Nicovic v Forest City Enters., Inc.
2017 NY Slip Op 32290(U)
October 30, 2017
Supreme Court, New York County
Docket Number: 150494/2011
Judge: Ellen M. Coin

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

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PAUL NICOVIC,

Plaintiff,

Index No. 150494/2011

-against-

FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANIES, LLC., WORTH CONSTRUCTION CO., INC., JKT CONSTRUCTION, INC., FC YONKERS ASSOCIATES, LLC., NTS IT'S NOT THE SAME USA, LLC. and TRINITY PHOENIX CORP.,

Defendants.

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JKT CONSTRUCTION, INC.,

Third-Party Plaintiff,

Third-Party Index No 590582/2012

-against-

NABER ELECTRIC CORP.,

Third-Party Defendant.

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FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANIES, LLC.,

Second Third-Party Index No. 590991/2012

Second Third-Party Plaintiffs,

-against-

NABER ELECTRIC CORP.,

Second Third-Party Defendant.

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NTS IT'S NOT THE SAME USA, LLC.

Third Third-Party Plaintiff, Third Third-Party Index No. 590165/2014

-against-

NABER ELECTRIC CORP.,

Third Third-Party Defendant.

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FC YONKERS ASSOCIATES, LLC.,

Fourth Third-Party Plaintiff, Fourth Third-Party Action

-against-

NABER ELECTRIC CORP.,

Fourth Third-Party Defendant.

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Coin, J.:

Motion sequence numbers 005, 006 and 007 are hereby consolidated for disposition.

This is a personal injury action. Plaintiff, an electrician, on October 17, 2011, was working at a construction site located in a store within the Ridge Hill Mall, 196 Market Street, Yonkers, New York (the Premises), when he fell from a ladder that was placed on an unsecured Masonite board.

In motion sequence number 005, defendants/second third-party plaintiffs Forest City Enterprises, Inc. and Forest City Ratner Companies, LLC (together, the Forest City defendants), defendant/fourth third-party plaintiff FC Yonkers Associates, LLC (FC Yonkers) and defendant/third third-party plaintiff NTS It's Not The Same USA, LLC (NTS) move, pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint in its entirety as against the Forest

City defendants, and dismissing the common law negligence and Labor Law § 200 claims as against FC Yonkers and NTS; (2) summary judgment in favor of NTS on its cross-claim for contractual indemnification against defendant/third-party plaintiff JKT Construction, Inc. (JKT), and on its third third-party claim for contractual indemnification against third-party defendant/ second third-party defendant/third third-party defendant/fourth third-party defendant Naber Electric Corp. (Naber); and (3) summary judgment in favor of FC Yonkers on its fourth third-party claim against Naber for contractual indemnification.

In motion sequence number 006, JKT moves, pursuant to CPLR 3212, for summary judgment dismissing the common law negligence and Labor Law § 200 claims against it, as well as for summary judgment in its favor on its third-party claims against Naber for contractual indemnification and breach of contract for failure to procure insurance.

In motion sequence number 007, plaintiff Paul Nicovic moves pursuant to CPLR 3212 for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against FC Yonkers, NTS and JKT.

BACKGROUND

On the date of the accident, FC Yonkers owned the Premises where the accident took place. NTS leased the Premises from FC Yonkers for the purpose of operating a retail store. NTS hired JKT to be the general contractor to build out the retail store at the Premises (the Project). JKT, in turn, hired Naber to perform electrical work at the Project. Naber employed plaintiff as an electrician on the Project.[1]

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1 Defendant Worth Construction is no longer a party to this action. In addition, a default judgment has been entered against defendant Trinity Phoenix Corp.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident he was employed by Naber as an electrician. His duties on the Project included the installation of electrical components, specifically, support mounts for a speaker system being installed near the store's 18-foot ceiling. Plaintiff's foreman on the Project, a Naber employee named "Brian," gave him his work instructions (plaintiff's tr at 23). During his deposition, when asked if anyone other than Brian gave him any instructions, plaintiff responded, "No" (*id.*).

Plaintiff explained that in the weeks prior to the accident, he had used a scissor lift to reach his elevated work area. However, on the workday before the accident, Brian told him that the scissor lift would no longer be available to him, because the area where he was working had recently been tiled. Therefore, using a scissor lift might damage the tile.

