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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48

Justice

Index Number : 102881/2009
KARBOWIAK, JOHN
vs.
ST. JOHN'S UNIVERSITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

Mtn decided in accordance w/ the accompanying memorandum decision/order of this Court

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/3/14

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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JOHN KARBOWIAK and DIANA KARBOWIAK,

Plaintiffs,

-against-

ST. JOHN'S UNIVERSITY and F.J. SCIAME CONSTRUCTION CO., INC.,

Defendants.

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Index No.: 102881/09

Mtn Seq. No. 002

DECISION AND ORDER

F.J. SCIAME CONSTRUCTION CO., INC. and ST. JOHN'S UNIVERSITY,

Third-Party Plaintiffs,

-against-

J.M.R. CONCRETE OF NEW YORK CORP.,

Third-Party Defendant.

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Third-Party Complaint

Index No. 590568/09

F.J. SCIAME CONSTRUCTION CO., INC. and ST. JOHN'S UNIVERSITY,

Second Third-Party Plaintiffs,

-against-

RAD & D'APRILE, INC.,

Second Third-Party Defendant.

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Second Third-Party Complaint

Index No. 590355/10

JEFFREY K. OING, J.:

Second third-party defendant, Rad & D'Aprile, Inc., moves pursuant to CPLR 3212, for order granting it summary judgment

dismissing the second third-party complaint and all cross-claims asserted against it.

Defendants/third-party plaintiffs, F.J. Sciame Construction Co., Inc. and St. John's University, cross-move: (1) for summary judgment dismissing plaintiff's Labor Law §§ 200, 240[1], and 241[6] claims; (2) for summary judgment granting it contractual indemnification against third-party defendants, JMR Concrete of New York Corp. and Rad & D'Aprile, Inc.; and (3) for summary judgment dismissing third-party defendants' JMR Concrete's and second third-party defendant Rad & D'Aprile's counterclaims.

Factual Background

This action arises out of a job site accident that occurred on or about February 11, 2009 at a construction project on the St. John's University campus in Queens, New York. Plaintiff John Karbowiak is a carpenter and was employed at the time by third-party defendant JMR Concrete of New York Corp. ("JMR"). Plaintiff Diana Karbowiak is his wife.[1] St. John's University ("St. John's") is the owner of the construction project (the "project"). St. John's hired F.J. Sciame ("Sciame") to be the project's construction manager. As construction manager, Sciame was responsible for managing the construction and all of the

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[1]According to the affirmation of Andrew Klauber, counsel for JMR, Diana Karbowiak's claims were to be discontinued by stipulation of the parties (Klauber Affirm., ¶ 9). There is no record of any such stipulation.

various trades working on the project. Sciame hired plaintiff's employer, JMR, to perform various concrete work and in-fills required for the project. Sciame hired second third-party defendant, Rad & D'Aprile, Inc. ("Rad"), to be the masonry contractor.

Specifically, Rad's responsibility was to construct the exterior veneer of the building as well as some demising and parapet walls. The equipment used by Rad at the job site included two wet saws that the company used to cut bricks. A 55-gallon drum supplied water to the wet saws. As Rad's workers used the wet saws, water would fill a trough that would have to be drained periodically in order to keep it from overflowing. To drain the trough, a plug would be removed allowing the water to drain into a five gallon bucket. On the day of the accident, according to Rad's daily report, it was constructing a parapet on the roof and laying bricks on the northwest side of the building (Clausen Affirm., Ex. Q). The daily report also states that Rad's bricklayer was using a wet saw on that day (Id.).

At the time, plaintiff was working in the basement on a concrete in-fill for a pedestrian handicap ramp. To that end, he was cutting Styrofoam with a saw for the in-fill work. The basement floor was made of concrete. The Styrofoam materials plaintiff was using were stacked next to the area where he was installing them. According to plaintiff's EBT testimony, he went

to retrieve some Styrofoam from one of the taller stacks and when he stepped off one of the lower stacks onto the concrete floor his left foot stepped onto a piece of polyethylene and some water and he slipped, causing him to fall and fracture his left ankle.

Polyethylene is plastic sheeting used in construction to cover material and protect it from rain and/or debris. The piece of polyethylene involved in plaintiff's accident was approximately four inches long. The tallest stack of Styrofoam was approximately six to eight feet tall. Plaintiff testified that to reach it, he had to step on the first stack, which was one foot off the ground, and then onto a second stack, which was an additional foot off the ground. Plaintiff testified that he did not notice any water on the floor prior to his accident, but he did see bricklayers who were working in the area preparing to use a wet saw. According to plaintiff and his foreman Harnarine (Harry) Jhinkoo, the bricklayers were cutting bricks in the basement that day for use on the outside of the building, where they were constructing a parapet on the roof. Plaintiff further testified that after he fell he could hear the wet saw running (Karbowiak 9/13/11 EBT, pp. 46-47, 78, 100).

The contract between St. John's and Sciame for the construction project (the "prime contract") authorized Sciame to enter into subcontracts to facilitate the project and specified that the subcontracts use a standardized form annexed thereto

(Clausen Affirm., Ex. R). The prime contract also required Sciame to incorporate certain specific indemnification language into each subcontract it entered for the project (Id., § 21.4.5). Specifically, section 21 of the prime contract provides that Sciame would obtain insurance and indemnify St. John's "from any claim, damage, liability, expense or loss including attorneys' fees." (Id., § 21.4.1). Additionally, as indicated, the prime contract required that Sciame:

> incorporate the following indemnification clause into every Subcontract it enters into.
>
> ***
>
> **"INDEMNIFICATION CLAUSE**
>
> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless [Sciame], the University, and their consultants, and the directors, officers, partners, employees and agents of any of them from and against claims, damages losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts any of them may be liable, regardless of whether or not such claim, damage, loss or expense is jointly caused in part by the negligent act or omission of a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce any other rights or obligations of indemnity which would otherwise exist as to a party or person described in this clause.

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

(Id., § 21.4.5).

The contract between Sciame and JMR, dated June 25, 2008, specifically incorporated by reference the foregoing indemnification clause (the "JMR subcontract") (Id., Ex. S, §4.6). The JMR subcontract also contains a "Subcontractor Insurance Rider" (Id.). Paragraph IX of the rider deals with indemnification, however, parts of the Insurance Rider attached to the original JMR subcontract appear to be redacted (Id.).

On or about March 2, 2009 -- after plaintiff's accident -- Sciame sent JMR a revised Subcontract Insurance Rider (Id., Ex. T). The letter accompanying the revision states that this "Subcontractor Insurance Rider is being issued to supercede the previous Rider provided with the Contract issued to JMR Concrete on July 16, 2008" (Id.). In the bottom right-hand corner of every page of the rider, it states, "Insurance Rider to supercede previous" (Id.). The revised insurance rider was initialed on each page and accepted by JMR on or about March 17, 2009 (Id.).

As pertains to indemnification, in a section entitled "Hold Harmless Agreement," the revised rider states: "See F.J. Sciame

Construction Co., Inc.'s subcontract agreement," thereby referencing section 4.6 of the subcontract and its incorporation by reference of section 21.4.5 of the prime contract as set forth above (Id., § X).

The subcontract between Sciame and Rad (the "Rad subcontract") likewise incorporates the indemnification clause set forth in section 21.4.5 of the prime contract (Id., Ex. V, § 4.6). The Rad subcontract also contains a Subcontractor Insurance Rider (Id.). This rider is identical to the form sent to JMR to supercede the redacted rider originally attached to the JMR subcontract.

The Claims

As noted above, plaintiff's complaint asserts two causes of action against Sciame and St. John's for: (1) violation of Labor Law §§ 200, 240[1], and 241[6] for himself; and (2) loss of consortium on behalf of his spouse.

In turn, Sciame and St. John's first third-party complaint asserts four claims against JMR for: (1) contribution sounding in negligence; (2) common law indemnification; (3) contractual indemnification; and (4) failure to procure insurance.

In its answer, JMR asserts counterclaims for common law indemnification and contribution against St. Johns and Sciame (counterclaims one and two); and for contractual indemnification and failure to obtain insurance against Sciame only

(counterclaims three and four). JMR also asserts the same four causes of action as cross-claims against Rad.

In the second third-party complaint, Sciame and St. John's also bring the same four causes action asserted in their first third-party complaint against Rad (Id., Ex. G).

In its answer, Rad asserts four counterclaims against Sciame only for indemnification and contribution (counterclaims one and two); and against Sciame and St. John's for contractual indemnification, and a cause of action seeking a declaration that Sciame and St. John's "defend, indemnify and hold harmless" Rad if plaintiff's injuries were sustained as alleged in his complaint (counterclaims three and four).

Arguments

In its motion, Rad argues that the claims against it must be dismissed because it owed no duty to plaintiff because it did not own or operate the project site; that there is no evidence that Rad created the dangerous condition or had constructive notice of it, and that mere speculation regarding causation is insufficient to sustain a negligence cause of action against it.

Rad also argues that JMR lacks standing to bring a contractual indemnification claim against it, and that neither Sciame nor St. John's are entitled to defense or indemnification. Concerning the latter argument, Rad contends that there is no evidence that Rad "had anything to do with the plaintiff's

accident and therefore they [sic] do not owe defense or indemnification to St. John's/Sciame as the accident did not arise out of Rad's work" (Morgenlender Reply Affirm., ¶ 43). Additionally, Rad contends that St. John's and Sciame should be "precluded from claiming that [it] has not procured insurance for their benefit as they are well aware of the policy being in effect with them as additional insureds" (Id., ¶ 46). To this end, Rad explains that its policy is presently defending and indemnifying Sciame and St. John's in another action currently pending in Supreme Court, King's County, Rojas v F.J. Sciame Construction Co., Index No. 18810/09 (Id., ¶ 47). As proof of a valid policy listing St. John's and Sciame as "additional insureds," Rad provides a copy of its insurance carrier letter to St. John's and Sciame accepting tender of their defense (Id., Ex. A).

In support of their cross-motion and in opposition to Rad's motion, Sciame and St. John's argue: (1) that Rad's motion should be denied because there is insufficient evidence as to liability for the accident and because Sciame and St. John's are entitled to summary judgment on their contractual indemnification claim; (2) that they are entitled to summary judgment on their contractual indemnification claim against JMR because the JMR subcontract incorporated by reference the express indemnification clause contained in the prime contract; and (3) that plaintiff's

complaint should be dismissed against them because they did not exercise direction or control over plaintiff's work or possess notice of the dangerous condition so as to subject them to liability under Labor Law § 200, that the accident clearly is not within the purview of Labor Law § 240[1], and that the industrial code violations cited by plaintiff are inapplicable or are too general to support his Labor Law § 241[6] cause of action.

JMR also opposes Rad's motion, and opposes that branch of Sciame and St. John's motion seeking summary judgment against JMR, but argues in support of dismissing plaintiff's action in its entirety. Specifically, JMR argues that Labor Law § 240[1] is clearly inapplicable because the facts demonstrate that this accident is a simple slip and fall case which does not involve an elevation related risk and, in any event, "the height differential of 'just a foot off the ground' which plaintiff descended just prior to the occurrence [] is insufficient to invoke" the labor law statute (Klauber Affirm., ¶ 12 [citation omitted]).

Additionally, JMR posits that Labor Law § 241[6] is inapplicable because to establish a finding of liability pursuant to this statute plaintiff must first establish a specific violation of the Industrial Code, and here the only provision cited by plaintiff is § 23-1.7, "Protection from General Hazards." JMR relies on plaintiff's testimony that the water on

which he slipped is attributable to the use of a wet saw to argue that because "the water was introduced as part of the construction project, [it] cannot be considered a foreign substance" (Klauber Affirm., ¶ 13). Thus, JMR contends that neither it nor Sciame "created the wet condition or dropped the scrap of plastic and neither had an opportunity to remedy either of those situations" (Id.). JMR further argues that if the Court is "constrained to find that the presence of water or a scrap of plastic on the floor constituted a violation," the Court should find that Rad created the condition or that it was Sciame that was responsible for its removal (Id.).

With regard to plaintiff's claims for common law negligence and violation of Labor Law § 200, JMR argues that these claims should be dismissed as Sciame did not direct or control the work of any employees of either JMR or Rad. Further, JMR argues that Sciame did not have any notice, actual or constructive, of the water or plastic.

Plaintiff does not dispute that he cannot sustain a claim for violation of Labor Law § 240[1] and by his counsel's Affirmation in Opposition discontinues this claim (Levien Affirm., ¶ 3). Plaintiff maintains, however, that a question of fact exists as to whether St. John's and Sciame violated Labor Law § 241[6]. To this end, plaintiff alleges a violation of 12

NYCRR § 23-1.7(d), entitled "Protections from General Hazzards," which provides:

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

Plaintiff also alleges a violation of 12 NYCRR 23-1.7(e)(2), which provides:

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

Additionally, plaintiff contends that defendants St. John's and Sciame may have violated Labor Law § 200 because a question of fact exists as to whether the water condition on the floor was a dangerous condition on the work site. In that regard, plaintiff claims a factual issue exists as to whether the water may have come from outdoor elements.

Discussion

I. St. John's and Sciame's Cross-motion

A. Labor Law § 200

Section 200 codifies the common law duty of an owner or general contractor to provide construction site employees with a safe workplace (Cappabianca v Skanska USA Bldg., Inc., 99 AD3d 139 [1st Dept 2012]). "Claims for personal injury under the

statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (Id. at 143-44). The facts herein implicate the former category. Where an existing defect or dangerous condition caused the injury, an owner or general contractor is liable only if it created, or had actual or constructive knowledge, of the condition (Mendoza v Highpoint Assocs., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011]).

Here, plaintiff argues that the water on the floor was a dangerous condition, and that St. John's and Sciame, as the owner and general contractor, respectively, are liable under section 200. The argument is unavailing. Assuming arguendo that the water and piece of plastic on which plaintiff slipped and fell constitute a dangerous or defective condition, there is no evidence that St. John's and Sciame possessed actual or constructive notice of the alleged unsafe condition. Plaintiff testified that the floor in question was dry before he went to take his coffee break and that the accident occurred immediately after he returned from break (Karbowiak 9/13/11 EBT, pp. 42:21-42:24; 50:12-50:15). In fact, he testified that his entire work area was "pretty clean" and there was no debris there while he was working that morning (Id., pp. 42-43, 123-124). Plaintiff also testified that coffee breaks on the project generally lasted

20-25 minutes, and that from the time he left for coffee to the time he slipped, it was "about half an hour" (Id., pp. 50:18-50:21; 149:11-149:14)). His testimony was that he did not see the piece of polyethylene at any time before he fell (Id., p. 94:3-94:5). When asked about the source of the water, plaintiff testified that to his knowledge, there was no possible source of the water other than the wet saw used by the bricklayers (Id., p. 120:6-120:10). Thus, by plaintiff's own testimony, neither St. John's nor Sciame actually created the alleged dangerous condition. To the extent that plaintiff's counsel argues that the water may have come from outside elements, that argument is entirely speculative and is simply not supported by record, which does not indicate there was any snow or rain on the date in question.

In order to impute constructive notice of the condition to defendants, "a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it" (Schick v 200 Blydenburgh, LLC, 88 AD 684, 686 [2d Dept 2011]). Additionally, "constructive notice of the allegedly unsafe condition that caused the accident ... must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (Mitchell v New York Univ., 12 AD3d 200, 201 [1st Dept 2004]). Plaintiff fails

to raise a triable issue of fact as to whether St. John's or Sciame had any constructive notice of the water in the "half an hour" between when plaintiff went to get coffee and the time he slipped and injured his ankle. As such, plaintiff has failed to raise a triable issue of fact as to whether St. John's or Sciame had actual or constructive notice of the alleged unsafe condition so as to impute liability to them under section 200.

St. John's and Sciame also argue that they are entitled to summary judgment on this claim because they did not exercise direct supervision or control over plaintiff's or JMR's work. For the reasons that follow, they are entitled to summary judgment dismissing the common law negligence and section 200 claims.

The record demonstrates that they exercised no supervisory control over the activity bringing about plaintiff's injury (Affri v Basch, 13 NY3d 592 [2009]). Further, the principle is well-established that a "general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations" (Buccini v 1568 Broadway Assocs., 250 AD2d 466, 469 [1st Dept 1998] [citation omitted]). Likewise, "'the fact that [the owner] may have dispatched persons to observe the progress and method of the

work does not render it actively negligent'" (Id., citing Aragon v 233 W. 21st St., 201 AD2d 353, 354 [1st Dept 2004]).

Here, plaintiff's foreman, Harry Jhinkoo, testified at his EBT that Sciame did not directly instruct JMR workers on what to do while at the job site and that it was he that instructed plaintiff on the work he needed to perform each day (Jhinkoo 4/10/12 EBT, pp. 26-27, 32). To the extent that Jhinkoo testified that Sciame workers would "normally clean up" the floor, Sciame's general responsibility for such a task is immaterial because Jhinkoo did not suggest that he asked Sciame to come clean the floor on the day in question. In fact, Jhinkoo testified that the last time he had asked Sciame to clean the floor was a "couple of days before" the accident and he was "satisfied" with their clean-up (Id., pp. 51-52). Similarly, Suresh Parmerssar, a JMR employee and part-time foreman, testified at his EBT that as part-time foreman his job duties were to instruct JMR employees on "what to do" and that no one from Sciame ever instructed him on how to perform his job (Parmerssar 11/30/12 EBT, pp. 11-13). Under these circumstances, plaintiff has failed to raise a factual issue as to whether St. John's or Sciame supervised or controlled plaintiff's or JMR's work to support this claim.

B. Labor Law § 241[6]

Section 241[6] imposes a duty of reasonable care upon owners, contractors and their agents, requiring them to provide reasonable and adequate protection to those employed in all areas where construction, excavation or demolition is being conducted (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]). "Since the statute by its express terms empowers the Commissioner of the Department of Labor to make rules to carry into effect the provisions of this subdivision, liability under the statute requires proof that a particular, non-general rule promulgated by the commissioner ... has been violated" (Griffin v Clinton Green South, LLC, 98 AD3d 41, 49 [1st Dept 2012] [quotation and citation omitted]).

12 NYCRR § 23-1.7, entitled, "Protection from General Hazards," on which plaintiff bases his claim, is sufficiently specific to support a section 241[6] cause of action (Boss v Integral Const. Corp., 249 AD2d 214 [1st Dept 1998]). As discussed, supra, plaintiff alleges that water on the concrete floor in conjunction with the polyurethane created a slippery condition causing him to slip. The cited regulation, as relevant, "unequivocally directs employers not to 'suffer or permit any employee' to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that any 'foreign substance which may cause slippery

footing shall be removed ... to provide safe footing'" (Rizzuto, supra, 91 NY2d at 351). The Court of Appeals explained that a "violation of 12 NYCRR § 23-1.7(d), while not conclusive on the question of negligence, would thus constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (Id. [emphasis in original]). If the negligence of some party to the construction project can be established at trial, then under section 241[6], St. John's and Sciame "would be vicariously liable, irrespective of [their] ability to direct, control or supervise the construction site or the activity connected therewith to enable [them] to prevent or remediate any hazardous worksite activity or condition" (Id. [emphasis in original]). This finding is compelled because the intent of the statute "was to compel owners and general contractors to become more concerned with the safety practices of subcontractors, because they would be exposed to liability without regard to control over the work" (Monroe v City of New York, 67 AD2d 89, 105 [1979]).

Defendants argue that with respect to "slipping hazards" encompassed by the cited regulation, "the courts impose a requirement that 'someone within the chain of the construction project' have a 'reasonable time, to prevent or remediate the

hazard." All of the cases cited by defendants for this proposition, however, hold that an issue of fact existed as to this question that precluded summary judgment dismissal (Rizzuto, supra; Booth v Seven World Trade Co., L.P., 82 AD3d 499 [1st Dept 2011]; Temes v Columbus Centre, LLC, 48 AD3d 281 [1st Dept 2008]). Thus, this argument is unavailing.

To the extent that defendants argue that when a substance naturally results from the work being performed the substance is not considered a "foreign substance" for purposes of the regulation at issue, defendants incorrectly rely on an exception to the statute that applies to substances that naturally result from the work being performed by the plaintiff, not by other unrelated workers at the work site (e.g., Kowalik v Lipschutz, 81 AD3d782 [2d Dept 2011] [holding 12 NYCRR § 23-1.7(d) not applicable where plaintiff slipped on sawdust and construction debris created by saw that plaintiff used all day]).

As such, defendants have failed to establish that no triable issue of fact exists as to whether "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that plaintiff's slipping, falling and subsequent injury proximately resulted from such negligence" (Rizzuto, supra, 91 NY2d at 351). Accordingly, defendants motion

to dismiss the section 241[6] claim with respect to a violation of 12 NYCRR § 23-1.7(d) is denied.

C. St. John's and Sciame's Contractual Indemnification Claim against JMR and JMR's counterclaim against them

As JMR was plaintiff's employer, none of the parties to this action can maintain a claim for common law contribution against JMR. Worker's Compensation Law § 11 provides that an employer is not liable for contribution or indemnity to any third-party based upon liability for injuries sustained by an employee acting within the scope of his employment unless such third-party first proves that the employee sustained a "grave injury." Here, as the record indicates, plaintiff sustained only a fractured ankle. This injury is not a "grave injury" as contemplated by the Worker's Compensation statute; the common law indemnification claim against JMR must be dismissed.

Causes of action for contractual indemnification and to recover damages for breach of contract to procure insurance, however, are not barred by Workers' Compensation Law § 11 (Murphy v Longview Owners, Inc., 13 AD3d 346 [2d Dept 2004]). With respect to contractual indemnification, JMR argues that under New York law, an indemnification clause in a prime contract cannot be incorporated by reference in a construction subcontract (citing Busanich v 310 East 55th Street Tenants, 282 AD2d 243 [1st Dept 2001], and Waitkus v Metropolitan Housing Partners, 50 AD3d 260 [1st Dept 2008]).

In Busanich v 310 E. 55th St. Tenants, the Appellate Division, First Department, held that "incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating the scope, quality, character and manner of the work to be performed by the subcontractor" (282 AD2d at 244). There, however, the prime contract did not contain provisions requiring the subcontractors to indemnify the contractor. Not so here. The clear language in the JMR contract demonstrates JMR's agreement to be bound by the insurance requirement of the prime contract incorporated by reference (see Carlisle SoHo East Trust v Lexington Ins. Co., 49 AD3d 272 [1st Dept 2008]). Under these circumstances, because the incorporation by reference here is specific and not general, an indemnification provision may be incorporated by reference into the JMR subcontract.

In addition, to the extent that the initial Subcontractor Insurance Rider was partially redacted, this redaction does not necessarily relieve JMR from its duty to indemnify defendants because JMR executed a new rider that clearly stated it would "supercede the previous Rider" and initialed the change on each page (Clausen Affirm., Ex. T). To the extent that the second rider was executed after plaintiff's accident, a term in a contract executed after a plaintiff's accident may be applied

retroactively where evidence establishes as a matter of law that it was made as of a pre-accident date and that the parties intended that it apply retroactively to that date (Elescano v Eighth-19th Co., LLC, 13 AD3d 80, 81 [1st Dept 2004]). Here, however, JMR has sufficiently raised an issue of fact as to whether the second rider was made "as of" the pre-accident date and that the parties intended that it apply as of that date (Podhaskie v Seventh Chelsea Assocs., 3 AD3d 361 [1st Dept 2004]; Temmel v 1515 Broadway Assocs., L.P., 18 AD3d 364 [1st Dept 2005]). Accordingly, that branch of defendants' motion seeking summary judgment on the contractual indemnification claim against JMR is denied.

Regarding defendants' claim that JMR failed to obtain insurance in favor of St. John's and Sciame, the parties' fail to address this claim as it pertains to JMR with any specificity. Accordingly, that branch defendants' cross-motion seeking summary judgment on this claim is denied.

Turning to that branch of defendants' cross-motion seeking summary dismissal of JMR's counterclaims, neither defendants nor JMR address this aspect of defendants' motion. As such, it is deemed abandoned.

II. Rad's Summary Judgment Motion

Rad has moved for summary judgment dismissing Sciame and St. John's second third-party complaint, and all cross-claims

asserted by JMR. In that regard, Rad primarily relies on the fact that it did not employ plaintiff, did not own or control the work site, and that it does have a policy of insurance in effect which would have defended and indemnified St. John's and Sciame if such a defense was warranted (Morganlender Reply Affirm., ¶¶ 16-20). Further, Rad argues that there is no evidence that it had anything to do with plaintiff's accident and, thus, argues it does not owe a defense or indemnification to St. John's and Sciame as the accident did not arise out of its work.

Rad's motion is denied with respect to the common law and contractual indemnification and contribution claims (causes of action one through three). As counsel for Rad readily admits, "all" of the third-party claims against Rad "hinge on whether or not the plaintiff was injured as a result of the work and/or negligence of Rad" (Id., ¶ 19). Rad then posits that, "[a]s there is no admissible evidence that [plaintiff was injured as a result of Rad's negligence], there is no duty [on Rad] to defend or indemnify" (Id., ¶ 20). Given there has been a finding, supra, that a factual issue exists as to whether Rad's employees were responsible for the water condition which caused plaintiff to slip and fall, Rad's argument is necessarily misplaced. Plaintiff testified that he believed the water on the floor came from Rad's employees' use of the water saw and that after he fell he heard the water saw running nearby. Records from the work

site indicate that Rad's bricklayer was, in fact, using the water saw on the day of the accident. Accordingly, at a minimum, an issue of fact exists as to whether Rad is responsible for the water on which plaintiff allegedly slipped. Thus, that branch of Rad's motion for summary judgment dismissing the common law and contractual indemnification and contribution claims is denied. For these same reasons, that branch of St. John's and Sciame's seeking summary judgment on these claims is denied.

That branch of Rad's summary judgment motion seeking dismissal of the claim for failure to procure insurance is granted, and it is dismissed. Rad submits a Certificate of Liability Insurance listing Sciame and St. John's as additional insureds (Monganlender Affirm., Ex. F). In opposition, Sciame and St. John's argue that a certificate of insurance is merely evidence of a contract for insurance and not proof of insurance, and is, thus, insufficient to entitle Rad to summary judgment. This argument is disingenuous in light of evidence submitted by Rad of a defense it tendered to Sciame and St. John's in a King's County action arising from the same project (Morganlender Reply Affirm., Exs. A, B), and Rad's production in discovery of documents indicating that defendants were covered under a certain QBE insurance policy HBG00649-6 (Id.). Moreover, once Rad submitted evidence that it had, in fact, procured insurance, the burden shifted to defendants to establish an issue of fact

precluding summary judgment or to otherwise show that this was not the case. Sciame and St. John's failed to do so. Accordingly, that branch of Rad's summary judgment motion to dismiss the claim for failure to name Sciame and St. John's as additional insureds is granted, and it is dismissed.

Turning to JMR's cross-claims against Rad, the cross-claim for failure to obtain insurance must be dismissed for the same reason, supra, and for the additional reason that JMR has no standing to allege this claim against Rad. Likewise, JMR has no basis to allege a contractual indemnification claim against Rad as there is no privity between JMR and Rad, and any contractual indemnification claim that may exist belongs to Sciame and St. John's, not JMR.

Questions of fact, however, exist as to whether Rad was responsible for the water condition that caused plaintiff to slip, which precludes summary dismissal of JMR's common-law contribution and indemnification claims against Rad. Accordingly, Rad's motion for summary judgment dismissing JMR's cross-claims asserting contractual indemnification and failure to obtain insurance is granted only with respect to the contractual indemnification and failure to obtain insurance claims, and is otherwise denied.

Accordingly, it is

ORDERED that second third-party defendant Rad & D'Aprile, Inc.'s motion for summary judgment is granted to the extent of dismissing third-party plaintiffs' claim for breach of contract for failure to obtain insurance, and dismissing third-party defendant JMR Concrete of New York, Corp.'s cross-claims for contractual indemnification and breach of contract for failure to obtain insurance, and is otherwise denied; and it is further

ORDERED that defendants/third-party plaintiffs St. John's University and F.J. Sciame Construction Co., Inc.'s cross motion is granted to the extent of dismissing plaintiff Karbowiak's Labor Law § 200 claim and is denied as to plaintiff's Labor Law § 241[6] claim. Plaintiff has discontinued his Labor Law § 240[1] claim. Those branches of the cross-motion seeking summary judgment as to third-party defendant JMR and second third-party defendant Rad are denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon counsel for defendants and upon the Clerk of the Trial Support Office, and said Clerk is respectfully directed to place this matter on the Part 40 calendar for trial.

This constitutes the decision and order of the Court.

Dated: 4/3/14

HON. JEFFREY K. OING, J.S.C.