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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES Justice

PART 59

Index Number : 601008/2004
REGA, ANTHONY
vs.
AVON PRODUCTS
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

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

Replying Affidavits _____ | No(s). _____

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

resolved in accordance with the the attached Memorandum Decision and Order dated September 25, 2014.

FILED
SEP 30 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
SEP 30 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: ~~September 25~~, 2014

DEBRA A. JAMES, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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ANTHONY REGA,

Plaintiff,

-against- Index No. 601008/04

AVON PRODUCTS, INC., AVON CAPITAL CORPORATION and INTELLISOURCE, INC., Motion Sequence Nos. 008, 009, 010 & 011

Defendants.

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AVON PRODUCTS, INC. and AVON CAPITAL CORPORATION,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 591179/04

PITNEY BOWES INC., PITNEY BOWES MANAGEMENT SERVICES, INC., CONTROL ENGINEERING SERVICES INC. f/k/a SERVICE FORCE INC., CONTROL BUILDING SERVICES INC. d/b/a SERVICE FORCE INC., SERVICE INTEGRATION GROUP, L.P. f/k/a INTELLISOURCE, INC. and INTELLISOURCE, INC.,

Third-Party Defendants.

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DEBRA A. JAMES, J.:

Motion sequence numbers 008, 009, 010, and 011 are consolidated for disposition.

In this Labor Law action, plaintiff Anthony Rega, a maintenance engineer, alleges that, on December 6, 2001, he was injured when he fell from an extension ladder while cleaning the cooling tower of an air conditioning system.

In motion sequence number 008, third-party defendants Control Engineering Services f/k/a Service Force, Inc. and Control Building Services, Inc. d/b/a Service Force, Inc. (collectively, Service Force) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint, and all cross claims against them.

In motion sequence number 009, third-party defendants Pitney Bowes, Inc., Pitney Bowes Management Services, Inc.,[1] and Services Integration Group, L.P.[2] (SIG) (collectively, the Pitney defendants) move, pursuant to CPLR 3212, for (1) defense and indemnification against Service Force; and (2) dismissal of Service Force's cross claims against them.

In motion sequence number 010, the Pitney defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint as against them.

In motion sequence number 011, defendants Avon Products,

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[1]The Pitney defendants refer to this third-party defendant as "Pitney Bowes Services, Inc." However, Avon impleaded Pitney Bowes Management Services, Inc. and this third-party defendant answered the third-party complaint as such.

[2]The Pitney defendants also refer to this third-party defendant as "Service Integration Group, L.P." The relevant contract identifies this third-party defendant as "Services Integration Group, L.P."

Inc. and Avon Capital Corporation (collectively, Avon) move, pursuant to CPLR 3212, for: (1) summary judgment dismissing the complaint; (2) a conditional judgment on their claims for contractual and common-law indemnification against the Pitney defendants; and (3) a conditional judgment on their claims for contractual and common-law indemnification against Service Force.

Plaintiff alleges that he suffered injuries on December 6, 2001 at Avon's premises located at 601 Midland Avenue in Rye, New York. Avon retained SIG to provide on-site maintenance work at the premises. Prior to the date of the accident, Pitney Bowes Management Services, Inc. purchased the sole limited partner of SIG. On January 1, 2001, SIG hired Service Force to perform engineering services at the Avon facility. Plaintiff was an employee of Service Force.

Plaintiff testified at his deposition that he was employed as an engineer by Service Force. According to plaintiff, his daily routine consisted of making adjustments to or replacing the thermostats, boiler and chiller in the building. At about 3:00 p.m. on December 6, 2001, the date of his accident, plaintiff's supervisor, Jeff D'Iorio, told him to clean the cooling tower, which entailed cleaning out debris inside the cooling tower and adding chemicals for its shutdown for the winter. The cooling

tower contained water and chemicals and had a capacity of thousands of gallons, which had to be drained for the winter. On the date of the accident, the tank had not been drained yet, and plaintiff had to drain and then clean the tank). Plaintiff had been asked to drain and clean the cooling tower every winter since he worked there. The cooling tower was located near the eastern part of the building, and was approximately 30 feet wide, 40 feet long, and 40 feet high. Plaintiff stated that there was gravel surrounding the cooling tower. At a height of approximately 12 feet above the gravel surface was a steel catwalk which went all the way around the tower. According to plaintiff's testimony, there was a fixed steel ladder leading from the ground to the catwalk. Since the fixed ladder was inoperable, plaintiff used a 12-foot or 14-foot aluminum extension ladder to access the cooling tower. The extension ladder that plaintiff used had feet with rubber pads and cleats on them. Service Force provided all of his tools and equipment, including ladders, at the Avon facility.

Before he climbed up the ladder, plaintiff checked the ladder and it seemed sturdy. However, he did not know whether both feet were on the gravel or something else when he climbed up the ladder. Just before the accident, plaintiff cleaned the

debris from inside the cooling tower and put debris in buckets to be dumped into a compactor, lowered the buckets by a rope, and then assessed what had to be cleaned on the outside of the cooling tower. Plaintiff checked the outside of the cooling tower and determined that it did not need to be cleaned, and after checking the roof for holes and partial cave-ins, decided that the roof also did not need to be cleaned. Plaintiff's accident happened after he cleaned the equipment and was climbing back down the extension ladder. Plaintiff felt the ladder shift, causing him to fall to the ground.

On April 13, 2004, plaintiff commenced this action against Avon and Intellisource, Inc., seeking recovery for violations of Labor Law §§ 200, 240, 241 (6) and for common-law negligence. Avon subsequently brought a third-party action for contribution, common-law indemnification, contractual indemnification, and failure to procure insurance against the Pitney defendants, Service Force, and Intellisource, Inc. As relevant here, the Pitney defendants assert cross claims for indemnification and contribution against Service Force. The action and the third-party action have been discontinued as against Intellisource, Inc.

"The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (O'Halloran v City of New York, 78 AD3d 536, 537 [1st Dept 2010]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (Ostrov v Rozbruch, 91 AD3d 147, 152 [1st Dept 2012]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, the court's function is "'issue-finding, rather than issue-determination'" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957], rearg denied 3 NY2d 941 [1957] [citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

Labor Law § 240 (1)

Service Force, the Pitney defendants, and Avon separately move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, arguing that routine seasonal maintenance of the cooling tower is not a protected activity under the statute. Service Force, the Pitney defendants, and Avon also contends

that, assuming that plaintiff was performing covered work, the statute does not apply because he had already completed cleaning the cooling tower when he fell off the ladder.

Plaintiff argues, in opposition, that his work on the cooling tower constitutes "cleaning," an enumerated activity under the statute. According to plaintiff, he was not engaged in routine maintenance; routine seasonal cleaning of the cooling tower occurred in the spring and fall, not in December. Additionally, plaintiff contends that his work was not complete at the time of his accident because he had not yet disposed of the debris which he removed from the tower, put away the cleaning tools he used to clean the tower, noted his findings, or descended from his elevated work station.

Labor Law § 240 (1) provides that:

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

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for failing to provide safety

devices that properly protect against elevation-related special risks (Jock v Fien, 80 NY2d 965, 967-968 [1992]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]). It is well established that the purpose of "the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials, and, accordingly, there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]).

"Cleaning" is an expressly enumerated activity under the statute (Labor Law § 240 [1]). Thus, section 240 (1) applies to commercial "cleaning" which is not part of construction, demolition or repair work (see Dahar v Holland Ladder & Mfg. Co., 18 NY3d 521, 525 [2012]; Broggy v Rockefeller Group, Inc., 8 NY3d 675, 681 [2007]), including commercial window washing and sandblasting (see Swiderska v New York Univ., 10 NY3d 792, 793 [2008]; Gordon v Eastern Ry. Supply, 82 NY2d 555, 561 [1993]). However, the statute does not apply to work which is incidental to routine maintenance (Soto v J. Crew Inc., 21 NY3d 562, 568 [2013]; Brown v Christopher St. Owners Corp., 87 NY2d 938, 939 [1996], rearg denied 88 NY2d 875 [1996] [routine household window

washing is not covered]; Hull v Fieldpoint Community Assn., Inc., 110 AD3d 961, 962 [2d Dept 2013] [Scaffold Law did not apply to clearing gutters of debris]; Rukaj v Eastview Holdings, LLC, 36 AD3d 519, 520 [1st Dept 2007] [routine cleaning of air conditioning units not covered]; Berardi v Coney Is. Ave. Realty, LLC, 31 AD3d 590, 591 [2d Dept 2006] [routine cleaning of gutters not covered]; Pound v A.V.R. Realty Corp., 271 AD2d 424 [2d Dept 2000] [routine maintenance on an air conditioning cooling tower not covered]).

In the recent case of Soto, supra, the Court of Appeals refined the test for determining whether an activity constitutes "cleaning":

> "Outside the sphere of commercial window washing . . . , an activity cannot be characterized as 'cleaning' under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is 'cleaning' is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the

other"

(*Soto*, 21 NY3d at 568-569).

In Soto, an employee of a commercial cleaning contractor fell from a four-foot-tall ladder while dusting a six-foot-tall display at a retail store. The Court held that the statute did not apply because the activity undertaken by the worker was not "cleaning," since (1) "[t]he dusting of a six-foot-high display shelf is the type of routine maintenance that occurs frequently in a retail store"; (2) "[i]t did not require specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting"; (3) "the elevation-related risks involved were comparable to those encountered by homeowners during ordinary household cleaning"; and (4) "the task was unrelated to a construction, renovation, painting, alteration or repair project".

Applying the four factors to this case, the court concludes that plaintiff's activity cannot be deemed "cleaning," when viewed in totality. Plaintiff was engaged in a routine shutdown of the cooling tower for the winter as part of ordinary maintenance of the premises, according to plaintiff's own deposition testimony. In addition, there is no evidence that

plaintiff's activity required specialized equipment or expertise, or required more than one or two workers to complete the task. Plaintiff testified that he used the extension ladder, cleaning solvents, a brush on an extended pole, rope, and buckets to clean the debris. Although plaintiff's cleaning task may have involved a greater elevation risk than that typically involved in domestic or household cleaning, plaintiff's task was unrelated to any ongoing construction, renovation, painting, alteration or repair project on the premises. Plaintiff was a maintenance engineer hired to maintain the premises on a daily basis.

Labor Law § 240 (1) does not apply to work that is incidental to regular maintenance (see Hull, 110 AD3d at 962). In light of this determination, the court need not consider the issue of whether plaintiff is entitled to coverage because he had already completed his work. Therefore, plaintiff's Labor Law § 240 (1) claim is dismissed.

Service Force, the Pitney defendants, and Avon argue that plaintiff's Labor Law § 241 (6) cause of action must be dismissed because the Industrial Code regulations relied upon by plaintiff are inapplicable to the accident. Plaintiff counters that there are issues of fact as to whether 12 NYCRR 23-1.7 (b) (4) (ii) and 12 NYCRR 23-12.1 (e) (2) and (3) were violated.

Labor Law § 241 (6), entitled "Construction, excavation and demolition work," provides, in relevant part, that:

> "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:
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> ***
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

In Nagel v D & R Realty Corp. (99 NY2d 98, 99 [2002]), a laborer was injured while performing a two-year safety inspection on an elevator. Reviewing the statute's legislative history, the Court of Appeals held that section 241 (6) was "meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition" (*id.* at 101). The Court, therefore, held that "[t]he Industrial Code definition of 'construction work,' which includes maintenance, must be construed consistently with this Court's understanding that section 241 (6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*id.* at 103).

In Esposito v New York City Indus. Dev. Agency (1 NY3d 526, 528 [2003]), the Court of Appeals reiterated that "[a]s for Labor

Law § 241 (6), we have held it inapplicable outside the construction, demolition or excavation contexts," and found that a worker who was engaged in replacing parts of an air conditioner was outside the statute's reach.

In this case, plaintiff's accident did not occur in the context of construction, demolition, or excavation. Indeed, plaintiff was injured while cleaning a cooling tower, which was not related to the construction of a building or structure. Consequently, plaintiff's section 241 (6) claim must be dismissed (see Jamison v GSL Enters., 274 AD2d 356, 360 [1st Dept 2000] [section 241 (6) did not apply to routine maintenance such as window cleaning]; Molloy v 750 7th Ave. Assoc., 256 AD2d 61, 62 [1st Dept 1998] [plaintiff's work of changing elevator contacts and cables, putting new chips in computer boards and painting and cleaning the elevator motor room was routine maintenance and did not bring plaintiff within the protective ambit of section 241 (6)]; cf. Rivera v Ambassador Fuel & Oil Burner Corp., 45 AD3d 275, 276 [1st Dept 2007] [summary judgment denied as to section 241 (6) claim where cleaning of fuel tank was part of comprehensive, overall contract for the installation of a boiler]).

Service Force, the Pitney defendants, and Avon move to

dismiss plaintiff's Labor Law § 200 and common-law negligence claims on the grounds that Avon did not supervise, direct or control plaintiff's work, and did not have actual or constructive notice of any dangerous condition of the extension ladder. In response, plaintiff contends that the fixed ladder on the cooling tower was inoperable, and thus constituted a dangerous condition which required him to use the extension ladder. Plaintiff maintains that this condition existed for the entire two or three years that he worked at the Avon facility. In reply, the Pitney defendants point out that plaintiff fell off the extension ladder, not the fixed ladder.

Labor Law § 200 (1) states:

> "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. The board may make rules to carry into effect the provisions of this section."

Labor Law § 200 is a codification of an owner's duty to provide workers with a reasonably safe place to work (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998]). In other

words, a Labor Law § 200 claim is "tantamount to a common-law negligence claim in a workplace context" (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011]). Generally, Labor Law § 200 claims fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising from the means or methods in which the work is performed (Chowdhury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]). "These two categories should be viewed in the disjunctive" (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]).

Where a premises condition is at issue, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (Mendoza, 83 AD3d at 9 [internal quotation marks and citation omitted]). Where the worker is injured as the result of the manner in which the work is performed, including dangerous or defective equipment, "the owner . . . is liable if it actually exercised supervisory control over the injury-producing work" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]; see also Mutadir v *80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013]).

An owner's fault may be predicated on actual or constructive notice of a defective ladder on the premises (see Cevallos v Morning Dun Realty, Corp., 78 AD3d 547, 549 [1st Dept 2010] [issues of fact as to whether owner had notice that ladder was defective, precluding dismissal of section 200 and common-law negligence causes of action]; Cruz v Kowal Indus., 267 AD2d 271, 272 [2d Dept 1999] [owner's fault could be predicated upon actual or constructive notice of a defective ladder present on the site]; Higgins v 1790 Broadway Assoc., 261 AD2d 223, 224-225 [1st Dept 1999] [presence of defective ladder in building constituted a dangerous condition, because it was reasonably foreseeable that a worker might use the ladder and sustain injury]).

Here, there is no evidence that the ladder was defective or that it was provided by Avon. Plaintiff testified that he checked the ladder before he climbed it and that it seemed sturdy. Plaintiff further stated that he had used the ladder "[m]aybe a dozen times" before, and did not notice anything different on the date of his accident. Plaintiff did not believe that anyone complained about the ladder. Furthermore, plaintiff testified that his employer, Service Force, provided all of his tools and equipment, including ladders.

Moreover, there is no evidence that Avon exercised

supervisory control over plaintiff's or Service Force's work. "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (Hughes v Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007]; see also Foley v Consolidated Edison Co. of N.Y., Inc., 84 AD3d 476, 478 [1st Dept 2011]). Plaintiff testified that his supervisor, Jeff D'Iorio, told him to clean the cooling tower. According to plaintiff, no one other than his supervisor gave him instructions on a daily basis.

Although plaintiff argues that the fixed ladder attached to the cooling tower constituted a dangerous condition, which required plaintiff to use the extension ladder, there is no evidence that the condition of the fixed ladder was the proximate cause of his fall from the extension ladder (see Wright v Bedevian, 6 AD3d 258, 259 [1st Dept 2004] [construction debris allegedly left on floor was not proximate cause of worker's fall from a ladder]; see also Sheehan v Gong, 2 AD3d 166, 170 [1st Dept 2003]). Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed.

The Pitney defendants move for defense costs and indemnification over and against Service Force pursuant to paragraph 13 of the Independent Contractor Agreement between SIG and Service Force.[3]

Paragraph 13 states that:

"13. Indemnification.

(a) *Contractor agrees to* indemnify and save harmless SIG and its affiliated companies and their respective properties and officers, employees, agents, contractors, licensees and insurance companies (in this paragraph included in the term 'SIG') from any and all costs, expenses, damages, charges, claims, demands or liabilities whatsoever (in this paragraph referred to as 'claim') arising out of or in any manner connected with or resulting from the performance of the Work by Contractor or relating in any other manner to Contractors' obligations or duties set forth in this Agreement whether the claim arose out of the acts or omissions of Contractor or its servants, employees, independent contractors or assigns, as the case may be, which may be asserted by any third party whomsoever, including, but not limited to, Contractor's employees and contractors. This indemnity obligation will not apply to Contractor to the extent a claim is caused by the sole negligence of SIG. Contractor will, at Contractor's own cost and expense, defend SIG against any and all actions, suits or other legal proceedings that may be brought or instituted against SIG on any such claim or demand or at SIG's option indemnify SIG for all costs of defense incurred by SIG, including actual attorney fees

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[3]Even upon the dismissal of the complaint, Service Force may be required to indemnify the Pitney defendants for attorneys' fees and other litigation costs (see generally Hennard v Boyce, 6 AD3d 1132, 1133-1134 [4th Dept 2004]). The Pitney defendants have made clear that they are seeking defense costs.

> reasonably incurred in such defense including appeals or settlement efforts. Contractor will further pay or satisfy any judgment or decree that may be rendered against SIG in any such action, suit or legal proceeding which might result therefrom"

(underlining added).

The Pitney defendants argue that Service Force is required to pay defense costs and indemnification because plaintiff was injured while performing work for his employer, Service Force. According to the Pitney defendants, Pitney Bowes, Inc. and "Pitney Bowes Services, Inc."[4] are affiliates of SIG because SIG was purchased by Pitney Bowes Management Services, Inc. on December 11, 2000. The Pitney defendants contend that Service Force is also required to reimburse them for defense costs paid for Avon, based upon the language providing that Service Force "will further pay or satisfy any judgment or decree that may be rendered against SIG in such action, suit or legal proceeding which might result therefrom."

In response, Service Force argues that the Pitney defendants' motion is, in effect, an attempt to seek declaratory relief against Service Force, and that its insurer, Greater New

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[4]As indicated above, the pleadings indicate that the proper name of this third-party defendant is Pitney Bowes Management Services, Inc.

York Mutual Insurance Companies, is a necessary party to this action. Service Force next contends that the Pitney defendants have established that Pitney Bowes Management Services, Inc., which is not a party to this action, is an "affiliate" of SIG, but there is no evidence as to the structure of any of the Pitney defendants as to how they are related by shareholdings or other means of control. In addition, Service Force argues that the agreement does not include any successor in interest or companies that acquire SIG. Moreover, Service Force argues, the indemnification provision does not mention Avon, and thus the attempt to obtain indemnification of payments to Avon should be denied.

In reply, the Pitney defendants contend that Service Force's opposition should be ignored because it was untimely served pursuant to CPLR 2214 (b). The Pitney defendants further assert that Pitney Bowes Management Services, Inc. was sued herein as Pitney Bowes Services, Inc.

Initially, the court rejects the Pitney defendants' argument that Service Force's opposition should be disregarded. Even if Service Force's opposition was untimely, the Pitney defendants have failed to establish any prejudice, especially in light of the fact that they submitted a reply (see Marte v City of New

York, 102 AD3d 557, 558 [1st Dept 2013]; Prato v Arzt, 79 AD3d 622, 623 [1st Dept 2010]).

Although Service Force argues that its insurer is a necessary party to this action, this argument is unpersuasive, because all parties to the contractual indemnification agreement are parties to this action.

"The right to contractual indemnification depends upon the specific language of the contract" (Roldan v New York Univ., 81 AD3d 625, 628 [2d Dept 2011]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (Suazo v Maple Ridge Assoc., L.L.C., 85 AD3d 459, 460 [1st Dept 2011]; see also Reyes v Post & Broadway, Inc., 97 AD3d 805, 807-808 [2d Dept 2012]).

Here, the indemnification provision states that "Contractor [Service Force] agrees to indemnify and save harmless SIG and its affiliated companies . . . from any and all costs . . . arising out of or in any manner connected with or resulting from the performance of the Work by Contractor [Service Force]," and that "Contractor [Service Force] will, at Contractor's [Service Force's] own cost and expense, defend SIG against any and all actions, suits or other legal proceedings that may be brought or

instituted against SIG on any such claim . . . or at SIG's option indemnify SIG for all costs of defense incurred by SIG" . Since plaintiff was injured during the course of his employment with Service Force, Service Force is required to pay defense costs to SIG (see Brown v Two Exch. Plaza Partners, 76 NY2d 172, 178 [1990] [subcontractor agreed to indemnify contractor for personal injuries or other claims arising out of or in connection with the performance of the work; clause applied where plaintiff, an employee of a subcontractor, was injured while performing work called for in contract with contractor]; Roldan, 81 AD3d at 628 [contractor had to indemnify owners for defense costs that owners incurred where indemnification agreement required contractor to indemnify owners for claims arising out of the performance of the work, which included the obligation to pay defense costs incurred as to such claims]). In addition, Pitney Bowes Management Services, Inc.[5] is entitled to defense costs as an affiliate of SIG. An "affiliate" is defined as "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent or sibling corporation" (Black's

[5]Service Force's contention that Pitney Bowes Management Services, Inc. is not a party to this action is incorrect (Reiter affirmation in support, exhibits 6, 8).

Law Dictionary [9th ed 2009]). On December 11, 2000, Pitney Bowes Management Services, Inc. purchased the sole limited partner of SIG.

Nevertheless, the Pitney defendants have not established that Pitney Bowes, Inc. is entitled to defense costs. The Pitney defendants did not present any evidence to establish that Pitney Bowes, Inc. is affiliated with SIG. Although the Pitney defendants submit a Lexis-Nexis printout in reply indicating that Pitney Bowes Management Services, Inc. is wholly owned by Pitney Bowes, Inc., the printout is not in admissible form, and "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (Matter of Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380, 381 [1st Dept 2006] [internal quotation marks and citation omitted]).

The Pitney defendants have not established entitlement to reimbursement of defense costs for Avon. While the Pitney defendants rely on the language that "[Service Force] will further pay or satisfy any judgment or decree that may be rendered against SIG in any such action, suit or legal proceeding which might result therefrom," a judgment has not been rendered

against SIG or Avon.

Avon also moves for conditional contractual indemnification, including defense costs, over and against the Pitney defendants pursuant to section 5.7 of the Amended and Restated Services Agreement between Avon Products, Inc. and Services Integration Group, L.P., which provides as follows:

> "(b) Indemnity by SIG. In addition to its obligations under Section 5.6, SIG shall indemnify Customer [Avon] from, and protect, defend, and hold harmless Customer [Avon] and its directors, officers, agents, attorneys and affiliates against, any Liabilities arising out of or relating to any claim (1) made by a third party which arises from the failure, incorrectness, or breach or any representation, warranty of covenant made by SIG in this Agreement, (2) for bodily injury to or death of any person or tangible personal property to the extent caused by SIG, (3) damage to, or loss or destruction of, any tangible real property or tangible personal property to the extent caused by SIG or its agents, subcontractors or employees; provided, however, in no event will SIG's indemnification obligation extend to Liabilities asserted by third parties as a result of SIG's performance or nonperformance of Services or (4) resulting from any obligations or liabilities of SIG not expressly assumed herein by Customer [Avon], except to the extent caused by Customer [Avon]".

Avon argues that the circumstances of this action trigger the indemnification provision. Specifically, Avon contends that (1) plaintiff was employed by Service Force, a subcontractor of SIG; and (2) Avon did not supervise or control plaintiff's work, or provide him with any equipment.

Nonetheless, as argued by the Pitney defendants, none of the four circumstances has been triggered here. First, plaintiff's injuries were not the result of a failure, incorrectness or a breach of any representation, warranty or covenant made by SIG in the agreement. Second, plaintiff's injuries were not "for bodily injury . . . caused by SIG." Third, this claim does not, in any way, involve "tangible real property or tangible personal property." Finally, Avon does not make any argument that the accident "result[ed] from any obligations or liabilities of SIG." Accordingly, Avon is not entitled to contractual indemnification of defense costs from the Pitney defendants.

Avon also seeks contractual indemnification, including defense costs, against Service Force, pursuant to the contract between SIG and Service Force as an intended third-party beneficiary of that agreement.

Initially, the court notes that "a contract assuming [the duty to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989]).

A party asserting third-party beneficiary rights under a contract must establish:

"(1) the existence of a valid and binding contract

> between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate, [rather than incidental,] to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost"

(Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). "[A] party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right" (Alicea v City of New York, 145 AD2d 315, 317 [1st Dept 1988]). An intended beneficiary is

> "one whose right to performance is appropriate to effectuate the intention of the parties to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance"

(id. [internal quotation marks and citation omitted]). "Thus, where the performance is rendered directly to a third party, that party is generally considered an intended beneficiary of the contract" (id. at 318).

> "The best evidence . . . of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself. An intent to benefit a third party can also be found when no one other than the third party can recover if the promisor breaches the contract . . . or . . . the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party"

(id., quoting Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 45 [1985]).

Here, Avon has failed to demonstrate that it is an intended third-party beneficiary of the contract between SIG and Service Force. Avon relies on paragraph 3 relating to warranties,[6] and the language of the indemnification of the provision, which provides for indemnification of "liabilities whatsoever," claims "which may be asserted by any third party whomsoever," "any and all actions, suits or other legal proceedings that may be brought or instituted" "on any such claim or demand," and "in any action, suit, or legal proceeding which might result therefrom". However, the language of the agreement does not evince an intent to permit enforcement by Avon (see Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc., 54 AD3d 394, 396 [2d Dept 2008], lv dismissed and denied in part 12 NY3d 881 [2009]). While Avon cites Edge Mgt. Consulting, Inc. v Blank (25 AD3d 364, 369 [1st Dept 2006], lv dismissed 7 NY3d 864 [2006]), that case is distinguishable. In that case, a lessor of a condominium unit was a third-party beneficiary of an indemnification provision in an alteration agreement, which expressly stated that the indemnification provision applied "to all persons, including,

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[6]This paragraph states that "Contractor's warranties will run to SIG, its successors, assigns and customers, and users of the materials".

without limitation, the owners of other units in the Building" (*id.*). As noted by the Court, "[t]he best evidence of the contracting parties' intent is the language of the agreement itself" (id.)

Avon also requests common-law indemnification from the Pitney defendants and Service Force. However, given that the court has dismissed the main complaint, there is no basis for awarding Avon common-law indemnification against either of these two parties. "Absent liability, vicarious or otherwise, there is no basis for [common-law] indemnification" (Nieves-Hoque v 680 Broadway, LLC, 99 AD3d 536, 537 [1st Dept 2012] [trial court erred in granting common-law indemnification against decedent's employer, where prior to the grant of indemnification, the court had dismissed the complaint on the ground that there was no non-speculative basis for liability]).

Accordingly, it is hereby

ORDERED that the motion (sequence number 008) for summary judgment of third-party defendants Control Engineering Services f/k/a Service Force, Inc. and Control Building Services, Inc. d/b/a Service Force, Inc. is granted and the complaint/the third party complaint against them are dismissed; and it is further

ORDERED that the motion (sequence number 009) of third-party

defendants Pitney Bowes, Inc. and Pitney Bowes Management Services, Inc. for summary judgment to the extent of their cross claims for their own defense costs over and against third party defendants Services Integration Group, L.P. and Control Engineering Services, Inc. f/k/a Services, Inc. and Control Building Services, Inc. d/b/a Service Force, Inc. third-party defendants is granted, but is otherwise denied; and it is further

ORDERED that the motion (sequence number 010) of third-party defendants Pitney Bowes, Inc., Pitney Bowes Management Services, Inc. and Services Integration Group, L.P. for summary judgment is granted to the extent of dismissing the complaint; and it is further

ORDERED that the motion (sequence number 011) of defendants Avon Products, Inc. and Avon Capital Corporation for summary judgment is granted to the extent that the complaint is dismissed against them with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment as aforesaid.

Dated: September 25, 2014

ENTER:

DEBRA A. JAMES J.S.C.