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SHORT FORM ORDER

COPY

INDEX No. 08-28733
CAL. No. 12-01681OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 4-26-13 (#001)
MOTION DATE 4-25-13 (#002)
MOTION DATE 5-1-13 (#003)
MOTION DATE 5-22-13 (#004)
ADJ. DATE 6-26-13
Mot. Seq. # 001 - MotD #003 - MD
002 - MD #004 - MG

ROCCO DE SIO,

Plaintiff,

- against -

RACANELLI CONSTRUCTION CO., INC., MELVILLE EQUITY PARTNERS, LLC, ALLSTATE INTERIORS, INC., STROBER BUILDING SUPPLIES, and PROBUILD EAST LLC,

Defendants.

BONGIORNO LAW FIRM, PLLC
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Mineola, New York 11501

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Attorney for Racanelli Construction Co., Inc.
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Mineola, New York 11501

RACANELLI CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

- against -

STAT FIRE SUPPRESSION, INC.,

Third-Party Defendant.

LESTER SCHWAB KATZ & DWYER, LLP
Attorney for Melville Equity Partners, LLC & Allstate Interiors, Inc.
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New York, New York 10271

SCHIFF HARDIN & WAITE, ESQS.
Attorney for Probuild East & Strober Bldg. Supplies
900 Third Avenue, 23rd Floor
New York, New York 10022

RACANELLI CONSTRUCTION CO., INC.,

Second Third-Party Plaintiff,

- against -

STROBER BUILDING SUPPLIES,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 72 read on these motions for summary judgment; and this cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; 35 - 47; 48 - 72 ; Notice of Cross Motion and supporting papers 28 - 34 ; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers __; Other Memorandum of Law by ProBuild i/s/h/a Strober Building Supplies ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendants Racanelli Construction Company, Melville Equity Partners and Allstate Interiors, Inc., the cross motion (002) by plaintiff Rocco De Sio, and the motions (003 and 004) by third-party defendants Stat Fire Suppression, Inc. and ProBuild East, LLC are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants Racanelli Construction Company, Melville Equity Partners and Allstate Interiors, Inc., for, inter alia, summary judgment dismissing the complaint against them is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by plaintiff Rocco De Sio for partial summary judgment on the issue of liability is denied; and it is

ORDERED that the motion by Stat Fire Suppression, Inc. for summary judgment dismissing the third-party complaint and all cross claims against it is denied; and it is

ORDERED that the motion by ProBuild East, LLC for summary judgment dismissing the complaint and the third-party and cross claims against it is granted.

Plaintiff Rocco De Sio commenced this action to recover damages for personal injuries he allegedly sustained on April 16, 2008 while working at the construction site of the Hilton Gardens Hotel located in Plainview, New York. Plaintiff allegedly was injured when a pile of sheetrock–measuring four feet in length–that was vertically stacked against the wooden studs of an unfinished passageway in which he was walking unexpectedly fell on him and caused serious injuries to his legs. At the time of the accident plaintiff allegedly was employed by third-party defendant Stat Fire Suppression, Inc., ("Stat Fire"), a subcontractor hired to install the fire prevention sprinkler system on the premises. Defendant Racanelli Construction Company ("Racanelli") was retained by defendant Melville Equity Partners ("Melville Equity"), the owners of the premises, as the general contractor for the project. Racanelli also hired defendant Allstate Interiors, Inc. ("Allstate") to perform, among other things, the installation of the sheetrock throughout the building. The sheetrock allegedly was purchased from defendant ProBuild East LLC ("ProBuild"), i/s/h/a Strober Building Supplies, which also allegedly delivered the sheetrock to the worksite. By his complaint, plaintiff alleges causes of action against the defendants based upon the common law and Labor Law §§ 200, 240 (1), and 241(6).

The defendants joined issue, asserting general denials and cross claims against each other. On April 30, 2009, Racanelli commenced a third-party action against Stat Fire, alleging causes of action for contractual indemnification, contribution, and breach of contract based upon Stat Fire's alleged failure to hold Racanelli harmless and to procure insurance covering it as an additional insured. Shortly thereafter, Racanelli commenced a second third-party action against ProBuild alleging the same claims asserted against Stat Fire, as well as a cause of action for damages based upon common law indemnification. In

response to the third-party complaints, ProBuild and Stat Fire asserted affirmative defenses and cross claims against Racanelli based on common law indemnification. The note of issue was filed on August 29, 2013. Following a compliance conference held on December 10, 2012, the parties were granted leave to file summary judgment motions no later than March 27, 2013.

Melville Equity, Racanelli, and Allstate (hereinafter referred to collectively as "the Racanelli defendants") now move for summary judgment dismissing the complaint on the grounds Labor Law §240(1) is inapplicable under the circumstances of this case since the sheetrock, which was resting at ground level at the time of the accident, was not being hoisted or secured at the time of the accident. They further argue that plaintiff's claims under Labor Law §§241(6) and 200 should be dismissed, as there is no evidence the sheetrock constituted a dangerous condition, that they had no notice of such condition, and that plaintiff failed to allege any applicable provision of the Industrial Code. More particularly, Allstate avers that it cannot be held liable for plaintiff's injuries under the common law or section 200 of the Labor Law, because it did not have a contractual or proprietary duty to keep the premises in a safe condition, it never assumed such a duty, and it did not launch a force or instrument of harm through its conduct at the worksite. Alternately, the moving defendants request that they be granted summary judgment on their claims for indemnification against ProBuild, as it supplied the sheetrock and was responsible for the manner in which it was stacked.

Plaintiff opposes the motion and moves for partial summary judgment on the issue of liability, arguing, inter alia, that the requirements of Labor Law §240 (1) have been met, since the incident occurred as a result of the force of descent generated by the application of gravity to the boards of sheetrock that were improperly stored in the hallway, and defendants failed to provide or utilize appropriate safety devices designed to avoid the accident. Additionally, plaintiff asserts that he pleaded specific applicable provision of the Industrial Code in support of his Labor Law §241(6) claim, and that his claim under Labor Law §200 is viable inasmuch as defendants had the authority to control where and how the sheetrock boards were stored, and possessed constructive knowledge of the unsafe condition prior to his accident.

"To establish entitlement to recovery under [Labor Law §240 (1)], a plaintiff must demonstrate both that a violation of the statute —i.e., a failure to provide the required protection at a construction site— proximately caused the injury and that 'the injury sustained is the type of elevation-related hazard to which the statute applies'" (***Oakes v Wal-Mart Real Estate Bus. Trust***, 99 AD3d 31, 34, 948 NYS2d 748 [3d Dept 2012], *quoting* ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 7, 935 NYS2d 551 [2011]; *see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 288-289, 771 NYS2d 484 [2003]). The hazards contemplated by Labor Law § 240(1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*see* ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). Therefore, while "a worker is not categorically barred from recovery under Labor Law § 240(1) where the worker sustains an injury caused by a falling object whose base stands at the same level as the worker" (***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 4, 935 NYS2d 551), "it is not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified

by the statute might have prevented the accident. Absent an elevation differential, '[t]he protections of Labor Law § 240 (1) are not implicated simply because the injury is caused by the effects of gravity upon an object'" (***Oakes v Wal-Mart Real Estate Bus. Trust***, *supra* at 35, 948 NYS2d 748, *quoting* ***Melo v Consolidated Edison Co. of N.Y.***, 92 NY2d 909, 911, 680 NYS2d 47 [1998]).

Here, the Racanelli defendants established, prima facie, that Labor Law §240(1) is inapplicable under the circumstances of this case, because the boards of sheetrock which struck plaintiff's leg were stacked on the same level as he was standing and the sheetrock was not secured or hoisted at a higher elevation (*see* ***Toefer v Long Is. R.R.***, 4 NY3d 399, 795 NYS2d 511 [2005]; ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 727 NYS2d 37 [2001]; ***Melo v Consolidated Edison Co. of N.Y.***, *supra*; ***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***Rodriguez v Margaret Tietz Ctr. for Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994]; ***Oakes v Wal-Mart Real Estate Bus. Trust***, 99 AD3d 31, 948 NYS2d 748 [Labor Law §240 (1) inapplicable where a vertically posited 10,000 pound steel truss resting at the ground level struck plaintiff who was standing on the same level and was slightly taller than the truss]; ***Whitehead v City of New York***, 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010] [Labor Law §240 (1) inapplicable where plaintiff's right knee was injured when steel tubes stored on the same level he was standing rolled and struck him when the bindings holding the tubes together were removed]; *compare* ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, *supra* [Labor Law §240(1) applied where elevation differential existed between height of falling plumbing pipes and plaintiff's head although the base of the pipes were resting at the same level at which plaintiff was standing]; ***Rodriguez v DRLD Dev. Corp.***,109 AD3d 409, 970 NYS2d 213 [1st Dept 2013] [Labor Law §240(1) applied because elevation differential existed between the level at which plaintiff was standing and the sheetrock that struck her since they were leaning against the wall and resting on top of wooden blocks approximately two feet high off the ground]).

In opposition, plaintiff failed to raise any triable issues warranting denial of this branch of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Even assuming, arguendo, as plaintiff's expert asserts, that the accident could have been prevented if the stack of sheetrock was secured by a rope, brace or some other device, for Labor Law §240 (1) to apply, there must be an inherent risk attributable to an elevation differential between the falling object and the level at which the work is performed (*see* ***Toefer v Long Is. R.R.***, *supra*; ***Melo v Consolidated Edison Co. of N.Y.***, *supra*; ***Misseritti v Mark IV Constr. Co.***, *supra*). Indeed, both ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 935 NYS2d 551 (2011) and ***McAllister v 200 Park, L.P.***, 92 AD3d 927, 939 NYS2d 538 (2d Dept 2012) are distinguishable from the present case since an elevation differential existed between the level at which the work was performed and the level from which the construction materials fell, be it ten feet high in the case of the steel pipes or four feet above the ground on top of a transportation platform in the case of the disassembled scaffold. Accordingly, the branch of the Racanelli defendants' motion for summary judgment dismissing plaintiff's claim under Labor Law §240(1) is granted.

As for the branch of the Racanelli defendants' motion seeking summary judgment dismissing plaintiff's claims under Labor Law §241(6), that section of the statute places an absolute duty on owners, contractors and their agents to provide workers a safe working environment and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (***Rizzuto v***

L.A. Wenger Contr. Co., 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). Although a subcontractor generally is not held liable under Labor Law §241(6) for violations of such rules and regulations, it can be held liable as an agent when it has supervision or control of the work which gives rise to the injury or the area where the accident occurred (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Rast v Wachs Rome Dev., LLC***, 94 AD3d 1471, 943 NYS2d 323 [4th Dept 2012]; ***Piazza v Frank L. Ciminelli Constr. Co.***, 12 AD3d 1059, 785 NYS2d 207 [4th Dept 2004]; ***DaSilva v Jantron Industries, Inc.***, 155 AD2d 510, 547 NYS2d 370 [2d Dept 1989]). To recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). Further, the rule or regulation alleged to have been breached must be a specific, positive command, and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, plaintiff's bill of particulars asserts the violation of various provisions of the New York Industrial Code, including, 12 NYCRR 23-2.1, 12 NYCRR 23-2.2, 12 NYCRR 23-3.3, 12 NYCRR 23-6.2, 12 NYCRR 23-9.2, 12 NYCRR 23-9.4, 12 NYCRR 23-1.7. However, the regulations set forth at 12 NYCRR 23-9.2, 23-9.4, 23-2.2, 23-3.3, 23-6.2, which set general standards for the maintenance of power operated equipment, the use of power shovels and backhoes, concrete work, demolition by hand, and the quality of ropes and chains used for the hoisting of construction material, are inapplicable under the circumstances of this case, as none of the these devices were required for plaintiff's work at the time of the alleged accident (*see generally* ***Clavijo v Universal Baptist Church***, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]; ***Forschner v Jucca Co.***, *supra* at 998-999; ***Dzieran v 1800 Boston Rd., LLC***, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]). 12 NYCRR 23-1.7, which regulates general hazards, including tripping and slipping hazards, likewise is inapplicable under the circumstances of this case, as plaintiff did not allege that he slipped on any foreign substance or tripped over any accumulation of dirt, tools or construction debris left on the floor of the hallway (*see* ***Gaspar v Pace Univ.***, 101 AD3d 1073, 957 NYS2d 393 [2d Dept 2012]; ***Mendez v Jackson Dev. Group, Ltd.***, 99 AD3d 677, 951 NYS2d 736 [2d Dept 2012]). Nevertheless, defendants failed to address, much less demonstrate, the inapplicability of 12 NYCRR 23-2.1, which provides, in pertinent part, that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." Further, Allstate –the contractor responsible for ordering and installing the sheetrock– failed to demonstrate that it lacked authority or control over the area where the accident occurred (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; ***Martinez v Tambe Elec., Inc.***, 70 AD3d 1376, 894 NYS2d 666 [4th Dept 2010]; ***Musillo v Marist Coll.***, 306 AD2d 782, 762 NYS2d 663 [3d Dept 2003]; ***Everitt v Nozkowski***, 285 AD2d 442, 728 NYS2d 58 [2d Dept 2001]). Therefore, the branch of the Racanelli defendants' motion seeking dismissal of plaintiff's Labor §241(6) claims is granted to the extent that his claims alleging violations of 12 NYCRR 23-2.2, 12 NYCRR 23-3.3, 12 NYCRR 23-6.2, 12 NYCRR 23-9.2, 12 NYCRR 23-9.4, 12 NYCRR 23-1.7 are dismissed, and is otherwise denied.

The branch of the Racanelli defendants' motion for summary judgment dismissing plaintiff's Labor Law §200 claim also is denied. Labor Law § 200 is a codification of the common-law duty imposed upon an owner, general contractor, or agent, 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]). Where a plaintiff's injuries stem from a dangerous condition on the premises, the defendant may be held liable in common-law negligence and under Labor Law §200 if they had control over the worksite and either created the dangerous condition or had actual or constructive notice of its existence (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Labor Law §241(6) reiterates the common law duty of care through the enforcement of rules promulgated by the Department of Labor (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). Although violation of Labor Law §241(6) does not constitute negligence per se, its violation presents some evidence of the breach of the common law duty to provide a safe place to work which must be determined by the trier of fact (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Zimmer v Chemung County Performing Arts***, *supra* at 518; ***Long v Forest-Fehlhaber***, 55 NY2d 154, 160, 448 NYS2d 132 [1982]). Furthermore, where, as here, the alleged violation concerns unused building materials that partially obstructed the passageway, the standard for determining liability of such violation is whether the unsecured object constituted a defective premises condition (*see eg* ***Slikas v Cyclone Realty, LLC***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]).

In addition, Allstate failed to establish its prima facie entitlement to dismissal of the Labor Law §200 claim against it. Although a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*see* ***Benavides v 30 Brooklyn, LLC***, 96 AD3d 889, 946 NYS2d 513 [2d Dept 2012]), a recognized exception to this rules exists where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a dangerous condition (*see* ***Petito v City of New York***, 95 AD3d 1095, 944 NYS2d 300 [2d Dept 2012]; ***Gordon v Pitney Bowes Mgt. Servs., Inc.***, 94 AD3d 813, 942 NYS2d 155 [2d Dept 2012]). Thus, courts have found that when a worker's injuries result from an unsafe or dangerous condition existing at a work site, as here, the liability of an allegedly negligent subcontractor depends upon whether they had control of the place where the injury occurred, and whether they either created, or had actual or constructive notice of the dangerous condition (*see* ***Russin v Louis N. Picciano & Son***, *supra*; ***Musillo v Marist Coll.***, *supra*; ***Everitt v Nozkowski***, *supra*). Although Allstate submitted evidence that it was not responsible for stacking the sheetrock in the passageway, a triable issue exists as to whether Allstate had been delegated authority or control over the area where the accident occurred, and, if so, whether it had constructive notice of the alleged defective condition.

Inasmuch as the Racanelli defendants failed to demonstrate, as a matter of law, that their negligence did not cause or contribute to the happening of the subject accident, an award of summary judgment in their favor on their third-party claims for contribution and/or indemnification is denied, as premature (*see* ***McAllister v Construction Consultants L.I., Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d

Cross Ready Mix, Inc., 75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1).

The motion by plaintiff for partial summary judgment on the issue of liability is denied. As stated above, Labor Law §240(1) is inapplicable under the circumstances of this case (*see* ***Toefer v Long Is. R.R.***, *supra*; ***Melo v Consolidated Edison Co. of N.Y.***, *supra*; ***Oakes v Wal-Mart Real Estate Bus. Trust***, *supra*). Additionally, rather than conclusively establish liability under Labor Law §241(6), the alleged violation of 12 NYCRR 23-2.1(a) raises a triable issue as to defendants' alleged negligence (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Zimmer v Chemung County Performing Arts***, *supra*; ***Long v Forest-Fehlhaber***, *supra*). Similarly, the existence of triable issues as to whether defendants either created or possessed constructive notice of the alleged defective condition requires denial of plaintiff's motion for summary judgment based on common law negligence and section 200 of the Labor Law (*see* ***Russin v Louis N. Picciano & Son***, *supra*; ***Musillo v Marist Coll.***, *supra*; ***Everitt v Nozkowski***, *supra*).

Stat Fire's motion for summary judgment dismissing the third-party complaint and all cross claims against it for contribution and contractual and/or common law indemnification also is denied. In support of its motion, Stat Fire argues, among other things, that the alleged accident did not arise from any of its acts or omissions at the worksite. However, Stat Fire's contractual obligation broadly requires, "to the fullest extent permitted by law," that it indemnify Racanelli for any injury or loss "arising out of or connected with, in whole or part, an actual or alleged (a) act or omission of the Subcontractor or anyone directly or indirectly retained by it for whose acts it may be held liable. . . or performance or lack of performance of the work. . . The Subcontractor's obligations under this section shall apply regardless of . . . the fault or negligence of the Subcontractor." Since it is undisputed that plaintiff was engaged in performance of Stat Fire's work at the time of the accident, and triable issues remain as to the relative fault, if any, of the Racanelli defendants, dismissal of the third-party complaint against Stat Fire is premature at this juncture (*see* ***Brown v Two Exch. Plaza Partners***, 76 NY2d 172, 556 NYS2d 991[1990]; ***Tarpey v Kolanu Partners, LLC***, 68 AD3d 1097, 892 NYS2d 447 [2d Dept 2009]; ***D'Angelo v Builders Group***, 45 AD3d 522, 845 NYS2d 814 [2d Dept 2007]; ***Brennan v R.C. Dolner, Inc.***, 14 AD3d 639, 789 NYS2d 312 [2d Dept 2005]).

As for the motion by ProBuild for summary judgment dismissing the claims against it, Labor Law §§ 240 (1) and 241 (6) only applies to "owners, contractors and their agents." A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervision or control of the work which gives rise to the injury or the area where the accident occurred (*see* ***Russin v Louis N. Picciano & Son***, *supra*; ***Rast v Wachs Rome Dev., LLC***, 94 AD3d 1471, 943 NYS2d 323 [4th Dept 2012]; ***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]). Similarly, Labor Law § 200 is a codification of "landowners' and general contractors' common-law duty to maintain a safe workplace" (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 505, 601 NYS2d 49).

Here, ProBuild established, prima facie, that it was not an owner, contractor, or agent withing the meaning of the Labor Law, and that it was not contractually required to indemnify Racanelli or Stat Fire for damages sustained as a result of the subject accident (*see* ***Brownell v Blue Seal Feeds, Inc.***, 89 AD3d 1425, 932 NYS2d 623 [4th Dep 2011]; ***Ficano v Franklin Stucco Supply, Inc.***, 72 AD3d 1018, 898 NYS2d 882 [2d Dept 2010]; ***Lopez v Strober King Bldg. Supply Ctrs.***, 307 AD2d 681, 763 NYS2d 176 [3d Dept 2003]; ***Brooks v Harris Structural Steel***, 242 AD2d 653, 662 NYS2d 781 [2d Dept 1997]). Significantly, it is undisputed that ProBuild merely supplied and delivered the sheetrock according to instructions it received from Racanelli and Allstate, and that it possessed no authority to control plaintiff's work or to enforce safety procedures at the worksite. Further, ProBuild submitted unrefuted evidence that it did not create the dangerous condition, since the stack of sheetrock that struck plaintiff consisted of water resistant sheetrock, which it delivered to the third floor of the premises at least five days prior to the accident. Lastly, a review of the purchase agreement between ProBuild and Allstate reveals that ProBuild was not required to follow any particular safety procedures when delivering the sheetrock, or to indemnify Allstate or any other of the named defendants in connection with such deliveries. Accordingly, the motion by ProBuild for summary judgment dismissing the complaint, the cross claims and the third-party claims against it is granted.

Dated: 9 Oct. 2013

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**