Maman v Marx Realty & Improvement Co., Inc.
2017 NY Slip Op 32294(U)
October 27, 2017
Supreme Court, New York County
Docket Number: 152441/12
Judge: Jennifer G. Schecter
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57**

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RAPHAEL MAMAN,

Index No.: 152441/12

Plaintiff,

-against-

MARX REALTY & IMPROVEMENT CO., INC., FJ SCIAME CONSTRUCTION CORP. and WEIR WELDING COMPANY, INC.,

Defendants.

---x

MARX REALTY & IMPROVEMENT CO., INC. and FJ SCIAME CONSTRUCTION CORP.,

Third-Party Index No:

Third-Party Plaintiffs,

-against-

WEIR WELDING COMPANY, INC.,

Third-Party Defendant.

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WEIR WELDING COMPANY, INC.,

Second Third-Party Index No.:

Second Third-Party Plaintiff,

-against-

CROSS COUNTY CONTRACTING, INC.,

Second Third-Party Defendant.

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Schecter, J.:

Motion sequence numbers 008, 009, 010 and 011 are consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an ironworker on February 13, 2012, after he fell through an unguarded floor opening while working on the second floor of a construction site located at 201 West 57th Street, New York, New York (the Premises).

In motion sequence number 008 defendants/third-party plaintiffs Marx Realty & Improvement Co., Inc. (Marx) and FJ Sciame Construction Corp. (FJ) (together, the Marx Defendants) and in motion sequence number 009 defendant/third-party defendant/second third-party plaintiff Weir Welding Company, Inc. (Weir) move, pursuant to CPLR 2221, for an order granting them leave to reargue plaintiff's motion for summary judgment on liability on his Labor Law §§ 240 (1) and 241 (6) claims, which was granted in a decision and order dated September 9, 2016 (the Prior Order).

In motion sequence number 010, the Marx Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as the Labor Law § 241 (6) claim based on the remaining unaddressed Industrial Code provisions and for summary judgment in their favor on their third-party claim for contractual indemnification against Weir and their purported second third-party claim for contractual indemnification against second third-party defendant Cross County Contracting, Inc. (Cross County).

Weir cross-moves for dismissal of the third-party claims for contribution and common-law indemnification against it.

In motion sequence number 011, Weir 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 the second third-party claim for contractual indemnification against Cross County.

BACKGROUND

On the day of the accident, Marx owned the Premises where the accident occurred. Marx hired FJ to serve as the construction manager on a project to build a TD Bank at the Premises (the Project). In turn, FJ hired Weir to provide the structural steel erection/fabrication work for the

Project. Thereafter, Weir hired plaintiff's employer, Cross County, to supply the ironworkers for the Project. At the time of the accident, plaintiff and a coworker were retrieving a piece of steel Q-decking for installation, when plaintiff slipped and/or tripped, lost his balance and fell through an unguarded floor opening, which was located between two steel beams.

Plaintiff's Deposition

Plaintiff testified that he was employed by Cross County as an ironworker on the day of the accident. Plaintiff explained that, while he received his daily work instructions from his Cross County foreman, Aaron Tracy, Tracy did not supervise plaintiff's actual work, as plaintiff already knew how to perform it. When asked if anyone associated with Weir ever gave him any direction or instruction as to how to perform his work, plaintiff replied, "No" (plaintiff's tr at 128). Plaintiff also asserted that he provided his own personal safety equipment, which included a harness, a six-foot lanyard, a hard hat, safety goggles and gloves. Plaintiff maintained that, while he was never specifically told to use a harness, it was his understanding that it was required when working at heights over six feet.

On the morning of the accident, Tracy directed plaintiff to help a coworker, "Ryan," to install Q-decking on the second floor of Premises. Plaintiff described the second floor as having tools and materials scattered all around. Two sides of the second floor were protected by perimeter cable. Although some portions of the second floor were covered with Q-decking, there remained areas with large open holes in the flooring.

