

<b>Bermeo v Fordham Univ.</b>
2015 NY Slip Op 31178(U)
June 15, 2015
Supreme Court, Bronx County
Docket Number: 307822/2010
Judge: Mary Ann Brigantti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

*C*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

\_\_\_\_\_  
MANUEL ALEJANDRO BERMEO, as Administrator of  
the Estate of ROSENDO ABRAHAN BERMEO  
CARERA, Deceased, and MARTHA DE LA CRUZ  
LITARDO, Individually, X

Plaintiffs,

-against-

FORDHAM UNIVERSITY,

Defendant.

**DECISION/ORDER**

Index No.: 307822/2010

\_\_\_\_\_  
FORDHAM UNIVERSITY, X

Third-Party Plaintiff,

Index No.: 84221/2010

-against-

ARTHUR VINCENT & SONS CONTRACTING, INC.,

Third-Party Defendant.

\_\_\_\_\_  
X

The following papers numbered 1 to 7 read on the below motion noticed on December 19, 2014  
and duly submitted on the Part IA15 Motion calendar of **March 6, 2015**:

<u>Papers Submitted</u>	<u>Numbered</u>
Fordham's SJ Motion, Affirmation in Support of Motion, Mem. Of Law, Exhibits	1,2,3
AV's Aff. In Opp., Exhibits.	4,5
Fordham's Reply Aff., Exhibits	6,7

Upon the foregoing papers, defendant Fordham University ("Fordham") moves for  
summary judgment, dismissing the common law negligence and Labor Law §200 claims of the

plaintiffs, Manuel Alejandro Bermeo, as Administrator of the Estate of Rosendo Abraham Bermeo Cabrera, deceased, and Martha De La Cruz Litardo, individually (“Plaintiffs”), and summary judgment on its contractual and common law indemnification claims against third-party defendant Arthur Vincent & Sons Construction, Inc., d/b/a Arthur Vincent & Sons Company (“Arthur Vincent”). Arthur Vincent opposes the motion.

I. Background

This matter arises out of a fatal accident that allegedly occurred on July 17, 2009, when the decedent, Rosendo Abraham Bermeo (“Decedent”), a roofer employed by Arthur Vincent, fell off of a roof during an ongoing roof replacement project at Fordham’s Armonk, New York campus. Fordham retained Arthur Vincent to perform the roof replacement, and in support of the motion, Fordham asserts that Arthur Vincent exercised exclusive supervision and control over the Decedent’s work. As a result of this accident, Plaintiffs brought this action against Fordham asserting, among other things, violations of Labor Law.

Fordham now argues that it is entitled to dismissal of Plaintiff’s Labor Law §200 and common law negligence claims because it did not supervise or control any of Plaintiff’s work. It has been acknowledged by Arthur Vincent’s foreman that Arthur Vincent was responsible for its own means and methods, and all of their employees, including Decedent, took all instructions exclusively from Arthur Vincent supervisors. Further, all tools and equipment are supplied by Arthur Vincent. Fordham also produces the deposition testimony of one of its employees, campus caretaker Michael Lambros, who testified that Fordham had no prior notice of any dangerous condition bringing about the accident, or any prior complaints concerning safety at the job site. In light of this evidence, Fordham asserts that they are entitled to dismissal of Plaintiff’s Labor Law §200 and common law negligence claims.

Fordham also seeks summary judgment on the issue of contractual and common law indemnity against Arthur Vincent. Fordham and Arthur Vincent entered into a written contract dated March 5, 2009, with the following indemnity provision:

“[Arthur Vincent] shall indemnify and hold harmless [FORDHAM], its governing board, officers, agents and employees from and against all, claims, damages, losses and expenses

for bodily injury, sickness, disease or death ... including but not limited to attorneys fees, arising out of or caused in whole or in part by negligent acts or omissions of [Arthur Vincent]...”

Fordham argues that this provision has been triggered by virtue of its undisputed fact that an Arthur Vincent employee was fatally injured during the course of his work, and the work was exclusively controlled and supervised by Arthur Vincent. Given the absence of any active negligence on the part of Fordham, and since it is clear that the accident “arises out of” Arthur Vincent’s work performed under the contract, the indemnification provision is triggered and Fordham is entitled to full contractual indemnification over and against Arthur Vincent.

Moreover, Fordham argues it is entitled to common law indemnification. Fordham has demonstrated (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 (Arthur Vincent) was either negligent or exercised actual supervision or control over the injury-producing work (citing *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369 [2011]).

Finally, Fordham argues that it is entitled to reimbursement of defense costs, pursuant to the indemnification provision found in the contract.

Arthur Vincent opposes the motion, and argues that there are significant issues of fact as to whether Fordham is actively negligent, and had notice of an allegedly dangerous condition. Fordham is not entitled to contractual or common law indemnification because Fordham has mistakenly interpreted its contractual relationship with Arthur Vincent.

On January 15, 2014, Arthur Vincent served a Notice to Admit upon Plaintiffs, which included a Safety Rules and Requirements Form signed by Decedent, indicating that Decedent was instructed not to go near roof edges, without using a safety harness, and directed Decedent not to disengage from the life line until he or she is on the ground. Plaintiffs have confirmed the authenticity of Decedent’s signature on this document. Arthur Vincent also submits the deposition testimony of its foreman. The project at issue entailed tearing off the existing wooden roof and replacing it with an aluminum roof. The foreman observed Decedent using the life line and harness. He saw Decedent on the roof about a hand length away from the “rope grabber,”

but could not tell if Decedent was tied off to the life line. The foreman then turned around and observed Decedent falling.

Arthur Vincent discusses the relevant March 2009 contract, that provided, in pertinent part, that the owner agrees to provide, without charge, electrical power inside gang box storage area, as well as a storage area for materials, in order to perform the necessary work. It also provided that "as discussed the dock will be placed in front of the house by Fordham maintenance personnel."

The relevant indemnity provision of the March 2009 contract states, in pertinent part, that Arthur Vincent is to indemnify Fordham from any injury or damage arising out of, or caused in whole or in part by negligent acts or omissions of Contractor (Arthur Vincent), regardless of whether or not such claims or damages were caused in part by "a party indemnified hereunder." In light of this language, Arthur Vincent argues that the Court should dismiss the claim for contractual indemnification because the provision is unenforceable and against public policy under General Obligations Law 5-322.1. The provision contains no savings language as required by the Court of Appeals, and seeks indemnification "regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." Indemnity provisions which purport to indemnify an indemnitee for its own negligence are unenforceable as against public policy.

Arthur Vincent also contends that there are issues of fact as to Fordham's own active negligence, as it had actual and constructive notice of dangerous conditions on the work site. Arthur Vincent relies in part on photographs of the site to demonstrate that "it is apparent to any passer-by, let alone the owner of the premises, that the work site presented a visibly dangerous condition." Fordham's witnesses admitted to observing positioning of ladders at the Calder Center and ongoing work, yet they failed to raise any safety concerns with Arthur Vincent.

John Wehr, acting director of Fordham's Calder Center, testified that on a daily basis, employees from Arthur Vincent would ask him if everything was fine and that whether he was satisfied with the work. Mr. Wehr also admitted there were "live wires" leading onto the roof on the west side of the building where the incident occurred, which had been there at some point prior to this incident. Mr. Lambros, resident caretaker at the accident location, opened the

building almost every day to allow Arthur Vincent employees access to the building. He observed the laborers working on the roof and the manner in which they were performing the work.

Arthur Vincent contends that this testimony confirms that Fordham had constructive, and possibly actual notice that life lines were not located in an area that would enable proper access or egress from the roof to the scaffold below. It is not disputed that Plaintiff fell off of the roof because he was not tied off to the subject lifeline. Accordingly, there are issues of fact as to whether Fordham had actual or constructive notice of the conditions at the site. Arthur Vincent urges that Fordham is relying on its own self-serving claim that they received no prior complaints about the job site, and lacked notice of its dangerous condition. The movant fails to address the fact that it indeed had notice of the manner in which ladders were positioned at the site, in relation to the safety lines. There are also issues regarding whether Fordham exercised supervisory control over Decedent's work, because Mr. Wehr spoke with Bradley Vincent, and other Arthur Vincent employees on a daily basis to confirm that the ongoing work was satisfactory.

Arthur Vincent argues that Fordham is not entitled to a conditional order of contractual indemnification because the clause is triggered only by a demonstration of Arthur Vincent's active negligence. The provisions directs indemnification from and against all claims "arising out of or caused in whole or in part by *negligent acts or omission* of Contractor..." Since Fordham has not demonstrated that Arthur Vincent was negligent, Fordham is not entitled to conditional summary judgment. Fordham has failed to demonstrate that this accident was not solely caused by the actions of the Decedent. Plaintiffs have admitted that the Decedent here signed a statement attesting to his knowledge and admitting that he was required to always be tied off to a life line by a safety harness and by the "rope grabber."

Arthur Vincent argues that *Sosa v. 46<sup>th</sup> Street Development LLC* is squarely on point with this case. In *Sosa*, the First Department affirmed denial of the general contractor's motion for summary judgment on the issue of contractual indemnification where there was evidence that the general contractor had notice of a dangerous electrical condition, but failed to remedy it (101 A.D.3d 490 [2012]). Arthur Vincent also distinguishes the caselaw relied upon by Fordham in

its moving papers. Notably, the indemnification clause at issue here is only triggered upon Arthur Vincent's negligence, and there are issues of fact as to Fordham's active negligence, even to 1%, which would void the contractual indemnification clause altogether under General Obligations Law §5-322.1.

Finally, Arthur Vincent argues that since there has been no finding of negligence on their part, summary judgment must be denied on Fordham's request for attorneys fees and costs.

In reply, Fordham initially notes that the lack of a "savings clause" in the indemnity provision is irrelevant, because Fordham has demonstrated that it is without any active negligence, and therefore the provision does not run afoul of General Obligations Law §5-322.1. Fordham reiterates its argument that it is entitled to dismissal of Plaintiff's Labor Law §200 and common-law negligence claims, since there is no evidence that Fordham exercised supervisory control over the work site. This action arises out of the "means and methods" of the Decedent's work, and did not arise from a "defective condition" on the premises. Fordham never recieved any OSHA violations after a full investigation, and moreover, there is no evidence to demonstrate that the presence of "live wires" near the roof contributed to this accident. Since the accident arose, instead, out of the manner in which the work was performed, Fordham's alleged notice of unsafe practices occurring is irrelevant, absent evidence that Fordham exercised supervisory control over the work. Here, there is no such evidence. The discussions between Arthur Vincent employees and Fordham were "mere pleasantries."

Fordham also contends that it is entitled to summary judgment on its common law and contractual indemnification claims. Even if the indemnity provision had a "negligence trigger," Fordham is entitled to summary judgment since it has established a lack of active negligence on its part, and moreover, Decedent's work was supervised and controlled exclusively by Arthur Vincent. At the very least, Fordham argues that is entitled to conditional summary judgment on its cross-claims for contractual indemnification, to be entered upon a finding of Arthur Vincent's negligence. Fordham also argues that it is entitled to an immediate award of defense fees and costs reimbursement since it has demonstrated freedom from fault.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

*Labor Law §200 and Common Law Negligence Claims*

Labor Law §200 is a codification of common-law negligence principles concerning the duty imposed upon an owner or general contractor to provide workers with a safe work environment. (See, *Comes v. New York State Elec. & Gas Corp.*, 82 NY.2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Electric Company et al.*, 81 N.Y.2d 494, 505 [1993]; *Dunham v. Hilco Construction Co., et al.*, 89 N.Y.2d 425, 429 (1996). It is well settled that an implicit precondition to this duty is that the party 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 (See *Rizzuto v. LA. Wenger Contracting Co., Inc.*, 91 NY.2d 343, 352 [1998]). Liability does not

attach “solely because the owner had notice of the allegedly unsafe manner in which the work was performed.” (*Comes*, 82 N.Y.2d at 878, 609 N.Y.S.2d 168, 631 N.E.2d 110; *see also Ortega v. Puccia*, 57 A.D.3d 54, 61 [2<sup>nd</sup> Dept. 2008]).

Cases involving Labor Law § 200 claims generally fall into two categories: those where workers are injured as a result of dangerous or defective conditions at a work site, and those involving the manner in which the work is performed (*Ortega v. Puccia*, 57 AD3d 54, 61–62). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident. (*Id.*). By contrast, where the manner of work is at issue, no liability will attach to the owner simply because he or she may have had notice of the allegedly unsafe manner in which work was performed (*Id.*, citing *Comes v. New York State Elec. & Gas Corp.*, 82 NY.2d 876, 877 [1993]). Instead, when a claim arises out of alleged dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*Id.* [citations omitted]; *see also Alonzo v. Safe Harbors of the Hudson*, 104 A.D.3d 446 [1<sup>st</sup> Dept. 2013]). More than “general control” over the work giving rise to the injury must be established for liability to lie. Further, the retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200 (*Dennis v. City of New York*, 304 A.D.2d 611 [2<sup>nd</sup> Dept. 2003]; *Brown v. City of New York City Economic Development Corp.*, 234 A.D.2d 33 [1<sup>st</sup> Dept. 1996]).

Arthur Vincent argues that this branch of Fordham’s motion must be denied, because there are issues of fact with respect to whether Fordham had actual or constructive notice of the unsafe manner in which the work was being performed. Specifically, Arthur Vincent argues that Fordham had notice of the manner in which ladders were positioned at the job site, where they were positioned relative to the only safety line. Arthur Vincent also argues that testimony establishes an issue of fact as to whether Fordham retained supervision or control over the work

site. On a daily basis, Bradley Vincent of Arthur Vincent would ask Mr. Wehr if everything was fine and if he was satisfied with how things were going. Mr. Wehr also testified that he spoke to employees every day.

Primarily, this matter clearly arose out of the “manner in which the work is performed,” and was not the result of a defective condition on the work site. This accident allegedly occurred when the Decedent fell from the roof of Fordham’s building while performing a roof replacement. There is no support for Arthur Vincent’s contention that this fall was the result of any defective condition on the premises. As noted in its own affirmation in opposition, “[i]t is beyond dispute that Mr. Bermeo fell because he was not tied off to the subject lifeline” (Arthur Vincent Aff. In Opp., at Par. 39). Rather, the evidence demonstrates that the fall allegedly arose from the means and methods, such as the absence of a proper safety device (*see Collado v. City of New York*, 72 A.D.3d 458 [1<sup>st</sup> Dept. 2010]), and the laborer’s use of materials and equipment, such as the ladders and scaffolding, to perform his tasks. Mr. Wehr’s reference to live wires leading to the roof do not raise an issue of fact, as there is no evidence that those wires had anything to do with Plaintiff’s fall.

Since this action arose out of the “means and methods” of Decedent’s work, in order to maintain an action against Fordham for common law negligence and Labor Law §200, there must be evidence that Fordham had the authority to supervise or control the performance of the work. Fordham has demonstrated prima facie entitlement to summary judgment on these claims, as Arthur Vincent’s own foreman testified that it provided its own tools for the project, he reported to Bradley Vincent of Arthur Vincent, and finally, he took instruction and direction from no one else.

In opposition, Arthur Vincent argues that the testimony establishes “significant issues of fact” as to whether Fordham’s employees “observed [Arthur Vincent] workers on the roof, yet they failed to raise any safety concerns to [Arthur Vincent] or anyone else” based upon the testimony of Fordham’s employees, and their review of certain photographs of the job site. However, as noted *supra*, “where the manner of work is at issue, no liability will attach to the owner simply because he or she may have had notice of the allegedly unsafe manner in which

work was performed” (*Ortega v. Puccia*, 57 AD3d 54, 61–62; *see Dalanna v. City of New York*, 308 A.D.2d 400 [1<sup>st</sup> Dept. 2003]).

Arthur Vincent also argues that there are issues of fact regarding Fordham’s supervisory control, because Mr. Wehr spoke to Arthur Vincent employees every day, and Bradley Vincent would ask Mr. Wehr if he was satisfied with how the work was progressing. This evidence, however, falls well short of the amount of supervision or control necessary to impose liability under Labor Law §200 or common law negligence. At best, it constitutes “monitoring,” “general instruction,” or mere presence on a job site, which is insufficient to raise an issue of fact as to Fordham’s negligence (*see Burkoski v. Structure Tone Inc.*, 40 A.D.3d 373 [1<sup>st</sup> Dept. 2007][internal citations omitted]; *see Dalanna v. City of New York*, 308 A.D.2d 400).

Accordingly, Fordham is entitled to summary judgment, dismissing Plaintiff’s claims under Labor Law §200 and common law negligence.

#### *Contractual and Common Law Indemnification Claims*

In light of the above finding that Fordham is free of liability under Labor Law §200 and common law negligence, General Obligations Law §5-322.1 does not apply so as to invalidate the indemnity provision, and the provision is enforceable “even though the agreement does not limit the obligation to what the law allows (*see Crouse v. Hellman Constr. Co., Inc.*, 38 A.D.3d 477 [1<sup>st</sup> Dept. 2007]; *Colozzo v. National Center Foundation, Inc.*, 30 A.D.3d 251 [1<sup>st</sup> Dept. 2006]).

Moreover, Fordham is entitled to summary judgment on the issue of contractual indemnification, but conditioned on a finding of negligence on the part of Arthur Vincent. The right to contractual indemnification depends upon the specific language of the contract (*Reisman v. Bay Shore Union Free School Dist.*, 74 A.D.3d 772, 773, [2<sup>nd</sup> Dept. 2010][internal quotation marks omitted]). The complete indemnity provision at issue here states as follows:

Contractor shall indemnify and hold harmless University, its governing board, officers, agents, and employees from and against all claims, damages, losses and expenses for bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including loss of use resulting there from, including but not limited to attorneys fees, arising out of or caused in whole or in part by negligent acts or omission of Contractor,

*subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.* Such obligations shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist to a party or persons described in this Agreement. This clause shall survive the termination of this Agreement. (Emphasis supplied).

The indemnity provision at issue contains a “negligence trigger” in that it limits Fordham’s right to indemnity to damages arising from the “negligent acts or omissions” of Arthur Vincent. Arthur Vincent contends that Fordham is not entitled to a conditional order of contractual indemnification until Fordham has demonstrated that the accident, in fact, was caused by Arthur Vincent’s negligence. When confronted with a nearly identical indemnity provision and fact pattern, however, the First Department in *Rivera v. Urban Health Plan, Inc.*, found that the indemnitee was nevertheless entitled to summary judgment on the issue of contractual indemnification, but conditioned the judgment upon a finding that the indemnitor was negligent (9 A.D.3d 322 [1<sup>st</sup> Dept. 2004]). In so holding, the Court noted, among other things, that there was no evidence of active negligence on the part of the indemnitor. Another analogous case is *Crimi v. Neves Assoc.*, 306 A.D.2d 152 [1<sup>st</sup> Dept. 2003]). In that case, the owner-indemnitor was entitled to summary judgment on the issue of contractual indemnification against the contractor-indemnitee, conditioned upon a finding of the indemnitee’s negligence, where the indemnity provision was triggered only to the extent that bodily injury was “caused in whole or in part by negligent acts or omissions of the contractor...” (Id., at 153), and moreover, the indemnitor was determined to be liable solely due to its status as an “owner” of the premises pursuant to Labor Law §240(1).

In this matter, as demonstrated *supra*, Fordham has established that it is entitled to dismissal of Plaintiff’s Labor Law §200 and common law negligence claims. Accordingly, any liability that may be imposed on Fordham in this action will be vicarious, pursuant to Labor Law § 240(1) and/or 241(6), and there will be no bar to their recovery of complete indemnification pursuant to the parties’ contract (*see, e.g., Best v. Tishman Constr. Corp. of New York*, 120 A.D.3d 1081 [1<sup>st</sup> Dept. 2014], *see also Masciotta v. Morse Diesel International, Inc.*, 303 A.D.2d 309 [1<sup>st</sup> Dept. 2003]). Under these circumstances, therefore, Fordham is entitled to summary

judgment on its contractual indemnification claims, conditioned upon a finding of Arthur Vincent's negligence (*see Johnson v Chelsea Grant East LLC*, 124 A.D.3d 542 [1<sup>st</sup> Dept. 2015]). Such a conditional order is not premature here, where it has already been determined that the indemnitee was not actively negligent (*cf. Picaso v. 345 East 73 Owners Corp.*, 101 A.D.3d 511 [1<sup>st</sup> Dept. 2012][conditional summary judgment on contractual indemnification claim premature because, *inter alia*, there were issues of fact regarding the indemnitee's negligence]; *Sosa v. 46<sup>th</sup> St. Dev LLC*, 101 A.D.3d 490 [to the same effect]).

Fordham is also entitled to conditional summary judgment on its common law indemnification claims, as it has demonstrated that it did not control or supervise Plaintiff's work, and by establishing that Arthur Vincent exercised its exclusive authority to supervise the Decedent's work and implement safety features (*see Bermejo v. New York City Health and Hospitals Corp.*, 119 A.D.3d 500, 504 [2<sup>nd</sup> Dept. 2014]; *citing, inter alia, McCarthy v. Turner Constr. Inc.*, 17 N.Y.3d 369 [2011] *see also Serowik v. Leardon Boiler Works, Inc.*, 2015 N.Y. Slip. Op. 04773 [1<sup>st</sup> Dept. 2015]). A conditional order is appropriate here, where the indemnitee's lack of negligence has been established, and there is no issue of fact as to whether the indemnitor, Arthur Vincent, exercised actual, exclusive, supervisory authority over the plaintiff-Decedent (*McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d at 377-378). The cases relied on by Arthur Vincent, including *DeJesus v. 888 Seventh Avenue LLC*, are distinguishable, because in those cases, triable issues of fact existed as to the indemnitee's own negligence, thus precluding summary judgment on the indemnitee's common law indemnification claims (114 A.D.3d 587 [1<sup>st</sup> Dept. 2014], *citing Chevalier v. 368 E. 148<sup>th</sup> Street Assoc., LLC*, 80 A.D.3d 411 [1<sup>st</sup> Dept. 2011]). In *Reilly v. DiGiacomo & Son*, 261 A.D.2d 318 (1<sup>st</sup> Dept. 1999), summary judgment was properly denied on an owner's common law indemnification claim against the general contractor because the owner did not establish that the contractor was "either negligent or exclusively supervised and controlled plaintiff's work site." Here, Fordham has established not only its own freedom of active negligence, but has also that Arthur Vincent exercised such control over the construction site.

Finally, Fordham is entitled to conditional summary judgment on its claim for defense costs and attorneys fees, to be determined upon a finding of negligence on the part of Arthur

Vincent (*see DiPerna v. American Broadcasting Companies, Inc.*, 200 A.D.2d 267 [1<sup>st</sup> Dept. 1994]). This matter is distinguishable from the cases cited by Arthur Vincent, in that it involves an indemnitor that exercised actual control and supervision of the plaintiff-employee's work (*cf. Gell-Tejada v. Macy's Retail Holdings, Inc.*, 116 A.D.3d 594 [1<sup>st</sup> Dept. 2014]). The conditional nature of Fordham's entitlement to summary judgment on its claim for reimbursement of costs and fees requires an assessment of such costs to await a determination of Arthur Vincent's negligence (*cf. Cuomo v. 53<sup>rd</sup> & 2<sup>nd</sup> Assoc., LLC.*, 111 A.D.3d 548 [1<sup>st</sup> Dept. 2013])[award of unconditional entitlement to indemnification imposed a present obligation upon indemnitor to pay defense costs]).

IV. Conclusion

Accordingly, it is hereby

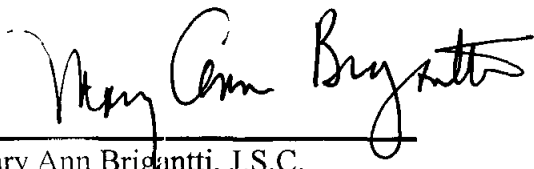
ORDERED, that Fordham's motion for summary judgment, dismissing Plaintiff's Labor Law §200 and common law negligence claims, is granted, and those claims as asserted against Fordham only are dismissed with prejudice, and it is further,

ORDERED, that Fordham's motion for summary judgment against Arthur Vincent on the issue of contractual and common law indemnification, is granted conditionally, only to the extent that there is a finding that the plaintiffs' damage arose out of the negligent acts or omissions of Arthur Vincent, in accordance with the parties' indemnification agreement, and it is further,

ORDERED, that Fordham's motion for reimbursement of defense costs and attorneys fees is granted conditionally, only to the extent that there is a finding that the plaintiffs' damages arose out of the negligent acts or omissions of Arthur Vincent, in accordance with the parties' indemnification agreement.

This constitutes the Decision and Order of this Court.

Dated: 6/15, 2015

  
\_\_\_\_\_  
Hon. Mary Ann Brigantti, J.S.C.