Bilyk v Empire State Realty Trust, Inc.
2017 NY Slip Op 30714(U)
April 12, 2017
Supreme Court, New York County
Docket Number: 154152/14
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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ANATOLE BILYK,

Plaintiff,

-against-

EMPIRE STATE REALTY TRUST, INC., COTY, INC., BENCHMARK BUILDERS, INC. and ESRT EMPIRE STATE BUILDING, LLC as successor in interest to EMPIRE STATE BUILDING COMPANY, LLC,

Defendants.

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Index No.: 154152/14

DECISION/ORDER

Mot. Seq. 002 and 003

KELLY O'NEILL LEVY, J.:

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for injuries sustained by a carpenter on April 2, 2013, when, while working at a construction site located on the 17th floor of the Empire State Building (the Premises), the top of the cabinet that he was moving fell and struck him.

In motion sequence number 002, plaintiff Anatole Bilyk moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim as against defendants Empire State Realty Trust, Inc. (Empire State Realty), Esrt Empire State Building, LLC, as successor in interest to Empire State Building Company, LLC (the Empire State Building) (together, the Empire defendants), Coty, Inc. (Coty) and Benchmark Builders, Inc. (Benchmark) (together, the Coty defendants).

In motion sequence number 003, the Empire 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 claim for contractual indemnification against

Coty.

The Coty defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them.

BACKGROUND

On the day of the accident, the Empire State Building owned the Premises where the accident occurred. The Empire State Building leased the Premises to Coty, a manufacturer of cosmetics and fragrances. Pursuant to a construction contract, Coty hired Benchmark to serve as the general contractor on a renovation project underway at the Premises, which entailed the construction of new offices for Coty (the Project). Pursuant to a purchase order, Benchmark hired plaintiff's employer, nonparty Island Architectural Woodwork (Island), to install wooden doors, wall panels and display cabinets at the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that he was employed by Island as a carpenter on the day of the accident. Plaintiff asserted that his foreman gave him his daily assignments and instructed his work. When asked if he ever took instruction from anyone else, plaintiff replied, "No" (plaintiff's tr at 142). Plaintiff further testified that Island provided all of the power tools that he needed to perform his work, and that he provided his own hand tools. Plaintiff maintained that he never complained about anything to anyone associated with the Empire State Building.

Plaintiff explained that at the time of the accident, he was helping his Island coworkers install a display cabinet at the Premises. The cabinet was approximately eight to 10 feet high, approximately four feet long and approximately four feet wide. The cabinet was to eventually have a glass front and back. However, at the time of the accident, the glass had not yet been

installed.

Due to its heavy weight, it was necessary for four Island carpenters, one on each corner, to move the cabinet to the niche that had been built to accommodate it. Plaintiff explained that the top of the cabinet, which was between six and 10 inches high, was attached to the cabinet's two side panels with "biscuits," which were glued into Lamello joints, or grooves. These grooves were cut into the top of each of the side panels, which were made of particle board.

Just prior to the accident, two of the men were pulling the cabinet into place as plaintiff and another coworker pushed it. The men had moved the cabinet about 16 to 20 inches when the top of the cabinet suddenly detached and fell five or six feet down between the cabinet's side panels, striking plaintiff on his right arm. Plaintiff maintained that the top of the cabinet weighed between 100 and 200 pounds.

After the accident, plaintiff and his coworkers looked inside the cabinet to ascertain what had caused the top of the cabinet to detach from the side panels. After inspecting the biscuit joints, they concluded that the glue "just didn't hold, didn't do the job" (plaintiff's tr at 52-53). Plaintiff did not know where the cabinet was assembled or who had assembled it.

Deposition Testimony of Eugene Sikorski (Island's Foreman)

Eugene Sikorski testified that he was Island's foreman on the day of the accident, and that he performed physical work on the Project as well. On the day of the accident, Island was installing doors, cabinets, wall panels and other wood items at the Premises, pursuant to a purchase order between Island and Benchmark. As foreman, Sikorski instructed his workers regarding what to do, and then he personally assisted them with the tasks. Sikorski maintained that he did not have any communication with anyone from the Empire State Building.

Sikorski explained that, on the day of the accident, he and his men were assembling and installing one of several display cabinets, which would later feature Coty's merchandise. At the time of the accident, the subject cabinet, which was delivered to the Premises in pieces, was not yet fully assembled, as the cabinet's front and back glass were still missing. Sikorski could not recall who attached the top of the cabinet to its two side panels. When asked to explain how the top of the cabinet was attached to its sides, Sikorski replied, "Definitely was done with the drill, with the screws and drill" (Sikorski tr at 29).