To perform the installation work, it was necessary for plaintiff and his coworker to travel to the back right corner of the second floor to retrieve a piece of Q-decking from one of the stacks stored there. The corner was located next to an unguarded and open portion of the second floor deck. Plaintiff noted that, although he was wearing a harness, he was not tied off, because there was no

place on the second floor to tie off to. While it might have been possible to tie off to one of the beams with a portable clamp, plaintiff did not know where to obtain one.

Just before to the accident, plaintiff and his coworker were in the process of retrieving a piece of Q-decking from a pile located approximately 20 feet from the area where it needed to be installed. At this time, plaintiff was walking on a five-inch-wide beam that was already installed. The areas on both sides of the beam were "open" (*id.* at 111). Suddenly, plaintiff tripped, lost his balance and fell head first through an unguarded opening to the floor below. Plaintiff asserted that there was no protection, such as warning signs, barricades or caution tape, around the subject opening. Plaintiff testified that he never complained to anyone about any unsafe condition at the Premises.

Deposition of Davey Glover (FJ's Field Superintendent)

Davey Glover testified that he served as FJ's field superintendent on the day of the accident. As field superintendent, Glover was responsible for coordinating the trades and making sure that "the job is being built to plans and specifications" (Glover tr at 10). He explained that at the time of the accident, Cross County was the only trade working at the Premises. He asserted that each trade was responsible for its own safety at the site.

Glover stated that, "as the job progress[ed] . . . [he would] make sure there were no openings for anyone to [be] exposed to" (*id.* at 85). Cross County, however, was responsible for providing the static lines, which were strung between columns, that the ironworkers needed to tie off to. Glover maintained that static lines were in place on the second floor of the Premises on the day of the accident. Glover never had any discussions with Weir regarding fall protection at the job site.

Glover further testified that, after hearing the news of plaintiff's fall, he prepared an accident report. Glover "spoke to [Tracy] who spoke to his guys and [he] got the information that was presented to [him]" (*id.* at 102). Based on his investigation of the accident, Glover concluded that

"[w]hile removing decking, [plaintiff] lost his footing, slipped and fell from the second floor to the first floor" (*id.* at 102-103).

Glover also testified that Ryan Boyle, plaintiff's coworker who witnessed the accident, provided him with a signed statement confirming that the accident occurred when plaintiff fell into a floor opening. The statement did not specify whether plaintiff was tied off at the time of the accident. Glover explained that a guardrail was not yet in place around the opening, because such protection is put in place "[a]fter all the steel erection is done" (*id.* at 172).

Deposition of Aaron Tracy (Cross County's Foreman)

Aaron Tracy testified that he was Cross County's foreman on the day of the accident. Cross County was retained by Weir to "perform the steel erection at [the Project]" (Tracy tr at 24). Tracy maintained that, on the day of the accident, he directed plaintiff and Ryan to remove temporary Q-decking from the second floor and to install a pour stop. Tracy told the two men to "setup your lifelines [horizontal static line] before you rip up your platforms . . . so you have a tie up point" (*id.* at 73). In addition, Tracy asserted that he "help[ed] them set [the horizontal safety line] up" (*id.* at 73-74).

Tracy explained that it was Cross County's duty, and not Weir's duty, to provide all required safety items necessary for its workers to perform their work, like full body harnesses and six-foot lanyards. That said, at the time of the accident, plaintiff was wearing his own personal harness that he had brought to the construction site. Tracy also explained that four lifelines, which were provided by Cross County, were typically in place at different locations on the second floor. Such locations included the areas around the perimeter of the stairs, elevator shafts and duct work. At the time of the accident, horizontal lifelines were in place at the accident location.

Tracy maintained that he specifically instructed plaintiff to tie off when working around the openings on the second floor, and that he remembered plaintiff being tied off. He opined that, therefore, plaintiff must have untied himself at some point in time after Tracy left him.

