

Smith v Hudson City Sav. Bank

2013 NY Slip Op 32186(U)

September 9, 2013

Sup Ct, Suffolk County

Docket Number: 08-27296

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 12-18-12 (#001 - #004)
MOTION DATE 1-15-13 (#005)
ADJ. DATE 4-23-13
Mot. Seq. # 001 - MG # 004 - MotD
002 - MotD # 005 - MotD
003 - MotD

-----X
BURTON SMITH and KATHLEEN SMITH,

Plaintiffs,

- against -

HUDSON CITY SAVINGS BANK, HAMPTONS
PONQUOGUE LLC, SANDPEBBLE BUILDERS,
INC., and GJC ASSOCIATES,

Defendants.

WILLIAM F. FARRELL, ESQ.
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Attorney for Plaintiff Burton Smith
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-----X
HAMPTONS PONQUOGUE LLC,

First Third-Party Plaintiff,

- against -

SANDPEBBLE BUILDERS, INC.,

First Third-Party Defendant.

PEREZ & VARVARO
Attorneys for Hudson City Savings Bank
333 Earle Ovington Building, P.O. Box 9372
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200 Madison Avenue
New York, New York 10016

-----X
HUDSON CITY SAVINGS BANK,

Second Third-Party Plaintiff,

- against -

GJC ASSOCIATES,

Second Third-Party Defendant.
-----X

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GJC ASSOCIATES,	X	MITCHELL SILBERBERG & KNUPP, LLP Attorneys for Godsell Contractors, Inc. 12 East 49th Street, 30th Floor New York, New York 10017-1028
Third Third-Party Plaintiff,		
- against -		
GODSELL CONTRACTORS, INC.,	X	
Third Third-Party Defendant.		

Upon the following papers numbered 1 to 1 - 126 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 39; Notice of Cross Motion and supporting papers (002) 40 - 79; (003) 80 - 82; (004) 83 - 85; (005) 86 - 88; Answering Affidavits and supporting papers 89 - 97; 98 - 103; 104 - 105; 106 - 107; 108 - 110; Replying Affidavits and supporting papers 111 - 112; 113 - 114; 115 - 116; 117 - 118; 119 - 120; 121 - 122; 123 - 126; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant Hamptons Ponquogue, LLC, for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the cross motion (002) by defendant Hudson City Savings Bank for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted to the extent that the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) are dismissed, and is otherwise denied; and it is

ORDERED that the cross motion (003) by defendant GJC Associates for summary judgment dismissing the causes of action against it based on Labor Law §§ 240(1) and 241(6) is granted; and it is

ORDERED that the cross motion (004) by defendant Sandpebble Builders, Inc. for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted to the extent that the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) are dismissed, and is otherwise denied; and it is

ORDERED that the cross motion (005) by defendant Godsell Contractors, Inc. for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted to the extent that the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) are dismissed, and is otherwise denied.

Plaintiff Burton Smith commenced this action to recover damages for personal injuries allegedly sustained on October 16, 2007, when he fell while servicing an HVAC unit in the attic of defendant Hudson City Savings Bank (“Hudson City”) located at 18 Montauk Highway, Hampton Bays, New York. The premises was owned by defendant Hamptons Ponquogue, LLC (“Hamptons LLC”), and leased by Hudson City, which hired plaintiff’s employer, non party Kolb Mechanical, to investigate a squealing noise emanating from the HVAC system. Plaintiff allegedly fell and injured himself when a catwalk

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located in the attic of the building collapsed while he was walking toward the HVAC unit to replace a worn mechanical belt. Prior to plaintiff's accident in 2005, Hudson contracted with defendant GJC Associates ("GJC") to perform renovations which converted the subject premises from a marine supply store into a bank. GJC subcontracted with Sandpebble Builders Inc. ("Sandpebble") to manage the renovation project. GJC also hired Godsell Contractors, Inc. ("Godsell") to perform portions of the renovation work, including the installation of the catwalk involved in the accident. By way of an amended complaint, plaintiff alleges causes of actions against the defendants based upon violations of Labor Law §§ 200, 240 (1), and 241(6). The amended complaint also asserts a claim by plaintiff's wife, Kathleen Smith, for loss of consortium and reimbursement of medical expenses.

Following commencement of the action, defendants joined issue and asserted cross claims against each other for common law and contractual indemnification, contribution, and breach of contract based upon the alleged failure to obtain liability insurance naming each other as additional insureds. Shortly thereafter, Hamptons LLC brought a third-party action against GJC alleging causes of action identical to those asserted in the cross claims. Asserting similar claims, Hudson City brought a second third-party action against Sandpebble, and GJC brought a third third-party action against Godsell.

Hamptons LLC now moves for summary judgment dismissing the complaint against it on the grounds plaintiff was engaged in routine maintenance when he fell, that there was no construction, excavation or demolition of the premises at the time of the accident, and that plaintiff failed to allege any specific violations of the Industrial Code. Hamptons LLC further asserts that as the out-of-possession landlord, it neither created nor possessed actual or constructive notice of the alleged dangerous condition, and did not exercise any control of plaintiff's work. Alternatively, Hamptons LLC seek summary judgment on its cross claims against Hudson City and GJC for contractual or common law indemnification. Hudson City opposes the branch of Hamptons LLC's motion for summary judgment on its cross claims, and cross-moves for summary judgment dismissing the complaint on bases similar to those set forth in Hamptons LLC's moving papers. Hudson City requests, alternatively, that it be granted summary judgment on its cross claims for indemnification against GJC.

GJC opposes the branch of Hudson City's cross motion for summary judgment on its cross claims, arguing, inter alia, that a triable issue exists as to whether Hudson City is partially responsible for the defective design of plywood flooring in the building's attic. GJC also adopts the arguments set forth in Hamptons LLC's moving papers and cross-moves for summary judgment dismissing plaintiff's claims against it under Labor Law §§240(1) and 241(6). Sandpebble cross moves for summary judgment dismissing plaintiff's claims against it; alternatively, it seeks summary judgment on its cross claims for common law indemnification. Godsell joins the branches of co-defendants' cross motions seeking dismissal of plaintiff's claims, but opposes the branches of those motions seeking summary judgment on the cross claims against it on the basis that it was not contractually obligated to provide indemnification and no nexus exists between the work it performed on the premises and the alleged dangerous condition that caused plaintiff's accident. Godsell argues, inter alia, no evidence exists that its employees failed to nail the plywood sheets to the beam at the floor of the attic, and that there is an insufficient nexus between its work and plaintiff's accident.

Plaintiff does not oppose the motion⁽⁰⁰¹⁾ by Hamptons LLC seeking dismissal of the complaint against it, and concedes that he failed to state causes of action under Labor Law §§240(1) and 241(6). However, plaintiff opposes the branches of defendants' cross motions seeking summary judgment dismissing his claims under the common law and section 200 of the Labor Law. In particular, plaintiff asserts that the cross motions by Sandpebble and Godsell were untimely, since they were made more than 120 days after the filing of the note of issue, and were not based on grounds nearly identical to those asserted in Hudson City's timely motion. Plaintiff further asserts that significant triable issues exist as to whether Hudson City created the alleged dangerous condition by deciding to install a narrow plywood catwalk in the attic rather than an actual floor; whether Godsell, the subcontractor responsible for installing the plywood catwalk, negligently failed to screw the plywood into the floor joists; and whether Sandpebble had notice of the alleged dangerous condition since it failed to carry out its contractual obligation of ensuring that the plywood catwalk was properly secured to the floor joists in the attic.

At his examination before trial, plaintiff testified that the accident occurred as he was walking toward the HVAC unit at the north end of the attic, when a plywood sheet that was not nailed into the floor joists gave way and caused him to fall. Plaintiff testified that unlike the plywood near the entrance of the attic which was nailed down, the plywood leading toward the HVAC unit at the north end of the attic was narrow and resting loosely on a roof vent. He testified that the plywood looked like it was placed there by whoever constructed the attic, and that it was so narrow that he could see portions of the building's drop ceiling six or eight feet below. Plaintiff testified that he took one step on the plywood sheet before it gave way beneath him, and that he could not tell from stepping on the plywood sheet whether it was nailed down or secured to the attic. Plaintiff testified that he was able to stop himself from falling to the floor of the bank by grabbing on to a pipe that was located between the attic floor and the drop ceiling. At a subsequent examination before trial held on August 3, 2011, plaintiff testified that the plywood which gave way beneath him was just laying on the floor of the attic and was not screwed into the beam beneath it. He further testified that the plywood sheet gave way and rotated before falling to the drop ceiling, and that the beam beneath it lost its rigidity and twisted because there was nothing screwed to the beam to give it any additional support.

At his examination before trial, Dominick Lombardo testified that he was employed by Hamptons LLC as the maintenance manager for the Hamptons Bay Shopping Center where the Hudson City Bank was located. He testified that his duties were limited to visiting the shopping center to ensure the lights in the parking lot were operating correctly, and to rent out any vacant shopping units. Mr. Lombardo testified that although he was aware of the renovations made during 2005, he was unaware of Hamptons LLC's hiring anyone to participate in the conversion, and he believed that the renovation was carried out by Sandpebble.

At his examination before trial, Ronald Butkovich testified that he was the senior vice president of the Hudson City Bank during 2005, and that his duties involved, among other things, the renovation and marketing of new branches in Eastern Long Island. Mr. Butkovich testified that he became involved in the renovation of the subject branch after the work had already begun, and that his role was to ensure the project was timely completed. He testified that his contact person during the renovation was Karl Knief, the executive vice president of GJC, and Steve Parker of Sandpebble, who was at the worksite on a daily

basis. Mr. Butkovich testified that he had no involvement in directing the workers during the project or ensuring that they complied with specifications of the architectural plans for the building. Mr. Butkovich testified that he did not go into the building's attic, but he was aware that the HVAC system was to be housed there. He further testified that he recognized an e-mail between himself and Mr. Kneif, wherein they discussed Mr. Kneif's concerns about a directive from the architect requiring GJC to install a "couple pieces" of plywood sheets for decking in the attic would not provide sufficient safety for maintenance people working on the HVAC system housed there. Mr. Butkovich testified that in response, he advised Mr. Kneif that the cost of his counter proposal for installing more plywood decking was too high, that he should do as directed, and that he should install 18 pieces of plywood sheets in the attic and keep a track of things. Mr. Butkovich testified that he did not recall having any conversations with Steve Parker regarding the adequacy of the attic flooring, and that he believed it was the general contractor's responsibility to ensure the attic flooring was safe. He also testified that he did not recall anyone from Hamptons LLC ever visiting, participating or supervising any of the work on the worksite.

At his examination before trial, Karl Kneif testified that GJC was hired to perform general construction services for the renovation project in 2005 and that, pursuant to its contract with Hudson City, GJC was responsible for implementing the architectural designs and construction documents. Mr. Kneif testified that Sandpebble was considered the general contractor for the project, and was obligated to supervise the work and conduct safety inspections. He testified that GJC hired Searles Stromski Associates to prepare the architectural plans for the renovation, and that Hudson City's Vice President, Ronald Butkovich, assumed oversight of the architects prior to the commencement of the project. Mr. Kneif further testified that Mr. Butkovich was Hudson City's representative on the project, and that he was there to approve financing and ensure GJC and the team it hired were completing the project properly. He testified that GJC hired Godsell as the carpenters for the project, and that Godsell was responsible for the installation of insulation and plywood decking in the attic. He testified that the architectural plans only required an open area above a finished acoustic ceiling, and that the decision to install the plywood flooring near the HVAC unit in the attic followed conversations between himself and Mr. Butkovich regarding instructions by the architects to install a couple sheets of plywood in the attic. Mr. Kneif also identified correspondence he received from the architects through Steve Parker of Sandpebble advising him that the installation of plywood sheets in the attic was acceptable, and that the plywood sheets should be screwed into the floor joists in the attic to prevent them from twisting and falling under load. He testified that Godsell was hired to install the plywood, and that he did not know if they screwed the plywood into the joists, as it was Sandpebble's obligation to inspect the work and ensure safety. In addition, Mr. Kneif testified that GJC relied on Sandpebble and Godsell to ensure that the work was done properly.

At his examination before trial, Steve Parker testified that he was Sandpebble's worksite supervisor for the renovation project at 18 Montauk Highway, that Sandpebble's role was limited to managing the worksite activities, and that GJC was the general contractor for the entire project. Mr. Parker testified that he did not direct the manner or methods of the subcontractor's work, and that he did not inspect or approve the finished work, because such inspection would be performed by the

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municipality, the architect or GJC. He testified that he was at the worksite on a daily basis, that he never went into the attic, and that he did not recall any specific conversation with Mr. Kneif about the lack of flooring in the attic. Mr. Parker testified that he knew Godsell was responsible for installing the plywood, but could not remember observing them doing that work. He further testified that he did not receive any complaints about the attic floor while he was at the worksite.

At his examination before trial, Joseph Godsell testified that his company had been hired by GJC to conduct carpentry work for the renovation project, and that his work was overseen Steve Parker, who instructed him how install the plywood sheets in the attic of the building. Mr. Godsell testified that he did not recall if he instructed his employees that the plywood needed to be screwed into the ceiling beams, and that, even though he visually inspected the plywood sheets, he did not walk on them or ensure that they were screwed into the ceiling beams. Mr. Godsell testified that Mr. Parker was the project supervisor, and that Mr. Parker sometimes inspected and supervised the means and methods of the work performed by Godsell's employees. He testified, however, that he had no recollection of whether Mr. Parker inspected the plywood after it had been installed in the attic. Mr. Godsell further testified that no one from Hamptons LLC supervised or inspected Godsell's installation of the plywood in the attic, and that he never received any complaints about the condition of the plywood prior to hearing of the accident.

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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Uni. Med. Ctr.*, *supra*). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, "on a defendant's motion for summary judgment, opposed by plaintiff, a court is required to accept the plaintiff's pleadings as true and its decision must be made on the version of the facts most favorable to the plaintiff" (*see Henderson v New York*, 178 AD2d 129, 124, 576 NYS2d 562 [1st Dept 1991]; *Bulger v Tri-Town Agency*, 148 AD2d 44, 543 NYS2d 217 [3d Dept 1989]).

Initially, the Court notes that the untimely cross motions by Godsell and Sandpebble may be considered where, as here, they were made on grounds nearly identical to those asserted in timely motions and contain issues already before the court (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]; *Whitehead v City of New York*, 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010]; *Grande v Peteroy*, 39 AD3d 590, 592, 833 NYS2d 615 [2d Dept 2007]). It is further noted that plaintiff's claims under sections 240(1) and 241(6) of the Labor Law are inactionable, as plaintiff concedes he was engaged in routine maintenance at the time of the accident, and that his injuries arose outside the context of any construction, demolition or excavation on the subject premises (*see Esposito v N.Y. City Indus. Dev. Agency*, 1 NY3d 526, 770 NYS2d 682 [2003]; *Abbate v Lancaster Studio Assoc.*, 3 NY3d 46,

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53,781 NYS2d 477 [2004]; *Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 954 NYS2d 113 [2d Dept 2012]). Therefore, the court grants the branches of defendants' motion and cross motions seeking summary dismissal of such claims and any cross claims predicated thereon. In particular, the Court grants in its entirety the cross motion by GJC for summary judgment dismissing plaintiff's claims under Labor Law §§240(1) and 241(6). However, plaintiff's remaining claims, predicated on common law negligence and a violation of section 200 of the Labor Law, are continued against defendants.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Haider v Davis*, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]). Indeed, a lessee of real property that hires a contractor and has the right to control the work performed at the property is considered to be an owner for the purposes of the Labor Law (see *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879 [2009]; *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 916 NYS2d 147 [2d Dept 2011]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*Rojas v Schwartz*, 74 AD3d 1046, 1047, 903 NYS2d 484 [2d Dept 2010]; see *Kuffour v Whitestone Constr. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 930 NYS2d 604 [2d Dept 2011]; *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Furthermore, under the principles of common-law negligence, a subcontractor may be held liable for negligence where there is an issue of fact as to whether its work created the condition that caused the plaintiff's injury (see *Ryder v Mount Loretto Nursing Home*, 290 AD2d 892, 893, 736 NYS2d 792 [3d Dept 2002]; *Stevenson v Alfredo*, 277 AD2d 218, 221, 715 NYS2d 444 [2d Dept 2000]).

Here, Hamptons LLC established its prima facie entitlement to summary judgment dismissing plaintiff's common law and Labor Law §200 claims against it by demonstrating that it was the out-of-possession owner of the premises at the time of the accident, and that it neither created nor had actual or constructive notice of the alleged dangerous condition (see *Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 961 NYS2d 513 [2d Dept 2012]; *Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 945 NYS2d 343 [2d Dept 2012]; *Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 938 NYS2d 146 [2d Dept 2012]; see also *Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 848 NYS2d 255 [2d Dept 2007]). Significantly, it is undisputed that Hamptons LLC leased the premises to Hudson City, that it played no role in the renovation of the building, including the installation of the plywood flooring in the attic, and that none of its employees received any complaints regarding the existence of any defective condition in the building's attic prior to the date of the accident. As no triable issues were raised by plaintiff or co-defendants regarding Hamptons LLC's liability, the branch of the motion by Hamptons LLC for summary judgment dismissing the complaint against it is granted. Further, having determined that Hamptons LLC was not actively at fault and in no way augmented plaintiff's injuries, the branch of its motion seeking

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summary judgment dismissing the cross claims against it for contribution or common law indemnification is granted (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]; *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 516 NYS2d 451 [1987]; *DiMarco v New York City Health & Hosps. Corp.*, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]).

