SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA PART 11
Justice

----------X

MILTON PEREZ,

Index No: 302/2012

Plaintiff,

-against- Motion Date: January 8, 2014

11 WEST 42 REALTY INVESTORS, LLC, ET. AL., Mot. Seq. No. 7

Defendants.

----------X

SKYLINE WINDOWS, LLC,

Third-Party Plaintiff,

-against-

WINDSTRUCT, INC.,

Third-Party Defendant.

----------X

The following papers numbered 1 to 16 were read on the motion of defendants 11 West 42 Realty Investors L.L.C., s/h/a 11 West 42 Realty Investors LLC (11 West) and Tishman Speyer Properties, L.P., s/h/a Tishman Speyer Properties, LP(Tishman) for an order granting summary judgment plaintiff's claims for violations of Labor Law §200 and 241(6) and for general negligence, as well as any and all counterclaims and cross claims; for an order granting summary judgment against Skyline Windows, LLC, (Skyline), Windstruct, Inc., (Windstruct), NTT Services, L.L.C. (NTT) and/Pritchard Industries Inc.(Prichard), on their claims for contractual indemnification; and for an order granting summary judgment against NTT and Pritchard on their claims for common law indemnification.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Opposing Affirmation.....	5-6
Opposing Affirmation-Exhibit.....	7-9
Opposing Affirmation-Exhibit.....	10-12
Opposing Affirmation.....	13-14

Reply Affirmation..... 15-16

Upon the foregoing papers the motion is determined as follows:

Plaintiff Milton Perez, a window installer then employed by Windstruct, alleges that he sustained personal injuries on September 28, 2011 during the course of his employment at the premises known as 11 West 42nd Street, New York. Mr. Perez alleges that he sustained a severe cut to his arm, when a uniformed porter working at the premises, knocked into him, causing the contents of the cart he was wheeling, which contained a metal window frame and glass to fall onto his right wrist.

Defendant 11 West is the owner of the real property where the accident occurred. Defendant Tishman is the manager of said real property. Defendants 11 West and Tishman entered into a contract with defendant Skyline, dated July 9, 2011, to replace existing windows on certain floors of the subject premises. Skyline entered into a subcontract with Windstruct to remove windows and install new ones.

Defendants NTT and Prichard are alleged to have entered into an agreement with the owner or its agent to provide janitorial services at the subject building.

Pleadings:

Plaintiff commenced this action against 11 West and Tishman on January 6, 2012, and asserted a single claim for negligence and violations of Labor Law §§200, 240 and 241(6). Defendants 11 West and Tishman served an answer and interposed two affirmative defenses. On February 14, 2012, 11 West and Tishman commenced a third-party action against NTT and Skyline for common law contribution, common law indemnification, breach of contract, and contractual indemnification. NTT served an answer to the third-party complaint, and interposed twelve affirmative defenses and counterclaims against 11 West and Tishman for common law indemnification and contribution. Skyline served an answer to the third-party complaint and interposed ten affirmative defenses and cross claims and counterclaims against 11 West and Tishman.

On February 21, 2012, plaintiff filed an amended summons and amended verified complaint naming NTT as a direct defendant. On March 7, 2012, plaintiff filed a second amended summons and second amended verified complaint, naming Skyline as a direct defendant.

On June 18, 2012, Skyline commenced a third-party action against Windstruct for common law and contractual indemnification, contribution, and breach of contract based upon the alleged failure to procure insurance. Windstruct served an answer to the third-party action, and interposed thirteen affirmative defenses and two cross claim against 11 West, Tishman and NTT, and two counterclaims against Skyline.

Plaintiff's Deposition:

Plaintiff testified at his deposition, via a Spanish interpreter, that he was working on the second floor of the subject building on the night of September 28, 2011, and by 11:15 p.m., he had removed a large window frame containing three glass panels by braking it into several pieces, and replaced it with a new window. He stated that a co-worker, Elvio Reyes, had loaded pieces of the old window frame, with the glass attached to it, in an open cart, and that he helped Reyes move the cart to the basement. He stated that they used the freight elevator to take the cart down to the basement and that a uniformed porter also got on the elevator on the second floor. When they got to the basement, plaintiff got off first and wheeled the cart out of the elevator. Plaintiff stated that he was approximately 10 feet from the freight elevator and was in the process of wheeling the cart away from the elevator when the porter began to push a cart filled with garbage bags behind the plaintiff. Mr. Perez stated that while he was pushing his cart, he held onto portions of the window and frame, and that the porter's cart came into contact with his cart; that the garbage fell off the porter's cart; and the window frame and glass he had been holding onto fell, cutting the underside of his right wrist. Mr. Perez stated that said window frame was made of antique metal, and weighed approximately 15 pounds. Mr. Perez was transported by ambulance to the emergency room of Roosevelt Hospital where he received 17 stitches. He subsequently underwent surgery on his right arm. Mr. Perez stated that he was unable to work for approximately a year and two months, and that when he returned to work he was no longer able to install windows.

Tishman's Deposition:

Edison Montoya was deposed on behalf of Tishman. He stated that the building is owned and managed by Tishman. Mr. Montoya, is the fire safety emergency action plan director and his primary responsibility is the fire command station in the first floor lobby of the subject building. He stated that he worked from 4:00 p.m. to 12:00 a.m, and that individuals who entered the building while he was on duty would sign in at his desk and be issued building passes. Mr. Montoya stated that at the time of plaintiff's accident Skyline was working in the building replacing the windows. He stated that he did not know if Skyline had hired other people to do the work and that his only involvement with the window replacement project was to issue building passes to the workers. Mr. Montoya stated that he never heard of Windstruct and was unaware of any subcontractors; that Tishman did not supervise the window replacement work; and that Tishman did not have a construction manager on the job.

Mr. Montoya stated that Skyline's foreman was in charge of the work; that Skyline's workers placed the old windows in a four sided open metal bin or cart on wheels; and that they would take the cart to the basement via freight elevator (car number 3), and then wheel the bin down a hallway to another elevator (car number 19) that would take them to the street level, where the cart would be placed outdoors.

Mr. Montoya stated that Tishman hired an outside company, "Prichard NTT" to clean the offices and take out garbage. He stated that the Prichard NTT cleaners begin working at 5:00 p.m.; that Edmond Milo was responsible for bringing the garbage out to street level; that Milo wore a Pritchard uniform; that the garbage was bagged by the cleaners; that Milo would place the bags into

a four-sided open wheeled plastic bin that is approximately four feet high; and that Milo would stack the bags so that they extended approximately two feet above the top of the bin. He also stated that Milo operated the freight elevator (car number 3) for Skyline's employees.

Mr. Montoya did not witness plaintiff's accident. He stated that a Prichard employee, Nelson Santos, used the elevator intercom to inform him of the accident. Mr. Montoya stated that he went to Prichard NTT's basement office where he spoke to Mr. Perez in Spanish, but that they did not discuss the details of the accident. He observed that Mr. Perez's arm had already been bandaged. He further observed from a distance of 10-12 feet a metal construction bin containing sharp objects, and that there was no debris on the floor.

Skyline's Deposition:

Roger Jones was deposed on behalf of Skyline and testified that he was the field supervisor at the subject building; that Skyline had a contract with Tishman to replace windows on approximately seven floors; that Windstruct was hired by Skyline as a subcontractor; that Windstruct had its own supervisor, foreman and workers. He stated that he had no interaction with Windstruct's workers; that he or his supervisor would give Windstruck the area to work in, but that he did not oversee their work. He stated that Skyline had its own employees on the job and that they worked during the day on Saturdays and from 5:00 p.m. to 12:30 a.m., during the week. He stated that replacement windows were delivered during the day and were brought in on open A-frame carts via the freight elevator. Mr. Jones stated that the windows that had been removed were placed in the A-frame cart and taken to the loading dock where they would be picked up the next day by a debris removal company. He described the A-frame cart an open cart consisting of a platform with four wheels and a pipe or tube along the center, and stated that the windows would be leaned against the pipe, to one side. He stated that although there were mini containers on wheels, made out of metal, they were used by the carpenters, electricians and plumbers and not by Skyline's employees.

Mr. Jones stated that the building's cleaner company employees used either a large garbage can on wheels, or cloth carts to remove the garbage. He stated that Skyline did not supply any tools or A-frame carts to Windstruct; that he conducted safety meetings only with Skyline employees; that he did not have any safety meetings with Windstruct or the other trades; and that Tishman's building engineer did not supervise the work. Mr. Jones did not witness Mr. Perez's accident and was unaware of any witnesses to the accident; and did not know when the accident occurred. He learned about the accident from Skyline's attorney.

