German v Antonio Dev., LLC
2014 NY Slip Op 33729(U)
January 9, 2014
Supreme Court, New York County
Docket Number: 104446/2010
Judge: Carol R. Edmead
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JULIO GERMAN and EDIT FORDESI,

Plaintiffs,

- against-

ANTONIO DEVELOPMENT, LLC, STILLMAN DEVELOPMENT INTERNATIONAL, LLC, MCP 50 STRATEGIC 56, LP, MCP 56, LLC and MCP 56 PROPERTIES, LLC,

Defendants.

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ANTONIO DEVELOPMENT, LLC, STILLMAN DEVELOPMENT INTERNATIONAL, LLC, MCP 50 STRATEGIC 56, LP, MCP 56, LLC and MCP 56 PROPERTIES, LLC,

Third-Party Plaintiffs,

- against -

SPIELER & RICCA ELECTRICAL CO., INC.,

Third-Party Defendants.

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SPIELER & RICCA ELECTRICAL CO., INC.,

Second Third-Party Plaintiff,

- against -

KREISLER BORG FLORMAN GENERAL CONSTRUCTION CO., INC.,

Second Third-Party Defendant.

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MCP SO STRATEGIC 56, L.P., ANTONIO DEVELOPMENT LLC, STILLMAN DEVELOPMENT INTERNATIONAL LLC, MCP 56 LLC and MCP 56 PROPERTIES LLC,

T hird Third-Party Plaintiffs,

- against -

CROSS COUNTRY CONSTRUCTION LLC, PARAMOUNT PLUMBING CO. OF NEW YORK INC., PRT CONTRACTING, INC. and PRT CONSTRUCTION, INC.,

Third Third-Party Defendants.

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Index No.: 104446/2010

DECISION AND ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Labor Law personal injury action by plaintiff Julio German and his wife Edit

[* 2]

Fordesi[1] against defendants MCP 50 Strategic 56 LP, MCP 56 LLC, and MCP 56 Properties LLC ("MCP"), Stillman Development International, LLC ("Stillman") and Antonio Development, LLC ("Antonio") (collectively, the "MCP defendants"), the MCP defendants move for summary judgment dismissing plaintiffs' Complaint and for summary judgment against third party Spieler & Ricca Electrical Co., Inc. ("Spieler") for contractual defense and indemnification and breach of contract for failure to procure insurance (motion seq. 004). Spieler likewise moves for summary dismissal of plaintiffs' complaint against the MCP defendants, but also seeks summary dismissal of the MCP defendants' common law indemnification and contribution claims (motion seq. 003).

Plaintiffs cross move for summary judgment on their Labor Law § 240 (1) and § 241 (6) claims. Third third-party defendants Cross Country Construction LLC ("Cross Country"), PRT Construction Inc. ("PRT"), and Paramount Plumbing Co. of New York Inc. ("Paramount") each cross move to dismiss the third party claims against them.

The above motions are consolidated for joint disposition herein.

Background Facts

This action arises out of two separate work-related accidents which allegedly occurred while plaintiff was working on the construction of Centurion Condominium Residence, a 17-story high-rise luxury building located at 33 West 56th Street, New York, New York (the "project"). The MCP defendants are the owners of the project. The general contractor/construction manager of the project Kreisler Borg Florman General Construction Co., Inc. ("KBF"), who is no longer a party to this action, hired Spieler and all other contractors for the project. Plaintiff was employed by Spieler as an electrician.

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[1] Plaintiff's wife Edit Fordesi asserts a claim for loss of services.

[* 3]

Plaintiff testified at his deposition that his first accident occurred on September 9, 2008 (the "first" or the "September 2008 accident"), in the corridor near the 14th floor elevators, when he was loading a large spool of electrical wire onto a cart used by electricians on the project. As plaintiff rolled the cart forward, it suddenly stopped as one of its wheels fell into a hole in the concrete flooring. Trying to stop the cart, plaintiff hyper-extended his elbow, causing injuries (plaintiff transcript, exhibit F).

The second accident occurred on January 19, 2009, on the ground level courtyard of the building, when plaintiff was attempting to place an electrical wire underneath the steel grates that covered a crawl space beneath (the "second" or the "January 2009 accident"). The grate consisted of several sections and was covered with snow. In order to place the wire underneath the grate, plaintiff removed snow with his hands and boots and stood on one of the sections. As he attempted to lift the adjoining grate using a five-foot long crowbar to pry it open, plaintiff slipped and lost his footing, further injuring his elbow (*id.*).

As a result, plaintiffs commenced this action against the MCP defendants for negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Thereafter, the MCP defendants commenced a third-party action against plaintiff's employer Spieler and also commenced a third-third party action[2] against Cross Country, Paramount, and PRT.

The MCP Defendants' Motion (Sequence 004)

The MCP defendants move for summary judgment to dismiss plaintiffs' complaint and any cross-claims against them, arguing, first, that they cannot be held liable for violation of Labor

[2] The second third-party action commenced by Spieler against Kreisler Borg Florman General Construction Co., Inc., was discontinued pursuant to a stipulation of discontinuance dated February 27, 2012 (Exhibit C).

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Law § 200 or common law negligence because MCP did not supervise or control plaintiff's work or the work site. The MCP defendants had no employees on the project during the construction, had no authority to stop the work, and did not hire plaintiff's employer Spieler. KBF was responsible for managing, coordinating and monitoring the performance of all the contractors. Armen Boyajian ("Boyajian"), the vice president of Stillman, who acted as the owner's representative and a liaison between the architects, engineers and contractors, testified that he visited the project site "a couple times a week" and attended weekly job progress meetings and monthly lender meetings on site (p.30). Boyajian discussed the progress of the work, but not specifically safety issues, with Steven Williams ("Williams"), the project superintendent/KBF's project manager, who also acted as the site's safety officer (p.28).

Neither did MCP have notice of any dangerous condition. In connection with the first accident, plaintiff testified that he worked on the 14th floor for several days prior to the accident and passed by the area at least four to five times on the morning of the accident, but never observed the alleged hole in the floor where the accident occurred (plaintiff transcript, at pp. 61-62, 130, 133-134). Likewise, plaintiff's former co-worker Lewis B. Schwartz ("Schwartz") testified that he walked down the subject hallway "over a hundred times" prior to plaintiff's accident, including on the morning of the accident, and did not recall seeing the subject hole (exhibit H at pp. 58, 79, 82). Boyajian of MCP also testified that he never observed an exposed hole in a concrete deck unless there was a contractor actively working at the area of the hole (exhibit E at p. 49). The MCP defendants likewise had no notice of any wet condition of the grates in the courtyard with respect to the second, January 2009 accident.

Next, the MCP defendants argue that Labor Law § 240 (1) is inapplicable as the work

performed by plaintiff at the time of the subject accidents did not involve the extraordinary elevation-related risks contemplated by § 240 (1). The Affidavit of a professional engineer Bernard P. Lorenz ("Lorenz"), shows that the crowbar used by plaintiff in the second accident was an appropriate tool for the task performed, as it was sufficient to raise the edge of the grate high enough to place the wire beneath it.

Further, plaintiffs' Labor Law § 241 (6) claim should be dismissed as the provisions of the Industrial Code[3] cited by plaintiffs are either too general or inapplicable to the work plaintiff was performing, or, in any event, were not violated.

To the extent that plaintiffs allege violation of Industrial Code 12 NYCRR § 23-1.7 (b)(1) ("Hazardous openings") in connection with the first accident, it is inapplicable. Schwartz, who was present when plaintiffs' accident occurred, testified that the hole into which plaintiff's cart "fell" was two to three inches in diameter. Thus, the hole was not an opening "into which a person may step or fall." And even if the alleged opening was 12 inches wide, such condition would not constitute a "hazardous opening" under 23-1.7 (b)(1), as shown by Lorenz's Affidavit.

Further, with respect to violation of section 23-1.7 (d) ("Slipping hazards") in connection with the second accident, the Affidavit of Timothy G. Joganich ("Joganich"), a Mechanical Engineer and Certified Human Factors Professional, states that the grates were slip-resistant and did not pose a "slipping hazard" with the meaning of section 23-1.7 (d).

Next, the MCP defendants argue that Spieler is obligated to defend and indemnify MCP for the claims alleged against MCP by plaintiff in the instant action based on the contract

[3] Plaintiffs have alleged violations of the Industrial Code 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8, 23-2.1, 23-1.30 and 23-6. However, the record shows that they abandoned their claims premised on all, but sections 23-1.7 (b)(1) and 23-1.7 (d).

between Spieler and KBF (*see* KBF/Spieler contract, §12.10, exhibit M). Plaintiff was an employee of Spieler, actively engaged in work pursuant to the subject contract at the time of his accident; and his claims for personal injury against MCP arose out of the contract and in connection with said work.

Finally, the MCP defendants argue that Spieler breached its contractual obligation to procure insurance naming the Owner [the MCP defendants] as an additional insured (*see* Spieler/KBF contract, §12.1.3, exhibit M). Upon the MCP defendants' tender of their demand to Spieler's insurance carrier Utica National Insurance ("Utica"), policy number CPP 4003341, Utica at first accepted the tender, but later disclaimed coverage (*see* letter from Utica, exhibit T).

Spieler's Motion (Sequence 003)

Spieler moves for summary judgment dismissing (1) plaintiffs' Complaint against the MCP defendants[4]; and (2) those portions of the Third-Party Complaint which seek common law indemnification and contribution from Spieler.

In support of the first part of its motion, Spieler, like the MCP defendants, argues that the MCP defendants did not supervise or control plaintiff's work in connection with either accident and did not have notice of any alleged dangerous condition, such that liability would attach under Labor Law § 200 and/or common law negligence. Spieler submits extensive testimonial evidence and expert affidavits in support of its arguments.

Spieler further argues that Labor Law § 240 (1) asserted by plaintiffs in connection with

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[4] Spieler notes that it has standing to make a motion for summary judgment on behalf of the main defendants, because any finding of liability as to the main defendants would adversely affect Spieler as a third-party defendant. Under CPLR 1008, a third-party defendant may assert any defenses which the third-party plaintiffs have to the plaintiffs' claim.This includes the right to assert such defenses in a motion for summary judgment.

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the second accident, is inapplicable to this case; and plaintiffs cannot establish a *prima facie* cause of action under Labor Law § 241 (6) in connection with either accident. Spieler adds that the grate does not constitute a floor or type of surface that falls under 12 NYCRR 23-1.7 (d) (Slipping hazards). And, according to Spieler's expert Joganich, who examined and tested the grates involved in the January 2009 accident, the grates' slip resistance level of 0.57 to 0.85 was within the acceptable standards in the industry. Likewise, engineering expert Lorenz stated that the subject metal grating was specifically designed to prevent slipping, such that the risk of walking on the grate was no greater than the risk of walking on a subway grate on the sidewalks of Manhattan.

Further, the MCP defendants' claims for contribution and common law indemnity against Spieler are barred by the Workers' Compensation Law §11, because plaintiff did not sustain a grave injury as defined by the statute. Plaintiff's claimed injuries to his right elbow and a limited range of motion in his fingers do not constitute "total loss of use" of his elbow or fingers. Moreover, plaintiff testified that he can still write with his right hand (exhibit I, p. 71) and that he is currently working as an endurance coach (*id.*, pp. 8-15). The records of Debra Parisi, M.D., plaintiff's hand specialist, indicate that plaintiff was partially disabled with a moderate to marked disability of 66.67%; and the examining orthopedist Michael Cushner, M.D. opined that the percentage of plaintiff's temporary impairment was 50%.

Plaintiffs' Cross-Motion (Sequence 004)

Plaintiffs cross-move for summary judgment on their Labor Law § 240 (1) and § 241 (6) claims.

Plaintiffs argue they are entitled to summary judgment on their § 240 (1) claim with

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respect to the January 2009 accident, because the injury to the plaintiff's elbow and arm was the direct consequence of the application of the force of gravity to the grate. Plaintiff argues he should have been provided with a hoist, rather than being used as a hoist. According to plaintiffs' expert, Robert J. O'Connor, who calculated the weight of the grate to be approximately 220 pounds, to assist him in lifting the grate, plaintiff should have been provided with one of the devices enumerated in Labor Law § 240 (1), *e.g.*, portable tripod hoist with a chain fall, a cantilever hoist or a winch with an anchor point (O'Connor Affidavit, p. 19). And, that plaintiff simultaneously slipped, does not take this case out of the ambit of Labor Law § 240 (1), since plaintiff's injuries were at least partially attributable to defendant's failure to take mandated safety measures to protect him from the elevation-related risks.

Plaintiffs further argue the MCP defendants are "vicariously" liable for violations of Labor Law § 241 (6), based on violations of two sections of the Industrial Code: section 23-1.7 (b)(1), with respect to the first accident, and section 23-1.7 (d) in connection with the second accident.

Section 23-1.7(b)(1) was violated because the 12-inch hole into which plaintiff's cart fell, was left uncovered. The testimony of plaintiff's co-worker Schwartz (exhibit G, p. 45) and Kevin O'Brien, the owner of the carpentry contractor PRT (exhibit J, pp. 28; 53) show that the holes existed in the area near the elevator where plaintiff's accident occurred.

As to the violation of section 23-1.7 (d), the grate and courtyard area were part of the building being constructed and plaintiff was installing the wire as part of the construction of the courtyard fountain. Furthermore, the grates on which plaintiff slipped were part of the "floor" in the courtyard area within the meaning of this section, as they were at the ground level and served

as a continuation of the courtyard floor; they can also be considered "walkways" since they provided a path across the crawl space in the courtyard; or "platforms" since they were suspended or raised above the crawl space.

Furthermore, Bisso, who took plaintiff to the courtyard on the day of the second accident and instructed him to install the wire, knew that there was snow on the subject grate, because, as the weather records show, it snowed the previous day and on the morning of the accident. Plaintiff's accident occurred at approximately 11:20 a.m. and the snow fall stopped prior to 7 a.m. (exhibit L).

Further, defendants' expert Joganich did not test the slip resistance of the grate under the snowy condition as it existed on the day of plaintiff's second accident. And, as noted by plaintiffs' expert O'Connor, "[t]he slip resistence of the grates, either in a wet or dry condition, is irrelevant to the issue of whether the failure to properly remove snow and/or ice from on top of the grates constituted a violation of Industrial Code § 23-1.7(d)" (O'Connor Affidavit, ¶ 25). Plaintiff was not comparatively negligent.

Alternatively, in opposition to MCP's and Spieler's motions, plaintiffs argue that the MCP defendants are not entitled to summary judgment because, at minimum, triable issues of fact exist as to whether the MCP defendants had constructive notice of the uncovered hole on the 14th floor, and of the snow-covered grates in the courtyard. That the MCP defendants did not supervise or control plaintiff's work is irrelevant in this case, since each of the plaintiff's injures were caused, in part, by a dangerous and defective condition.

As the owners of the premises, the MCP defendants had constructive notice of the dangerous condition of the hole that caused plaintiff's first accident because they failed to make a

reasonable inspection and discover said hole. Plaintiff's co-worker Schwartz's testified at his deposition that the plumbing contractors made "a lot of mistakes" in setting the plumbing holes when the concrete was poured as they placed holes and risers "in the wrong spots"; the plumbers "screwed up the whole job. They had holes everywhere" (Schwartz transcript, plaintiff's exhibit G, pp. 35; 45). Furthermore, the electricians complained to Bisso about these uncovered holes many times during staff meetings, requesting that Bisso raise the issue with KBF's project manager Williams in order to get the holes covered, which was "always a topic" of discussion at the safety meetings (Exhibit F, p. 64). The minutes of Spieler's safety meeting on August 27, 2008, approximately two weeks before the first accident on September 9, 2008, specifically note: "Watch For holes in deck" (Exhibit K). Moreover, Williams was aware of these complaints and even told the electricians that they were "high maintenance" and to "stop complaining so much because Larry's [Bisso's] minutes [regarding safety issues] took half of the meeting [time]" (Exhibit F, p. 78-79). Given these complaints, and because MCP's representative Boyajian testified that he was present on site approximately twice a week and communicated with Williams about the work issues, the MCP defendants should have known about the uncovered holes on site. Notably, the MCP defendants failed to demonstrate when the last inspection was made of the area where the accident occurred.

Likewise, with respect to the second accident, the MCP defendants had constructive notice of the dangerous condition of the slippery surface of the grate in the exposed areas of the courtyard.

The Third Third-Party Defendants' Cross-Motions to Dismiss Third-Party Claims

MCP defendants' claims against all third third-party defendants are limited to the first

accident, *i.e.* the cart wheel falling into a hole.

Cross Country (*Sequence.003*)

In support of its cross-motion, Cross Country, the concrete contractor on the site, argues[5] first, that as a subcontractor, it cannot be held liable to plaintiff under the Labor Law §§ 240 (1) or 241 (6) because this statute is intended to apply to owners and general contractors. Second, Cross Country cannot be held liable for negligence because it did not control the work that caused plaintiff's injuries. And in any event, it finished its work on the 14th floor of the project one year prior to plaintiff's accident. Cross Country's foreman Lawrence Lane testified that Cross Country poured concrete on the 14th floor some time in September of 2007, and it finished pouring concrete on the final, 17th floor, in November 2007 (Lane transcript, exhibit M, pp 20-22). Further, Cross Country argues it did not create the hole that caused plaintiff's injuries and thus, cannot be held liable for common law indemnification or contribution. Before the concrete floor was poured, other trades, *i.e.*, plumbers, electricians and steam fitters placed tin sleeves according to the architectural drawings, which would create penetrations in the concrete slab for each their mechanical needs. These penetrations were later covered by other trades.

Thus, Cross County argues, since it is free from negligence, it cannot be held liable for common law indemnification or contribution to the MCP defendants. Neither can it be liable for contractual indemnification pursuant to the trade contract between Cross Country and KBF (the "Cross Country/KBF contract"). Plaintiff's injury did not arise out of or in connection with Cross County's work, negligent omission or breach or default under the contract.

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[5] Cross County states that it fully adopts and incorporates the exhibits attached to and referred to third-party defendant/second third- party plaintiff Spieler.

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Paramount (*Sequence 003*)

In support of the dismissal of the third third-party complaint against it, Paramount, the plumbing contractor, also argues that as it was not negligent.[6] Plaintiff's claim for personal injury did not arise out of the performance of Paramount's work or its negligence so as to trigger the indemnification provision in Paramount's contract with KBF (the Paramount/KBF contract") (*see* Paramount/KBF contract, exhibit 3, §12.10). Assuming that a one-foot diameter hole existed in the corridor near the elevators, which allegedly caused plaintiff's [first] accident, there is nothing to connect that condition to the work of Paramount's employees. Paramount's superintendent Frank Massaro ("Massaro") testified that, as indicated in the plumbing drawings, Paramount placed tin boxes or "sleeves" which would subsequently hold water pipes, inside the areas of the apartments' kitchens and bathrooms. However, no penetrations of that size were made by Paramount anywhere on the 14th floor, since the largest sleeve used was six inches in diameter and was located behind one of the fire escape stairwells. This has not been contradicted by any other evidence or testimony in the record. Notably, plaintiff's employer also testified that the penetrations for water risers were only two to four inches in diameter. According to Paramount's work schedule, by September 1, 2008, all the openings on the 14th floor had already been fitted with pipes and no complaints were received from the general contractor that the layout engineer made penetrations in the wrong places. Thus, the contractual, common law indemnification and contribution claims against Paramount should be dismissed.

PRT (*Sequence 004*)

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[6] Like Cross County, Paramount adopts and incorporates the exhibits attached by the third-party defendant/second third-party plaintiff Spieler.

In support of its cross-motion, PRT, who was hired by KBF to do carpentry and "temporary protection" work at the project, argues that there is no evidence that PRT was negligent so as to entitle the MCP defendants to common law contribution or indemnification from PRT. PRT did not create the penetration and or include the penetration in the architectural drawings. PRT's owner O'Brien testified that pursuant to its contract with KBF (the "PRT/KBF contract"), PRT covered all the openings on the 14th floor pursuant to plans and specifications, and there were no planned openings for HVAC, wiring or pipes in the area where plaintiff claims the hole existed (exhibit B, p. 45). Even assuming that the alleged uncovered penetration in the concrete floor existed, PRT had no notice of it. And, it did not have a duty to monitor the site for any extra floor openings.

Further, MCP defendants' contractual indemnification claim against PRT should be dismissed as plaintiff's injury did not arise out of PRT's work as required by the contract (*see* contract, §12.10, exhibit C). PRT's "temporary protection" work on the 14th floor was completed well before plaintiff's accident (exhibit B, pp. 52-53).

Spieler's Oppositions to Motions and Cross-Motions

Spieler opposes only that part of the MCP defendants' motion which seeks summary judgment on their claim for breach of contract for failure to procure insurance. And, Spieler only opposes the third third party defendants' cross-motions to the extent that plaintiffs' Complaint against the MCP defendants is not dismissed.

In opposition to plaintiffs' cross-motion, Spieler argues that plaintiff's alleged injuries did not result from falling from an elevation or being struck by a falling object in violation of Labor Law § 240 (1). The grate was not "suspended," or hung from above, but instead, rested on a four-

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inch steel frame (Lorenz Affidavit, exhibit S to Spieler's motion). Neither was plaintiff required to get under the grate or lift and hold the grate or completely remove it. Rather, he was simply required to lift the grate a couple of inches or to slide it out and to place the wire under the grate. He testified that he needed to lift up a section of the grate (exhibit E; p.150). Moreover, plaintiff did not accomplish his task because he allegedly slipped on the wet surface and not because he could not lift the grater in the absence of a proper lifting tool. And, since plaintiff testified that he removed the snow from the grate, no dangerous condition of "snow and ice" existed in the area where plaintiff stood.

Spieler further opposes plaintiffs' motion for summary judgment on Labor Law § 241 (6). The alleged violation of section 23-1.7 (b)(1) cannot be a predicate of this claim because plaintiff did not fall or step into the alleged hazardous opening. Plaintiff's co-worker Schwartz testified that the hole was approximately two to three inches; plaintiff testified that he did not see the alleged one foot hole prior to the accident; the cart remained upright and did not fall to the side after one of its wheels hit the hole; and according to plans and specifications, no holes were created at the place of the accident. Further, section 23-1.7 (d), as it relates to the second accident, is likewise inapplicable, since Spieler's expert Lorenz's Affidavit shows that the grate was not a "slipping hazard" (exhibit S). And, plaintiff's climatological data and "expert" opinion with respect to the snowfall are speculative and thus, cannot support summary judgment.

Spieler further contends that the MCP defendants are not entitled to summary judgment on their third-party claim against Spieler for breach of contract for failure to procure insurance.[7]

[7] The court notes that in its opposition, Spieler does not address MCP's claim for contractual defense and indemnification against it.

Spieler obtained the required insurance coverage with Utica National Insurance in accordance with the contract. Utica's denial of MCP's coverage cannot be resolved on this motion and should be more properly addressed in a declaratory judgment action against the carrier.

Finally, Spieler also opposes the third third-party defendants' cross-motions to the extent that the court does not dismiss plaintiff's Complaint against the MCP defendants. Specifically, concerning the first accident, if the alleged opening existed, Cross County or Paramount may have created it and PRT may have failed to cover it with plywood or handrails.

The MCP Defendants' Oppositions

In response to plaintiffs' cross-motion, MCP defendants reiterate the arguments asserted in their motion, *i.e.*, that the Labor Law § 240 (1), as asserted in connection with the second accident, is inapplicable since plaintiff did not need to lift the grate all the way, but only to slide the wire under the partially lifted grate; and the Labor Law 241 (6) claim cannot be supported by the alleged violations of section 23 -1.7 (b)(1) and 23-1.7 (d).[8]

Next, in response to plaintiffs' opposition to MCP defendants' motion to dismiss the Labor Law § 200 and common law negligence claims, MCP defendants add that plaintiff testified that he was not aware of any representatives of the building owners ever being on the job site. Also, MCP's representative Boyajian testified that KBF was in control of the site and would not need permission from MCP to stop any work at the site (Boyajian transcript, p. 36). No complaints were made to the MCP defendants regarding holes or penetrations as shown by testimony of plaintiff's former co-worker Schwartz (Schwartz transcript, p. 118) and Spieler's

[8] MCP defendants also note that plaintiffs abandoned their claims premised on Industrial Code violations of sections 23-1.5, 23-1.8, 23-2.1, 23-1.30 and 23-6, since they do not oppose the dismissal of these sections and in their motion, only assert arguments with respect to violations of sections 23-1.7 (b)(1) and 23-1.7 (d).

foreman Bisso.

And, the wetness of the grate from the removed snow is not a "dangerous condition" since, as shown in the Affidavit of the expert Joganich, the grates were slip-resistant and safe to walk on.

Next, MCP defendants partially oppose PRT's, Paramount's and Cross-County's cross-motions, to the extent that the court finds that issues of fact exist as to whether plaintiff's first accident was proximately caused by the presence of a hole in the subject area; whether said hole constitutes a "hazardous opening" within the meaning of Industrial Code §23-1.7(b)(1); and/or whether MCP had actual or constructive notice of said hole.

The MCP defendants contend that any liability attributed to them under common law or the Labor Law would be vicarious, and they would be entitled to indemnification and/or contribution from PRT, Paramount and Cross Country. PRT was responsible for covering any floor penetrations at the work site; plaintiffs co-worker Schwartz testified that he believed the hole in the floor where plaintiff's first accident occurred was mistakenly created by Paramount plumbers (Schwartz transcript, exhibit H pp. 35; 45); and Cross Country poured the concrete on the subject floor and was responsible for covering any holes in the concrete created by the mechanical contractors' sleeves.

Finally, the MCP defendants argue they are entitled to contractual defense and indemnification from each of these third-party defendants and the dismissal of MCP's insurance procurement claims is also unwarranted because the third party defendants submitted no evidence that they obtained the required coverage.

MCP Defendants' Reply to Spieler

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In reply, the MCP defendants argue that summary judgment against Spieler contractual defense and indemnification should be granted as unopposed. And in any event, the MCP defendants showed that they are free from negligence and thus entitled to contractual indemnification claim from Spieler. Furthermore, Spieler failed to submit an insurance policy or any evidence that it procured insurance with the requisite coverage limits, naming MCP as one of the additional insureds, as required by the contract.

Spieler's Reply to Plaintiffs[9]

In reply, Spieler incorporates all of its arguments asserted in opposition to plaintiffs' cross-motion and reiterates that plaintiffs' Labor Law §200 and common law negligence claims lack merit due to the lack of supervision or control over plaintiff's work, and the lack of notice.[10]

Plaintiffs' Reply to the MCP Defendants and Spieler

Plaintiffs argue, with respect to the second accident, that the MCP defendants violated Labor Law §240 (1) because plaintiff's injury was caused by the improperly lifted and secured grate crashing back into place. Both defendants mischaracterize plaintiff's task, as plaintiff had to raise the 225-pound, two by seven feet grate and then move or hold it so he could run the wire underneath it (exhibit A, pp. 194-195). As stated in plaintiffs' expert O'Connor's Affidavit, plaintiff should not have been instructed to perform this kind of job without an appropriate hoisting device (O'Connor Affidavit, ¶20). Notably, the MCP defendants did not offer an expert

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[9] Plaintiffs' arguments in opposition to Spieler's motion are contained within plaintiffs' cross-motion (*sequence 004*). Spieler's reply only addresses the Labor Law §200 and common law negligence claim, not addressed in Spieler's opposition.

[10] Spieler also argues that the MCP defendants did not oppose the portion of Spieler's motion seeking to dismiss their third-party common law indemnification and contribution claims against Spieler, and thus, should be deemed to have abandoned those claims.

opinion to support their claim that using the crowbar was safe for the type of work performed by plaintiff. And, the elevation differential is not necessarily determinative of whether the case falls within the ambit of Labor Law § 240 (1).

Further, as to liability under Labor Law § 241 (6) for the first accident, the MCP defendants violated Industrial Code 23-1.7 (b)(1) by failing to provide plaintiff with a safe work place, free from hazardous openings. As to the second accident, the MCP defendants are vicariously liable for plaintiff's injuries due to the failure to remove snow from the courtyard area and grates, in violation of Industrial Code 23-1.7 (d).

The Third Third-Party Defendants' Replies

All the third third-party defendants respond to Spieler and the MCP defendants by denying any liability for plaintiff's September 2008 accident.

Cross Country argues it did not create the alleged hole and had no responsibility to cover any holes. Additionally, Cross Country argues that it did not breach its contractual duty to procure insurance for the benefit of the MCP defendants. It attaches the copy of the insurance policy (exhibit A), containing an endorsement (exhibit B), pursuant to which coverage is automatically extended to any party required by a written contract to be named as an additional insured. It also limits the additional coverage to "liability arising out [Cross Country's work]" and provides that the status as an additional insured ends when [Cross Country's] operations for that insured are completed" (exhibit A). Thus, since Cross Country finished its work one year prior to plaintiff's accident, MCP's coverage ended at that time.

Paramount argues again that there is no basis for finding liability on its part either in negligence, common law or contractual indemnity and Schwartz's testimony about the

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improperly placed holes is speculative.

PRT adds that the MCP defendants' third-party claims against PRT for failure to procure insurance should be dismissed because it complied with the insurance procurement provision by obtaining coverage for the benefit of MCP, through the Additional Insured Endorsement in the policy. PRT submits a copy of the insurance policy to show that it obtained general liability insurance in the amount of $1 million per occurrence and $2 million in the general aggregate; and excess liability insurance in the aggregate amount of $5 million (exhibit B; C). That the Illinois Insurance company denied coverage to the MCP defendants has no bearing on PRT since MCP's rights against Illinois are separate and apart from their rights against PRT.

Discussion

A defendant moving for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Such a defendant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

"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]; *Zuckerman v City of New York*, 49 NY2d

557, 562 [1980]).

Plaintiffs' Negligence and Labor Law § 200 Claim

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010]). "An implicit precondition to this duty [is] . . . that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Coyago,* at 665). "To support a finding of liability under Labor Law § 200 . . . a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition" (*Torkel v NYU Hospitals Ctr.*, 63 AD3d 587, 883 NYS2d 8 [1st Dept 2009]). Thus, "in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control, liability [under Labor Law § 200] can also arise when the accident is caused by a dangerous condition at the worksite, that was either created by the owner or general contractor or about which they had prior notice [and failed to remedy it]" (*Makarius v Port Authority of New York and New Jersey,* 76 AD3d 805, 907 NYS2d 658 [1st Dept 2010]); *Minorczyk v Dormitory Authority of State*, 74 AD3d 675, 904 NYS2d 383 [1st Dept 2010], *citing Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009] [since the Labor Law §200 and common-law negligence claims were based not on the injured plaintiff's employer's methods or materials but on a dangerous condition at the site, it was not necessary to show that the

construction manager or the City exercised supervisory control over the manner of performance of the injury-producing work, but whether they had notice of the icy condition on the roof]).

With respect to the *first* accident (September 9, 2008), the MCP defendants established that they lacked any supervision or control over the plaintiff's work that caused his injury. "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 Const. Corp.*, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007] *citing O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 [2006], *affd.* 28 AD3d 225, 813 NYS2d 373 [2006]).

The record indicates that plaintiff received all instructions directly from his employer, Spieler's foreman Bisso and was "assigned" on the day of the accident to Spieler employee Schwartz. No one from the MCP defendants controlled the manner in which plaintiff transported the spool of wire. Indeed, plaintiff testified that the project manager Williams (of the general contractor KBF) never instructed plaintiff as to the work performed by plaintiff on the day of the accident.

The MCP defendants also established, through plaintiff's accident report and witness testimony, that they had no notice of the alleged one-foot hole in the concrete floor. The architectural plans and specifications did not contain any openings in the area in front of the elevators where plaintiff's accident occurred and plaintiff and his co-worker Schwartz walked past that area many times on the day of the accident and did not observe any such hole.

However, plaintiff testified that his injury was caused when a wheel of the cart he was pushing fell into a hole in the concrete floor. The testimony of plaintiff's co-worker Schwartz

shows that there may have been holes in the area of plaintiff's accident arguably because the plumbing contractors mistakenly placed holes and risers "in the wrong spots" (Schwartz transcript, exhibit G, pp. 35; 45). Furthermore, plaintiff testified that during weekly staff/safety meetings, Spieler employees complained to Bisso about the uncovered holes, which was "always a topic," and asked that Bisso raise the issue with the project manager Williams (plaintiff transcript, exhibit F, p. 64). The minutes of a Spieler's safety meeting on August 27, 2008, approximately two weeks before the first accident on September 9, 2008, specifically note: "Watch For holes in deck" (exhibit K). Moreover, the record shows that KBF's superintendant Williams, with whom Boyajian of the MCP admittedly "talked to" approximately twice a week (Boyajian transcript, pp. 26-27), was aware of these complaints and even stated, even if jokingly, that the electricians [Spieler employees] were "high maintenance" and to "stop complaining so much because Larry's [Bisso's] minutes [regarding safety issues] took half of the meeting [time]" (exhibit F, pp. 78-79). Thus, such complaints and Boyajian's testimony that he attended weekly job progress meetings raises an issue of fact as to whether the MCP defendants were on notice of the alleged dangerous condition in the subject area of the work site, warranting denial of this portion of the MCP defendants' motion with respect to the first accident.

To the extent that plaintiff's common-law negligence and Labor Law § 200 claims with respect to the *second* accident are based upon the allegedly dangerous condition of wet slippery surface of the grate, the MCP defendants established their entitlement to summary judgment as a matter of law. Specifically, they established that they lacked actual or constructive notice of the alleged dangerous condition of the snow accumulation. And, even if arguably the grate on which plaintiff was standing was wet after plaintiff removed snow from it, the various deposition

testimonies indicate that no one from the MCP defendants was present at the subject work site on the morning of plaintiff's accident. And, there is no indication that anyone reported any snow or ice condition to the MCP defendants.

In opposition, plaintiffs failed to raise a triable issue of fact. Even assuming several inches of snow fell the day before plaintiff's accident, plaintiff testified that he removed snow from the grate before stepping on it and there is no evidence in the record that the MCP defendants were aware of any wet condition of the grate so as to have actual notice. Plaintiffs likewise failed to demonstrate a triable issue as to whether the defendants had constructive notice of the condition. "To constitute constructive notice, a [condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [defendants] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). In the instant case, plaintiff submitted no evidence that the alleged condition existed for a sufficient length of time prior to the accident (*Guccione v West 44th Street Hotel LLC*, 2011 WL 1616839 [Sup Ct, New York County 2011](Trial Order); *cf. Raffa v City of New York*, 100 AD3d 558, 955 NYS2d 9 [1st Dept 2012][during the two days immediately before the accident, plaintiff had lodged multiple complaints to the foreman and superintendents about snow and/or ice covering the work site area; and, two of his co-workers also testified that the area had been covered in a slippery sheet of ice four to six inches thick for about three days prior to plaintiff's accident]).

The cases on which plaintiff relies are distinguishable or inapplicable to the present facts.

Accordingly, based on the above, the branch of the MCP defendants' motion (and Spieler's motion) to dismiss the Complaint is granted as to the Labor Law § 200 and common

law negligence claims arising from the second (January 19, 2009) accident, and such claims are severed and dismissed. However, since plaintiffs raised an issue of fact as to whether the MCP defendants are liable under common law negligence and Labor Law § 200 for the accident that allegedly occurred in September 2008 (the first accident), summary judgment dismissing the Complaint is denied as to this claim.

Plaintiffs' Labor Law § 240 (1) Claim

Labor Law § 240 (1) provides, in relevant part:

> "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."

"The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] [citations omitted]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]). Labor Law § 240(1) applies to both falling worker and falling object cases (*Garzon v Metropolitan Transp. Auth.*, 70 AD3d 568, 895 NYS2d 83 [1st Dept 2010] ("Labor Law § 240(1) applies to falling object cases where the falling of an object is related to a significant risk inherent in the relative elevation at which materials and/or loads must be positioned or secured"); *Simione v City of New York*, 16 Misc 3d 1111(A), 847 NYS2d 899 [Sup Ct, New York County 2007]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Rocovich v Consolidated*

Edison Co.,78 NY2d 509 [1991]).

Plaintiff alleges that his injury in the *second* accident[11] was caused by the MCP defendants' failure to provide a hoisting device for lifting and securing the grate.

In clarifying the statute's scope, the Court of Appeals explained that "the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker."

In *Runner v New York Stock Exchange, Inc.* (13 NY3d 599, 922 NE2d 865 [2009]), a worker serving as a counterweight on a makeshift pulley was dragged into the pulley mechanism after a heavy object on the other side of the pulley rapidly descended a set of stairs, injuring the worker's hand. The Court continued: "[T]he governing rule is to be found in the language from Ross . . . . where we elaborated more generally that 'Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*id.* at 604, *quoting Ross* at 501). Holding that Labor Law § 240(1) applied to the worker's injury, the Appeals Court explained:

> "Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the worker. The relevant inquiry-one which may be answered in the affirmative even in situations where the object does not fall on the worker-is rather *whether the harm flows directly from the application of the force of gravity to the object . . . .*"
> (*Runner*, at 604) (emphasis added).

Indeed, in *Runner*, the Court stated that "the single decisive question" in the case was

[11] The court notes that plaintiff does not claim violation of Labor Law § 240 (1) with respect to the *first* accident.

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"whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.* at 603, 895 NYS2d 279, 922 NE2d 865 [emphasis added]). *Runner* expanded the application of Labor Law § 240(1) with the holding that "the applicability of the statute in a falling object case ... does not ... depend upon whether the object has hit the worker," but "rather whether the harm flows directly from the application of the force of gravity to that object." (*see id.* at 604, 895 NYS2d 279, 922 NE2d 865).

Thus, in *Runner*, "the Court clarified the law in two respects, including that the statute's reach is not to be limited to falling worker cases or falling object cases in which the object directly strikes the worker and - more relevantly here - that the weight and force of the object during descent must be considered in determining whether a height differential is *de minimis"* (*Oakes v Wal–Mart Real Estate Business Trust*, 99 AD3d 31, 39 [3rd Dept 2012], *citing Runner supra*; and *Harris v City of New York*, 83 AD3d at 110, 923 NYS2d 2 [1st Dept 2011]).

In determining whether an elevation differential is "physically significant" versus "*de minimis*," the Court of Appeals instructed that "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent," must be taken into account" (*Oakes*, *supra*, *quoting Runner*, *supra*; *see also Brown v VJB Constr. Corp.*, 50 AD3d 373, 376–377, 857 NYS2d 56 [2008]).

Thus, simply because plaintiff's injury was caused by the effects of gravity [on the grate] does not necessarily implicate the protections of section 240 (1) *(see DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652 [1st Dept 2012], *citing Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911, 680 NYS2d 47 [1998][no liability where injury caused by falling steel plate that

was being moved by defective hoist and perpendicular to ground, but with edge resting on or hovering just above ground]).

Plaintiffs failed to demonstrate on its cross-motion that the subject accident involved extraordinary elevation risks envisioned by Labor Law § 240 (1), so as to bring this case within the ambit of the protections afforded by the statute. Plaintiff's own testimony indicates that he had to lift one of the grates only high enough to place the wire underneath it (plaintiff transcript, pp. 155-160). As such, plaintiff's claim that the task he performed required certain protective devices enumerated by the statute, lacks merit.

Instead, the court finds that the MCP defendants satisfied their *prima facie* burden establishing their entitlement to judgment as a matter of law. Based upon plaintiff's own description of how the accident occurred, and the Affidavit of their expert Lorenz, the MCP defendants sufficiently established that there was no physically significant height differential between the grate and its supporting base, notwithstanding the weight (225 lbs) and size (seven by two feet) of the grate (*see e.g. Oakes, supra* ["Notwithstanding the substantial weight of the truss and the significant force generated as it fell due to the force of gravity, however, there was no elevation differential present here, let alone a physically significant elevation differential"]; *Garcia v Edgewater Development Company*, 61 AD3d 924, 925 [2d Dept 2009] [no physically significant height differential where worker injured his back as he was pulling with his hands a panel of drywall through a second-story window]; *Cruz v Neil Hospitality, LLC*, 50 AD3d 619, 620 [2d Dept 2008][no physically significant height differential where worker injured when beam that was 20 feet long and weighed 800 pounds fell on him as he was attempting to move it, along with his co- workers by pushing it over another beam atop a 15-foot high dirt mound]).

Here, the undisputed deposition testimony established that plaintiff and the subject grate were both at the ground level when plaintiff "lifted [one end of] the steel grate high enough to get the wire underneath it" (plaintiff transcript, p.144). Thus, the height from which the grate fell back to its base was minuscule (*see Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994][plaintiff not faced with the special elevation risks contemplated by Labor Law § 240 (1) where he was struck in the knee by a falling 120-pound beam that he was moving from seven inches above his head to ground level][12]).

And while the elevation differential is not determinative of whether the case falls within the ambit of Labor Law § 240 (1) (*Brown v VJB Constr. Corp., citing Rocovich v Consolidated Edison Co., supra*), the Court of Appeals made clear that section 240 (1) is not implicated in *all* gravity related accidents (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, *supra*; *Narducci v Manhasset Bay Associates*, 96 NY2d 259 [2001]). In this regard, courts have explained that, even though the Court of Appeals has rejected a "same level rule" that automatically precludes liability "where the base of a falling object ... and the injured worker are on the same level" (*see Oakes*, 99 AD3d at 38), the Court of Appeals has not abandoned the requirement that there be a physically significant height differential between the plaintiff and the object in order to establish liability under Labor Law § 240 (1) (*id.*).

Additionally, plaintiff testified that he dropped the grate when he slipped and lost his footing on the wet surface of the abutting grate on which he was standing (plaintiff transcript, pp.

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[12] Although *Rodriguez* preceded both *Runner* and *Willinski*, *Rodriguez* was recently cited by the Court of Appeals in *Ortiz v Varsity Holdings, LLC* (18 NY3d 335, 960 NE2d 948, 937 NYS2d 157 [2011]) for the proposition that "[i]t is true that courts must take into account the practical differences between the usual and ordinary dangers of a construction site, and [. . .] the extraordinary elevation risks envisioned by Labor Law § 240(1)" (*see id.* at 339, *quoting Rodriguez*, 84 NY2d at 843).

161-165). In *Ghany v BC Tile Contrs., Inc.* (95 AD3d 768, 945 NYS2d 657 [1st Dept 2012]), where plaintiff, a stonemason, was injured when he tripped over a small stone and the 100 pound stone he was carrying fell upon his knee and wrist, the court found that the protections of Labor Law § 240 (1) were not implicated, since the impetus for the heavy stone's fall was plaintiff's tripping on ground level, rather than the direct consequence of gravity (*citing Gasques v State of New York,* 15 NY3d 869, 870 [2010]; *Rodriguez*, 84 NY2d at 843-844; *see also Rajkumar v Markham Gardens, L.P.*, 41 Misc 3d 1205(A), Slip Copy, 2013 WL 5445784 (Table) [Sup Ct, Kings County 2013][plaintiff, injured by a falling beam he was trying to lift, when he slipped on the debris, was not faced with direct consequences of gravity so as to impose on the defendants owners Labor Law § 240 (1) liability for lack of any safety devices to assist in lifting the beam]). The mere fact that plaintiff was lifting a heavy grate does not give rise to liability pursuant to Labor Law § 240(1) (*see Oakes*, *supra*, *citing Melo, supra).*

Likewise here, the impetus for the grate's fall was plaintiff's slipping on ground level, rather than the direct consequence of gravity. Thus, under these circumstances, plaintiff was exposed to "the usual and ordinary dangers of a construction site, and [not] the extraordinary elevation risks envisioned by Labor Law § 240(1)" (*see Ortiz*, 18 NY3d at 339, *quoting Rodriguez; Toeffer, supra*).

In opposition, plaintiffs failed to raise a triable issue of fact. The cases cited by plaintiffs are all factually distinguishable from the instant case, as they involve falls from ladders and falling objects hoisted at significant elevation levels.

Therefore, the branches of the MCP defendants' and Spieler's motions to dismiss plaintiffs' Labor Law § 240 (1) claim are granted and said claim is severed and dismissed.

Consequently, the branch of plaintiffs' cross-motion related to this claim is denied.

Plaintiffs' Labor Law § 241 (6) Claim

Plaintiffs argue that the MCP defendants are vicariously liable for violations of two sections of the Industrial Code: section 23-1.7 (b)(1), with respect to the first accident, and section 23-1.7 (d) as to the second accident.[13]

As relevant herein, Labor Law § 241 (6) "requires owners and contractors . . . to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Misicki v Caradonna*, 12 NY3d 511, 515, 909 NE2d 1213 [2009]).

This section imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]; *Misick v Caradonna, supra*). In order to recover, a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross,* 81 NY2d at 501-502; *Long v Forest-Fehlhaber,* 55 NY2d 154 [1982]). However, the worker must prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a "specific safety standard" of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81 NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010]) and that such

[13] Although plaintiffs allege multiple violations of the Industrial Code in their Bill of Particulars, with the exception of Industrial Code 12 NYCRR 23-1.7 (b)(1) and 23-1.7 (d), plaintiffs fail to address those Industrial Code violations in their opposition papers. Therefore, this court deems those parts of plaintiffs' Labor Law § 241 (6) claim predicated on violations of those sections abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *Musillo v Marist College*, 306 AD2d 782, 784 [3rd Dept 2003]) and MCP defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim.

violation was a proximate cause of the injury (*see Padilla v Frances Schervier Housing Dev Fund Corp.*, 303 AD2d 194, 758 NYS2d 3 [1st Dept 2003], *citing Brown v New York City Economic Development Corp.*, 234 AD2d 33, 650 NYS2d 213 [1st Dept 1996]). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long,* 55 NY2d at 160).

12 NYCRR 23.1-7 (b)(1)

Industrial Code section 23.1-7 (b)(1) states that

> "[e]very 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)."

This section has been deemed sufficiently concrete in its specification to support a Labor Law §241 (6) claim (*Olsen v James Miller Mar. Serv, Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

The term "hazardous opening" is not defined in 12 NYCRR 23-1.7 (b)(1). The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002] [Labor Law § 241 (6) inapplicable to the drainpipe hole into which plaintiff stepped because it was not large enough for a person to fit through, and thus, not a "hazardous opening"]; *accord Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Piccuillo v Bank of N. Y Co.*, 277 AD2d 93, 94 [1st Dept 2000] [a hand hole 8 by 12 inches in diameter, used by electricians to provide access to wiring and ducts embedded in floors, into which plaintiff stepped, was not a "hazardous opening" requiring a cover or safety railing]; *cf. Gottstine v Dunlop Tire Corp.*, 272 AD2d 863, 864-865 [4th Dept

2000][12 inch by 12 inch openings in the rebar mat were "hazardous openings" under 23-1.7(b)(1)]).

Here, based on the conflicting witness testimony, an issue of fact exists as to whether the subject hole, if existed, was of the sufficient size and depth to constitute a "hazardous opening" under 23-1.7 (b)(1). While plaintiff testified that the hole was a foot in diameter, his co-worker Schwartz testified that hole was approximately two to three inches (*see* plaintiff transcript exhibit C; Schwartz transcript exhibit G, p. 45). Thus, in light of the existence of the issue of fact, the MCP defendants and Spieler are not entitled to dismissal of that part of plaintiffs' Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-1.7 (b)(1). Likewise, the branch of plaintiffs' cross-motion premised on this section of the Industrial Code is likewise denied.

12 NYCRR 23.1-7(d)(1)

Section 23.1-7(d)(1) of the Industrial Code provides as follows:

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

This regulation protects workers from, *inter alia*, being required or permitted to work in areas where the working surface is in a slippery condition (*see e.g. Velasquez v 795 Columbus LLC,* 103 AD3d 541, 959 NYS2d 491 [1st Dept 2013], *citing Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 855 NYS2d 54 [1st Dept 2008]; *McCarty v Port Auth. of NY & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]).

Here, plaintiff alleges that he slipped on the wet surface of the grate which was part of the

"floor" in the courtyard area and served as a continuation of the courtyard floor (Aff. In Support of Cross-Motion, ¶59), and that the grate could be considered a platform as it was suspended over a crawl space. First, plaintiff cites no caselaw in support of his interpretation of such grates. Further, cases have held that this section did not apply to a slip and fall in a courtyard *(see Bale v Pyron Corp.*, 256 AD2d 1128, 1128, 684 NYS2d 393 [4th Dept 2012] (holding that this section "does not apply where 'the accident occurred in an open area and not on a defined walkway, passageway or path" and that "defendants established that the open courtyard in which plaintiff slipped does not constitute a walkway, passageway or path sufficient to support a cause of action based on an alleged violation of 12 NYCRR 23–1.7(d)"]; *Hertel v Hueber-Breuer Const. Co., Inc.*, 48 AD3d 1259, 850 NYS2d 806 [4th Dept 2008] (the regulation is inapplicable to this case because plaintiff did not slip and fall on an elevated working surface and plaintiff was not using the area in which he fell as a passageway at the time of his fall, because plaintiff's fall "occurred in a common area or open courtyard between the various buildings under construction"]; *Stairs v State Street Associates L.P.*, 206 AD2d 817, 615 NYS2d 478 [3d Dept 1994]).

Thus, as the MCP defendants and Spieler established that 12 NYCRR 23.1-7(d)(1) does not apply to the grate in the open courtyard on which plaintiff slipped, summary dismissal of Labor Law § 241(6) predicated on such section is granted, and the branch of plaintiffs' cross-motion for summary judgment under § 241(6) premised on § 23–1.7 (d) is denied.

The MCP Defendants' Third-Party Claims Against Spieler

Contribution and Indemnification

Spieler established its *prima facie* entitlement to summary dismissal of the MCP defendants' contribution and common law indemnification claims against it on the ground that

plaintiff, an employee of Spieler who acted within the scope of his employment during both accidents, did not suffer a "grave injury" as defined under the Workers' Compensation Law § 11[14] (*Anton v West Manor Const. Corp.*, 100 AD3d 523, 954 NYS2d 76 [1st Dept 2012] (granting summary judgment motion by defendant/employer Tiegre Mechanical Corp. to dismiss West Manor Construction Corp. and Bradhurst 100 Development LLC's claims for common-law indemnification and contribution against it where Tiegre established that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, and opponents failed to raise an issue of fact]). It is uncontested that the medical records and reports of plaintiff's hand specialist and orthopedist, plaintiff's Bill of Particulars, and plaintiff's testimony demonstrate that plaintiff's injuries do not constitute "total loss of use" of his elbow or fingers.

Thus, the branch of Spieler's motion for summary judgment dismissing the contribution and common law indemnification claims against it is granted and said third-party claims are severed and dismissed.

Contractual Defense and Indemnification Claims Against Spieler

"A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010], *citing Drzewinski v Atlantic Scaffold & Ladder Co. Inc.*, 70 NY2d 774,777 521 NYS 2d 216 [1987]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d

[14] Workers' Compensation §11 defines "grave injury" as: "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

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309, 758 NYS2d 286 [1st Dept 2003]). "The interpretation of an unambiguous contract is the function of the court and the intent of the parties must be gleaned from the four corners of the agreement" (*Pierson v Empire State Land Associates, LLC*, 65 AD3d 1114, 886 NYS2d 411 [2d Dept 2009]).

Here, the relevant clause in the contract between Spieler and KBF provides as sollows:

> "Contractor [Spieler] shall indemnify, defend and hold harmless Owner, Construction Manager [. . .] against all losses, claims [. . .] arising out of or in connection with (i) any personal or bodily injury [. . .] sustained [. . .] *as a result of performance of the Work*; (ii) any negligent or wrongful act or omission of Contractor, its employees, subcontractors, representatives [. . .]."
> (KBF/Spieler Contract §12.10, exhibit M).

Thus, the language of the contract obligates Spieler to indemnify the MCP defendants for any claims for bodily injuries arising from the "performance of the Work."

Here, it is undisputed that plaintiff's claims for personal injury arose as a result of the performance of Spieler's work. However, a "party seeking contractual indemnification must establish that it is free from any negligence and that its liability is solely vicarious arising from the non-delegable duty imposed by the Labor Law" (*see Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]; *Brown v Two Exchange Partners*, 76 NY2d 172, 180-181, 556 NYS2d 991 [1990]). As the court noted above, questions of fact exist, as to, *inter alia*, whether the MCP defendants had notice of the dangerous condition of the unguarded hole, into which plaintiff's cart fell; and if so, whether they failed to take reasonable steps to guard it. Thus, although Spieler did not oppose this part of the MCP defendants' motion, the MCP defendants failed to establish their freedom from negligence so as to entitle them to summary judgment for contractual indemnification from Spieler at this juncture (*Cuevas v City of New York*, 32 AD3d 372, 374, 821 NYS2d 37 [1st Dept 2006]; *Brennan v 42nd Street Development*

Project, Inc., 10 AD3d 302, 781 NYS2d 335 [1st Dept 2004][upholding the trial court's denial of Bovis's motion for summary judgment on its claim for contractual indemnification against third-party defendant M. O'Connor upon the court's determination that Bovis did not establish as a matter of law that it was free from negligence]).

Breach of Contract for Failure to Procure Insurance Against Spieler

It is undisputed that Spieler had a contractual obligation to procure insurance covering the MCP defendants for all liabilities arising out of Spieler's work. The relevant provision in the Spieler/KBF contract requires that Spieler provide comprehensive general liability insurance of not less than $1,000,000/$2,000,000 in the aggregate, per occurrence, *inter alia*, for the benefit of the "Owner," MCP, for bodily injury and property damage "arising as a result of the construction of the project and the services performed thereunder" (*see* Spieler/KBF contract, exhibit M, §12.1.3). The contract further obligates Spieler, *inter alia*, to designate the "Owner" as additional insureds under the insurance policies maintained by Spieler, and that said insurance shall be primary for the parties named as insureds (*id.* §12.3).

The MCP defendants established *prima facie* their entitlement to judgment as a matter of law on this claim. Based on the correspondence from Spieler's insurance carrier Utica (exhibit T), the subject policy (No.: CPP 4003341) provides coverage "for any person or organization" with whom Spieler has entered into a written contract. Since the MCP defendants were not parties to the KBF/Spieler's contract, they were not afforded coverage as additional insured under the policy. It is undisputed that Utica declined the MCP's defendants' request for defense and indemnity. In opposition, Spieler fails to produce any evidence that it obtained adequate coverage for the MCP defendants (*see e.g., Bachrow v Turner Const. Corp.*, 46 AD3d 388, 848

NYS2d 86 [1st Dept 2007] [where "subcontract between Turner and Lowy required Lowy to procure insurance covering Turner for all liabilities arising out of Lowy's work, including liabilities resulting from Turner's own acts of negligence[, and] that the insurance Lowy procured limited Turner's coverage to liabilities caused by Lowy's negligent acts or omissions," Lowy therefore breached the subcontract's requirement to obtain insurance]; *385 Third Ave. Associates, L.P. v Metropolitan Metals Corp.*, 81 AD3d 475, 916 NYS2d 95 [1st Dept 2011] (finding that while "Metropolitan obtained insurance coverage and had them [plaintiffs] named as additional insureds, it failed to procure the coverage required by the subcontract that would protect them in the event of a claim made by an injured employee of one of the other named insureds"]).

Therefore, the branch of the MCP defendants' motion for summary judgment on their claim against Spieler for breach of contract for failure to procure insurance is granted.

The MCP Defendants' Claims Against the Third Third-Party Defendants[15]

Common Law Contribution and Indemnification

A party seeking common law indemnification must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work (*Naughton v City of New York*, 94 AD3d 1, 940 NYS2d 21 [1st Dept 2012], *citing McCarthy v Turner Constr., Inc.*, 17 NY3d at 377–378, 929 NYS2d 556, 953 NE2d 794 [2011]; *Reilly v DiGiacomo & Son*, 261 AD2d 318, 690 NYS2d 424 [1999]).

"Contribution is available where two or more tortfeasors combine to cause an injury and

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[15] All claims against the third third-party defendants relate solely to plaintiff's first accident - the cart falling in the alleged hole.

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is determined 'in accordance with the relative culpability of each such person" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 594 [2005][citation and quotation marks omitted]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 764 NYS2d 17 [1st Dept 2003]). It is well established that "to maintain a claim for contribution, [a defendant] has to show that [the co- defendant] contributed to plaintiff's alleged injuries by breaching a duty either to plaintiff or to [defendant]" (*see Jehle v Adams Hotel Associates*, 264 AD2d 354, 695 NYS2d 22 [1st Dept 1999]).

Here, Cross Country demonstrated *prima facie* that it did not create the subject hole, and had no obligation to cover any such holes on the concrete floor. The testimonial evidence establishes that Cross Country began its work by laying the plywood forms, which was followed by other trade contractors placing sleeves or penetrations in the locations necessary for their work. The carpentry contractor bore the responsibility "to cover voids that have been created" by the sleeves or penetrations and that Cross Country was not responsible to "keep looking down below" to see if a hole was covered (Lane, EBT, p. 75). Further, the record shows that Cross Country completed its work on the 14th floor a year prior to plaintiff's accident, in September of 2007 (Lane transcript, exhibit M; p. 20) and, after Cross Country's work progressed to the upper floors, the responsibility to guard any openings or holes fell on the "protection carpenter" PRT (*see* PRT's owner O'Brien EBT, p. 44). Indeed, PRT's owner O'Brien stated that PRT's "temporary protection" work was completed on the 14th floor prior to September of 2008.

However, contrary to Cross Country's claim that there is no showing that it had the responsibility to cover any penetrations, the MCP defendants point out that Lane also testified that Cross Country covered the penetrations ("openings") temporarily by nailing plywood over

them (Lane EBT, pp. 102, 105). Lane stated that the carpentry protection carpenter "elects [whether or not] to use what I put in there." (Lane EBT, p. 102). Thus, as an issue of fact exists as to whether Cross Country was negligent in failing to adequately cover the penetrations (holes), dismissal of the common law indemnification and contribution claims against it is unwarranted.

PRT also failed to establish entitlement to dismissal of the indemnification and contribution claims against it. Although PRT did not create the alleged penetration, and insists that it covered all the openings on the 14th floor that were specified in the architectural plans, that no openings existed in the corridor where plaintiff's accident occurred (exhibit B, p. 45), and it had no duty to monitor the site for any unplanned for or unspecified openings, the record indicates that it was PRT's responsibility to cover any openings prior to and on the day of plaintiff's accident. As pointed out by the MCP defendants, O'Brien testified that as to PRT, it was "our job to cover them [the penetrations] with plywood and/or handrails depending on the size of the penetration" and "try to make them so that they are removable . . ." (O'Brien EBT, pp. 26-27). He further stated, "We do go back often and reattach certain pieces of protection if it comes to someone's attention that something is missing and removed, we go to that area and take care of it." (Id., p. 27). And, whether openings in fact existed in the area where plaintiff fell is an issue of fact and pertains to plaintiff's credibility, which cannot be decided on a motion for summary judgment (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] ["[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact"]; *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 [1st Dept 2000][holding that issues of credibility should be left for resolution by the trier of fact]). Thus, dismissal of the common law indemnification and

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contribution claims against PRT is unwarranted.

And, Paramount failed to establish entitlement to dismissal of the MCP defendants' common law indemnification or contribution claim against it. Even assuming that Paramount met its initial burden of establishing *prima facie* that its plumbers did not create the alleged hole, the testimonial evidence in the record indicating that the Paramount plumbers mistakenly placed holes in the hallway area on the 14th floor, coupled with evidence of the electricians' complaints at the weekly meetings about the uncovered holes, raises an issue of fact as to whether Paramount was responsible for creating the hole into which plaintiff's cart fell. The credibility issues regarding plaintiff's co-worker Schwartz's testimony of the Paramount plumbers' alleged improper placing of penetrations in or near the area of plaintiff's accident cannot be resolved on a motion for summary judgment and should be decided by a trier of fact (*S.J. Capelin Assoc. v Globe Mfg. Corp., supra*). Thus, if PRT is found negligent, and the MCP defendants' liability, if any, is found to be purely vicarious, in the absence of their own negligence, the MCP defendants may be entitled to common law indemnification and contribution from PRT. Thus, dismissal of the common law indemnification and contribution claims against Paramount is unwarranted.

Thus, the branches of Cross Country's, PRT's, and Paramount's cross-motions to dismiss the MCP defendants' common law indemnification and contribution claims are denied.

Contractual Indemnification

The identical indemnification clauses in KBF's trade contracts with Cross County, Paramount and PRT provide in relevant parts:

> "To the fullest extent permitted by law, Contractor shall indemnify, defend and hold harmless Owner, Construction Manager [. . .] from and against all losses, claims [. . .] arising out of or in connection with: (i) any personal or bodily injury...*as a result of performance of the Work*; (ii) *any negligent or wrongful omission of Contractor*; (iii) any

> breach or default under the Contract by Contractor; and (iv) any claim asserted, or lien or notice of lien filed [. . .] in connection with the Work."
> (*see* Cross County/KBF contract, exhibit S; Paramount/KBF contract, exhibit 3, section 12.10)(emphasis added).

Thus, the plain reading of the above clause shows that the contracts require Cross Country, Paramount and PRT indemnify the MCP defendants for injuries, as suffered by plaintiff here, arising out of the performance of the contractor's work or its negligent acts or omissions.

Here, an issue of fact exists as to the negligence of Cross Country, PRT and Paramount, and thus, they are not entitled to dismissal of the MCP defendants's contractual defense and indemnification claims against them.

Failure to Procure Insurance

It is undisputed that each contractor, Cross Country, Paramount and PRT, had a contractual obligation to procure insurance covering the MCP defendants for all liabilities arising out of each contractor' work.

The KBF's trade contracts with Cross County, Paramount and PRT likewise contain identical insurance procurement provisions, which state:

> "Contractor will provide and maintain at all times during the performance of Work on the Project [. . .] Comprehensive General Liability Insurance to provide not less than $1,000,000.00 per occurrence/$2,000,000 General Aggregate - per job/location covering the liability of the Owner, Construction Manager and Contractor for bodily injury, including death and property damage arising as a result of the construction of the project and the services performed thereunder.
>
> ***
>
> Contractor will provide an Umbrella Liability Insurance Policy which is in excess of the policies in place [. . .] and has a limit of $10,000,000 or an amount otherwise required by the Construction manager, but in no case, less than $3,000,000."

Cross Country failed to establish as a matter of law that it complied with its obligation to procure insurance for the benefit of the MCP defendants. The insurance policy included in

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[Cross Country's] submissions contains an endorsement, which provides that it

> "include[s] as an insured any person or organization for whom [contractor is] performing operations when [contractor] *and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.* Such person or organization is an additional insured only with respect to liability arising out of [contractor's] ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when [contractor's] operations for that insured are completed."
> (exhibits A; B to Cross Country's reply) (Emphasis added).

Here, the MCP defendants are not parties to KBF/Cross Country contract. Thus, contrary to Cross Country's argument, the policy endorsement extending coverage to a party required by a written contract to be named as an additional insured did not automatically extend to the MCP defendants. Since Cross Country failed to provide the required coverage, its argument that the MCP defendants' coverage ended upon the completion of its work at the project, lacks merit. Thus Cross Country's failure to meet its burden requires denial of this portion of its summary judgment motion, without regard to the sufficiency of the opposition (*see Murray v City of New York*, 74 AD3d 550, 903 NYS2d 34 [1st Dept 2010]; *Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]).

Similarly, Paramount failed to submit any evidence that the required insurance policy for the benefit of the MCP defendants was obtained. Thus, dismissal of this claim against Paramount is likewise unwarranted.

PRT, however, established *prima facie*, through the copies of the insurance policies, that it complied with its insurance procurement obligation under the contract with KBF. Said policies contain an "Additional Insured" endorsement stating that coverage is provided to the "Person or Organization [. . .] [a]s required by signed written contract" (exhibits B and C to PRT's reply). Since the contract requires, *inter alia*, to obtain coverage for " the Owner," PRT complied with

this contractual obligation.

However, the MCP defendants' claim that PRT's carrier denied coverage raises an issue of fact as to whether PRT procured the liability insurance in satisfaction of its obligation to the MCP defendants. Thus, dismissal of the MCP defendants' claim for failure to procure insurance against PRT is unwarranted.

Thus, the dismissal of the third third-party claims for breach of contract for failure to procure insurance is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the cross-motions of the third third-party defendants PRT Construction Inc., (sequence 004), Paramount Plumbing Co. of New York Inc., (sequence 003) , and Cross Country Construction LLC (sequence 003), for summary judgment dismissing the complaint of the defendants/third third-party plaintiffs MCP SO Strategic 56 LP, MCP 56 LLC, and MCP 56 Properties LLC; Stillman Development International, LLC and Antonio Development, LLC, and all cross-claims against it is denied; and it is further

ORDERED that the branch of the third-party defendant Spieler & Ricca Electrical Co., Inc.'s motion (sequence 003) for summary judgment dismissing the third-party claims of MCP SO Strategic 56 LP, MCP 56 LLC, and MCP 56 Properties LLC, Stillman Development International, LLC, and Antonio Development, LLC for common law indemnification and contribution is granted; and it is further

ORDERED that the branches of the motions by defendants MCP SO Strategic 56 LP, MCP 56 LLC; MCP 56 Properties LLC, Stillman Development International, LLC, and Antonio

Development, LLC (sequence 004) and the third-party defendants Spieler & Ricca Electrical Co., Inc.'s motion (sequence 003) for summary judgment dismissing plaintiffs' complaint is granted solely to the extent of dismissing the Labor Law§ 240 (1), common law negligence, and Labor Law §200 claims as they relate to plaintiff Julio German's *second accident,* granted to the extent of dismissing plaintiffs' Labor Law § 241(6) claim solely as predicated upon Industrial Code 12 NYCRR § 23-1.7(d), and §§ 23-1.5, 23-1.8, 23-2.1, 23-1.30 and 23-6, and denied as to plaintiffs' Labor Law § 241(6) claim as predicated on upon Industrial Code 12 NYCRR § 23-1.7 (b)(1) and it is further

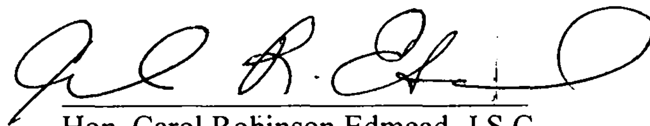
ORDERED that the branch of the motion (sequence 004) by defendants MCP SO Strategic 56 LP, MCP 56 LLC, and MCP 56 Properties LLC, Stillman Development International, LLC, and Antonio Development, LLC for summary judgment on their third-party claims against the third-party defendant Spieler & Ricca Electrical Co., Inc., is granted solely as to the claim for breach of contract to procure insurance; and it is further

ORDERED that plaintiffs' cross-motion (sequence 004) pursuant to CPLR 3212 for summary judgment is denied; and it is further

ORDERED that counsel for defendants MCP SO Strategic 56 LP, MCP 56 LLC, and MCP 56 Properties LLC; Stillman Development International, LLC and Antonio Development, LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 9, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD