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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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MICHAEL GARDNER and CHRISTINE GARDNER,

Plaintiffs,

-against-

TISHMAN CONSTRUCTION CORP., TISHMAN CONSTRUCTION CORP. OF MANHATTAN, TISHMAN CONSTRUCTION CORP. OF NEW YORK and 53rd STREET AND MADISON TOWER DEVELOPMENT, LLC, ROLYN COMPANIES, INC. and DEGMOR, INC.,

Defendants.

Index No.: 104180/10

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TISHMAN CONSTRUCTION CORP., TISHMAN CONSTRUCTION CORP. OF MANHATTAN, TISHMAN CONSTRUCTION CORP. OF NEW YORK and 53rd STREET AND MADISON TOWER DEVELOPMENT, LLC,

Third-Party Plaintiffs,

-against-

E.J. ELECTRIC INSTALLATION COMPANY, ROLYN COMPANIES, INC. and DEGMOR, INC.,

Third-Party Defendants.

Third-Party Index No.: 590892/10

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ROLYN COMPANIES, INC.,

Second Third-Party Plaintiff,

-against-

SITE SAFETY, LLC,

Second Third-Party Defendant,

Second Third-Party Index No.:

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ROLYN COMPANIES, INC.,

Third Third-Party Index No: 590892

Third Third-Party Plaintiff,

-against-

PRINCE CARPENTRY, INC.,

Third Third-Party Defendant.

ROLYN COMPANIES, INC.,

Fourth Third-Party Index No.:

Fourth Third-Party Plaintiff,

-against-

DEGMOR, INC. and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Fourth Third-Party Defendants.

HON. ANIL C. SINGH, J.:

Motion sequence numbers 002, 003, 004, 005, 006 and 007 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an electrician when he stepped into a floor opening while working at a construction site located at 510 Madison Avenue in Manhattan (the premises) on November 10, 2009.

In motion sequence number 002, second third-party defendant Site Safety, LLC (Site Safety) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint, as well as any and all cross-claims asserted by defendants/third-party plaintiffs Tishman Construction Corp., Tishman Construction Corp. of Manhattan, Tishman Construction Corp. of New York (Tishman) and 53rd Street and Madison Tower Development (Madison) (collectively, the Tishman defendants) and third third-party defendant Prince Carpentry, Inc.

(Prince), as well as summary judgment in its favor on its cross-claim for defense and contractual indemnification claim as against Tishman Construction Corp., Tishman Construction Corp. of Manhattan and Tishman.

In motion sequence number 003, the Tishman defendants and Prince move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims and counterclaims asserted against them, as well as summary judgment in their favor on their cross-claims for common-law and contractual indemnification against defendant/third-party defendant/second third-party plaintiff/third third-party plaintiff/fourth third-party plaintiff Rolyn Companies, Inc. (Rolyn) and defendant/third-party defendant/fourth third-party defendant Degmor Company (Degmor), and their third-party claim for contractual indemnification against third-party defendant E.J. Electric Installation Company (E.J. Electric).

In motion sequence number 004, Rolyn moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, as well as the Tishman defendants' cross-claims for common-law and contractual indemnification against it. In addition, Rolyn moves pursuant to CPLR 3212 for summary judgment in its favor on its cross-claim for contractual indemnification against Degmor, as well as its fourth third-party claim against Degmor for breach of contract for failure to procure insurance.

In motion sequence number 005, E.J. Electric moves pursuant to CPLR 3212 for summary judgment in its favor on its cross-claims for common-law indemnification against Rolyn and Degmor. E.J. Electric cross-moves pursuant to CPLR 3212 and/or 3211(a)(1) and (a)(7), for summary judgment dismissing the third-party complaint and all cross-claims against it, and for summary judgment in its favor on its counterclaim for common-law indemnification

against the Tishman defendants.

In motion sequence number 006, plaintiffs Michael Gardner (plaintiff) and Christine Gardner move pursuant to CPLR 3212 for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Rolyn, Degmor and the Tishman defendants, and the Labor Law § 241(6) claim against the Tishman defendants. In addition, plaintiffs move pursuant to CPLR 3211(b) to dismiss and strike the affirmative defenses of Rolyn, Degmor and the Tishman defendants, which allege that plaintiff's negligence was a proximate cause of the accident.

In motion sequence number 007, Degmor moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, the fourth third-party complaint and all cross-claims against it.

BACKGROUND

Defendant/third-party plaintiff Madison owned the premises on the day of the accident. Madison hired defendant/third-party plaintiff Tishman to serve as construction manager on a project underway at the premises, which entailed the construction of a 30-story office building (the project). Madison also hired third-party defendant E.J. Electric to serve as the project's electrical subcontractor, and third third-party defendant Prince to serve as the project's carpentry subcontractor. Prince supplied all fall and penetration protection at the site, which included covering floor openings with plywood.

Following a fire at the premises in 2009, Madison retained the services of defendant/third-party defendant/second third-party plaintiff/third third-party plaintiff/fourth third-party plaintiff Rolyn to remediate the effects of smoke and odor which lingered at the premises

after the fire. In turn, Rolyn subcontracted the actual physical remediation work out to defendant/third-party defendant/fourth third-party defendant Degmor. Tishman hired second third-party defendant Site Safety to serve as the project's site safety manager. At the time of the accident, plaintiff was employed as an electrician by E.J. Electric.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by E.J. Electric and working on the 30th floor of the premises. Plaintiff was employed by E.J. Electric. That day, plaintiff's duties on the project included opening and closing dampers for the cleaning crew in a room that he described as a mechanical room (the room). In addition, plaintiff was instructed by his foreman to pull circuits from the 30th floor up to the roof through a conduit. The floor of the room was composed of concrete slab.

After lunch, plaintiff continued to pull cables through the conduit, with plaintiff at one end of a pipe pulling the wire and the apprentice in the room feeding the wire. After awhile, plaintiff walked approximately 15 feet into the room while looking straight ahead. At this time, plaintiff did not observe any changes in the surface of the floor or any openings in the floor. As another electrician entered through the doorway, plaintiff stepped out of his way. Suddenly, plaintiff's left foot passed approximately halfway into an opening in the floor (the opening) and he fell over. Plaintiff noted that no other part of his body, other than his left foot, passed through the opening. After falling, plaintiff looked at the opening and observed a rip in some plastic (the plastic) where his foot had passed through.

Plaintiff explained that he did not know the dimensions of the opening or its shape, because the opening was covered with the plastic, which was almost the same color as the floor.

The plastic was taped to the floor with silver duct tape. In the month or so that plaintiff worked at the premises, he never observed plastic on any hole that had not been first covered with plywood and marked with "an orange X" (Tishman's notice of motion, exhibit Q, plaintiff's tr at 46).

Kenneth Cord's Deposition Transcript (Tishman's Project Superintendent)

Kenneth Cord testified that he was Tishman's project superintendent on the day of the accident. Cord's duties as project superintendent included coordinating the activities of the subcontractors on the project. Cord maintained that Tishman was not in charge of safety for the project, and that it retained a separate site safety manager, Site Safety, LLC, to carry out the duties pertaining to safety. However, Cord did coordinate the remediation of safety issues with Site Safety. For example, if Site Safety brought a safety issue regarding fall protection to his attention, he would direct Prince to remedy the situation. Both Site Safety and Tishman had the authority to stop work in the event that an unsafe condition or practice was discovered.

Cord testified that Rolyn, a remediation company, was hired by the owner of the premises to perform smoke remediation work following a fire in 2009. Rolyn then subcontracted out the actual labor for the work to Degmor. Cord maintained that, while he did coordinate their work, he did not supervise or direct either Rolyn or Degmor's work.

Cord also testified that the eight-inch opening that plaintiff stepped into could have either been core drilled or formed when the concrete floor was first poured. Cord explained that the plastic covering the opening was placed by Degmor in preparation for an ozone treatment. The ozone treatment entailed encapsulating every floor of the premises in plastic, and then using an ozone machine to chemically remove the odor of smoke. However, all openings at the site, such

as the one at issue in this case, were supposed to have been covered by either a piece of plywood or a prefabricated core cover before any plastic was applied over them. In fact, it was a violation of safety practices for Degmor to place any plastic over an unprotected opening. Cord further explained that only Degmor was charged with the responsibility of covering the openings with plastic.

Importantly, if Degmor encountered a floor opening without a plywood cover, it was its responsibility to contact either Site Safety or Tishman, so that they could arrange with Prince to have the opening in question covered. Cord testified that he did not know why the opening that plaintiff fell into was not covered, but that it should have been in order for it to be safe.

John Benedetto's Deposition Testimony (Employee of Site Safety)

John Benedetto testified that he was employed by Site Safety on the day of the accident. Tishman hired Site Safety to serve as a safety manager on the project. He explained that Site Safety created a site safety plan (the plan) for the project, as required by the City building code. Tishman purchased the plan, which required all floor openings be planked and barricaded, from Site Safety.

Benedetto's duties on the project included conducting walk-throughs of the entire premises, which included the 30th floor. During his walk-throughs, among other things, Benedetto looked for unprotected floor openings. If he observed a floor opening which was not covered, he would report the condition to Tishman. In turn, Tishman would notify the carpentry subcontractor to cover the opening with plywood. Site Safety was not contracted to perform any physical labor at the site. As site safety manager, Benedetto did not have the authority to instruct workers from the trades as to how to perform their work.

Benedetto explained that the plastic that plaintiff stepped through was typically used during environmental abatement to seal floor openings, doors and windows. Benedetto maintained that he never observed any other trades, other than Degmor, placing plastic over floor openings. In addition, when Degmor completed its ozone treatment work, it was Degmor's responsibility to remove the plastic.

Benedetto testified that the opening that plaintiff fell into was approximately eight inches in diameter and round. The plastic that covered the opening was rectangular in shape and taped to the floor. Benedetto asserted that he probably never discovered the unsafe condition prior to the time of the accident, because the dusty and dirty plastic blended into the concrete floor. However, if he had noticed the unprotected opening, he would have addressed it. Benedetto could not say whether the opening was created as part of the building's creation or whether it was drilled out later by one of the subcontractors.

Deposition Testimony of Michael Lawrence-Yannacelli (E.J. Electric's Sub-Foreman)

Michael Lawrence-Yannacelli testified that he was employed as E.J. Electric's sub-foreman on the day of the accident. He testified that there was no strict protocol in place for notifying Tishman when holes were drilled. Prior to the date of the accident, he never observed any floor openings at the premises which were not covered with plywood and marked with orange paint.

After hearing about plaintiff's accident, Lawrence-Yannacelli reported to the 30th floor and observed the opening to be approximately six to eight inches in diameter and round in shape. He also noticed that the opening was covered with plastic, which was covered in dust, blending into the surrounding concrete. Lawrence-Yannacelli maintained that the plastic was used only by

the subcontractor charged with environmental remediation.

Deposition Transcript of Michael Rabil (Rolyn's Senior Project Supervisor)

Michael Rabil testified that he served as Rolyn's senior project supervisor on the day of the accident. Rabil explained that Rolyn, a disaster remediation company, was hired by the owner of the premises to remediate the fire and smoke damage which had resulted from a fire. To perform this work, it was necessary to use ozone to treat the areas contaminated by smoke. This treatment required covering the affected areas with plastic, so as to contain the ozone.

Rabil testified that, because Rolyn was a non-union remediation company, Rolyn subcontracted with Degmor, a union remediation company, to actually perform the physical work for the project. Rolyn followed Tishman's safety plan, which Rolyn adapted to meet site-specific requirements. Rolyn also hired its own site safety contractor, Engineering Safety Consultants (ESC), to make sure that all floor openings were properly covered and to prepare inspection reports for Rolyn's review.

Rabil also testified that Rolyn created the means and methods and protocol of doing the remediation work, which were then implemented by Degmor. While all of the physical work was performed by Degmor employees, Rolyn provided all supervision, planning, scheduling and materials. Specifically, Rabil testified that "Rolyn . . . came up with the means and methods, the protocol; and Degmor implemented those means and methods and protocol" (Rolyn's notice of motion, exhibit T, Rabil tr at 43). Rabil testified further that Rolyn had five supervisors on site, and that these supervisors were present every day, supervising all aspects of Degmor's work.

Rabil testified that floor openings at the site were to be covered by plywood by the carpentry subcontractor before Degmor covered them with plastic. Degmor was the only entity

charged with the task of applying plastic over floor openings. Although Degmor did not need to be instructed as to how to apply the plastic over the openings, Rolyn supervisors were present to observe Degmor apply and remove it. If an opening were found by Degmore to be lacking a plywood covering, it was protocol for Degmor to bring the problem to the attention of Rolyn, so that Rolyn could notify Tishman. Thereafter, Tishman would instruct Prince to remedy the unsafe situation by applying a plywood covering over the opening. Union rules required that only Prince supply plywood covers at the site.

Rabil asserted that an eight-inch opening, like the one at issue in this case, would certainly need to be covered by plywood before plastic was applied. However, an opening of this size would not require a railing or a barricade to guard it. Rabil also explained that Degmor, as supervised by Rolyn, was responsible for removing all plastic from floor openings when the remediation work was complete. However, it was not Degmor or Rolyn's responsibility to remove the plywood coverings. After the remediation work on each floor was completed, Rolyn performed a "swipe test," which included "wiping to make sure [the floor] was clean but also that all plastic was removed and the floors were mopped and cleaned as well" (*id.* at 170).

Rabil testified that all of the smoke remediation work done on the 30th floor was completed by September of 2009. As of that time, all plastic would have been removed when the room was cleared and cleaned. Rabil could not explain as to why the plastic was still covering the opening on the date of the accident.

Deposition Testimony of Zdzislaw Henk (Degmor's Supervisor)

Zdzislaw Henk testified that he was a supervisor for Degmor on the day of the accident. He explained that Degmor is a union company, employing workers from Local 78. Degmor's

work on the project included covering floor penetrations with plastic. Degmor was the only trade performing this task. Henk regularly communicated with Rolyn regarding Degmor's work. Degmor was required to follow both Rolyn and Tishman's safety plans.

Prior to the installation of plastic over the floor openings, Rolyn participated in walkthroughs of the areas to be treated with Tishman, Site Safety, Prince and Degmor. It was important that all penetrations were covered with plywood and marked with orange paint before any plastic was applied over the them. Importantly, it was impermissible for Degmor to cover a floor opening with plastic without first making sure that it was covered by plywood.

Notably, when Degmor's work on each floor was complete, it was also Degmor's responsibility to remove the plastic. Then, a Rolyn supervisor inspected the areas to confirm that all plastic was removed. Henk testified that, at times, he was asked for plastic by other trades. However, he never observed any of them using plastic to cover any floor openings.

Deposition Testimony of Kevin Corrigan (Prince Foreman)

Kevin Corrigan testified that he was a foreman for Prince on the day of the accident. Corrigan explained that Prince performed all the carpentry work, as well as fall and penetration protection at the site. As part of his duties, Corrigan performed daily walkthroughs at the site. During this time, Corrigan was not specifically looking for floor openings that needed to be covered.

Prince was responsible for the means and methods of its work. As part of its work, Prince covered all floor openings with three-quarter-inch plywood, which included a cleat at the bottom to provide a snug fit into the floor opening. Prince was advised by either Tishman, or the trade that made the penetration, when a floor opening needed to be covered. However, if he

observed an unprotected floor opening on his own, he would immediately have it covered by Prince workers. While on the project, Corrigan never observed any floor openings which were covered only by plastic. In addition, only Degmor employees used plastic at the site.

DISCUSSION

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

The Complaint and Cross-Claims Against Tishman Construction Corp. and Tishman Construction Corp. of Manhattan (motion sequence number 003)

Initially, it should be noted that, among others, plaintiffs sued Tishman Construction Corp., Tishman Construction Corp. of Manhattan and Tishman (Tishman Construction Corp. of New York). However, of these three parties, it is undisputed that only Tishman was involved in the project in any way. To that effect, Tishman served as construction manager on the project pursuant to a contract with Madison, the owner of the premises. None of the parties to this case

has provided any documents or other evidence to establish anything to the contrary. Thus, defendants Tishman Construction Corp. and Tishman Construction Corp. of Manhattan are entitled to summary judgment dismissing the complaint and all cross claims and counterclaims asserted against them. Therefore, the remainder of the decision will be addressing only Madison and Tishman when referring to "the Tishman defendants."

Plaintiffs' Labor Law § 241 (6) Claim Against the Tishman Defendants (motion sequence numbers 003 and 006)

Plaintiffs move for summary judgment in their favor on the Labor Law § 241 (6) claim against the Tishman defendants. The Tishman defendants move for summary judgment dismissing the Labor Law § 241 (6) claim against them.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. . . ."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing

regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.7 (b) (1) (i) and 1.7 (b) (1) (ii), plaintiff does not address these alleged Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d at 833; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, the Tishman defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Initially, as the undisputed owner of the premises where the accident took place, defendant Madison may be held liable for plaintiff's injuries under Labor Law § 241 (6). However, it must be determined as to whether defendant Tishman, as construction manager, may also be liable under the Labor Law as a statutory agent of the owner.

While

> "a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(*Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

A review of the record in this case reveals that Tishman did not supervise or control the activity that brought about the injury – i.e., the placement of the plastic over the opening without first making sure that it was properly protected by a plywood covering – so as to be liable as an agent of the owner. As such, Tishman is not liable for plaintiff's injuries under Labor Law § 241 (6) as an agent of the owner. Thus, plaintiffs are not entitled to summary judgment in their favor on the part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) and (ii) against Tishman. Accordingly, Tishman is entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) and (ii)

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) and (ii) state:

> (b) Falling hazards
> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the

opening shall be a substantial gate.

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole – particularly the safety measures delineated therein – it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through'" (*Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003] quoting *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422-423 [2d Dept 2001] ["hazardous openings" regulation did not apply where the 12-inch by 16-inch hole that worker fell into was too small for him to fall through]; *Urban No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [a 10-12-inch gap was not a hazardous opening]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002] [Labor Law § 241 (6) was not meant to apply to the drainpipe hole into which plaintiff stepped because it was not large enough for a person to fit through, and thus, it was not a "hazardous opening"]; *Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94 [1st Dept 2000] [where plaintiff was injured when he stepped into a hand hole, Court held that plaintiff's accident was not caused by the type of hazardous opening for which defendants would have been required to provide a cover or safety railing]).

Here, the opening, which measured approximately eight inches in diameter, was clearly not large enough in size such that a person could pass through it. Thus, as Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) and (ii) do not apply to the facts of this case, plaintiffs are not entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of these provisions against Madison. Accordingly, Madison is entitled to dismissal of the same.

Plaintiffs' Common-Law Negligence and Labor Law § 200 Claims Against Rolyn, Degmor and the Tishman Defendants (motion sequence numbers 003, 004, 006 and 007)

Plaintiffs move for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Rolyn, Degmor and the Tishman defendants. Rolyn, Degmor and the Tishman defendants move for summary judgment dismissing these claims against them.

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Electric & Gas*

Corp., 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

Here, it appears that the alleged accident resulted from both the means and methods of the work (the fact that the plastic was placed over an opening that was not first properly covered with plywood), and an allegedly dangerous condition (the fact that the opening, which was an inherent

defect in the floor, was covered in plastic that blended in with the concrete floor, thus creating a hidden trap-like condition). Thus, the applicability of the common-law negligence and Labor Law § 200 claims against defendants will be analyzed under both standards.

Common-Law Negligence and Labor Law § 200 Liability As Analyzed Under An Unsafe Condition Theory

Initially, it should be noted that Degmor was the sole entity charged with covering the openings with plastic. As Degmor improperly covered the opening without first notifying the proper parties that the necessary plywood covering was missing, Degmor created the unsafe condition. Thus, plaintiffs are entitled to summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Degmor on an unsafe condition theory. Accordingly, Degmor is not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

As to Rolyn and the Tishman defendants, a review of the record reveals no evidence that either the Tishman defendants or Rolyn created or had actual or constructive notice of the alleged unsafe condition. The deposition testimonies establish that, due to the dust and dirt that covered the plastic, the unprotected opening was invisible to the naked eye. For example, plaintiff testified that the plastic was the same color as the floor, and, in the month that he worked on the project, he never observed any unprotected openings like the one that caused his accident.

In addition, Cord of Tishman, Benedetto of Site Safety and Rabil of Rolyn all testified that if they had observed any uncovered openings, they would have directed Prince to cover them with plywood. Benedetto testified that he was not able to observe the unsafe condition, because the dirty and dusty plastic that was placed over the opening blended in with the concrete floor.

E.J. Electric's foreman, Lawrence-Yannacelli, also testified that, upon his inspection after the accident, he noticed that the plastic blended in with the floor. Finally, Prince's foreman, Corrigan, never observed any floor openings covered only by plastic prior to the day of the accident.

Further, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]). A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the injury (*see Gordon v American Museum of Natural History*, 67 NY2d at 838; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [1st Dept 2008], *affd* 11 NY3d 889 [2008] [no constructive notice found, where, on the evidence presented, it was possible that the piece of carpet that caused the plaintiff's fall could have been deposited just prior to the time of the accident]; *Berger v ISK Manhattan, Inc.*, 10 AD3d at 512 [no constructive notice where no evidence was presented on the issue of the length of time the hazardous wet spot was present, as well as plaintiff's admission that two other customers used the stairs in the few minutes prior to the accident]).

Here, no evidence has been put forth regarding the length of time that the subject unsafe condition existed, or whether any of the defendants received any prior complaints, so as to establish that defendants had constructive notice of the same (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 968 [1994]; *Murphy v 136 N. Blvd. Assoc.*, 304 AD2d 540, 541 [2d Dept 2003] [no constructive notice where plaintiff presented no evidence regarding the length of time

the unsafe condition existed, or whether defendant had received any prior complaints about said condition]). Thus, Rolyn and the Tishman defendants cannot be held liable for plaintiff's injuries under an unsafe condition analysis.

Common-Law Negligence and Labor Law § 200 Liability As Analyzed Under the Means and Methods Theory

As there is no evidence in the record to demonstrate that the Tishman defendants supervised or directed the injury-producing work in this case, i.e., the application of the plastic over the opening which was not properly covered with plywood, the Tishman defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

While it is arguable that Tishman was ultimately responsible for making sure that the floor openings at the site were properly covered, it is clear from the record that Tishman's responsibility as to this matter was limited to those situations where it was notified that the openings were in need of protection. Moreover, testimony in the record indicates that floor openings were continually being created throughout the premises by the various trades on the massive project encompassing construction on 30 floors. As floor openings were also often difficult to see due to the construction dust and dirt, it is not surprising that Tishman relied on trades working in the immediate areas to notify them when an opening was unprotected and in need of a plywood covering. In other words, the mere fact that an opening existed on the 30th floor did not create the required notice to Tishman.

However, as Rolyn and Degmor did supervise and direct the injury-producing work, plaintiffs are entitled to summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against these defendants. Accordingly, Rolyn and Degmor are not

entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

Here, not only did Degmor actually place the plastic over the opening, the record is replete with evidence that Rolyn supervised the means and methods and protocol of Degmor's work. Rabil of Rolyn and Henk of Degmor specifically conceded that Rolyn came up with the means and methods for the remediation work, and that Degmor implemented the same. This included Rolyn observing Degmor employees both apply and remove the plastic, as well as inspecting the subject areas after the work was complete to make sure that all plastic was properly removed. Moreover, if Degmor encountered an unprotected opening, it was Rolyn and/or Degmor's responsibility to contact Tishman, so that Tishman could instruct Prince to install a proper plywood covering. As such, Degmor and Rolyn were the first line of defense in making sure that plywood was placed over the opening before the plastic was applied. In fact, it was a safety violation for Degmor not to have done so.

Thus, plaintiffs are entitled to summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Rolyn and Degmor, and Rolyn and Degmor are not entitled to dismissal of these claims against them.

Whether Plaintiffs Are Entitled to Summary Judgment Dismissing and Striking Defendants' Affirmative Defenses Which Allege That Plaintiff Was Culpable for the Happening of the Accident (motion sequence number 006)

Plaintiffs move, pursuant to CPLR 3211 (b), to dismiss and strike Rolyn and the Tishman defendants' affirmative defenses which allege that plaintiff was culpable and comparatively negligent for the happening of the accident. CPLR 3211 (b) states: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (*see Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 882 [2d Dept 2011]).

Here, as there are no issues of fact that have been established regarding comparative negligence on the part of plaintiff for his accident, plaintiffs are entitled to dismissal and striking of defendants' affirmative defenses which allege the same.

The Tishman Defendants' Common-Law and Contractual Indemnification Claims Against Rolyn and Degmor (motion sequence number 003, 004 and 007)

The Tishman Defendants' Cross-Claims for Common-Law Indemnification Against Rolyn and Degmor

The Tishman defendants move for summary judgment in their favor on their cross-claims for common-law indemnification as against Rolyn and Degmor. Rolyn and Degmor move to dismiss said cross-claims against them. "To establish a claim for common-law indemnification, 'the one seeking indemnity 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'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, the accident was caused when Degmor, as supervised by Rolyn, applied plastic over the opening without first notifying Tishman, Site Safety or Prince that the opening was not properly protected by a plywood covering. As such, Rolyn and Degmor were guilty of some negligence that contributed to the causation of the accident. In addition, there is no evidence in the record to support the notion that Tishman's negligence contributed to the causation of the

accident. Thus, the Tishman defendants are entitled to summary judgment in their favor on their cross-claims for common-law indemnification against Rolyn and Degmor. Accordingly, Rolyn and Degmor are not entitled to dismissal of these cross-claims against them.

The Tishman Defendants' Cross-Claims for Contractual Indemnification Against Rolyn and Degmor

The Tishman defendants move for summary judgment in their favor on their third-party cross-claims for contractual indemnification against Rolyn and Degmor. Rolyn and Degmor move to dismiss said cross-claims. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.J. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

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

The Indemnification Provision Contained in the Madison/Rolyn Agreement

Pertinent to the issue of whether Rolyn owes the Tishman defendants contractual indemnification, an indemnity provision attached to the Madison/Rolyn work authorization states in pertinent part as follows:

"In consideration for permitting Rolyn Companies, Inc. ("Contractor") to perform

> work on the premises ... contractor hereby agrees that, to the fullest extent permitted by law contractor is to indemnify and hold harmless owner, owner and managing agent, construction consultants, construction manager and their respective affiliates ... from and against all liability, claims and demands on account of injuries to persons ... arising out of the performance or lack of performance of the assignment by contractor and its affiliates ... respective employees and agents.... Contractor shall at its own expense, defend any and all actions at law brought against any of the owner parties based thereon and shall pay all attorneys fees and ... other expenses"

(Plaintiff's notice of motion, exhibit II, Madison/Rolyn work authorization, indemnity provision).

Here, the accident was caused when Degmor, an agent of Rolyn, negligently placed plastic over an improperly covered opening. Thus, the accident arose out of the performance or lack of performance of Degmor's work. In addition, as Rolyn was responsible for supervising and directing Degmor's work, the accident also arose out of Rolyn's work on the project. Thus, pursuant to the above indemnification provision, the Tishman defendants are entitled to summary judgment in their favor on their cross-claim for contractual indemnification against Rolyn. Accordingly, Rolyn is not entitled to dismissal of this cross-claim.

The Indemnification Provision Contained in the Rolyn/Degmor Subcontractor Agreement

As to the issue of whether Degmor owes the Tishman defendants contractual indemnification, it should be noted that an indemnity provision, Section 15, entitled "Indemnification," contained in the Rolyn/Degmor subcontractor agreement, states in pertinent part as follows:

> "15.1.1 [Degmor's] Performance. With the exception that this Section 15 shall in no event be construed to require indemnification by [Degmor] to a greater extent than permitted under law ... [Degmor] shall defend, protect, indemnify and hold harmless [Madison] and Rolyn, including their ... agents, employees, affiliates ... from any and all claims, demands, causes of action, damages, costs, expenses, actual attorney's fees ... including, but not limited to (a) Personal injury claims ...

> caused or alleged to be caused in whole or in part of any act or omission of [Degmor] or anyone directly employed by [Degmor]"

(plaintiff's notice of motion, exhibit KK, Rolyn/Degmor subcontractor agreement, section 15).

Pursuant to the indemnification provision contained in the Rolyn/Degmor subcontract, Degmor must indemnify Madison and Madison's agents, i.e., Tishman, from all claims "caused in whole or in part of any act or omission of [Degmor]." Thus, as Degmor created the condition that caused the accident, the Tishman defendants are entitled to summary judgment in their favor on their cross claim for contractual indemnification against Degmor. Accordingly, Degmor is not entitled to dismissal of this cross claim against it.

It should be noted that Rolyn and Degmor argue that an issue of fact exists as to whether the plastic was, in fact, applied over the opening by Degmor, because the subject remediation work was completed for at least two to three months before the date of the accident, at which time the floor was wiped clean (and was not dusty). However, as Rolyn and Degmor's own witnesses assert, Rolyn and Degmor were the only entities who ever placed plastic over openings at the site, and it was ultimately the responsibility of Rolyn and Degmor to make sure that all plastic was removed from the 30th floor upon completion of their work.

Rolyn and Degmor also attempt to create an issue of fact as to whether other contractors used plastic on the 30th floor, by submitting Henk's testimony, wherein he asserts that he gave plastic to other trades at the site. However, as there is absolutely no evidence to suggest that any tradesmen, other than Rolyn and Degmor, used plastic to cover floor openings, Rolyn and Degmor's argument on this issue is speculative and without merit.

Rolyn's Cross-Claim for Contractual Indemnification Against Degmor (motion sequence number 004 and 007)

Rolyn moves for summary judgment in its favor on its cross-claim for contractual indemnification against Degmor. Degmor moves for dismissal of said cross-claim. As set forth above, the indemnification provision in the Rolyn/Degmor subcontract requires that Degmor indemnify Rolyn from all claims "caused in whole or in part of any act or omission of [Degmor]" (*id.*). As discussed previously, as the accident was caused by Degmor's negligence in not making sure the opening was covered with plywood before placing the plastic over it, Rolyn is entitled to contractual indemnification from Degmor. Accordingly, Degmor is not entitled to dismissal of Rolyn's cross-claim for contractual indemnification against it.

Rolyn's Fourth Third-Party Claims for Failure to Procure Insurance Against Degmor (motion sequence numbers 004 and 007)

Rolyn moves for summary judgment in its favor on its fourth third-party claim against Degmor for breach of contract for failure to provide insurance. Degmor moves to dismiss said fourth third-party claim against it.

Pursuant to section 16 of the Rolyn/Degmor subcontract, entitled "Insurance," Degmor was obligated to purchase a general liability insurance policy in the amount of one million dollars and to name Rolyn and Madison as additional insureds under said policy (plaintiff's notice of motion, exhibit KK, section 16.1.2). Importantly, Rolyn concedes that Degmor obtained said insurance (with American International Specialty Lines [AISL] under policy # 1243161 with a policy period from March 10, 2009, to March 10, 2010). However, Rolyn maintains that, although a tender demand was made to AISL by letter dated September 5, 2013 requesting that AISL defend and indemnify Rolyn in the instant suit, to date, AISL has failed or refused to pay defense costs incurred on behalf of Rolyn for the injuries sustained by plaintiff as a result of the accident.

Here, as it is not disputed, and as Rolyn concedes, that Degmor obtained the proper insurance on behalf of Rolyn, as required under the Rolyn/Degmor subcontract, Rolyn is not entitled to summary judgment in its favor on the fourth third-party complaint, which asserts a cause of action for Degmor's alleged failure to procure insurance. Accordingly, Degmor is entitled to dismissal of the fourth third-party complaint against it.

The Tishman Defendants' Third-Party Claims for Contractual Indemnification and Failure to Procure Insurance Against E.J. Electric (motion sequence number 003). E.J. Electric's Cross Motion to Dismiss the Third-Party Claims And All Cross Claims Asserted Against It

The Tishman defendants move for summary judgment in their favor on their third-party claims for contractual indemnification and breach of contract for failure to procure insurance against E.J. Electric. E.J. Electric cross-moves to dismiss the third-party claims and all cross claims asserted against it.

On the day of the accident, plaintiff was working within the scope of his employment with E.J. Electric. As such, Workers Compensation Law § 11 is relevant to this case. Section 11 prescribes in pertinent part as follows:

> "For purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."
>
> Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to

workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). Here, as it has not been argued that plaintiff suffered a "grave injury" as defined by Workers' Compensation Law § 11, E.J. Electric is entitled to dismissal of any and all cross claims asserted against it sounding in common-law indemnification.[1]

In addition, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]). As such, with respect to the Tishman defendants' third-party claims against E.J. Electric for contractual indemnfication, it must be determined as to whether a clear and unambiguous written agreement exists between the parties which requires E.J. Electric to indemnify the Tishman defendants (*Rodrigues v N & S*

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[1]It should be noted that, although E.J. Electric states that it is owed attorneys' fees and costs under CPLR 3123 (c) from Degmor, on the ground that Degmor's claims for common-law negligence as against E.J. Electric are frivolous, as of the date of the motion, Degmor has stipulated to withdraw its cross claims against E.J. Electric, and E.J. has agreed to no longer pursue such fees and costs.

Bldg. Contrs., Inc., 5 NY3d at 431-432; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365 [2005]).

The Indemnity Provision Contained in the Madison/E.J. Electric Agreement

The indemnity provision contained in the Madison/E.J. Electric subcontractor agreement states in pertinent part as follows:

> "[E.J. Electric] covenants and warrants that it shall perform the work in a safe and proper manner ... and will (I) be liable to [Madison] for a breach of this covenant and warranty and (II) indemnify and save the indemnitees harmless ... against all penalties for violation of same and any and all costs and damages of whatever nature incurred in connection therewith. Wherever used in this contract, an indemnity is referred to as being provided for the indemnitiees, said indemnity shall extend to their respective parent companies and/or corporations, and their respective agents, consultants, servants and employees of each"

(Tishman's notice of motion, exhibit Z, Madison/E.J. Electric agreement, at 3).

Initially, it should be noted that on page 1 of the Madison/E.J. Electric agreement, the term "indemnitees" is defined as including Madison and Tishman (*id.* at 1). In addition, as plaintiff is an employee of E.J. Electric, the costs and damages were incurred in connection with E.J. Electric's work. Therefore, pursuant to the indemnity provision contained in the Madison/E.J. Electric subcontractor agreement, E.J. Electric owes contractual indemnification to the Tishman defendants.

In opposition, E.J. Electric argues that the subject indemnification provision is unenforceable because it violates General Obligation Law § 5-322.1, in that it purports to indemnify the Tishman defendants for their own negligence and does not contain a "savings clause" (*see Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2d Dept 2006] [an indemnification clause that purports to indemnify a party for its own negligence is not void under General Obligations Law § 5-322.1 if it authorizes indemnification "to the fullest extent

permitted by law"]).

However, as in the instant case, where there is no negligence on the part of the proposed indemnitee, that statute does not apply (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 177 [1990]). General Obligations Law § 5-322.1 "only prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, or had the authority to supervise, direct, or control the work that caused the injury" (*Naranjo v Star Corrugated Box Co., Inc.*, 11 AD3d 436, 438 [2d Dept 2004] [citations omitted]).

Thus, the Tishman defendants are entitled to summary judgment in their favor on the third-party contractual indemnification claim against E.J. Electric, and E.J. Electric is not entitled to dismissal of said third-party claim against it.

As none of the other parties that brought cross claims against E.J. Electric for contractual indemnification ever put forth any written agreement requiring E.J. Electric to contractually indemnify them, E.J. Electric is entitled to dismissal of any such remaining cross claims for contractual indemnification asserted against it.

However, to the extent that E.J. Electric moves to dismiss the third-party claim against it for breach of contract to procure insurance, an issue of fact exists as to whether E.J. Electric failed to obtain additional insurance on behalf of the Tishman defendants, as required by the E.J. Electric/Madison subcontractor agreement. Thus, E.J. Electric is not entitled to dismissal of this third-party claim.

E.J. Electric's Cross-Motion for Common-Law Indemnification Against Rolyn, Degmor and Prince (motion sequence number 004, 005, 007)

E.J. Electric cross-moves for common-law indemnification as against Rolyn, Degmor and Prince. As discussed previously, there has been no credible evidence submitted to raise a

question of fact as to whether any negligence on the part of plaintiff, E.J. Electric's employee, proximately caused the accident. As it has been established that Rolyn and Degmor's negligence proximately caused the accident, E.J. Electric is entitled to common-law indemnification from Rolyn and Degmor. However, as it has not been established that any negligence on the part of Prince proximately caused the accident, E.J. Electric is not entitled to summary judgment in its favor on that part of its cross-motion for common-law indemnification against Prince. To that effect, E.J. Electric has not sufficiently established that Prince was either on notice that the opening needed covering, or that Prince was advised that the opening required covering and failed to do so.

E.J. Electric's Counterclaim for Common-Law Indemnification Against the Tishman Defendants (motion sequence number 005)

E.J. Electric moves for summary judgment in its favor on its counterclaim for common-law indemnification against the Tishman defendants. The Tishman defendants move for dismissal of this counterclaim. As discussed previously, it has not been established that any negligence on the part of the Tishman defendants proximately caused the accident. Thus, E.J. Electric is not entitled to summary judgment in its favor on its counterclaim for common-law indemnification against the Tishman defendants. Accordingly, the Tishman defendants are entitled to dismissal of this counterclaim against them.

Site Safety's Cross-Claim For Contractual Indemnification Against the Tishman Defendants (motion sequence number 002 and 003)

Site Safety moves for summary judgment in its favor on its cross-claim for contractual indemnification, as well as attorneys' fees, against Tishman. Tishman moves to dismiss said cross-claim against them.

The Indemnification Provision Contained in the Site Safety/Tishman Contract

The indemnification provision contained in the Site Safety/Tishman Contract states, as follows:

> "It is expressly understood and agreed that [Tishman] shall have the sole responsibility for any damages or injuries caused to person or property by or during the execution of the work being performed by or on behalf of [Tishman]. [Tishman] further agrees to indemnify and hold Site Safety, LLC harmless from and against any loss, claim or damage arising out of or relating to the work being performed by or on behalf of [Tishman], including attorney's fees, costs and disbursements"

(Site Safety notice of motion, exhibit DD, Site Safety/Tishman contract, at 4).

Here, the accident at bar arose out of or related to the work performed by or on behalf of Tishman. Thus, pursuant to the indemnification provision contained in the Site Safety/Tishman contract, Site Safety is owed contractual indemnification from Tishman.

In opposition, the Tishman defendants argue that the Site Safety/Tishman contract appears to violate General Obligations Law § 5-322.1, inasmuch as it contemplates Tishman indemnifying Site Safety for Site Safety's own negligence and does not contain a savings clause, such as "to the fullest extent permitted by law" (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). However, as noted previously, where there is no negligence on the part of the proposed indemnitee, such as Site Safety in this case, that statute does not apply (*see Brown v Two Exch. Plaza Partners*, 76 NY2d at 177).

Here, there is no evidence that Site Safety created the alleged unsafe condition, or that it had actual or constructive notice of the same. While part of Benedetto's duties as site safety manager may have included walkthroughs of the site to identify unsafe conditions, such as unprotected floor openings, numerous testimonies in this case all confirmed that the plastic that

covered the opening was covered in dust and dirt and blended in with the concrete floor. No evidence was put forth regarding how long the alleged unsafe condition existed or whether anyone ever notified Site Safety, or anyone else, that the unsafe condition needed rectifying.

Thus, pursuant to the indemnification provision contained in the Tishman/Site Safety contract, Site Safety is entitled to summary judgment in its favor on its cross-claim for contractual indemnification, as well as attorneys' fees, from Tishman. Accordingly, Tishman is not entitled to dismissal of Site Safety's contractual indemnification claim against it. The court has considered Tishman's remaining arguments on this issue and finds them to be without merit.

The Tishman Defendants and Prince's Cross-Claims For Common-Law and Contractual Indemnification Against Site Safety (motion sequence number 002)

Site Safety moves to dismiss the Tishman defendants and Prince's cross-claims for common-law and contractual indemnification against it. In their opposition papers, the Tishman defendants and Prince do not address that part of Site Safety's motion seeking to dismiss said cross-claims. Thus, Site Safety is entitled to dismissal of the same.

In any event, as no negligence on the part of Site Safety caused the accident, Site Safety is entitled to dismissal of the cross-claim for common-law indemnification asserted against it. In addition, as no written instrument exists requiring Site Safety to indemnify Prince or the Tishman defendants, Site Safety is also entitled to dismissal of the cross-claim for contractual indemnification asserted against it.

Rolyn's Second Third-Party Complaint Against Site Safety (motion sequence number 002)

Site Safety moves for summary judgment dismissing Rolyn's second third-party claims for common-law and contractual indemnification against it. As Rolyn's negligence contributed to the causation of the accident, and as no negligence on the part of Site Safety caused the

accident, Site Safety is entitled to dismissal of Rolyn's second third-party claim for common-law indemnification against it. In addition, as no contract exists requiring Site Safety to indemnify Rolyn, Site Safety is entitled to dismissal of Rolyn's second third-party claim for contractual indemnification against it, as well.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of second third-party defendant Site Safety, LLC's (Site Safety) motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment to dismiss the second third-party complaint herein and any and all cross-claims asserted against it by defendants/third-party plaintiffs Tishman Construction Corp., Tishman Construction Corp. of Manhattan, Tishman Construction Corp. of New York (Tishman) and 53rd Street and Madison Tower Development (together, the Tishman defendants) and third third-party defendant Prince Carpentry, Inc. (Prince) is granted, and the second third-party complaint and these cross-claims are dismissed as to Site Safety, with costs and disbursements to Site Safety as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Site Safety; and it is further

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

ORDERED that the part of Site Safety's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in its favor on its cross-claim for defense and contractual indemnification claim as against Tishman is granted; and it is further

ORDERED that the part of the Tishman defendants and Prince's motion (motion

sequence number 003), pursuant to CPLR 3212, for summary judgment to dismiss the complaint herein and all cross-claims and counterclaims asserted against them, is granted, with the exception of Site Safety's cross-claim for defense and contractual indemnification as against Tishman, and the complaint and all cross-claims and counterclaims are dismissed as to the Tishman defendants and Prince, with costs and disbursements to the Tishman defendants and Prince as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the Tishman defendants and Prince; and it is further

ORDERED that the part of the Tishman defendants's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in their favor on their cross-claims for common-law and contractual indemnification against defendant/third-party defendant/second third-party plaintiff/third third-party plaintiff/fourth third-party plaintiff Rolyn Companies, Inc. (Rolyn) and defendant/third-party defendant/fourth third-party defendant Degmor Company (Degmor), as well as their third-party claim for contractual indemnification against third-party defendant E.J. Electric Installation Company (E.J. Electric) is granted; and it is further

ORDERED that the part of Rolyn's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment to dismiss the complaint, as well as the Tishman defendants' cross-claims for common-law and contractual indemnification against it, is denied; and it is further

ORDERED that the part of Rolyn's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment in its favor on its cross-claim for contractual indemnification against Degmor is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of E.J. Electric's motion (motion sequence number 005),

pursuant to CPLR 3212, for summary judgment in its favor on its cross-claims for common-law indemnification against Rolyn and Degmor is granted; and it is further

ORDERED that the part of E.J. Electric's cross-motion, pursuant to CPLR 3212 and/or 3211 (a) (1) and (a) (7), for summary judgment to dismiss the third-party complaint herein and all cross-claims against it is granted, with the exception of the Tishman defendants' cross-claim for contractual indemnification against it and the fourth third-party claim for breach of contract for failure to procure insurance, and the third-party complaint and said cross-claims are dismissed in their entirety as against E.J. Electric, with costs and disbursements to E.J. Electric as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly in favor of E.J. Electric, and the cross-motion is otherwise denied; and it is further

ORDERED that the part of plaintiffs Michael Gardner and Christine Gardner's (plaintiffs) motion (motion sequence number 006), pursuant to CPLR 3211 (b), to dismiss the affirmative defenses of defendants Rolyn and the Tishman defendants, which allege that plaintiff's negligence was a proximate cause of the accident, is granted, as follows: (i) Rolyn's affirmative defenses numbers 13 and 17 are dismissed, and (ii) and the Tishman defendants' affirmative defense number 1 is dismissed; and it is further

ORDERED that the part of plaintiffs' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Rolyn and Degmor is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of Degmor's motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment to dismiss the fourth third-party complaint herein is

granted, and the fourth third-party complaint is dismissed in its entirety as against Degmor, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: 11/18/14

ENTER:

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE