

Zollo v TDX Constr. Corp.

2015 NY Slip Op 31720(U)

January 21, 2015

Supreme Court, New York County

Docket Number: 110611/2009

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

FA
1/22/15
ES

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

2010

TDX Construction Corp et al.

RECEIVED
JAN 22 2015
INDEX NO. 110611/09
MOTION DATE _____
GENERAL CLERK'S OFFICE
NYS SUPREME COURT
FILE NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2
Answering Affidavits — Exhibits _____ No(s). 3
Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is ~~is~~ By third-party defendant
HRAD Construction is granted in accordance
with the attached memorandum decision.
(Consolidated for disposition with Motion
Seq. Nos: 006, 007, 008 + 009).

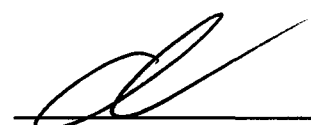
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 23 2015

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/21/15


_____, J.S.C.

JUSTICE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36**

-----X
LOUIS A. ZOLLO and PHYLLIS ZOLLO,
Plaintiffs,

Index No. 110611/2009

-against-

Motions No.: 005, 006, 007
008 & 009

TDX CONSTRUCTION CORPORATION and
GILBANE BUILDING COMPANY, BOTH
INDIVIDUALLY and AS JOINT VENTURE,
Defendants.

-----X
TDX CONSTRUCTION CORPORATION and
GILBANE BUILDING COMPANY, BOTH
INDIVIDUALLY and AS JOINT VENTURE,
Third-Party Plaintiffs,

Third-Party Index No.
590734/2010

-against-

FIVE STAR ELECTRIC CORP. and HRAD
CONSTRUCTION CORP.,
Third-Party Defendants.

FILED

JAN 23 2015

**COUNTY CLERK'S OFFICE
NEW YORK**

-----X
TDX CONSTRUCTION CORPORATION and
GILBANE BUILDING COMPANY, BOTH
INDIVIDUALLY and AS JOINT VENTURE,
Second Third-Party Plaintiffs,

Second Third-Party Index
No. 590079/2012

-against-

CYAN CONTRACTING CORP.,
Second Third-Party Defendant.

-----X
FIVE STAR ELECTRIC CORP.,
Third Third-Party Plaintiffs,

Third Third-Party Index
No. 590091/2012

-against-

CYAN CONTRACTING CORP.,
Third Third-Party Defendant.

-----X

Ling-Cohan, J.:

This is an action to recover damages for personal injuries sustained by an electrician on July 28, 2006, when he tripped on a threaded rod while descending a stairway at a construction project located at Bellevue Hospital on East 26th Street, New York, New York (the premises). In motion sequence number 005, third-party defendant Hrad Construction (Hrad) moves, pursuant to CPLR 3212, for summary judgment dismissing defendants/third-party and second third-party plaintiffs TDX Construction Corporation (TDX) and Gilbane Building Company (Gilbane), both individually and as a joint venture's (TDX/Gilbane) (collectively, TDX/Gilbane) third-party complaint and all cross claims against it. In motion sequence number 006, plaintiffs Louis A. Zollo (plaintiff) and Phyllis Zollo move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the common-law negligence and Labor Law § 200 claims, as well as that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and/or (2), against TDX/Gilbane. In motion sequence number 007, third-party defendant/third third-party plaintiff Five Star Electric Corp. (Five Star) moves, pursuant to CPLR 3212, for summary judgment dismissing TDX/Gilbane's third-party complaint, as well as Hrad's cross claims, against it. In motion sequence number 008, TDX/Gilbane moves, pursuant to CPLR 3212, for summary judgment granting TDX/Gilbane's cross motion for summary judgment seeking to dismiss plaintiffs' claims against them.

In motion sequence number 009, TDX/Gilbane moves, pursuant to CPLR 3212, for summary judgment granting (1) a TDX/Gilbane cross motion for contribution, common-law indemnification and contractual indemnification against HRAD; and (2) a TDX/Gilbane cross motion for contribution and common-law indemnification against second third-party and third

third-party defendant Cyan Contracting Corp..

BACKGROUND

On the date of the accident, nonparty The Dormitory Authority of the State of New York (the Dormitory Authority) owned the premises where the accident took place. Pursuant to a contract, the Dormitory Authority hired nonparty Ahern General Construction (Ahern) to serve as the general contractor for a project, which entailed the construction of a new medical examiner's building at the premises. Pursuant to a contract, the Dormitory Authority hired TDX/Gilbane to serve as construction manager for the project. TDX and Gilbane are separate entities that formed a joint venture for the purpose of serving as construction manager on the project. The Dormitory Authority hired plaintiff's employer, Five Star, to perform the electrical work for the project. In addition, TDX/Gilbane hired Hrad to provide, among other things, laborers to clean up debris stockpiled in designated areas at the premises.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was working as a journeyman electrician for Five Star, installing outlets on the seventh and eighth floors of the premises. Plaintiff's work was solely supervised by a Five Star general foreman and subforeman. Five Star also provided the materials and safety equipment that were necessary for plaintiff to perform his work on the project. Plaintiff testified that TDX/Gilbane, who he believed to be the general contractor on the project, told his supervisor "what they wanted done" (Five Star's notice of motion, exhibit J, plaintiff's tr at 24). However, plaintiff never communicated with anyone from TDX/Gilbane directly, and no one from TDX/Gilbane ever instructed plaintiff as to how to perform his electrical work.

Plaintiff testified that his accident occurred as he was descending the center staircase of the premises on his way to the Five Star shanty for lunch. Plaintiff explained that, as he reached the stairway leading down from the fifth to the fourth floor of the building (the stairway), and as he was stepping down from the landing onto the first step, his left foot “tripped on the debris that was on the landing and stairs” (*id.* at 40). Plaintiff was able to prevent himself from “going down completely” by holding on to the stairway’s railing (*id.* at 79).

Specifically, plaintiff testified that he tripped on a “threaded rod” that was three-eighths of an inch in diameter and approximately four-to-six inch long (the rod), which he knew was used by steamfitters “in connection with the work they were doing on the stairway” (*id.* at 40-41). Plaintiff maintained that the rod was not one used by Five Star workers. Plaintiff also testified that he observed steamfitters installing pipe in the stairwells between the third and sixth floors of the premises on the day of the accident.

Plaintiff also testified that, in addition to rods, other debris, such as sheetrock and metal studding, were normally present in the stairway, and that he complained to his foremen about said debris, though he never made any complaints to anyone from TDX/Gilbane or Hrad. Plaintiff explained that “[m]ost of the trades did drop their debris right there [where they were working]” (*id.*). He also noted that it was the responsibility of the various trades to clean up their debris and “put it into a safe location until it could be picked up” by laborers hired by TDX/Gilbane (*id.* at 44). It should be noted that plaintiff was not familiar with the entity, Hrad, and could not testify as to Hrad’s role in clean-up at the site.

Deposition Testimony of James Jones (TDX’s Project Manager)

James Jones testified that, on the date of the accident, he was employed as a project

manager by TDX. Jones testified that the Dormitory Authority hired TDX/Gilbane to serve as a construction manager on the project. The Dormitory Authority hired a company called “Ahern” to serve as general contractor in regard to the work involving architectural finishes, partitions, ceilings and floors (Five Star’s notice of motion, exhibit K, Jones tr at 13). However, Ahern did not supervise the work on the project, nor did it advise as to how any of the work on the project was to be performed.

TDX/Gilbane’s role on the project entailed “coordinating communications between the owner, the prime contractors, the architect, engineers, tracking of submittals, packaging, change orders,” as well as hiring various subcontractors and performing daily walkthroughs (*id.* at 14). Jones testified that TDX/Gilbane hired Total Safety to perform site safety management services at the premises, noting that TDX/Gilbane did not hold any safety meetings in regard to the project. TDX/Gilbane, as well as all the prime contractors at the site, had the authority to stop work in the event that they observed an unsafe practice. Jones asserted that TDX/Gilbane did not control “the manner and method in which the work was being performed at the site” (*id.* at 49).

Jones also testified that “each individual prime contractor was responsible for placing their debris in a given location” (*id.* at 36). In fact, Jones stated that it “[w]as a contract requirement that the contractors clean up after themselves . . . and stockpile [the debris]” (*id.* at 79). TDX/Gilbane inspected the work of the contractors “[f]or compliance with the contract documents” (*id.* at 50). Jones further noted that TDX/Gilbane was responsible “for following the work of the contractors to make certain that they were cleaning up after themselves pursuant to contract” (*id.* at 80).

Jones also explained that TDX/Gilbane hired Hrad to provide laborers responsible for

picking up debris, which had been stockpiled by the trades at predetermined centralized locations (the designated locations). Hrad then carted the debris from the designated locations in dumpsters on an as-needed basis, and when notified by the prime contractors and subcontractors. The prime contractors and TDX/Gilbane decided on the whereabouts of the designated locations, so as “to minimize the impact to the project” (*id.* at 66). Of relevance, Jones asserted that the stairwells were never a designated location for pick up. In addition, at the time of the accident, no entity, including Hrad, had been assigned the task of cleaning up debris not located in the designated locations. TDX/Gilbane never received any complaints regarding Hrad’s work on the project.

In July of 2006, steamfitters were installing risers within the stairways of the premises. Jones described the risers as “[s]tand-up pipes [which] went between the stairs” (*id.* at 42). When specifically asked if anyone was assigned to clean up debris within the stairways in 2006, Jones replied, “[a]nyone performing the work in that staircase was responsible for removing that debris and placing it in a stockpile location” (*id.* at 43). When asked if Hrad had any responsibility for removing debris in the stairways, Jones replied, “Only if the material was being utilized for temporary protection,” which means materials such as “[h]andrills that are not affixed permanently” (*id.* at 44).

Deposition Testimony of Wayne Adderley (President of Hrad)

Wayne Adderley, president of Hrad, testified that TDX/Gilbane hired Hrad, pursuant to a contract, to provide mechanical, electrical and plumbing consulting services for the project. In addition, Hrad was hired to provide laborers “to remove debris from the central location on the floor to the outside-site area to be picked up by trucking” (Five Star’s notice of motion, exhibit

M, Adderley tr at 17). Specifically, the duties of the Hrad laborers included “[r]emoving debris from the central location from the floors, placing it in the dumpster and [then] transporting the dumpster to a site outside the building to be picked up and carted away” (*id.* at 45). Adderley testified that the TDX/Gilbane general foreman directed the Hrad laborers as to when and where to perform their work.

Adderley further explained that the various trades were responsible for bringing the debris to the central location. TDX/Gilbane’s general foreman decided where the central locations for Hrad’s debris pick-up would be located, and he then advised the trades of said locations. Adderley testified that Hrad was not supposed to pick up debris in the stairwells of the building. In fact, with only one exception, which he believed was indicated in one of the TDX/Gilbane daily reports, Adderley did not recall Hrad ever removing any debris from the upper stairways. Moreover, Hrad workers were instructed that, if they were ever advised of a pile of debris that was not in one of the designated locations for pick up, they were not to sweep it up unless first directed to do so.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of*

New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiffs' Motion For Summary Judgment In Their Favor As To Liability On Those Parts Of The Labor Law § 241 (6) Claim Predicated On Alleged Violations Of Industrial Code Section 23-1.7 (e) (1) and/or (2) Against TDX/Gilbane (motion sequence number 006)

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

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 505).

Initially, it should be noted that it must be determined whether TDX/Gilbane, serving as construction manager on the project, may be vicariously liable for plaintiff's injuries under Labor

Law § 241 (6), as a statutory agent of the owner. While “a construction manager of a work site is generally not responsible for injuries under Labor Law § § 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury,” (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). “When the work giving rise to [the duty to conform to the requirements of Labor Law § 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory “agent” of the owner or general contractor” (*Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

A review of the submissions in this case indicates that TDX/Gilbane had sufficient authority to supervise and control the injury-producing work at issue, i.e., the removal of the rod in the stairwell, so as to be held vicariously liable for plaintiff’s injuries as a statutory agent of the owner under Labor Law § 241 (6) (*see Walls v Turner Constr. Co.*, 4 NY3d at 864 [Court noted that defendant Turner was not a typical construction manager, because it had “broad responsibility” as a “coordinator and overall supervisor for all the work being performed on the job site,” including the plaintiff’s work]).

Clause 19 of the construction management agreement between the Dormitory Authority and TDX/Gilbane provides that TDX/Gilbane shall “at all times during the progress of the Work keep the building and the site free from accumulation of debris resulting from the Work” (Five Star’s notice of motion, exhibit Q, the Dormitory Authority/TDX/Gilbane agreement). In addition, Jones TDX’s project manager, testified that, pursuant to contract, “each individual

prime contractor was responsible for placing their debris in a given location” (*id.* at 36).

Importantly, Jones also testified that TDX/Gilbane was responsible “for following the work of the contractors to make certain that they were cleaning up after themselves pursuant to contract” (*id.* at 80). Thus, as TDX/Gilbane had the ability to control the activity which brought about the injury, it can be held liable for plaintiff’s injuries under Labor Law § 241 (6) as an agent of the owner.

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) states:

“Tripping and other hazards

- (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
- (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.”

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (e) (1), which states that “[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping,” and Industrial Code 12 NYCRR 23-1.7 (e) (2), which requires that floors in work areas be “kept free from the accumulation of dirt and debris, and from scattered tools and materials and from sharp projections,” are not necessarily applicable to the facts of this case, because the pipe that plaintiff tripped on may have been an integral part of the work being performed in the stairwell at the time of the accident (*O’Sullivan v IDI Constr. Co., Inc.*, 7 NY3d

805, 806 [2006] [Court held that the plaintiff's Labor Law § 241 (6) cause of action predicated on alleged violations of Industrial Code sections 23-1.7 (e) (1) and (2) failed where the electrical pipe or conduit that he tripped over was an integral part of the construction]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007]; *Dubin v S. DiFazio & Sons Constr., Inc.*, 34 AD3d 626, 627 [2d Dept 2006]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed]; *Bond v York Hunter Constr.*, 270 AD2d 112, 113 [1st Dept 2000], *aff'd* 95 NY2d 883 [2000] ["the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"]).

Here, plaintiff testified that he tripped on a three-eighths of an inch in diameter and approximately four-to-six inch long "threaded rod" that he knew to have been used by the steamfitters "in connection with the work they were doing on the stairway" (Five Star's notice of motion, exhibit J, plaintiff's tr at 40-41). Importantly, plaintiff also testified that he observed steamfitters performing their installation work between the third and sixth floors of the premises on the day of the accident.

In a similar case, *Burkoski v Structure Tone, Inc.* (40 AD3d 378, 383 [1st Dept 2007]), the plaintiff was injured when his left leg came in contact with a stack of uninstalled floor tiles which were spread along the floor. In holding that section 23-1.7 (e) (2) was inapplicable to the facts of that case, the Court stated that

"[s]ince the flooring contractor obviously had to bring substantial quantities of tile into the room before installing them, the subject pile was 'consistent with' the work being done in the room and therefore was not 'scattered' within the meaning

of [Industrial Code] § 23-1.7 (e) (2).”

Thus, plaintiffs have not made a prima facie showing and as section 23-1.7 (e) (1) and (2) may not apply to the facts of this case, plaintiffs are not entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of this rule against TDX/Gilbane.

Plaintiffs’ Motion For Summary Judgment In Their Favor As To Liability On The Common-Law Negligence and Labor Law § 200 Claims Against TDX/Gilbane (motion sequence number 006)

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work’ [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

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

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

“Where an existing defect or dangerous condition caused the injury, liability [under Labor

Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over plaintiff’s work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor’s means and methods, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff’s injury was caused by lifting a beam and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed (*Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant’s “employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures,” they “did not otherwise exercise supervisory control over the work”]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor’s work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Initially, as plaintiff was injured when he tripped over a pipe while in a stairwell, the factual scenario in the instant case clearly shows that the accident occurred, not because of any inherently dangerous condition of the property itself, but rather, because of “a defect in the subcontractor’s own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work” (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; *see also Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]).

As explained in *Cappabianca* (99 AD3d at 144-145), a means and methods analysis is applied when an allegedly dangerous condition on the premises directly arises from the manner and means of the work. In *Cappabianca*, the plaintiff’s work at the job site consisted of cutting bricks with a stationary wet saw. The saw and its stand stood on a wooden pallet which sat on a concrete floor (*id.* at 142). When in use, a wet saw sprays water on bricks in order to cool and lubricate them, also reducing dust and flying particles (*id.*). According to the plaintiff’s testimony, when the saw that he was using malfunctioned, it sprayed water onto the floor, making it slippery (*id.* at 142-143). Thereafter, after cutting a brick and turning to place it on an adjacent pallet, the pallet upon which the plaintiff was standing “shifted on the slippery floor as he turned, causing him to lose his footing” and fall (*id.* at 143).

Notably, the *Cappabianca* Court held that “all of the contributing causes of the accident directly arose from the manner and means in which [the plaintiff] was performing his work” (*id.* at 144). Thus, “[s]ince the City defendants and Skanska did not control the work that caused the accident, the section 200 and related negligence claims were properly dismissed” (*id.*). The *Cappabianca* Court reasoned:

“Since defendants could not control the activity that continuously produced the water, namely, the operation of the wet saw, they lacked any ability to correct the unsafe condition and thus were not liable under section 200 or for negligence [citation omitted]”

(*id.* at 146).

Cited by the Court in *Cappabianca*, in *Dalanna v City of New York* (308 AD2d 400, 400 [1st Dept 2003]), the First Department affirmed the dismissal of a Labor Law § 200 claim which was brought by a plumber who was injured when he tripped over a bolt that protruded from a concrete slab. Prior to the day of the accident, a number of bolts had been used to temporarily anchor a tank to the slab before its permanent installation at another location. After the tank was removed, the plaintiff’s employer was supposed to have cut all the bolts level with the surrounding surface. However, the plaintiff’s employer neglected to cut the bolt on which the plaintiff tripped.

The Court in *Dalanna* determined that the protruding bolt was not a defect inherent in the property, but instead, its presence was the result of the manner in which the plaintiff’s employer performed its work. Therefore, even though the owner and construction manager had constructive notice of the bolt, they could only be held liable under Labor Law § 200 if they had exercised supervisory control over the employer’s work (*id.*).

Likewise, in the instant case, the pipe that caused plaintiff to trip was not the result of a defect inherent in the property; rather, it was the result of the manner in which the steamfitters stored their rods as they performed pipe installation work (*see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010] [tripping hazard created by pin, which was stored on a wooden form and was to be inserted into a form to hold it together during a concrete pour, was

created by the manner in which plaintiff's employer performed its work, rather than an unsafe premises condition]). Therefore, in order to find TDX/Gilbane liable under Labor Law § 200, it must be shown that defendants exercised some supervisory control over the way that the steamfitters stored their rods during installation process.

Here, there is no evidence in the record to indicate that TDX/Gilbane supervised the means and methods by which the steamfitters performed their installation work. In addition, the alleged tripping hazard was arguably “part of or inherent in’ the very work being performed” in the stairway at the time of the accident (*Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004], quoting *Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963]; *Meyers v City of New York*, 230 AD2d 691, 693 [1st Dept 1996]).

Thus, plaintiffs are not entitled to summary judgment in their favor as to liability on the common-law negligence and Labor Law § 200 claims against TDX/Gilbane.

Hrad's Motion For Summary Judgment Dismissing The Third-Party Complaint And Five Star's Cross Claims Against It (motion sequence number 005)

The Third-Party Claims And Five Star's Cross Claims For Contribution and Common-Law Indemnification Against Hrad

Third-party defendant Hrad moves for summary judgment dismissing TDX/Gilbane's third-party claims, as well as Five Star's cross claims, for contribution and common-law indemnification against it. “Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]).

“To establish a claim for common-law indemnification, ‘the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident’” (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). “It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault” (*Chapel v Mitchell*, 84 NY2d 345, 347 (1994).

Here, the record fails to show that HRAD was guilty of any negligence that contributed to the cause of plaintiff’s accident. Plaintiff, Jones (TDX’s project manager) and Adderly (president of Hrad) all testified that it was the responsibility of the various contractors to clean up their own debris and place it in the designated locations to be cleared away. Jones testified that Hrad did not have any responsibility to remove debris that was not stockpiled in the central locations, and that Hrad was not responsible for removing metal debris from the stairways. Adderley also testified that Hrad laborers removed stockpiled debris only from central locations. Moreover, if Hrad’s laborers came upon any debris that was not stockpiled in a designated location for pick up, they were instructed not to sweep it up unless they were first directed to do so. In this case, there has been no evidence put forth to create an issue of fact as to whether Hrad laborers were ever instructed to clear debris from the stairwell, which was not a designated location, on or around the day of the accident. Thus, as no negligence on the part of Hrad could be said to have proximately caused the accident, Hrad is entitled to dismissal of TDX/Gilbane’s third-party claims and Five Star’s cross claims for contribution and common-law indemnification

against it.

The Third-Party Claim For Contractual Indemnification Against Hrad

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant’ [citation omitted]” (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Article 12 of the contract between TDX/Gilbane and Hrad states, in pertinent part, as follows:

“Article 12. Hold Harmless. In addition to any risks specifically assumed by [Hrad] . . . [Hrad] agrees to indemnify and hold harmless [TDX/Gilbane], the Owner, the Owner’s Client, and their respective members . . . against all claims arising out of the negligent acts, alleged negligent acts, or failure to act, by [Hrad], and shall pay any judgment or expense . . . imposed against any of them for personal injury, wrongful death . . . , and to defend and pay the costs and expenses, thereof, any action, proceeding or lawsuit brought against the parties indemnified and held harmless herein”

(Hrad’s Notice of Motion, Exhibit S, TDX/Gilbane/Hrad Contract, Article 12).

As established previously, the rod that plaintiff allegedly tripped on was integral to the work being performed by the steamfitters at the time of the accident. As such, it cannot be said

that plaintiff's accident was caused by any negligence on the part of TDX/Gilbane in not properly removing the rod. However, as also discussed previously, the evidence in this case demonstrates that Hrad was not responsible for removing debris in the stairwells, nor is there any evidence that Hrad removed any debris in the stairwells on the day of the accident. As such, it cannot be said that plaintiff's accident arose out of Hrad's negligent act, alleged negligent act or failure to act. Thus, Hrad is entitled to dismissal of TDX/Gilbane's third-party claim for contractual indemnity against it.

Five Star's Motion To Dismiss The Third-Party Claim And Hrad's Cross Claims Against It (motion sequence number 007)

In motion sequence number 007, third-party defendant/third third-party plaintiff Five Star moves for summary judgment dismissing TDX/Gilbane's third-party complaint, as well as third-party defendant Hrad's cross claims, against it.

In support of their motion, Five Star argues that the third-party claims and Hrad's cross claims for contribution and common-law indemnification claims against Five Star should be dismissed, because plaintiff's injuries do not rise to the level of "grave injury" within the meaning of the Workers' Compensation Law. Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

"For purposes of this section, the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave

injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, 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."

To that effect, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (*Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001]).

Significantly, none of the parties oppose that part of Five Star's motion which seeks to dismiss the third-party claims and/or cross claims for contribution and common-law indemnification against it. Thus, these claims are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion to dismiss the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n [3d Dept 2003]). Accordingly, Five Star is entitled to dismissal of the third-party and cross claims for contribution and common-law indemnification asserted against it.

In any event, a review of plaintiffs' bills of particulars, as well as plaintiff's deposition testimony, reveals that plaintiff's injury, which was limited to tearing of the left meniscus of his left knee, did not rise to the level of a "grave injury" within the meaning of Workers' Compensation Law § 11. Thus, Five Star is entitled to dismissal of the third-party claims and

Hrad's cross claims for contribution and common-law indemnification asserted against it. It should also be noted that, as Hrad did not have a contract with Five Star, Hrad's cross claim for contractual indemnification against Five Star is also dismissed.

TDX/Gilbane's Summary Judgment Motions (motion sequence numbers 008 and 009)

In motion sequence number 008, TDX/Gilbane moves for an order denying plaintiffs' summary judgment and granting its supposed cross motion for summary judgment dismissing plaintiffs' claims against them. In motion sequence number 009, TDX/Gilbane moves for summary judgment granting a supposed cross motion for contribution, common-law indemnification and contractual indemnification against third-party defendant HRAD, as well as for contribution and common-law indemnification against second third-party defendant/third third-party defendant Cyan. However, as TDX/Gilbane has not, in fact, filed any such cross motions, these summary judgment motions (which are, nevertheless, untimely), are denied.

CONCLUSION AND ORDER

For the foregoing reasons, it hereby

ORDERED that third-party defendant Hrad Construction Corp.'s motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing defendants/third-party plaintiffs TDX Construction Corporation and Gilbane Building Company's third-party complaint and all cross claims against it is granted, and the third-party complaint and all cross claims against this third-party defendant are dismissed with costs and disbursements to Hrad as taxed by the Clerk upon the submission of the appropriate bill of costs; and it is further

ORDERED that the plaintiffs Louis A. Zollo and Phyllis Zollo's motion (motion

sequence number 006), pursuant to CPLR 3212, for summary judgment in their favor as to liability on the common-law negligence and Labor Law § 200 claims, as well as that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and/or (2) against TDX/Gilbane is denied; and it is further

ORDERED that third-party defendant/third third-party plaintiff Five Star Electric Corp.'s (Five Star) motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing TDX/Gilbane's third-party complaint, as well as third-party defendant Hrad's cross claims against it, is granted, and the third-party complaint and Hrad's cross claim are dismissed with costs and disbursements to Five Star as taxed by the Clerk upon the submission of the appropriate bill of costs, and it is further

ORDERED that TDX/Gilbane's motions (motion sequence numbers 008 and 009) are denied; and it is further

ORDERED that within 30 days of entry of this order, third-party defendant Hrad Construction Corp. shall serve a copy upon all parties, with notice of entry.

ORDERED that the remainder of the action shall continue.

DATED: 1/21/15


Doris Ling-Cohan, J.S.C.

FILED

JAN 23 2015

COUNTY CLERK'S OFFICE
NEW YORK