[* 1]

FA SM13 JS

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT **PART** 2

Justice

Index Number : 113804/2011
BORESS, CORY
vs.
200 PARK, L.P.
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 007

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

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

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

Replying Affidavits _____ **No(s).** _____

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAY 04 2015
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
MAY 04 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 4-30-15
APR 30 2015

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

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**

[* 2]

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - IAS PART 2

---x

CORY BORRESS,

Plaintiff,

-against-

200 PARK, L.P., and STRUCTURE TONE, INC.,

Defendants,

---x

200 PARK, L.P., and STRUCTURE TONE, INC.,

Third-Party Plaintiffs,

-against-

DONNELLY MECHANICAL CORP., and A-VAL ARCHITECTURAL METAL, III, LLC,

Third-Party Defendants.

---x

200 PARK, L.P., and STRUCTURE TONE, INC.,

Second Third-Party Plaintiffs,

-against-

SIEMENS BUILDING TECHNOLOGIES, INC.,

Second Third-Party Defendant,

---x

DONNELLY MECHANICAL CORP.,

Fourth-Party Plaintiff,

-against-

SIEMENS INDUSTRY, INC., f/k/a SIEMENS BUILDING TECHNOLOGIES, INC.,

Fourth-Party Defendants,

---x

DECISION AND ORDER

Index No. 113804/11

Motion Seq. Nos. 007, 008, 009, 010

Index No. 590174/12

Index No. 590150/13

Index No. 590289/13

----------x

SIEMENS INDUSTRY, INC.,

Second Fourth-Party Plaintiff, Index No. 590351/13

-against-

GALLANT FOX ELECTRIC CORP.,

Second Fourth-Party Defendant.

----------x

KATHRYN E. FREED, J.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

SEQ. 007

PAPERS	NUMBERED
A-VAL's NOT. OF MOT. AND AFFIDAVITS ANNEXED	1,2 (Exs. A-H)
A-VAL's MEMORANDUM OF LAW IN SUPPORT	3
PLAINTIFF'S AFF. IN OPP.	4(Exs. A-K)
200 PARK AND STRUCTURE TONE'S AFF. IN PARTIAL OPP.	5
REPLY AFFIRMATION	6
REPLY MEMORANDUM OF LAW	7

SEQ. 008

DONNELLY'S NOT. OF MOT. AND AFFS. ANNEXED	1,2 (Exs. A-M)
DONNELL'S MEMO. OF LAW IN SUPPORT	3
SIEMENS' AFF. IN PARTIAL OPP.	4 (Exs. A-D)
200 PARK AND STRUCTURE TONE'S AFF. IN OPP.	5 (Exs. A-B)
REPLY AFF.	6
SIEMENS' NOT. OF CROSS MOT. AND AFF. IN SUPP.	7, 8 (Exs. A-AN)
200 PARK AND STRUCTURE TONE'S AFF. IN OPP. TO CROSS MOT.	9
DONNELLY'S AFF. IN OPP. TO SIEMENS' CROSS MOT.	10
REPLY AFFIRMATIONS	11-13

SEQ. 009

SIEMENS' NOTICE OF MOTION AND AFF. IN SUPPORT	1, 2 (Exs. A-AL)
200 PARK AND STRUCTURE TONE'S AFF. IN OPP.	3 (Exs. A-E)
REPLY AFFIRMATION	4

SEQ. 010

PLAINTIFF'S NOTICE OF MOTION AND AFF. IN SUPPORT	1, 2 (Exs. A-M)
MEMORANDUM OF LAW IN SUPPORT	3
SIEMENS' AFF. IN OPPOSITION	4 (Exs. A-AE)
A-VAL'S AFF. IN OPP.	5 (Exs. A-B)
A-VAL's MEMORANDUM OF LAW IN OPP.	6
200 PARK AND STRUCTURE TONE'S AFF. IN OPP.	7
REPLY AFFIRMATION	8

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

Sequences 007-010 are consolidated for disposition.

This case arises from an incident on February 11, 2011 in which plaintiff, Cory Borress, an employee of fourth party defendant Gallant Fox Electric Corp., was allegedly injured when four panes of heavy glass fell over on his leg. As a result of the incident, plaintiff alleges violations of sections 200, 241(6) and 240(1) of the New York State Labor Law as well as common law negligence. The incident occurred during the renovation of several floors of a building owned by defendant/third-party plaintiff 200 Park, L.P. at 200 Park Avenue in Manhattan. Defendant/third-party plaintiff Structure Tone, Inc. was the construction manager at the site. A-Val Architectural Metal III, LLC ("A-Val") was the glazier on the project.

A-Val moves for summary judgment under motion sequence number 007 seeking dismissal of plaintiff's causes of action pursuant to Labor Law sections 200, 240(1) and 241(6). Donnelly Mechanical Corp. ("Donelly"), Structure Tone's heating, ventilation and air conditioning ("HVAC") subcontractor, moves, under motion sequence number 008, for summary judgment dismissing plaintiff's Labor Law claims and also seeks dismissal of the third party complaint against it by 200

Park and Structure Tone. Additionally, Donnelly seeks summary judgment on its fourth party complaint against its electrical subcontractor, second third party defendant Siemens Building Technologies, Inc. ("Siemens"). Siemens cross-moves under sequence 008 for summary judgment against Donnelly. Siemens moves under sequence 009 for summary judgment dismissing the second third party complaint against it by Structure Tone. Finally, plaintiff moves under motion sequence number 010 for summary judgment on his complaint. After oral argument, and a review of the parties' papers and the relevant case law, this Court decides the motions as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Sequence 007

On December 8, 2011, plaintiff commenced this action against 200 Park and Structure Tone (hereinafter collectively "Structure Tone"). Ex. B.[1] In his complaint and bill of particulars, plaintiff alleged negligence and violations of Labor Law sections 200, 240(1) and 241(6). Exs. A, B. In his bill of particulars, plaintiff claimed that he was injured when a "stacked glass partition fell and struck him." Ex. A. Plaintiff further claimed that defendants failed to provide him with proper protection from the falling glass partition on the 21st floor of 200 Park Avenue. Ex. A. Additionally, plaintiff alleged violations of Industrial Code sections 23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-1.31, and 23-1.32. Ex. A. On April 9, 2014, plaintiff supplemented his bill of particulars to assert a violation of section 23-2.1 of the Industrial Code. Ex. K to Plaintiff's Aff. In Opp. To A-Val's Motion.

Thereafter, Structure Tone impleaded Donnelly and A-Val for common law and contractual

[1]Unless otherwise noted, all references are to the exhibits annexed to A-Val's motion for summary judgment under sequence 007.

indemnification, breach of contract for failure to procure insurance, and attorneys' fees. Ex. C. Donnelly joined issue on or about May 8, 2012. Ex. D. A-Val joined issue on or about July 11, 2012. Ex. E. At his deposition, plaintiff testified that he was a licensed electrician and that he was employed as a foreman by Gallant Fox Electric Corp. ("Gallant Fox") on the date of the incident. Ex. H, at 10, 20-22. The incident occurred in a room with two side walls and a third wall containing a window. Ex. H, at 38. The area where the fourth wall was to be was an open space. Ex. H, at 39. At the time of the incident he was with his co-worker Osei Weekes. Ex. H, at 39. His job was to connect air conditioning units installed by Donnelly to control panels and/or thermostats. Ex. H, at 41-42. Gallant Fox installed the thermostats, which were approximately 5 feet from the ground. Ex. H, at 41.

When plaintiff entered the room where the glass was stored, it was hidden by corrugated cardboard to his right side. Ex. H. at 45-46. He "guessed" that the glass was leaning against the wall. Ex. H, at 45-47. He was not certain of the angle at which the glass was leaning. Ex. H at 144. The four glass panes were about 8-10 feet long and about 4 feet wide. Ex. H at 46-47.

When asked how the alleged incident occurred, plaintiff, who is 5'7", simply stated "[t]he glass fell on me." Ex. H at 49, 133. The corrugated cardboard and whatever was behind it (which he learned were panes of glass) fell towards him but he did not know why. Ex. H at 50, 53, 144. Nor did anyone ever tell him why the glass fell. Ex. H at 145. The glass knocked him to the ground and covered his body from the waist down. Ex. H at 52. Prior to his accident, neither he nor Weekes touched the glass. Ex. H, at 48, 138, 145. There was no vibration or shaking in the building which could have moved the glass. Ex. H at 49, 144.

Structure Tone was the general contractor on the project. Ex. H at 54. 200 Park was the

owner of the building. Exs. A, B. Siemens Building Technologies, Inc. ("Siemens") hired Gallant Fox to work at the building. Ex. H at 119. Nobody from Siemens was at the premises when the accident occurred although Gallant Fox reported to Siemens each day. Ex. H at 119.

Weekes, an employee of Gallant Fox, testified at his deposition that he did not know what caused the glass to fall on plaintiff. Ex. C to Plaintiff's Aff. In Opp. To A-Val's Mot., at 8-9, 22, 31. Before the glass fell, it was leaning against the wall and he did not feel any vibration. Id., at 30, 53.

Krzysztof Branas appeared for deposition on behalf of A-Val, which he said specialized in glass and ornamental metal fabrication and installation. Ex. F at 6-7. A-Val was hired by Structure Tone to install glass on the 19-22 floors. Ex. F at 12, 101. The largest panes of glass installed were 9 feet long by 4 1 ½ feet. Ex. F at 31. He was not certain how much they weighed but they required several men to carry them. Ex. F, at 42. After the panes were taken to the 21st floor by dolly, they were removed, and multiple panes were leaned against a wall. Ex. F at 31. The glass was placed in a room with two walls, a third side with an exterior window, and the fourth side was where a glass partition was to be placed. Ex. F at 113. Two or three blocks were placed under the glass so that it would not rest on the concrete floor. Ex. F at 32, 77. The glass was also leaned against cardboard so it would not damage the wall. Ex. F, at 78. Glass was typically stored in rooms on floors where it was to be installed. Ex F at 34. If the glass needed to be moved, A-Val's glazier would need to do so. Ex. F at 35.

No devices were provided or installed by A-Val to secure the glass panes leaned against the wall. Ex. F at 79. After the alleged incident, Structure Tone instructed A-Val to secure the glass by screwing a two by four to a stud in the wall. Ex. F at 85. However, Structure Tone later withdrew

this instruction, agreeing with Branas that it was unnecessary to take this measure since there was "no way [the] glass [could] fall over by itself." Ex. F, at 87.

In an affidavit submitted in support of A-Val's motion, Branas stated that it was A-Val's custom and practice to store the panes of glass by leaning them up against a wall, placing them on top of a sheetrock to avoid having the glass touch the floor. Ex. G. He further stated that it was not necessary to secure the glass since its weight as it leaned against the wall made it "impossible" for it to fall over (away from the wall) without human intervention. Ex. G.

Patrick Higgins, Structure Tone's project manager, testified at his deposition that his company was the general contractor for the renovation of the 18-22 floors of 200 Park Avenue. Ex. D to Plaintiff's Aff. To A-Val's Mot., at 8-10. Structure Tone hired Donnelly as its HVAC subcontractor. Id., at 13. Donnelly hired Siemens as its base building control vendor. Id., at 14. As of the date of the accident, Gallant Fox was installing wiring from air conditioning units to thermostats. Id., at 14-15. According to Higgins, A-Val was hired by Structure Tone and installed glass on the project. Id., at 17-18.

Sequences 008 and 009

On August 5, 2002, Donnelly entered into a contract ("the 2002 contract") with Siemens to perform HVAC work. Paragraph 6 of the contract provided that:

> To the fullest extent permitted by law, [Siemens] shall indemnify and hold harmless [Donnelly] and Owner against any claims, damages, losses, and expenses, including legal fees, arising out of or resulting from performance of subcontracted work to the extent carried in whole or in part by [Siemens] or anyone directly or indirectly employed by [Siemens]."

Ex. L to Donnelly's Motion.

Exhibit "A" to the 2002 contract, entitled "Indemnification and Contribution Agreement", provided, inter alia, that:

> To the fullest extent permitted by law . . . [Siemens] shall indemnify, hold harmless and defend [Donnelly] * * * against any and all losses, claims, actions, demands, damages, liabilities, or expenses, including but not limited to attorneys' fees and all other costs of defense, by reason of the liability imposed by law or otherwise upon [Donnelly] because of bodily injuries * * * arising directly or indirectly from the performance of [Siemens'] work or from any of the acts or omissions on the part of [Siemens] [or its employees or subcontractors].

Ex. L to Donnelly's Motion.

Addendum "A" to the 2002 contract, entitled "Insurance Requirements", required Siemens to procure commercial general liability insurance with limits of $1 million per occurrence and $2 million in the aggregate. Ex. L to Donnelly's Motion. Paragraph 5(a) of the 2002 contract required Siemens to name Donnelly as an additional insured on its commercial general liability insurance policy. Ex. L to Donnelly's Motion.

In or about 2010, Structure Tone hired Donnelly to work at the site pursuant to a purchase order. Ex. I to Donnelly's Motion.

On or about November 6, 2009, Donnelly executed a "Blanket Insurance/Indemnity Agreement" requiring, inter alia, that:

> To the fullest extent permitted by law, and except to the extent of [Structure Tone's] and owner's negligence, [Donnelly] agrees to hold [Structure Tone] and owner [and its agents and employees] harmless against any claims, suits, liens, judgments, damages, losses, liability, expenses or costs including but not limited to, all reasonable legal fees, defense costs, court costs, and the cots of all appellate proceedings incurred because of the injury to or death of any person * * * or any other claim arising out of or in connection with or as a consequence of the performance of the work under this agreement . . . the acts, omissions, or breaches of this agreement, or default as to this agreement by [Donnelly] or any of [Donnelly's] subcontractors] . . . [Donnelly] will defend and bear all costs of

> defending any actions or proceedings brought against [Structure Tone] or owner . . . arising in whole or in part out of any such acts, omissions, breaches or defaults. This indemnification agreement contemplates that [Structure Tone] and owner are entitled to full indemnification from [Donnelly] to the fullest extent permitted by law. To the extent that [Structure Tone and owner] are not entitled to full indemnification, [then they] are entitled to partial contractual indemnification for any percentage of fault or negligence not attributable to [them].

Ex. I to Donnelly's Motion.

Donnelly obtained a commercial general liability insurance policy from Liberty Mutual Insurance Company effective April 1, 2010 - April 1 2011. Ex. K to Donnelly's Motion. Although the policy contained additional insured endorsements for "owners, lessees or contractors" as "[p]er schedule on file with [Liberty Mutual]" (Id.), the said schedule was not annexed to the exhibit.

On or about February 1, 2013, Structure Tone commenced a second third party action against Siemens. Ex. D to Donnelly's Motion. Siemens answered the second third party complaint on or about April 15, 2013. Ex O to Siemens' Cross-Motion.

On or about April 1, 2013, Donnelly commenced a fourth party action against Siemens. Ex. E to Donnelly's Motion. Siemens answered the fourth party complaint and counterclaimed against Donnelly for contribution and common law indemnification. Ex. F to Donnelly's Motion.[2]

Bradley Rickert, an account executive for Siemens, appeared for deposition on behalf of that company. Ex. A to Siemens' Aff. In Opp. To Donnelly's Motion. In this capacity, he sold temperature control panels and thermostats to Donnelly for the renovation project at which plaintiff was allegedly injured. Id at 11. The sale was made pursuant to a 2010 purchase order issued by Donnelly. Id. at 11-13. The purchase order was issued in response to a proposal by Siemens. Id. at

---

[2]Although Siemens commenced a second fourth party action against Gallant Fox, that party did not answer and is in default.

27. Once the purchase order was issued, Rickert had to add to it Siemens' proposal number. Id. at 13. Paragraph 2.6 of Siemens' proposal dated October 13, 2010 provided that:

> SIEMENS shall be responsible for any portion of the Work performed by any subcontractor of SIEMENS. SIEMENS shall not have any responsibility, duty or authority to direct, supervise or oversee any contractors of [Donnelly] of their work or to provide the means, methods or sequence of their work or to stop their work. SIEMENS' work and/or presence at a site shall not relieve others of their responsibility to [Donnelly] or others. SIEMENS shall not be liable for the failure of [Donnelly's] contractors or others to fulfill their responsibilities, and [Donnelly] agrees to indemnify, hold harmless and defend SIEMENS against any and all claims arising our of such failures.

Exhibit AL to Siemens' Cross Motion. The proposal also provided that it was to be governed by Illinois law. Id. at par. 1.2.

According to Rickert, if Siemens did a lot of business with a particular company, it would occasionally enter into a "master agreement" which governed the terms and conditions of its business relationship with that entity. Id. at 27. If a master agreement had been referenced in Siemens' proposal to Donnelly, it would have been noted on page one of the document and that was not done here. Id. at 27. Nor did the purchase order reference a master agreement. Id. at 28.

Rickert further stated that Siemens hired Gallant Fox as an electrical subcontractor and oversaw the work it performed. Id. at 18. He also added that Siemens had no contract with Structure Tone. Id. At 10.

Dave Losak, Donnelly's director of construction, appeared for deposition on behalf of that entity. Ex. G to Donnelly's Motion at 8. Losak testified that Donnelly, which installed and serviced HVAC systems, was hired by Structure Tone, construction manager on the project, to install such equipment for three floors at the site. Id. at 9, 11-12. He identified the purchase order pursuant to

which Donnelly was hired. Id. at 16. His daily duties included, inter alia, overseeing project managers. Id. at 10.

Donnelly did not perform the HVAC work on the project. Id. at 20. As of the date of the incident, Donnelly was reviewing the progress of the subcontractors it had on site. Id. at 19, 35. One of the subcontractors was Siemens, which installed the control network for the HVAC system, the wiring for the HVAC equipment, and thermostats. Id. at 20, 25. Siemens in turn hired Gallant Fox, an electrical subcontractor, to run control wiring between HVAC devices. Id. at 37-40. Donnelly did not direct the work of its subcontractors. Id. at 35.

Losak stated that, if materials needed to be moved on the site, Structure Tone would be notified and the contractor which owned the materials would move them. Id. at 71.

Although Losak maintained that the 2002 contract between Donnelly and Siemens was a master subcontract, he did not know whether it "was specific to the project itself." Id. at 26. He later conceded, however, that Donnelly's 2010 purchase order was the agreement between Donnelly and Siemens for the project in question. Id. at 74-75. Losak further stated that he did not know whether an addendum to the 2002 contract, dated January 7, 2005, governed Siemens' work on the project in question. Id. at 28.

Sequence 010

The facts of sequence 010 have been set forth in connection with the motion in sequence 007, supra.

THE MOTIONS AND THE PARTIES' CONTENTIONS:

Sequence 007

A-Val argues that it is entitled to summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6). It asserts that the § 240 (1) claim is without merit because plaintiff was not injured by an elevation-related risk. Additionally, it asserts that the § 241(6) claim must be dismissed since plaintiff has failed to plead and prove the violation of a specific and applicable section of the New York State Industrial Code. A-Val further asserts that, since the accident did not result from any act or omission on its part, the Labor Law § 200/common law negligence claim against it must be dismissed.

In opposition to the motion, plaintiff argues that the § 240 (1) claim against A-Val should not be dismissed since plaintiff was injured by a gravity-related hazard. Plaintiff further asserts that A-Val failed to equip the work site with safety devices which would have prevented the glass from falling on him. Plaintiff further asserts that, since A-Val violated section 23-2.1 of the Industrial Code by unsafely storing the glass panes, it violated Labor Law § 241(6).

Structure Tone supports A-Val's argument that the § 200, 240 (1), and 241 (6) claims should be dismissed as against A-Val, and also assert that they should be dismissed as against all other defendants. In partial opposition, they assert that the branch of A-Val's motion seeking dismissal of the cross claims by Structure Tone should be denied since there was a contract between those entities setting forth insurance and indemnification obligations which will be the subject of a future summary judgment motion.

In its reply affirmation, A-Val argues that it is not liable pursuant to Labor Law § 240(1) since plaintiff was not injured due to a height differential. A-Val reiterates its argument that the

§241(6) claim must be dismissed since none of the Industrial Code sections relied on by plaintiff are applicable herein. Finally, since the alleged incident could not have occurred unless plaintiff moved the glass, A-Val asserts that the Labor Law § 200 claim must be dismissed.

Sequence 008

Donnelly argues that it has no liability under Labor Law § 200 since it did not have supervision and control over the work. It further asserts that the plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) have no merit for the same reasons set forth by A-Val. Additionally, Donnelly argues that 200 Park and Structure Tone's third party claims against it for contractual and common law indemnification and breach of contract must be dismissed since plaintiff's accident did not arise from Donnelly's work or from any negligence of Donnelly or its subcontractors. Donnelly further asserts that plaintiff cannot establish that it was negligent since Donnelly owed no duty to plaintiff and was not responsible for the work site. Donnelly further asserts that it is entitled to judgment on its fourth party claim against Siemens since plaintiff was an employee of Siemens' subcontractor, Gallant Fox, and Siemens had contracted with Donnelly to defend and indemnify Donnelly and to purchase insurance for its benefit.

