| **Charkowski v Paper Communications, Inc.** |
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| 2016 NY Slip Op 31437(U) |
| July 26, 2016 |
| Supreme Court, New York County |
| Docket Number: 153310/12 |
| Judge: Ellen M. Coin |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 63**

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RONALD CHARKOWSKI,

Index No.: 153310/12

Plaintiff,

-against-

PAPER COMMUNICATIONS, INC. d/b/a EXTRAEXTRA, MATTEL, INC., PAPER PRODUCTS LLC d/b/a EXTRAEXTRA, YORKE CONSTRUCTION CORPORATION, 11TH ST. WORKSHOP INC., 61 WEST 62 OWNERS CORP., YORK SCAFFOLD EQUIPMENT CORP. and WALTER T. GORMAN, P.E., P.C.,

Defendants.

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YORKE CONSTRUCTION CORPORATION,

Third-Party Index No.: 590391/13

Third-Party Plaintiff,

-against-

YORK SCAFFOLD EQUIPMENT CORP., LINCOLN CENTER FOR PERFORMING ARTS, INC. and WALTER T. GORMAN, P.E., P.C.,

Third-Party Defendants.

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**Ellen M. Coin, J.:**

Motion sequence numbers 005, 006 and 009 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries Ronald Charkowski, a stagehand and carpenter/construction worker, sustained on February 14, 2012. He alleges that a piece of a stage set inside the David Rubenstein Atrium (the Atrium) at the Lincoln Center for the Performing Arts, 61 West 62nd Street, New York, New York, fell on him while he was assisting

in its disassembly.

In motion sequence number 005, defendant/third-party defendant Walter T. Gorman, P.E., P.C. (Gorman) moves for summary judgment dismissing the complaint and all cross-claims and counterclaims against it pursuant to CPLR 3212.

In motion sequence number 006, defendants Paper Communications, Inc. d/b/a/ ExtraExtra Mattel, Inc. (Mattel), Paper Products LLC d/b/a ExtraExtra (Paper) and 61 West 62 Owners Corp. (61 West) (collectively, the Paper defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against them, as well as for summary judgment in their favor on their cross-claims for common law and contractual indemnification against third-party defendant Lincoln Center for the Performing Arts, Inc. (Lincoln Center).

In motion sequence number 009, defendant 11th St. Workshop Inc. (11th St.) moves for summary judgment dismissing the complaint and all third-party claims and cross-claims against it pursuant to CPLR 3212.

## BACKGROUND

On January 18, 2012, in connection with a Fashion Week event, defendant Mattel entered into an agreement with Paper, a promoter, for Paper to design and arrange for the construction of a three-story tall "Barbie Dream Closet" set (the Closet) to be built inside the Atrium (the Project). Paper, on behalf of Mattel, entered into a lease agreement with third-party defendant Lincoln Center for the use of the Atrium for the event. On the day of the accident, defendant 61 West was the fee owner and Lincoln Center the tenant of the space occupied by the Atrium, where the accident occurred.

After designing the Closet, Paper hired nonparty HappenCreative to design the structural and decorative components of the Closet. Paper hired defendant York Scaffold Equipment Corporation (York Scaffold) to design and install the metal frame of the Closet from which the decorative elements of the Closet were to be hung. HappenCreative subcontracted the fabrication and installation of the decorative components of the Closet, including custom flats, doors and trimmings, to defendant 11th St.

Paper also hired defendant Yorke Construction Corporation (Yorke)[1] to provide general contracting services for the Project. Yorke then entered into a contract with Lincoln Center providing that Lincoln Center would employ union labor to construct the Closet and to strike it at the end of the event. Lincoln Center employed stagehands, including plaintiff, from the International Alliance of Theatrical State Employees union (Local 1). Thereafter, 11th St. delivered the decorative components of the Closet to the Atrium and then supervised Local 1's assembly of the Closet. Because Lincoln Center is a union building, only Local 1 stagehands were permitted to build and disassemble the Closet.

