

Nurse v Uberto Ltd.

2013 NY Slip Op 33532(U)

November 15, 2013

Supreme Court, New York County

Docket Number: 111099/2010

Judge: Shlomo S. Hagler

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

JULIAN NURSE,

Plaintiff,

- against -

UBERTO LTD., UBERTO CONSTRUCTION,
9 EAST 69TH STREET, LLC, and
NEW MILLENIUM MILLWORK LTD.,

Defendants.

INDEX NO.: 111099/2010

MOTION SEQ. NO.: 003

DECISION and ORDER

FILED

NOV 22 2013

COUNTY CLERK'S OFFICE
NEW YORK

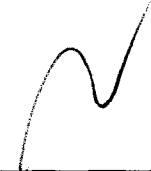
Motion by defendants Uberto Ltd. and Uberto Ltd. d/b/a Uberto Construction ("Uberto") for summary judgment to dismiss plaintiff's complaint and all cross-claims and to grant Uberto's cross-claims for common law and contractual indemnification and breach of contract against co-defendant Millenium Millwork Ltd. ("Millenium").

	Papers Numbered
Umberto Defendants' Notice of Motion with Affirmation of Umberto Defendants' Counsel Teresa A. Klaum, Esq., in Support of the Motion and Exhibits "A" through "R"	1, 2
Affirmation of Plaintiff's Counsel John C. Naccarato, Esq., in Opposition to Umberto Defendants' Motion and Exhibits "A" through "B"	3
Affirmation of Co-Defendant 9 East 69th Street's Counsel John R. Marquez, Esq., in Partial Opposition to Umberto Defendants' Motion and Exhibit "A"	4
Affirmation of Umberto Defendants' Counsel Teresa A. Klaum, Esq., in Reply to Affirmation of Plaintiff's Counsel in Opposition to Umberto Defendants' Motion	5
Affirmation of Umberto Defendants' Counsel Teresa A. Klaum, Esq., in Reply to Affirmation of Co-Defendant 9 East 69th Street's Counsel's Opposition to Umberto Defendants' Motion	6
Transcript of Oral Argument of December 3, 2012	7

Cross-Motion: No Yes Number of Cross-Motions: 0

Upon the foregoing papers, it is hereby ordered that this Motion is granted in part to the extent set forth in the attached separate written Decision and Order and is otherwise denied.

Dated: November 15, 2013
New York, New York



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

Check one: Final Disposition Non-Final Disposition

Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

FILED

NOV 22 2013

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

COUNTY CLERK'S OFFICE
NEW YORK

-----X
JULIAN NURSE,

Plaintiff,

Index No. 111099/2010

-against-

**UBERTO LTD., UBERTO CONSTRUCTION,
9 EAST 69TH STREET, LLC, and
NEW MILLENIUM MILLWORK LTD.,**

Defendants.

DECISION and ORDER

**Motion Sequence
Numbers: 003 & 005**

-----X

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

In this action, plaintiff Julian Nurse (“plaintiff” or “Nurse”) seeks to recover damages for personal injuries that he allegedly sustained on June 1, 2009, when he tripped and fell while delivering a large cabinet to a construction site located at 9 East 69th Street in Manhattan (“the Premises”). In motion sequence number 003, defendants Uberto Ltd. and Uberto Ltd. d/b/a Uberto Construction (together, “Uberto”), move for summary judgment to dismiss plaintiff’s complaint and all cross-claims, and to grant Uberto’s cross-claims for common-law indemnification, contractual indemnification, and breach of contract against co-defendant Millenium Millwork, Ltd. (“Millenium”). In motion sequence number 005, defendant 9 East 69th Street LLC, the owner of the Premises (“Owner”), moves for summary judgment to dismiss plaintiff’s complaint and all cross-claims, and to grant the Owner’s cross-claims for contractual and common-law indemnification against co-defendants Uberto and Millenium. Motion sequence numbers 003 and 005 are consolidated for disposition.

BACKGROUND

At the time of the occurrence, the Premises, a six-story townhouse, was undergoing a gut renovation to convert it into a single-family residence for the Owner’s principals. The Owner had

contracted with co-defendant Uberto to act as both general contractor and construction manager on the project. Uberto had contracted with co-defendant Millenium for Millenium to manufacture and install certain cabinetry and millwork for the project. Millenium had hired nonparty J & S Fast Delivery, Inc. ("J&S"), a company partially owned by plaintiff, to pick up and deliver Millenium's product to the Premises once or twice each week.

According to plaintiff's deposition testimony, at the time of his injury, plaintiff was delivering a large cabinet that Millenium was to install on the fourth floor of the Premises. Plaintiff testified that he and his helper, Greg Husbands ("Husbands"), had picked up the cabinet from Millenium's Bronx workshop between 8:00 and 8:30 a.m. that morning. Plaintiff testified that the cabinet, which was encased in boards and wrapped in shrinkwrap, measured approximately five feet in length and weighed approximately 250 pounds.

Plaintiff testified that, upon arriving at the Premises, plaintiff and Husbands had unloaded the cabinet and placed it upon a dolly to transport it to the first floor of the Premises. Plaintiff testified that he had intended to place the cabinet into a newly finished one- or two-person passenger elevator that had just been installed at the Premises. Before he could do so, plaintiff was informed, by an employee of Uberto, that the elevator was not to be used for deliveries and that plaintiff would have to use the stairs. The staircase recently had been refinished and, at the time, the stairs and landings of the Premises were covered and protected by pieces of Masonite.

In order to carry the cabinet up the stairs, Husbands took hold of the front end of the cabinet and began ascending the staircase backward, while plaintiff took hold of the back end of the cabinet and began ascending the staircase forward. Plaintiff does not believe that he was wearing gloves at the time.

Plaintiff testified that the accident occurred as he reached the landing between the first- and second-floor staircase. Plaintiff and Husbands had just lifted the cabinet to about knee height off the ground. Plaintiff testified that his right foot was on the landing, and that he was attempting to bring his left foot up to the landing, while simultaneously resting the cabinet on his right knee, when his left foot got caught on a piece of unsecured Masonite on the stair. The loose Masonite caused plaintiff to trip and fall sideways into and partially through the wall on the right side of the landing. The cabinet, which plaintiff was holding, then fell onto his legs, arms and chest. Plaintiff testified that, as his head and shoulder hit the right wall, the impact caused plaintiff to be knocked unconscious for a few seconds and he fell to the ground.

Plaintiff testified that, as he regained consciousness, he felt someone lift the cabinet off of him. Plaintiff then exited the Premises and went outside to his truck to recover and have a drink of water. Husbands, with the aid of an Uberto employee, finished taking the cabinet upstairs. Plaintiff testified that, when he returned to the Premises, he noticed for the first time that the Masonite on the stair had lifted up, and that the Masonite had not been taped down or secured. Plaintiff testified that, although a woman at the Premises had asked him if he was okay, no one spoke to him about the accident or asked him to fill out any paperwork with respect thereto.

Plaintiff testified that, after Husbands had completed making the delivery, he and Husbands left the Premises for the day. Plaintiff testified that, although he went back to Millenium for an additional job the next day, he did so only to drive, and not to lift or carry stuff up the stairs. Plaintiff testified that about three days after the accident, he went to the hospital complaining of headaches and tingling in his shoulder and back.

Anette Sarenbrant ("Sarenbrant"), who was employed as an assistant site supervisor for Uberto, was working at the Premises that day. According to her deposition testimony, Sarenbrant was sitting at a desk directly in front of the staircase at the time of the accident. Sarenbrant testified that the staircase had just been refinished by another subcontractor that spring, i.e., in April and/or May of 2009. Sarenbrant testified that Uberto thereafter had installed the Masonite covering to protect the refinished surfaces. Sarenbrant testified that the Masonite was held in place by blue tape and wood blocks that were screwed into the risers so that they would not move.

Sarenbrant testified that the accident happened above her on the landing of the staircase. Sarenbrant testified that, at the moment of the occurrence, she was looking down and did not see the accident. However, she heard what sounded like a tumble, huffing and puffing, and cursing. After hearing the noise, Sarenbrant testified that she looked up at the landing and saw the two delivery men, with the unit between them, going up the stairs. Sarenbrant testified that she asked plaintiff what was going on, and that he said everything was fine.

Sarenbrant testified that the two delivery men continued carrying the cabinet up the stairs, while she stayed on the second floor. Sarenbrant testified that she later asked plaintiff to provide her with information for an accident report, but that plaintiff failed to fill out the requested report. Sarenbrant then contacted Peter Cyr, Millenium's owner, to alert him about the accident and to provide him with an accident report form for plaintiff to fill out.

In his deposition testimony, Husbands confirms that the accident occurred on the landing between the first and second staircases. Husbands testified, however, that the accident occurred after Husbands had begun ascending the second staircase, and while plaintiff was on the landing. Specifically, Husbands testified that plaintiff had just reached, and was attempting to step onto, the

first stair of the second staircase when plaintiff tripped on the piece of unsecured Masonite and fell. Husbands testified that plaintiff fell backwards to the right and into the wall of the landing, which he hit with his right shoulder. Husbands testified that the cabinet then fell back, and that although Husbands continued to hold the cabinet and tried to keep the weight off the plaintiff, the cabinet still fell on top of him. Husbands continued holding the cabinet until the workers from Uberto lifted the cabinet off the plaintiff.

Husbands testified that, although he had not noticed any Masonite out of place before the accident, after plaintiff's accident, Husbands did notice that the Masonite had come up off the step. Husbands additionally testified that wood blocks to secure the Masonite were not present on the steps at the time of the accident.

Danielle Scholz ("Scholz"), who was employed as a project manager for the Owner on the renovation project, was at the Premises sometime that day but did not witness the accident. Scholz testified that, in her role as the Owner's project manager, she visited the Premises at least weekly to attend site meetings, check on the schedule and status of the work, facilitate design decisions that were left on the project, and report to the Owners. Scholz testified that, as project manager, she was not involved in negotiating the contract with Uberto or in hiring any of the subcontractors, and that neither she, nor the Owners, had any involvement in the manner or method in which the work was to be performed.

Scholz testified that, in her visits to the Premises, she had walked the stairs that were covered with the protective Masonite. However, at no time had Scholz seen any loose steps or other dangerous conditions when she was present at the site. Scholz further testified that she had never received any complaints about the condition of the steps or of the protective Masonite covering.

Peter Cyr ("Cyr"), Millenium's owner, testified that he had contracted with Uberto for Millenium to manufacture and install cabinetry and millwork on the fourth floor the Premises, pursuant to a written agreement executed in August 2008. Cyr testified that he also entered into an oral agreement with plaintiff to deliver Millenium's finished products to the Premises approximately four times a month. Cyr acknowledged that, on the date of the accident, he did not have a commercial general liability policy covering Millenium's work at the Premises.

Cyr testified that, generally, when he contacted plaintiff to request his delivery services, Cyr would describe the items to be delivered, and that plaintiff would then determine how many helpers he needed to complete the job. Cyr testified that, on the date of the accident, he had requested that plaintiff deliver the cabinet to the fourth floor of the Premises. Cyr testified that he believed the cabinet weighed approximately 100 pounds.

Cyr recalled that the staircase that his employees had used to reach to fourth floor of the Premises had been refinished sometime at the end of May. It also was Cyr's recollection that the Masonite on the staircase had been installed between Memorial Day and June 1, 2009.

Cyr testified that he was notified of plaintiff's accident by Sarenbrant on the same day the accident occurred. Sarenbrant indicated that she needed plaintiff to fill out an accident form. Cyr then contacted plaintiff to request that he come pick up and fill out the accident report form.

On August 19, 2010, plaintiff commenced the instant action asserting causes of action against Uberto, the Owner, and Millenium for common-law negligence and violations of Labor Law § 200, § 240(1) and § 241(6). Uberto has asserted cross-claims against the Owner and Millenium for contribution, contractual and common-law indemnification, and breach of contract in failing to procure the requisite insurance coverage. The Owner has asserted cross-claims against Uberto and

Millenium for contribution, contractual and common-law indemnification, and breach of contract in failing to procure the requisite insurance coverage. Millenium has asserted a counterclaim against plaintiff for fraudulent misrepresentation, and cross-claims against Uberto and the Owner for contribution and/or indemnification.

Uberto and the Owner separately move for summary judgment dismissing plaintiff's complaint, and all cross-claims asserted against them. In addition, Uberto moves for summary judgment on its cross-claims against Millenium for common-law and contractual indemnification, and for breach of contract. The Owner moves for summary judgment on its cross-claims against Uberto and Millenium for common-law and contractual indemnification.

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 Labor Law § 200 and Common-Law Negligence Claims

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to maintain a safe worksite (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993];

Russin v Louis N. Picciano & Son, 54 NY2d 311 [1981]). Specifically, Labor Law § 200 requires, inter alia, that all work places

“be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places”

(*id.*). Claims involving Labor Law § 200 generally fall into two broad categories: those where workers are injured as a result of the methods or manner in which the work is performed, and those where workers are injured as a result of a defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Where an accident is the result of a contractor’s or worker’s means or methods, it must be shown that a defendant exercised actual supervision and control over the activity, rather than possessing merely general supervisory authority (*Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]; *Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003]). Generally, monitoring, coordination, and oversight of the timing and quality of the work, as well as a general duty to supervise the work and ensure compliance with safety regulations, are insufficient to trigger liability under Labor Law § 200 (*see Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400 [1st Dept 2004]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

Where the accident is the result of a dangerous or defective condition at the work site, it must be shown that the owner or contractor either caused the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). “In order to constitute constructive notice, ‘a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[] . . . to discover and remedy it’ ” (*Dombrower v Maharia Realty Corp.*, 296 AD2d

353, 353 [1st Dept 2002], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). “The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken” (*Mitchell v New York Univ.*, 12 AD3d at 201). Supervision and control need not be proven where the injury arose from a dangerous condition at the work site (*see Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]).

To obtain summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claim, the burden is on defendants “to demonstrate, beyond a material issue of fact, that [they] bore no responsibility for plaintiff’s accident” (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). Specifically, defendants must “show that [they] did not exercise any authority over the means and methods of plaintiff’s work, or that, to the extent the accident arose out of a dangerous condition on the premises, [they were] not liable for the condition” (*id.*, citing *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 148).

Uberto argues that its motion for summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims should be granted because the evidence demonstrates that (1) Uberto did not direct, supervise, or control the work being done by plaintiff, and (2) Uberto did not create or have actual or constructive notice of the defective condition that caused plaintiff’s accident. In support of its first contention, plaintiff proffers the deposition testimony of plaintiff, Husbands, and Cyr, that plaintiff was in charge of the delivery, supplied his own equipment, and coordinated his own workers. In support of its second contention, Uberto proffers the deposition testimony of plaintiff and Husbands, each of whom testified that they had not observed any defect in the Masonite prior to the accident. Uberto also proffers the deposition testimony of the Owner’s

project manager, Scholz, who testified that she had never observed nor received any complaints about a dangerous condition on the staircase.

In support of its motion for summary judgment, the Owner incorporates and expands on the arguments made by Uberto in support of its motion. The Owner additionally notes that plaintiff has failed to put forth any evidence regarding the length of time that the allegedly dangerous condition on the staircase may have existed, or that the Owner ever received any complaints about the conditions.

In opposition, plaintiff argues that Uberto's motion for summary judgment to dismiss his common-law negligence and Labor Law § 200 claims should be denied, because an issue of fact exists as to Uberto's supervision and control of the construction at the Premises. Plaintiff points to his own deposition testimony as evidence that it was an employee of Uberto who had directed him to use the stairs instead of the elevator on the day of the accident. Plaintiff argues that this evidence is sufficient to raise an issue of fact as to Uberto's supervision and control over plaintiff's work.

Plaintiff argues that the Owner's motion for summary judgment should be denied, because an issue of fact exists whether the defective condition of the Masonite may have existed for a sufficient length of time to permit the Owner to have discovered and remedy it. In support of his contention, plaintiff proffers the deposition testimony of Sarenbrant, that the stairs had been refinished sometime in the "spring," and were covered with Masonite after they were refinished. Based on this testimony, plaintiff argues that the stairs were refinished possibly weeks or months before plaintiff's accident, and that the alleged defect in the Masonite could have existed for a sufficient length of time for the Owner to discover and remedy it. In further support of this contention, plaintiff also proffers the deposition testimony of Scholz, who testified that she had

walked through the property regularly, and understood and had observed what materials were being placed on the stairs. Plaintiff argues that “[i]t is not unreasonable to expect that the loose Masonite, being open and obvious and so clearly a dangerous condition, is something that was, or should have been noticed by Ms. Scholz on her walkthrough on the day of the accident” (Naccarato Affirm. in Opposition, ¶ 13).

The Owner’s motion for summary judgment to dismiss these causes of action is granted, as there is no evidence sufficient to raise a triable issue of fact whether the Owner supervised the means or methods of plaintiff’s work, or had actual or constructive notice of the allegedly dangerous condition on the stairs. Other than speculation, plaintiff has produced no evidence to establish a triable issue of fact whether the defective condition of the Masonite had existed for a sufficient length of time prior to plaintiff’s accident to permit the defendants to discover and remedy the defect, or whether the alleged dangerous condition was open and obvious. To the contrary, in support of its motion, Owner has proffered copies of daily reports prepared by Sarenbrant, which show that the work to refinish the stairs was performed during the last two weeks of May, and not completed until the end of May, only days prior to plaintiff’s accident. Defendants also proffer the deposition testimony of Sarenbrant, that the Masonite was not put down until after the stairs were refinished, as well as the deposition testimony of plaintiff and Husbands, that neither had noticed the alleged defect on the stairs prior to the accident. As any finding that the Owner had constructive notice of the dangerous condition upon which plaintiff tripped would rest solely on speculation (*see Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]), the Owner is entitled to summary judgment dismissing these causes of action insofar as they are asserted against it.

However, Uberto's motion to dismiss plaintiff's common-law negligence and Labor Law § 200 claims is denied. Although there is no evidence that Uberto exercised direct supervision or control over the methods and manner of plaintiff's work, or exercised more than general supervisory control over the construction site, Uberto did place and was responsible for securing the Masonite on the staircase after its subcontractor had completed the refinishing. The evidence produced by plaintiff, i.e., that immediately after the accident, plaintiff and Husbands had observed that the Masonite on the stairs was not taped or secured with wood blocks, is sufficient to raise a triable issue of fact as to whether Uberto had actual notice of the dangerous condition by improperly securing the Masonite to the stairs and landing and/or improperly maintaining it, thus allegedly creating the dangerous condition that caused plaintiff's injury (*Acevedo v New York City Tr. Auth.*, 97 AD3d 515 [2d Dept 2012] [triable issue of fact as to whether wooden board placed by defendant on subway platform constituted a dangerous condition]; *Monaghan v Lake Park 135 Crossways Park Dr., LLC*, 80 AD3d 679 [2d Dept 2011] [genuine issue of material fact existed as to whether the manner in which defendant company had placed Masonite boards on floor was hazardous and whether presence of unsecured board was open and obvious]; *cf. Schwind v Mel Lany Const. Mgt. Corp.*, 95 AD3d 1196 [2d Dept 2012] [although Appellate Division granted homeowner summary judgment dismissing complaint of plaintiff who was allegedly injured when he tripped on the edge of unsecured Masonite placed on stairway landing by the general contractor, action against general contractor who placed the Masonite continued]).

Plaintiff's Labor Law § 240(1) Claim

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

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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” (*id.*).

“The statute imposes absolute liability on building owners and contractors whose failure to ‘provide proper protection to workers employed on a construction site’ proximately causes injury to a worker” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). The statute is to be liberally construed to achieve its purpose (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

Uberto argues that this cause of action must be dismissed because plaintiff’s work in delivering the cabinetry and millwork to be installed at the premises was not one of the enumerated “covered activities” entitled to the protections of Labor Law § 240(1). Uberto additionally argues that, even if plaintiff’s work can be considered a “covered activity” entitled to the protections of Labor Law § 240(1), the statute is inapplicable in this case, because plaintiff’s injury did not involve a gravity-related occurrence stemming from the inadequacy or absence of an enumerated safety device, and thus does not fall within the ambit of the statute.

The Owner adopts and incorporates Uberto’s arguments in support of its summary judgment motion to dismiss this cause of action. The Owner additionally argues that this cause of action must be dismissed against it, because Labor Law § 240(1) specifically exempts “owners of one and two-family dwellings who contract for but do not direct or control the work” from absolute liability” (*Bartoo v Buell*, 87 NY2d 362, 367 [1996], quoting Labor Law § 240).

As a threshold matter, in order to fall within the special protections afforded by Labor Law § 240(1), a worker must, at the time of the accident, have been engaged in a “covered activity,” i.e., one of the statute’s enumerated activities (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880–881 [2003]; *Jock v Fien*, 80 NY2d 965, 968 [1992]). The focus of inquiry is on the “type of work the plaintiff was performing at the time of injury” (*Panek v County of Albany*, 99 NY2d 452, 457 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]). Where the type of work in which the injured plaintiff was engaged does not fall within one of the activities enumerated in the statute, the worker will be entitled to the protection of the statute only if the work in which he is engaged is “integral to the progress of an ongoing construction project” (*Melendez v Abanno Bldg. Maintenance, Inc.*, 17 AD3d 147, 147 [1st Dept 2005]), or “sufficiently necessary and incidental to one of the enumerated activities” (*La Fontaine v Albany Mgt.*, 257 AD2d 319, 320 [3rd Dept 1999]; *see also Vilardi v Berley*, 201 AD2d 641 [2nd Dept 1994]). The question of whether a particular activity falls within the statute “must be determined on a case-by-case basis, depending on the context of the work” (*Prats*, 100 NY2d at 883).

Here, the type of work in which the plaintiff was engaged, delivering cabinetry to the Premises, does not fall within one of the activities enumerated in the statute. Therefore, plaintiff will be afforded the protections of Labor Law § 240(1) only if the work in which he was engaged was integral to the project or “sufficiently necessary and incidental to one of the enumerated activities” to be a covered activity (*La Fontaine*, 257 AD2d at 320). Defendants do not dispute that the work being done by Millenium, the installation of cabinetry and millwork at the premises, is a covered activity under the statute. As plaintiff’s work, delivering the cabinetry and millwork that was to be installed by Millenium, was necessary and integral to the work in which Millenium was engaged,

it arguably falls within the protections of the statute (*cf. Simms v Elm Ridge Assoc.*, 259 AD2d 538 [2nd Dept 1999] [delivery of washer-dryer that was to be installed on premises was protected under Labor Law § 241(6) as integral part of construction process]; *Williams v G.H. Dev. & Constr. Co.*, 250 AD2d 959 [3rd Dept 1998] [delivery of bath unit protected under Labor Law § 241(6), as activity was integral to the construction of the building]). At a minimum, defendants have failed to eliminate all triable issues of fact as to whether plaintiff's work fell within the protections of the statute (*cf. White v Village of Port Chester*, 92 AD3d 872 [2nd Dept 2012]).

Nevertheless, the Owner's motion to dismiss this cause of action, insofar as it is asserted against it, is granted. Our courts have held that an owner is entitled to the homeowner's exemption when the purpose of the construction is to convert a building into a single-family residence, and the owner does not direct or control the work (*see Khela v Neiger*, 85 NY2d 333 [1995]; *Stejskal v Simons*, 309 AD2d 853 [2nd Dept 2003]). Here, the Owner has demonstrated prima facie entitlement to summary judgment as a matter of law by presenting evidence establishing that the Premises was being converted into a single-family residence for the use of the Owner's principals, and that the Owner did not direct or control the work being performed. Plaintiff has since conceded, during oral argument, that the Owner is exempt from liability under this statute. Accordingly, the Owner is entitled to summary judgment dismissing this claim.

Uberto's motion for summary judgment dismissing this cause of action also is granted. For an injury to fall within the ambit of Labor Law § 240(1), "a plaintiff must demonstrate both that the statute was violated, and that the violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation" (*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011], citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]).

Rather, “[l]iability under Labor Law § 240(1) depends on whether the injured worker’s task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against” (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011] [internal citation and quotation marks omitted]).

“ ‘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’ ” (*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]). The “single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential*” (*id.* at 603 [emphasis added]). In determining whether an elevation differential is “physically significant,” the court must consider, among other things, “the weight of the object and the amount of force” the object is “capable of generating, even over the course of a relatively short descent” (*id.* at 605; *see also Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 10).

In *Wilinski*, the Court of Appeals held that a worker is not precluded from recovery under Labor Law § 240 simply because the object that struck him is on the same level, provided that the risk “arose ‘from a physically significant elevation differential’” (*id.* at 10, quoting *Runner*, 13 NY3d at 603). Thus, although the pipes that struck plaintiff in *Wilinski* were at the same level, recovery under section 240(1) was not precluded, because the height differential between the pipes and the worker could not be described as “de minimis,” where the pipes “were metal and four inches in

diameter, stood at approximately 10 feet[,] and toppled over to fall at least four feet before striking plaintiff, who is five feet, eight inches tall” (*id.*).

Nevertheless, the hazards covered by Labor Law § 240(1) “do not encompass any and all perils that may be connected in some tangential way with the effects of gravity” (*Gasques v State of New York*, 59 AD3d 666, 667 [2nd Dept 2009], *affd* 15 NY3d 869 [2010] [internal citation and quotation marks omitted]). Rather, “the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk” (*Runner*, 13 NY3d at 603). In determining whether section 240(1) applies in this case, it is necessary to distinguish between “routine workplace risks” and those “pronounced risks” that arise from work site elevation differentials (*id.*).

In *Ghany v BC Tile Contrs., Inc.*, (95 AD3d 768 [1st Dept 2012]), the First Department held that the protections of Labor Law § 240(1) were not implicated where plaintiff, a stonemason, was injured after he tripped over a small stone while carrying a stone weighing approximately 100 pounds, which then fell upon his knee and wrist. The Court found the statute inapplicable, because “the impetus for the heavy stone’s fall was plaintiff’s tripping on ground level, rather than the direct consequence of gravity” (*id.* at 769).

More recently, in *Rajkumar v Markham Gardens, L.P.* (2013 NY Slip Op 51581[U] [Sup Ct, Kings County 2013]), the court found that Labor Law § 240(1) was not implicated where plaintiff was injured after he slipped and fell on debris while attempting to hand a channel iron, measuring 16 feet long and weighing 200 pounds, to a co-worker who was situated above him on scaffold; as

a result of the slip and fall, a portion of the channel iron had fallen on top of him causing his injuries. At the time of the accident, the plaintiff had been holding the channel iron above his right shoulder with both hands on one end of the iron, while the other end was resting on the edge of a scaffold where another worker was standing. Nevertheless, the court found that there was no physically significant height differential between the beam and plaintiff, notwithstanding the weight and length of the beam. Rather, the court held that the impetus for the heavy beam's fall was plaintiff slipping on debris, rather than the direct consequence of gravity operating on the beam.

Here, based upon plaintiff's and Husbands's description of how the accident occurred, it is clear that the impetus for the cabinet's fall was plaintiff's tripping over the piece of unsecured Masonite as he ascended to the landing, which caused him to fall and lose grasp of the cabinet that he then was holding at knee height. Even though the other end of the cabinet may have been elevated, and notwithstanding the weight and size of the cabinet, there was no physically significant height differential between plaintiff and the cabinet that he was holding. Thus, although the effect of gravity may have contributed to plaintiff's injury, where, as here, there was no appreciable height differential between plaintiff and the object that struck him, the "pronounced risks arising from construction work site elevation differentials" is not implicated (*Runner*, 13 NY3d at 603). Accordingly, dismissal of this cause of action is appropriate.

Furthermore, Labor Law § 240(1) may not apply to permanent staircases in a building such as was the situation here (*see, e.g., Ryan v Morse Diesel, Inc.*, 98 AD2d 615 [1st Dept 1983]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531 [2d Dept 1999]; *Williams v City of Albany*, 245 AD2d 916 [3d Dept 1997] *appeal dismissed* 91 NY2d 957 [1998]; *Domrowski v Schwartz*, 217 AD2d 914

[4th Dept 1995]; *but see Ramirez v Shoats*, 78 AD3d 515, 517 [1st Dept 2010] [criticizing dissent's reliance on the above cases]).

Plaintiff's Labor Law § 241(6) Claim

Labor Law § 241(6) provides, in pertinent part:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places” (*id.*).

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494). However, the statute is not self-executing; to sustain a cause of action under section 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.*).

Uberto argues that plaintiff's Labor Law § 241(6) claims should be dismissed because the Industrial Code violations alleged by plaintiff are either not sufficiently specific to create liability, or do not fit the facts of this case. Uberto argues that dismissal also is warranted as plaintiff was not engaged in “construction, excavation and demolition work” at the time of the accident.

The Owner adopts and incorporates Uberto's arguments in support of its summary judgment motion to dismiss this cause of action, and also argues for dismissal of this claim based on the

homeowner exemption contained in this statute. The homeowner's exemption contained in Labor Law § 241(6) is identical to the exemption found in Labor Law § 240(1). As the Owner has established, and plaintiff has conceded, that the Owner is entitled to this exemption, this cause of action is appropriately dismissed as against the Owner.

To the extent that Uberto argues that this cause of action should be dismissed because plaintiff was not engaged in a protected activity, the motion is denied for the reasons discussed with respect to plaintiff's Labor Law § 240(1) claim. As discussed *supra* at 14, defendants do not dispute that the work being done by Millenium, the installation of cabinetry and millwork at the premises, is a covered activity under the statute. As plaintiff's work, delivering the cabinetry and millwork that was to be installed by Millenium, was necessary and integral to the work in which Millenium was engaged, it arguably falls within the protections of the statute.

Although plaintiff asserted a number of violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.7(d) and (e), plaintiff has failed to address those Industrial Code violations in his response to the defendants' motions for summary judgment. Accordingly, this court deems those parts of plaintiff's Labor Law § 241(6) claim that are predicated on such other violations to be abandoned (*see Rodriguez v Dormitory Auth. of State of N.Y.*, 104 AD3d 529 [1st Dept 2013]; *Cardenas v One State Street, LLC*, 68 AD3d 436 [1st Dept 2009]).

As for Industrial Code provisions 12 NYCRR 23-1.7(d) and (e), each of these provisions have been held to be sufficiently specific to support a cause of action under Labor Law § 241(6) (*see Jennings v Lefcon Partnership*, 250 AD2d 388 [1st Dept 1998]). Industrial Code provision 12 NYCRR 23-1.7(d), which pertains to slipping hazards, provides:

“Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing”

(*id.*). Industrial Code provision 12 NYCRR 23-1.7 (e), which pertains to tripping and other hazards, provides:

“(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed”

(*id.*).

Here, it is clear that 12 NYCRR 23-1.7(d) is not applicable to this action, as plaintiff does not claim to have slipped on the Masonite, and there is no evidence that a slippery condition otherwise existed in the stairwell. Additionally, as the Masonite was intentionally placed on the floor as part of the construction project, it cannot be considered a foreign substance that may cause a slippery footing (*see Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]).

Industrial Code provision 12 NYCRR 23-1.7(e)(2) is not applicable to this action, as the evidence establishes that the piece of Masonite, on which the plaintiff allegedly tripped, was purposefully set down as a protective covering. In such circumstances, our courts have held that the Masonite does not constitute “debris” or “scattered materials” within the meaning of the regulation (*Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]).

However, to the extent that plaintiff bases his Labor Law § 241(6) cause of action on Industrial Code provision 12 NYCRR 23-1.7(e)(1), this provision arguably could be applicable to the facts of this case. The evidence establishes that the accident occurred in a permanent stairwell that was plaintiff's sole means of access to the fourth floor work site where he was to deposit the cabinet. Our courts have held that the term "passageway" can encompass a permanent staircase when that staircase is the sole means of access to the worksite (*see e.g. Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012]; *see also Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642 [1st Dept 2013]). Although, as noted above, the Masonite, which was intentionally placed as a floor covering, would not constitute debris within the meaning of this provision, to the extent that such Masonite was loose and unsecured, it arguably is a "condition[] which could cause tripping" (*see Holloway v Sacks & Sacks*, 275 AD2d 625 [1st Dept 2000]; *cf. Schwind v Mel Lany Const. Mgt. Corp.*, 95 AD3d 1196 [2d Dept 2012]). As a triable issue of fact exists as to whether this provision was violated and such violation was a proximate cause of plaintiff's injury, Uberto's motion for summary judgment to dismiss this cause of action is denied.

Defendants' Cross-Claims for Contractual and Common-Law Indemnification

Any right that defendants may have on their cross-claims for contractual indemnification will depend upon the specific language of the indemnification provisions contained in each of the contracts (*Zastenchik v Knollwood Country Club*, 101 AD3d 861, 864 [2nd Dept 2012]). "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]). “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” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2nd Dept 2009]; see General Obligations Law § 5-322.1).

The evidence establishes that by agreement dated July 17, 2006, the Owner and Uberto entered into an American Institute of Architects “Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is Also the Constructor” (the Standard Agreement) (Klaum Affirm., Exhibit N; Marquez Affirm., Exhibit H). Section 1.2 of that agreement, entitled General Conditions, provides, in pertinent part, that “[f]or the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference” (General Conditions) (*id.*). Section 3.18 of the General Conditions contains an indemnification provision, which provides:

“3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of

indemnity which would otherwise exist as to a party or person described in the Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.2 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts."

(Marquez Affirm., Exhibit I).

The evidence establishes that by agreement dated July 22, 2008, Uberto and Millenium executed a purchase order which contained the following indemnification provision:

"To the fullest extent permitted by law, [Millenium] agrees to indemnify, defend and hold Uberto, the Owner, Architect, Designer, Building Owner, Management Company, Construction Manager and their agents, representatives and employees (the indemnified parties) harmless from and against all claims, damages, losses and expenses including but not limited to, attorney's fees and disbursements, arising out of or in connection with the Work performed by [Millenium] pursuant to this Order whether or not such claims, damages, losses and expenses are caused in part by an indemnified party.

Further, to the fullest extent permitted by law, the [Millenium] agrees to indemnify, defend and hold Uberto Ltd., the Owner, Architect, Designer, Building Owner, Management Company, Construction Manager and their agents, representatives and employees (the indemnified parties) harmless from and against all claims, damages, losses and expenses including but not limited to attorneys' fees and disbursements, arising out of or in connection with the Work performed by Millenium] pursuant to this Order in the event any such claim, damage, loss or expense is based upon an act or omission of [Millenium] that is then sought to be imposed upon one or more of the indemnified parties pursuant to the Labor Law of the State of New York"

(Klaum Affirm., Exhibit O; Marquez Affirm., Exhibit F).

The Owner argues that it is entitled to summary judgment on each of its cross-claims for contractual indemnification against Uberto and Millenium, because (1) the indemnification provisions in both contracts require the indemnitor to indemnify the Owner with respect to personal injury claims arising out of its work at the premises; and (2) the evidence establishes that the Owner was free from any negligence.

Uberto opposes the Owner's motion for summary judgment on its cross-claim for contractual indemnification, and moves to dismiss this cause of action. Uberto argues that it is not clear that the General Conditions that were incorporated into the Standard Agreement ever were actually provided to the Owner with the Standard Contract, and thus are enforceable by the Owner. In any event, Uberto argues that the Owner's motion for summary judgment on its contractual indemnification claim must be denied, as the Owner has not established negligence on the part of Uberto, which is required to trigger Uberto's obligation to indemnify Owner under the terms of the indemnification provision contained in section 3.18.1 of the General Conditions.

Uberto argues that it is entitled to summary judgment on its claim for contractual indemnification against Millenium, because Millenium agreed to indemnify Uberto for any losses or damages arising out of its work, and there is no evidence of negligence on the part of Uberto.

Millenium has submitted no response to either of these motions.

The Owner's motion for summary judgment on its claim for contractual indemnification against Uberto is denied. Under the terms of the indemnification provision in the agreement between the Owner and Uberto, Uberto agreed to indemnify the Owner for damages, losses and expenses, arising out of or resulting from performance of the work, "but only to the extent caused by the

negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable” (Marquez Affirm., Exhibit I). As any negligence on the part of Uberto, or an entity for whose acts it might be liable, has yet to be determined, the Owner’s motion for summary judgment on this cause of action is premature.

To the extent that Uberto seeks dismissal of the Owner’s cross-claim for contractual indemnification, the motion is denied. Uberto has provided no relevant authority for its argument that the failure to provide the Owner with a copy of the General Conditions, which were incorporated expressly by reference into the Standard Agreement, would render the General Conditions unenforceable on the part of the Owner. The one case cited by Uberto, *Lopez v 14th St. Dev., LLC* (40 AD3d 313 [1st Dept 2007]), addresses only the issue of the correct interpretation of an arbitration clause that was contained in the General Conditions that were incorporated into the written agreement, and not whether the General Conditions, which were incorporated by reference, were enforceable.

The Owner’s motion for summary judgment on its cross-claim for contractual indemnification against Millenium is granted. The contractual indemnification provision in the Millenium purchase order, which applies to claims “arising out of or in connection with the Work performed by [Millenium] pursuant to this Order,” is broad enough to apply to the work that plaintiff was performing for Millenium when he was injured (*see Hurley v Best Buy Stores, L.P.*, 57 AD3d 239 [1st Dept 2008]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268 [1st Dept 2007]). As the Owner has established its freedom from any negligence in this action, summary judgment on this cross-claim is appropriate.

However, Uberto's motion for summary judgment on its cross-claim for contractual indemnification against Millenium is denied, as there remain triable issues of fact as to whether Uberto created the dangerous condition, namely the unsecured Masonite that caused plaintiff to allegedly trip and become injured. Where a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature (*Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500 [1st Dept 2011]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2nd Dept 2009]). To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

The Owner argues that it is entitled to summary judgment against Uberto on its claim for common-law indemnification because, to the extent that the loose Masonite constituted a dangerous condition at the Premises, the condition was proximately caused by Uberto, the entity that had installed and was responsible for maintaining the Masonite. Uberto opposes the Owner's motion, on the ground that any negligence on its part has yet to be established. Uberto also moves for summary judgment on its cross-claim for common-law indemnification against Millenium.

The Owner's motion for summary judgment on its cross-claim for common-law indemnification against Uberto is denied, as Uberto's negligence has yet to be determined. Uberto's motion for summary judgment on its cross-claim for common-law indemnification against Millenium must also be denied because not only has Uberto not established its own freedom from

negligence, Uberto has failed to produce any evidence to establish negligence on the part of Millenium.

The Owner's motion to dismiss all cross-claims that have been asserted against it is granted. There is no evidence in the record that the Owner had a contractual obligation to indemnify anyone; nor is there is any evidence of negligence on the part of the Owner that would sustain a claim of common-law indemnification or contribution.

Uberto's Breach of Contract Claim against Millenium

Finally, Uberto argues that it that it is entitled to summary judgment on its cross-claim against Millenium for breach of contract in failing to procure additional insured coverage on Uberto's behalf. Uberto argues that its contract with Millenium included an insurance provision requiring that Millenium procure additional insured coverage on behalf of Millenium, which Millenium breached by failing to procure such additional insured coverage.

Uberto's motion for summary judgment on this cause of action is denied. As an initial matter, this court notes that Uberto has failed to identify, either in the original assertion of its cross-claim or in its motion papers, the specific contractual provision in the Millenium contract on which it now seeks summary judgment; thus, Uberto has failed to establish prima facie its entitlement to summary judgment.

In any event, "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated" (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2nd Dept 2003]). For example, "contract language that merely requires the purchase of insurance will not be read as also requiring

that a contracting party be named as an additional insured” (*id.*). The insurance provision included on page two of the Millenium purchase order states only that:

“In order to receive payment, [Millenium] must submit a current certificate of insurance evidencing coverage for general liability, and all other forms of insurance required for the Project naming Uberto as holder and additional insured. Uberto shall inform [Millenium] of the required additional forms of insurance”

(Klaum Affirm., Exhibit O). This contract provision only states that Millenium must submit the certificate of insurance “[i]n order to receive payment” but not as an absolute requirement. As this provision does not expressly and specifically require that Millenium procure insurance naming Uberto as an additional insured, but only to submit a certificate of insurance evidencing coverage for general liability, Uberto’s motion for summary judgment on the breach of contract claim must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Uberto Ltd. and Uberto Ltd. d/b/a Uberto Construction for summary judgment to dismiss plaintiff’s complaint and all cross-claims, and to grant these defendants’ cross-claims for common-law indemnification, contractual indemnification, and breach of contract against co-defendant Millenium Millwork, Ltd. (Motion Sequence Number 003), is granted to the extent of dismissing plaintiff’s Labor Law § 240(1) cause of action as asserted against them, and the motion is otherwise denied; and it is further

ORDERED that the motion by defendant 9 East 69th Street LLC for summary judgment to dismiss plaintiff’s complaint and all cross-claims, and to grant this defendant’s cross-claims for


contractual and common-law indemnification against co-defendants Uberto Ltd. and Uberto Ltd. d/b/a Uberto Construction, and Millenium Millwork, Ltd. is granted to the extent of dismissing plaintiff's complaint and all cross-claims asserted against 9 East 69th Street LLC, and granting this defendant's cross-claim for contractual indemnification against co-defendant Millenium Millwork, Ltd., and the motion is otherwise denied.

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

The foregoing constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
November 15, 2013

ENTER :



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

FILED

NOV 22 2013

COUNTY CLERK'S OFFICE
NEW YORK