Tracy testified that plaintiff was injured when he fell through "the opening for the ductwork" (*id.* at 97). After the accident, FJ requested that Tracy prepare an accident report, which he read into the record, as follows:

> "[Plaintiff and Ryan] were working on the second floor removing long sheets of deck around elevator and duct shaft. Worker under [an OSHA guideline for steel and deck installation] with horizontal lifelines in place, [plaintiff] tripped or slipped on deck and fell into opening down to elevated first floor. Both [plaintiff and Ryan] had on their harnesses and both had the ability to tie off at the location. [Plaintiff] fell approximately fourteen feet"

(*id.* at 130-131).

Deposition of Ryan Boyle (Plaintiff's Cross County Coworker)

Boyle testified that he was working with plaintiff on the Project on the day of the accident. He also testified that he received his assignments, instruction and direction solely from his Cross County foreman, Tracy. He explained that Tracy directed the men to finish laying Q-decking on the second floor of the Premises. While performing this work, the only safety equipment available to them was certain safety cables that had been strung around the outside perimeter of the building. He explained that these perimeter lines were different from static lines, which are typically installed on the inside of the building, and which are meant for workers to tie off to when working at heights. Boyle testified that he was not a member of the Cross County crew in charge of installing safety protection on the second floor.

Boyle explained that just prior to the accident, Tracy instructed the men to retrieve some decking stored at the northeast corner of the second floor. On the way there, plaintiff tripped on some decking, lost his balance and then "went head over heels . . . into the [elevator shaft] hole"

(Boyle tr at 75-76). The opening that plaintiff fell into did not have any protection or toe boards surrounding it. In addition, at the time of the accident, no static lines had been installed on the second floor, and, thus, it was not possible to tie off a lanyard there. Boyle specifically testified that he did not perform his work with a lifeline "because there wasn't one there and [he] had to get to work" (*id.* at 59).

Boyle noted that, after the accident, but before the OSHA representative arrived, someone put up "static lines" on the second floor (*id.* at 89-91). Boyle also testified that no one from Weir ever provided him with any safety equipment, nor did he ever request any safety equipment from Weir.

Deposition of Mark Hoffa (Weir's Project Manager)

Mark Hoffa testified that he was Weir's project manager on the day of the accident. He explained that Weir, a steel fabrication company, was hired by FJ, pursuant to a contract (the FJ/Weir Contract), to serve as the steel subcontractor on the Project. Hoffa maintained that Weir did not have any employees at the site performing physical labor. Rather, it subcontracted the actual performance of the steel work to Cross County. Cross County was also responsible for providing all equipment, labor and supervision necessary to carry out the structural steel erection at the site. Hoffa noted that Tracy, Cross County's foreman, was responsible for supervising the work of its employees, and that Cross County provided"full protection and personal protection equipment at the job site" (Hoffa tr at 18). Hoffa further asserted that he only went to the job site occasionally to address steel misfits and steel erection coordination issues.

REARGUMENT
(motion sequence numbers 008 and 009)

The Marx Defendants and Weir move for reargument of plaintiff's summary judgment motion (sequence number 008), which was granted.

As to the Labor Law § 240 (1) determination, the Marx Defendants and Weir urge that the court overlooked testimonial evidence that plaintiff was provided with appropriate and safe horizontal lifelines/static lines and tie-off points, which he opted not to use. Defendants point out that the availability of such lifelines and tie-off points was confirmed by the testimony of Glover, FJ's field superintendent, and Tracy, Cross County's foreman.

As set forth in the Prior Order, however, even if a proper static line was in place at the time of the accident, the lack of a protection over or around the opening, which was necessary to prevent plaintiff from falling through it, was a more proximate cause of the accident; therefore, any alleged negligence on plaintiff's part in not tying off goes to the issue of comparative fault, which 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]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [even "if there were admissible evidence (that the 'plaintiff failed to attach his safety harness to the lifeline in the proper manner') the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] ["even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety (equipment) was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] ["even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

The "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. City*, 1 NY3d 280, 290 [2003]). 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]).

Additionally, it is not disputed that the floor opening that plaintiff fell through lacked a substantial cover or safety railing, and that the lack of these safety devices was a proximate cause of the accident. Thus, Industrial Code 12 NYCRR 23-1.7 (b) (1) (i), which requires that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or a safety railing, was violated.

Nor in the underlying motion did the Marx Defendants "offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the [plaintiff's] knowledge and control" so as to justify denial of summary judgment (*Espada v City of New York*, 74 AD3d 1276, 1277 [2d Dept 2010], citing CPLR 3212 [f]; *Hill v Ackall*, 71 AD3d 829, 830 [2d Dept 2010]). The court has considered the remaining arguments put forth by these defendants, moreover, and finds them to be unavailing.

In sum, because nothing was overlooked or misapprehended, the motions for reargument are denied.

SUMMARY JUDGMENT
(motion sequence numbers 010 and 011 and Weir's cross motion)

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting

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

The Labor Law § 241 (6) Claim Against the Marx Defendants (motion sequence numbers 010)

The Marx 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 v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). 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).

Plaintiff does not oppose dismissal of those portions of his Labor Law § 241 (6) claim predicated on violations of the Industrial Code other than §§ 23-1.7(b)(1)(i) and 23-1.16(b);[1] thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

Summary judgment is denied with respect to the Labor Law § 241 (6) claim based on the alleged violation of Industrial Code § 12 NYCRR 23-1.16. The Industrial Code section is sufficiently specific to sustain a § 241 (6) claim (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]).

The provision provides:

> "*Attachment required.* Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Here, plaintiff had a harness and lanyard at the time of the accident. However, while he and Boyle testified that there was no anchor to tie off to in the area of the accident, Glover and Tracy testified that a proper fall protection system was in place. Given that disputed question of fact, the Marx Defendants are not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b).

The Common-Law Negligence and Labor Law § 200 Claims Against the Marx Defendants and Weir (motion sequence numbers 010 and 011)

In separate motions, the Marx Defendants and Weir move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "codification of the

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[1] It has already been determined that plaintiff is entitled to summary judgment in his favor as to liability on his Labor Law § 241 (6) claim predicated on violation of Industrial Code § 23-1.7 (b) (1) (i).

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]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states:

> "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 Labor Law § 200 cases depending on whether the accident resulted from a dangerous condition or whether it was a consequence of the means and methods used by a contractor to do its work (*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] [general contractor's supervision and control over plaintiff's work was immaterial because the injury arose from the condition of the workplace created by or known to contractor rather than the method of the work]).

In cases where the defect or dangerous condition arose from a contractor's methods, to find liability under Labor Law § 200 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 § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that 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] [common-law negligence and § 200 claims dismissed where the deposition testimony established that, while 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 § 200 liability where 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 resulted from how the work was being performed and not a dangerous condition or defect. There is no evidence that Marx, as the owner of the Premises, or Weir, the entity that subcontracted the actual physical ironwork to Cross County, had any role in supervising or directing the injury-producing work (the protection of the floor openings at the construction site).

Thus, Marx and Weir are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.[2]

However, as Glover, FJ's field superintendent, testified that he was in charge of making sure that "there were no openings for anyone to [be] exposed to," at least a question of fact exists as to whether it was FJ's responsibility to provide protection for the floor opening at issue in this case.

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[2] Even if the facts of this case were analyzed under an unsafe condition theory, Marx would still be entitled to dismissal to summary judgment on these claims because, in response to its motion, no evidence has been presented to establish that it had actual or constructive notice of the subject hazard.

Thus, FJ is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

The Marx Defendants' Claims for Contractual Indemnification Against Weir and Cross County (motion sequence number 010)

The Marx Defendants move for summary judgment in their favor on their third-party contractual indemnification claim against Weir.[3] It is well settled that "[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]).

A party seeking contractual indemnification need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[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]).