Paper had to obtain work permits and approvals from the New York City Department of Buildings (the DOB) because the installation of the structural components of the Closet modified the interior layout of the Atrium, which was open to the public. Paper hired Gorman, a structural engineering company, to carry out the necessary filings. Gorman also reviewed York Scaffold's metal framing design and incorporated it into Gorman's structural plans.

The Closet consisted of three modular eight-foot-high tiers, each built and placed on top of the other as in a three-story house. Local 1 workers affixed these three tiers, along with the

[1] All claims against Yorke Construction have been dismissed.

Closet's fascia, to the Closet's freestanding metal frame, which was erected at the Closet's east and west entrances. After Fashion Week was over, Local 1 workers dismantled the Closet in accordance with the contract between Paper and Lincoln Center. By the time of the accident, three of the Closet's four doors had already been disassembled and lowered to the floor by a system of ropes.

At the time of the accident, plaintiff was standing at the base of the Closet and holding its bottom section while other workers dismantled the top level of the Closet's final 20-foot-high plywood door, which was located on the west side of the Atrium. After plaintiff's coworker made a hole in the top of this last remaining piece of plywood, so that he could run a rope through it to make a hoist, the two top tiers of the Closet tipped over and struck plaintiff on top of his head as well as on other areas of his body. It is undisputed that the top two tiers of the Closet fell because they were not attached to the lower tier during the Closet's assembly.

***Plaintiff's Deposition Testimony***

Plaintiff testified that on the day of the accident he was working at the Atrium for his employer, Lincoln Center, as a Local 1 stagehand (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. T: Charkowski Tr. at 7:22-25, 10:5-12). As a union stagehand, plaintiff's duties included building and breaking down scenery, moving props, and performing electrical work such as mounting lights on pipes and beams (*id.* at 11:13-12:10). As the Closet, which was assembled solely by Local 1 workers, was being disassembled, plaintiff recalled that he stood at the base of the Closet and held the lowest eight-foot section of it, while the last of the Closet's plywood fascia sections was detached from the Closet's frame and lowered via a hoist system (*id.* at 45-46). Plaintiff's coworker, Marshall Rubin, had made a hole in the top of the door and run a rope

through it, creating a hoist (*id.* at 48). The entire top two sections of the Closet suddenly fell over, striking plaintiff on the head and injuring him (*id.* at 55-57). Although Rubin shouted "look out" immediately before the sections fell, plaintiff was in a corner and could not escape (*id.* at 55:12-17).

After the accident, Rubin told plaintiff that the top two sections of the Closet fell over on him because although they were screwed to each other, they were not screwed to the lowest tier of the Closet (*id.* at 57:8-12). Plaintiff specifically testified that the tower of tiers "[were not] tied off or . . . secured" and maintained that the Closet "just tipped over" (*id.* at 59:15-22). Plaintiff explained that "normal operating procedure" required that the top two tiers of the Closet be screwed into the lowest tier, and that they also be connected and secured to the ceiling with "safety wire" as the Closet was being disassembled (*id.* at 61-63).

***Deposition Testimony of George Zissou (Yorke's Construction Supervisor)***

George Zissou testified that he was Yorke's construction supervisor on the day of the accident. He explained that Yorke was hired to install protection at the event site, which consisted of taping "masonite, maybe paper and masonite . . . on the floor" and other protective material on the walls (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. Y: Zissou Tr. at 11:6-10). Zissou asserted that Yorke had no involvement with the erection, design or disassembly of the Closet (*id.* at 13:11-16), and that Local 1 stagehands supervised by the atrium staff, separate from "entities that provided the various components of the assembly," performed the physical work (*id.* at 13-14, 45:16-21).

Zissou, who was at the accident site at the time of the accident, further explained that the accident occurred when one of the "door towers fell over" after "[t]hey chopped a hole in the top

panel so [that] they can secure it to a panel tied to the scissor lift" (*id.* at 18:3-7 & 21, 23:6-8). Zissou noted that "when [they] looked at [the Closet] later [they] realized they had never screwed framing section one to framing section two. So when [the worker] hit it, it just fell over" (*id.* at 23:14-17).

