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

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

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AUGUSTINE ACCARDI,

Plaintiff,

- against -

TISHMAN INTERIORS CORPORATION, *et al,*

Defendants.

INDEX NO.: 103626/2008

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TISHMAN INTERIORS CORPORATION, *et al,*

Third-Party Plaintiffs,

-against-

MICHAEL MAZZEO ELECTRIC CORP.,

Third-Party Defendant.

THIRD-PARTY INDEX No.: 590672/2008

**DECISION and ORDER**

Motion Seq. No.: 001

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Motion by Plaintiff for Partial Summary Judgment on Labor Law § 240(1) Claim.

| | Papers Numbered |
|---|---|
| Plaintiff's Notice of Motion for Partial Summary Judgment on Labor Law § 240(1) Claim | 1 |
| Affirmation of Plaintiff's Counsel in Support of Motion with Exhibits "1" through "7" | 2 |
| Affirmation of Defendants/Third Party Plaintiffs' Counsel in Opposition to Motion with Exhibits "A" and "B" | 3 |
| Reply Affirmation of Plaintiff's Counsel in Support of Plaintiff's Motion | 4 |
| Transcript of Oral Argument of November 26, 2012 | 5 |

**Cross-Motion:** ☑ No ☐ Yes

FILED

SEP 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

**Upon the foregoing papers, it is hereby ordered that Plaintiff's Motion for partial summary judgment (motion sequence 001) is granted as set forth in the attached separate written Decision and Order.**

Dated: August 30, 2013
New York, New York

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

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

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

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AUGUSTINE ACCARDI,

Plaintiff,

-against-

TISHMAN INTERIORS CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN, TISHMAN CONSTRUCTION CORPORATION, VERIZON NEW YORK INC., VERIZON NEW YORK INC., f/k/a NEW YORK TELEPHONE REALTY CORPORATION, NEW YORK TELEPHONE REALTY CORPORATION, VERIZON NEW YORK INC., f/k/a NEW YORK TELEPHONE COMPANY and NEW YORK TELEPHONE COMPANY,

Defendants.

Index No. 103626/2008



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TISHMAN INTERIORS CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN, TISHMAN CONSTRUCTION CORPORATION, VERIZON NEW YORK INC., VERIZON NEW YORK INC., f/k/a NEW YORK TELEPHONE REALTY CORPORATION, NEW YORK TELEPHONE REALTY CORPORATION, VERIZON NEW YORK INC. f/k/a NEW YORK TELEPHONE COMPANY and NEW YORK TELEPHONE COMPANY,

Third-Party Plaintiffs,

-against-

MICHAEL MAZZEO ELECTRIC CORP.,

Third-Party Defendant.

Third-Party Index No. 590672/2008

DECISION and ORDER

Motion Seq. Nos.: 001 & 002

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

In this action, plaintiff Augustine Accardi ("Accardi" or "plaintiff"), a union journeyman electrician, seeks to recover damages for personal injuries that he sustained on July 14, 2005

("accident date"), when he fell from a ladder while working at a construction site located at 140 West Street in downtown Manhattan ("the premises").

In motion sequence number 001, plaintiff moves for partial summary judgment against all of the named defendants on the issue of liability with respect to his Labor Law § 240(1) claim. In motion sequence number 002, all of the named defendants/third-party plaintiffs move for summary judgment against plaintiff's employer, third-party defendant Michael Mazzeo Electric Corp. ("Mazzeo"), on their cross claim seeking contractual indemnification, including attorney's fees. Motion sequence numbers 001 and 002 are consolidated for disposition.

## BACKGROUND

On the date of the occurrence, the premises were undergoing reconstruction to repair damage resulting from the events of September 11, 2001. Defendant Verizon New York, Inc. ("Verizon") is the owner of the premises. Verizon had contracted with Tishman Construction Corporation of New York ("Tishman Construction") to be the construction manager on this reconstruction project. Defendant Tishman Interiors Corporation ("Tishman Interiors") was the project manager for the construction manager. Tishman Interiors, as agent for Verizon, had entered into a contract with third-party defendant Mazzeo to perform certain electrical work at the premises.

At the time of the accident, plaintiff was performing electrical work on the eighth floor of the premises. According to his deposition testimony, plaintiff had begun working for Mazzeo only one or two days prior to the accident, and had been sent to perform electrical work at the premises that day for the first time. Plaintiff testified that, when he arrived at the site, he was assigned to work with another journeyman electrician employed by Mazzeo named Vladimir. Plaintiff testified that

Vladimir took him to the eighth floor of the premises where they were to perform a "wire pull." The task required that wires be pulled through electrical tubing to a box located approximately one foot above the ceiling level, or about 11 feet off the ground. In order to perform the work, Vladimir had obtained an eight-foot A-frame ladder for plaintiff to use. Vladimir set up the ladder for plaintiff, and then left to go to the other end of the wire pull to feed the wires. Plaintiff testified that the ladder looked fine to him at the time.

Plaintiff testified that after Vladimir had left the area, plaintiff proceeded up the eight-rung ladder and waited until Vladimir tugged on the jet line. Plaintiff then pulled the wire through the tubing until approximately 10 inches of wire came out of his end of the electrical box. After completing this task, plaintiff began to come down off the ladder to inform Vladimir that the wire had been pulled through. Plaintiff testified that, as he was descending from the sixth to the fifth rung of the ladder, the ladder twisted and came out from under him, causing plaintiff and the ladder to fall to the floor. Plaintiff testified that he fell first onto his right shoulder, after which his buttocks and left leg hit the floor. Plaintiff testified that, following his fall, he rolled around on the floor in pain for approximately 10 minutes before pulling himself together, getting up, and walking over to where Vladimir was working to inform him of the accident. It does not appear that anyone else witnessed the accident.

After informing Vladimir of his fall, Vladimir asked plaintiff if he wanted to go to the hospital or to go downstairs and report the accident. Plaintiff told Vladimir that he would rather wait and see how he felt towards the end of the day, as he had just returned to work and didn't want to lose more time. The two then continued to work through the day connecting the electrical outlets. Plaintiff testified, however, that his condition only worsened as the day progressed, so that night he

went to the emergency room at Riverview Hospital. At the hospital, X-rays were taken and plaintiff was informed that no bones were broken. Plaintiff thereafter made an appointment to see an orthopedist for the pain in his right shoulder, left knee, and lower back. Plaintiff did not return to work at the site.

On March 11, 2008, plaintiff commenced the instant action against Tishman Interiors, Tishman Construction, Verizon, and the other named Tishman and Verizon entities (collectively "Tishman/Verizon" or "defendants"), asserting causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Tishman/Verizon thereafter commenced a third-party action against Mazzeo seeking common-law and contractual indemnification and/or contribution. Mazzeo then asserted its own cross claims against Tishman/Verizon for indemnification and/or contribution.

Plaintiff now moves for partial summary judgment against Tishman/Verizon solely on the issue of liability with respect to his Labor Law § 240(1) claim. Tishman/Verizon move for summary judgment against Mazzeo with respect to their claim for contractual indemnification including attorney's fees.

**DISCUSSION**

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent 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]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If

there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

**Plaintiff's Motion for Partial Summary Judgment Under Labor Law § 240(1)**

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

> "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"

Labor Law § 240(1) was enacted 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility" (*Ross*, 81 NY2d at 500). The statute has been liberally construed to achieve this purpose (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

To succeed on his Labor Law § 240(1) claim, plaintiff must show both a violation of the statute (i.e., that the owner or contractor failed to provide adequate safety devices) and that the statutory violation was a proximate cause of the injuries sustained (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Cuentas*

*v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013], quoting *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]). Here, plaintiff has established *prima facie* entitlement to summary judgment as a matter of law through his uncontroverted deposition testimony and affidavit that the unsecured ladder on which he was working suddenly twisted out from under him as he was descending, causing him to fall and sustain injury (*see Fanning v Rockefeller Univ.*, 106 AD3d 484,484-485 [1st Dept 2013]; *Krejbich v Schimenti Constr. Co., Inc.*, 94 AD3d 668 [1st Dept 2012]).

Tishman/Verizon argue that plaintiff's motion for summary judgment should be denied because the accident was unwitnessed and plaintiff's deposition testimony on the issue of damages shows a pattern of misrepresentation and falsehood sufficient to raise an issue of fact as to plaintiff's credibility. Specifically, defendants note that over plaintiff's 30-year career as an electrician, i.e., between 1975 and 2005, plaintiff made 37 other workers' compensation claims, and that on a number of these claims, plaintiff lost significant amounts of time from work. Defendants note, however, that when plaintiff was asked about those claims at his deposition, plaintiff testified that he was unable to recall the incidents or particulars about the injuries he sustained on those claims. At the same time, plaintiff was able to recall "vaguely" other incidents in which he lost no time from work. Defendants argue that it strains credibility that plaintiff was unable to recall a single incident in which he missed a significant amount work, while he was able to recall incidents where no work was lost. Defendants argue that this selective recall raises an issue of fact as to plaintiff's credibility requiring a determination by the trier of fact whether or not the accident happened. Therefore, under the doctrine of *falsus in uno*, defendants posit that plaintiff's motion for summary judgment should be denied.