In an affirmation in partial opposition to Donnelly's motion, Siemens argues that it is not obligated to indemnify Donnelly since the latter failed to provide any evidence that the 2002 contract, which Donnelly claims was a master subcontract agreement between those parties, governed the project at which plaintiff was allegedly injured. Siemens maintains that, if the 2002 contract's terms and conditions had been included in Siemens' proposal, a reference indicating the same would have been set forth on the first page of the proposal. Id. at 27. Siemens further asserts

that Losak conceded that he did not know whether the 2002 contract applied to the project.

In an affirmation in partial opposition to Donnelly's motion, Structure Tone argues that it is entitled to indemnification by Donnelly since the alleged injury arose from Donnelly's operations and thus fell within the scope of the provision governing Donnelly's indemnification obligations to that entity. Therefore, urges Structure Tone, that branch of Donnelly's motion seeking dismissal of its contractual indemnification claim must be denied. Additionally, Structure Tone asserts that that branch of Donnelly's motion seeking dismissal of its claim for breach of contract to procure insurance must be denied since Donnelly's insurer, Liberty Mutual, refused to defend or indemnify Structure Tone in this action. See Structure Tone's Aff. In Opp., at Ex. B.

In a reply affirmation in further support, Donnelly asserts that it is entitled to indemnification from Siemens based on the 2002 contract since there is no indication that that agreement was ever "abrogated or discharged by Donnelly." See Donnelly's Reply Aff., at par. 4.

Siemens cross-moves for partial summary judgment dismissing Donnelly's fourth party complaint. It asserts that Donnelly's contractual indemnification claim must be dismissed since there is no contract requiring Siemens to indemnify Donnelly. Specifically, it claims that there is no proof that the indemnification obligations contained in the 2002 contract between the parties (Ex. AJ to Siemens' Cross Motion) or a January 4, 2005 addendum to a purchase order between the parties dated December 17, 2004 (Ex. AK to Siemens' Cross Motion) have any applicability to the project. Siemens also asserts that the October 10, 2013 purchase order issued by Donnelly (Ex. AM to Siemens' Cross-Motion), which Losak acknowledged was the agreement for the work at the site (Ex. D to Siemens Aff. In Opp., at 75), contained no indemnification provision. Further, Siemens asserts that Donnelly's common law indemnification claim must be dismissed since Siemens did not

direct, supervise or control the plaintiff's work or the movement of glass at the site. Finally, Siemens asserts that Donnelly's claim for contribution must be dismissed since Siemens cannot be held negligent herein. In the alternative, Siemens argues that, if this Court grants Donnelly's motion, then Donnelly's fourth party complaint against Siemens should also be dismissed as a matter of law.

In opposition, Structure Tone argues that Siemens' cross motion must be denied because an issue of fact exists regarding which agreement governed Siemens' obligations towards Donnelly arising from its work at the project.

Donnelly opposes Siemens' cross motion on the ground that the 2002 and 2005 agreements between the parties require Siemens to indemnify Donnelly.

In reply, Siemens reiterates that the 2010 purchase order did not incorporate by reference any other agreement containing an indemnification provision.

In reply, Donnelly reiterates its argument that the 2002 agreement between Donnelly and Siemens required Siemens to defend, indemnify, and procure insurance for Donnelly.

Sequence 009

Siemens moves for summary judgment dismissing Structure Tone's second third party complaint against it on the ground that it had no contractual obligation to indemnify or procure insurance for that entity. Additionally, Siemens argues that the claim against it for common law indemnification must be dismissed since it not direct or supervise plaintiff's work and the contribution claim must be dismissed since it was not negligent. It asserts that it neither created the dangerous condition, i.e., the leaning glass, nor had notice of the same.

In opposition to the motion, Structure Tone argues that Siemens' motion must be denied

because Siemens required Gallant Fox to name Donnelly as an additional insured and "Donnelly was to require Siemens to have any of its subcontractors also name [Structure Tone] as [an additional insured]." Structure Tone's Aff. In Opp., at Par. 14.

In reply, Siemens asserts that Structure Tone's contractual claims against it must be dismissed since it failed to identify any document requiring Siemens to defend, indemnify, or procure insurance for Structure Tone. Siemens further asserts that, since it committed no wrongdoing, the contribution and common law indemnification claims asserted against it by Structure Tone must be dismissed.

Sequence 010

Plaintiff moves for summary judgment on his claims pursuant to Labor Law §§ 240(1) and 241(6). He argues that defendants violated Labor Law § 240(1) by failing to secure the glass panels. He claims that he was injured as the result of defendants' failure to provide any safety devices to protect him from the gravity-related hazard of being struck by the glass panels. Additionally, plaintiff asserts that defendants violated Labor Law § 241(6) by failing to comply with Industrial Code § 23-2.1(a), which requires all building materials to be stored safely.

In opposition to plaintiff's motion, Siemens argues that the panels were not located at a height which required them to be secured. Siemens asserts that plaintiff is not entitled to the protections of Labor Law § 240(1) but rather was injured by a routine workplace hazard. Siemens further asserts that plaintiff failed to submit any expert opinion addressing what, if any, type of device could have prevented the alleged incident. Siemens also argues that plaintiff's motion must be denied as to his Labor Law § 241 (6) claim, since the alleged incident did not occur in a

passageway, walkway, stairway or thoroughfare so as to violate Industrial Code § 23-2.1(a).

A-Val opposes plaintiff's motion based on the same arguments it set forth in support of its own motion for summary judgment seeking dismissal of plaintiff's complaint. A-Val emphasizes that plaintiff failed to refute Branas' testimony that it would have been impossible for the glass panes to fall over without human intervention.

Structure Tone argues that plaintiff's accident could not have happened in the manner he described since physics dictates that materials at rest do not move by themselves. They adopt Siemens' arguments in opposition to plaintiff's motion.

In reply, plaintiff argues that he is entitled to summary judgment under Labor Law § 240(1) because the glass panes exposed him to an elevation-related risk. Plaintiff further argues that, because the panes were not stored safely, defendants violated Industrial Code § 23-2.1(a), regardless of the fact that the panes were not located in a walkway, thoroughfare, passageway or stairway.

LEGAL CONCLUSIONS:

"[T]he 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 issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (internal quotation marks and citation omitted). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Kosson v*

Algaze, 84 NY2d 1019 (1995). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

Sequence 007

A-Val's Motion For Summary Judgment

A-Val is entitled to summary judgment granting the dismissal of the plaintiff's claims and all cross claims against it.

Sir Isaac Newton's first law of motion, published in1687, posits that an object either remains at rest or moves at a constant velocity unless acted upon by an external force. *See* Browne, Schaum's Outline of Theory and Problems of Physics for Engineering and Science, McGraw-Hill, July, 1999, at 58. This Court takes judicial notice of this law of motion for the purpose of determining that the alleged accident could not have occurred without any human intervention. As noted above, both plaintiff and Weekes testified that the four extremely heavy panes of glass, which were leaned against a wall, suddenly leaned in the opposite direction and fell on plaintiff. To accept the version of the incident given by plaintiff and Weekes, one would have to "discard common sense and common knowledge" credit testimony "which is incredible and unbelievable, that is . . . contrary to experience (*citations omitted*)" *Sullivan v Pilevsky*, 281 AD2d 410 (2d Dept 2001); *see also Dorazio v Delbene*, 37 AD3d 645 (2d Dept 2007). Indeed, as noted above, plaintiff and Weekes could not even explain why or how the incident occurred. Plaintiff and Weekes also testified that

there were no vibrations at the time of the incident. Ex. H, at 49, 144; Ex. C to Plaintiff's Aff. In Opp. To A-Val's Motion, at 30. In light of the foregoing, plaintiff has failed to raise an issue of fact regarding a violation of Labor Law §§ 200, 240(1) and 241(6).

In any event, however, there is no evidence of common law negligence or a violation of Labor Law § 200. The panes of glass were leaned against a wall and Branas testified that he agreed with Structure Tone that there was no need to secure the panels. Ex. F, at 87. The Court also notes that plaintiff was unable to identify any device which would have secured the glass.

Contrary to plaintiff's adamant opposition to the motion, neither A-Val nor any defendant committed a violation of Labor Law § 240(1). Labor Law § 240(1) was designed to prevent those types of accidents in which a safety device proved inadequate to shield a worker "'*from harm directly flowing from the application of the force of gravity to an object or person.*'" *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009), *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993). The crucial inquiry is thus 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." *Nicometi v The Vineyards of Fredonia*, LLC, ___ NY3d ___ (April 2, 2015) *quoting Runner, supra*, at 603. In determining whether an elevation differential is physically significant, a court must consider, inter alia, "the weight of the object and the amount of force" the object is "capable of generating, even over the course of a relatively short descent." *Runner, supra*, at 605; *see also Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 (2011).

In *Wilinski*, upon which plaintiff relies in opposing A-Val's motion, the Court of Appeals held that a worker may recover under § 240(1) even if the object which struck him was on the same

level, provided that the risk arose from a significant elevation differential. In that case, pipes which struck plaintiff were at the same level where he had been standing, but recovery was not precluded under § 240(1) because the pipes, which were about 10 feet tall, fell onto the plaintiff, who was about 5'8" tall.

This case is clearly distinguishable from *Wilinski*. Plaintiff testified that he was 5'7" tall. Ex. H, at 133. However, the glass panels were only 4-4 ½ feet high and plaintiff saw nothing elevating them off the ground. Ex. F, at 31; Ex. H, at 46-47. Therefore, the panels were clearly not at a significant elevation at any time before the alleged incident.

Plaintiff further relies on *Rodriguez v DRLD Dev. Corp.*, 109 AD3d 409 (1st Dept 2013). However, the facts of that case are distinguishable as well. Plaintiff in that case tripped on a cable, dislodging sheetrock boards approximately eight feet high which had been leaning against a wall. However, the court therein found that, because the boards had been resting atop blocks of wood approximately two feet high, there was a sufficient height differential to implicate § 240(1).

Additionally, plaintiff relies on *Marrero v 2075 Holding Co. LLC* 106 AD3d 408 (1st Dept 2013). In that case, a cart containing sheetrock and two 500-pound steel beams tipped over onto plaintiff and landed on his leg. The court held that "while the record did not specify the height," the beams "fell a short distance" from the top of the cart to plaintiff's leg. Id., at 409. That case is distinguishable, however, since in that case the beams fell on plaintiff from a height. This case is more similar to *Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002 (2d Dept 2012), in which a cart holding sheetrock fell over onto the leg of the plaintiff, who had been standing next to the cart. In *Grygo*, the Appellate Division held that plaintiff's injuries resulted from a "general hazard encountered at a construction site." Id., at 1003; *see also DeRosa v Bovis Lend Lease LMB, Inc.*, 96

AD3d 652 (1st Dept 2012); *Reyes v Magnetic Const., Inc.*, 83 AD3d 512 (1st Dept 2011).

Plaintiff further relies on *Kempisty v 246 Spring Street, LLC*, 92 AD3d 474 (1st Dept 2012) In that case, the Appellate Division held that the IAS court erred in finding § 240(1) inapplicable because there was no appreciable height difference between plaintiff and the object being hoisted, a four-ton steel block, which crushed plaintiff's foot. The Appellate Division held that the elevation differential could not be considered de minimus where the object being hoisted was able to generate an extreme amount of force. However, that case, too, is distinguishable, since the glass panels herein were not being hoisted and there was no elevation differential involved in this case.

Even assuming, arguendo, that plaintiff's accident was caused by an elevation-related risk, plaintiff must still establish a "causal nexus between [his] injury and a lack or failure" of a safety device as contemplated by Labor Law § 240(1). *Wilinksi, supra* at 9. Here, plaintiff has not submitted any evidence explaining how the accident could have been prevented if a certain device(s) had been provided. *See Ortiz v Varsity Holdings,* 18 NY3d 335, 340 (2011). Here, plaintiff's failure to submit an expert affidavit stating which device(s) should have been provided to prevent the alleged incident is a glaring omission from his papers. *See generally Diaz v Vasques*, 17 AD3d 134, 136 (1st Dept 2005).

Nor did plaintiff raise an issue of fact regarding a violation of Labor Law § 241(6). It is well settled that, in order to establish a violation of Labor Law § 241(6), plaintiff must establish a violation of a specific section of the New York State Industrial Code. *See Ross v Curtis-Palmer Hydro-Elec. Co., supra.* Here, although plaintiff alleged violations of several sections of the Industrial Code (Exs. J, K), the only section in contention in the parties' papers is 23-2.1, entitled "Maintenance and housekeeping." Paragraph (a) of the rule, entitled "Storage of material and

equipment", provides at subparagraph (1) that "All building materials shall be stored in a safe an orderly manner [and that m]aterial piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Here, plaintiff's claim pursuant to § 241(6) must be dismissed, since plaintiff's alleged accident occurred in a room, and not in a passageway, walkway, stairway or thoroughfare. *See Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419 (1st Dept 2014). Further, there is no indication that the glass was stored in an unstable or unsafe manner. Id. Branas testified at his deposition there was no device needed to prevent the glass from falling. Ex. F, at 87. As noted previously, neither plaintiff nor Weekes could explain why the glass moved. Additionally, Branas opined that the glass could not have moved unless someone touched it. Ex. G at par. 7.

Structure Tone asserts that its cross claims against A-Val should not be dismissed because A-Val is obligated to indemnify and procure insurance for it. Although Structure Tone represents that this will be the subject of a future motion for summary judgment, it inexplicably fails to oppose A-Val's motion with any documentary evidence and thus A-Val's motion is granted.

Sequence 008

Donnelly's Motion for Summary Judgment

Donnelly correctly asserts that it is entitled to summary judgment dismissing all claims against it by plaintiff, based on Labor Law §§ 200, 240(1), and 241(6) on the same grounds as such claims were dismissed against A-Val.

Donnelly is also entitled to the dismissal of the claim against it by Structure Tone for common law indemnification. "To be entitled to common-law indemnification, a party must show

1) that it has been held vicariously liable without proof of negligence or actual supervision on its part; and 2) that the proposed indemnitor was either negligent or exercised supervision or control over the injury-producing work (*citations omitted*)" *Naughton v City of New York*, 94 AD3d 1, 6 (1st Dept 2012). Here, since Donnelly was neither negligent nor was there evidence that it supervised plaintiff's work, it is entitled to dismissal of this claim.

Donnelly is not entitled to dismissal of the breach of contract and contractual indemnification claims against it by Structure Tone. As noted above, the "Blanket Insurance/Indemnity Agreement" which Donnelly entered into with Structure Tone imposed on it broad indemnity obligations. Ex. I to Donnelly's Motion. These included providing insurance for Structure Tone, as well as reimbursing it for defense costs. Id., at par. 3.2(h). The agreement required Donnelly to indemnify Structure Tone, to "the fullest extent permitted by law", for any damages, including legal fees and defense costs, arising from Donnelly's work or the work of its subcontractors or sub-subcontractors, such as Gallant Fox. Id., at par. 6. Here, since plaintiff was clearly injured during the course of his work for Gallant Fox, Structure Tone may pursue a claim against Donnelly for contractual indemnification. Additionally, to the extent Donnelly failed to procure insurance for the benefit of Structure Tone, as indicated by the letter sent by Liberty Mutual, Donnelly's insurer, to Structure Tone on May 31, 2012 (Ex. B to Structure Tone's Aff. In Opp.), Structure Tone may pursue a claim against Donnelly for breach of contract for failure to procure insurance.

Donnelly is not entitled to summary judgment on its fourth party complaint against Siemens. The fourth party complaint alleges contractual and common law indemnification, contribution, and breach of contract to procure insurance. Ex. E to Donnelly's Motion. In support of this branch of its motion, Donnelly relies on the 2002 contract, which it maintains was a master subcontract. In

opposition to the motion, Siemens correctly maintains that Donnelly failed to provide any evidence that the 2002 contract governed the project. Although Losak said that it was his understanding that the master contract was the "general agreement between [Donnelly] and Siemens for any project" (Ex. D to Siemens' Aff. To Donnelly's Motion at 74), this was simply his opinion and was unsubstantiated by any documentation. Losak also said that Donnelly's 2010 purchase order was the agreement between Donnelly and Siemens for the project in question. Id. at 75. Rickert agreed that the 2010 purchase order was the agreement which governed Siemens work at the project. Ex. A to Siemens' Aff. In Opp. To Donnelly's Mot., at 11-13. According to Rickert, if a master agreement had been referenced in Siemens' proposal to Donnelly, it would have been noted on page one of the document and it was not. Id. at 27. Nor did the purchase order reference a master agreement. Id. at 28. Thus, as Siemens asserts, there is no indication that the 2002 contract governed its work on the project and thus there is no proof that Siemens had the duty to indemnify Donnelly or procure insurance for its benefit in connection with such work. *See Vail v 1333 Brodway Assocs., LLC*, 105 AD3d 636 (1st Dept 2013).

Siemens' Cross Motion for Summary Judgment

Siemens' cross motion seeking dismissal of Donnelly's fourth party complaint is granted. As noted above, there is no proof of any written contract which required Siemens to insure or indemnify Donnelly. Additionally, since there is no proof of any wrongdoing which caused or contributed to plaintiff's accident, Donnelly is not entitled to contribution or common law indemnification from Siemens.

Sequence 009

Siemens' Motion for Summary Judgment

Siemens is entitled to summary judgment dismissing Structure Tone's second third party complaint. The second third party complaint sets forth claims for contractual defense and indemnification, common law indemnification, reimbursement of attorneys' fees, and breach of contract to procure insurance. Structure Tone does not submit any documents establishing, or even suggesting, that Siemens is required to provide it with insurance coverage, contractual indemnification, or indemnification of attorneys' fees. Nor is Structure Tone entitled to common law indemnification against Siemens since there is no proof that it caused or contributed to the alleged injuries.

Structure Tone argues that Siemens' motion must be denied because Siemens required Gallant Fox to name Donnelly as an additional insured and "Donnelly was to require Siemens to have any of its subcontractors also name [200 Park and Structure Tone] as [additional insureds]." Structure Tone's Aff. In Opp., at Par. 14. This Court does note, in fact, that the Blanket Insurance/Indemnity Agreement between Donnelly and Structure Tone was to "apply to all sub-subcontractors employed by [Donnelly]." Ex. A to Structure Tone's Aff. In Opp. However, as stated above, there is nothing indicating that Donnelly fulfilled this obligation by ensuring that Siemens obtained such protection for Structure Tone. Indeed, at oral argument, Structure Tone's attorney acknowledged that there was no contract between Structure Tone and Siemens.

Sequence 010

Plaintiff's Motion for Summary Judgment

Plaintiff motion for summary judgment on his claims pursuant to Labor Law §§ 240(1) and 241(6) is denied on the same grounds as the motions by A-Val and Donnelly seeking dismissal of those claims were granted.

In light of the foregoing, it is hereby:

ORDERED that A-Val's motion (Seq. 007) for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further,

ORDERED that the branch of Donnelly's motion (Seq. 008) for summary judgment seeking dismissal of plaintiff's claims pursuant to Labor Law §§ 200, 240(1), and 241(6) is granted; and it is further,

ORDERED that the branch of Donnelly's motion (Seq. 008) seeking summary judgment dismissing the claim against it by 200 Park and Structure Tone for common law indemnification is granted; and it is further,

ORDERED that the branch of Donnelly's motion (Seq. 008) seeking summary judgment dismissing the claims against it by 200 Park and Structure Tone for breach of contract and contractual indemnification is denied; and it is further,

ORDERED that the branch of Donnelly's motion (Seq. 008) seeking summary judgment on its fourth party complaint against Siemens is denied; and it is further,

ORDERED that Siemens' cross-motion for summary judgment (Seq. 008) seeking dismissal

of Donnelly's fourth party complaint is granted; and it is further,

ORDERED that Siemens' motion for summary judgment dismissing the second third party complaint by 200 Park and Structure Tone (Seq. 009) is granted; and it is further,

ORDERED that plaintiff's motion for summary judgment on its claims pursuant to Labor Law §§ 240(1) and 241(6) (Seq. 010) is denied; and it is further,

ORDERED that plaintiff's claims against A-Val and Donnelly are hereby severed and dismissed against said defendants, and the Clerk is directed to enter judgment in favor of said defendants on plaintiff's claims; and it is further;

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the caption of this action be amended to reflect the dismissal of A-Val and that all future papers in this action bear the amended caption; and it is further,

ORDERED that counsel for A-Val shall serve a copy of this order on all other parties, the County Clerk (Room 141B), and the Trial Support Office (Room 158). The County Clerk and the Trial Support Office are hereby directed to mark the court's records to reflect the change of the caption; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: April 30, 2015

KATHRYN E. FREED, J. S. C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT