SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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JOHN KLINGER,

Plaintiffs,

-against-

J & E ENTERPRISES, INC., INSTALLATION CONCEPTS, INC., J & E MOVING AND STORAGE, LLC, CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, CAPITAL BUILDERS GROUP, INC., MALL AT SMITH HAVEN, LLC, SPARKS CUSTOM RETAIL, LLC, and ABC CORPORATION 1-10 (fictitious names for unknown quantities),

Defendants.

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CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Third-party Plaintiff,

-against-

SPARKS CUSTOM RETAIL, LLC,

Third-party Defendant

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Index №.: 152972/2012
Motion Seq. Nos.:
002, 003, 004 and 005
Subm. Date: April 27, 2016

DECISION AND ORDER

ELLEN M. COIN, J.S.C.:

In a case involving a worker who was injured by a table saw, defendant/third-party plaintiff Cellco Partnership d/b/a Verizon Wireless (Verizon) moves pursuant to CPLR 3212 for summary judgment on its cross-claims for contractual indemnification and failure to procure insurance against defendant/third-party defendant Sparks Custom Retail, LLC (Sparks), as well as defendants Capital Builders Group, Inc. (Capital) and Installation Concepts, Inc. (Installation

Concepts);[1] Verizon also seeks costs and disbursements against each of these defendants (motion seq. No. 002). Installation Concepts, along with J & E Moving and Storage, LLC (J & E) and J & E Enterprises, Inc. (J & E Enterprises) move for summary judgment dismissing the complaint as against them (motion seq. No. 003). Capital moves for summary judgment dismissing all claims and cross-claims as against it, as well as for summary judgment on its common-law indemnification claims against Verizon and Installation Concepts (motion seq. No. 004). Finally, defendant/third-party defendant Sparks moves to dismiss plaintiff's negligence and Labor Law § 241 (6) claims, as well as the third-party complaint and any cross-claims against it (motion seq. No. 005). The motions are consolidated for disposition.

BACKGROUND

Plaintiff John Klinger injured his left thumb on June 3, 2011, while using a table saw provided to him without a safety guard or stabilizing stand (plaintiff's tr at 42, 72). More specifically, plaintiff was injured in the process of cutting a windowsill down to proper size for installation, as a co-worker helped position the windowsill (*id.* at 72-75). At the time, plaintiff was a foreman of J & E and he was working at a Verizon store in the Smith Haven Mall in Lake Grove, New York (*id.* at 22-23).

Capital was the general contractor for a project to remodel the Verizon store. However, the millwork that plaintiff was engaged in did not arise from work that Capital subcontracted for the remodeling project. Verizon contracted directly with Sparks to fabricate, among other things, the windowsills that plaintiff was cutting at the time of his accident. Sparks appears to have

[1] Verizon refers to Installation Concepts and J & E Enterprises, Inc. as a single entity, although they are not listed as such in the caption and refer to each other as distinct entities.

contracted with nonparty ICI of New England LLC (ICI New England) to install the millwork on the project, including the windowsills that plaintiff was cutting when he was injured. Although ICI New England was contracted to do the work, J & E performed the work, without a written subcontract, with tools provided by Installation Concepts. Erik Golbeck (Golbeck), the co-owner of ICI New England, Installation Concepts, and J & E, explained that while Installation Concepts and J & E are separate and distinct -- as Installation Concepts uses non-union labor while J & E uses union labor -- they have the same ownership, office space and tools (Golbeck tr at 147-148).

Plaintiff filed his complaint in May 2012. The first cause of action alleges negligence against all defendants, while the second and third causes of action allege negligent hiring against Verizon, Capital, and defendant Mall at Smith Haven, LLC (the Mall).[2] The fourth cause of action alleges violation of Labor Law § 241 against all defendants.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

[2] Pursuant to obligations under its lease, Verizon has undertaken defense on behalf of the Mall.

I. Verizon's Motion

Verizon seeks summary judgment against Sparks, Capital, Installation Concepts and J & E on its claims for contractual indemnification and failure to procure insurance.