The doctrine of *falsus in uno* allows the trier of fact to disregard, in part or in whole, the testimony of a witness who has wilfully testified falsely as to any material fact (*see, e.g., DiPalma v State of New York*, 90 AD3d 1659, 1660 [4th Dept 2011]). The doctrine is based upon the principle that one who testifies falsely about one material fact may well have testified falsely about everything. Assuming the doctrine is applicable, defendants have not identified a particular "material fact" to which plaintiff is alleged to have testified falsely.

As defendants acknowledge in their opposition papers, the fact that plaintiff was the sole witness to his accident does not, by itself, preclude an award of summary judgment in his favor (*see Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [1st Dept 2004]). Rather, once plaintiff has established his *prima facie* case, it is the defendants' burden to offer "evidence, other than mere speculation, to undermine the plaintiff's showing of entitlement to judgment as a matter of law, or present a *prima facie* issue regarding the plaintiff's credibility as to a material fact" (*Melchor v Singh*, 90 AD3d 866, 869 [2nd Dept 2011]; *see also Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 891 [2nd Dept 2011]).

Here, defendants have not identified anything in the record that might contradict plaintiff's version of events (*see Gontarzewski v City of New York*, 257 AD2d 394 [1st Dept 1999]). Specifically, defendants have proffered no evidence to show that plaintiff's deposition testimony concerning the manner in which the accident occurred is either inconsistent with any other of his accounts of the accident, or contradicted by other evidence (*see Noah v 270 Lafayette Assoc.*, 233 AD2d 108 [1st Dept 1996]; *Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996]). Defendants' contention, that plaintiff must have been lying when he testified that he was unable to recall the particulars of any of the significant worker's compensation claims

that he had made over the prior 30 years, is based wholly on conjecture and without any evidence to show that plaintiff was lying rather than actually unable to recall the details of injury claims. Thus, as a matter of law, it is insufficient to raise a triable issue of fact as to plaintiff's credibility (*see Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69-70 [1st Dept 1996] [summary judgment granted, as plaintiff's inability to recall certain "basic matters" is "not the kind of genuine credibility questions raised when, for example, the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness"] [internal quotation marks and citation omitted]).

Accordingly, as defendants have failed to present evidence sufficient to raise a triable issue of fact relating to plaintiff's *prima facie* case, or a substantiated challenge to plaintiff's credibility, partial summary judgment as to liability is properly awarded to plaintiff on his Labor Law § 240(1) claim (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408 [1st Dept 2013] [summary judgment granted where defendant failed to present any evidence raising a triable issue of fact relating to the *prima facie* case or to plaintiff's credibility; plaintiff's criminal conviction, by itself, is insufficient to raise issue of credibility]; *Weber v Baccarat, Inc.*, 70 AD3d 487 [1st Dept 2010] [summary judgment granted where defendants failed to present a conflicting theory with supporting evidence or to raise any *bona fide* credibility issues with respect to plaintiff's testimony]; *Mannino v J.A. Jones Const. Group, LLC*, 16 AD3d 235 [1st Dept 2005] [summary judgment granted where there was no substantiated challenge to plaintiff's credibility]).

**Tishman/Verizon's Motion for Partial Summary Judgment Against Third-Party Defendant Mazzeo for Contractual Indemnification**

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the

surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). Here, it is not disputed that the contract between Verizon and Mazzeo contains an indemnification provision, whereby Mazzeo agreed to indemnify Verizon and Tishman against losses arising out of any negligent or willful act or omission on the part of Mazzeo or its employees. Specifically, section 12.1 of the agreement provides:

> To the extent permitted by law, the Trade Contractor shall indemnify and hold harmless VERIZON, Construction Manager, Design Professional, and their officers, directors and employees from and against all claims, costs, losses and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals and all court or arbitration or other dispute resolution costs to the extent reasonable) caused by, arising out of or resulting from the performance or nonperformance of this Agreement, provided that any such claim, cost, loss or damage: (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), including the loss of use resulting therefrom; and (ii) is caused in whole or in part by any negligent or willful act or omission of the Trade Contractor, Subcontractor, Supplier, any person or organization directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.

