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SCANNED ON 6/4/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. J.S.C.

PRESENT: _____ PART 2

Justice

Index Number : 103031/2011
HINER, FRANCIS
vs.
WHITEHALL STREET REAL ESTATE
SEQUENCE NUMBER : ~~003~~ 004 (03)
PARTIAL 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 decided in accordance with the accompanying decision

FILED

JUN 04 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: June 3, 2014

Ruly, 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 : PART 2

FRANCIS HINER,

Plaintiff,

-against-

WHITEHALL STREET REAL ESTATE LIMITED PARTNERSHIP, GS SITE 25 HOTEL, LLC, GS SITE 25 RETAIL, LLC, GS SITE 25 ASSOCIATES, LLC and EMBASSY SUITES MANAGEMENT, LLC,

Defendants.

INDEX NO. 103031/2011
Motion Sequence 003 & 004
DECISION & ORDER

WHITEHALL STREET REAL ESTATE LIMITED PARTNERSHIP, GS SITE 25 HOTEL, LLC, and EMBASSY SUITES MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

BATTERY PARK APPLE, LLC and APPLE-METRO, INC.,

Third-Party Defendants.

Third-Party Index No. 590583/2012

LOUIS B. YORK, J.:

Motion sequences bearing the numbers 003 and 004 are hereby consolidated for disposition. In this action for personal injury, plaintiff Francis Hiner (Hiner) moves, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim as against GS Site 25 Retail, LLC (GS Retail) alone (mot. seq. 003). Defendants and third-party plaintiffs Whitehall Street Real Estate Limited Partnership (Whitehall), GS Site 25 Hotel, LLC

(GS Hotel), and Embassy Suites Management, LLC (Embassy), (together, Hotel Parties), cross-move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against them, and for summary judgment in their favor on the third-party complaint. Defendant GS Retail, and third-party defendants Battery Park Apple, LLC (BP Apple) and Apple-Metro, Inc. (Metro) (together, Restaurant Movants), move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims as against GS Retail, and for summary judgment dismissing the third-party complaint (mot. seq. 004).

BACKGROUND

Whitehall owned a property at 102 North End Avenue, New York County. It contained two commercial condominium units, a hotel unit owned by GS Hotel, licensed to Embassy, and a retail unit owned by GS Retail. The retail unit was leased to BP Apple, owned by Metro. BP Apple shared the space with Battery Park Fresh, LLC (BP Fresh), also owned by Metro. BP Apple operated an Applebee's Restaurant on the premises, and BP Fresh operated a Chevy's Restaurant. Plaintiff, a manager at Chevy's, was allegedly injured, on May 12, 2009, when he fell while painting the restaurant's interior.

The original action commenced on March 11, 2011, with the complaint charging negligence, and violations of Labor Law §§ 200, 240 and 241 (the Hiner Action). On July 31, 2012, an amended third-party complaint was filed by the Hotel Parties, asserting causes of action for indemnification, contribution, defense and breach of contract.

TESTIMONY

Plaintiff Hiner was deposed on December 3, 2012. Anthony Favuzzi (Favuzzi), general manager of Chevy's, an employee of Metro, was deposed on February 19, 2013. Roberto Molina

(Molina), a server at Chevy's, was deposed on September 17, 2013. Frank Venice (Venice), executive vice president and chief financial officer of Metro, was deposed on August 19, 2013. . Lauren Hedvat (Hedvat), who managed real estate leases and relationships with retail tenants on behalf of the Goldman Sachs corporate real estate group, the ultimate owner of the property, testified for defendants on June 12, 2013.

At the time of the incident, Hiner was on vacation from his job as bar manager at Chevy's and was painting the restaurant for an extra $5,000. He had painted another Metro restaurant where he had been employed, and he said that Favuzzi, his boss at that location and now at Chevy's, asked him to paint the restaurant at 102 North End Avenue. Hiner was engaged to paint the walls on the first of two floors, applying two coats of paint. His contract with Metro was in the form of a letter from Metro, identifying the work and the price. He did not recollect if it mentioned insurance or indemnification. He had no insurance as a painter.

The only equipment that Hiner said that he owned and used was brushes, rollers and pans. *Id.* at 19. He expected ladders to be provided at each site that he was hired to paint. He did not ask his boss at Chevy's for a ladder when painting the restaurant. However, the maintenance man, a Metro employee, when asked "do we have enough ladders and stuff he said yes, yes, you have everything that you need." When Hiner started the paint job, he found paint, rollers, pans and three ladders left for him. There was a "step-stool type ladder," a "six-foot ladder, six- to eight-foot ladder," and "a huge ladder which was not usable because based upon the low laying lights. It was probably a 12- to 15-foot ladder." They were all A-frame ladders, "all metal, aluminum, metal, whatever material it was." He had used similar ladders on other painting jobs.

Hiner testified that Molina and "a friend of a friend," named Russ, were working with him at the time of the incident. Molina and Russ were using the two shorter ladders, which is

why he climbed onto a bar stool. He had not used a bar stool before, only at the time that he fell. It was the second night of the painting job. The group started working after midnight. They had worked about eight hours the night before. Hiner did not recall speaking to anyone with responsibility at Chevy's, in person or on the telephone, about the working conditions for the paint job once it began. He testified that there were no problems the first night, having only two ladders; as there were a lot of areas "with half-walls and low-lying areas where we didn't have [to use] ladders to work." Additionally, they used pole extensions that slid out beyond the six-foot reach of a normal pole for heights. (Hiner tr at 41-48)

Hiner said the ceiling where he was working when he fell was high, "maybe 10, 12 [feet]. It could have been as much as up to the 18." *Id.* at 43. He stated that there was a "low-lying light which prevented me from using the large ladder," and the space required "[c]ut work, meaning it had to be done with a brush," not a roller on a pole extension. *Id.* He explained that switching ladders "slows down the job." *Id.* at 121.

Hiner identified some photographs that he had taken of the scene which showed a half-wall where he hit his head as he fell. He said that he was standing on a bar stool when he fell. One of the photographs showed "the actual type of bar stool that I did use to stand on," but not the stool itself. *Id.* at 31-32. He picked the bar stool himself and moved it into position. He climbed onto the bar stool, and then reached down for the paint and brush. The bar stool was not unsteady. He did not secure it in any manner, nor did he ask his helpers to hold the bar stool.

Hiner thought that the floor surface on which the bar stool stood was a "half inch commercial rug with concrete underneath." *Id.* at 122. He assumed that it was level. He estimated that he was standing about three feet above the ground. He painted from that position

for some minutes before he fell, "approximately ten to 15 minutes." He was reaching up to the top right corner of the wall that he was facing when the bar stool wobbled and he fell. He speculated that the bar stool wobbled because of "my shift in weight, leaning up to the right and the fact that it is not meant to be used for painting and there you go." *Id.* at 126. He claimed that no dirt or debris contributed to his accident, and the lighting was "[p]retty good." *Id.* at 135.

Hiner said that Molina did not see him fall, but "heard the crash and came running over." Hiner could not recall whether Russ saw or heard anything.

Hiner testified that the defendants "never were involved in any of what went on." *Id.* at 137. He acknowledged that he "was the main guy" on the painting project. *Id.* at 140. He was paying Molina and Russ an hourly rate himself.

Favuzzi testified that he worked with Hiner at a Staten Island restaurant owned by Metro for about two years before it closed and they were both reassigned to the North End location in 2008. Favuzzi tr at 8-9. According to Favuzzi Hiner previously painted the Staten Island restaurant at the request of one of Metro's owners, and was hired to paint Chevy's by Miguel Ferenandez, Metro's district manager. Favuzzi had no information about details of the prospective paint job other than the premises "looked kind of beat-up and run down." All that he knew about it, he learned from Hiner.

According to Favuzzi, there were two aluminum-framed ladders at Chevy's, one was seven or eight feet, the other 18 or 19 feet. They were typically used to change light bulbs, and by outside workers handling plumbing or ventilation matters. He was unaware of which ladders Hiner planned to use to do the painting. Favuzzi claimed that he never told Hiner not to use a bar stool.

Favuzzi did not direct Chevy's day-to-day operations.

Molina knew Hiner for about two years; Hiner was his manager at Chevy's. Molina tr at 9. They had also worked together at the Staten Island restaurant. *Hiner and Molina* agreed orally that Molina would be paid $150 for each night's work, after normal operating hours. *Id.* at 19. No one but Hiner gave him any instructions about the painting. Molina only spoke to Favuzzi, whom he knew as general manager, about the painting after the accident.

No other restaurant employees were involved with the painting, but he brought friends to help on some nights, who were also paid directly by Hiner. On the night of the accident, none of his friends worked with them, but another man, a stranger to him, did. He never saw the man before or since. He did not recognize the name Russ.

Molina brought no equipment to Chevy's, "everything was there." *Id.* at 24-25. There were two ladders, "a really big one," an extension ladder, and "an aluminum open ladder," an A-frame ladder. *Id.* at 25-26. He took the extension ladder and the other man took the A-frame ladder, without being directed to do so.

Molina saw Hiner painting in the area of the bar, standing on "a stool like those bar chairs." *Id.* at 30. It was "about like three or four feet high with backing." The stool had four legs; its seat was all wood, not cushioned. Hiner could not stand on the bar to reach that part of the wall that Hiner was painting because of obstructions. Molina heard nothing, but he said that instinct made him turn to see Hiner falling. He estimated that he was about 12 feet away from Hiner at the time. Molina's view was partially blocked, so he could not see the movement of the stool, if any.

Venice testified that he was employed by Metro about 19 years when deposed. He said

that he visited the Chevy's site three or four times a year. Venice tr at 25. He had no direct knowledge of the accident; he described his information as "[t]hird-hand knowledge." *Id.* at 41.

Hedvat testified that BP Apple and BP Fresh were owned by Metro, were tenants of GS Retail, and operated restaurants at the location, Applebee's and Chevy's respectively. She testified that she had no involvement with the restaurants; her dealings were with Metro's management.

LEGAL STANDARDS

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, 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).

DISCUSSION

Plaintiff's Motion for Partial Summary Judgment - Mot. Seq. 003

Hiner moves, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim as against GS Retail alone. Labor Law § 240 (1) makes the owner, general contractor or their agent at a property undergoing construction, demolition, repair or painting strictly liable for elevation-related risks to workers on site. It requires that ladders,

scaffolds or other appropriate equipment "shall be so constructed, placed and operated as to give proper protection to a person so employed." This statute is meant to provide "protection against risks due in some way to relative differences in elevation." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 (1991).

In some instances, liability under the statute seems simple. *Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675, 675 (1st Dept 2009) ("Plaintiff made a prima facie showing of liability under section 240 [1] by his testimony that the ladder tipped, causing him and the ladder to fall"). Further, "regardless of any carelessness on plaintiff's part which might also have contributed to his fall, defendants were properly held absolutely liable for the full extent of the damages proximately resulting from the improper placement of the ladder." *Bland v Manocherian*, 66 NY2d 452, 460 (1985).

However,

> "[n]ot 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). "Certainly, section 240 of the Labor Law does not give absolution to the plaintiff where his injury has been caused, *exclusively*, as a result, of his own willful or intentional acts." *Tate v Clancy-Cullen Stor. Co.*, 171 AD2d 292, 296 (1st Dept 1991); *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 856 (2d Dept 2007) ("A plaintiff cannot recover under Labor Law § 240 [1] if his or her actions were the sole proximate cause of the accident").

> "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory

> violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation."

Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 290 (2003). In the instant situation, Hiner's conduct was the sole proximate cause of his accident, which requires the denial of his motion for partial summary judgment.

Hiner testified that there were three ladders available for use in painting the restaurant. There is no allegation that any defendant or third-party defendant, to the degree that they were aware of the paint job, knew that he planned to work with others. The agreement to paint, written in Hiner's voice, states that "I will repaint Chevy's fresh Mexican restaurant . . . I will apply wall covering with two coats of paint . . . ." No one else is mentioned. As he was "the main guy," Hiner was responsible for not choosing the right size ladder to reach the section of the restaurant that he chose to paint. There is no allegation of a deadline or time pressure on Hiner that limited his ability to use the proper equipment. *See* Hiner tr at 121-12. It was the second night of what he anticipated as a longer job. He does not claim that there was little left to do, leaving him only to address an awkwardly situated area of the restaurant. Even if no third ladder was available to accommodate all three men working that night, he could have waited for a ladder to become available. Alternatively, Hiner could have directed one of his workers to paint a lower section of the premises without a ladder, or to use the tallest ladder to paint a high, unobstructed area, allowing Hiner to use one of the two other ladders. Instead, he stood on a bar stool, something that he had never done before, admitting that he was reckless, when he testified "that it is not meant to be used for painting." Hiner tr at 126.

When a worker at a job site, where eight-foot ladders were available, continued to use a six-foot ladder when moving to an area with a higher ceiling, the Court of Appeals affirmed the

dismissal of his complaint, including his Labor Law § 240 (1) claim. *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 (2006) ("there were adequate safety devices – eight-foot ladders – available for plaintiff's use at the job site. Plaintiff's own negligent actions – choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work – were, as a matter of law, the sole proximate cause of his injuries"). When a laborer fell off the top edge of a Dumpster while he was trying to make room for more debris, the Court of Appeals denied him summary judgment on his Labor Law § 240 (1) claim. *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 (2011) ("Ortiz failed to adduce evidence, through testimony or other means, to establish what he asserted in his affidavit – that he was required to stand on or near the ledge"). An action involving the collapse of an aluminum ladder was dismissed because of evidence "that [plaintiff] Gomes's misuse of the ladder was responsible for the incident." *Gomes v State of New York*, 272 AD2d 440, 440 (2d Dept 2000).

Hiner, akin to the *Robinson* plaintiff, passed on safe alternatives to reach high on the wall to paint; akin to the *Ortiz* plaintiff, he chose to stand in a perilous position; and, akin to the *Gomes* plaintiff, he misused a piece of furniture, not appropriate to the task. In sum, Hiner's conduct was the sole proximate cause of his injuries, and his motion for partial summary judgment on his Labor Law § 240 (1) claim as against GS Retail is denied.

Hotel Parties' Cross Motion for Summary Judgment - Mot. Seq. 003

The Hotel Parties, that is, those entities owning the property or operating a hotel on the property, cross-move for dismissal of all claims and cross claims as against them, and for summary judgment in their favor on the third-party complaint. Hiner's complaint charged all

defendants with negligence, and violations of Labor Law §§ 200, 240 and 241. GS Retail asserted a cross claim for contribution against the Hotel Parties, if it were found liable to Hiner. In their third-party complaint, the Hotel Parties asserted causes of action for indemnification, contribution, defense and breach of contract against BP Apple, lessee of the retail space occupied by the restaurants, and Metro, BP Apple's parent company.

Dismissal of the Hiner Action

GS Retail owns the commercial condominium unit where Metro's affiliates operate restaurants. In the Labor Law frame of reference, GS Retail stands as the landlord, and Metro and/or BP Apple and/or BP Fresh stand as the general contractor for Chevy's paint job. The Hotel Parties are no more than neighbors of the Restaurant Movants, but the court will proceed to examine plaintiff's allegations nevertheless.

There is no basis to hold the Hotel Parties liable for Hiner's injuries under a theory of common-law negligence, or violation of Labor Law § 200, New York's codification of common-law negligence.

> "To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site, a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition."

Torkel v NYU Hosps. Ctr., 63 AD3d 587, 591 (1st Dept 2009) (citation omitted).

Hiner's testimony disclaims any involvement by the Hotel Parties with his after-hours paint job; "they never were involved in any of what went on." Hiner tr at 137. "Related to Goldman Sachs, if that be the case, that GS stands for Goldman Sachs, not one person from Goldman Sachs had given me any instructions or anything with insurance or paint brushes or

anything. They were not involved in any way, shape or form." He went on to say the same about Embassy.

Additionally, there is no allegation of the creation or notice of an unsafe condition by the Hotel Parties. The complaint's cause of action for common-law negligence and/or violation of Labor Law § 200, therefore, shall be dismissed as against the Hotel Parties.

The same dispositive authority cited above in reference to the complaint's Labor Law § 240 (1) claim applies to the instant cross motion. Hiner's conduct was the sole proximate cause of his injuries. Although alone responsible for managing the paint job, he let a ladder go unused while he climbed onto a bar stool, for the first time, to paint a high section of the restaurant's wall. The three ladders, and the amount of work still to be done on the second night of the job, allowed him to organize the three-man crew and its resources safely instead of choosing the admittedly inappropriate bar stool to extend his reach. The complaint's cause of action for violation of Labor Law § 240 (1) shall be dismissed as against the Hotel Parties.

Labor Law § 241 (6) imposes liability on property owners, general contractors and their agents without regard to their involvement in the day-to-day operations of their construction project. It provides that "the owners and contractors and their agents for such [construction, demolition or excavation] work . . . shall comply" with the New York State Industrial Code (Industrial Code). However, holding an owner or general contractor liable for work site injuries, pursuant to Labor Law § 241 (6), requires a specific, applicable violation of the Industrial Code. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993) ("we hold that, for purposes of the nondelegable duty imposed by Labor Law § 241 [6] and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating

compliance with concrete specifications and those that establish general safety standards").

Plaintiff's bill of particulars alleges violations of Industrial Code §§ 12 NYCRR 23-1.5, 23-1.7, 23-1.7 (d) - (f), 23-1.15, 23-1.16, 23-1.30, 23-2.1 (a) and (b), 23-2.2 (b) - (e) and 23-3.3 ©, as well as unspecified regulations of the United States Department of Labor's Occupational Safety & Health Administration (OSHA). Abele affirmation in support, mot. seq. 004, exhibit E. Industrial Code section 23-1.5 announces itself as dealing with the "[g]eneral responsibility of employers," far from enunciating concrete job site specifications. Section 23-1.7 addresses "general hazards," while subsections (d), (e) and (f) deal with slipping hazards, tripping and hazards from debris or obstructions, and vertical passages, respectively. Hiner testified that "there was nothing on the [bar stool] seat that was slippery." Hiner tr at 134. He also said that dirt or debris did not contribute to his accident. *Id.* Stairways, ramps and/or runways were not present in the area that he was working, and ladders were provided, as the code requires, for "access to working levels above or below ground."

Section 23-1.15 deals with safety railings, not at issue here; section 23-1.16 deals with safety belts, harnesses and attached lines, also not involved with this incident. Section 23-2.1 (a) provides for the safe storage of equipment and material, not an element of this incident; section 23-2.1 (b) calls for the safe disposal of debris, not at issue here. Section 23-2.2 (b) - (e) outlines the requirements for working with concrete, none of which are applicable to the events of May 12, 2009. Finally, section 23-3.3 © deals with the inspection of demolition work, not an activity conducted by Hiner.

OSHA regulations are not the predicate for a Labor Law § 241 (6) claim against a nonsupervising owner or general contractor. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343,

351 n (1998) ("As the Federal provisions relied upon by plaintiff are not the type which establish a nondelegable duty, the breach of which would constitute some evidence of negligence, any violation of the OSHA regulations by the subcontractor, plaintiff's employer, would not form the basis for liability under Labor Law § 241 [6]"). Therefore, the complaint's charge that the Hotel Parties are liable under Labor Law § 241 (6) shall be dismissed. Consequently, the Hiner Action shall be dismissed in its entirety as against the Hotel Parties.

Additionally, the Hotel Parties request dismissal of GS Retail's cross claim against it, and for summary judgment in their favor on the third-party complaint.

Dismissal of GS Retail's Cross Claim

In its answer to Hiner's complaint, GS Retail asserts a cross claim for contribution against the Hotel Parties, if it were found liable to Hiner. In motion sequence number 004, GS Retail moves, in conjunction with BP Apple and Metro, for summary judgment dismissing plaintiff's complaint as against GS Retail, and for summary judgment dismissing the third-party complaint in its entirety. Resolution of GS Retail's motion to dismiss the Hiner Action may determine the fate of its cross claim for contribution, and, therefore, the Hotel Parties' request for dismissal of GS Retail's cross claim against it will be examined below in conjunction with the motion to dismiss GS Retail from the Hiner Action.

Hotel Parties' Third-Party Complaint

The Hotel Parties' third-party complaint asserts causes of action for indemnification, contribution, defense and breach of contract against BP Apple and Metro, the lessee of the restaurant space and its parent company. In their cross motion, the Hotel Parties ask for summary judgment on the third-party complaint to the extent of granting them contractual

defense and indemnification in the Hiner Action. The issue of indemnification is now moot as a result of the dismissal of the Hiner Action as against the Hotel Parties, as decided above. The request for contractual defense remains. The Hotel Parties contend that, as of the date of this cross motion, BP Apple and Metro have taken over defense of GS Retail, but not of the Hotel Parties.

Section 9.01 (a) of the Lease (the Indemnity Clause), originally executed between GS Retail's predecessor, as Landlord, and BP Fresh, as Tenant, provides:

> "Tenant shall defend, indemnify and save Landlord, Superior Lessors, Superior Mortgagees, and the owner and/or operator of the Hotel Unit and its or their respective partners, directors, officers, agents and employees harmless from legal action, damages, loss, liability and any other expense (including reasonable attorney fees and disbursements) in connection with loss of life, bodily or personal injury or property damage arising from or out of all acts, failures, omissions, or negligence of Tenants, its agents, employees or contractors which occur in or about the Premises, unless such legal action, damages, loss, liability or other expense (including reasonable attorney fees and disbursements) results from the sole act, omission or neglect of Landlord, its respective agents, contractors, employees or persons claiming through it."

As Hiner's conduct is found as the sole proximate cause of his injuries, no other party is found liable for damages. No act, omission or neglect implicates the Hotel Parties. The issue of liability is now limited only to defense of the Hotel Parties by BP Apple and Metro, BP Fresh's parent, pursuant to the Indemnity Clause. The Hotel Parties, however, do not seek this relief on behalf of Whitehall, because only GS Hotel and Embassy, as "owner and/or operator of the Hotel Unit," are expressly mentioned as third-party beneficiaries of the Indemnity Clause. Gotlib reply affirmation, ¶ 24.

GS Retail, additionally, joins the opposition to the Hotel Parties' cross motion in asserting four arguments: (1) the Indemnity Clause is void and unenforceable; (2) it is unclear

whether there was an intent to indemnify the Hotel Parties; (3) the Lease and exhibits are not in admissible form; and (4) the cross motion is procedurally defective. The opponents claim that indemnifying the Landlord et alia except where their "sole act, omission or neglect" is responsible for the harm violates General Obligations Law (GOL) § 5-322.1, which provides that an owner or contractor may only enforce an indemnification agreement in the absence of its own negligence. *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 181 (1990) ("[A] contractor who is guilty of negligence will be barred from recovering contractual indemnity by virtue of the General Obligations Law provision"); *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 193 (1st Dept 2004) ("Such clause indemnifies the owner and construction manager for their own negligence and therefore runs afoul of General Obligations Law § 5-322.1 [1]").

If the Landlord were to be indemnified for anything but its sole negligence, GOL § 5-322.1 would make the Indemnity Clause unenforceable. However, section 37.12 of the Lease provides that

> "this lease shall be governed by and construed in accordance with the laws of the State of New York. If any provisions of this Lease or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, the remainder of this Lease and the application of that provision to other persons or circumstances shall not be affected but rather shall be enforced to the extent permitted by law."

This language brings the Indemnity Clause in line with GOL § 5-322.1. *See Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 (2008); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004); *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 (1st Dept 2002). The Indemnity Clause properly extends to GS Hotel and Embassy as owner and operator, respectively, of the hotel on site.

The opposition to the cross motion claims that "there is nothing in admissible form to document that Whitehall or GS Hotel or Embassy were intended to be indemnitees." Abele affirmation in opposition, ¶ 7. On the contrary, no factual allegations are raised to bring doubt that GS Hotel and Embassy are the "owner and/or operator of the Hotel Unit," specified in the Indemnity Clause.

The claim that the Lease is not admissible, that it is not authenticated, does not survive scrutiny. No one disputes the authenticity, accuracy or substance of the Lease. Venice, executive vice president and chief financial officer of Metro, was shown a copy of the Lease during his deposition, and the transcript of his testimony contains 35 references to it, such as, "Q. Was this the lease for the premises we've been discussing where the Chevys was located at 102 North End Avenue? A. Yes." Venice tr at 30. The Restaurant Movants, in their motion for summary judgment, attach a copy of Venice's deposition transcript and refer to it in support. Abele's affirmation in support, mot. seq. 004, exhibit O. The copy of the Lease, submitted by both plaintiff and Restaurant Movants, shall be actively considered as a part of this record.

The final objection is that the cross motion is procedurally defective, because a cross motion may only be directed against a moving party, as the opponents read CPLR 2215. Here, the Hotel Parties, as third-party plaintiffs, cross-move for summary judgment against third-party defendants on a motion sequence initiated by plaintiff. The Hotel Parties contend that they are proceeding pursuant to CPLR 2215 (b): "Relief in the alternative . . . may be demanded; relief need not be responsive to that demanded by the moving party."

"The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party." *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 (1st Dept 2013). Yet, "courts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215." *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 65 (2d Dept 2013). "[A] technical defect of this nature [seeking affirmative relief from a nonmoving party] may be disregarded where, as here, there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought." *Daramboukas v Samlidis*, 84 AD3d 719, 721 (2d Dept 2011). Here, where the opposing parties have had ample opportunity to be heard on the merits of the relief sought, and in the absence of prejudice, the court will entertain the Hotel Parties' cross motion. CPLR 2001 ("the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid").

To summarize, the Hotel Parties' cross motion for summary judgment dismissing the Hiner Action as against them is granted. Their request for dismissal of GS Retail's cross claim is discussed below, in conjunction with the motion to dismiss the complaint as against GS Retail in the Hiner Action. Additionally, Hotel Parties' cross motion for partial summary judgment on the third-party complaint is granted to the extent of directing third-party defendants BP Apple and Metro to defend third-party plaintiffs GS Hotel and Embassy in the Hiner Action.

Restaurant Movants' Summary Judgment Motion – Mot. Seq. 004

Dismissal of the Hiner Action

Restaurant Movants request dismissal of GS Retail from the Hiner action. They contend that

- GS Retail had no common-law duty to Hiner, and it had no control over the means and methods utilized by him;
- Hiner's conduct was the sole proximate cause of his injuries, precluding liability by any other party; and,
- there are no violations of the Industrial Code that support a claim under Labor Law § 241 (6).

GS Retail contracted with Hiner for the painting of Chevy's, "all materials applemetro will be purchasing." Abele affirmation in support, mot. seq. 004, exhibit J. Hiner testified that paint, rollers, pans and extension rods, along with three ladders of different lengths, were supplied to him. From that point on, he had no association with any other party, its agent or employee, except as Molina was also employed as a server by Chevy's. He and his two assistants worked during the overnight hours, when the restaurant was closed. He said that he spoke to no one in a position of responsibility, in person or by telephone, about the work as it progressed. He paid his two assistants an hourly rate himself; none of the other parties "were involved in any of what went on." Hiner tr at 137. He said that he "was the main guy" on the painting project. *Id.* at 140.

Favuzzi, who arranged for Hiner to do the paint job, disclaimed any detailed knowledge about its performance. Molina testified that he only spoke about the paint job to Favuzzi, whom he knew as general manager, after the accident. Venice said that he only knew that Hiner was paid for his after hours work, but otherwise Venice had no information about the conduct of the

job. Hedvat stated that she knew nothing about the incident until two days before her deposition. Although responsible for relations with her company's retail tenants, she testified that she was never notified of Chevy's planned paint job, and she thought that the tenant was under no obligation to provide such notice.

Based on plaintiff's testimony, as confirmed by other witnesses, no party was negligent under common law, or in violation of Labor Law § 200 by virtue of its involvement in supervising or controlling Hiner's work. Additionally, no hazardous condition was created or noticed on the premises by any party. The cause of action for common-law negligence, or violation of Labor Law § 200, shall be dismissed as against GS Retail.

The Hiner Action's remaining causes of action, for violation of Labor Law §§ 240 (1) and 241 (6), are dismissed for the same reasons given above in examining the Hotel Parties' cross motion for summary judgment. Hiner's conduct was the sole proximate cause of his injuries, and there was no regulatory violation that entailed liability under Labor Law § 241 (6). Therefore, Restaurant Movants' motion for summary judgment dismissing GS Retail from the Hiner Action is granted.

GS Retail's Cross Claim

The dismissal of GS Retail from the Hiner Action moots its cross claim for contribution by the Hotel Parties. Accordingly, the Hotel Parties' cross motion for summary judgment dismissing GS Retail's cross claim is granted (mot. seq. 003).

Dismissal of the Third-Party Complaint

Restaurant Movants move for dismissal of the third-party action in its entirety, because BP Apple and Metro allegedly fulfilled their contractual and common-law obligations by assuming the defense and indemnification of GS Retail in the Hiner Action. There is no dispute

that BP Apple and Metro have assumed the defense and indemnification of GS Retail in the Hiner Action. See the acceptance of tender by York Risk Services Group, Inc., acting for The Hartford, dated August 22, 2011. (Abele affirmation in support, mot. seq. 004, exhibit U.)

Restaurant Movants correctly argue that the Hotel Parties are not liable under any theory proposed by plaintiff, and, therefore, do not warrant indemnification. Restaurant Movants then contend that "Third-party Defendants have no obligation running to the Third-party Plaintiffs." *Id.*, ¶ 127. Without any specific citations, they conclude that "[a] review of the Lease Agreement and the modifications to the Lease Agreement reveals that there is no obligation running from Third-Party Defendants for common law indemnity or contribution or contractual indemnification or failure to procure insurance." *Id.*, ¶ 130. The court disagrees, reading the plain language of the Indemnity Clause to cover the Hotel Parties: "Tenant shall defend, indemnify and save Landlord, Superior Lessors, Superior Mortgagees, and the owner and/or operator of the Hotel Unit and its or their respective partners, directors, officers, agents and employees harmless . . . ."

Moreover, the Hotel Parties' outstanding claim is for defense alone, pursuant to the Indemnity Clause. While Restaurant Movants avoid use of the words "defend" or "defense" in the instant motion, the protection promised by the Indemnity Clause is not eliminated by going unnamed. The decision above, granting the Hotel Parties summary judgment on the third-party complaint, prevails, and Restaurant Movants' motion to dismiss the third-party complaint is, therefore, denied.

Accordingly, it is

ORDERED that the motion by plaintiff Francis Hiner, pursuant to CPLR 3212,

for partial summary judgment in his favor on his Labor Law § 240 (1) claim (mot. seq. 003) is denied; and it is further

ORDERED that the cross motion by defendants and third-party plaintiffs Whitehall Street Real Estate Limited Partnership, GS Site 25 Hotel, LLC, and Embassy Suites Management, LLC, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against them is severed and granted, with costs and disbursements to said defendants as against plaintiff as taxed by the Clerk of the Court, against plaintiff, upon submission of an appropriate bill of costs (mot. seq. 003); and it is further

ORDERED that the main action is continued against the remaining defendants; and it is further

ORDERED that the cross motion by defendants and third-party plaintiffs Whitehall Street Real Estate Limited Partnership, GS Site 25 Hotel, LLC, and Embassy Suites Management, LLC, pursuant to CPLR 3212, for summary judgment in their favor on the third-party complaint against third-party defendants Battery Park Apple, LLC, and Apple-Metro, Inc., is severed and granted, and the issue of reasonable attorney fees and disbursements for the defense of GS Site 25 Hotel, LLC, is referred to a Special Referee to Hear and Decide and to enter a judgment thereon (mot. seq. 003); and it is further

ORDERED that the motion by defendant GS Site 25 Retail, LLC and third-party defendants Battery Park Apple, LLC and Apple-Metro, Inc., pursuant to CPLR 3212, for summary judgment dismissing the complaint as against GS Retail is granted, with costs and disbursements to said defendants as taxed by the Clerk of the Court, against plaintiff, upon submission of an appropriate bill of costs (mot. seq. 004); and it is further

ORDERED that the action as against defendant GS Site 25 Retail, LLC is continued against the remaining defendant; and it is further

ORDERED that the motion by defendant GS Site 25 Retail, LLC and third-party defendants Battery Park Apple, LLC and Apple-Metro, Inc., pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint is denied (mot. seq. 004); and it is further

ORDERED that the Hiner Action shall continue as to defendant GS Site 25 Associates, LLC.

DATED: ~~May~~ June 3, 2014

ENTER:

J.S.C.

FILED
JUN 04 2014
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK
J.S.C.