On the morning of the accident, plaintiff arrived at work and received his work instructions from Brian. Plaintiff was advised that the Project's carpenters were going to cover the newly tiled floor with a Masonite board in order to protect it, and that "as soon as that was to be taken care of then [he] was to use [an] extension ladder" to perform his work (*id.* at 28). Plaintiff testified that Naber supplied his ladder, and that he was not provided with any other safety equipment. Plaintiff was not directed to have anyone assist him while he was on the ladder.

Plaintiff waited until a carpenter placed the Masonite board in the work area before beginning his work. Only one eight-by-four Masonite board was placed over the tile, and the carpenter did not secure it to the ground. After the Masonite board was placed, plaintiff asked the carpenter if he was done. The carpenter said "yes," so plaintiff set up his ladder (*id.* at 133).

Plaintiff set the extension ladder's two legs on top of the Masonite board, leaning the top of the ladder against a horizontal I-beam close to the ceiling. He checked to see if the ladder was stable and secure, and that its latches were locked. Plaintiff then climbed the ladder and began his work. Shortly thereafter, the Masonite board under the ladder's feet began to slide, pulling the ladder with it and causing the top of the ladder to slip off the I-beam. Both plaintiff and the ladder then fell to the ground.

Deposition Testimony of Brian Detlefsen (Naber's Foreman)

Brian Detlefsen was employed by Naber as a foreman for the Project. His duties included directing and supervising Naber's employees, including plaintiff. Naber was hired to install the light and power lines at the Premises, as well as the speaker lines.

Detlefsen testified that while he had no conversations with plaintiff regarding the use of the scissor lift, he and plaintiff were both aware that "[they] were not allowed to use scissor lifts at a certain point on the job" (Detlefsen tr at 93). Accordingly, at that point, plaintiff would need to use a ladder to perform his work. Detlefsen did not witness the accident, but went to the accident site immediately after it occurred. There he saw the ladder on the ground and a Masonite board nearby. Detlefsen acknowledged that it would be unsafe to put a ladder on top of a Masonite board, because "Masonite's not stable on the tile floor . . . . It could slip out from under the ladder" (*id.* at 113).

Deposition Testimony of Joseph Price (Job Superintendent for JKT)

At the time of plaintiff's accident, Price was JKT's superintendent on the Project. JKT was the Project's general contractor. As superintendent, Price's duties included general oversight

of the Project, as well as coordination of the work. JKT did not provide any equipment or materials for the Project.

Price testified that at the time of plaintiff's accident the Project was nearly completed, as "[t]he walls were up, the ceiling was up, the floor was done, all the tile and everything on the floor was done" (Price tr at 25). In addition, once the tile floor was installed, scissor lifts were "not allowed to run on the tile" because the tile would "break into pieces" under the weight of the lift (*id.* at 82). Initially, during his deposition, when Price was asked whether he directly told Detlefsen not to use the scissor lift on top of the tile, Price testified, "No, I wouldn't have told him that" (*id.* at 123). However, shortly thereafter, Price acknowledged that he "probably told" Detlefsen that scissor lifts could not be used (*id.* at 125).

Price testified that as scissor lifts were no longer an option once the tile was installed, the workers had to use ladders to reach elevated work areas. It was also common knowledge that workers should protect the newly-installed tiles with Masonite boards in order to prevent damage to the tiles during construction. The Masonite boards needed to be taped to the floor in order to keep them from moving, as both the Masonite and the tile were "slick" (*id.* at 35). If not properly taped down, the Masonite boards could slide around on the tile. Price maintained that he did not instruct anyone at the job site regarding the proper securing of the Masonite.

DISCUSSION

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial

of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

The Complaint and Cross-Claims Against the Forest City Defendants (Motion Sequence 005)

The Forest City defendants, FC Yonkers and NTS move for summary judgment dismissing the complaint and all cross-claims as against the Forest City defendants. As no party has opposed said relief, the Forest City defendants are entitled to the dismissal of the complaint and all cross-claims against them.

The Labor Law § 240 (1) Claim against FC Yonkers, NTS and JKT (Motion Sequence 007)

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against FC Yonkers, as owner, NTS, as lessee, and JKT, as general contractor. Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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]). 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]). Not every worker who falls at a construction site is afforded the 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]). Indeed, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated and that the violation proximately caused his injury (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Initially, as the owner and general contractor, respectively, FC Yonkers and JKT may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined whether NTS, as lessee, may also be considered an owner for the purpose of the statute. As to NTS, "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has not been limited to titleholders but has 'been held to encompass a person 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]).

Here, it is undisputed that NTS had an interest in the Premises, i.e., its lease, its plan to operate a store there, and its retention of JKT to build out the store. As NTS had an interest in the Premises and fulfilled the role of owner by contracting for work for its benefit, it is considered an owner for the purposes of Labor Law § 240 (1).

That said, plaintiff argues that he is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against FC Yonkers, NTS and JKT, because the ladder that he was working on at the time of the accident failed to protect him from falling, as it was improperly placed on an unsecured Masonite board (*see Bland v Manocherian*, 66 NY2d 452, 459-460 [1985] [upholding jury determination that section 240 (1) violated where ladder "not 'placed so as to give proper protection'" and proximately caused plaintiff's injuries]; *see also Izzo v AEW Capital Mgt.*, 288 AD2d 268, 269 [2d Dept 2001] [plaintiff established entitlement to summary judgment on his section 240 (1) claim where he "demonstrated that he fell from an improperly-placed ladder," and that improper placement was proximate cause of injuries]).

In opposition to plaintiff's motion, FC Yonkers, NTS and JKT argue that plaintiff is not entitled to judgment in his favor, because questions of fact exist as to whether plaintiff was recalcitrant, in that he chose to use the ladder instead of the scissor lift, a safer alternative under the circumstances. In addition, they assert that plaintiff was the sole proximate cause of his accident, because, before climbing the ladder, he failed to properly secure the Masonite board to the tile, so as to prevent the ladder from sliding.

Initially, in order to find plaintiff recalcitrant, it must be established that plaintiff knew "both that [adequate safety devices] were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill*, 4 NY3d at 40; *see also Jastrzebski v North Shore Sch. Dist.*, 223 AD2d 677, 679 [2d Dept], *affd* 88 NY2d 946 [1996] [recalcitrant worker defense is "premised upon the principle that 'the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it'"]).

Here, FC Yonkers, NTS and JKT have not established that a scissor lift was available for plaintiff's use, and that for no good reason, plaintiff chose not to use it. In fact, plaintiff testified that he was specifically directed not to use the scissor lift, because, to do so would damage the newly-installed tile. Detlefsen also testified that plaintiff had to use the ladder, because the scissor lift would damage the newly installed tile. Defendants fail to offer any evidence to refute the aforesaid testimony.

In addition, the record does not show that plaintiff, by failing to secure the Masonite, was the sole proximate cause of the accident. There is no evidence that plaintiff was specifically directed by anyone to tape down, or otherwise secure, the Masonite board prior to climbing the ladder, or that he ignored such a directive. Under the Labor Law, a worker is not charged with securing his own safety. Indeed, "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's, Inc.*, 120 AD3d 41, 47 [1st Dept 2014]).

In any event, plaintiff's use of the ladder in lieu of a scissor lift, or his failure to secure the Masonite board, go to the issue of comparative fault. Comparative fault is not a defense to a

Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation has been shown (*Bland v Manocherian*, 66 NY2d at 461). Indeed, "[i]t 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. City*, 1 NY3d 280, 290 [2003]; *see also Granieri v 500 Fifth Ave. Assoc.*, 223 AD2d 450, 451 [1st Dept 1996] [plaintiff's possible culpable conduct related to alleged improper placement of ladder does not defeat claim under section 240 [1]).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on his Labor Law § 240 (1) claim as against defendants FC Yonkers, NTS and JKT.

The Common Law Negligence and Labor Law § 200 Claims Against FC Yonkers, NTS and JKT (Motion Sequence Numbers 005 and 006).

FC Yonkers and NTS move for summary judgment dismissing the common law negligence and Labor Law § 200 claims against them. Separately, JKT moves for the same relief.

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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). 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 type of situation involved: (1) when the accident is the result of the means and methods used by the contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

Here, the accident occurred due to the improper placement of the ladder on an unsecured Masonite, implicating the means and methods of plaintiff's work. "Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [citation omitted] [emphasis in text]).

Initially, plaintiff does not oppose that part of the subject motions seeking to dismiss the common law negligence and Labor Law § 200 claims against said defendants.

In any event, a review of the record reveals that FC Yonkers, NTS and JKT did not have the authority to supervise or control the performance of the injury-producing work, i.e., the placement of the ladder on the unsecured Masonite board. To that effect, plaintiff testified that his Naber supervisor, and no one else, instructed him in regard to how to perform his work. In

addition, Price testified that he did not direct or instruct Naber's workers. Moreover, there is no evidence that any of these defendants were responsible for securing the subject Masonite board.

While Naber argues that FC Yonkers and NTS had the authority to stop work in the event that they observed an unsafe practice, such general supervisory control is insufficient to impute liability under section 200 or under the common law (*see Hughes*, 40 AD3d at 309 [that entity "may have had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [it] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence"]).

Thus, FC Yonkers, NTS and JKT are entitled to summary judgment dismissing the common law negligence and Labor Law § 200 claims against them.

NTS' Cross-Claim Against JKT For Contractual Indemnification (Motion Sequence Number 005)

NTS moves for summary judgment in its favor on its cross-claim for contractual indemnification against JKT. "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. Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245*

Park Co., L.P., 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d at 65).

Additional Facts Relevant to This Issue

On August 8, 2011, NTS and JKT entered into an "AIA A101 – 2007 Standard Form of Agreement Between Owner and Contractor" (the NTS/JKT Contract), which provided that JKT serve as general contractor on the Project (NTS's notice of motion, exhibit E, the NTS/JKT Contract). While the NTS/JKT Contract does not include an indemnification provision, it incorporates, by reference, a document entitled "AIA A201 – 2007 General Conditions of the Contract for Construction" (the General Conditions Document, or GCD), which includes the following indemnification provision, as relevant:

> "3.18.1 To the fullest extent permitted by law the Contractor [JKT] shall indemnify and hold harmless the Owner . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim . . . is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder . . ."

(*id,* exhibit F, the GCD.).

The GCD, submitted by NTS, is unsigned, undated, and contains the word "Sample" in the space for the name of the Project and leaves blank spaces for the owner and the architect. Most importantly, the GCD is marked "DRAFT" and "For Educational Purposes Only" on each

of its 40 pages (*id.*). In addition, the GCD's "creation date" has been cut off from each of its pages.[2]

Incorporation by reference requires that "the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt'" *Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995] [citation omitted]; *see also Kenner v Avis Rent A Car Sys., Inc.*, 254 AD2d 704, 705 [4th Dept 1998]). Here, due to the vague, incomplete and "educational" nature of the GCD, the court cannot determine as a matter of law whether the subject GCD was the document referred to, and incorporated into, the NTS/JKT Contract.

Thus, NTS is not entitled to summary judgment in its favor on its cross-claim for contractual indemnification against JKT.

FC Yonkers, NTS and JKT's Claims For Contractual Indemnification Against Naber (Motion Sequence Nos. 005 and 006)

FC Yonkers moves for summary judgment in its favor on the fourth third-party claim for contractual indemnification against Naber. Similarly, NTS moves for summary judgment in its favor on the third third-party claim for contractual indemnification against Naber. JKT also moves for summary judgment in its favor on the third-party claim for contractual indemnification against Naber.

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2 It should also be noted that the GCD was not exchanged during discovery, and that it was first produced as an exhibit to the instant motion.

Additional Facts Relevant to This Issue

The Indemnification Provisions

The contract between JKT and Naber (the JKT/Naber Contract), dated August 16, 2011, contains two indemnification provisions. The first indemnification provision (the First Indemnification Provision) states, in pertinent part, as follows:

> "Subcontractor [Naber] hereby agrees to the fullest extent permitted by law to assume the entire responsibility and liability for and defense of and to pay and Indemnify the Owner [FC Yonkers], Architect, Contractor [JKT], Managing Agent, and Tenant [NTS] against any loss, cost, expense, attorney fees . . . which the Owner, Architect, Contractor, Managing Agent, and/or Tenant incur in connection with, or as a consequence of the performance of the work by Subcontractor and/or any directors, employees, agents, subcontractors, or anyone directly or indirectly employed by the Subcontractor, or anyone for whose acts Subcontractor may be liable.
>
> "This indemnification provision is limited only to the extent that the General Obligations Law of the State of New York is applicable, in that this provision does not require indemnification for the Contractor's or Building Owner's own negligence. This provision does, however, require liability imposed by statute"

(JKT's notice of motion, exhibit A, the JKT/Naber Contract, § 4.3.6, the First Indemnification Provision).

In addition to this broad indemnification provision, the JKT/Naber Contract contains a narrower second indemnification provision (the Second Indemnification Provision), which states, in pertinent part:

> "To the fullest extent permitted by law, the Subcontractor [Naber] shall indemnify and hold harmless the Owner [FC Yonkers], Contractor [JKT], Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages losses and expenses, including but not limited to attorney's fees,

> arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim . . . is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder"

(*id.* § 4.6.1, the Second Indemnification Provision).

The Merger Clause

Notably, the JKT/Naber Contract includes a merger clause (the Merger Clause) that provides, in pertinent part: "This Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral" (*id.*, exhibit A, the JKT/Naber Contract, § 1.1). In connection with the Merger Clause, the JKT/Naber Contract contains an "Enumeration of Subcontract Documents" (the Enumeration Clause), which lists the documents that comprise the entirety of the JKT/Naber Contract (*id.*, art. 16).

The Hold Harmless Agreement

Entirely separate from the JKT/Naber Contract, there exists a document entitled "Hold Harmless," dated August 11, 2011 (the Hold Harmless Document). The Hold Harmless Document predates the JKT/Naber Contract by five days and is not included in the Enumeration Clause. Accordingly, the Hold Harmless Document is barred by the Merger Clause, which states that all prior agreements are superseded by the JKT/Naber Contract.

Analysis

Under the broad First Indemnification Provision, Naber must indemnify FC Yonkers, NTS and JKT for any injury occurring "in connection with, or as a consequence of the performance of" Naber's work. Alternatively, under the Second Indemnification Provision, Naber must indemnify FC Yonkers and JKT only for injuries arising out of Naber's (or its employee's) negligence. Of note, only the First Indemnification Provision provides that Naber must indemnify NTS, the tenant.

At issue is whether the First or Second indemnification provision is controlling. The JKT/Naber Contract gives no guidance as to this issue. Therefore, the court must make such a determination. In so doing:

> "The agreement must be read as a whole to determine its purpose and intent. It is a cardinal rule of contract construction that a court should avoid an interpretation that would leave contractual clauses meaningless. Moreover, conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect"

(*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133-134 [1st Dept 2017] [internal quotation marks and citations omitted]).

Applying the aforementioned principles, the court determines that the broad First Indemnification Provision is controlling, and that the narrower Second Indemnification Provision is, effectively, subsumed by and incorporated into, the First Indemnification Provision.

Here, plaintiff, an employee of Naber, was injured while performing work which fell within the four corners of the JKT/Naber Contract. Accordingly, plaintiff's injuries arose from Naber's work. Therefore, Naber owes FC Yonkers, NTS and JKT contractual indemnification.

Noting that the First Indemnification Provision "does not require indemnification for the Contractors' or Building Owners' own negligence," Naber argues that because FC Yonkers and NTS had the power to stop work if they saw an unsafe condition, a question of fact exists as to whether any negligence on the part of FC Yonkers, NTS and JKT caused or contributed to plaintiff's accident. However, general supervision alone is insufficient to raise a triable issue of fact with respect to whether FC Yonkers or NTS "exercised the requisite degree of supervision and control over the work being performed to sustain a claim . . . for common-law negligence" (*Hughes v Tishman Constr. Corp.*, 40 AD3d at 309).

Turning to JKT, Naber fails to offer any evidence that any negligence on the part of JKT caused the accident. Further, Price testified that JKT did not supervise or direct plaintiff's work, and there is no evidence to suggest that JKT was responsible for securing the Masonite board.

Naber also argues that the aforementioned indemnification provisions run afoul of General Obligations Law (GOL) § 5-322.1, which voids any indemnification provision that seeks to indemnify an indemnitee for its own negligence. However, as noted above, the First Indemnification Provision contains language that limits indemnification "to the extent that the [GOL] is applicable" (JKT's notice of motion, exhibit A, the JKT/Naber Contract, § 4.3.6). Therefore, the indemnification provision does not violate GOL § 5-322.1 (*see e.g. Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). Indeed, the Second Indemnification Provision also contains the requisite limiting language, so as to not run afoul of GOL §5-322.1.

In any event, section 5-322.1 will not prevent the enforcement of an indemnification provision "where the party to be indemnified is found to be free of any negligence," such as in

the instant case (*Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508, 508 [2d Dept 2005]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]).

Thus, FC Yonkers, NTS and JKT are entitled to summary judgment in their favor on their claims for contractual indemnification against Naber.

The court has considered the parties' remaining arguments with respect to these causes of action and finds them to be without merit.

JKT's Third-Party Claim for Breach of Contract for Failure To Procure Insurance Against Naber (Motion Sequence Number 006)

JKT moves for summary judgment in its favor on its third-party claim against Naber for breach of contract for failure to procure insurance.

JKT acknowledges that Naber procured the required primary insurance covering JKT. However, JKT argues that Naber breached the JKT/Naber Contract by failing to also procure excess/umbrella insurance that names JKT as an additional insured. In opposition, Naber provides a copy of its primary insurance policy, which, in fact, does not contain a separate or integrated umbrella policy.

However, JKT's third-party complaint alleges only a breach of contract for the failure to procure primary insurance. Thus, it alleges, in pertinent part, as follows:

> "[22] That pursuant to a contract entered into by and between [JKT and Naber], [Naber] was obligated to purchase and maintain a general liability policy of insurance and have [JKT] named as an additional insured party therein.
>
> "[23] That said insurance policy was to provide primary coverage for defense and indemnification to [JKT] . . ."

(JKT's notice of motion, exhibit F, ¶¶ 22-23).

As JKT has not asserted a claim for relief with respect to the procurement of excess/ umbrella insurance on the part of Naber, its motion for summary judgment against Naber on its third-party claim for breach of contract for failure to procure insurance is denied.

CONCLUSION AND ORDER

The court has considered the parties' remaining arguments and finds them to be without merit.

For the foregoing reasons, it is hereby

ORDERED that the part of the motion of defendants/second third-party defendants Forest City Enterprises, Inc. and Forest City Ratner Companies, LLC, defendant/fourth third-party plaintiff FC Yonkers Associates, LLC and defendant/third third-party plaintiff NTS It's Not The Same USA, LLC (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted, and the complaint is severed and dismissed as against defendants/second third-party defendants Forest City Enterprises, Inc. and Forest City Ratner Companies, LLC, with costs and disbursements to them, as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the part of motion sequence number 005, pursuant to CPLR 3212, for summary judgment dismissing the common law negligence and Labor Law § 200 claims against defendant/fourth third-party plaintiff FC Yonkers Associates, LLC and defendant/third third-party plaintiff NTS It's Not The Same USA, LLC is granted, and said claims are dismissed as against these defendants, and it is further

ORDERED that the part of motion sequence number 005, pursuant to CPLR 3212, for summary judgment in favor of NTS It's Not The Same USA, LLC on the third third-party claim for contractual indemnification against third-party defendant/second third-party defendant/third third-party defendant/fourth third-party defendant Naber Electric Corp., is granted; and it is further

ORDERED that the part of motion sequence number 005, pursuant to CPLR 3212, for summary judgment in favor of defendant/fourth third-party plaintiff FC Yonkers Associates, LLC on the fourth third-party claim for contractual indemnification against Naber Electric Corp., is granted; and the motion is otherwise denied; and it is further

ORDERED that the part of the motion of defendant/third-party plaintiff JKT Construction Inc. (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the common law negligence and Labor Law § 200 claims against it is granted, and these claims are dismissed as against defendant/third-party plaintiff JKT Construction Inc., and it is further

ORDERED that the balance of motion sequence number 006, pursuant to CPLR 3212, for summary judgment on JKT Construction Inc.'s third-party claim for contractual indemnification against Naber Electric Corp. is granted; and the motion is otherwise denied; and it is further

ORDERED that the motion of plaintiff Paul Nicovic (motion sequence number 007), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim as against defendant/fourth third-party plaintiff FC Yonkers Associates, LLC and defendant/third third-party plaintiff NTS It's Not The Same USA, LLC and defendant/

third-party plaintiff JKT Construction Inc. is granted, and the amounts of recoverable damages shall be determined at trial; and it is further

ORDERED that balance of the action is severed and shall continue.

This constitutes the Decision and Order of the Court.

Dated: October 30, 2017

ENTER:

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

HON. ELLEN M. COIN