Trippett v Kushner Cos., LLC
2016 NY Slip Op 30815(U)
April 14, 2016
Supreme Court, New York County
Docket Number: 155634/2012
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

FRANK TRIPPETT, JR.,

Plaintiff,

- against -

KUSHNER COMPANIES LLC, KUSHNER PROPERTIES LLC, VORNADO REALITY L.P., STRUCTURE TONE, INC., VORNADO REALTY TRUST, 666 FIFTH AVENUE ASSOCIATES LLC, 666 FIFTH MANAGEMENT LLC, 666 FIFTH EQUITY and 666 KC MANAGEMENT LLC,

Defendant.

INDEX NO. 155634/12

MOTION SEQ. NO. 001

STRUCTURE TONE, INC., VORNADO REALTY TRUST, 666 FIFTH AVENUE ASSOCIATES LLC and 666 FIFTH MANAGEMENT LLC,

Third-party Plaintiff,

- against -

ROBERT B. SAMUELS, INC.,

Third-party Defendant.

THIRD-PARTY INDEX NO. 590418/13

The following papers were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ **Yes** ■ **No**

This is an action to recover damages for personal injuries sustained by an electrician when he stepped into an uncovered electrical box located in the floor (the Hole) while working at a construction site located at 666 Fifth Avenue, New York, New York (the Premises) on May 17, 2012.

Defendants/third-party plaintiffs Structure Tone, Inc. (Structure Tone), Vornado Realty Trust (Vornado), 666 Fifth Avenue Associates LLC and 666 Fifth Avenue Management LLC (together, 666 Fifth Avenue) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them, as well as for summary judgment in their favor on the third-party complaint against third-party defendant Robert B. Samuels, Inc. (Samuels).

In the complaint, plaintiff alleges violations of common-law negligence and Labor Law §§ 200, 240(1) and 241(6). In the third-party complaint, defendants maintain that they are entitled to judgment in their favor on their common-law and contractual indemnification claims and breach of contract for failure to procure insurance claim against Samuels.

BACKGROUND

On the day of the accident, 666 Fifth Avenue and its management agent, Vornado, were the owners of the Premises where the accident took place. Structure Tone served as general contractor on a project underway at the Premises, which entailed the renovation of the 23rd floor of the Premises (the Project). Structure Tone hired third-party defendant Samuels to perform the electrical work for the Project. Plaintiff was employed by Samuels as a journeyman electrician. At the time of the accident, plaintiff was installing temporary lighting at the Premises. He was injured when, as he was leaving the gang box area after collecting his materials, he stepped back and caught his foot on the Hole, which caused him to trip and twist his left knee.

Plaintiff's Deposition Testimony

Plaintiff testified that he was employed by Samuels as an electrician on the day of the accident. At the time of the accident, he was installing temporary lighting on the 23rd floor of the Premises. Plaintiff received all of his work instructions from his Samuels' foreman. Plaintiff explained that, after just getting his tools out of the gang box and while he was returning to his

work area, he "stepped back in a narrow pass way and fell and twisted [his] knee, left knee" (plaintiff's tr at 34). Plaintiff maintained that he caught his foot on the Hole, which he described as "an uncovered floor cell," and a steel square "box in the floor" (*id.*). He noted that the Hole was not raised above the floor slab, and that he was not aware of its presence before the time of the accident. He described the Hole as measuring approximately eight inches in diameter and approximately three feet deep.

Plaintiff also testified that, while the gang boxes were located in a large area, the Hole was located within a "narrow passage" (*id.* at 35, 36). He described this passageway as "around the gang boxes. It was like gang boxes, ladders and pipe racks and stuff" (*id.* at 36).

Plaintiff maintained that "after [he] tripped and fell, [he] felt his knee pop" (*id.* at 40). He did not know if his foot entered the Hole, he "just [knew] that [he] was on the floor when [he] tripped" (*id.* at 41). Plaintiff testified that there was no protective covering over the Hole, and that it was not marked in any way. In the past, whenever he observed such floor openings, they were covered with some type of plate or cover. Plaintiff did not speak to anyone from Structure Tone about his accident, and he did not fill out any accident reports.

Deposition Testimony of Sean Mulqueen (Structure Tone's Project Superintendent)

Sean Mulqueen (Mulqueen) testified that he served as Structure Tone's project superintendent on the day of the accident. He explained that Structure Tone was the general contractor on the Project, and that it hired the subcontractors. As project superintendent, Mulqueen made sure that the subcontractors performed their work in compliance with their contract documents. He also told the subcontractors to keep their materials in the gang boxes on the south side of the space.

Mulqueen also testified that he conducted two to three walk-throughs of the site daily. During these walk-throughs, Mulqueen observed electrical floor boxes, which were flush with the floor. He explained that some of these boxes were uncovered, some had lids and some

were covered by cones and/or mini-containers. On his first day at the job site, when he observed the uncovered openings, he instructed a Structure Tone laborer, Kevin DeSantis, to cover the openings, because they "could be a tripping hazard" (Samuels' Notice of Motion, exhibit C, Mulqueen tr at 41). Mulqueen further testified that such openings were typically covered by fastened-down plywood. When asked why the openings were only covered with cones and mobile mini containers, he replied that he "knew [he] was filling them up [in four or five days], so, it was a temporary . . . cover" (*id.* at 78). Mulqueen warned the foremen of the various trades about the openings.

Mulqueen also testified that the uncovered openings were present on the 23rd floor "a couple of days" before the accident, and that there was no caution tape or spray paint identifying them (*id.* at 70). He maintained that, other than when the electricians were working in them, the boxes were never to be left uncovered. When asked if the electricians were still working on the Project on the 23rd floor at the time of the accident, he replied, "No. [The floor boxes] were abandoned" (*id.* at 42).

Deposition Testimony of Donald Kohl (Samuels' Foreman)

Donald Kohl (Kohl) testified that, on the day of the accident, he was employed by Samuels as a foreman on the Project. He explained that his electricians stored their tools and materials in the Samuels gang box, which was located in the southeast corner of the 23rd floor. He remembered observing 14 to 18 floor boxes on the 23rd floor, none of which were covered or marked in any way, so as to warn of their presence. The nearest floor box was approximately six to eight feet away from the Samuels gang box.

Kohl testified that the floor boxes were eventually filled in with concrete, but that it took a couple of days to fill them all. He warned his workers to watch out for the floor boxes. When plaintiff told him that he had stepped into the Hole and twisted his knee, Kohl responded, "You have got to be kidding me, I just told you about that" (Kohl tr at 39).

Kohl also testified that Samuels did not perform any work in the floor boxes, and no one from Samuels removed any covers from them. Kohl noted that it was in his experience that all floor openings are supposed to be filled with concrete, covered with secured plywood or cordoned off when not in use.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth*

Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). 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]; CPLR 3212[b]).

The Labor Law § 240(1) and 241(6) Claims Against Defendants

Defendants move for dismissal of the Labor Law §§ 240(1) and 241(6) claims against them. Initially, as plaintiff does not oppose that part of defendants' motion seeking dismissal of the Labor Law § 240(1) claim against them, this claim is deemed abandoned, and, thus, these defendants are entitled to dismissal of said claim against them (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]).

Labor Law § 241 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, [and] 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 at 501-502. 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.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.17(e)(1) and (2), plaintiff does not address these Industrial Code violations in his opposition to defendants' motion, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d at 833). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241(6) claim predicated on those abandoned provisions.

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

Industrial Code 12 NYCRR 23-1.7(e)(1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241(6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Industrial Code sections 23-1.7(e)(1) and (2) provide, in pertinent part:

"(e) Tripping and other hazards

(1) Passageways. All passageways shall be kept free from . . . debris and from any other obstructions or conditions which could cause tripping.

* * *

(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."

Defendants argue that section 23-1.7(e)(1) does not apply to the facts of this case because the 23rd floor of the Premises, where plaintiff was working at the time of the accident, was a large open work space and not a passageway. However,

> "[r]esponsibility under Labor Law § 241 (6) 'extends not only to the point where the . . . work was actually conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work'" (*Linkowski v City of New York*, 33 AD3d 971, 974 [2d Dept 2006], quoting *Sergio v Benjolo N.V.*, 168 AD2d 235, 236 [1st Dept 1990]; *Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]; *see also Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000]).

Here, plaintiff testified that he was injured when, while exiting the gang box area through a narrow passageway comprised of gang boxes, ladders and other materials, he tripped over the Hole, which was unprotected and unmarked. Thus, as section 23-1.7(e)(1) applies to the facts of this case, defendants are not entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on an alleged violation of said provision.

As to section 23-1.7(e)(2), as plaintiff testified that he tripped over a floor box, which was flush to the floor, and not on any accumulations of dirt, debris, tools, materials or sharp projections, as required by the provision, this section does not apply to the facts of this case. Thus, defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on an alleged violation of section 23-1.7(e)(2).

The Common-Law Negligence and Labor Law § 200 Claims Against Defendants

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. 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'" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [citation omitted]; *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 the plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, 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 was injured as he was lifting a beam, and no evidence was put forth that the defendant exercised supervisory control or had any input into the method of moving the beam]).

As noted previously, plaintiff was injured when he tripped over the unprotected and unmarked Hole. Accordingly, the accident must be analyzed under an unsafe condition theory. Initially, contrary to defendants' contention, "[p]roof of defendants' supervision and control over plaintiff's work is not required to impose liability under [Labor Law § 200] and the common law where, as here, the accident results from a dangerous work site condition" (*Cordeiro v TS*

Midtown Holdings, LLC, 87 AD3d 904, 906 [1st Dept 2011]).

However, as Structure Tone's project superintendent, Mulqueen, testified that he observed uncovered floor boxes on the 23rd floor a couple of days before the accident, at least a question of fact exists as to whether Structure Tone had actual and/or constructive notice of the fact that the Hole at issue in this case was not properly covered, creating an unsafe condition. In addition, as Structure Tone served as defendants' general contractor on the Project, at least a question of fact exists as to whether the other defendants also possessed notice of said unsafe condition (*id.* [where "(t)he building superintendent testified that he had seen an unusual configuration in the hatchway doors prior to the accident . . . issues of fact exist[ed] as to whether defendants [owners and managers of the premises] had notice of the dangerous or defective doors"]). Thus, the Court finds that defendants are not entitled to dismissal of the common-law negligence and Labor Law § 200 claims asserted against them.

The Third-Party Claim for Common-law Indemnification Against Samuels

Defendants move for summary judgment in their favor on the third-party claim for common-law indemnification against Samuels. "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]).

As is relevant to the instant case, Workers' Compensation Law section 11 prescribes, in pertinent part, as follows:

> "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 . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[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]).

In his bill of particulars, plaintiff alleges that, as a result of the accident, he sustained injuries, which included "[s]evere and permanent left knee derangement," rendering his left knee "permanently disfigured" (defendants' Notice of Motion, exhibit E, bill of particulars). Plaintiff also sustained certain "injury, tearing, derangement and damage" to his blood vessels, spinal connective nerves and soft tissues (*id.*). Here, a review of plaintiff's alleged injuries as set forth in the bill of particulars reveals that he did not suffer a grave injury for the purposes of the statute. Thus, defendants are not entitled to judgment in their favor on the third-party common-law indemnification claim against Samuels.

The Third-Party Claims for Contractual Indemnification and Breach of Contract for Failing to Procure Insurance Against Samuels

Defendants also move for summary judgment in their favor on the third-party claims for contractual indemnification and breach of contract for failure to procure insurance against Samuels. "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 Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *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'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

"Even in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013] [internal quotation marks and citation omitted]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Structure Tone hired Samuels to perform certain electrical work on the Project pursuant to a subcontract (the Subcontract). The Subcontract stated that ""[t]he insurance and indemnification provisions are set forth in a separate Blanket insurance/indemnity agreement signed by [Samuels], the terms of which are incorporated herein" (the Insurance/Indemnification Agreement (defendants' notice of motion, exhibit I, the Subcontract, para 11).

The Insurance/Indemnification Agreement, dated August 10, 1994, in effect on the day of the accident, and which applied to all work that Samuels performed for Structure Tone, provided, in pertinent part:

> "To the fullest extent permitted by law, [Samuels] will indemnify and hold harmless Structure Tone Inc. ("STI") and Owner . . . agents and employees from and against any and all claims, suits, liens, judgements, damages, losses and expenses, including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of [Samuels], its officers . . . agents, employees and subcontractors, in connection with the performance of any work by or for [Samuels] pursuant to any Purchase Order and / or related Proceed Order. [Samuels] will defend and bear all costs defending any actions or proceedings brought against STI and/or Owner . . . agents and employees, arising in whole or in part out of any such acts, omission, breach or default" (defendants' notice of motion, exhibit J, the Insurance/Indemnify Agreement).

The Insurance/Indemnification Agreement also required that Samuels obtain general liability insurance at $4,000,000.00 and naming defendants as additional insureds.

Initially, contrary to defendants' contention, "[t]he indemnification agreement between defendants and third-party defendant did not violate General Obligations Law § 5-322.1, in that the obligation was 'to the fullest extent permitted by applicable law'" (*Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]; *see also Dutten v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002]). In addition, as the accident clearly arose out of plaintiff's work for Samuels, the defense and indemnification provisions set forth in the Insurance/Indemnity Agreement are triggered. Thus, defendants are entitled to judgment in their favor on the third-party claim for contractual indemnification against Samuels.

However, it should be noted that Samuels has put forth evidence that it procured an insurance policy (issued by Harleysville Insurance Company of New York) which was in effect at the time of the accident, and which identified defendants as additional insureds. In addition, in their reply to Samuels's opposition, defendants do not refute Samuels's contention that it procured said insurance coverage. Thus, defendants are not entitled to summary judgment in their favor on the third-party breach of contract for failure to procure insurance claim against Samuels.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the parts of defendants/third-party plaintiffs Structure Tone, Inc., Vornado Realty Trust, 666 Fifth Avenue Associates LLC and 666 Fifth Avenue Management LLC's (together, defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted with respect to the Labor Law § 240(1) claim, as well as those parts of the Labor Law § 241(6) claim predicated on abandoned provisions, and these claims are dismissed as against defendants, and the parts of the motion for summary judgment dismissing the complaint is otherwise denied; and it is further,

ORDERED that the part of defendants' motion for summary judgment in their favor on the third-party contractual indemnification claim against third-party defendant Robert B. Samuels, Inc. is granted; and it is further,

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

ORDERED that counsel for Structure Tone, Inc., shall serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4/14/16 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**