NTT and Prichard's Deposition:

Edmond Milo, a former employee of Pritchard, was deposed on behalf of NTT and Prichard. Mr. Milo stated that he worked in the subject building from 5:00 p.m. to 12:00 a.m., Monday through Friday. Mr. Milo stated that he operated the freight elevator that went to the basement and that he also operated a second freight operator that went to the street level where there was a loading dock. He stated that he was also responsible for collecting garbage, which was left on the loading dock for collection by a carting company. Mr. Milo stated that he wore a uniform consisting of blue pants and a blue shirt with a patch bearing the address of the building.

Mr. Milo stated that he brought Mr. Perez down in the elevator; that only the two of them were in the elevator; that Mr. Perez had an A-Frame cart with two or three old windows; that when they exited the elevator, he was to the left of Perez and his cart, and intended to accompany him to the second freight elevator. Mr. Milo stated that Perez had stopped wheeling the cart and tried to fix or lift a frame; that he heard Perez cry out; and saw that Perez had cut his arm on the glass. He stated that he radioed his supervisor, Milena, on his walkie talkie; that another worker came down the stairs; and that the three of them went to Milena's office where she administrated first aid to Perez. He stated that Perez's co-worker was not present at the time of the accident.

Mr. Milo stated that after he exited the elevator he did not retrieve a bin that was used to collect garbage; that he did not push a bin down the hallway immediately prior to the accident; and he did not make contact with the plaintiff or plaintiff's cart with a bin. Mr. Milo stated that the basement floor had tiles and canals or ruts, and that it was possible that the condition of the floor caused the contents of plaintiff's cart to shift.

Defendants 11 West and Tishman's motion to dismiss plaintiff's complaint and all cross and counterclaims:

At the outset the court notes that plaintiff's complaint consists of a single cause of action which includes a claim for a violation of Labor Law §240(1). As defendants 11 West and Tishman have not moved to dismiss the Labor Law §240(1) claim, this court makes no determination at this time with respect to said claim.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (*see Alvarez v Prospect Hosp., supra*).

In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Torres v Perry St. Dev. Corp.*, 104 AD3d 672 [2d Dept 2013]; *Eldoh v Astoria Generating Co., L.P.*, 81 AD3d 871 [2d Dept 2011]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002]), or had actual or constructive notice of the defective condition causing the accident (*see LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 [2d Dept 2006]; *Gatto v Turano*, 6 AD3d 390, 391 [2d Dept 2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 AD3d 548 [2d Dept 2003]).

Where as here it is alleged that the plaintiff's injury was caused by the means and methods of work, in order to establish their respective prima facie entitlements to judgment as a matter of law, the defendants 11 West and Tishman are required to demonstrate that they did not have the authority to control or supervise the plaintiff's work (*see Eldoh v Astoria Generating Co., L.P.*, 81 AD3d 871,

874-875 [2d Dept 2011]; *Aloi v Structure-Tone, Inc*., 2 AD3d 375, 376 [2nd Dept 2003]). As Labor Law § 200 "merely codified the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe workplace" (*Lopes v Interstate Concrete*, 293 AD2d 579, 580 [2d Dept 2002]), a defendant's prima facie demonstration of entitlement to judgment as a matter of law pursuant to Labor Law § 200 also serves as a demonstration of entitlement to judgment as a matter of law dismissing a common-law negligence cause of action. "The determinative factor on the issue of control is not whether a [defendant] furnishes equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed" (*Eldoh v Astoria Generating Co., L.P.*, 81 AD3d at 874-875, *quoting*, *Everitt v Nozkowski*, 285 AD2d 442, 443-444 [2d Dept 2001]; *see Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]).
"General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (*Dos Santos v STV Engrs*., *Inc.*, 8 AD3d 223, 224 [2d Dept 2004], *lv denied* 4 NY3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (*see Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465 [2d Dept 2000]).

Applying these principles to the circumstances of the instant case, the court finds that the evidence presented establishes that defendant Tishman neither directed nor controlled the method or manner in which plaintiff's work was conducted. Contrary to the assertions of counsel for defendants NTT and Prichard, the condition of the basement floor is not at issue here, as plaintiff asserts that he was injured solely due to the negligent conduct of another person, and he has not raised a claim based upon the condition of the subject premises. The court further finds that there is no evidence that Tishman directed or controlled the manner in which Pritchard's employees performed their work. Therefore, that branch of defendants' motion which seeks to dismiss plaintiff's common law negligence and Labor Law §200 claims is granted as to defendant Tishman.

Defendant 11 West, however, has failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action, since it failed to produce competent evidence establishing that it lacked control over the work site (*see Nasuro v PI Assoc., LLC*, 49 AD3d 829 [2d Dept 2008]). Mr. Montoya's deposition transcript makes it clear that he testified on behalf of Tishman, and that he believed that Tishman was the owner of the subject building. However, there is no evidence that Mr. Montoya also testified on behalf of the property owner, 11 West. Defendants do not state whether 11 West was deposed, and said property owner has not submitted an affidavit from a person with personal knowledge of the facts. Accordingly, regardless of the adequacy of the papers submitted in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853[1985]), that branch of the defendants' motion which seeks to dismiss plaintiff's common law negligence and Labor Law §200 claims is denied as to 11 West.

The court next turns to the branch of the defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and

safety to construction workers (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 348; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). In order to establish his Labor Law § 241(6) claim, plaintiff must demonstrate a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). In the bill of particulars, plaintiff herein alleges violations of 12 NYCRR 23-1.2, 23-1.3, 23-1.5, 23-1.7, 23-2.1, OSHA Sec. 5(a) and (b), and 29 CFR 1926.20(b), 1926.21(b)(2) and 1926.250.

Although not specified, plaintiff appears to be relying upon 12 NYCRR 23-1.2(e), which sets forth a general safety standard and is not sufficient to impose a duty on the defendant under Labor Law § 241(6) (*Biszick v Ninnie Const. Corp*., 209 AD2d 661[2d Dept 1994]).

12 NYCRR 23-1.3 sets forth a general safety standard and cannot provide a basis for liability (*Maday v Gabe's Contracting, LLC*, 20 AD3d 513 [2d Dept 2005]).

12 NYCRR 23-1.5 merely sets forth general safety standards, which is an insufficient predicate for liability under Labor Law § 241(6) (*see Gasques v State of New York*, 59 AD3d 666 [2d Dept 2009], *affirmed* 15 NY3d 869 [2010]; *Maday v Gabe's Contr., LLC*, 20 AD3d 513 [2d Dept 2005]; *Sparkes v Berger*, 11 AD3d 601 [2d Dept 2004]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450 [2d Dept 2004]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2003]; *Fowler v CCS Queens Corp.*, 279 AD2d 505 [2001]; *Lynch v Abax, Inc.,* 268 AD2d 366 367 [2000]).

12 NYCRR 23-1.7 is inapplicable here, as plaintiff's did not testify that his accident was caused by any hazard specified in this section of the Industrial Code.

Industrial Code provision 12 NYCRR 23-2.1(a)(1), which requires that "building materials" be "stored in a safe and orderly manner" and that "material piles" be stable and "so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare," does not apply to the facts of the instant case because the materials plaintiff was disposing of was not a ""building material" but rather demolition debris, it was not being stored, and the accident was not caused by an obstruction of a passageway, walkway, stairway or other thoroughfare. Similarly, 12 NYCRR 23-2.1(a)(2), which directs that material or equipment shall not be stored upon any floor, platform, or scaffold in such quantity or weight so as to exceed the safe carrying capacity of such floor, platform, or scaffold, is inapplicable here because plaintiff accident did not involve material or equipment being stored. Furthermore, Industrial Code provision 12 NYCRR 23-2.1(b) has been held to be a general safety standard and, therefore, is insufficiently specific to support liability under Labor Law § 241(6) (*see Longo v Long Is. R.R.*, 116 AD3d 676 [2d Dept 2014]; *La Veglia v St. Francis Hosp*., 78 AD3d 1123 [2d Dept 2010]; *Parrales v Wonder Works Constr. Corp*., 55 AD3d 579[2d Dept 2008]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450 [2d Dept 2004]).

The alleged violations of OSHA standards cited by plaintiff does not provide a basis for liability under Labor Law § 241 (6) (*see Shaw v RPA Assoc. LLC,* 75AD3d 634 [2d Dept 2010]; *Schiulaz v Arnell Constr. Corp*., 261 AD2d 247 [1st Dept 1999]; *Greenwood v Shearson, Lehman*

& Hutton, 238 AD2d 311, 313[2d Dept 1997]; *Vernieri v Empire Realty Co.*, 219 AD2d 593[2d Dept 1995]).

As defendants 11 West and Tishman have established, prima facie, that the Industrial Code sections relied upon by plaintiff are either general standards or inapplicable to the facts of this action, that branch of the defendants' motion which seeks summary judgment dismissing plaintiff's claim for a violation of Labor Law §241(6), is granted.

That branch of defendant 11 West and Tishman's motion which seeks to dismiss all cross claims and counterclaims against them is decided as follows: Defendant NTT's counterclaims against 11 West and Tishman for common law contribution and common law indemnification are dismissed as to 11 West to the extent that said claims are based upon plaintiff's claims against 11 West for a violation of Labor Law §241(6), and are dismissed as to Tishman to the extent that they are based upon plaintiff's claims against Tishman for common law negligence and for violations of Labor Law §§200 and 241(6).

Defendant Skyline's cross claims for breach of contract, common law indemnification and common law contribution are dismissed as to 11 West to the extent that they are based upon plaintiff's claim for a violation of Labor Law §241(6), and are dismissed as to Tishman to the extent that they are based upon plaintiff's claims against Tishman for common law negligence and for violations of Labor Law §§200 and 241(6).

Defendant Skyline's counterclaims against 11 West and Tishman for common law contribution and indemnification are dismissed to the extent that they is based upon plaintiff's claims against 11 West for a violation of Labor Law §241(6) and to the extent that they are based upon plaintiff's claims against Tishman for negligence and for violations of Labor Law §§200 and 241(6).

Defendant Windstruct cross claims against 11 West and Tishman for common law indemnification and contribution are dismissed to the extent that they are based upon plaintiff's claims against 11 West for a violation of Labor Law §241(6) and to the extent that they are based upon plaintiff's claims against Tishman for negligence and for violations of Labor Law §§200 and 241(6).

Defendants' request for conditional summary judgment against Skyline, Windstruct, NTT and Pritchard on their crossclaims and counterclaims for contractual indemnification:

The right to contractual indemnification depends upon the specific language of the contract (*see Ramales v Pecker Iron Workers of Westchester, Inc.*, 114 AD3d 920, 921[2d Dept 2014]; *Zastenchik v Knollwood Country Club*, 101 AD3d 861, 864 [2d Dept 2012]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). The " 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [citation omitted]' " (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]); *see also M & V Concrete Contracting Corp. v Modica*, 76 AD3d 614, 615-616 [2d Dept 2010]; *Eversfield v Brush Hollow Realty, LLC*, 75 AD3d 492, 493 [2d Dept 2010)]. Indemnity contracts

are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006]; *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]*; Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

11 West entered into a contract with Skyline to dated July 9, 2011 to replace the existing windows in the subject building on the 3rd, 9th, 24th and 25th floors. Said contract was executed by representatives of the owner's agent, Tishman and by Skyline. Paragraph 5.2 of the General Provisions of said contract provides as follows:

"To the fullest extent permitted by law, Contractor shall indemnify, defend, protect and hold harmless Owner, Owner's Agent and their respective direct or indirect officers, directors, partners, agents and employees (collectively, the "Parties") from and against all claims, damages, losses and expenses, including attorney's fees, directly or indirectly arising out or alleged to arise out of or resulting from the performance of the Work, or the failure to perform the Work, including but not limited to all claims, damages, losses, or expenses which may be: (a) 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, and (b) caused in whole or part by any fault or negligent act or omission of Contractor, any subcontractor, anyone employed by any of them, or anyone for whose acts any of them may be liable, or by anyone acting for or on behalf of them, regardless of whether or not it is caused in part by one of the Parties. Such obligation shall not be construed to negate, waive, or otherwise reduce any other right of indemnity which would otherwise exist as to any of the Parties".

The General Conditions define the "Work" as "any and all tasks necessary to complete the Project, and includes all labor, material and equipment needed to accomplish such tasks."

Skyline, and its subcontractor, Windstruct, entered into an idemnification and insurance agreement, dated September 23, 2011, which provides, in relevant part, as follows:
"1. Indemnification. To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Skyline and their respective members, officers, directors, shareholders, agents, employees and assigns (collectively "Indemnitees") from and against all losses, claims, costs, damages and expenses (including, without limitation, the deductible amounts of any insurance and attorney's fees, court costs, and the cost of appellate proceedings), arising out of or resulting from the Subcontractor's furnishing of work, labor and services at the Project and/or the Subcontract. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity that would otherwise exist as to any Indemnitee."

"In any and all claims against any Indemnitee by any employee of Subcontractor...the idennification obligation hereunder shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Subcontractor under the workers' or workmen's compensation acts, disability acts or other employee benefits acts."

"Subcontractor's obligations hereunder shall survive both the: (i) termination of the Subcontract, and

(ii) Subcontractor's completion of its work at the Project."

"A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed *(see George v Marshalls of MA, Inc.*, 61 AD3d 931, *supra*; *O'Brien v Key Bank*, 223 AD2d 830, 831, [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of … statutory [or vicarious] liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Tranchina v Sisters of Charity Health Care Sys. Nursing Home*, 294 AD2d 491, 493 [2d Dept 2002]). However, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature (*see Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [1st Dept 2004]; *State of New York v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758 [3d Dept 2001])." (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616-617 [2d Dept 2011]).

Here, 11 West has not met its initial burden of demonstrating that it is free from any negligence with respect to plaintiff's claims for common law negligence, and for violations of Labor Law §§200 and 240(1), and that it can only be held liable based on statutory or vicarious liability as the owner of the subject property where the accident occurred. Notably, 11 West failed to submit any evidence with respect to its liability and merely seeks to rely upon the deposition testimony of Mr. Montoya who was deposed only on behalf of Tishman. Tishman has met its met its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law on its contractual indemnification claims against Skyline and Windstruct, by submitting evidence establishing that it was free from any negligence and can only be held liable on plaintiff's Labor Law 240(1) claim, based on statutory or vicarious liability as the owner's managing agent of the subject property where the accident occurred.

However, pursuant to the terms of the contractual indemnification provision at issue, Skyline is required to indemnify 11West and Tishman against "claims, damages, losses and expenses" only to the extent "caused in whole or part by any fault or negligent act or omission" of Skyline "or any subcontractor, anyone employed by any of them, or anyone for whose acts any of them may be liable, or by anyone acting for or on behalf of them". Windstruct's idemnification agreement likewise is premised on a finding of liability. Since it has not been demonstrated that Skyline or Windstruct's alleged negligence caused the plaintiff's accident, 11 West and Tishman have failed to establish it entitlement to conditional summary judgment against Skyline and Windstruct on its claim for contractual indemnification (*see Zastenchik v Knollwood Country Club*, 101 AD3d 861[2d Dept 2012]; *see also Ramales v Pecker Iron Workers of Westchester, Inc.*, 114 AD3d 920 [2d Dept 2014]). Therefore, that branch of defendants' motion which seeks a conditional summary judgment on the contractual indemnification claims against Skyline and Windstruct, is denied.

With respect to NTT, defendant has submitted a copy of an agreement between 11 West 42 Limited Partnership and NTT, dated September 17, 2008 whereby NTT agreed to provide janitorial

cleaning, window cleaning and lighting maintenance services at the subject building. Said contract was executed by several individuals on behalf of Tishman, who is described in the contract as the owner's agent.".

Defendants have failed to establish the relationship between the alleged present owner of the subject building 11 West 42 Realty Investors LCC, and the owner named in said contract, 11 West 42 Limited Partnership. Defendants, thus, have failed to establish that they are parties to the NTT agreement. Therefore, that branch of defendants' motion which seeks conditional summary judgment on its claims against NTT for contractual indemnification is denied.

Although the moving defendants refer to the co-defendants as "NTT/Prichard", they have failed to present any evidence regarding the relationship between NTT and Pritchard. Furthermore, defendants have not established the existence of an indemnification agreement that was executed by Pritchard, or that is binding on Pritchard. Therefore, that branch of defendants' motion which seeks conditional summary judgment on its claims against Pritchard for contractual indemnification is denied.

Defendants' request for conditional summary judgment on its claims for common law indemnification against NTT and Prichard:

A party seeking common-law indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (*Correia v Professional Data Mgt*., 259 AD2d 60, 65 [1st Dept 1999]; *see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr*., 10 AD3d 493, 495 [1st Dept 2004]) or, in the absence of any negligence, that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (*Benedetto v Carrera Realty Corp*., 32 AD3d 874, 874, [2d Dept 2006]).

Here, 11 West has not met its initial burden of demonstrating that it is free from any negligence with respect to plaintiff's claims for common law negligence, and for violations of Labor Law §§200 and 240(1). Tishman has established that it is free from any negligence with respect to plaintiff's claims for common law negligence, and for violations of Labor Law §§200 and 241(6), and may only be vicariously liable for a violation of Labor Law §240(1). However, neither Tishman nor 11 West has established that NTT and Prichard were negligent or that they had the authority to "had the authority to direct, supervise, and control the work giving rise to the injury". Moreover, as plaintiff and Mr. Milo's testimony raise a triable issue of fact as to how the accident occurred, defendants' request for summary judgment on their claims for common-law indemnification against NTT and Prichard, are premature. Therefore, that branch of the defendants motion which seeks conditional summary judgment on their claims against NTT and Prichard for common law indemnification is denied.

Dated: May 30, 2014

SIDNEY F. STRAUSS, J.S.C.