When asked if the Closet was built properly, Zissou replied, "I think this was an oversight, on the installers . . . because people tend not to be as effective when they are working double shifts three double days in a row" (*id.* at 31:22-32:2). He also opined that the Closet assembly was improper, because "[i]t was not screwed together . . . you can't rely on gravity alone to pull that assembly together and if you were aware that gravity alone was holding it together, you would not try to hammer a hole into the top part of it" (*id.* at 32:19-25).

***Deposition Testimony of Obadiah Savage (Local 1 Stagehand)***

Obadiah Savage testified that he was a stagehand, a member of Local 1 on the day of the accident, and one of the foremen who supervised the construction of the Project at various times (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. CC: Savage Tr. at 23:25-24:13). He explained that Local 1 stagehands were solely responsible for performing all the labor necessary to assemble and strike the Closet, and that the Local 1 stagehands were considered Lincoln Center employees (*id.* at 45:11-22).

When asked whose decision it was to connect the pieces of the Closet to each other, Savage replied, "That would be 11th Street" (*id.* at 71:8-10). He also maintained that 11th St. gave instructions to Local 1 regarding how the Closet's various internal structures were to be connected (*id.* at 67:2-21). Specifically, Paul Outlaw of 11th St. "[told them] how [the Closet] was to be built and to be assembled and attached" (*id.* at 59:2-6). Savage also testified that 11th

St. directed his workers as to "how things are supposed to go together, where they're supposed to go, laying them out. Making sure they're built to spec" (*id.* at 72:3-11). In addition, Savage testified that all four of the Closet's doors were constructed and assembled in the same way, and that 11th St. directed this work "every step of the way" (*id.* at 72:16-24).

***Deposition Testimony of Brant Murray (Lincoln Center's Technical Supervisor)***

Brant Murray testified that 11th St. designed the Closet's "wooden frame doors" (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. BB: Murray Tr., at 94:14-18). In addition, 11th St.'s supervisor made the ultimate decision as to how to connect the parts of the Closet, including the tiers at issue here (*id.* at 49:12-16, 55:18-22, 78:8-79:11). Further, Local 1 had no discretion regarding how the Closet parts were to be assembled (*id.* at 79:12-24).

***Deposition Testimony of Chris Kaiser (Yorke Construction's Project Manager)***

Chris Kaiser testified that he was Yorke Construction's project manager on the day of the accident (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. X: Kaiser Tr. at 9:2-5). He testified that York Scaffold provided the Closet's shop drawings and that Gorman, a structural engineer, used York Scaffold's shop drawings as a basis for filing their documents with the DOB (*id.* at 69:17-70:9).

***The Affidavits of Juan Carlos Villars (Gorman's Project Manager)***

In his affidavit, Juan Carolos Villars stated that "[Gorman] was not the general contractor or property owner and did not control or direct any aspect of the work at the Site" (Affidavit of Juan C. Villars in support of summary judgment for Walter T. Gorman, August 10, 2015, at ¶4). Villars explained that the Project was comprised of two components:

(1) the structural components which consisted of a free-standing independent

> frame that measured approximately 18 feet high and 12 feet wide erected at the east and west entrances to the site, and (2) the decorative components which consisted of pink jeweled pink fascia and a three-tier wooden tower frame affixed to the structural components to resemble two large closet doors and a closet

(*id.* at ¶8). Villars further maintained that Gorman's role in the Project was limited to the structural components, noting that, as confirmed by a proposal, Gorman's role was to "prepare and file the structural plans for approval" by the Department of Buildings "and obtain a temporary place of assembly ("TPA") and work permit for the structural components erected by others" (*id.* at ¶2). Villars conducted daily inspections of the site, but those inspections "[were] required to maintain the TPA and [were] limited to confirming that all paths of egress remain clear to ensure the public safety during the event" (Reply affidavit of Juan C. Villars, October 19, 2015, at ¶7).

***Affidavit of Waseem Hakeem (Gorman's Civil Engineer Expert)***

In his affidavit, Waseem Hakeem stated that he was responsible for verifying the structural stability of the Closet's metal framing system, which was installed by York Scaffold (Reply affidavit of Waseem Hakeem, October 8, 2015, at ¶¶13, 16). He maintained that neither he, Villars or anyone else "had any involvement with the supervision or inspection of any scenic or decorative elements" of the Closet (*id.* at ¶17). Gorman's scope of work was limited to its inspection of the Closet's "steel frame to verify compliance with the details shown on the approved construction documents" (*id.* at ¶10). He also stated that the Closet's metal framing system was not involved in plaintiff's accident and that it remained intact during the accident (*id.* at ¶24).