(Exhibit F to Affirmation of Richard T. Bogle, Esq. in Support of Tishman/Verizon's Motion for Summary Judgment [motion sequence no. 002] ["Bogel Aff."]).

Tishman/Verizon argue that they are entitled to summary judgment on their contractual indemnification claim against Mazzeo, because the cause of plaintiff's injuries could only have been due to Mazzeo's negligence. In support of their motion, Tishman/Verizon have proffered copies of the contract with Mazzeo along with plaintiff's deposition and affidavit, to establish that the accident arose solely out of Mazzeo's performance of the work, and Mazzeo's failure to secure the ladder or to provide plaintiff with any other safety device to prevent him from falling in the event the unsecured ladder twisted and fell. Specifically, this evidence establishes that the ladder, the

instrumentality of plaintiff's accident, was provided by Mazzeo, was set up by a Mazzeo employee, and was neither secured nor held by anyone while plaintiff, who was employed by Mazzeo, performed his work.

In opposition, Mazzeo does not rebut the evidence of its own negligence proffered by Tishman/Verizon; nor does Mazzeo proffer any evidence of active negligence on the part of Tishman/Verizion, which would preclude the granting of this motion. Rather, Mazzeo argues that Tishman/Verizon's motion for summary judgment must be denied because their attempt to obtain contractual indemnification from Mazzeo violates the anti-subrogation rule, which denies an insurer the right of subrogation against its own insured for a claim arising out of the very risk for which the insured was covered. Mazzeo notes that, under section 14.1 of the contract between Verizon and Mazzeo, Verizon agreed to set up an Owner's Controlled Insurance Program (OCIP), under which it expressly agreed to insure trade contractors, such as Mazzeo, for Statutory Workers Compensation, Employers Liability, Commercial General Liability, and Builders Risk (Exhibit F to Bogle Aff.). Mazzeo argues that, because it was included as an insured under the Commercial General Liability policy that Verizon provided to its trade contractors under the OCIP, the attempt by Tishman/Verizon to obtain contractual indemnification and attorney's fees from Mazzeo, is nothing more than an effort by the actual party in interest, i.e., the insurance company that provided this coverage, to recover from Mazzeo in violation of the anti-subrogation rule.

Tishman/Verizon argue that the anti-subrogation rule is inapplicable, because paragraph 2 of the OCIP expressly excludes trade contractors and subcontractors who are self-insured for workers' compensation from the coverage provided by the OCIP. Tishman/Verizon note that, as

Mazzeo admittedly was self-insured for workers' compensation, it is excluded form coverage under the OCIP.

Paragraph two of the OCIP provides, in pertinent part, that "Trade Contractors and subcontractors who are self-insured for workers compensation will be excluded from the ***coverage's*** provided by the OCIP" (Exhibit F to Bogle Aff.). Mazzeo argues that this provision, as written, makes no grammatical sense, as it was drafted using the singular possessive form of the word "coverage," rather than the plural form of the word. At best, Mazzeo argues that this provision is ambiguous, and, therefore, should be construed against the drafter's preferred interpretation and "given the plain meaning that a singular word would provide." Mazzeo argues that, if the word coverage is interpreted as a singular word, the logical conclusion would be that the exclusion to coverage applies only to one coverage, the workers' compensation coverage, and not to all coverage provided under the OCIP.

Tishman/Verizon argue that Mazzeo is putting form over substance, and turning a blind eye to the context of the sentence and its obvious and intended meaning. Tishman/Verizon note that the context of the provision and sentence make clear that although written as a possessive, the word "coverage's" was intended as a plural. Tishman/Verizon note that the sentence simply makes no sense unless so construed.

Whether an ambiguity exists in a written agreement is a question of law for a court to decide after reading the document "as a whole to determine its purpose and intent" *(W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162 [1990]. *See also Helmsley-Spear, Inc. v New York Blood Center, Inc.*, 257 AD2d 64, 68 [1st Dept 1999] ["Interpretation of an unambiguous contract provision is a function of the court, and matters extrinsic to the agreement may not be considered when the intent

of the parties can be gleaned from the face of the instrument." (quoting *Teitelbaum Holdings Ltd. v Gold*, 48 NY2d 51, 56)]). A contract should be interpreted "so as to give full meaning and effect to the material provisions" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [internal quotation marks and citations omitted]), and "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases" (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). "An ambiguity will be found only where reasonable minds could differ as to what was intended by the parties" (*Wiggins v Kopko*, 94 AD3d 1268, 1269 [3rd Dept 2012]).

Here, when the document describing the OCIP is read in its entirety, it is clear that the use by the drafter, of the singular possessive form of the word "coverage," is simply a grammatical or typographical error. In fact, this same error was made consistently by the drafter four other times. It is clear, from the context of each of these uses, that the drafter could not have intended the singular possessive form of the word "coverage," but the plural form of the word. Thus, the use of the singular possessive form, "coverage's," first appears in paragraph one of the OCIP, which provides:

> "The Construction Manager, Design Professional, Trade Contractors, subcontractors and Suppliers are insured to the extent described below for Statutory Workers Compensation, Employers Liability, Commercial General Liability, Builders Risk, and such other ***coverage's*** as VERIZON may in writing specifically add or delete for this project"

(*id.*). It next appears twice in paragraph two of the OCIP, which provides:

> "Suppliers, vendors, fabricators, material dealers, drivers and others who merely transport, pick up, deliver, or carry materials, personnel, parts or equipment or any other items or persons to or from the Project site and others specifically agreed to by VERIZON and Construction Manager shall be excluded from the ***coverage's*** provided by the OCIP. Also Trade Contractors and subcontractors who are self-insured for workers compensation will be excluded from the ***coverage's*** provided by the OCIP"

(*id.*). It last appears in paragraph five of the OCIP, which provides:

> "Prior to commencement of the Project, VERIZON shall maintain the insurance ***coverage's*** specified in the OCIP at all times for VERIZON, Construction Manager, Design Professional, Trade Contractors, subcontractors and Suppliers of all tiers and such other persons or interests as VERIZON may designate in connection with the performance of the Project as insured parties and with limits not less than those specified below for each coverage"

(*id.*).

As Mazzeo acknowledges, the use of the word "coverage," in its singular possessive form, makes no grammatical sense in these contexts. However, the word makes complete grammatical sense when read as a plural. Therefore, as it is clear when read as a whole, the drafter of the OCIP document had not intended to invoke the singular possessive form of the word "coverage," this court finds that provision excluding coverage under the OCIP is not ambiguous, and that trade contractors who are self-insured for workers' compensation are excluded from all coverage provided under the OCIP, and not just from the OCIP's workers' compensation coverage. Accordingly, as Mazzeo admittedly was self-insured for workers' compensation, it is not an insured under the OCIP; therefore, the claim by Tishman/Verizon for contractual indemnification does not run afoul of the anti-subrogation rule.

Nevertheless, although Tishman/Verizon are entitled to seek contractual indemnification from Mazzeo, the motion by Tishman/Verizon for summary judgment on their claim for contractual indemnification is denied as premature at this time. "When liability attaches solely pursuant to Labor Law § 240(1), indemnification may be sought from the party actually responsible for the supervision, direction, and control of the work giving rise to the injury" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 661-662 [2nd Dept 2009], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). "However, a party seeking contractual indemnification

must [first] prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*id.* at 662; *see* General Obligations Law § 5–322.1. *See also Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011] ["where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (citations omitted)]).

Although the record on these motions contains no evidence that an unsafe condition existed at the premises, or that Tishman/Verizon supervised the work and/or were actively negligent, the common-law negligence and Labor Law § 200 claims that were asserted by plaintiff against Tishman/Verizon have yet to be dismissed, and thus remain to be determined. Therefore, it is yet to be established there is, in fact, no triable issue of fact as to whether Tishman/Verizon were free from all negligence, and can be held liable solely by virtue of their vicarious liability.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that plaintiff Augustine Accardi's motion for partial summary judgment as to liability against the Tishman/Version defendants on his Labor Law § 240(1) claim (motion sequence number 001) is granted; and it is further

ORDERED that the Tishman/Verizon third-party plaintiffs' motion for summary judgment against third-party defendant Michael Mazzeo Electrical Corp. on their claim for contractual indemnification (motion sequence number 002) is denied without prejudice as premature at this time; and it is further

ORDERED that this action shall continue as to the remaining causes of action.

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

ENTER:

Dated: August 30, 2013
New York, New York

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