

<b>Muevecela v 117 Kent Ave., LLC</b>
2013 NY Slip Op 33931(U)
November 6, 2013
Supreme Court, Kings County
Docket Number: 32377/08
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29<sup>th</sup> day of October, 2013.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X  
IVAN MUEVECELA,

Plaintiff,

- against -

117 KENT AVENUE, LLC,  
66-68 WASHINGTON AVENUE, LLC, and  
EIGHTH AVENUE BUILDER CORP.,

Defendants.  
-----X

EIGHTH AVENUE BUILDER CORP.,

First Third-Party Plaintiff,

- against -

CHS CONTRACTING, LLC,

First Third-Party Defendant.  
-----X

117 KENT AVENUE, LLC, and 66-68 WASHINGTON AVENUE, LLC,

Second Third-Party Plaintiffs,

- against -

CHS CONTRACTING, LLC,

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

EIGHTH AVENUE BUILDER CORP.,

Third Third-Party Plaintiff,

- against -

JW RUFOLO AND ASSOCIATES, INC.,

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

**DECISION AND ORDER**

Index No. 32377/08

Mot. Seq. No. 11, 12, 13, 14

First Third-Party  
Index No. 75657/09

Second Third-Party  
Index No. 75261/10

Third Third-Party  
Index No. 75880/11

-----X  
JW RUFOLO AND ASSOCIATES, INC.,

Fourth Third-Party Plaintiff,

- against -

Fourth Third-Party  
Index No. 75746/12

CHS CONTRACTING, LLC,

Fourth Third-Party Defendant.

-----X  
JW RUFOLO AND ASSOCIATES, INC.,

Fifth Third-Party Plaintiff,

- against -

Fifth Third-Party  
Index No. 75200/13

117 KENT AVENUE, LLC, and 66-68 WASHINGTON AVENUE, LLC,

Fifth Third-Party Defendants.

-----X

The following papers numbered 1 to 31 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2; 3-4; 5-6; 7-8
Opposing Affidavits (Affirmations) _____	9, 10; 11; 12, 13; 14, 15, 16; 17-18
Reply Affidavits (Affirmations) _____	19, 20-21; 22, 23, 24; 25, 26
Memoranda of Law _____	27, 28, 29, 30, 31

In this action to recover monetary damages for a workplace injury and related actions for indemnification, the Court has before it four motions for summary judgment served by defendants and third-party defendants. All the motions are timely and will be considered on the merits.

In sequence No. 11, the defendants/second third-party plaintiffs/fifth third-party defendants, the building owners 117 Kent Avenue, LLC and 66-68 Washington Avenue, LLC (collectively, the Owners), move for summary judgment on (1) their contractual indemnification claim against the defendant/first third-party plaintiff/third third-party plaintiff, the general contractor Eighth Avenue Builder Corp. (Eighth Avenue), (2) their

contractual indemnification claim against the first third-party defendant/second third-party defendant/fourth third-party defendant, the subcontractor CHS Contracting, LLC (CHS), and (3) their claims against Eighth Avenue and CHS for defense costs and attorneys' fees.

In sequence No. 12, the third third-party defendant/fourth third-party plaintiff/fifth third-party plaintiff, the site-safety consultant JW Rufolo and Associates, Inc. (Rufolo), moves for summary judgment (1) awarding it contractual indemnification, together with defense costs and attorneys' fees, against Kent, and (2) dismissing Eighth Avenue's third third-party complaint, together with all cross claims and counterclaims, insofar as asserted against it.

In sequence No. 13, CHS, as the first and second third-party defendant,<sup>1</sup> moves for summary judgment dismissing all claims asserted against it by the first third-party plaintiff, Eighth Avenue, and the second third-party plaintiffs, the Owners.

Finally, in sequence No. 14, Eighth Avenue moves for summary judgment (1) dismissing the Labor Law § 200 and common-law negligence claims of the plaintiff Ivan Muevecela (plaintiff) insofar as asserted against it, and (2) granting it contractual indemnification, together with defense costs and attorneys' fees, against CHS in the first third-party action.

### *The Accident*

The essential facts of plaintiff's accident are undisputed. At the time of the accident (Sept. 26, 2008), plaintiff, in the course of the performance of his duties as a carpenter's helper for CHS, was on the seventh floor of the building under construction at 117 Kent Avenue in Brooklyn, New York (the building), belonging to the Owners. A hole, measuring

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<sup>1</sup>CHS' motion is explicitly limited to its position as the first and second third-party defendant. Although CHS is also the fourth third-party defendant in an action commenced against it by Rufolo, the instant motions do not address the fourth third-party action.

5-6 feet by 3-4 feet, in the seventh floor opened to the sixth floor below.<sup>2</sup> The hole had been created to accommodate a yet-to-be-installed interior stairwell between the sixth and seventh floors for a duplex apartment on these two floors (hereinafter, the stairwell opening). The stairwell opening was covered by a set of planks and a layer of plywood. The plywood layer, consisting of two square sheets of plywood each measuring 4 feet long by 4 feet wide, was laid side by side on top of the planks.<sup>3</sup> At the time of plaintiff's accident, he was walking over the plywood layer, when the planks underneath gave way,<sup>4</sup> and he fell through the stairwell opening to the sixth floor below. The planks were described by plaintiff's co-worker Bryant Cambrelan as "old," "corroded," and "cracked."<sup>5</sup> At the time of the accident, plaintiff was 45 years old, weighed about 150 pounds, and stood about 5'2" tall (155 centimeters). He claims that the accident and the two ensuing surgeries on his spine have rendered him "incapacitated from employment from the date of the occurrence to the present time which incapacity is progressive and continuing."<sup>6</sup>

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<sup>2</sup>The size of the hole was variously described at pretrial depositions as measuring 5-6 feet by 3-4 feet, 7 feet by 7 feet, and 7 feet by 8 feet.

<sup>3</sup>See Cambrelan Tr at 33:3-18, 73:12-13, 183:8, 306:21-307:25, and 308:17-23.

<sup>4</sup>Rufolo selectively cites to a portion of the deposition testimony of plaintiff's co-worker (Bryant Cambrelan) who inspected the remnants of the planks-and-plywood cover immediately after the accident. According to Rufolo, "Bryant Cambrelan . . . testified that the *plywood and planks* covering [ ]hole snapped in half at the time of the accident" (citing to Cambrelan Tr at 40:20-41:6 [emphasis added]). When taken in the context of Mr. Cambrelan's entire deposition testimony, however, it is clear that only the planks, not the plywood, snapped, as Mr. Cambrelan clarified in his deposition testimony two pages later in the transcript (see Cambrelan Tr at 42:23-43:9 ["(T)hey (the plywood sheets) were two individual pieces, so no, they didn't snap. The planks broke. The planks is what snapped. The plywood came down, those two pieces, which were 4-by-4, came down individually."]).

<sup>5</sup>See Cambrelan Tr at 183:4-9.

<sup>6</sup>See Verified Bills of Particulars as to Eighth Avenue and Kent, dated May 7, 2009, and July 3, 2009, respectively.

### *The Contracts*

A trio of contracts – all in effect at the time of the accident – are relevant to the disposition of this case. First, on Dec. 20, 2006, the Owners entered into a Standard Form of Agreement (AIA Document A101-1997), as amended by two riders and as supplemented by the General Conditions of the Contract of Construction (AIA Document A201-1997) (collectively, the Owners' Contract), with Eighth Avenue as the general contractor for the construction of the building. The Owners' Contract (in § 10.2.6) required that Eighth Avenue, as relevant to this case, "designate a responsible member of [Eighth Avenue's] organization at the site whose duty shall be prevention of accidents." However, Eighth Avenue's on-site superintendent Simcha Helfgott testified (at pages 88:10-15 and 115:10-15) that neither he nor anyone else in Eighth Avenue's employ was responsible for safety at the site. Rather, it appears that all safety at the site was provided by Rufolo, which was retained by one of the Owners (117 Kent Avenue, LLC [Kent]<sup>7</sup>) pursuant to a Consulting Agreement, dated Sept. 24, 2007 (the Consulting Agreement), which is the second contract in the series of three contracts governing this project.<sup>8</sup>

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<sup>7</sup>Although the Consulting Agreement references "117 Kent Avenue *Development*, LLC," the record evidence reflects that such reference is incorrect and that the correct party is "117 Kent Avenue, LLC," without the word "Development" in its name.

