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

PRESENT : DONNA M. MILLS **PART 58**

Justice

HAROLD DUSENBURY,

INDEX NO. 110923/11

Plaintiff,

MOTION DATE

MOTION SEQ. NO. 002

-against-

MOTION CAL. NO.

11 MADISON AVENUE MEMBER LLC, et al.,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for _____:

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	4-6
Replying Affidavits	7,8

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/2/14

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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HAROLD DUSENBURY, Index No.: 110923/11

Plaintiff,

-against-

11 MADISON AVENUE MEMBER, LLC, ARAGON, LLC, STRUCTURE TONE, INC. and CREDIT SUISSE (USA) INC.,

Defendants.

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11 MADISON AVENUE, LLC s/h/a 11 MADISON AVENUE MEMBER, LLC, STRUCTURE TONE, INC. s/h/a STRUCTURE-TONE, INC. and CREDIT SUISSE (USA), INC., Index No.: 590416/12

Third-Party Plaintiffs,

-against-

HATZEL & BUEHLER, INC.,

Third-Party Defendants.

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Mills, J.:

This is an action to recover damages for personal injuries sustained by an electrician when a junction box fell on him while working on a project which involved the retrofitting of the electrical systems (the project) in a commercial building located at 11 Madison Avenue, New York, New York (the building) on June 3, 2011.

Plaintiff Harold Dusenbury moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs 11 Madison Avenue Member, LLC (Madison), Structure Tone, Inc. (Structure Tone) and Credit

Suisse (USA) Inc. (Credit) (collectively, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them, as well as granting summary judgment in their favor on the third-party claims against third-party defendant Hatzel & Buehler for defense, indemnification and insurance.

BACKGROUND

On the day of the accident, defendant/third-party plaintiff Madison owned the building where the accident took place. Defendant/third-party plaintiff Credit, a tenant in the building, hired defendant/third-party plaintiff Structure Tone to serve as the construction manager on the project. Structure Tone hired third-party defendant Hatzel & Buehler (Hatzel) to serve as an electrical subcontractor on the project. Plaintiff was employed as a union electrician by Hatzel.

The accident occurred as plaintiff was standing on the platform of a hydraulic man lift (the man lift) while installing a 300-to-400-pound junction box (the junction box) in the ceiling. Plaintiff was injured when the junction box, which was in the process of being hoisted up to the ceiling on a mechanical duct lift (the duct lift), suddenly shifted and fell from the duct lift, striking plaintiff on the head.

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that, on the day of the accident, he was working on the project as a union electrician employed by Hatzel. That day, plaintiff's duties on the project included installing conduit tubing and junction boxes on a number of floors in the building. At the time of the accident, plaintiff was working with two other Hatzel electricians to install the junction box, connecting it to a conduit which was previously installed in the ceiling. In order to

install the junction box, the men had to raise the junction box up to the level of the ceiling so that they could thread rods from the conduit into the junction box.

Plaintiff explained that, in order to raise the junction box to the proper height for the work to be done, it was necessary to utilize the duct lift. While one of plaintiff's coworkers stood on the floor and operated the hand crank of the duct lift, in order to raise the junction box to the ceiling, plaintiff stood on the man lift and raised himself up to the proper height necessary to thread the conduit into the junction box. Plaintiff's other coworker remained on the floor and acted as a spotter for safety purposes. Notably, plaintiff testified that the junction box was not strapped in or chained to the duct lift in any way. Plaintiff described the junction box as just "sitting on the lift" (plaintiff's notice of motion, exhibit 6, plaintiff's tr at 50).

Plaintiff testified that the accident happened as the man lift and the duct lift were being raised next to each other at approximately the same time. During this time, plaintiff's head was approximately 18 inches away from the center line of the junction box. Suddenly, just as plaintiff heard a coworker yell to him to look out, plaintiff "saw the box moving towards [him]" (*id.* at 217). The junction box then fell on plaintiff's head before falling to the ground below.

Plaintiff testified that he had no daily contact with anyone from Structure Tone while on the project, nor was he given any tools or told how to perform his job by Structure Tone.

Deposition Testimony of Kevin Mulvey (Vice President of Structure Tone)

At his deposition, Kevin Mulvey testified that he was employed by Structure Tone on the day of the accident. Hired by Credit, Structure Tone served as the construction manager on the project to renovate two of the uninterruptible power supply systems in the building. Mulvey explained that Structure Tone hired all the subcontractors on the project and conducted daily

walk-through inspections of the work to monitor progress. He noted that Structure Tone personnel had the authority to stop work in the event that they observed any subcontractor working in an unsafe manner.

Mulvey further testified that Structure Tone hired Hatzel, pursuant to a purchase order, to serve as an electrical contractor on the project (the Structure Tone/Hatzel purchase order). He maintained that the Structure Tone/Hatzel purchase order was the only written agreement between the parties regarding the project. In addition, Mulvey testified, "Hatzel & Buehler [were] responsible for the work being installed and the means and methods of how they install[ed] their work" (defendants' notice of cross motion, exhibit F, Mulvey tr at 23).

Deposition Testimony of Felice Morizio, a Hatzel Foreman

At his deposition, Felice Morizio testified that he was a Hatzel foreman on the date of the accident, and that he instructed the crew to install the junction box. He also testified that Hatzel supplied all of the tools and equipment for the work, including the duct lift. Morizio explained that Hatzel supervised "the actual work" (defendants' notice of cross motion, exhibit G, Morizio tr at 4). To that effect, plaintiff and his coworkers "decided how they were going to install the junction box" (*id.* at 69). He also maintained that Structure Tone never instructed Hatzel workers as to how to perform their work.

Affidavit of Rodney Feitelberg (Plaintiff's Hatzel Coworker)

In his affidavit, Rodney Feitelberg stated that he was part of the three-man team that was assigned to install the junction box on the day of the accident. Feitelberg was acting as a safety spotter at the time of the accident, and he was an eyewitness to the accident. He confirmed that the accident occurred when the junction box suddenly shifted and fell off the duct lift, striking

plaintiff on the head and knocking him to the platform of the man lift.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Common-law Negligence and Labor Law § 200 Claims Against Defendants

Initially, defendants cross-move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them. As plaintiff states in his papers that he does not oppose that part of defendants' cross motion for summary judgment dismissing these claims, defendants are entitled to summary judgment dismissing the same.

Plaintiff's Labor Law § 240 (1) Claim Against Defendants

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

As the owner of the building, Madison may be held liable for plaintiff's injuries under

Labor Law § 240 (1). However, it must be determined whether Structure Tone, which served as construction manager on the project, may be vicariously liable for plaintiff's injuries under Labor Law § 240 (1) as statutory agent of the owner. In addition, it must be determined as to whether Credit, as the lessee of the building and the entity which hired Structure Tone to serve as construction manager, may also be vicariously liable for plaintiff's injuries under Labor Law § 240 (1).

While a construction manager of a work site is generally not responsible for injuries under Labor Law §§ 240 (1) and 241 (6), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). "'When the work giving rise to [the duty to conform to the requirements of Labor Law § 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (*Walls,* 4 NY3d at 864, quoting *Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

A review of the evidence in this case reveals that Structure Tone did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., installation of the junction box, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law § 240 (1). Plaintiff testified that he had no contact with Structure Tone, nor did Structure Tone instruct him as to how to perform his work. Mulvey testified that plaintiff's employer, Hatzel, was responsible for the means and methods of their work. Hatzel's foreman, Morizio, asserted that Structure Tone never instructed Hatzel workers as to how to

perform their work. In fact, plaintiff and his coworkers "decided how they were going to install the junction box" (defendants' notice of cross motion, exhibit G, Morizio tr at 69).

As to Credit, it should be noted that "[t]he meaning of 'owners' under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] [defendant tenant acted as an owner when it hired the plaintiff's employer pursuant to an oral contract to perform siding work on the building, from which it derived a benefit for the operation of its business]; *Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]).

"The statute may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor" (*Zaher v Shopwell, Inc.*, 18 AD3d at 339-340; *Addonisio v City of New York*, 112 AD3d 554, 555 [1st Dept 2013] [although the plaintiff argued that Con Ed had a property interest in the site of the accident, it was not deemed an owner for the purposes of the Labor Law where there was "no evidence that it contracted to have the work performed or had the authority to control the work site"]; *Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]; *Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]). "While one way to prove such control of the work site is through evidence that the lessee actually hired the general contractor, the right to control the work site may be proved by other means, such as contractual or statutory provisions granting such right [internal citations omitted]" (*Bart v Universal Pictures*, 277 AD2d at 5]; *Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306, 307 [1st Dept 2002]).

In this case, while Credit may have hired Structure Tone, plaintiff has not put forth any evidence or argument whatsoever to establish that Credit had any right to control the work site. Thus, Credit cannot be deemed an owner for the purposes of the Labor Law.

As to Madison's liability under Labor Law § 240 (1), in order to recover damages for a violation of Labor Law § 240 (1), plaintiff must demonstrate that the object that fell was in the process of being hoisted or secured, or that it was in need of being secured (*Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]).