A. Contractual Indemnification

Sparks

Verizon submits a copy of its contract with Sparks, executed in March 2010. The contract contains the following indemnification provision:

> [Sparks] shall defend, indemnify and hold harmless Verizon . . . from and against any claims, demands, lawsuits, damages, liabilities, loss, costs or expenses (including, but not limited to, reasonable fees and disbursements of counsel and court costs), and judgments, settlements and penalties of every kind ("Claims") that may be made: (a) by anyone for injuries (including death) to persons or damage to property, including theft, resulting in whole or in part from the acts or omissions of [Sparks] or those persons furnished by [Sparks], including its subcontractors (if any); (b) by persons furnished by [Sparks] and its subcontractors (if any) under Worker's Compensation or similar acts, [sic] (c) by anyone in connection with or based upon Products, Services, information or work provided by [Sparks] and its subcontractors, if any, or contemplated by this [a]greement, including [c]laims regarding the adequacy of any disclosures, instructions or warnings related to any such Products or Services; and (d) under any federal securities laws or under any other statute, at common law or otherwise arising out of or in connection with the performance by [Sparks] contemplated by this agreement or any information obtained in connection with such performance. The foregoing indemnification shall apply whether [Sparks] or [Verizon] defends such a [c]laim and whether the [c]laim arises or is alleged to arise out of the sole acts or omissions of [Sparks] (and/or any subcontractor of [Sparks]) or out of the concurrent acts or omissions of [Sparks] (and/or any subcontractor of [Sparks]) and [Verizon]. [Sparks] further agrees to bind its subcontractors, if any, to similarly indemnify, hold harmless and defend [Verizon]

(Verizon/Sparks agreement, §26.1).

The Verizon/Sparks agreement is denominated as a "General Purchase and Services Agreement." While it makes reference to Verizon purchasing goods from Sparks (Verizon/ Sparks § 4.1 - § 4.6), it places no specific obligation on Sparks to install those goods. However, Verizon submits the testimony of its own project manager, Stephen Stolarski, who testified that Sparks had contracted to "manufacture and install the millwork" (Stolarski tr at 101). While Verizon provides a contract between itself and Capital, as well as itself and Installation Concepts, it provides no agreement between Sparks and Capital, Installation Concepts, or J & E.

In opposition, Sparks argues that since it was not present at the jobsite when plaintiff's accident occurred, there is no evidence that the accident was caused by any of its acts or omissions. Moreover, citing to *Gonzalez v Magestic Fine Custom Home* (115 AD3d 796 [2d Dept 2014]), Sparks argues that summary judgment is precluded because a question of fact exists as to Verizon's negligence in the subject accident (115 AD3d at 798 ["[a]lthough a clause in a construction contract that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such a clause may be enforced where the party to be indemnified is found to be free of any negligence"]).

Here, Verizon has failed to make a prima facie showing of entitlement to summary judgment on its claim for contractual indemnification against Sparks. Verizon maintains that the indemnification provision in its contract with Sparks is applicable because the acts or omissions of Capital and Installation Concepts, which Verizon characterizes as Sparks' subcontractors, triggered the indemnification provision. However, Verizon fails to make an evidentiary showing that Capital or Installation Concepts were Sparks' subcontractors on this project. Instead,

Verizon submits contracts which demonstrate that Capital and Installation Concepts contracted directly with Verizon.

While Sparks' witness, Katherine Sheneman (Sheneman), in responding to questions at her deposition, seemed to tacitly acknowledge that Installation Concepts was Sparks' subcontractor (*see* Sheneman tr at 65-68), Verizon provides no portion of Sheneman's transcript that shows that she had direct knowledge of any subcontract agreement between Sparks and Installation Concepts. Similarly, Verizon's Stolarski testified that Sparks hired Installation Concepts (Stolarski tr at 87), but Verizon fails to show that Stolarksi had any direct knowledge of a contract between Sparks and Installation Concepts. This is not enough to establish a prima facie showing that Installation Concepts was Sparks' subcontractor. Thus, Verizon has failed to establish that the indemnification provision is applicable against Sparks, and the branch of its motion seeking summary judgment on its claim for contractual indemnification against Sparks must be denied.

Capital

Capital's agreement with Verizon to serve as the general contractor for a project to remodel a Verizon store was executed in April 2011. It contains an indemnification provision functionally identical to the one, quoted above at length, in the Verizon/Sparks agreement. Verizon argues that the indemnification provision was triggered because Capital's failure to properly supervise plaintiff's work caused the accident. Verizon points to another section of its contract with Capital, which provides that Capital "shall supervise and direct the Work using its best skill and attention" and that Capital "shall be solely responsible for all construction means,

methods, techniques, sequences and procedures and for coordinating all portions of the [w]ork" (Verizon/Capital agreement, § 8.1.2).

Capital initially argues that Verizon's motion is procedurally defective under CPLR 3212 (b), because it fails to submit the answer of any defendant outside of itself and because it submits only portions of various deposition transcripts. Next, Capital argues that, in any event, the indemnification provision was not triggered because it had no role in plaintiff's accident.

Capital notes that plaintiff's work was outside the scope of its contract with Verizon and that Verizon separately contracted for the millwork that was involved in plaintiff's accident. Capital submits the affidavit of its vice president, Kenneth Mitchell, who averred that Capital subcontracted with parties who provided work on wall coverings, insulation, demolition, electrical installation, drywall and carpentry, HVAC services, tiles, roofing, structural work and shoring, and glass (Mitchell aff, ¶¶ 3-5). However, Mitchell testified that Capital did not subcontract any of the millwork (*id.*, ¶ 6). This point is not contested.

Next, Capital argues that Verizon, not it, supervised plaintiff's work. It submits plaintiff's deposition testimony, in which plaintiff states that he reported only to Verizon's Stolarski, that Stolarski typically previewed the scope of the work each morning, and that it was Stolarski who responded to his accident (plaintiff's tr at 64-67, 88). Capital argues that as it provided no actual supervision over plaintiff's work, the accident did not arise from its acts or omissions.

Capital is correct that the indemnification provision is not triggered against it, as the accident did not arise from any of its acts or omissions. As Capital had no role in plaintiff's

accident, Verizon's only remaining argument for implementation of the indemnification provision is that Capital had a duty to supervise plaintiff's work and that its failure to do so caused the accident. However, despite Verizon's arguments, nothing in Capital's contract with Verizon places a burden on Capital to supervise work outside the scope of the contract, such as the millwork involved in plaintiff's accident. Accordingly, the branch of Verizon's motion seeking contractual indemnification against Capital must be denied.

Installation Concepts

Despite its claim that Installation Concepts was Sparks' subcontractor, Verizon submits an agreement between itself and Installation Concepts containing an indemnification provision that is functionally identical to the one quoted at length above (Verizon/Installation Concepts agreement, §§ 23.1 - 23.2). Verizon argues that the indemnification provision is triggered because plaintiff's accident was caused by the failure of his "employer" to supply him with a table saw without a safety guard.

In opposition, Installation Concepts and J & E delve into the muddy contractual waters from which plaintiff's work on the subject project arose. Installation Concepts and J & E produce a purchase order, dated April 5, 2011, issued by Sparks to ICI New England LLC for "installation for Lake Grove, New York," as well as a one-page subcontract between Sparks and ICI New England dated February 24, 2011.[3]

Installation Concepts and J & E offer an affidavit from Golbek, who states, "I am one of the two owners of [Installation Concepts], [J & E], [ICI New England], and the now defunct J &

[3] Verizon did not submit this evidence to support its motion against Sparks.

E Enterprises, Inc. [J & E Enterprises]" (Golbeck aff, ¶ 1). Golbeck states that while Installation Concepts and J & E shared office space, ICI New England operated from a separate office in Worcester, Massachusetts (*id.*, ¶¶ 3-4).

As to the contractual relationships, and the contract between Verizon and Installation Concepts, Golbek testified that while Installation Concepts "has worked directly for Verizon, and has contracted with Verizon in the past for services, they were not hired to do work at the Verizon store where plaintiff was injured by either [Verizon] or [Sparks]" (*id.*, ¶ 10). Explaining how J & E ended up doing the work when ICI New England was contracted to do it, Golbek states that J & E "is the labor end of our business, they provided labor for this job . . . on behalf of [ICI New England]. They also provide labor for Installation Concepts jobs" (*id.*, ¶ 12).

With that background, Installation Concepts argues that contractual indemnification is inappropriate because the agreement between itself and Verizon did not involve the subject store renovation. It relies on Golbek's affidavit, particularly his statement that Verizon did not hire it to do the subject work (*id.*, ¶ 10). Verizon, in reply, points to Golbek's deposition transcript, in which he testified that the contract between Installation Concepts and Verizon was in effect at the time of the accident (Golbek tr at 78-80).

Golbek's deposition testimony, however, while acknowledging that the service agreement between Verizon and Installation Concepts was in effect, does not address the question of whether the agreement applied to the subject work. Section 4.2 of the agreement provides, in relevant part, "This is an as-ordered Agreement and does not by itself order any Service. Verizon shall order Service by submitting an Order in accordance with the terms of this Agreement

specifying the Service and price set forth in Exhibit A." Thus, in order for this agreement to have applied to the subject work, Verizon would have had to place a specific order for the work with Installation Concepts. As Verizon has failed to produce evidence that the Installation Concepts agreement applied to the subject work, the branch of its motion seeking summary judgment as to liability on its contractual indemnification claim against Installation Concepts must be denied.

B. Failure to Procure Insurance

Although Verizon seeks summary judgment for breach of contract for failure to procure insurance against "all defendants," it makes specific arguments only against Sparks and Capital.

Sparks

Verizon argues that while Sparks presented it with proof of insurance, it was for a policy that was insufficient. Verizon submits its contract with Sparks, which requires that Sparks maintain "Commercial General Liability Insurance" with "limits of at least $2,000,000, combined single limit for each occurrence" (Verizon/Sparks Agreement, § 27.1.1). Verizon submits Sparks' policy, on which it was an additional insured, with a combined single limit of $1,000,000.

Sparks does not make any arguments in opposition to Verizon's summary judgment motion on this claim. "[A] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570, 571 [2d Dept 2014][internal quotation marks and

citations omitted). Here, Verizon submits evidence that the provision in the Verizon/Sparks contract requiring Sparks to procure insurance was only partially complied with, in that Sparks obtained insurance with a $1,000,000 combined single limit, instead of a $2,000,000 combined single limit, as it was required to do. As such, Verizon is entitled to summary judgment on the issue of liability against Sparks for failure to procure insurance.

Capital

Verizon argues that Capital has breached its obligation to procure insurance because its insurer refused to provide coverage to Verizon because the accident was not within the scope of Capital's employment. However, an insurer's refusal to indemnify or tender coverage is not proof of a failure to procure insurance (*see Sicilia v City of New York*, 127 AD3d 628 [1st Dept 2015]). The insurer's refusal tender coverage here is reasonable, as Verizon has failed to show that the accident arose out of Capital's work. Therefore, the branch of Verizon's motion that seeks summary judgment on this cause of action is denied.

II. J & E Enterprises, J & E, and Installation Concepts' Motion

J & E Enterprises

J & E Enterprises, J & E and Installation Concepts (the J & E defendants) argue that J & E Enterprises should be granted summary judgment because it was no longer in business at the time of plaintiff's accident. In support, the J & E defendants submit Golbek's affidavit, in which he states:

> I mistakenly testified at my deposition that on the date of plaintiff's accident, he was an employee of J & E Enterprises, Inc. In 2011, J & E Enterprises, Inc. was a defunct business and no longer doing any business. Defendant J & E Enterprises stopped doing business in 2010 and filed their final tax returns in 2011 . . . J & E

> Enterprises did not have any relationship or involvement whatsoever with the Verizon store in the Smith Haven Mall where plaintiff was injured in 2011

(Golbek aff, ¶¶ 5-7).

The J & E defendants also submit plaintiff's deposition, in which he testifies that he received paychecks from J & E, rather than J & E Enterprises for the subject project (plaintiff tr at 32-34). Finally, the J & E defendants submit the 2010 tax return that showed no income for J & E Enterprises for that year.

Plaintiff opposes summary judgment, citing *Lupinsky v Windham Constr. Corp.* (293 AD2d 317, 318 [1st Dept 2002]), which held that "[g]enerally, a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded." This principle is inapposite. Golbek's statement is not self-serving, as it implicates another entity he controls as plaintiff's employer. Moreover, the affidavit is not the only evidence that suggests that plaintiff worked for J & E and that J & E Enterprises was defunct by the time the accident occurred. Plaintiff himself testified that he worked for J & E and tax records indicate that J & E Enterprises had no income in 2010, corroborating Golbek's testimony that J & E Enterprises went out of business the year before plaintiff's accident. Thus, as J & E Enterprises has made an unrebutted showing that it was out of business and was not plaintiff's employer at the time of the accident, it is entitled to summary judgment dismissing all claims and cross-claims against it.

J & E

J & E argues that as plaintiff's employer, it has no liability to plaintiff under Workers' Compensation Law §§ 11 and 29 (6). Courts have long held that under the Workers'

Compensation Law, "[a]s a general rule, when an employee is injured in the course of his employment, his sole remedy against his employer lies in his entitlement to a recovery under the Workers' Compensation Law" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 156 [1980]). Here, plaintiff has testified that at the time of his accident, he worked for J & E. Moreover, J & E issued checks to plaintiff and his W-2 Wage and Tax Statement listed J & E as his employer. Thus, it is clear that J & E was plaintiff's employer.

Plaintiff argues that J & E should be denied dismissal, as New Jersey law should apply to the question of whether he is allowed to recover for his injuries from his employer. "The first step in any choice-of-law analysis is to determine if there is actually a conflict between the laws of the competing jurisdictions" (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]). "If no conflict exists, then the court should apply the law of the forum state in which the action is being heard" (*Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd* 3 NY3D 577 [2004]). "To find that there is an 'actual conflict,' the laws in question must provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant *possible* effect on the outcome of the trial'" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013] [citations omitted]).

Plaintiff concedes that an "intentional wrong" is an exception to the exclusive remedy provisions of the workers' compensation laws in both New York and New Jersey. However, plaintiff contends that the states differ in how they interpret "intentional wrong." In support, plaintiff cites to a case from New York, *Acevedo v Consolidated Edison Co. of N.Y.* (189 AD2d 497 [1st Dept 1993]), and one from New Jersey, *Mull v Zeta Consumer Prods.* (176 NJ 385 [Sup

Ct, NJ 2003]) that each use the term, as well as to a case from a federal district court that interprets the meaning of "intentional wrong" in both states (*In re Air Crash Near Clarence Ctr.*, 882 F Supp 2d 405 [WD NY 2012]).

In *Acevedo*, the First Department, discussing the exception to the exclusivity provisions of New York's Workers' Compensation law, held:

> To sufficiently plead an intentional tort that will neutralize the statute's exclusivity there must be alleged an intentional or deliberate act by the employer directed at causing harm to the particular employee. In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury ... A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue

(189 Ad2d 497 at 500-501 [internal quotation marks and citation omitted]).

In *Mull*, the Supreme Court of New Jersey held that "in order for an employer's act to lose the cloak of immunity" granted by New Jersey's Workers' Compensation law, "two conditions must be satisfied":

> (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize

(176 NJ at 391 [internal quotation marks and citation omitted]).

The federal district court case, *In re Air Crash Near Clarence Ctr.*, held that the plaintiff sufficiently pled a claim for the "intentional act" exception to New Jersey's Workers' Compensation law (882 F Supp 2d at 411). The Court held that New Jersey law should apply, as "New York generally applies the law of the state where workers'

compensation benefits are paid, because that state has the greater interest in having its law applied on that issue," and the plaintiff was paid compensation benefits in New Jersey, which is also "where the workers' compensation insurance carrier and claims administrator is located" (*id.* at 410). While the Court took for granted that there is conflict between New Jersey and New York law as to the "intentional act" exception, it did not analyze New York "intentional act" jurisprudence.

Here, there may be a substantive difference in the nature of the exceptions that New York and New Jersey afford to the exclusivity provisions of their respective workers' compensation laws. That is, New Jersey's exception appears to be somewhat broader than that of New York, as the intentional conduct in New York must be directed at a specific employee. The next question is whether this difference could possibly have a significant outcome on the trial.

Here, the answer is no. New Jersey's "intentional wrong" exception is not so broad that it would apply in the present circumstances. Plaintiff's injury is not "plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize." That is, J & E's failure to furnish plaintiff with a guard for his saw is typical of the kind of conduct that subjects employers to liability for workplace injuries.

In contrast, the New Jersey Supreme Court, in *Laidlow v Hariton Mach. Co., Inc.* (170 NJ 602, 617-618 [2002]), held that "although the alteration or removal of a safety device is not an intentional wrong as a matter of law, a specific set of facts might, nonetheless, meet the standard." The Court further held that the plaintiff had raised a

triable issue of fact on the issue of "intentional wrong" where several indicia of intent, not present here, were alleged (170 NJ 619-623). First, the *Laidlow* plaintiff, who injured his hand while operating a rolling mill with no safety guard, had "asked his supervisor three times to restore the guard because the unguarded machine was dangerous" (170 NJ at 621). Secondly, his employer, who removed the guard for the purposes of speed and efficiency, only re-attached it "when OSHA inspectors came," in order to deceive the inspectors. The employer then had the guard removed again, despite the fact that it knew that there had been "prior close calls," where serious injury had nearly occurred because of its intentional decision to remove the guard" (*id.* at 621-622).

Here, there are no allegations of J & E intentionally removing the guard, deceiving OSHA, or any other facts that would make the furnishing of a guard-less saw intentional conduct under New Jersey law. Accordingly, there is no conflict of law here and New York law applies.

While plaintiff argues that he told Installation Concepts' Pat Crilley (Crilley) that he needed a better stand for the table saw because the existing stand was more dangerous than none (plaintiff's tr at 236-237), he did not advise anyone at Installation Concepts or J & E of the lack of a guard for the table saw (*id.* at 238). Under New York law, as under New Jersey law, J & E is entitled to the protection of the exclusivity provisions, since it was plaintiff's employer and it did not intentionally injure plaintiff.

In opposition, Verizon asks the court to convert its contractual indemnification cross-claim against J & E into a third-party claim. However, that claim is baseless, as

Verizon has failed to submit a contract between itself and J & E on which it might base such a claim for contractual indemnification. Thus, Verizon's application to convert its cross-claim is denied.

Moreover, J & E is entitled to dismissal of all cross-claims against it because there is no allegation of grave injury (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415 [2004]).

Installation Concepts

Installation Concepts argues that it, like J & E, should be shielded from liability by the exclusivity provisions as it was, essentially, J & E's alter ego. In support, Installation Concepts relies on *Paulino v Lifecare Transport*. (57 AD3d 319 [1st Dept 2008]), which granted summary judgment on the ground that the suit was barred by the exclusivity of the remedy under Workers' Compensation Law § 11. The court found that "defendants, as well as plaintiff's nonparty employer, were all part of a single integrated entity in that they operated under the control of the same parent corporation, shared payroll services and an employee manual, and were covered by the same workers' compensation insurance policy" (57 AD3d at 319). Installation Concepts also relies on *Hernandez v Sanchez* (40 AD3d 446, 447 [1st Dept 2007]), in which the First Department similarly held plaintiff's claims barred against related entities that were owned by the same parent, had the same officers and members on their board of directors, operated out of the same premises, used the same computers and telephone, were covered by the same insurance policies and "otherwise function as one in their day-to-day operations."

In support, Installation Concepts points to various areas of overlaps between itself and J & E. Golbek lays out the case in his affidavit, where, aside from stating that, together with Jim Skillen, he owned both companies, he states:

> Installation Concepts is a furniture and fixture company and [J & E] is our labor company . . . . [J & E] is the labor end of our business, they provided labor for this job at Smith Haven on behalf of ICI of New England. They also provided labor for Installation Concepts jobs . . . Installation Concepts and [J & E] work at the same location. [J & E] uses Installation Concepts' trucks with Installation Concepts' logos to perform their work. [J & E] uses Installation Concepts owned tools to do their work, including the saw involved in plaintiff's accident. They share the same space and facilities. John Klinger was a foreman for [J & E]. He worked at the joint Installation Concepts/[J.E.] warehouse in New Jersey. He got his direction as to where to go on a day to day basis from Installation Concepts Operations Manager Pat Crilly, who sent him to the Smith Haven mall . . . on the date in issue . . . . Furthermore, [plaintiff], as foreman, had a company card provided to him by Installation Concepts for his job expenses. That balance was paid by Installation Concepts . . . . [J & E] employees are directed by myself, Mr. Skillen and Pat Crilley, Operations Manager for Installation Concepts . . . . All of our companies above named used the same payroll service . . . . While they were separately incorporated, it was because [J & E] was formed to provide labor on jobs . . . . The employees of Installation Concepts and [J & E] actually functioned as one company under the direction of myself, Mr. Skillen and Pat Crilley of Installation Concepts. Installation Concepts and [J & E] used the same computers and telephone systems. They had the same executive officer and owners. They used the same facilities, equipment and tools. Furthermore, Installation Concepts purchased the Worker's Compensation Insurance Policy and the General Liability Insurance Policy that covered [J & E]

(Golbek aff, ¶¶ 9-12).

Plaintiff argues in opposition that there is no true integration between Installation Concepts and J & E, as the two entities have separate workforces. However, in *Hernandez* the injured plaintiff and the defendant who caused his injury were employees of the separate companies found by the court to be so integrated as to share the exclusivity protection of the

Workers Compensation law. Plaintiff cites *Buchner v Pines Hotel, Inc.* (87 AD2d 691 [3d Dept 1982], *affd* 58 NY2d 1019 [1983]). In *Buchner*, the trial court directed a trial on the issue of whether two related entities were in fact engaged in a joint venture and found, after the trial, that they were not (*id.* at 691). On appeal, the Third Department upheld the trial court's decision. In *Buchner* the entities were a parent company and its subsidiary, and had a lessor-lessee relationship. The appellate court reasoned that although the entities had significant overlap, the trial court was correct to respect the entities' decisions about how to organize themselves, as it was only fair that they receive the consequences, as well as the benefits, of formal separation:

> a business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee

(*id.* at 692 [internal quotation marks and citation omitted]).

Here, all the Court has before it on which to rest a finding that Installation Concepts should be shielded by exclusivity, is an affidavit from an interested party, Golbek. In these circumstances, where there has been little discovery into this issue, Installation Concepts fails to make a prima facie showing of entitlement to judgment, as there remains a question of fact as to whether J & E and Installation Concepts were so integrated as to warrant protection for Installation Concepts. Thus, the branch of the motion seeking dismissal of all claims and cross-claims against Installation Concepts must be denied. However, the branch of the motion seeking dismissal of plaintiff's Labor Law § 241 (6) claims as against Installation Concepts must be granted, as the record clearly establishes that Installation Concepts was neither an owner nor a

general contractor, nor an agent of either (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

III. Capital's Motion

Plaintiff's Claim for Negligent Hiring

Capital argues that this claim should be dismissed, as it did not hire anyone who was involved in the accident. Plaintiff does not respond to Capital's arguments and has thus effectively abandoned his claim for negligent hiring against Capital (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] [holding that the "plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"]). Accordingly, the branch of Capital's motion seeking dismissal of this claim is granted.

Sparks' Cross-Claim for Additional Insured Coverage from Capital

Capital argues that this claim should be dismissed as there was no contract between Capital and Sparks. As Sparks has failed to furnish one, or explain why this claim should be preserved, this branch of Capital's motion is granted.

Negligence

Capital argues that plaintiff's negligence claim against Capital, and the cross-claims of Sparks, J & E, Installation Concepts, J & E Enterprises for common-law indemnification and contribution should be dismissed as against it, as it had no supervisory control over plaintiff's work. Although plaintiff has not specifically pled a violation of Labor Law § 200, a negligence claim made in the context of a construction project is generally governed by Labor Law § 200, which "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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

This accident clearly arose from the methods and materials of plaintiff's work. Thus, plaintiff has to show supervisory control over the work. As discussed above in the context of Verizon's motion, Capital exercised no supervisory control over plaintiff's work. More broadly, it is clear that Capital owed no duty to plaintiff, as plaintiff was not working on the same project as Capital, but was working under a separate agreement Verizon made directly with ICI of New England. Accordingly, the court grants the branch of Capital's motion that seeks dismissal of plaintiff's negligence claims, together with all cross-claims for contribution (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [holding that contribution requires some degree of active culpability] and common-law indemnification (*see McCarthy v Turner Constr.,*

Inc., 17 NY3d 369, 374-375 [2011] [holding that common-law indemnification requires active fault]).

Common-law Indemnification Against Installation Concepts and Verizon

Capital argues in the alternative that if plaintiff's negligence claims against it are not dismissed, then it is entitled to summary judgment as to common-law indemnification against Installation Concepts and Verizon. As the Court is granting dismissal of plaintiff's negligence claims against Capital, this alternative branch of its motion is moot.

Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross*, 81 NY2d at 501-502, quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Capital and plaintiff differ as to whether plaintiff's Labor Law § 241 (6) claim should be dismissed because plaintiff has failed to allege any violation of a specific Industrial Code violation in its amended complaint and bill of particulars. Instead, plaintiff alleges specific Industrial Code violations in its opposition. That will not avail.

Moreover, the Labor Law § 241 (6) claim must be dismissed as against Capital because it was not an owner or general contractor, or agent of either, with respect to the work involved in plaintiff's accident and had no oversight of it (*see Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 341 [1st Dept 2007] [citations omitted]; *cf Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). As discussed above in relation to Verizon's motion, the work plaintiff was doing when he was injured was outside the scope of Capital's contract. Thus, plaintiff's Labor Law § 241 (6) claim must be dismissed as against Capital.

Verizon's Claims for Contractual Indemnification and Breach of Contract For Failure to Procure Insurance

As discussed at length above, the indemnification provision in Verizon's contract with Capital was not triggered. Accordingly, the branch of Capital's motion seeking dismissal of Verizon's cross-claim for contractual indemnification must be granted. Verizon fails to oppose the branch of Capital's motion seeking dismissal of its claim for breach of contract for failure to

procure insurance. Thus, that claim is dismissed as abandoned. To the extent that Verizon articulated a basis for this claim in its own motion, that basis -- the insurer's decision not to tender coverage to Verizon -- is invalid, as discussed above (*see Sicilia*, 127 AD3d at 629).

IV. Sparks' Motion

It is clear that Sparks has no liability to plaintiff. As discussed above in relation to Verizon's motion, Sparks had no presence at the Verizon store, and is only involved in the case because it fabricated the windowsills involved in plaintiff's accident. There are no allegations that the windowsills were defective. Thus, it is clear that Sparks was not negligent. Accordingly, the branch of Sparks' motion seeking dismissal of plaintiff's amended complaint as against it is granted. The lack of any negligence by Sparks also requires the dismissal of all cross-claims against Sparks, except for Verizon's claim for contractual indemnification.

As discussed above, Verizon's claim for contractual indemnification is based on the allegation that actions of Sparks' subcontractor gave rise to this lawsuit. There is a question of fact as to whether Installation Concepts and J & E were subcontractors of Sparks. Thus, there is also a question of fact as to whether the indemnification provision between Sparks and Verizon is triggered. Accordingly, the branch of Sparks' motion seeking dismissal of Verizon's contractual indemnification claim is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant/third-party plaintiff Cellco Partnership d/b/a Verizon Wireless (motion seq. No. 002) for summary judgment on its claims for contractual

indemnification and breach of contract for failure to procure insurance is denied, except for the branch of the motion that seeks summary judgment against defendant Sparks Custom Retail, LLC for failure to procure insurance, which is granted; and it is further

ORDERED that the motion of defendants Installation Concepts Inc., J & E Moving and Storage, LLC, and J & E Enterprises, Inc. for summary judgment dismissing all claims against them is resolved as follows:

- The branch of the motion seeking dismissal of all claims and cross-claims as against defendant J & E Enterprises, Inc. is granted;
- The branch seeking dismissal of all claims and cross-claims as against J & E Moving and Storage, LLC is granted;
- The branch seeking dismissal of all claims and cross-claims as against Installation Concepts is denied;

and it is further

ORDERED that the motion of defendant Capital Builders Group Inc. (motion seq. No. 004) for summary judgment dismissing all claims and cross-claims as against it is granted; and it is further

ORDERED that the motion of defendant/third-party defendant Sparks Custom Retails, LLC for summary judgment dismissing all claims and cross-claims as against it (motion seq. No. 005) is granted except for defendant/third-party plaintiff Cellco Partnership d/b/a Verizon Wireless's claim for contractual indemnification, which remains.

Dated: October 13, 2016

ENTER:

ELLEN M. COIN, J.S.C.