<sup>8</sup>In addition to the Consulting Agreement with Kent, Rufolo entered into a pair of separate consulting agreements with Eighth Avenue. Neither of the Eighth Avenue-Rufolo consulting agreements are relevant to this case. The first Eighth Avenue-Rufolo consulting agreement, dated Mar. 1, 2005, expired, by its terms, on Mar. 1, 2008, six months before the accident. The second Eighth Avenue-Rufolo agreement, dated Nov. 18, 2004, was limited in scope to Rufolo's representation of Eighth Avenue before OSHA in connection with any investigation of Eighth Avenue by OSHA. The pretrial deposition testimony makes it clear that no OSHA investigation of Eighth Avenue occurred in connection with this project and that the Nov. 18, 2004, agreement is not implicated in this case. Accordingly, only the Consulting Agreement between Rufolo and Kent is discussed herein.

The Consulting Agreement required that Rufolo provide, among other things, “technical assistance for the safety and health of . . . employees” at the site.<sup>9</sup> The Consulting Agreement defined “technical assistance” to include:

*“Audit Inspections.* Performing ‘OSHA’ style audit inspections twice a month at 117 Kent Avenue, Brooklyn, NY 11211. The ‘OSHA’ style audit will be a snapshot of the apparent discrepancies that exist at the time of the inspection. The Firm is not responsible for the correction of audit discrepancies nor jobsite accidents, at the time of the audit or thereafter;

*Safety Meeting Attendance.* Attend Client Safety Meeting and/or Site Superintendent Meeting when requested;

*Telephone Support.* Providing unlimited telephone support regarding OSHA Technical Issues relative to the audit inspection of all Client employees; and

The pretrial deposition testimony of Rufolo’s site safety inspector Salvatore Minutella establishes that he orally reported the results of his inspections to Eighth Avenue’s site superintendent Simcha Helfgott, even though the latter did not work for Rufolo’s client, Kent. In fact, Mr. Minutella repeatedly communicated (or attempted to communicate) his findings to Mr. Helfgott, who, although aware of when Mr. Minutella would visit the site to inspect it, was rarely present on site at the time of these inspections.<sup>10</sup>

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<sup>9</sup>In *haec verba*, this provision states that the “Firm [Rufolo] agrees to render those Services as agreed upon to include providing technical assistance for the safety and health of Firm’s employees.” Read literally, this provision would require Rufolo to protect the safety and health of its own employees. The only way out of this absurdity is to omit the qualifier “Firm’s” and to posit that by “employees,” this provision means all employees at this project *other than* the “Firm’s.”

<sup>10</sup>See Minutella Tr at 87:8-14 (“I had spoken to Simcha about the days that I would do my audit, and he was quite aware that I would come either on Thursdays or Fridays at the start of the workday. So he was pretty familiar with when I would be on the work site.”). See also Minutella Tr at 42:5-6 (“There were times where they [the workers] would say the foreman [*i.e.*, Simcha Helfgott] was not there.”); 54:16-55:4 (“I would call up the site foreman if I didn’t see him on the site . . . to explain to him the deficiencies, particularly serious deficiencies. So I would call up a gentleman by the name of Simcha, and I would either leave a message, or [have] some people speak to him personally and tell him if there [were] any fall protection issues. After a certain period of time usually he would not even call back. I tried to speak with him.”); 55:10-18 (testifying that he provided “telephone support” at the site to “[t]he foreman, whose name was Simcha”); 64:6-10 (“What I would observe would be when Simcha was there, and I would address Simcha about the issues I saw on the site, he would immediately assign a worker to remedy the situation [*i.e.*, a potential OSHA violation].”); 65:1-12 (there may have been five instances when Simcha assigned

(continued...)

Third and finally, some time before the accident, Eighth Avenue entered into a subcontract with CHS for the performance of “layout and frame,” “firestop and sheetrock,” “insulation,” “taping,” “trim (complete),” and “grounds and accessories.” The subcontract consisted of (1) a one-page proposal on CHS’ letterhead specifying the aforementioned work to be performed, and (2) a two-page Subcontractor Agreement on Eighth Avenue’s letterhead (collectively, the Subcontract). The Subcontract includes an indemnification covenant running from CHS in favor of Eighth Avenue and the Owners. It also requires (in § B.4) that CHS’ insurance policy for this project contain a blanket additional insured endorsement.

### *The Pre-Accident Inspection*

On the morning of (and about six hours before) plaintiff’s accident, Rufolo site-safety inspector Mr. Minutella visited the site to perform his duties under the Consulting Agreement. Mr. Minutella testified at his pretrial deposition that, while he was on site that day, he walked the entire building from top to bottom, noting all potential safety violations. According to his notes, he found seven safety violations that day. In terms of their location, these violations were spaced out between the basement and the fourth floor, and none extended above the fourth floor. Mr. Minutella testified (at pages 116:21-118:4) that (1) he specifically inspected the seventh floor; (2) he observed a cover over the stairwell opening; and (3) he considered such cover to be adequate based on his visual observation (he did not test it by walking on it). He explained that he would have written down a violation if he had observed one on the seventh floor, and the fact that he did not write one down indicates that none existed. This appears to be an erroneous conclusion, as his claimed custom and practice failed him in this instance.

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<sup>10</sup>(...continued)

workers to remedy the “situation” at the site before plaintiff’s accident); 84:19-23 (“I would speak with him in person if he was present at the site. Otherwise I would call him on his phone, and if I didn’t speak to him personally I would leave a message.”); 85:3-7 (“Initially he was [at the site]. Shortly after I no longer saw Simcha at the site, and from then on there was no one who I could speak to about the issues that I found, so I would call Simcha on the phone.”); 86:2-7 (“I believe it was already in 2007 where I didn’t see him present. After that sporadically” or “[v]ery rarely”).

It is undisputed that the planks-and-plywood cover over the stairwell opening was never painted with a warning to alert workers of its presence. Yet, Mr. Minutella testified (at page 80:12-18) that “if [the cover] was not marked with the word ‘hole,’ then [he] would also make a notation that it should be marked with the word ‘hole’ in a bright orange paint so that it could be witnessed by the worker who was in the vicinity.”<sup>11</sup> More importantly, Mr. Minutella indicated that the placement of two short (4 x 4) sheets of plywood side by side on the planks over the stairwell opening was unsafe. He testified (at pages 96:16-17 and 97:21-22) that a single sheet of plywood should have been placed on top of the planks to secure the stairwell opening.

The record evidence further discloses that Mr. Minutella did far more, and offered site superintendent Helfgott far more, than routine OSHA form-checking to assist with maintaining safety at the site, as set forth more fully at the margin.<sup>12</sup> He testified that, along

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<sup>11</sup>See also Minutella Tr at 165:5-10 (“OSHA regulations say it [the floor cover over a hole] should be marked,” and it would be a departure from the OSHA regulations not to mark it.); 187:5-9 (the absence of such a marking would be a deficiency).