***Deposition Testimony of Paul Outlaw (11th St. Project Manager)***

In his deposition, Paul Outlaw stated that he served as 11th St.'s project manager on the

day of the accident (Reply affirmation of Marnie R. Kudon, Esq. in further support of Gorman's motion for summary judgment, November 16, 2015, Ex. LL: Outlaw Tr. at 13:9-14). 11th St. was hired to fabricate the Closet, including its doors, and then deliver it to the Atrium for a Fashion Week event (*id.* at 18-22). Once 11th St. delivered the Closet's decorative components, Local 1 union workers brought the items inside the Atrium without the help of any 11th St. employees (*id.* at 19:20-20:4). Under the union agreement, only Local 1 workers were permitted to assemble and/or disassemble the Closet (*id.* at 14:16-24).

Although 11th St. was not permitted to construct or strike the Closet, Outlaw was responsible for instructing Local 1 supervisor Obadiah Savage regarding how the various pieces of the Closet "needed to fit together in the assembly/construction process" (*id.* at 29:4-7, 30:9-16). Outlaw answered any questions regarding the installation of the Closet because he "had intimate knowledge of how the thing was built and how it was to be assembled" (*id.* at 111:22-25). Outlaw explained Savage "would be the liaison for [11th St.] to the union laborers...when they had questions about installation or construction" (*id.* at 28:24-29:7). Generally, 11th St. "would talk to Obadiah [Savage] and he would give the information to the other laborers" (*id.* at 30:12-16). Local 1 workers were then solely responsible for screwing the sections of the doors together with the hardware provided by 11th St (*id.* at 33:22-34:9). No one from 11th St. "physically touch[ed] any of the materials for the doors" (*id.* at 64:3-4).

Outlaw maintained that Local 1 supervisors were the ones responsible for the inspection of the work (*id.* at 108:16-19). If Outlaw had observed an incorrectly assembled part during the Closet's assembly or disassembly, he would have brought it to the attention of Savage (*id.* at 110:3-18). If Savage did not fix the problem, Outlaw would then take the issue up with "the

person who hired him...and say I am getting uncooperative responses from the labor union" (*id.* at 112:6-18). Outlaw, and other 11th St. employees, "had no authority" to hire, fire, or discipline Local 1 stagehands (*id.* at 110:23-25).

Although Outlaw did not witness the accident, he "inspected section one and section two after the accident and saw that no screws were used to connect section one and section two" of the door that fell on plaintiff (*id.* at 97:24-98:3).

***The Affidavit of Anthony Asaro (11th St.'s Vice President)***

Anthony Asaro testified that while 11th St. built "custom flats, doors, trimmings, etc. for the [Closet]," it was not involved in the actual assembly of the Closet once it was delivered to the Atrium (Affirmation of Alan R. Meller, Esq. in support of summary judgment, Ex. O, Asaro Aff. at ¶2). Because only union workers "were allowed to be part of the installation of the panels and facades," 11th St. left the completed panels and facades on the sidewalk (*id.* at ¶4). However, 11th St. did advise the Local 1 supervisors as to how the Closet's pieces fit together:

> [11th St.] merely advised union supervisor[s] where each of the pieces needed to go. Thereafter, it was solely the Local 1 workers, at the direction of their supervisor, that determined how to assemble the doors. And it was solely the Local 1 workers, at the direction of their supervisor, that assembled the doors

(*id.* at ¶8).

Asaro also explained that 11th St. maintained a presence at the Atrium because 11th St. workers needed to be available "to paint, decorate and repair materials damaged during transport" (*id.* at ¶6).

***The Lincoln Center Accident Report***

The Lincoln Center accident report described the accident as follows:

> Crew was removing a flat from the side of the triangular unit, apparently there were no screws holding the top and bottom units together. The top scenic element was not secured with rope from above. As they removed the flat [door] the top 2/3rds of the structure fell over and struck [plaintiff] in the head and body

(Affirmation of Daniel J. Hansen, Esq. in support of plaintiff's motion for summary judgment, Ex. 10, Lincoln Center accident report).

***Deposition of Neil S. Goldstein (Vice President of 61 West)***

Neil S. Goldstein testified that 61 West has an ownership interest in the Atrium where the accident took place (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. U: Goldstein Tr. at 9-10). He stated that 61 West had no involvement in constructing or disassembling the Closet, nor did it have any control over or knowledge of the Barbie Dream Closet event (*id.* at 17-19).

***Deposition Testimony of Diane Drennan-Lewis (Accounts Services Director for Paper)***

Diane Drennan-Lewis testified that no one from Paper was ever present at the Atrium during the construction or disassembly of the Closet, and that only union workers were allowed to perform said work (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. V: Drennan-Lewis Tr. at 23:4-24:25). Gorman, not Paper, drew the final engineering drawings for the project (*id.* at 20:3-6). In addition, Paper did not supervise, direct, or control any of the activities related to the disassembly of the Closet (*id.* at 26:18-24).

***Deposition Testimony of Kristina Duncan (Mattel's Vice President of Marketing and Communications)***

Kristina Duncan testified that Mattel entered into an agreement with Paper to produce the subject event for Fashion Week (Affirmation of Frank Raia, Esq., dated August 13, 2015, Ex. W: Duncan Tr. at 12:2-4, 15:2-5). She testified that Mattel did not manufacture, assemble or disassemble the Closet (*id.* at 21:22-22:2, 22:8-17). In addition, Duncan was not aware of any

defective condition associated with the Closet doors (*id.* at 33:14-20). Although Mattel employees were present during the construction of the Closet, they played no role in the construction and were solely there to ensure that the Closet accurately reflected Mattel's brand (*id.* at 16:18-17:4).

## DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

***The Labor Law § 240 (1) and 241 (6) Claims Against the Paper Defendants, 11th St. and Gorman***

In their separate motions, the Paper defendants, 11th St. and Gorman move for dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against them. Initially, as plaintiff does not oppose those parts of said motions seeking dismissal of the Labor Law § 241 (6) claim, this claim is dismissed as abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *see also Musillo v Marist Coll.*, 306 AD2d 782, 783 n1 [3d Dept 2003]).

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

***Whether the Paper Defendants, 11th St. and Gorman Are Proper Labor Law Defendants***

In Motion Sequence 004, summary judgment was granted against the Paper defendants on plaintiff's Labor Law 240 (1) claims. The Court concluded that the Paper Defendants were proper Labor Law defendants, that the Closet was a structure, and that Plaintiff was entitled to recovery on a falling objects theory (*Charkowski v Paper Communications, Inc*, Sup Ct, NY County, March 15, 2016, Coin, J., index No. 153310/2012). However, the Court did not address the Labor Law liability of 11th St. or Gorman.

In order for a contractor to be considered an agent for purposes of Labor Law 240 (1), it must have been able to exert control over both the construction site condition that caused the plaintiff's injury and the actions of the relevant group of workers at the site (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-64 [2005]). "An agency relationship for purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job" (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 293 [2003]). A party's ability to control the work is the dispositive factor in determining whether it is an agent (*Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 99 [1st Dept 1999]). The mere fact that a company was hired to "make certain that the project was built in accordance with the plans and specifications" is insufficient to make that company an agent (*Sikorski v Springbrook Fire Dist.*, 225 AD2d 1041 [4th Dept 1996]).

The level of control 11th St. had over the work is disputed. Obadiah Savage, a Local 1 supervisor, observed 11th St. employees "playing a supervisory role" in the construction of the doors (Savage Aff., 65). He recalled that Paul Outlaw, an 11th St. employee, "was to tell [Local 1] how [the first structure of the east doors] was to be built and to be assembled and attached" and

"was there to sort of direct [Local 1] guys" (*id.*, 59). When asked if Outlaw in particular "act[ed] in a supervisory capacity with regard to the construction, assembly, and installation of the doors," Savage responded "[c]ertainly, yes" (*id.* at 67). This description is challenged by Anthony Asaro, vice president of 11th St., who avers that "[w]e didn't have any supervisory role in the installation" despite the mention of supervision on an invoice for the project prepared by 11th St. (Asaro Aff. at 37). Asaro also denied that 11th St employees "inform[ed], in any way, the folks at the job where the flat, each specific flat went" (*id.* at 71). Outlaw states that he was a "supervisor" at the site and that "there [were] instructions given by 11th Street as to connecting section two to section one" of the doors (Outlaw Aff., 14, 62). However, he also asserts that "[w]e were not supervising the manner in which [Local 1] did the work, we advised them on how [the] pieces were to be assembled" and that he "had no authority over" Local 1 workers (*id.*, 29, 111). These conflicting descriptions of the role 11th St. played at the site create a factual dispute that cannot be resolved on a motion for summary judgment (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In contrast, Gorman, a professional engineer retained to obtain permits for, and to inspect, the metal scaffolding around the doors, cannot be held liable. Labor Law § 240 (1) specifically excepts professional engineers from its purview: "No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law." An engineer who does not direct or control the work which brought about the injury to the plaintiff is specifically exempt from Labor Law liability (*Carter v Vollmer Assoc.*, 196 AD2d 754, 754 [1st Dept 1993]; *Santoro v American Airlines*, 170 AD2d 206, 207-208 [1st Dept 1991]).

In this case, plaintiff testified that he was injured when he was struck by the unsecured second and third tiers of the Closet, which were part of the Closet's wooden scenic elements. While Gorman's work included ensuring the safety of the metal scaffolding installed by York Scaffold, it had no responsibilities regarding the Closet's scenic elements, nor did it supervise or direct the Local 1 workers who assembled them. Thus, Gorman is not liable for plaintiff's injuries under Labor Law § 240 (1).

***The Common Law Negligence and Labor Law § 200 Claims Against the Paper Defendants, Gorman and 11th St.***

The Paper defendants, 11th St., and Gorman 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 and internal quotation marks omitted]).

There are two distinct standards applicable to section 200 cases: one that applies when the accident is the result of the means and methods used by the contractor to do its work, and one that applies when the accident is the result of a dangerous condition on the property (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]). Plaintiff was injured because the top two tiers of the Closet were not properly fastened to the lower tier, so this case must be analyzed under a means and methods theory.

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 plaintiff was injured by lifting beam, and no evidence was put forth that defendant exercised supervisory control or had any input into method of moving beam]).

There is no evidence in the record to support an argument that any of the Paper defendants supervised or directed the construction or disassembly of the Closet, so these defendants are entitled to dismissal of the common law negligence and Labor Law § 200 claims against them.

In fact, Gorman's work was limited to the metal frame of the Closet, which played no role in the accident. When the two upper tiers of the door fell, they had been detached from the metal frame for disassembly. Therefore, the record does not support a claim that Gorman was negligent in a manner that contributed to the accident. Thus, Gorman is entitled to dismissal of the common law negligence and Labor Law § 200 claims against it.

On the other hand, there is weighty testimonial evidence that 11th St. not only fabricated the scenic components of the Closet but also closely supervised and oversaw Local 1 workers, even providing the hardware to them. As issues of fact exist as to whether 11th St was negligent in its supervision of the injury-producing work and whether this negligence caused the accident, 11th St. is not entitled to dismissal of the common law negligence and Labor Law § 200 claims against it.

***The Cross-Claims for Contribution and Common Law Indemnification against Gorman, the Paper Defendants and 11th St.***

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation

marks and citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). "To establish a claim for common law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, as the claims of negligence against Gorman have been dismissed, no claim for contribution or common-law indemnification may lie against it either. As none of the Paper defendants directed, supervised or controlled the work of the Local 1 stagehands responsible for assembling the Closet, the Paper defendants are also entitled to dismissal of the cross-claims for contribution and common law indemnification against them. Defendant 11th St. moves for dismissal of any cross-claims asserted against it. However, as 11th St. has put forth no argument in support of said request, that part of its motion is denied.

***The Paper Defendants' Cross-Claims for Common Law and Contractual Indemnification Against Third-Party Defendant Lincoln Center***

Initially, the Paper defendants are entitled to summary judgment in their favor on their cross-claim for common law indemnification against Lincoln Center. As discussed previously, the Paper defendants played no role in the construction of or the striking of the Closet, nor did they have actual or constructive notice of any defect in the set that caused the accident.

Moreover, Local 1 stagehands, who were employees of Lincoln Center, were responsible for failing to properly affix the top two tiers of the Closet to its bottom tier.

With respect to contractual indemnification, prior to the date of the accident, 61 West entered into a lease agreement with Lincoln Center (the Lease Agreement), which included leasing of the Atrium where the accident took place. "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]).

Section 16.3 (a) of the Lease Agreement states in pertinent part that Lincoln Center, as tenant:

> [S]hall indemnify [61 West] against liability in connection with (i) the conduct or management of the premises . . . or any work or thing done, or any condition created (other than by Landlord, Superior Landlord . . . or their respective agents, employees or invitees) in or about the Premises during the Term . . . , (ii) any negligent or willfully wrongful act or omission of the Tenant or any occupant, subtenant or licensee or their respective employees, agents, contractors or invitees, (iii) any accident, injury or damage (except to the extent caused by the negligence . . . of the Landlord . . . . ) occurring in, at or upon the Premises

(the Paper defendants' notice of motion, exhibit DD, the Lease Agreement).

Paper, on behalf of Mattel, contracted with Lincoln Center for the use of the Atrium to stage the subject event (the Event Agreement). The Event Agreement states in pertinent part that Lincoln Center:

> [s]hall defend, indemnify and hold harmless the User Indemnitees set forth in Exhibit 4 as attached hereto and incorporated by reference herein, from and against

> . . . any and all Losses of any nature whatsoever resulting from or arising out of, in whole or in part, (i) the breach of [Lincoln Center] of any term of this agreement, (ii) the negligence, gross negligence, or willful misconduct of [Lincoln Center] or its . . . employees or agents . . . however, that [Lincoln Center] shall not be obligated to indemnify a User Indemnity . . . for any Losses that are determined by a final, non-appealable judicial determination to have been caused entirely by such User Indemnitee's gross negligence or willful misconduct

(the Paper defendants' notice of motion, exhibit FF, the Event Agreement). The "Indemnitees" listed in "Exhibit 4" include Paper and Mattel.

A review of the record indicates that the accident resulted from or arose out of the work of the Local 1 stagehands, all Lincoln Center employees, and there is no dispute that a degree of negligence was present in their work in constructing the west side doors. Therefore, the Paper defendants are entitled to summary judgment on the issue of contractual indemnification from Lincoln Center.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that defendant/third-party defendant Walter T. Gorman, P.E., P.C.'s (Gorman) motion pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims and counterclaims against it (motion sequence number 005) is granted, and the complaint and all cross-claims and counterclaims are severed and dismissed as against Gorman, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that so much of the motion of defendants Paper Communications, Inc. d/b/a/ ExtraExtra Mattel, Inc. (Mattel), Paper Products LLC d/b/a ExtraExtra (Paper) and 61 West 62 Owners Corp. (61 West) (collectively, the Paper defendants) (motion sequence number 006) as

seeks summary judgment dismissing the common law negligence and Labor Law §§ 200 and 241 (6) claims pursuant to CPLR 3212, as well as the cross-claims for contribution and common law indemnification against them, is granted; and it is further

**ORDERED** that so much of the Paper defendants' motion seeking summary judgment in their favor on their common law and contractual indemnification claims against third-party defendant Lincoln Center for the Performing Arts, Inc. is granted, and the motion is otherwise denied; and it is further

**ORDERED** that so much of the motion of defendant 11th St. Workshop Inc. (11th St.) pursuant to CPLR 3212 for summary judgment dismissing the Labor Law § 241 (6) claims against it (motion sequence number 009) is granted, and the motion is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

DATED: July 26, 2016

ENTER:

Ellen M. Coin, A.J.S.C.