153). Eaton’s general foreman, Albert Staffa, also testified that if a large quantity of usable materials remained on the job, Eaton retained ownership of the materials and would send them back to the shop or send them to another job (*id.*, Exh. FF [Staffa EBT], at 133). In light of the evidence that Eaton’s work in the fan plant was nearly complete, and Fernandez’s co-worker’s testimony that the conduit was not cut in half because he believed that it was saved for future use (*id.*, Exh. AA [San Martin EBT], at 41, 148), a reasonable jury could conclude that the conduit being removed from the fan plant remained the property of Eaton and was intended for its future use.

*Pepe v Center for Jewish History, Inc.* (59 AD3d 277 [1st Dept 2009]), another case relied upon by Eaton to show that it has no indemnification obligation, is distinguishable. In *Pepe*, the plaintiff, an employee of a general contractor, was assigned to clear debris from the roof, hopped over a parapet wall that a masonry subcontractor was constructing, landed on an unsecured plywood which was covering a hole in the roof, and fell through (*id.*). The subcontractor was required to indemnify the owner for any claims that “arose out of” or “in connection with” the subcontracted work (*id.*). The Court held that the building owner was not entitled to contractual indemnification from the subcontractor, since “[t]he connection between plaintiff’s accident and the mere existence of the partially constructed wall . . . [was] too tenuous to trigger the indemnification clause” (*id.* at 278). According to the Court, “plaintiff was not

performing work that was even remotely related to [the subcontractor's] masonry work, and the ramp was neither an instrumentality for which [the subcontractor] was responsible nor a tool or material supplied by or needed by [the subcontractor] to perform its work" (*id.*). Here, as noted above, there is evidence that Fernandez's accident involved material supplied by Eaton to perform its work, i.e., electrical conduit, and that Eaton was responsible for removing the conduit.

Eaton also contends that the common-law indemnification and contribution claims against it must be dismissed, because there is no evidence that it was negligent. As indicated previously, there are issues of fact as to whether Eaton used the conduit in the course of its work, and was responsible for removing it from the fan plant. Therefore, this branch of its motion is denied.

Although Eaton argues that Judlau either negligently or intentionally spoliated the pipe, Eaton has failed to establish that it is "prejudicially bereft of appropriate means to confront a claim [or defense] with incisive evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174 [1st Dept 1997] [internal quotation marks and citation omitted]).

Eaton also moves for summary judgment dismissing Five Star's and the MTA defendants' failure to procure insurance claims, asserting that it fulfilled its contractual responsibility to secure the required insurance. Rider B of Eaton's subcontract with Five Star states that Eaton was to obtain a commercial general liability policy covering bodily and property damage from any occurrence, including any contractual agreement assuming liability of the owner by the terms of the contract in an amount of not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate with the owner and Five Star as additional insureds (Camacho

Affirm., Exh. EE).

Eaton has not submitted a copy of its policy. While Eaton submits a certificate of liability insurance, indicating that “[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder” and that “[t]his certificate does not amend, extend or alter the coverage afforded by the policies below” (*id.*, Exh. HH), it is well established that “[a] certificate of insurance is only evidence of a carrier’s intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists” (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]; *see also Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]). Eaton improperly argues, for the first time in reply, that the insurance obligations were not expressly incorporated into the subcontract. Therefore, the court has not considered this new argument (*see Dannasch*, 184 AD2d at 417).

In view of the above, Eaton’s motion is denied.

#### **Five Star’s Cross Motion for Conditional Contractual Indemnification Against Eaton**

Five Star moves for conditional contractual indemnification against Eaton, based upon the indemnification provision in Five Star’s subcontract with Eaton. Five Star’s cross motion is denied. It has yet to be determined whether the accident “ar[ose] out of, or result[ed] from the performance of [Eaton’s] contract or occur[ed] in connection therewith” (Camacho Affirm., Exh. EE).

#### **The MTA Defendants’ Motion for Summary Judgment (Motion Sequence Number 011)**

The MTA defendants move for contractual indemnification in favor of City, NYCTA,

MTA, and MTACC against Judlau pursuant to articles 6.02 and 6.03 of the general contract, which provide as follows:

“ARTICLE 6.02            RESPONSIBILITY FOR INJURIES TO PERSONS AND PROPERTY

- “A.    *The Contractor [Judlau] shall be solely responsibly for (1) all injuries (including death) to persons, including but not limited to employees of the Contractor [Judlau] and Subcontractors and Indemnified Parties and (2) damage to property, including but not limited to property of the Indemnified Parties, the Contractor or its Subcontractors. The liability hereunder shall be limited to such injuries or damage occurring on account of, or in connection with, the performance of the Work, whether or not the occurrence giving rise to such injury or such damage happens at the Project Site, but shall exclude injuries to such persons or damage to such property to the extent caused by the negligence of the Contracting Party or the Authority.*

“ARTICLE 6.03            INDEMNIFICATION

- A.    *The Contractor [Judlau] shall indemnify and hold harmless the Indemnified Parties, to the fullest extent permitted by law, from loss and liability upon any and all claims and expenses, including but not limited to attorneys' fees, on account of such injuries to persons or such damage to property, irrespective of the actual cause of the accident, irrespective of whether it shall have been due in part to negligence of the Contractor or its subcontractors or negligence of the Indemnified Parties, or of any other persons, but excepting bodily injuries and property damage to the extent caused by the negligence of the Contracting Party or the Authority.”*

(Sande Affirm., Exh. S [emphases supplied]).<sup>8</sup>

In moving for contractual indemnification from Judlau, the MTA defendants contend that they had no involvement in the work that led to Fernandez’s accident. Thus, according to the MTA defendants, their liability is solely statutory and passive.

Judlau argues that there are issues of fact as to whether the MTA defendants were at least

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<sup>8</sup>Pursuant to article 6.01, the “Indemnified Parties” are defined as: (1) the City, (2) the Authority, (3) the Government, (4) the State, and (5) the MTA (Sande Affirm., Exh. S).

partially negligent in causing Fernandez's accident.

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). “In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification agreement that authorizes indemnification “to the fullest extent permitted by law” is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210-211 [2008]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this limiting language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]).

Here, Judlau does not dispute that it expressly agreed to indemnify the MTA defendants for the type of loss suffered by Fernandez. The indemnification provision states that Judlau “shall be solely responsible for (1) all injuries (including death) to persons, including but not

limited to employees of the Contractor [Judlau],” “on account of, or in connection with, the performance of the Work,” and that Judlau “shall indemnify and hold harmless the Indemnified Parties, to the fullest extent permitted by law, from loss and liability upon any and all claims and expenses, including but not limited to attorneys’ fees, on account of such injuries to persons or such damage to property” (Sande Affirm., Exh. S [emphasis supplied]). Since the indemnification provision provides for indemnification “to the fullest extent permitted by law,” it does not run afoul of General Obligations Law § 5-322.1. As noted above, the City has been found vicariously liable as fee owner of the fan plant under Labor Law § 240 (1). The MTA defendants have shown that they were not negligent. Fernandez testified that he did not speak to anyone from the City regarding his job and tasks (*id.*, Exh. G [Fernandez EBT], at 36-38). In addition, the provision is triggered because Fernandez was an employee of Judlau, and his injuries were “on account of or, in connection with, the performance of [Judlau’s] Work” (*see Brown*, 76 NY2d at 179; *Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003]).

Judlau’s contention that there are issues of fact as to the MTA defendants’ negligence is unpersuasive. Although Judlau contends that the MTA defendants had the authority to stop work, the authority to stop work for safety reasons is insufficient to raise a triable issue of fact as to a defendant’s supervision and control of the work (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007]). While Judlau points out that MTA representatives were present in the fan plant at the time the conduit was being hoisted, monitoring and oversight of the timing and quality of the work, mere presence on the job site, and a general duty to ensure compliance with safety regulations, are insufficient to impose liability in common-law negligence (*see Phillip v 525 E. 80<sup>th</sup> St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]);

*Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]; *Carty*, 32 AD3d at 733).

Moreover, liability does not attach to an owner where it has “notice of the unsafe manner in which the work [is being] performed” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). Thus, the City is entitled to contractual indemnification, including attorneys’ fees, from Judlau.

The MTA defendants also seek common-law indemnification from Judlau. As noted previously, the City has been held vicariously liable under Labor Law § 240 (1), and there is no evidence of negligence on its part. In addition, it is undisputed that Judlau actually supervised and controlled his work on the date of his accident. Judlau also does not dispute that Fernandez suffered a “grave injury” (Sande Affirm., Exh. E [Verified Bill of Particulars, ¶ 8]). Accordingly, the City is also entitled to common-law indemnification from Judlau.

The MTA defendants also seek summary judgment dismissing the complaint as to MABSTOA. Fernandez has not opposed this branch of the motion. MABSTOA was created pursuant to Public Authorities Law § 1203-a (2). Pursuant to Public Authorities Law § 1203-a (1), MABSTOA was not given the authority “to construct, reconstruct, improve, maintain and operate any transit facility.” The MTA defendants submit an affidavit from Kothari, which states that MABSTOA is a subsidiary of NYCTA whose sole area of responsibility is the operation of certain bus lines in Manhattan and the Bronx; it had no involvement in this project (*id.*, Exh. Q [Kothari Aff.], ¶ 5). Therefore, the complaint is dismissed as against MABSTOA.

### CONCLUSION

Accordingly, it is hereby

**ORDERED** that the motion (sequence number 005) of plaintiff Jose Fernandez for

partial summary judgment is granted on the issue of liability under Labor Law § 240 (1) as against defendant City of New York, and the motion is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 006) of defendant/second third-party plaintiff Five Star Electric Corp. is granted as follows: (1) the complaint is dismissed as against Five Star Electric Corp., sued herein as defendant Five Star Contracting Co., (2) third-party defendant Judlau Contracting, Inc.'s cross claims for common-law indemnification and contribution are dismissed against defendant/second third-party plaintiff Five Star Electric Corp., (3) the cross claims of defendants/third-party plaintiffs The City of New York, MTA/New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, Metropolitan Transportation Authority, and MTA Capital Construction Company as against Five Star Electric Corp. are converted into third-party claims, and (4) the caption is amended to delete second third-party defendant Nunez Electric, Inc. from the caption, and the motion is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 008) of third-party defendant Judlau Contracting, Inc. for leave to amend its answer to the third-party complaint to assert cross claims for contractual indemnification and failure to procure insurance against Five Star Electric Corp. is granted, and the proposed amended verified answer annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

**ORDERED** that the motion (sequence number 010) of second third-party defendant Eaton Electric, Inc. for summary judgment is denied; and it is further

**ORDERED** that the cross motion of defendant/second third-party defendant Five Star Electric Corp. for conditional contractual indemnification against second third-party defendant

Eaton Electric, Inc. is denied; and it is further

**ORDERED** that the motion (sequence number 011) of defendants/third-party plaintiffs The City of New York, MTA/New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, Metropolitan Transportation Authority, and MTA Capital Construction Company is granted as follows: (1) the complaint is severed and dismissed as against defendant Manhattan and Bronx Surface Transit Operating Authority, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to judgment in favor of defendant Manhattan and Bronx Surface Transit Operating Authority accordingly; (2) defendant/third-party plaintiff City of New York is granted summary judgment as to liability in its favor on its claims for contractual indemnification and common-law indemnification, including reasonable attorneys' fees, against third-party defendant Judlau Contracting, Inc., and the motion is otherwise denied; and it is further

**ORDERED** that the action shall bear the following caption:

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

-----X  
JOSE FERNANDEZ,

Plaintiff,

-against-

Index No. 105177/09

THE CITY OF NEW YORK, MTA/NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY, MTA CAPITAL  
CONSTRUCTION COMPANY and FIVE STAR  
ELECTRIC CORP.,

Defendants.

-----X

THE CITY OF NEW YORK, THE NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY and MTA  
CAPITAL CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

-against-

JUDLAU CONTRACTING, INC.,

Third-Party Defendant.

-----X

FIVE STAR ELECTRIC CORP.,

Second Third-Party Plaintiff,

-against-

EATON ELECTRIC, INC.,

Second Third-Party Defendant.

-----X

THE CITY OF NEW YORK, THE NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY and MTA  
CAPITAL CONSTRUCTION COMPANY,

Third Third-Party Plaintiff,

-against-

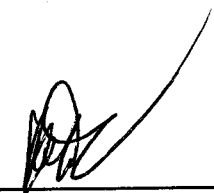
FIVE STAR ELECTRIC CORP.,

Third Third-Party Defendant.

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Dated: July 12, 2013  
New York, NY

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**

JUL 17 2013

COUNTY CLERK'S OFFICE  
NEW YORK

HON. MICHAEL D. STALLMAN