Here, plaintiff has established that Madison is subject to liability under Labor Law § 240 (1) by putting forth the various deposition testimonies which demonstrate that the unsecured junction box fell on him while it was being hoisted. In other words, the junction box "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["(p)laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]; *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007] [elevation risk fell within ambit of section 240 (1) where plaintiff was hit with a load of cinder blocks that became loose and fell on him as it was being hoisted from a flatbed truck by a fork boom]; *Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]).

In addition, plaintiff has established that defendants failed to provide appropriate safety

devices to secure the junction box, as required by Labor Law § 240 (1), and this breach was a proximate cause of plaintiff's injury (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 479-480 [1st Dept 2007] [partial summary judgment properly granted where plaintiff, while performing asbestos removal work, was injured when he was struck by a pipe that fell from above, and the record established that no safety devices were provided]). It is well settled that "[a]bsolute liability for falling objects under Labor Law § 240 (1) arises only when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506-507 [2d Dept 2007]).

In opposition, defendants argue that they are entitled to dismissal of the Labor Law § 240 (1) claim, because plaintiff was the sole proximate cause of the accident (*Gabrus v New York City Hous. Auth.*, 105 AD3d at 700). To that effect, defendants argue that it was plaintiff and the other two men on his crew who decided to raise the junction box without securing it first, and it was plaintiff who opted to rise up on the man lift at the same speed as the duct lift, so as to remain level with the junction box.

"When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Cahill v Triborough Bridge &*

Tunnel Auth., 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

In any event, as it has not been established that an appropriate safety device for securing the junction box was provided to plaintiff in the first place, plaintiff's actions go to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Gove v Pavarini McGovern, LLC*, 110 AD3d 601, 603 [1st Dept 2013]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d at 488). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Torres*

v Monroe Coll., 12 AD3d at 262 [Court noted that even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]).

Further, defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Gove v Pavarini McGovern, LLC*, 110 AD3d at 603 [where the plaintiff was injured when a bundle of rebar that was being lowered fell on him, the defendants failed to establish that the plaintiff was the sole proximate cause of the accident, where they failed to show that a crane or pulley was readily available at the construction site, or that the plaintiff had been instructed to use said devices]; *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]; *Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548, 549 [1st Dept 2012] [although defendants argued that the plaintiff was recalcitrant in not utilizing one of the harnesses available at the job site, the Court found that defendants failed to establish that the plaintiff was the sole proximate cause of his fall from an unsecured ladder, because they "[did] not show that the workers were expected to, or instructed to, use a harness while ascending or descending a ladder"]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*,

33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against Madison.

The Third-Party Claims Against Hatzel

Defendants cross-move for summary judgment in their favor on the third-party claims for defense, indemnification and insurance as against plaintiff's employer, Hatzel, based on the relevant language contained in the Structure Tone/Hatzel purchase order. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

In this case, as it is undisputed that plaintiff was an employee of Hatzel on the day of the

accident, Section 11 of the Workers' Compensation Law applies. Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

> "For purposes of this section, the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). "Even in the absence of grave injury, such as in the case at bar, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]). As such, with respect to defendants' third-party claims against Hatzel, it must be determined as to whether a written agreement exists between the parties which requires Hatzel to defend and indemnify defendants, as well as procure insurance on their behalf (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 431-432 [2005]; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365 [2005]).

The Structure Tone/Hatzel Purchase Order

The Structure Tone/Hatzel purchase order, dated June 10, 2011, contains certain terms and conditions (the terms and conditions) relating to defense, indemnification and insurance procurement, which are located on the back of the purchase order. The terms and conditions state, in pertinent part, as follows:

> "11.1 The insurance and indemnification provisions are set forth in the separate Blanket Insurance/Indemnity Agreement signed by [Hatzel], the terms of which are incorporated herein. In the absence of said Agreement, the following indemnification and insurance provisions shall apply.
>
> 11.2 To the fullest extent permitted by law, subcontractor will indemnify and hold harmless Structure Tone (STI) and owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part in any manner from the acts or omissions breached at default of [Hatzel] in connection with the performance of any work by [Hatzel] pursuant to this purchase order and/or related purchase order. [Hatzel] will defend and bear all costs of defending any acts or proceedings brought against Structure Tone and /or the owner . . . arising in whole or in part out of any such acts, omissions, breach or default.
>
> 11.3 Subcontractor shall obtain Workers Compensation as required by law, Comprehensive General Liability Insurance . . . naming Structure Tone as additional insured"

(defendants' notice of cross motion, exhibit H, Structure Tone/Hatzel purchase order). The Structure Tone/Hatzel purchase order also states, "This Purchase Order is not binding until accepted" (*id.*). Notably, the purchase order is not countersigned by Hatzel (*id.*).

The blanket insurance/indemnity agreement between Structure Tone and Hatzel, which is referred to in the Structure Tone/Hatzel purchase order, is dated November 9, 2009 and signed by Paul Angerame, as vice president of Hatzel (the Structure Tone/Hatzel blanket agreement). This agreement advises, "All Purchase Orders . . . hereafter issued to [Hatzel] shall be deemed to

include the provisions set forth below . . . [Hatzel is required to purchase . . . Comprehensive General Liability Insurance . . . [that] must name Structure Tone, Inc., owner . . . as additional insureds" (defendants' notice of cross motion, exhibit I, Structure Tone/Hatzel blanket agreement). The Structure Tone/Hatzel blanket agreement also requires that Hatzel defend and indemnify Structure Tone and the owner for claims "arising out of or in connection with or as a consequence of the performance of the work under this agreement" (*id.*).

Initially, in order for a written contract, such as the Structure Tone/Hatzel purchase order, to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d at 433; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

As Hatzel sets forth, Mulvey testified that the Structure Tone/Hatzel purchase order is the only written document for the project between Structure Tone and Hatzel. While plaintiff's accident occurred on June 3, 2011, the Structure Tone/Hatzel purchase order is not dated until June 10, 2011, seven days after the accident. In addition, the Structure Tone/Hatzel purchase order does not contain any language which provides that the defense, indemnification and insurance procurement requirements contained within it are intended to be retroactive to the date of the accident. Importantly, "such an agreement 'cannot be held to have a retroactive effect unless by its express words or necessary implication it clearly appears to be the parties' intention

to include past obligations'" (*Mikulski v Adam R. West, Inc.*, 78 AD3d at 911., quoting *Kane Mfg. Corp. v Partridge*, 144 AD2d 340, 341 [2d Dept 1988]). Moreover, the Structure Tone/Hatzel purchase order, which clearly states, "This Purchase Order is not binding until accepted," is not countersigned by Hatzel (*id.*).

Therefore, as the Structure Tone/Hatzel purchase order was not accepted by Hatzel, as required by the express language of the purchase order, and as "an indemnification agreement executed by a party after the plaintiff's accident occurred will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the agreement to apply as of that date," under the circumstances of this case, no written agreement was in place between Structure Tone and Hatzel on the date of the accident (*id.* at 912); *see also Maxwell v Rockland County Community Coll.*, 78 AD3d 793, 795 [2d Dept 2010]).

While defendants argue that, in any event, the defense, indemnification and insurance provisions of the Structure Tone/Hatzel blanket agreement apply, this agreement advises only that "[a]ll Purchase Orders . . . hereafter issued to [Hatzel] shall be deemed to include the provisions set forth below" (defendants' notice of cross motion, exhibit I, Structure Tone/Hatzel blanket agreement). Accordingly, as the purchase order is deemed invalid, the provisions set forth in the Structure Tone/Hatzel blanket agreement do not come into play either.

Thus, as the Structure Tone/Hatzel purchase order does not meet the requirements of Workers' Compensation Law § 11, defendants are not entitled to summary judgment in their favor on the third-party complaint against Hatzel.

Finally, it should be noted that Hatzel argues that the testimony of defendants' witness,

Mulvey, cannot be used as evidence against Hatzel, because, as Mulvey's deposition was not signed, it does not constitute evidentiary proof in admissible form. However, Mulvey's unsigned transcript is admissible for the purpose of defendants' cross motion, because it was submitted by the defendants' deponent, and accordingly, the transcripts were adopted as accurate by that deponent (*Pavane v Marte*, 109 AD3d 970, 971 [2d Dept 2013]; *David v Chong Sun Lee*, 106 AD3d 1044 [2d Dept 2013]; CPLR 3116 [a]). Moreover, plaintiff did not challenge the accuracy of the deposition (*id.*).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Harold Dusenbury's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendant/third-party plaintiff 11 Madison Avenue Member, LLC (Madison) is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of defendant/third-party plaintiffs Madison, Structure Tone, Inc. and Credit Suisse (USA) Inc.'s (collectively, defendants) cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them is granted, and these claims are dismissed as against these defendants, and the cross motion is otherwise denied; and it is further

ORDERED that remainder of the action shall continue.

DATED: 4/2/14

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.