Section 4.4 of the FJ/Weir Contract contains an indemnification provision (the Indemnification Provision) that states:

> "[Weir] shall be solely responsible for any and all injuries to persons . . . resulting from or arising out of any act or omission of any negligence or carelessness on the part of [Weir], its employees, sub-subcontractors, or agents . . .. Weir shall defend . . . indemnify and hold harmless [FJ], [Marx] . . . to the fullest extent permitted by law, from any and all liabilities, damages, expenses (including reasonable attorneys' fees and consultants' fees), disbursements and costs . . . to which any or all of them

[3] Although the Marx Defendants move for summary judgment in their favor as to a contractual indemnification claim that they purport to have asserted against Cross County, a review of the record reveals that they never asserted such a claim.

> may be subject by reasons of any claim or suit alleging personal injury . . .. This indemnification obligation encompasses (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law, or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of Indemnitees either causing or contributing to the underlying claim, in which case indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, by operation of law, or otherwise"

(the Marx Defendants' notice of motion, exhibit S, the FJ/Weir Contract, section 4.4).

Section 13 of the FJ/Weir Contract, entitled "Indemnity," provides:

> "To the fullest extent permitted by applicable Laws, [Weir] shall (a) indemnify and hold harmless each of the Indemnitees, from and against all Losses that may be incurred by any of the indemnitees as a result of, in connection with, or as a consequence of . . . (v) a violation by [Weir] or any Sub-sub contractor of any Applicable Laws or any Permits . . . [or] any acts or omissions or willful conduct of [Weir] or any Sub-sub contractor or any of their respective employees, agents, or representatives in connection with [Weir's] work"

(*id.*, section 13).

Section 13.1.5 of the FJ/Weir Contract further states:

> "[Weir] shall include in each Sub-subcontract an indemnity provision substantially similar to the provisions in this section 13.1, which shall also expressly provide that the Sub-sub contractor thereunder shall defend, indemnify, and hold harmless the Indemnitees, in addition to the Subcontractor, and that the Indemnitees are third-party beneficiaries of said provision"

(*id.*, section 13.1.5).

Rider B to the FJ/Weir Contract provides that "[Weir] shall be primarily responsible for and have control over construction means, methods, techniques, sequences and procedures for the Work" (*id.*, section 4.9).

Here, the Indemnification Provision provides that Weir must indemnify Marx and FJ for all personal injuries that arise out of its own negligence or carelessness, as well as the negligence or carelessness of its subcontractors such as Cross County. While there is no evidence in the record that establishes that the accident was caused by any negligence on the part of Weir, a question of fact

exists as to whether Cross County, like FJ, was responsible for providing protection for the floor openings created as a result of their Q-decking installation work, and whether Cross County's negligence in failing to provide that protection caused or contributed to the accident.

Moreover, as FJ's Glover testified that he was responsible for checking to make sure that all floor openings were properly protected, a question of fact exists as to whether any negligence on the part of FJ, in failing to provide protection for the subject opening, proximately caused the accident.

Thus, the Marx Defendants are not entitled to summary judgment in their favor on their third-party contractual indemnification claim against Weir.

Weir's Second Third-Party Claim for Contractual Indemnification Against Cross County (motion sequence number 011)

Weir moves for summary judgment in its favor on its second third-party claim for contractual indemnification against Cross County.

In the contract between Weir and Cross County (the Weir/Cross County Contract), Cross County was charged with

> "provid[ing] all fall protection and personal protection equipment and enforc[ing] its use and provid[ing] all work platforms, ladders, scaffolding, lifts, etc. . . . and safety items as required to perform this scope of work. . .. Two line OSHA cable to be provided with all perimeter conditions including all interior openings. Posts to be supplied by Weir Welding Company, Inc. All cables and associated hardware to be provided by Cross County Contracting"

(Weir's notice of motion, exhibit J, the Weir/Cross County Contract).

The Weir/Cross County Contract also contains an indemnification provision (the Weir/Cross County Indemnification Provision), which provides that:

> "To the fullest exten[t] permitted by law, [Cross County] shall indemnify and hold harmless [Weir] . . . [and its] agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from [the] performance of the work providing such claim, damage, loss or expense is attributable to bodily injury . . . or injury to or destruction of tangible property . . . including loss of use resulting therefrom, whether caused in

> whole or in part by negligent acts or omissions of [Cross County], anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified thereunder"

(*id.*).

By its terms, the Weir/Cross County Indemnification Provision requires that Cross County hold Weir harmless for claims arising out of Cross County's work, caused, in whole or in part, by Cross County's negligent acts or omissions. In addition, pursuant to the Weir/Cross County Contract, Cross County was responsible for providing fall protection, such as lifelines, at the site. Based on the conflicting testimony regarding whether places to tie off were available to plaintiff at the time of the accident, a question of fact exists as to whether Cross County was negligent. In addition, as discussed previously, a question of fact exists as to whether it was Cross County's responsibility to provide guardrails and safety railings around the floor openings at the Premises.

Thus, Weir is not entitled to summary judgment in its favor on its second third-party claim for contractual indemnification against Cross County.

The parties' remaining arguments are unavailing.

Weir's Cross Motion To Dismiss the Third-Party Claims for Contribution and Common-Law Indemnification Against It

Weir cross-moves for dismissal of the third-party claims for contribution and common-law indemnification against it. "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). "The 'critical requirement' for apportionment by contribution . . . is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d

599, 603 [1988]; *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 AD2d 229, 229 [1st Dept 2002]).

"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]).

Initially, it should be noted that Weir's cross motion is untimely. On December 16, 2015, a status conference was held, wherein this court approved a stipulation (the Stipulation) that provided that "the time for all parties to serve and file motions for summary judgment is extended to sixty days after completion of the non-party depositions of Eric Slater and George Harsel" (Marx Defendants' opposition to Weir's cross motion, exhibit A, the Stipulation). Harsel's deposition was conducted on September 6, 2016, and the parties had 60 days thereafter to file motions for summary judgment. Weir's cross motion was filed on January 10, 2017.

However,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion "

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014], citing *Filannino*).

Here, in its cross motion, Weir seeks dismissal of the Marx Defendants' third-party claims for contribution and common-law indemnification against it, on the ground that its negligence could not have caused the accident, because it was not responsible for providing any fall protection at the Premises. As such, the relief sought by Weir in its cross motion is almost identical to the relief sought by Weir in its motion for summary judgment (seeking dismissal of the common-law negligence and Labor Law § 200 claims against it). In addition, the Marx Defendants advance arguments in opposition to Weir's cross motion which are nearly identical to those advanced in their opposition to Weir's motion. Therefore, pursuant to CPLR 3212 (b), Weir's untimely cross motion will be addressed.

As there is no evidence of any active negligence on the part of Weir that proximately caused the accident, it is entitled to dismissal of the third-party claims for contribution and common-law indemnification against it. Weir had no employees or physical labor at the site, it was not charged with providing fall protection at the Premises, nor did it receive any complaints regarding the lack thereof. In addition, Weir hired Cross County to perform all aspects of the steel erection at the Premises, which included providing fall protection. In addition, plaintiff testified that he took all of his direction from his Cross County foreman. Further, testimonial evidence in the record indicates that FJ was responsible for providing guardrails and safety railings around the floor openings.

Accordingly, it is

ORDERED that the motions for reargument are denied; it is further

ORDERED that the Marx Defendants' motion for summary judgment (sequence number 010), is granted to the extent that the common-law negligence and Labor Law §§ 200 claims as against defendant Marx are dismissed as against said defendant and Labor Law § 241 (6) claims based on Industrial Code sections other than §§ 23-1.7(b)(1)(i) and 23-1.16(b) are dismissed as against the Marx Defendants and the motion is otherwise denied; it is further

ORDERED that Weir's cross motion for dismissal of the third-party claims for contribution and common-law indemnification against it is granted, and these claims are dismissed as against Weir; it is further

ORDERED that the parts of Weir's motion (motion sequence number 011), 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 Weir, and the motion is otherwise denied; and it is further

ORDERED the remainder of this action shall continue.

This is the decision and order of the court.

Dated: October 27, 2017

ENTER:

Jennifer G. Schecter, J.S.C.