

**Birch v Manhattan College**

2013 NY Slip Op 33643(U)

October 30, 2013

Sup Ct, Bronx County

Docket Number: 304995/2008

Judge: Lucindo Suarez

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**PART 19**

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

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

-----X  
**BRCH, JOHN**

Index N<sup>o</sup>. **304995/2008**

- against -

Hon. **LUCINDO SUAREZ,**

Justice.

**MANHATTAN COLLEGE, et ano**  
-----X

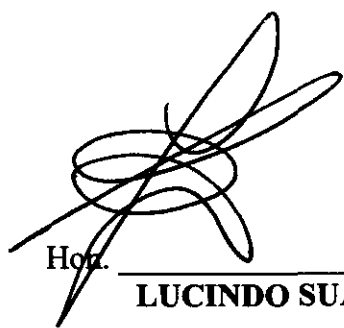
and a third-party action.

The following papers numbered 1 to 7 read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #3)**, noticed on **July 5, 2013** and duly submitted as No. **56** on the Motion Calendar of **September 5, 2013**, and the following papers numbered **8** to **17** read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #4)**, noticed on **July 29, 2013** and duly submitted as No. **57** on the Motion Calendar of **September 5, 2013**

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affidavits Annexed ( <b>Motion Sequence #3</b> )	1, 2, 3	
Answering Affidavit and Exhibits	4, 5, 6	
Replying Affidavit and Exhibits	7	
Notice of Motion - Exhibits and Affidavits Annexed ( <b>Motion Sequence #4</b> )	8, 9, 10	
Answering Affidavit and Exhibits	11, 12, 13, 14	
Replying Affidavit and Exhibits	15, 16, 17	
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, the applications of third-party defendant Unistress Corp. and defendant Pavarini Construction Co., Inc. for summary judgment are consolidated for decision herein and disposed of in accordance with the annexed decision and order.

Dated: **10/30/2013**

  
Hon. **LUCINDO SUAREZ, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

-----X  
JOHN BIRCH,

Plaintiff,

- against -

MANHATTAN COLLEGE and PAVARINI  
CONSTRUCTION CO, INC.,

Defendants.

-----X  
MANHATTAN COLLEGE,

Third-Party Plaintiff,

- against -

UNISTRESS CORP.,

Third-Party Defendant.

-----X

PRESENT: Hon. Lucindo Suarez

DECISION AND ORDER

Index No. 304995/2008

Third-Party Index No.

83693/2011

As to Motion Sequence #3: upon the notice of motion dated June 14, 2013 of third-party defendant Unistress Corp. and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated July 11, 2013 of defendant and third-party plaintiff Manhattan College and the exhibits submitted therewith; the affirmation in opposition dated August 29, 2013 of defendant Pavarini Construction Co., Inc.; movant's reply affirmation dated September 4, 2013; as to Motion Sequence #4: upon the notice of motion dated June 13, 2013 of defendant Pavarini Construction Co., Inc. and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated July 24, 2013 of defendant and third-party Manhattan College and the affidavit and exhibits submitted therewith; plaintiff's affirmation in opposition dated August 14, 2013; movant's affirmation in reply dated August 28, 2013; movant's affirmation in reply dated August

28, 2013 and the exhibit submitted therewith; and upon due deliberation; the court finds:

The applications of third-party defendant Unistress Corp. ("Unistress") and defendant Pavarini Construction Co., Inc. ("Pavarini") for summary judgment are consolidated for decision herein, inasmuch as they involve common issues of law and fact.

Plaintiff, an employee of non-party Jem Erectors, Inc. ("Jem"), was standing on a ladder leaning against a pre-cast concrete form on a flatbed trailer when the ladder shifted and plaintiff fell. Plaintiff was attempting to attach the concrete form to a crane to unload it from the trailer. Defendant Manhattan College owned the construction site, upon which a parking garage - composed, in part, of concrete forms of the type being unloaded by plaintiff - was to be built.

The project was divisible into two phases - erection of the primary garage structure itself, and subsequent erection of ancillary components including a pedestrian bridge, vehicular bridge and elevator tower. The accident occurred during erection of the primary structure. Manhattan College contracted with Pavarini as the general contractor/construction manager; with Unistress to manufacture and deliver the forms, and to "provide field supervision and project management services" during erection of the primary structure; and with Jem to remove the concrete forms from Unistress's trailers and assemble them to form the structure.

**Unistress's Motion (Motion Sequence #3)**

Manhattan College asserted causes of action against Unistress for contractual indemnification, breach of contract for failure to procure insurance and common-law contribution and indemnification. Pavarini asserted cross-claims against Unistress for common-law contribution and indemnification. Unistress moves for summary judgment on all claims asserted against it.

Unistress first argues that the contractual indemnification claim asserted by Manhattan College must be dismissed because the accident did not arise out of the performance of Unistress's

work as per its contract. The contract between Manhattan College and Unistress states:

To the fullest extent permitted by law, the Design-Builder shall indemnify and hold harmless the Owner, Owner'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 Design-Builder, Architect, a 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 that would otherwise exist as to a party or person described in this Section A.3.17.

Terms and Conditions § A.3.17.1, Exhibit A to Standard Form of Agreement Between Owner and Design-Builder (the "Agreement") (emphasis added).

"The Work," referred to above, is defined as

the design, construction and services required by the Design-Build Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Design-Builder to fulfill the Design-Builder's obligations. The Work may constitute the whole or a part of the Project [and is limited to the scope described in the Unistress Corporation proposal of 12-11-07 for Job #40715, including Exhibit "A" through Exhibit "F"].

Terms and Conditions § A.1.1.6. The above-cited language in square brackets was added by the Supplementary Terms and Conditions, Exhibit D to the Agreement. The scope described in Unistress's proposal, Exhibit E to the Agreement, was that Unistress would fabricate, deliver and erect a vehicle bridge, pedestrian bridge and elevator tower ancillary to the garage but that it would only fabricate and deliver the parking garage structure. Unistress's proposal specifically excluded the cost to erect the parking garage members. Furthermore, the design-build contract, formed by the design-build documents as defined in § 1.1 and Article 8 of the Agreement, represented "the entire and integrated agreement between the parties hereto." § 1.2 of the Agreement. None of these documents obligated Unistress to erect the garage itself or to supervise same.

Indeed, ¶ 7 of the Erection Contractor Scope of Work, Exhibit G to the Agreement, stated:

All precast concrete product is being supplied to the job site under separate contract with Unistress Corporation, Inc., 550 Cheshire Road, Pittsfield, Mass. Erector is to unload, store, erect, plumb and secure all precast product in accordance with the PCI Erection's Manual, MNL-127. Erector must submit four weeks prior to start of work, an erection plan specifying guying, bracing, and welding procedures prepared by a registered engineer.

Furthermore, paragraph 11 of the Erection Contractor Scope of Work stated, "Erector to direct delivery trucks to crane and to provide flagman within the jobsite if required."

The first page of the Agreement, preceding the terms of the Agreement, reiterated the scope of Unistress's work as per its proposal and added that

The erection of the parking garage is under separate contract and not part of this agreement however the Design-Builder shall provide field supervision and project management services under this agreement as consultant to the Owner during the erection of the pre-cast concrete components of the parking garage structure.

This is the sole mention of such services; nowhere are they defined or explained.

Thus, with regard to the primary structure, Unistress was to fabricate and deliver concrete forms and provide field supervision and project management. The accident did not occur during fabrication or delivery, leaving field supervision and project management as the possible source of indemnification. Regardless of the scope of services provided by Unistress, however, the indemnification provision, on its face, was limited to the Work as defined by the contract documents wherein supervision of the erection of the garage was not included. *See Cahn v. Ward Trucking, Inc.*, 101 A.D.3d 458, 955 N.Y.S.2d 583 (1st Dep't 2012); *Hamill v. Mutual of Am. Inv. Corp.*, 79 A.D.3d 478, 913 N.Y.S.2d 62 (1st Dep't 2010) (no proof of a triggering event). Indemnification provisions are subject to heightened scrutiny and must establish the parties' unmistakable intent to provide for indemnification under the particular circumstances presented. *See Hartz Consumer Group, Inc. v. JWC Hartz Holdings, Inc.*, 33 A.D.3d 555, 824 N.Y.S.2d 227 (1st Dep't 2006).

Evidence of the parties' purportedly "true intent" may not be used to contravene the express intent in a written contract. See *Halkedis v. Two East End Ave. Apartment Corp.*, 137 A.D.2d 452, 525 N.Y.S.2d 31 (1st Dep't 1988), *affirmed*, 72 N.Y.2d 933, 529 N.E.2d 173, 532 N.Y.S.2d 843 (1988). "[A] contract should be enforced according to its terms and is 'not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist.'" *Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 341, 693 N.E.2d 740, 743, 670 N.Y.S.2d 393, 396 (1998), *cited in White Rose Food v. Saleh*, 99 N.Y.2d 589, 592 n1, 788 N.E.2d 602, 603, 758 N.Y.S.2d 253, 254 (2003).

Where the meaning of a contract is clear upon its face, "evidence of the intention and acts of the parties other than exists in the contract itself plays no part in the decision" and "no proof need be taken as to its real meaning." *Parochial Bus Systems, Inc. v. Board of Education*, 91 A.D.2d 13, 17, 457 N.Y.S.2d 285, 288 (1st Dep't 1983) (citations omitted), *affirmed*, 60 N.Y.2d 539, 458 N.E.2d 1241, 470 N.Y.S.2d 564 (1983). Had the parties intended to expand the scope of the indemnification provision to cover Unistress's "field supervision and project management services" during the erection of garage structure, "they had only to say so unambiguously." *Tonking v. Port Auth.*, 3 N.Y.3d 486, 490, 821 N.E.2d 133, 135, 787 N.Y.S.2d 708, 710 (2004). Thus, Manhattan College failed to raise a triable issue of fact through its witness's deposition testimony, and this facet of the motion is granted.

The court should endeavor to interpret a contract such that no clauses are rendered meaningless, see *UBS Sec. LLC v. Red Zone LLC*, 77 A.D.3d 575, 910 N.Y.S.2d 55 (1st Dep't 2010), but where two apparently irreconcilable provisions exist, the specific dominates over the general, see *Israel v. Chabra*, 12 N.Y.3d 158, 168 n1, 906 N.E.2d 374, 878 N.Y.S.2d 646 (2009), *citing* 11 Lord, *Williston on Contracts* § 32:15, at 507-510 (4th ed). In this case there is no

ambiguity in the language of the contract, which is the best evidence of the parties' intent. *See Innophos, Inc. v. Rhodia, S.A.*, 10 N.Y.3d 25, 882 N.E.2d 389, 852 N.Y.S.2d 820 (2008). The parties made numerous very specific amendments to the terms and conditions of the Agreement but did not expand the scope of the indemnification provision.

Unistress next argues that the common-law indemnification and contribution claims must be dismissed because, relying on the parties' testimony, Unistress was not negligent.

Plaintiff testified that his foreman showed him how to perform his tasks. He reported to his foreman only and only his foreman instructed, directed and supervised him and provided him with tools and equipment. His knowledge of Unistress was only that it fabricated the concrete. He had no interaction with anyone from Unistress and did not know if he had ever seen anyone from Unistress on the site.

Unistress's field superintendent testified that he was the only Unistress employee on the site and his duties were to coordinate with Jem's foreman regarding the number and timing of deliveries of concrete and to verify that Jem completed the project per Unistress's details and specifications. He never instructed Jem employees how to do their jobs and he never provided them with any tools or equipment (except for one isolated incident when he offered a Jem worker his safety glasses so that Pavarini would not stop the work). He had no direct responsibility to dictate the safety of Jem's work and, although he possessed authority to stop and correct unsafe work, he had never observed unsafe practices with which he interceded. He did not supervise Jem's work, because Jem determined its own means and methods. Offloading and erection were "all Jem's operation."

Manhattan College's witness testified that it was the college's intent that Unistress "monitor Jem's operations and resolve with Jem any issues that came up in the field" and perform with such authority over and responsibility for Jem as if Jem were Unistress's direct subcontractor. Thus,

Unistress was referred to as a “consultant” “to give Unistress the authority to provide direction to Jem.” He had never, however, observed Unistress’s employees communicating with Jem’s employees; the sole basis of his belief that Unistress supervised Jem’s offloading of the concrete products was the aforementioned language appearing on the first page of the Agreement.

Pavarini’s project manager testified that while Unistress *oversaw* delivery and erection, Jem *supervised* the delivering and offloading of the concrete panels brought by Unistress. The difference between oversight and supervision lay in a contractor being answerable to a supervisor.

It should be noted that § 9.2.1 of the contract between Manhattan College and Jem for erection of the garage stated that

[Jem] shall supervise and direct the Work, using the [Jem’s] best skill and attention. [Jem] shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.

The Unistress agreement mentioned supervision only generally, not addressing means or methods.

“Liability for indemnification may only be imposed against those parties . . . who exercise actual supervision” and does not lie against a party solely on the basis of contractual authority to supervise. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 378, 953 N.E.2d 794, 801, 929 N.Y.S.2d 556, 563 (2011). The proposed indemnitor must have been actively negligent in bringing about plaintiff’s injury. *See Cahn v. Ward Trucking, Inc.*, 101 A.D.3d 458, 955 N.Y.S.2d 583 (1st Dep’t 2012). Here, regardless of Manhattan College’s assumptions, there is nothing in the record to suggest that Unistress actually supervised and/or directed plaintiff’s work, and the claims for common-law indemnification must therefore be dismissed.

As to the claims for common-law contribution, Unistress must show that it did not contribute to plaintiff’s injuries by breaching a duty to plaintiff, Manhattan College or Pavarini. *See Jehle v.*

*Adams Hotel Assocs.*, 264 A.D.2d 354, 695 N.Y.S.2d 22 (1st Dep't 1999). Unistress had no direct contractual relationship with Pavarini or Jem. See *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449, 492 N.Y.S.2d 371 (1st Dep't 1985). However, given that the language in the Agreement between Manhattan College and Unistress obligating Unistress to provide Manhattan College with "field supervision and project management services" during erection of the garage is undefined, given the conflicting testimony with regard to Unistress's role in this regard, given Unistress's recognition that it had the authority to stop and/or correct Jem's unsafe work practices, and given the conflicting testimony as to whether using a ladder under the circumstances presented here constituted an unsafe work practice, Unistress has not met its *prima facie* burden with respect to the common-law contribution claims.

Unistress next argues that Manhattan College's cause of action for breach of contract for failure to procure insurance must be dismissed because Unistress procured the insurance required by the contract, as evidenced by a certificate of insurance naming Unistress as the insured and Manhattan College as the certificate holder and additional insured. However, the certificate contains the following statements:

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

The policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which the certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies. Aggregate limits shown may have been reduced by paid claims.

"A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists." *Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198,

200, 774 N.Y.S.2d 11, 13 (1st Dep't 2004). Inasmuch as Unistress submitted nothing other than the certificate, it failed to meet its *prima facie* burden on this facet of the motion.

**Pavarini's Motion (Motion Sequence #4)**

Pavarini moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, arguing that the parties' testimony reveals that it possessed only general supervisory authority over plaintiff's work and did not direct plaintiff's work. Pavarini further moves for summary judgment on its cross-claim against Manhattan College for defense and indemnification premised upon an Indemnification and Hold Harmless Agreement.

Plaintiff testified that he believed Pavarini to be the general contractor, because the construction trailer on the site said "Pavarini" on its side. He did not believe he had ever spoken to anyone from Pavarini. He did not report to anyone other than his foreman, and no one other than his foreman instructed, directed or supervised him or provided him with tools or equipment.

Unistress's field superintendent testified that he believed Pavarini to be the general contractor. Pavarini's superintendent was on site daily, its project manager was there "frequently" and it also had a "safety person." All three "looked like superintendent types" and he believed them to have the authority to correct Unistress's and Jem's work. He interacted with Pavarini's superintendent only as to access and coordination because the site was so small. Pavarini would "dictate" where Unistress and Jem could and could not go depending on Pavarini's work at the site, and occasionally Pavarini safety personnel would "dictate safety" to Jem employees. Pavarini "certainly acted like a general contractor;" its supervisors would ask Unistress and Jem what they were doing on a daily basis and its safety personnel would tell workers to get their safety equipment. Pavarini once threatened to stop work at the site because a worker lacked proper safety equipment.

Manhattan College's witness testified that Manhattan College contracted with Pavarini as

construction manager to “run” the site and coordinate the activities of the various contractors, testifying elsewhere that Pavarini was the general contractor for the entire project. Manhattan College relied on Pavarini to supervise and monitor the work of all contractors on the site, including Unistress and Jem, and to correct any unsafe work practices observed. For the portion of the work with which Manhattan College had contracted with Pavarini directly, Pavarini contracted with all the various trades such as foundation, plumbing, electrical, paving, painting and beautification. The witness conceded that because the only activity at the time of the accident was the erection of the primary structure, which was the subject of the contract between Manhattan College and Jem, he did not know what the Pavarini superintendent would have been doing.

Pavarini’s superintendent testified that he did not recall whether Pavarini was the general contractor or the construction manager. He was responsible to oversee how the project ran, making sure the project was on schedule and making sure the work was done per the drawings. He walked through the site daily to make sure that the building was being built per the drawings and contract documents, that the site was safe, that the public was safe, that tasks were not performed incorrectly and that the workers were working in a safe manner. He had the authority over any contractor on the site to stop and correct unsafe work practices, including wholly unsecured ladders.

He further testified that Pavarini observed and oversaw Jem but did not supervise Jem because Jem was not working for Pavarini. Therefore, Pavarini did not tell Jem what to do. Given this lack of direct contractual relationship, Jem did not respond to Pavarini’s concerns about the pace of its performance. Pavarini also lacked authority over Unistress; their communication was confined to daily scheduling and coordination. Pavarini did not provide Jem or Unistress with tools or equipment. The witness understood that Unistress was to ensure specifically that the primary structure was delivered and erected, and Pavarini was to finish the garage after Unistress was done.

With respect to the erection of the structures ancillary to the primary structure, Pavarini oversaw “everything” as with the rest of the project.

“To prevail on [a common-law negligence or Labor Law § 200 claim] against an owner or general contractor, a plaintiff must prove that the party so charged exercised direct supervisory control over the manner in which the activity alleged to have caused the injury was performed. Further, . . . evidence that a general contractor ‘may have had overall responsibility for the safety of the work done by the subcontractors . . . [is] insufficient to raise a question of fact as to [the] negligence’ of the general contractor itself.” *Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 380-81, 836 N.Y.S.2d 130, 133-34 (1st Dep’t 2007). As amorphous as Pavarini’s role appears to be, nothing in the record suggests that Pavarini actually provided any supervision to Unistress or Jem beyond general safety and scheduling oversight, which is an insufficient basis upon which to impose liability. *See Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 950 N.Y.S.2d 35 (1st Dep’t 2012); *O’Sullivan v. IDI Constr. Co., Inc.*, 28 A.D.3d 225, 813 N.Y.S.2d 373 (1st Dep’t 2006), *affirmed*, 7 N.Y.3d 805, 855 N.E.2d 1159, 822 N.Y.S.2d 745 (2006). Its authority to stop and correct unsafe work practices is insufficient to establish the requisite supervision or control to confer liability under Labor Law § 200 or negligence theories. *See Martinez v. 342 Prop. LLC*, 89 A.D.3d 468, 469, 932 N.Y.S.2d 454, 455 (1st Dep’t 2011); *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dep’t 2007).

Furthermore, the overall contractual scheme indicates that Jem and Unistress were primarily responsible for their own supervision and safety. *See Buccini v. 1568 Broadway Assocs.*, 250 A.D.2d 466, 673 N.Y.S.2d 398 (1st Dep’t 1998). Unistress’s obligations regarding safety (*see e.g.* Terms and Conditions § A.10.2.1) were limited to “the Work,” as defined above in its contract, and, as cited above, § 9.2.1 of the contract between Manhattan College and Jem for erection of the garage

stated that Jem was solely responsible for control of its work.

The opposition failed to raise an issue of fact. Exhibit A to the contract between Manhattan College and Pavarini stated, without elaboration, that Pavarini, acting as construction manager, would “provide supervision and coordination, as well as other normal Construction Management services” over Jem. Ostensibly, this language was included specifically because Pavarini had no contractual relationship with any of the entities present at the site at the time of plaintiff’s accident. Such a general supervisory duty, however, is insufficient to establish that Pavarini exercised control over the method of plaintiff’s work. *See Conforti v. Bovis Lend Lease LMB, Inc.*, 37 A.D.3d 235, 829 N.Y.S.2d 498 (1st Dep’t 2007). The causes of action are properly dismissed where there is no evidence that an entity arguably having general supervisory authority over plaintiff’s employer actually exercised supervisory control or had any input into how plaintiff would perform the subject activity, *see Sparendam v. Lehr Constr. Corp.*, 24 A.D.3d 388, 807 N.Y.S.2d 335 (1st Dep’t 2005), *appeal denied*, 7 N.Y.3d 703, 853 N.E.2d 241, 819 N.Y.S.2d 870 (2006), regardless of the contractual language, *see Reilly v. Newireen Assocs.*, 303 A.D.2d 214, 756 N.Y.S.2d 192 (1st Dep’t 2003), *appeal denied*, 100 N.Y.2d 508, 795 N.E.2d 1244, 764 N.Y.S.2d 235 (2003).

The collective testimony establishes that, despite Manhattan College’s expectations, Pavarini did not actually control or direct the activity bringing about plaintiff’s injuries. There is no doubt that Pavarini possessed some authority over the worksite; however, “liability under Labor Law § 200 or for common-law negligence may only be imposed on a general contractor or construction manager who controls the manner in which the plaintiff performed his or her work.” *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 309, 836 N.Y.S.2d 86, 91 (1st Dep’t 2007) (emphasis added). While Pavarini’s superintendent testified that he did not know who had determined the means and methods employed by Jem, plaintiff specifically testified that it was his own foreman

who explained to him what he was to do and who demonstrated how he was to do it and that only his foreman instructed him. Unistress's superintendent testified that he had no recollection of anyone from Pavarini ever discussing Jem's methods with him.

Manhattan College's citation to the court's June 12, 2013 decision in this action does not require a different result. The prior decision found a question of fact as to whether the scope of Pavarini's duties rendered it a true general contractor or construction manager for the purposes of Labor Law § 240(1) liability. *See Kosovrasti v. Epic (217) LLC*, 96 A.D.3d 695, 948 N.Y.S.2d 260 (1st Dep't 2012). Here, it is apparent that there is no debate as to whether Pavarini performed in either general contractor or construction management role, the distinction of which is not of primary concern here, *see Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 831 N.E.2d 408, 798 N.Y.S.2d 351 (2005); the question here is whether Pavarini actually controlled the manner in which plaintiff performed his work. Furthermore, Manhattan College's characterization of the events as involving a dangerous condition, as opposed to the method of offloading, is belied by the proof. *See Collado v. City of New York*, 72 A.D.3d 458, 900 N.Y.S.2d 10 (1st Dep't 2010); *see also Lombardi v. Stout*, 80 N.Y.2d 290, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1992).

Next, Pavarini moves for summary judgment on its cross-claim against Manhattan College for defense and indemnification, premised upon an Indemnification and Hold Harmless Agreement.

The agreement, signed by Manhattan College, reads, in pertinent part:

[Manhattan College] agrees to protect, defend, indemnify, save, and hold harmless [Pavarini], its officers, agents, servants and employees, from and against any and all claims, demands, expense and liability arising out of injury or death to any person or the damage, loss or destruction of any property which may occur or in any way relate to any act or omission of [Manhattan College], its agents, servants, and employees, and separate contractors (or any and all of them) as a result of any claim, demand, and/or cause of action (excepting any claim and/or causes of action arising out of the sole negligence of [Pavarini], its agents, servant, and employees, and subcontractors) in connection with the furnishing of precast concrete products to the project and for the construction and erection of precast concrete products performed under direct

contract with [Manhattan College] by [Unistress] . . . of a certain parking garage . . .

Pavarini argues that because plaintiff was injured while attempting to offload precast concrete forms provided by Unistress for erection of the garage - work that was to be done under Unistress's supervision - plaintiff's accident is covered by this agreement.

The agreement purports to indemnify Pavarini for the "furnishing," "construction" and "erection" of precast concrete products "performed under direct contract with [Manhattan College] by [Unistress]." The contract with Unistress required it to furnish the precast parts for all components of the garage, but to construct or erect only the pedestrian bridge, vehicular bridge and elevator tower. Plaintiff's accident did not occur during Unistress's furnishing of the concrete; the concrete had already been delivered and Jem was in the process of erecting the garage. The contract with Unistress did not require it to construct or erect the garage structure itself; such work had been contracted to Jem. Unistress's provision of "field supervision and project management services under this agreement as consultant to the Owner during the erection of the pre-cast concrete components of the parking garage structure," such erection work having been contracted directly to Jem, is not "furnishing," "construction" or "erection" of precast concrete products under the Unistress contract. Had the parties intended that Pavarini be indemnified for Unistress's "field supervision and project management services," they needed merely include that in the list of enumerated covered activities. *See Tonking, supra.*

Accordingly, it is

ORDERED, that the motion of third-party defendant Unistress Corp. for summary judgment is granted to the extent of dismissing the causes of action of third-party plaintiff Manhattan College for contractual and common-law indemnification and dismissing the cross-claim of defendant Pavarini Construction Co., Inc. for common-law indemnification (Motion Sequence #3); and it is

further

ORDERED, that the causes of action of third-party plaintiff Manhattan College for contractual and common-law indemnification and the cross-claim of defendant Pavarini Construction Co., Inc. for common-law indemnification are dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of third-party defendant Unistress Corp. dismissing the causes of action of third-party plaintiff Manhattan College for contractual and common-law indemnification; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of third-party Unistress Corp. dismissing the cross-claim of defendant Pavarini Construction Co., Inc. for common-law indemnification; and it is further

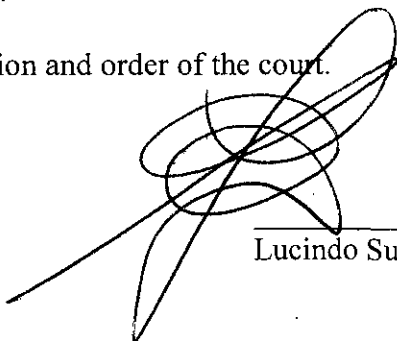
ORDERED, that the motion of defendant Pavarini Construction Co., Inc. for summary judgment is granted to the extent of dismissing plaintiff's causes of action premised upon Labor Law § 200 and common-law negligence (Motion Sequence #4); and it is further

ORDERED, that plaintiff's causes of action against defendant Pavarini Construction Co., Inc. premised upon Labor Law § 200 and common-law negligence are dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Pavarini Construction Co., Inc. dismissing plaintiff's causes of action premised upon Labor Law § 200 and common-law negligence.

This constitutes the decision and order of the court.

Dated: October 30, 2013



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Lucindo Suarez, J.S.C.