Sikorski testified that, because the cabinet was so heavy, it took four men to move it. As the men were moving the cabinet, its top piece, which weighed between 25 and 30 pounds, came loose and fell, striking plaintiff's arm. Sikorski did not know what caused the top of the cabinet to fall. As far as he was aware, there was no bracing inside the cabinet to connect the top to the sides of the cabinet.

Deposition Testimony of James Higgins (Island Carpenter)

James Higgins testified that he was employed by Island as a carpenter on the Project on the day of the accident. At the time of the accident, he was installing the subject cabinet with the assistance of his coworkers. The cabinet weighed approximately 100 pounds, and the top piece of it weighed approximately 20 to 30 pounds. The cabinet was shipped to the job site in four pieces, along with the materials for its assembly. Higgins explained that the top of the cabinet was attached to its side panels with dowels and screws, which were placed into pre-drilled holes. Higgins did not know what caused the top of the cabinet to come loose from the side panels.

Deposition Testimony of Phillip Henry, Jr. (Coty's Facilities Manager)

Phillip Henry, Jr. testified that he was Coty's facilities manager on the day of the

accident. He explained that Coty leased the Premises from the Empire State Building. At the time of the accident, the Premises were being renovated to construct new offices for Coty. Benchmark served as general contractor on the Project. As part of the Project, Coty was having four display cabinets installed. Henry testified that he never communicated with the owner of the Premises with regard to the Project.

Deposition Testimony of David Bouchard (Benchmark's Superintendent)

David Bouchard testified that he was Benchmark's superintendent on the day of the accident. He explained that Island was installing display cabinets at the Premises on the day of the accident. The cabinets were delivered to the Premises in separate sections and then put together by Island workers. While Bouchard coordinated with Island's foreman to ensure that the cabinets were being installed on schedule, Benchmark did not assist with the cabinet's installation in any way.

Deposition Testimony of Robert Pender (The Empire State Building's Assistant Director of Operations)

Robert Pender testified that he was the Empire State Building's assistant director of operations on the day of the accident. He also worked as the tenant coordinator for the building. As tenant coordinator, Pender served as the liason between the owner of the building, the Empire State Building, and its tenants. Pender testified that he had no role whatsoever in the Project, nor was he aware of the Empire State Building having any role. He also asserted that the Empire State Building did not provide any supervision or equipment for the work being done at the Premises.

Affidavit of Plaintiff's Expert Joseph A. Sage

In his affidavit, architect, cabinet maker, and woodworker Joseph A. Sage stated that

plaintiff's accident occurred "due to the lack of proper bracing necessary to secure [the top piece] to the sides of the cabinet during the particular moving and installation process" (plaintiff's notice of motion, exhibit A, Sage aff). As a result, the "approximately 23-pound header . . . fell at least four feet from the effects of gravity and caused [plaintiff] serious injury when it struck him on his arm" (*id.*). However, Sage could not "precisely determine how the top portion was secured, because there was insufficient detail on the installation drawings . . . and the inner portion of the [top] was hidden from view during inspection by the nature of the installation itself" (*id.*). He noted that, in any event, as it was "evident the cabinet assembly was inherently weak since it was not supported on its sides . . . [t]here should have been bracing for the cabinet during shipping and right up to the point the cabinet was moved into its final position" (*id.*).

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]).

Initially, as asserted by the Empire defendants, Empire State Realty did not have any connection to the Premises on the day of the accident. Empire State Realty, which is a self-administered and self-managed real estate investment trust formed to manage real estate assets, did not become involved in the ownership and/or management of the Empire State Building's assets until October 7, 2013, about six months after the date of the accident. It should also be noted that plaintiff does not oppose this assertion.

Thus, Empire Realty is entitled to dismissal of all claims and cross claims asserted against it. Therefore, in the remainder of this decision, discussions involving the Empire defendants will be in reference to the Empire State Building only.

The Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against the Empire defendants and the Coty defendants. In their separate motions, the Empire defendants and the Coty defendants move for dismissal of the same. 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]).

Initially, the Empire defendants, as the owner of the Premises, and Benchmark, as the general contractor on the Project, may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined whether Coty, as a tenant, may also be liable for plaintiff's injuries under the statute.

As to Coty, "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has not been limited to titleholders but has 'been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008]; *Lacey v Long Is. Light. Co.*, 293 AD2d 718, 718-719 [2d Dept 2002]).

Here, Coty was a party to a lease (the Lease) in regard to the Premises, and it hired Benchmark to serve as general contractor for the Project, which entailed the construction of its offices. Therefore, as Coty had an interest in the property and fulfilled the role of owner by contracting for work for its benefit, it is to be considered an owner for the purposes of Labor Law § 240 (1).

That said, plaintiff has established prima facie that defendants failed to provide appropriate safety devices to properly secure the top of the cabinet so as to keep it from falling while it was being moved into place and that this breach was a proximate cause of his injuries (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 479-480 [1st Dept 2007] [partial summary judgment properly granted where plaintiff, while performing asbestos removal work, was injured when he was struck by a pipe that fell from above, and the record established that no safety devices were provided]). It is well settled that "[a]bsolute liability for falling objects under Labor Law § 240 (1) arises . . . when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506-507 [2d Dept 2007]).

In opposition to plaintiff's motion and in support of their own motions, the Empire defendants and the Coty defendants argue that plaintiff must show more than that an object, i.e., the cabinet's top, fell causing injury to a worker; he must show that the object fell while being hoisted or secured.

However, importantly, case law dictates that a falling object need not be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240 (1). It is enough that said object simply needed securing "'for the purposes of the undertaking'" (*Moncayo*

v Curtis Partition Corp., 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and thus, was not in the process of being hoisted or secured at the time that it fell on the plaintiff]). Here, the top of the cabinet needed to be properly and sufficiently secured while being moved into place.

The Empire defendants and the Coty defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, the cabinet was located on the same level as plaintiff when its top fell onto plaintiff.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), a case with similar facts, the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes which stood 10-feet tall and measured four inches in diameter. As in the instant case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605); *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery

simply because the cabinet that he was moving was on his same level, but, given the fact that the top was located above him, and given the significant amount of force that its 25 to 30 pound weight generated during its fall, his accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603). In addition, as the top of the cabinet was precariously attached to the cabinet's sides, and as no protective devices, such as slings or ropes, were provided to secure it from falling, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*id.*).

The Coty defendants also argue that the Labor Law does not apply to the facts of this case, because plaintiff was the sole proximate cause of his accident. To that effect, they allege that the top of the cabinet was properly attached to the sides of the cabinet, until such point that plaintiff and his coworkers began to push and pull on it. Plaintiff argues that he did not determine the method the men used to move the cabinet, but rather, he was simply following the lead of his foreman.

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Even so, any action on the part of plaintiff regarding how the cabinet was moved goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur(ies)"]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the

Labor Law § 240 (1) claim. Accordingly, the Empire defendants and the Coty defendants are not entitled to dismissal of same.

The Labor Law § 241 (6) Claim

In their separate motions, the Empire defendants and the Coty defendants move for dismissal of the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) 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' for workers" (*Ross,* 81 NY2d at 501). 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.* at 503-505).

Initially, although plaintiff alleges violations of Industrial Code sections 23-1.5 (a) and (b) in his bill of particulars, plaintiff does not address those alleged Industrial Code violations in his opposition to the Empire defendants' motion or the Coty defendants' cross motion, and, thus, they are deemed abandoned (*see 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]). As such, these defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

In addition, sections 23-1.5 (a) and (b), which provide that employers must provide safe work areas, equipment and methods, as well as competent supervisors, are not sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Hawkins v City of New York*, 275 AD2d 634, 635 [1st Dept 2000]; *Ferreira v Unico Serv. Corp.*, 262 AD2d 524, 525 [2d Dept 1997]).

It should also be noted that, although plaintiff argues that OSHA regulation 26 CFR 1926.250 (a) (1), which requires that work materials that are stored in tiers be stacked and secured so as to prevent them from falling or collapsing, was violated by defendants, an OSHA regulation does not impose a non-delegable duty on an owner and therefore may not be used as a predicate for a Labor Law § 241 (6) claim (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). However, the cabinet was a partially assembled piece of furniture, and not materials being stored. Therefore, said regulation does not apply to this case.

The Common-Law Negligence and Labor Law § 200 Claims

In their separate motions, the Empire defendants and the Coty 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] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "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 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 its 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's injury was caused by lifting a beam, and there was no evidence that the

defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, the accident occurred because the top of the cabinet was not securely attached to the sides of the cabinet while it was being moved by plaintiff and his coworkers. Therefore, the accident was caused due to the means and methods of the work. A review of the record reveals no evidence that the Empire defendants and/or the Coty defendants supervised or directed Island's assembly and/or installation of the cabinet. Moreover, plaintiff testified that he only took instruction from his Island foreman.

Thus, the Empire defendants and the Coty defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

The Cross Claims for Common-Law Negligence Against the Empire Defendants and the Coty Defendants (motion sequence number 003 and the Coty Defendants' Cross Motion)

In their separate motions, the Empire defendants and the Coty defendants move for dismissal of any cross claims for common-law indemnification asserted against them. "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 there is no evidence of any active negligence on the part of these defendants that proximately caused the accident, they are entitled to dismissal of any cross claims for common-law indemnification against them.

The Empire Defendants' Cross Claim for Contractual Indemnification Against Coty (motion sequence number 003 and the Coty Defendants' Cross Motion)

The Empire defendants move for summary judgment in their favor on their cross claim for contractual indemnification against Coty. Coty cross-moves for dismissal of said cross claim against it. "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; "'[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]).

Additional Facts Relevant to this Issue:

The Lease between the Empire State Building and Coty contains an indemnification provision, which states, in pertinent part, as follows:

> "[Coty] shall indemnify, defend and save [the Empire State Building] and any of the other Landlord Parties (as hereinafter defined) harmless from and against any liability or expense arising from (i) the negligence or willful misconduct of [Coty], its agents, employees or contractors"

(the Empire defendants' motion, exhibit J, the Lease, at 49).

As discussed previously, the record does not contain any evidence of negligence on the part of the Coty defendants that proximately caused the accident. Coty did not supervise plaintiff's work, and it did not supply any of plaintiff's tools. However, importantly, the indemnification provision also requires that Coty indemnify the Empire defendants for any negligence on the part of its "agents, employees or contractors," and plaintiff's employer, Island, was one of Coty's contractors on the Project. Island was the entity responsible for assembling and installing the cabinet, and plaintiff was injured as a result of Island's failure to properly attach the top of the cabinet to its side panels. Therefore, the indemnification provision in the Lease is triggered.

Thus, the Empire defendants are entitled to summary judgment in their favor on the cross claim for contractual indemnification against Coty, and Coty is not entitled to dismissal of said cross claim against it.

It should be noted that the Coty defendants also moved for dismissal of all cross claims asserted against them. However, they have only addressed Empire's cross claims against them for common-law and contractual indemnification. Therefore, as there are outstanding cross claims against these defendants that have not been addressed, the Coty defendants are not entitled to dismissal of all cross claims asserted against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff Anatole Bilyk's motion (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim is granted as against defendant Esrt Empire State Building, LLC as successor in interest to Empire State Building Company, LLC (Empire State Building), Coty, Inc. (Coty) and Benchmark Builders, Inc. (together, the Coty defendants), and the motion is otherwise denied; and it is further

ORDERED that defendant Empire State Realty Trust, Inc.'s (Empire State Realty)'s motion (motion sequence number 003) to dismiss the complaint and all cross claims asserted against it is granted, and the complaint and all cross claims are severed and dismissed as against Empire State Realty, with costs and disbursements to Empire State Realty as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Empire State Realty; and it is further

ORDERED that the parts of the Empire State Building's motion (motion sequence

number 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint and cross claims asserted against it, is granted to the extent of dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims, and all cross claims for common-law indemnification asserted against it, and the motion is otherwise denied; and it is further

ORDERED that the portion of the Empire State Building's motion for summary judgment in its favor on the contractual indemnification cross claim against Coty is granted; and it is further

ORDERED that the branch of the Coty defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them is granted to the extent of dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims, and all cross claims for common-law indemnification asserted against them, and the motion is otherwise denied; and it is further

ORDERED that the action shall continue.

This constitutes the decision and order of the court.

Dated: April 12, 2017

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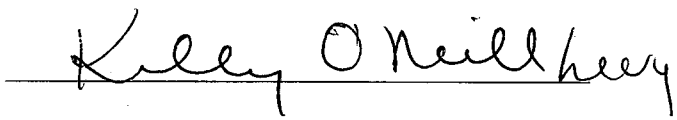

HON. KELLY O'NEILL LEVY J.S.C.