<sup>12</sup>See Minutella Tr at 90:4-11 (“[s]ometimes on occasion,” he would tell the workers in the area either to repair the fall protection or install the fall protection); 90:21-91:8 (“If I spoke to somebody about fall protection or a floor hole cover I would generally tell them to fix what was there. There were some specific instances where there was nothing there. . . . [I]f I saw someone doing that function of carpentry or something of that sort I would inform them you could cut a piece of wood and put it down there and fasten it down.”); 93:2-5 (“The workers would bring over a piece of wood if they did anything if I spoke to them, and cover the floor hole with a piece of wood.”); 123:24-25 (“I had told workers on occasion to cover a floor hole that I witnessed.”). See also Minutella Tr at 40:25-41:13 (“I would speak to the workers if I noticed they were doing something wrong, and that way I could address it directly and have them correct it there and then, especially if it was something about their personal protective equipment such as safety glasses, if they were cutting or if they were using a hammer or producing dust or in a dusty environment I would see that they would get from their foreman a dust mask, or safety glasses, or something to that effect so that they would immediately take care of that situation.”); 41:18-23 (“I would speak to the foreman and inform them that their worker needs to get certain equipment, this way I could make sure they were aware that the workers needed it so they could order the equipment and bring it to the site.”); 42:17-43:9 (if he saw a condition that needed to be rectified – be it with the actual work being performed or the equipment being worn by the workers – “[he] would at least speak to them and tell them what they need. If they refused it, it was not my job to force them or to stop the work. I was there simply to do as OSHA would do. OSHA would not shut down a site unless there was a fatal condition. So, my job was to simply write down the OSHA violations. I would go a little beyond that and instruct the person, but that was not my responsibility.”); 89:2-6 (“If someone [a worker] was near an area in which they were working without fall protection, I would mention to them . . . , don’t do this work in this manner because there is the hazard.”); 89:12-15, 22-24 (“It was not my  
(continued...)”)

with his inspections, he conducted safety talks for CHS and other subcontractors “on various topics that pertained to particular work that would be done at that time.”<sup>13</sup> In the morning of the accident, he gave workers a tool-box talk on “Keeping Sidewalks Safe for the Public” and distributed a one-page flyer to the six workers who attended his talk. (Plaintiff did not attend the tool-box meeting.)

### *The Pleadings*

Plaintiff’s accident has spawned a good deal of litigation. The underlying action asserts claims against the Owners and Eighth Avenue under, as pertinent herein, common-law negligence and a violation of Labor Law § 200. The Owners’ and Eighth Avenue’s respective answers in the underlying action assert cross claims against each other for indemnification and contribution.<sup>14</sup> Thereafter, the Owners and Eighth Avenue separately impleaded plaintiff’s employer CHS for contractual and common-law indemnification, contribution, and breach of contract for failure to obtain insurance. CHS answered, asserting (1) counterclaims and cross claims against the Owners and Eighth Avenue for contractual and common-law indemnification and contribution, and (2) counterclaims against the Owners and Eighth for breach of contract. Next, Eighth Avenue impleaded Rufolo for (1) common-law indemnification and contribution, and (2) contractual indemnification and breach of contract to obtain insurance. Rufolo answered, asserting cross claims against the Owners, Eighth Avenue, and CHS for contractual and common-law indemnification and contribution. Finally, Rufolo separately impleaded CHS and the Owners, asserting (1) common-law

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<sup>12</sup>(...continued)

function to even speak to the workers to inform them to do something. I did it upon myself to speak with them if there was a hazard. . . . Sometimes I would instruct them either nail this down or to get a stronger piece of wood, but it was not my duty to do that.”).

<sup>13</sup>For example, if some work consisted of making openings in the building floor, that would be “something that [he] would have discussed with the workers at the job site” (Minutella Tr at 38).

<sup>14</sup>The Owners initially answered by separate counsel and asserted cross claims against each other in their respective answers. Thereafter, the Owner Kent assumed the other Owner’s representation in the underlying action and the ensuing third-party actions. Nothing in this decision and order affects any cross claims between the Owners *inter se*.

indemnification and contribution against CHS and the Owners, and (2) contractual indemnification and breach of contract against the Owners. CHS has not answered or otherwise responded to the complaint in Rufolo's third-party action against it, and Rufolo has taken no default against it. The Owners answered Rufolo's third-party action, asserting (1) a counterclaim against Rufolo for contribution and indemnification, and (2) cross claims against all other defendants in the underlying action and in all third-party actions for contractual and common-law indemnification and contribution.

### *The Motions*

Eighth Avenue has moved for dismissal of plaintiff's common-law negligence and Labor Law § 200 claims insofar as asserted against it. In addition, all defendants have moved for dismissal of cross claims, counterclaims, and third-party claims asserted by other defendants against them. Specifically, the Owners have moved for summary judgment on their contractual indemnification claims and cross claims against Eighth Avenue and CHS, together with defense costs and attorneys' fees. Next, Rufolo has moved for summary judgment (1) granting it summary judgment on its contractual indemnification claim against Kent, together with defense costs and attorneys' fees in the fifth third-party action, and (2) dismissing Eighth Avenue's third third-party complaint, together with all cross claims and counterclaims, insofar as asserted against it.<sup>15</sup> Thereafter, CHS has moved for summary judgment dismissing all third-party claims asserted against it in the first and second third-party actions. Finally, Eighth Avenue has moved for summary judgment for contractual indemnification, including defense costs and attorneys' fees, against CHS in the first third-party action.

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<sup>15</sup>Although Rufolo's counsel neglected to sign the notice of motion, the Court will consider its motion because he signed the supporting affirmation (*see* CPLR 2001).

***Plaintiff's Common-Law Negligence and  
Labor Law § 200 Claims Against Eighth Avenue***

Where a premises condition is at issue, a general contractor may be held liable in common-law negligence and for a violation of Labor Law § 200 if the general contractor either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused it (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Here, the conflicting deposition testimony presents triable issues of material fact as to which defendant – either Eighth Avenue, CHS, or both – created, or had actual or constructive notice of, the allegedly inadequate planks-and-plywood cover over the stairwell opening. Both Eighth Avenue and CHS point an accusing finger at the other as they assess blame for plaintiff's accident. The principal of Eighth Avenue, Morris Kompel, testified that, before plaintiff's accident: (1) Eighth Avenue had only one employee at the site (Helfgott) as the entire job had been subcontracted out to various trades; (2) CHS, and no one else, was responsible for installing floor protection at the site; (3) CHS provided Eighth Avenue with a written proposal for additional laborers to perform a clean-up and "odds and ends" at the site at the billing rate of \$110 per laborer per day; (4) CHS' additional laborers performed safety protection at the site; and (5) CHS invoiced Eighth Avenue for the work of its (CHS') additional laborers.<sup>16</sup> The site superintendent for Eighth Avenue, Mr. Helfgott, testified that, before plaintiff's accident: (1) he was the only Eighth Avenue employee on site on a regular basis; (2) CHS was responsible for installing fall protection at the site; (3) he informed CHS' principal Hewlett Samuel that CHS was responsible for protection of floor openings as part of its layout/framing work; and (4) CHS fulfilled that responsibility by protecting the stairwell opening.<sup>17</sup>

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<sup>16</sup>See Kompel Tr at 10:24-12:7, 37:24-38:24, 39:25-40:13, 42:14-21, 44:3-6, 66:5-68:19, 77:23-78:3, 127:15-128:18, and 147:18-21.

<sup>17</sup>See Helfgott Tr at 34:22-35:4, 35:14-17; 47:22-48:5, 55:13-22, 78:23-79:16, 98:8-12, 116:9-23, 117:5-13, 122:6-7, and 142:14-143:5.

Turning to CHS, the Court notes that two of its three witnesses have placed blame for plaintiff's accident squarely on Eighth Avenue. According to CHS' owner, Hewlett Samuel, and CHS' supervisor, Carlton Craig: (1) CHS did not use any planks or plywood at the site; (2) no one from CHS covered (or instructed anyone else to cover) the stairwell opening; (3) CHS did not install any partitions around the stairwell opening; (4) Helfgott of Eighth Avenue was "[i]n total control" of the site; (5) CHS made its proposal to provide Eighth Avenue with additional laborers six months *after* the accident; (6) Eighth Avenue had five laborers<sup>18</sup> working at the site under Simcha Helfgott's supervision *before* the accident; (7) the five laborers were maintained on its payroll *before* the accident, but were transferred to CHS' payroll, at Eighth Avenue's request, *after* the accident; (8) the five laborers performed, in addition to cleaning, "protection" of the openings in the main staircases that led from the first floor to the seventh floor; (9) the five laborers installed the protection for the stairwell opening *before* the accident, using the plywood supplied by Eighth Avenue; and (10) the Eighth Avenue laborers performed a post-accident repair of the planks-and-plywood opening, together with the installation of a surrounding barricade.<sup>19</sup>

The third witness for CHS – plaintiff's co-worker Bryant Cambrelan – has made Eighth Avenue and CHS so intertwined that they cannot be separated for the purpose of determining which of the two entities was responsible for the accident. According to Mr. Cambrelan (at pages 43:21-44:7, 78:22-79:4, and 80:7-15), the "general contractor" had installed the planks-and-plywood cover for the stairwell opening *before* plaintiff's accident, although he erroneously identified the general contractor as "CHS." Despite his

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<sup>18</sup>Mr. Samuel noted (at pages 318:12-319:25 and 321:18-21) that a pair of Eighth Avenue's laborers had been placed on CHS' payroll *before* the accident (other than the five laborers who were placed on CHS' payroll *after* the accident) to perform a specific task in the garage – work that was unrelated to the protection of the stairwell opening.

<sup>19</sup>See Samuel at 62:23-63:5, 79:11-80:7, 128:5-130:11, 149:14-17, 150:11-14, 151:6-16, 152:21-155:6, 174:22-175:14, 213:3-8, 214:10-12, 218:8-14, 220:23-221:5, 228:5-13, 291:14-292:25, 293:14-295:2, 296:9-12, 300:6-12, 301:5-6, 301:18-25, 305:20-307:6, 307:21-308:8, 380:22-25, 396:7-10, 402:9-22, 409:8-20, and 432:4-21. See also Craig at 45:23-48:19, 49:3-50:10, 52:22-25, 56:10-57:7, 92:19-93:3, 96:3-20, 101:7-9, 104:25-105:8, 113:12-114:7, 138:18-139:2, 176:14-22, 185:9-13, 246:15-247:6, 263:10-15, 264:5-14.

unfamiliarity with the general contractor's name "Eighth Avenue" and his confusion as to the scope of CHS' role in the project. Mr. Cambrelan (at pages 80:23-81:4) correctly identified Mr. Helfgott of Eighth Avenue as the site superintendent who oversaw all other contractors at the site and allocated their daily duties. But when Mr. Cambrelan was asked to identify his employer at the time of the accident, he explained (at pages 11:20-24 and 79:8-20) that he worked for Mr. Samuel (the owner of CHS), who, in Mr. Cambrelan's (erroneous) view acted as the subcontractor to CHS; in other words, that CHS was the general contractor. That said, Mr. Cambrelan testified that, on the first business day *after* plaintiff's accident, Carlton Craig at CHS instructed him to protect the stairwell opening<sup>20</sup> and that he (Cambrelan) installed a barricade around it.<sup>21</sup> Thus, according to Mr. Cambrelan, the general contractor (*i.e.*, Eighth Avenue) was responsible for covering the stairwell opening *before* the accident, but the subcontractor (*i.e.*, CHS or Mr. Samuel's company) was responsible for the installation of the barricade around the stairwell opening *after* the accident. To add to the mystery of the party responsible for the accident, Mr. Cambrelan was unable to recall which individuals or entity installed the new planks-and-plywood cover over the stairwell opening *after* the accident. In light of the conflicting deposition testimony, the branch of Eighth Avenue's motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims insofar as asserted against it is denied without regard to the sufficiency of plaintiff's opposition papers, for failure to make out a prima facie case for the relief requested.

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<sup>20</sup>“Although evidence that repairs were made or remedial measures taken after an accident are not admissible to show that a party was negligent, such evidence may be admitted where there is a disputed issue of maintenance or control” (*DeRoche v Methodist Hosp. of Brooklyn*, 249 AD2d 438, 439 [2d Dept 1998]).

<sup>21</sup>See Cambrelan at 66:9-67:25, 68:13-70:13, 111:4-22, and 270:12-271:7. Contrary to Eighth Avenue's characterization of Mr. Cambrelan's testimony, CHS did not cover "any" floor holes with plywood at the site. Mr. Cambrelan was specific in his deposition testimony (at pages 88:22-89:20 and 91:7-11) that the only holes which his company (*i.e.*, CHS) covered were very small – about 4 inches by 5 inches – in size.

### *The Owners' Contractual Indemnification Claim Against Eighth Avenue*

The Owners' contract with Eighth Avenue expressly requires that Eighth Avenue indemnify the Owners for all claims relating to the site-related work to the extent that a bodily injury at the site is caused by the negligent acts or omissions of Eighth Avenue or CHS. Specifically, the Owners' contract contains an indemnification covenant (in § 3.18.1) which provides, in relevant part, that:

“To the fullest extent permitted by law . . . , the Contractor [Eighth Avenue] shall indemnify and hold harmless the Owner<sup>[22]</sup> . . . 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 . . . , but only to the extent caused by the negligent acts or omissions of the Contractor [Eighth Avenue], a Subcontractor [CHS],<sup>23</sup> [or] anyone directly or indirectly employed by them . . . , regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder” (emphasis added).

The Owners have made a prima facie showing to trigger the application of the aforementioned covenant. Plaintiff's accident – a bodily injury – arose out of his performance of the work in the building, and the stairwell opening in the seventh floor was inadequately protected either (1) by Eighth Avenue, which was contractually obligated to the Owners to “take reasonable precautions for safety of, and . . . provide reasonable protection to prevent . . . injury . . . to[,] . . . employees on the Work” (§ 10.2.1.1), or (2) by Eighth Avenue's subcontractor CHS for whose work Eighth Avenue was also contractually responsible to the Owners (§ 3.3.2),<sup>24</sup> or (3) by both Eighth Avenue and CHS.

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<sup>22</sup>The term “Owner” is defined (on page 1 of the Owners' Contract) to include both Owners (footnote by the Court).

<sup>23</sup>The term “Subcontractor” is defined (in § 5.1.1 of the Owners' Contract) as “a person or entity who has a direct contract with the Contractor [Eighth Avenue] to perform a portion of the Work at the site” (footnote by the Court).

<sup>24</sup> See Owners' Contract, § 3.3.2 (“The Contractor shall be responsible to the Owner for acts and omissions of the . . . Subcontractors and their agents and employees. . .”).

The Owners' motion discloses that, after plaintiff's accident, Eighth Avenue did not contest the Owners' right to contractual indemnification. In fact, the Owners already have tendered the defense and indemnity of this case to Eighth Avenue, as evidenced by the letters, dated Jan. 3, 2013, and Jan. 7, 2013, from Eighth Avenue's primary insurer, Interstate Fire & Casualty Company (Interstate), and its excess insurer, Everest National Insurance Company, respectively. The Jan. 3<sup>rd</sup> letter states that "Interstate . . . will accept [the Owners'] tender of defense and provide primary coverage without reservation of rights," subject to two conditions: (1) the law firm of Lester, Schwab, Katz and Dwyer, LLP (the Lester Schwab firm) must be substituted as the Owners' defense counsel in this case, and (2) the Owners must dismiss all cross claims against Eighth Avenue. The Jan. 7<sup>th</sup> letter states that Everest, as Eighth Avenue's excess insurer, "agrees to 'follow form' on the tender acceptance by Interstate . . . and provide excess coverage above the Interstate . . . policy." However, the Owners have been unable to comply with Interstate's conditions and transfer the litigation file to the Lester Schwab firm because they have been unwilling to withdraw their cross claims against Eighth Avenue. In this regard, the Owners assert that they "seek full contractual indemnity against Eighth Avenue for any exposure that is *over and above* any coverage which is actually provided by the carriers for Eighth Avenue, including legal fees which the carriers have refused to reimburse."<sup>25</sup>

In opposition to this branch of the Owners' motion, Eighth Avenue posits that the Owners' claim for contractual indemnification is moot. Eighth Avenue contends that because its insurers, Interstate and Everest, have already accepted the Owners' defense in this matter after much "lolly-gagging"<sup>26</sup> by the Owners' counsel, the Owners' failure to transfer the litigation file to the Lester Schwab firm was a breach of its insurers' tender-acceptance

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<sup>25</sup>See Affirmation of Attorney Timothy S. Nelson, dated May 14, 2013, ¶ 51 (emphasis added).

<sup>26</sup>See Affirmation in Opposition of Attorney Victor Kotec, ¶ 13, dated Aug. 1, 2013. According to the unabridged Oxford English Dictionary (the CD edition), "lollygagging" (alternatively spelled as "lallygagging") is an American slang term for, among other things, dawdling or dallying.

agreement. Eighth Avenue also asserts that the Owners “may argue that [they are] precluded from abiding by the tender acceptance agreement with Eighth Avenue on account of a contractual indemnification claim asserted by . . . Rufolo against [one of the Owners,] Kent.”<sup>27</sup>

The Court finds that Eighth Avenue has failed to rebut the Owners’ prima facie showing. Three reasons support the Court’s conclusion. First, the Owners are expressly seeking indemnity for any damages in *excess* of Eighth Avenue’s policies, a fact that Eighth Avenue has failed to acknowledge in its opposition. Second, Eighth Avenue’s primary insurer, Interstate, has agreed to the Owners’ continued retention of their own law firm (Hoffman Roth & Matlin, LLP), with such retention to be maintained as a separate litigation file on Eighth Avenue’s policies with Interstate and Everest. Thus, it appears from the Owners’ submissions that Interstate (and, likewise, Everest) has waived – at least for now – its prior requirements that the Lester Schwab firm be substituted for the Owners’ counsel and that the Owners withdraw their cross claims against Eighth Avenue.<sup>28</sup> Third, as is explained more fully below where the Court addresses Rufolo’s motion, Rufolo does not possess a valid contractual indemnification or common-law indemnification/contribution claim against Kent. Thus, the Court need not determine whether Rufolo’s claim against Kent falls within the scope of the Owners’ indemnification agreement with Eighth Avenue. In the absence of any evidence that the Owners were negligent, the Court grants the branch of the Owners’ motion for contractual indemnification against Eighth Avenue to the extent that, as set forth in the Owners’ motion, they seek damages in excess of Eighth Avenue’s insurance policy limits with Interstate and Everest (*see Tobio v Boston Props., Inc.*, 54 AD3d 1022, 1024 [2d Dept 2008]; *Walsh v Morse Diesel, Inc.*, 143 AD2d 653, 656 [2d Dept 1988]).

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<sup>27</sup>See Affirmation in Opposition of Attorney Kotec, ¶ 14.

<sup>28</sup>See Affirmation of Attorney Olivia M. Gross, dated Aug. 9, 2013, ¶ 21.

Contractual indemnification “encompasses the right to recover attorneys’ fees, costs, and disbursements” (*American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 307 AD2d 939, 942 [2d Dept 2003] [internal quotation marks omitted]). Because the Owners are entitled to contractual indemnification from Eighth Avenue, the Owners are also entitled to recover from Eighth Avenue their defense costs and attorneys’ fees (*see Centennial Contractors Enters. v East N.Y. Renovation Corp.*, 79 AD3d 690, 693 [2d Dept 2010]; *Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1019-1020 [2d Dept 2011]). Such defense costs and attorneys’ fees are subject to an offset to the extent that Eighth Avenue’s insurers have already reimbursed the Owners.

#### ***The Owners’ Contractual Indemnification Claim Against CHS***

The indemnity provision in the subcontract dispenses with proof of negligence on CHS’ part to trigger its obligation to indemnify the Owners. The indemnification provision at issue states, in relevant part, that:

“To the fullest extent permitted by law, Subcontractor [CHS] will indemnify and hold harmless Eighth Avenue . . . and Owner[s] . . . from and against any and all claims . . . , including legal fees and all court costs . . . [,] arising in whole or in part and in any manner from injury . . . of person . . . *resulting from the acts, omissions, breach or default of Subcontractor [and] its . . . employees . . . in connection with the performance of any work by . . . Subcontractor* pursuant to any contract . . . , except [when] these claims, suits, liens, judgments, damages losses and expenses [are] caused by the negligence of Eighth Avenue. . . . Subcontractor will defend and bear all costs of defending any actions or proceedings brought against Eighth Avenue . . . and/or Owner[s], . . . arising in whole or in part out of any such acts, omissions, breach or default. The foregoing indemnity shall include injury . . . of any employee of the . . . Subcontractor. . .” (emphasis added).

The Owners have made a prima facie showing that CHS is obligated to indemnify them under the foregoing provision. It is undisputed that the accident arose out of plaintiff’s work when, as he was walking on the seventh floor in search of materials he needed for his work, he stepped on the planks-and-plywood cover and fell into the stairwell opening.

CHS responds that the Owners' reading of the indemnification provision is too narrow and that its obligation to indemnify the Owners is triggered by a confluence of two discrete events: (1) performance of work, plus (2) "the acts, omissions, breach or default of Subcontractor [CHS]" in the performance of such work. According to CHS, the second event did not occur because the installation of the inadequate planks-and-plywood cover predated CHS' work on the site. Separately, CHS argues that the Owners are vicariously liable for the acts or omissions of two individuals who frequented the site before the accident. The first such individual, according to CHS, was site safety inspector Mr. Minutella who, as Kent's agent, was negligent in failing to observe the inadequacy of the planks-and-plywood cover. The second such individual was Avi Feldman, the son of Eighth Avenue's principal (Morris Feldman), who was on site about four days a week before the accident, spending two-three hours on each visit observing the progress of construction. As CHS summarizes its vicarious liability argument, "there was an alleged OSHA violation on the premises [in the form of the inadequate planks-and-plywood cover] which was observed by Morris Feldman's son, Avi Feldman, on behalf of . . . Kent[,] and obviously observed by their site safety contractor, . . . Rufolo[,] on numerous occasions."<sup>29</sup>

The Court finds that CHS has failed to rebut the Owners' prima facie showing. As an initial matter, the Court notes that CHS misconstrues the terms of the indemnification provision as a matter of law. Appellate courts have held, in construing similar indemnification provisions, that "work" alone is the sole event triggering indemnification, without a concomitant inquiry into the indemnitor's negligence (*see Tobio*, 54 AD3d at 1024; *Keena v Gucci Shops, Inc.*, 300 AD2d 82 [1<sup>st</sup> Dept 2002]).

Next, the Court finds CHS' vicarious liability argument to be ill-founded. An analogous decision of the Court of Appeals in *O'Sullivan v IDI Constr. Co., Inc.* (7 NY3d

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<sup>29</sup>See Affirmation in Opposition to the Owners' motion of Attorney Joseph C. Bellard, dated Aug. 1, 2013, ¶ 24 (emphasis added).

805 [2006]) precludes CHS from imputing to the Owners the alleged negligence of Kent's site-safety consultant Rufolo. In *O'Sullivan*, the worker was carrying lumber on his shoulder when he tripped over a protruding piece of metal. He asserted, as is pertinent to this case, common-law negligence and Labor Law § 200 claims against the general contractor (known in that case as "IDI"). He maintained that the general contractor could be held liable to him under this theory of liability because the general contractor employed a site-safety manager who had failed to observe the protrusion over which he, the worker, tripped. In a memorandum decision, the Court of Appeals held that the injured worker could not "recover in negligence or pursuant to Labor Law § 200 because no triable issue of fact exists that defendant IDI[s] . . . on-site safety manager controlled the activity bringing about the injury to enable it to avoid or correct an unsafe condition or that IDI maintained an unreasonably dangerous work environment" (*id.* at 806 [internal quotation marks and citations omitted]). Similarly, Kent here exercised no control over Rufolo, which interacted on site with Eighth Avenue's site superintendent Helfgott or, in Mr. Helfgott's absence, with any other employer representative.<sup>30</sup> No one from Kent or the other Owner visited the site on a regular basis; rather, Kent merely received reports from Rufolo.<sup>31</sup> Accordingly, Rufolo's alleged failure to observe the inadequacy of the planks-and-plywood cover cannot be imputed to Kent or to the Co-Owner.

Finally, the acts or omissions of the other individual – Avi Feldman, the son of Eighth Avenue's principal – cannot impose any vicarious liability on the Owners. It was Eighth Avenue, as the general contractor (not the Owners), which was contractually responsible for

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<sup>30</sup>See Rufolo Tr at 39:20-40:5 ("We [Rufolo] arrive at the site. We ask for and meet with the designated representative of the employer and we offer that designated employer the opportunity to walk around with us when we do the OSHA-style audit or we offer to that person the opportunity for us if they choose not to go with us, the opportunity for us to discuss with them what we found after we did the audit . . .").

<sup>31</sup>See Rufolo Tr at 41:3-4.

maintaining employee safety at the site. Avi Feldman played no meaningful role in construction at the site or in worker protection.<sup>32</sup> Therefore, CHS' contentions lack merit.

Because the Owners have made a prima facie showing that they were free from negligence, and in opposition, CHS has failed to raise a triable issue of fact, the Owners are entitled to a complete contractual indemnification against CHS under the Subcontract (*see Grant v City of N.Y.*, 109 AD3d 961, 2013 NY Slip Op 05986, \*3 [2d Dept 2013]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 802 [2d Dept 2010]). Likewise, the Owners are entitled to an award of defense costs and attorneys' fees from CHS.<sup>33</sup>

#### ***Eighth Avenue's Contractual Indemnification Claim Against CHS***

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 (*see Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *see also* General Obligations Law [GOL] § 5-322.1). The aforementioned factual dispute between Eighth Avenue and CHS regarding which of them created, or had actual or constructive notice of, the allegedly inadequate planks-and-plywood cover over the stairwell opening precludes the grant of the branch of Eighth Avenue's motion which is for contractual indemnification against CHS.

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<sup>32</sup>The record evidence establishes that Avi Feldman accompanied a Rufolo site-safety inspector once, and that, at some other time, a Rufolo site-safety inspector discussed the results of an inspection with him (*see* Rufolo Tr at 102:15-103:11; Minutella Tr at 58:22-59:4). The record evidence fails to disclose when these events occurred in relation to plaintiff's accident. Although Mr. Helfgott (at pages 62:7-8 and 134:23-135:2) characterized Avi Feldman as the Owners' representative, it appears that the only work that Mr. Feldman actually performed at the job site was to take progress photographs (Helfgott Tr at 62:17-25) and observe the progress of construction at the site (Avi Feldman Tr at 21:16-17, 26:13-16, 29:24-30:8, and 50:7-12 ("I observed what was going on as far as the progress of construction. I was at the time a gofer, a liaison . . . , a go-between, between the engineer to get the plans, to the on-site contractor so the progress could proceed.")).

<sup>33</sup>Unlike Eighth Avenue's insurers, both of which have agreed to indemnify the Owners and assume their defense, CHS' insurer has not done the same.

### ***Rufolo's Contractual Indemnification Claim Against Kent***

Rufolo's Consulting Agreement with Kent contains a broadly worded indemnification provision in Rufolo's favor. The Consulting Agreement (in § 8) states, in relevant part, that:

“Client [Kent] assumes entire responsibility for . . . all claims . . . of any nature . . . whatsoever for which Firm [Rufolo] shall be liable under the Consulting Agreement or, by operation of law, with respect to the scope of work covered by this Consulting Agreement and agrees to indemnify, save Firm harmless, and defend from and against all claims . . . caused or occasioned thereby . . . , or occurring in connection therewith under the Consulting Agreement, or as imposed by law.”

As noted, a party seeking contractual indemnification must prove itself free from negligence. Here, in moving for summary judgment on its fifth third-party claim for contractual indemnification against Kent, Rufolo has failed to eliminate the existence of all triable issues of fact regarding its negligence. Two specific points stand out. First, Rufolo acted as the sole safety inspector at the site. Except for Rufolo, no one inspected the entire building for safety and no one conducted tool-box safety talks for the workers. Although Eighth Avenue's site superintendent, Helfgott, should have been present on site at all times, the evidence in the record establishes that he was often absent from the site and, in fact, he was off site on the Friday afternoon when plaintiff had his accident, even though it was his (Mr. Helfgott's) duty to lock up the site after all workers were gone.<sup>34</sup> Second, an inadequately protected stairwell opening was indisputably within the scope of Mr. Minutella's inspection duties and, as his deposition testimony indicates, he tried to fulfill his duties conscientiously by writing down and communicating his findings to Eighth

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<sup>34</sup>To downplay its role as the overall site-safety consultant acting for the benefit of both Eighth Avenue (the general contractor) and Kent (an Owner), Rufolo isolates one fact from other facts disclosed in discovery. Whether, as Rufolo argues, Mr. Minutella spoke with construction workers at the site outside the scope of his duties to Rufolo is clearly less substantial in the overall mix of issues this case presents; namely, that (1) Mr. Minutella dutifully reported his observations of safety violations to Eighth Avenue's site superintendent Simcha Helfgott; (2) Mr. Helfgott remedied the violations to the extent reported by Mr. Minutella; (3) Mr. Helfgott conceded that he was not responsible for safety at the site; and (4) Eighth Avenue failed to have its own site-safety consultant, in violation of its contractual obligation to the Owners to have one on site.

Avenue's site superintendent Helfgott, either in person or by telephone. Mr. Minutella, by his own deposition testimony, made it clear that he was not a passive note-taker but an active participant in the remediation of dangerous conditions when, *and if*, he happened to observe them.<sup>35</sup> About six hours prior to plaintiff's accident when he inspected the building, he observed no violations above the fourth floor, and acknowledges he inspected the seventh floor where the accident occurred.<sup>36</sup> In particular, he failed to observe at that time that two sheets of plywood were lying side by side over the planks covering the stairwell opening. He conceded in his pretrial testimony that a single sheet of plywood should have been laid on top of the planks, instead of two sheets of plywood placed side by side.<sup>37</sup> He also failed to observe at that time that the planks-and-plywood cover over the stairwell opening was not

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<sup>35</sup>Rufolo places great store in the terms of the Consulting Agreement – understandably so, since it provides that its “OSHA” style audit will be a snapshot of the apparent discrepancies that exist at the time of the inspection.” But other evidence before the Court shows that Rufolo’s site-safety inspector Mr. Minutella did more than that. Not only did Mr. Minutella identify the safety violations, but he also followed up with general contractor Eighth Avenue to ensure that those safety violations were remedied, even though Eighth Avenue was not Rufolo’s client. Whether Mr. Minutella performed additional work at the site simply as a “courtesy,” he did perform such work voluntarily (rather than in response to a request from anyone at the site) and within the scope of his employment for Rufolo. Thus, the terms of the Consulting Agreement have been modified by the course of Mr. Minutella’s actual performance of Rufolo’s work at the site (*see CT Chemicals (U.S.A.), Inc. v Vinmar Impex, Inc.*, 81 NY2d 174, 179 [1993] [“Once a contract is formed, the parties may . . . change their agreement by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel.”])).

<sup>36</sup>Rufolo’s argument that “[n]o party has come forward with any evidence to even suggest the fall protection was the same” from the time of Mr. Minutella’s inspection of the seventh floor at about 8:30 A.M. and plaintiff’s accident at about 2:30 P.M. on the same day, misses the point. To obtain dismissal of claims against it, Rufolo bears the burden of making a prima facie showing that the fall protection had undergone a change in the six hours between the time of Mr. Minutella’s inspection and plaintiff’s accident. At the summary judgment stage, it would not be proper to require the parties opposing Rufolo’s motion to prove the negative.

<sup>37</sup>The fact that two short, side-by-side sheets of plywood were laid on top of the planks disposes of Rufolo’s argument that “the accident could only have been caused by a *latent or hidden defect within* the planks and plywood covering” (emphasis added). The two side-by-side sheets of plywood, lying on top of the planks, were readily observable. Similarly unpersuasive is Rufolo’s assertion that “[a] *visual inspection* would not reveal any deficiencies regarding the internal ability of the planks and plywood to hold the Plaintiff’s weight” (emphasis added). Plaintiff’s co-worker, Bryant Cambrelan, who examined the planks immediately after the accident, readily observed that they were “old” and “corroded.” On summary judgment, the Court is unprepared to find as a matter of law that a visual inspection of the plywood and planks by Rufolo before the accident would have failed to reveal their deficiencies.

painted with a warning “Hole” to alert the workers of the presence of the stairwell opening underneath.<sup>38</sup> In light of the existence of these triable issues of material fact, it is irrelevant whether or not the aforementioned indemnification provision complies with GOL § 5-322.1. What is important is that Rufolo has failed to establish that it was free of any negligence contributing to plaintiff’s accident.<sup>39</sup> Accordingly, Rufolo is not entitled to summary judgment on its contractual indemnification claim against Kent (*see Rodriguez v Tribeca 105, LLC*, 93 AD3d 655, 657 [2d Dept 2012]; *see also Goodleaf v Tzivos Hashem, Inc.*, 19 Misc 3d 1104[A], 2008 NY Slip Op 50555[U] [Sup Ct, Kings County 2008], *aff’d on other grounds* 68 AD3d 817 [2d Dept 2009]).

The decisions cited by Rufolo in support of its position that, as a site-safety consultant, it was free of negligence as a matter of law are inapposite. In *Doherty v City of N.Y.* (16 AD3d 124, 125 [2005]), the First Department affirmed the dismissal of the general contractor’s indemnification claim against a safety consultant, since, in that case, “there [was] no evidence that it acted negligently or otherwise unreasonably as the site safety consultant.” Here, however, there is sufficient evidence of Rufolo’s negligence precluding summary judgment in its favor. Next, the decisions in *Hernandez v Yonkers Contr. Co., Inc.* (306 AD2d 379 [2d Dept 2003]), *Hughes v Tishman Constr. Corp.* (40 AD3d 305 [1<sup>st</sup> Dept 2001]), and *Lachow v City of N.Y.* (2012 NY Slip Op 32012[U] [Sup Ct, NY County 2012])

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<sup>38</sup>The absence of the warning word “Hole” on the planks-and-plywood cover defeats Rufolo’s position that its contractual obligations were limited to “[a]pparent discrepancies that exist[ed] at the time of the inspection.” Assuming that the phrase “apparent discrepancies,” as used in the Consulting Agreement excluded hidden OSHA violations, the undisputed absence of a requisite painting on the planks-and-plywood cover was undoubtedly “apparent.”

<sup>39</sup>Muddying the waters between worker supervision on the one hand and dangerous conditions on a construction site on the other hand, Rufolo argues that it “did not supervise, direct, control, or instruct any work whatsoever on the subject construction project and had no authority to do so,” and that “[t]here is no evidence in the instant matter to even remotely suggest that Rufolo exercised any direction, supervision or control over the means and methods of [p]laintiff’s work” (emphasis omitted). However, Rufolo’s undisputed lack of authority to supervise workers on the site does not excuse them for ignoring dangerous conditions on the site, the specific task for which they were engaged. It is equally irrelevant that Rufolo did not supervise, direct, or control plaintiff’s work.

are all factually and legally inapposite because they either involved construction managers/consulting engineers (rather than site-safety inspectors) or concerned the improper means and methods of work (rather than a dangerous condition on a construction site).<sup>40</sup> Finally, *Cahill v Triborough Bridge & Tunnel Auth.* (31 AD3d 347 [1<sup>st</sup> Dept 2006]), a means and methods case, did not concern a site-safety inspector.

***Third-Party Plaintiffs' Common-Law  
Indemnification and Contribution Claims Against CHS***

The third-party plaintiffs' common-law indemnification and contribution claims against CHS are barred by Workers' Compensation Law § 11. This statute precludes any third-party claim for common-law indemnity and contribution against the injured worker's employer in the absence of a "grave injury" (see *Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642, 644 [2d Dept 2011]). The statute defines a "grave injury" to include, as is relevant herein, "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." In *Rubeis v Aqua Club, Inc.* (3 NY3d 408, 417 [2004]), the Court of Appeals defined "permanent total disability" as "unemployability in any capacity."

The Owners and Eighth Avenue, as opponents of this branch of CHS' motion, bear the ultimate burden of showing a "grave injury" and, at the very least, must demonstrate the existence of a question of fact in this regard. Their burden as opponents is *not* dependent on whether CHS as the movant has made a sufficient prima facie case as to the absence of a "grave injury" (see *Ibarra v Equipment Control, Inc.*, 268 AD2d 13, 17 [2d Dept 2000]). Here, the medical submissions by the Owners and Eighth Avenue have failed to raise a triable issue of fact as to whether plaintiff sustained a brain injury resulting in "permanent total disability," since they are either not in admissible form (see *Grasso v Angerami*, 79

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<sup>40</sup>Rufolo's characterization of a "consulting engineer" as a "safety engineer" in *Hernandez* is a stretch in light of the *Hernandez* court's specific reference to that defendant as a "consulting engineer." Equally important, the consulting engineer in *Hernandez* was dismissed from the case on plaintiff's direct claim. Unlike *Hernandez*, Rufolo is not a direct defendant in this case.

NY2d 813, 824 [1991]),<sup>41</sup> or are factually insufficient (*see Anton v W. Manor Constr. Corp.*, 100 AD3d 523, 524 [1<sup>st</sup> Dept 2012]). Plaintiff's treating neurologist Aric Hausknecht, M.D., found in his Feb. 12, 2009, report that plaintiff: (1) experiences "persistent neck and back pain with associated sensorimotor signs and symptoms, (2) suffers from "significant neurocognitive and neuropsychological sequelae from his head injury," (3) "may be an appropriate candidate for interventional pain management or surgery," and (4) is "totally" (rather than permanently) disabled. Although Dr. Hausknecht ticks off (in a section captioned "Impression") plaintiff's numerous injuries, including a "[c]losed head trauma with post concussion syndrome and traumatic brain injury," the only radiological support for this conclusion is a CT scan of the brain which states that its results were "normal."<sup>42</sup> Dr. Hausknecht does not specifically attribute plaintiff's disability to a brain injury, as opposed to some of his other alleged injuries, especially the injuries to his neck and back that are also discussed in the report (*see Paredes v 1668 Realty Assoc. LLC*, 34 Misc 3d 1240[A], 2012 NY Slip Op 50486[U], *affd as modified* 2013 NY Slip Op 06353 [2d Dept 2013]). Next, plaintiff in his bills of particulars does not plead that he has been permanently disabled, but rather that he has been "incapacitated from employment from the date of the occurrence to the present time which incapacity is progressive and continuing."<sup>43</sup> Finally, Eighth Avenue's own expert, vocational rehabilitation specialist Peter D. Caposto, M.S., CRC, opines in his Mar. 22, 2013, report, that plaintiff is "employable for performing production tasks, such as assembly, packaging, inspection, labeling, parts sorting, re-work, machine operation, and

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<sup>41</sup>This evidence consists of the unsigned and unaffirmed Sept. 13, 2012, brain MRI report revealing that plaintiff is suffering from a "traumatic axonal injury with hemorrhage."

<sup>42</sup>The CT scan report to which Dr. Hausknecht refers (on page 3 of his report) is not in the record. While the court is aware that CT scans are not the best test for detecting a brain injury and that a person with a traumatic brain injury can have a normal CT scan, no other test was done. See, e.g., *Diffusion Tensor Imaging in Mild Traumatic Brain Injury Litigation*, J Am Acad Psychiatry Law 39:5 1-23, 2011. The use of this test is controversial, however, and may not be admissible.

<sup>43</sup>Indeed, plaintiff, in his bill of particulars as to Kent, skirts the "grave injury" issue altogether (*see* ¶ 11.C ["Grave injury is not a claim to be made by plaintiff. Claim of grave injury belongs to defendant(s) seeking impleader against employer."]).

related industrial tasks.” Accordingly, the branch of CHS’ motion for dismissal of the Owners’ and Eighth Avenue’s common-law indemnification and contribution claims against it is granted, and such claims are dismissed (*see Goodleaf v Tzivos Hashem, Inc.*, 68 AD3d 817 [2d Dept 2009]).

Although CHS has not moved to dismiss Rufolo’s common-law indemnification and contribution claims against it in the fourth third-party action, the Court is empowered to search the record and dismiss such claims without the necessity of a separate motion, and choose to do so (*see 63-65 Corp. v Prevosti*, 28 AD3d 469, 470 [2d Dept 2006]; *see also* CPLR 3212 [b]).

### ***The Remaining Claims***

The remaining claims can be treated more summarily. Eighth Avenue does not oppose the branch of Rufolo’s motion for dismissal of the causes of action in Eighth Avenue’s third third-party complaint to the extent they are based on contractual indemnification and failure to obtain insurance.<sup>44</sup> Accordingly, Eighth Avenue’s contractual indemnification and breach of contract claims against Rufolo are dismissed.

Next, Rufolo has moved to dismiss, among other things, the common-law indemnification and contribution claims of Eighth Avenue and CHS against it. “[A] party seeking common-law indemnification must prove its own lack of negligence, as well as actual negligence on the part of the proposed indemnitor. . . .” (*Toney v Raichoudhury*, 36 Misc 3d 1202[A], 2012 NY Slip Op 51154[U] [Sup Ct, Kings County 2012]). Likewise, “an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties” (*Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept

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<sup>44</sup>These claims are based on the consulting agreements between Eighth Avenue and Rufolo, to be distinguished from the Consulting Agreement between Kent and Rufolo at issue in this case. As noted above, the consulting agreements between Eighth Avenue and Rufolo were either not in effect at the time of plaintiff’s accident or are not applicable to the facts of this case.

2009)). Here, dismissal of such claims against Rufolo is unwarranted at this time because of the existence of triable issues of fact concerning the degree of fault, if any, attributable to Rufolo, Eighth Avenue, and CHS (*see Kwang Ho Kim v D&W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008]; *Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489-490 [2d Dept 2006]).<sup>45</sup>

Rufolo has also moved to dismiss the Owners' common-law indemnification and contribution counterclaims against it in the fifth third-party action. Here, the analysis becomes more complex because of the exculpatory clause in Kent's Consulting Agreement with Rufolo. The exculpatory clause provides, in relevant part, that Rufolo "is not responsible for . . . jobsite accidents, at the time of the audit or thereafter." An exculpatory clause that expresses in unequivocal terms the parties' intention to relieve a defendant of liability for negligence is generally enforceable (*see Uribe v Merchants Bank of NY*, 91 NY2d 336, 341 [1998]). Although "an exculpatory agreement, no matter how flat and unqualified its terms, . . . will not apply to exemption of willful or grossly negligent acts" (*Kalisch-Jarcho, Inc. v City of N.Y.*, 58 NY2d 377, 384-385 [1983], *motions to amend denied remittitur denied* 60 NY2d 645 [1983]), no party has alleged that Rufolo acted willfully or was grossly negligent. Because Kent is a party to the Consulting Agreement, its common-law indemnification and contribution counterclaims against Rufolo are barred by the exculpatory clause.

With respect to the Co-Owner (66-68 Washington Avenue, LLC), which is not a party to the Consulting Agreement, the record is bereft of evidence as to whether Kent represented

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<sup>45</sup>Rufolo's argument that it did not breach any duty owed to plaintiff misses the mark by a wide margin. Even in the absence of any actionable duty owed by Rufolo directly to plaintiff, Rufolo may still be held liable for a proportionate share of plaintiff's damages on the basis of any breach of duty: to the other defendants (*see Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 259 [1983] ["the nexus of duty between wrongdoers may exist independently of the respective duties owing a plaintiff"] [footnote omitted]; *Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988] ["While the culpable party from whom contribution is sought will ordinarily have breached a duty owed directly to the injured party, this is not invariably so"]).

the interests of this Co-Owner insofar as site safety was concerned. Accordingly, it is premature for the Court to dismiss the common-law indemnification and contribution counterclaims by the Co-Owner, 66-68 Washington Avenue, LLC, against Rufolo.

Finally, CHS has moved to dismiss the claims of the third-party plaintiffs the Owners and Eighth Avenue for breach of the subcontract, stemming from its alleged failure to obtain insurance. CHS has failed to make a prima facie showing in support of this branch of its motion. The bald, conclusory affirmation of CHS' attorney – that “[a]ny claim by either third-party plaintiff is with Scottsdale Insurance Company, the carrier for CHS Contracting, LLC”<sup>46</sup> – does not constitute admissible evidence for purposes of summary judgment (*see Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 681 [2d Dept 2009]). The Court declines to consider a denial of coverage letter submitted by CHS in its reply papers because the third-party plaintiffs have had no opportunity to respond and submit papers in surreply as to whether CHS complied with the Subcontract's requirement that CHS obtain a blanket additional insured endorsement (*see St. John's Univ. v Butler Rogers Baskett Architects, P.C.*, 105 AD3d 728, 728-729 [2d Dept 2013]; *Matter of TIG Ins. Co. v Pellegrini*, 258 AD2d 658 [2d Dept 1999]).

### ***Conclusion***

In sequence No. 11, the branch of the Owners' motion for summary judgment for contractual indemnification and an award of defense costs and attorneys' fees against Eighth Avenue under the Owners' Contract is granted as to (1) the Owners' damages in excess of Eighth Avenue's insurance policy limits with Interstate and Everest, and (2) the Owners' defense costs and attorneys' fees to the extent not reimbursed by Interstate or Everest. The remaining branch of the Owners' motion, for contractual indemnification and an award of defense costs and attorneys' fees against CHS under the subcontract is granted as well.

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<sup>46</sup>See the undated Affirmation in Support of Attorney Joseph C. Bellard, ¶ 120.

In sequence No. 12, the branch of Rufolo's motion for summary judgment for contractual indemnification and an award of defense costs and attorneys' fees against Kent under the Consulting Agreement is denied. The remaining branch of Rufolo's motion for summary judgment dismissing Eighth Avenue's third third-party complaint against it, together with all cross claims and counterclaims against it, is granted to the extent that (1) Eighth Avenue's contractual indemnification and breach of contract claims against Rufolo in the third third-party action, and (2) Kent's common-law indemnification and contribution counterclaims against Rufolo in the fifth third-party action are dismissed, and is otherwise denied.

In sequence No. 13, CHS' motion is granted to the extent that the Owners' and Eighth Avenue's common-law indemnification and contribution claims against it are dismissed, and is otherwise denied. Upon searching the record, the Court dismisses Rufolo's common-law indemnification and contribution claims against CHS in the fourth third-party action.

In sequence No. 14, the branch of Eighth Avenue's motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims insofar as asserted against it is denied. The remaining branch of Eighth Avenue's motion for summary judgment for contractual indemnification and an award of defense costs and attorneys' fees against CHS in the first third-party action is denied.

The parties are reminded of their next court appearance in JCP-1 on Dec. 2, 2013.

The foregoing constitutes the Decision and Order of this Court.

**E N T E R,**

  
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**Hon. Debra Silber, A.J.S.C.**

Hon. Debra Silber  
 Justice Supreme Court

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