However, the branch of Hudson City's cross motion for summary judgment dismissing plaintiff's common law and Labor Law §200 claims against it is denied, as it failed to meet its prima facie burden on the motion by eliminating significant triable issues from the case (*see Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*). Significantly, when viewed in a light most favorable to plaintiff, the adduced evidence raises a significant triable issue as to whether, as the lessee of the premises, Hudson City was negligent in creating the unsafe condition by approving the installation of a narrow plywood catwalk in the attic despite receiving notice that it may pose a danger for maintenance workers who needed to gain access to the HVAC unit (*see Baillargeon v Kings County Waterproofing Corp.*, 60 AD3d 881, 875 NYS2d 576 [2d Dept 2009]; *DiSalvo v Young Men's Christian Assn. of N.Y.*, 51 AD3d 711, 858 NYS2d 310 [2d Dept 2008]; *Hatfield v Bridgedale, LLC*, 28 AD3d 608, 814 NYS2d 659 [2d Dept 2006]; *Fernez v Kellogg*, 2 AD3d 397, 767 NYS2d 864 [2d Dept 2003]). Additionally, the existence of a triable issue as to whether Hudson City's created the defective condition, requires denial of the branches of its cross motion for summary judgment on its third-party claims, and for dismissal of the cross claims against it (*see McAllister v Construction Consultants L.I. Inc.*, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]; *Martinez v City of New York*, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]).

The branch of Sandpebble's cross motion for summary judgment dismissing plaintiff's common law and Labor Law §200 claims against it likewise is denied, as Sandpebble failed to meet its prima facie burden on the motion. Notably, the adduced evidence, including testimony by Karl Knief, Steve Parker and Joseph Godsell regarding whether Sandpebble was the general contractor for the project, whether it exercised control of the means and methods of Godsell's work, and whether the project supervisor failed to inspect Godsell's work despite his awareness of the insufficiency of the plywood flooring, raises significant triable issues requiring denial of the motion (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; *Pino v Irvington Union Free Sch. Dist.*, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]; *Aranda v Park E. Constr.*, 4 AD3d 315, 772 NYS2d 70 [2d Dept 2004]). In light of the existence of triable issues as to whether Sandpebble may be held liable for plaintiff's injuries, the branch of its cross motion for summary judgment on its cross claims for contribution or common law indemnification is denied, as premature (*see Nasuro v PI Assoc., LLC*, 49 AD3d 829, 858 NYS2d 175 [2008]; *Martinez v City of New York, supra; Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 489, 818 NYS2d 546 [2d Dept 2006]).

Finally, the branch of the cross motion by Godsell for summary judgment dismissing plaintiff's Labor Law §200 claim and the cross claims against it is denied, as testimony by the plaintiff and Joseph Godsell raise triable issues as to whether the plywood sheet at issue was screwed into the floor joist, whether Godsell's employees were responsible for failing to secure it, and, if so, whether such failure

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caused plaintiff's accident (*see Frisbee v 156 R.R. Ave. Corp.*, 85 AD3d 1258, 924 NYS2d 640 [3d Dept 2011]; *Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 832 NYS2d 625 [2d Dept 2007]; *Ryder v Mount Loretto Nursing Home Inc.*, *supra*; *Stevenson v Alfredo*, *supra*). Moreover, Godsell's assertion that the accident may be attributed to some unidentified intervening or superseding cause is insufficient to satisfy its burden on the motion, as it cannot obtain summary judgment by pointing to gaps in plaintiff's proof. Rather, to meet its burden, Godsell must adduce affirmative evidence that it did not create the alleged defective condition (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 906 NYS2d 284 91[2d Dept 2010]; *Vittorio v U-Haul Co.*, 52 AD3d 823, 861 NYS2d 726 [2d Dept 2008]; *Mennerich v Esposito*, 4 AD3d 399, 772 NYS2d 91[2d Dept 2004]).

Dated: September 9, 2013


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION