Romero v Barrett
2015 NY Slip Op 32504(U)
December 16, 2015
Supreme Court, Suffolk County
Docket Number: 09-48074
Judge: Thomas F. Whelan

SHORT FORM ORDER

INDEX No. 09-48074
CAL. No. 14-01808OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1-15-15 (004 & 005)
MOTION DATE 3-10-15 (006)
MOTION DATE 4-3-15 (007)
ADJ. DATE 5-18-15
Mot. Seq. # 004 - MotD
005 - MotD
006 - MD
007 - MG

MELQUI ROMERO,

Plaintiff,

- against -

BROOKE D. BARRETT, GEORGE E. VICKERS, JR., ENTERPRISES, INC., KEITH BROWN, d/b/a K.T.B. CONSTRUCTION and JOSE ROBERTO QUIHUIRI d/b/a USA GENERAL CARPENTRY,

Defendants.

BROOKE D. BARRETT and GEORGE E. VICKERS, JR. ENTERPRISES INC.,

Third-Party Plaintiffs,

- against -

ICON CUSTOM CONSTRUCTION,

Third-Party Defendant.

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ICON CUSTOM CONSTRUCTION,

Second Third-Party Plaintiff,

- against -

KEITH BROWN d/b/a K.T.B. CONSTRUCTION, INC., and JOSE ROBERTO QUIHUIRI d/b/a USA GENERAL CARPENTRY,

Second Third-Party Defendants.

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BROOKE D. BARRETT and GEORGE E. VICKERS JR. ENTERPRISES INC.,

Third Third-Party Plaintiffs,

- against -

KEITH BROWN d/b/a K.T.B. CONSTRUCTION, INC., and JOSE ROBERTO QUIHUIRI d/b/a USA GENERAL CARPENTRY,

Third Third-Party Defendants.

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Upon the following papers numbered 1 to 141 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15, 16 - 33, 34 - 49 ; Notice of Cross Motion and supporting papers 50 - 61; Answering Affidavits and supporting papers 62 - 73, 74 - 80, 81 -83, 84 - 93, 94 - 100, 101 - 111, 112 - 127 ; Replying Affidavits and supporting papers 128 - 132, 133 - 134, 135 - 139, 140 - 141 ; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (004) by defendant/third-party plaintiff George E. Vickers, Jr. Enterprise Inc., the motion (005) by defendant Keith Brown d/b/a/ K.T.B. Construction Inc., the motion (006) by third-party Jose Roberto Quihuiri d/b/a USA General Carpentry, and the cross motion (007) by plaintiff Melqui Romero are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant/third-party plaintiff George E. Vickers, Jr. Enterprise Inc., for summary judgment dismissing the complaint and cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by defendant Keith Brown d/b/a K.T.B. Construction Inc. for summary judgment dismissing all claims against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by Jose Roberto Quihuiri d/b/a USA General Carpentry for summary judgment dismissing the third-party and second third-party complaints brought against it is denied; and it is

ORDERED that the motion by plaintiff for partial summary judgment in his favor on the issue of liability is granted.

Plaintiff Melqui Romero commenced this action to recover damages for personal injuries he allegedly sustained on June 24, 2009 while working on the roof of a garage located at the home of defendant/third-party plaintiff Brooke Barrett. Plaintiff allegedly was injured when a bracket scaffold on which he was standing gave way, causing him to fall to the ground. At the time of the accident, plaintiff was an employee of defendant/third-party plaintiff Icon Construction Inc. (hereinafter "Icon"), a subcontractor hired to perform custom roofing and siding services. Pursuant to an existing business relationship between the two entities, third-party defendant Jose Roberto Quihuiri, d/b/a USA General Carpentry ("Quihuiri"), provided consultative services to Icon during the project. Defendant/third-party plaintiff George E. Vickers, Jr. Enterprise Inc. ("Vickers") was the general contractor for the construction project. Defendant/third-party defendant Keith Brown, d/b/a/ K.T.B. Construction Inc. ("Brown"), allegedly was the project's site supervisor. By way of an amended complaint, plaintiff alleges causes of action against defendants based upon the common law and Labor Law §§ 200, 240 (1), and 241(6). Defendants joined issue, asserting general denials and cross claims against each other.

On April 2, 2012, plaintiff signed a stipulation discontinuing his action against Quihuiri. Shortly thereafter, Barrett and Vickers brought a third-party action against Icon, and Icon commenced a second third-party action against Brown and Quihuiri. On May 8, 2012, Barrett and Vickers commenced another third-party action which sought contribution and/or indemnification against Quihuiri. By order dated September 4, 2012, this court granted a motion by Barrett seeking summary judgment dismissing plaintiff's claims against her. In a decision dated July 17, 2013, this court also granted an unopposed motion by Barrett for summary judgment dismissing the cross claims against her. In light of plaintiff's execution of a stipulation discontinuing all his claims against Quihuiri, the court's order further granted an unopposed motion by Quihuiri to amend the caption by deleting its name as a defendant in the underlying action. Issue was joined by the third-party defendants, and the note of issue was filed on October 27, 2014.

Vickers now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds it did not exercise control over the worksite or plaintiff's work such that it could be regarded as the general contractor for the project, and that plaintiff's accident did not arise out of any of its acts or omissions. Alternatively, Vickers seeks summary judgment on its contractual indemnification cross claim against Icon. Plaintiff opposes the motion on the basis Vickers agreed to be the general contractor for the project and possessed, by virtue of such agreement, the authority to direct and control the manner of his work and safety practices. Icon only opposes the branch of the motion seeking judgment on the indemnification cross claim against it, arguing that such an award would be premature, since its contractual obligation to indemnify Vickers is triggered only upon a showing of its negligence, and no such showing has been made. Brown also partially opposes Vickers' motion, arguing that Vickers failed to establish its prima facie entitlement to dismissal of Brown's cross claims against it. By

way of a separate motion, Brown moves for summary judgment dismissing all claims against it. Brown argues that it cannot be held liable under Labor Law §§240(1) or 241(6), as it was a mere subcontractor on the worksite and was not delegated the authority to control or supervise plaintiff's work or the area of the worksite where the accident occurred. Brown also asserts that it cannot be held liable under the common law and Labor Law §200, because it did not supervise or control the means and methods of plaintiff's work, and it did not create or have notice of the alleged dangerous condition that caused the accident.

Plaintiff opposes Brown's motion, arguing, inter alia, that triable issues exist as to whether Brown, who allegedly acted as Vickers' agent and worksite supervisor, possessed the authority to supervise the means and methods of his work and safety practices. Plaintiff also cross-moves for partial summary judgment in his favor on the issue of liability with respect to the claims contained in his complaint. Among other things, plaintiff argues that he is entitled to summary judgment on his Labor Law §240 (1) claim, since the bracket scaffold on which he was standing failed to fulfill its safety function when it suddenly collapsed beneath him. Vickers opposes plaintiff's motion on the bases it did not provide plaintiff with the allegedly defective scaffold, and it delegated its authority to control plaintiff's work and safety practices to Brown. Vickers further asserts triable issues exist as to whether plaintiff – the sole witness to the accident – gave two differing accounts of how the accident occurred, and whether his decision to utilize the bracket scaffold while soldering the window frame, or his refusal to utilize a safety harness or lanyard given to him by Icon, was the sole proximate cause of the accident. Icon opposes plaintiff's motion on similar bases.

"Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (***Bland v Manocherian***, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; *see* ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 562, 606 NYS2d 127 [1993]). Section 240(1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 NE 2d 133 [1948]). Therefore, an owner, contractor or agent who breaches this duty may be held liable in damages regardless of whether it actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Moreover, comparative negligence is not a defense to a Labor Law § 240(1) action (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.***, 1 NY3d 280, 771 NYS2d 484 [2003]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 521, 493 NYS2d 102 [1985]), and where it has been established that a statutory violation was a proximate cause of the accident, it is conceptually impossible for a plaintiff's conduct to be considered the sole cause of such

accident (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.***, *supra*; ***Fabiano v State of New York***, 123 AD3d 1262, 999 NYS2d 217 [3d Dept 2014]; ***Portes v New York State Thruway Auth.***, 112 AD3d 1049, 976 NYS2d 232 [3d Dept 2013]).

Here, plaintiff established his prima facie entitlement to partial summary judgment on his Labor Law §240(1) claim against Vickers by submitting evidence that the bracket scaffold on which he was standing failed to fulfill its safety function when it collapsed and caused him to fall, and that Vickers, the project's general contractor, possessed the authority to supervise his work and enforce safety standards at the worksite (*see* ***Fabiano v State of New York***, *supra*; ***Bermejo v New York City Health & Hosps. Corp.***, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014]; ***Vasquez v C2 Dev. Corp.***, 105 AD3d 729, 963 NYS2d 675 [2d Dept 2013]; ***Tapia v Mario Genovesi & Sons, Inc.***, 72 AD3d 800, 899 NYS2d 303 [2d Dept 2010]). Significantly, plaintiff testified that he was leaning against the roof of the building with one leg planted on the base of the scaffold when the scaffold suddenly collapsed and caused him to fall to the ground. Plaintiff's submissions also contained the deposition transcript of Vickers' operations manager, who testified, among other things, that Vickers was contractually obligated to coordinate, monitor, and supervise the work and safety practices of the project's subcontractors.

In opposition, Vickers' mere assertion that it delegated its supervisory authority to Brown is insufficient to raise a triable issue, as it is well established that a general contractor which possesses the authority to control the work and safety practices of subcontractors may be held statutorily liable for a plaintiff's injuries, regardless of whether it actually exercised such authority (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Guanopatin v Flushing Acquisition Holdings, LLC***, 127 AD3d 812, 7 NYS3d 322 [2d Dept 2015]; ***Rauls v DirecTV, Inc.***, 113 AD3d 1097, 977 NYS2d 864 [4th Dept 2014]; ***Aversano v JWH Contr., LLC***, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]). The fact that plaintiff was the only witness to the accident also presents no bar to summary judgment in his favor, since immaterial inconsistencies concerning the placement of his leg at time of the scaffold's collapse and speculation as to where he had to position himself while soldering the window, are insufficient to bar summary judgment in plaintiff's favor (*see* ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; ***Weber v Baccarat, Inc.***, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]; ***Rivera v Dafna Constr. Co., Ltd.***, 27 AD3d 545, 813 NYS2d 109 [2d Dept 2006]; ***Rodriguez v Forest City Jay St. Assocs.***, 234 AD2d 68, 650 NYS2d 229 [1st Dept 1996]). Moreover, where, as in this case, the very scaffold meant to support plaintiff failed, and that failure is a proximate cause of the accident, it is conceptually impossible for a plaintiff's conduct to be considered the sole cause of such accident (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.***, *supra*; ***Fabiano v State of New York***, *supra*). Accordingly, the branch of plaintiff's motion seeking partial summary judgment in his favor on the issue of liability against Vickers is granted.

Plaintiff failed, however, to establish his prima facie entitlement to partial summary judgment against Brown, as his own submissions raise a triable issue as to whether Brown should be regarded as Vickers' agent for the purposes of the Labor Law, and, if so, whether it was vicariously liable for plaintiff's injuries (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Although plaintiff adduced evidence that Vickers delegated its supervisory authority to Brown, and that Brown's principal signed the "Supervisor's Accident Investigation" following plaintiff's accident, plaintiff's submissions also include

deposition testimony by Brown's principal stating that he was hired to perform general carpentry work only, that he did not possess the authority to control Icon's workers or their safety practices, and that none of its employees were present at the worksite on the day of the alleged accident (*see* ***Barreto v Metropolitan Transp. Auth.***, 25 NY3d 426, 34 NE3d 815 [2015]; ***Campoverde v Sound Hous., LLC***, 116 AD3d 897, 983 NYS2d 817 [2d Dept 2014]; ***Fraser v Pace Plumbing Corp.***, 93 AD3d 616, 941 NYS2d 114 [1st Dept 2012]; ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]). The branch of plaintiff's motion seeking partial summary judgment as against Brown, therefore, is denied.

Based on the foregoing, the branches of the motions by Vickers and Brown for summary judgment dismissing plaintiff's complaint are denied. However, inasmuch as the record indicates that Brown's and Vickers' liability, if any, for the happening of the accident is vicarious, and that they did not exercise any actual control over plaintiff's work, the branches of their motions for summary judgment dismissing the cross claims, third-party claims, and counterclaims against them based on contribution and common law indemnification, are granted (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 377-78, 929 NYS2d 556 [2011]; ***Guzman v Haven Plaza Housing Dev. Fund Co.***, 69 NY2d 559, 5567-568, 516 NYS2d 451 [1987]; ***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; ***Reilly v DiGiacomo & Son***, 261 AD2d 318, 690 NYS2d 424 [1st Dept 1999]; *see also* ***McDermott v New York***, 50 NY2d 211, 428 NYS2d 643 [1980]).

As for the branch of Vicker's motion seeking conditional summary judgment on its contractual indemnification cross claim against Icon, the "hold harmless" provision of the subcontractor agreement provides as follows:

> To the fullest extent permitted by law, the Subcontractor will indemnify and hold harmless George E. Vickers, Jr. Enterprises, Inc. and the Owner. . . agents and employees from and against any and all claims, suits, liens, judgments, damages, losses, and expenses, including legal fees and all court costs and liability (including statutory liability) arising in whole or in part and in any manner from injury and/or death of a person or damage to or loss of any property resulting from the acts, omissions, breach or default of the Subcontractor, its officers, directors, agents, employees and Subcontractors, in connection with the performance of any work by or for Subcontractor pursuant to any contract, Purchase Order and/or related Work Order either written or verbal, except those claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of George E. Vickers, Jr. Enterprises, Inc. The foregoing indemnity . . . shall not be limited in any way by an amount or type of damage, compensation, or benefits payable under workers compensation, disability benefits or other similar employees benefit act. The subcontractor hereby expressly permits George E. Vickers, Jr. Enterprises, Inc. to pursue and assert claims against the Subcontractor for indemnity, contribution and common law negligence arising out of claims for death and personal injury.

New York's Worker's Compensation Law §11 permits third-party indemnification claims against employers where such claim is based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see* ***Rodrigues v N&S Blg. Contrs.***

Inc., 5 NY3d 427, 805 NYS2d 299 [2005]; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Further, General Obligations Law §5-322.1 does not prohibit contractual indemnification where, as here, the parties agreement requires indemnification "[t]o the fullest extent of the law"(*see* ***Brooks v Judlau Contr. Inc.***, 11 NY3d 204, 869 NYS2d 366 [2008]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; ***O'Brien v Key Bank***, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]).

Here, Vickers established its prima facie entitlement to summary judgment on its contractual indemnification cross claim against Icon by submitting evidence that its liability, if any, for the happening of the accident was purely vicarious, and that the accident arose out of the acts or omissions of persons employed by Icon during the performance of its work under the subcontract (*see* ***Muevecela v 117 Kent Ave., LLC***, 129 AD3d 797, 11 NYS3d 224 [2d Dept 2015]; ***Bermejo v New York City Health & Hosps. Corp.***, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014]; ***Mouta v Essex Mkt. Dev. LLC***, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Icon failed to raise a triable issue in opposition (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Contrary to Icon's assertion that its contractual obligation to indemnify Vickers is contingent upon an initial finding of negligence, the plain language of the agreement contains no such condition (*see* ***Tobio v Boston Props., Inc.***, 54 AD3d 1022, 864 NYS2d 172 [2d Dept 2008]; ***Keena v Gucci Shops, Inc.***, 300 AD2d 82, 751 NYS2d 188 [1st Dept 2002]). Furthermore, Vickers' general supervisory authority to coordinate the subcontractors work and monitor safety conditions is an insufficient basis to deny the branch of its motion for conditional summary judgment on its contractual indemnification cross claim (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Sparks v Essex Homes of WNY, Inc.***, 20 AD3d 905, 798 NYS2d 293 [4th Dept 2005]; ***Correia v Professional Data Mgt.***, *supra*). Therefore, the branch of Vickers' motion for conditional summary judgment on its contractual indemnification cross claim against Icon is granted.

By way of a separate motion, Quihuiri now moves for summary judgment dismissing third-party complaints brought against it by Icon and Vickers. Quihuiri argues that Icon's third-party breach of contract and indemnification claims against it must be dismissed, as no agreement obligating it to indemnify or insure Icon existed at the time of the alleged accident. Alternatively, Quihuiri asserts that even if such an agreement existed at the time of the alleged accident, it cannot be held liable for the underlying claims, as plaintiff's alleged accident did not arise out of its work. Additionally, Quihuiri argues that the third-party claims against it for contribution and/or common law indemnification should likewise be dismissed, as it never owed plaintiff a duty of care, it never exercised any actual supervision

or control over his work, and it neither breached any contractual obligation or acted negligently in any manner that caused or contributed to the happening of the alleged accident. Icon opposes the motion, arguing triable issues exist as to whether a long term construction services agreement it entered with Quihuiri obligated Quihuiri to indemnify and insure it against plaintiff's claims, and whether the negligence of Quihuiri's principal, who actually supervised plaintiff's work, caused or contributed to the happening of the accident. Plaintiff also opposes the motion on a similar basis.

The branch of Quihuiri's motion for summary judgment dismissing Icon's third-party indemnification claim against it is denied, as Quihuiri failed to eliminate triable issues as to whether it exercised actual supervision of plaintiff's work and, if so, whether it was contractually obligated to indemnify Icon from the underlying claim (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Significantly, Quihuiri's own submissions contain sharply conflicting testimony by its principal and the principal of Icon regarding the existence and duration of a long-term subcontractor services agreement obligating Quihuiri to insure and indemnify Icon against claims arising out of its work on the premises. During his examination before trial, Icon's principal testified that Icon and Quihuiri were parties to a subcontractor services agreement containing indemnification and insurance requirements at the time of the accident, and that it was their custom and practice to renew the agreement annually. Quihuiri's submissions also include a copy of a subcontractor services agreement executed by the parties in 2014, which contain clauses requiring Quihuiri to insure and indemnify Icon, "[t]o the fullest extent permitted by law . . . from and against any and all claims arising . . . in connection with the performance of any work by or for [Quihuiri]." Although Quihuiri's principal initially testified such an agreement had been in existence at the time of plaintiff's accident, he later executed an errata correction sheet denying the existence of such an agreement during 2009. Further, by way of an affidavit, Quihuiri's principal also avers that he believes the first long term subcontractor services agreement between the parties was not executed until 2010.

Where, as here, the existence and the terms of the parties' agreement are disputed, "it is necessary to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (***Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.***, 41 NY2d 397, 399, 393 NYS2d 350 [1977]; *see also* ***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 367, 795 NYS2d 491 [2005]). Indeed, while it is the responsibility of the court to interpret written instruments, where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises (***Flores v Lower E. Side Serv. Ctr., Inc.***, *supra*; ***Murphy v Eagle Scaffolding, Inc.***, 129 AD3d 799, 11 NYS3d 218 [2d Dept 2015]; ***Tullino v Pyramid Cos.***, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; ***Auchampaugh v Syracuse Univ.***, 67 AD3d 1164, 889 NYS2d 706 [3d Dept 2009]). Accordingly, any finding as to whether Quihuiri was contractually required to insure or indemnify Icon against claims related to the underlying accident should be left to the trier of fact (*see* ***Flores v Lower E. Side Serv. Ctr., Inc.***, *supra*; ***Murphy v Eagle Scaffolding, Inc.***, *supra*; ***Tullino v Pyramid Cos.***, *supra*; ***Auchampaugh v Syracuse Univ.***, *supra*).

Moreover, Quihuiri failed to demonstrate, prima facie, that it did not supervise plaintiff's work, and that the alleged accident did not arise out of the work it performed at the worksite. In particular, the court notes that Quihuiri's principal testified that the work he performed for Icon included, among other things, personally teaching plaintiff how to fabricate and solder metal onto window wells, the very task

plaintiff allegedly was performing at the time of the accident. Further, in contrast to deposition testimony by Quihuiri's principal wherein he denied ever supervising plaintiff, plaintiff testified that Quihuiri was his only supervisor at the worksite. Plaintiff also testified that he personally observed Quihuiri install roof brackets which were used to support scaffolds, though he did not know whether Quihuiri was responsible for installing the brackets which failed and caused the scaffold on which he was working at the time of the accident to collapse. Therefore, the branch of Quihuiri's motion seeking summary judgment dismissing Icon's third-party claims against it for contribution, contractual and/ or common law indemnification is denied.

Inasmuch as triable issues exist as to whether Quihuiri actually supervised plaintiff's work and was responsible for installing the roof brackets which supported the scaffold on which plaintiff was working at the time of the accident, the branch of its motion for summary judgment dismissing Vickers' third-party contribution and common law indemnification claims against it is denied (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Guzman v Haven Plaza Housing Dev Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Tabickman v Batchelder St. Condominiums By the Bay, LLC***, 52 AD3d 593, 859 NYS2d 721 [2d Dept 2008]; ***Stevenson v Alfredo***, 277 AD2d 218, 715 NYS2d 444 [2d Dept 2000]).

Dated: 12/16/15

THOMAS F. WHELAN, J.S.C.