At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of December, 2017.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

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KWESI BROWN,

PLAINTIFF,

- AGAINST - Index No. 503790/15

TRANCARE, INC. D/B/A AAMCO TRANSMISSIONS, D/B/A AAMCO OF BROOKLYN AND 2900 ATLANTIC LLC,

DEFENDANTS.

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2900 ATLANTIC LLC,

THIRD-PARTY PLAINTIFF,

- AGAINST -

ATLANTIC LUBE, INC.

THIRD-PARTY DEFENDANT.

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The following papers numbered 1 to 13 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5
Opposing Affidavits (Affirmations)	6, 7, 8
Reply Affidavits (Affirmations)	9, 10
Affidavit (Affirmation) Aff. of Vito Vitulli	11
Other Papers Plaintiff's Memorandum of Law and Plaintiff's Supplemental Opposition	12, 13

Upon the foregoing papers, defendant/third-party plaintiff 2900 Atlantic LLC (2900 Atlantic) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims insofar as asserted against it; for summary judgment on its cross claims against defendant Trancare, Inc. d/b/a AAMCO Transmissions d/b/a AAMCO of Brooklyn (Trancare) and on its third-party claims against third-party defendant Atlantic Lube, Inc. (Atlantic Lube); and for an order directing Trancare and/or Atlantic Lube to reimburse it for its legal fees. Trancare and Atlantic Lube move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims insofar as asserted against Trancare, and for summary judgment dismissing the third-party complaint against Atlantic Lube.

Facts and Procedural History

This is an action for personal injuries sustained by plaintiff Kwesi Brown (plaintiff) on February 28, 2015, at approximately 11:45 a.m., while he was working as an auto mechanic at a garage located on Atlantic Avenue in Brooklyn, New York. Trancare leased one side of the garage, located at 2900 Atlantic Avenue, and Atlantic Lube leased the other side of the garage, located at 2896 Atlantic Avenue, from owner Thomas Heaney. Trancare and Atlantic Lube shared a physical wall, which contained a small door allowing passage between the two sides.

At his deposition, plaintiff testified that he had worked for Trancare for approximately two years. In the middle of 2014, his supervisor and manager of Trancare - Malik Aziz - transferred him to Atlantic Lube, where he worked until the date of the accident. After his transfer to Atlantic Lube, plaintiff's pay remained the same as it was when he was working

for Trancare, but because he was transferred in the middle of the year, at the end of 2014, he received two W-2 forms; one from Trancare and one from Atlantic Lube. He did not have to fill out any paper work when he was transferred to Atlantic Lube, and after the transfer he began receiving paychecks from Atlantic Lube. Thomas Heaney was the "boss" of Trancare.

When plaintiff worked for Trancare, his job title was "transmission." His job duties included retrieving and installing transmissions on cars and vans, as well as light duty mechanic work. He worked from 8 a.m. to 5 p.m. Monday through Saturday and was paid $750 per week via a paycheck from Trancare.

Mr. Aziz was also the manager of Atlantic Lube. Atlantic Lube performed regular mechanical repairs, such as "front end, engine," tune-ups, and inspections, but not transmission work. While plaintiff was employed by Atlantic Lube, he worked from 8 a.m. to 5 p.m. Monday through Saturday for $750 per week, performing regular mechanical work, "swing engines," front end work, tune-ups, oil changes and changing tires. Mr. Aziz gave plaintiff his instructions on what he was going to work on. While plaintiff was working for Trancare, and when Atlantic Lube was "overburdened" with work, Mr. Aziz asked him to work for Atlantic Lube on Atlantic Lube's side of the garage approximately three to four times a month. While plaintiff was working for Atlantic Lube, and when Trancare was "overwhelmed" or when Frank Thompson, a Trancare employee, was absent from work, Mr. Aziz asked plaintiff to work for Trancare on Trancare's side of the premises doing transmission work once or twice a month.

On the day of the accident, plaintiff was working for Atlantic Lube. He arrived at work a little before 8 a.m. and changed his clothes on the Trancare side of the garage, where he had previously changed while working at both Trancare and Atlantic Lube. Mr. Aziz asked plaintiff to complete a job begun by Frank Thompson, who was out that day due to a dentist appointment. The job involved installing a transmission and performing some front end work on a commercial van called a "Chevy Express." After changing, plaintiff retrieved his tools from a mobile tool cart on the Trancare side of the garage,[1] and began to install the transmission on the Trancare side of the garage on a Trancare lift.

After working on the transmission for approximately three hours, plaintiff began to work on the front end, which included replacing a ball joint. Plaintiff used an oxy acetylene torch, owned by Trancare and located on the Trancare side of the garage, to heat up the ball joint area so that he could "press [the ball joint] out." After about one minute, a small fire ignited in the grease cup in the ball joint.[2] Plaintiff walked over to a yellow pail five to six feet away, retrieved an empty water bottle near the pail, and filled it with the liquid from the pail. He then poured the liquid on the ball joint to extinguish the fire, but the fire became big, and plaintiff's right shirt sleeve and the wheel arch of the van caught on fire. Plaintiff panicked and tossed the bottle with fluid back into the yellow pail, which caused a fire to ignite in the pail. His right wrist and hand started to burn. As plaintiff tried to push the pail

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[1]Most of the time, the tool cart was on the Trancare side of the garage.

[2]Plaintiff testified that a ball joint is a "swivel joint that allows for movement of the tire," and that a grease cup "is like a rubber boot that holds the grease inside so to lubricate the joint . . . There is a joint. It's like a ball and a socket."

away from the vehicle and toolbox, his shirt caught fire, and the fire traveled toward his neck, which Mr. Aziz witnessed as he drove a car into the garage.

Plaintiff ripped his shirt to get the fire off him. He then heard Mr. Aziz putting out the fire with a fire extinguisher. Plaintiff ran to the other side of the Trancare garage to get a fire extinguisher, but Mr. Aziz told him it was not the right kind to extinguish the type of fire in the pail. Mr. Aziz then extinguished the fire in the pail.

Plaintiff was taken by ambulance to the emergency room. Either before or after the ambulance arrived, plaintiff texted Mr. Aziz asking what they were going to say about the fire. Mr. Aziz texted back saying: "'[w]e could tell them that it was the drop light.'" Plaintiff said "ok."[3]

Before the ambulance arrived, Mr. Aziz said: "[w]ho the F would leave this container here with gas in it?" When the ambulance arrived, plaintiff told the EMTs what Mr. Aziz had told him to say because he was protecting "the shop."

Mr. Aziz was the only person who told plaintiff what to do, but if Cindy, who worked for Trancare, told plaintiff what to do, he would do it. Generally, when using an oxy acetylene torch, it is highly recommended that goggles be worn for eye protection. Plaintiff was not wearing goggles or gloves on the day of the accident because he did not use them while working, and he did not ask anyone at Atlantic Lube or Trancare for them. Heavy construction gloves and goggles were not available to him at the garage. He never made any

[3]Plaintiff read the text from his phone. Plaintiff texted: "where should I say the gas came from?" and Mr. Aziz replied: "We can say that it was the solvent. And it hit the drop light and caught on fire."

complaints to anyone at Trancare or Atlantic Lube about his working conditions, including the water pail. Before the accident, plaintiff had used one of the water pails in the garage to douse a flame that was lit by a torch, and when he had done that, the pail was filled with water.

At the time the accident occurred, there was no fluid in the van's transmission, the front-end work did not involve any fluids, and plaintiff was the only person on the Trancare side, except for Mr. Aziz, who had been there before plaintiff had started to work. When plaintiff started to heat the ball joint, it was not lubricated with grease, because the grease was on the inside of the ball joint, and in the past, plaintiff had seen a ball joint catch fire at least ten times, and had put water on it to extinguish the fire. On the day of the accident, plaintiff was wearing a shirt with the word "AAMCO" written on it, which he had gotten from the uniform company. When he started to work at Atlantic Lube, Atlantic Lube did not change his uniform.

There were free-standing fire extinguishers in the building which could be picked up and moved, but not in the area where plaintiff was working on the day of the accident. The liquid in the subject pail did not smell like anything. Plaintiff thought it was water, it looked like water, and occasionally there was dirty water in the pail used to mop the floor. Plaintiff was using a drop light when he was working on the transmission but not when he was heating up the ball joint.

Plaintiff received workers' compensation benefits for the injuries he sustained in the subject accident.

Plaintiff subsequently commenced the instant action against Trancare and 2900 Atlantic on or about April 1, 2015, alleging common-law negligence and a violation of Labor Law § 200. On or about April 24, 2015, 2900 Atlantic interposed its answer generally denying the allegations of the complaint and asserting cross claims against Trancare for contribution, and common-law and contractual indemnification. Trancare interposed its answer on or about June 18, 2015, generally denying the allegations of the complaint. On or about July 14, 2015, 2900 Atlantic commenced a third-party action against Atlantic Lube alleging causes of action for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

Thereafter, 2900 Atlantic and Trancare/Atlantic Lube made the instant motions for summary judgment. 2900 Atlantic argues that as an out-of-possession landlord which did not retain control over the premises, it cannot be held liable to plaintiff as a matter of law; that plaintiff's Labor Law § 200 and common-law negligence claims insofar as asserted against it must be dismissed because it neither supervised nor controlled plaintiff's work, nor created or had notice of the allegedly dangerous condition; and that it is entitled to summary judgment on its cross claims against Trancare for common-law and contractual indemnification and on its third-party claims against Atlantic Lube for its defense, indemnification, and breach of contract based upon the lease provisions in the respective leases with these defendants which, although naming another individual as the "Landlord," provided that the leases were enforceable by the landlord's successors or assigns.

In support of their own motion for summary judgment, Trancare/Atlantic Lube argue that plaintiff's claims against it are barred by Workers' Compensation Law §§ 11 and 29 because Trancare and Atlantic Lube are alter egos or, alternatively, because plaintiff was a "special employee" of Trancare, or alternatively (with respect also to the cross claims against it for contribution and common-law indemnification) because it was not foreseeable that plaintiff would use a "mop bucket" to extinguish the fire, and thus it owed plaintiff no duty to provide a safe bucket sufficient to extinguish a fire. In addition, Trancare/Atlantic Lube assert that 2900 Atlantic's claims for contractual indemnification must be dismissed because there is no contractual provision which specifically requires Trancare or Atlantic Lube to indemnify 2900 Atlantic; that 2900 Atlantic's claims for contribution/common-law indemnification must be dismissed because plaintiff did not suffer a "grave injury" under Workers' Compensation Law § 11; and that 2900 Atlantic's claim for breach of contract for failure to procure insurance must be dismissed because the relevant leases do not contain any provisions obligating Atlantic Lube to procure such insurance.

In opposition, plaintiff contends that Trancare/Atlantic Lube's theories of alter ego and special employee are inapplicable because they are two separate corporate entities, operating in different locations, under separate leases, with different clientele, bank accounts, and equipment. Plaintiff also asserts that based upon the facts of the case and his "garage safety" expert, Trancare cannot claim that it was not negligent.

In partial opposition to the arguments of Trancare/Atlantic Lube, 2900 Atlantic contends that its leases with these defendants in fact contain provisions obligating them to

defend and indemnify it by virtue of the clause in both leases which provides that "[t]his Lease shall be binding upon and inure to the benefit of and be enforceable by the respective successors and assigns of the Parties hereto."

In reply, Trancare asserts that 2900 Atlantic's claims for contribution or common-law indemnification must be dismissed because 2900 Atlantic does not dispute that plaintiff did not sustain a grave injury; that Trancare and Atlantic Lube are alter egos or that plaintiff was a special employee of Trancare; and that it was not foreseeable that plaintiff would use the contents of a mop bucket to extinguish a fire which he started.

Discussion

"Workers' Compensation Law §§ 11 and 29 (6) provide that the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" (*Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 150 [2nd Dept 2010]). "The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities which are alter egos of the entity which employs the plaintiff" (*Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 [2nd Dept 2013]). Thus, "[a] defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer" (*id.*). "A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 619 [2d Dept

2013]). "However, a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (*Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595 [2d Dept 2010]). Specifically, "'[c]losely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, *and the principals treat the two entities as separate and distinct*'" (*Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 1262 [3d Dept 2010], quoting *Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 965 [3d Dept 2003][emphasis added]).

Similarly, "where an injured worker elects to receive Workers' Compensation benefits from his or her general employer, a special employer is shielded from an action at law commenced by the special employee" (*Franco v Kaled Mgt. Corp.*, 74 AD3d 1142, 1142 [2d Dept 2010]). "A special employee is described as one who is transferred for a limited time of whatever duration to the service of another" (*id*). While "[g]eneral employment is presumed to continue . . . this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*id.*). On the other hand, "[i]t is well settled that one who is in the general employ of one party may be in the special employ of another despite the fact that the general employer is responsible for the payment of wages, has the power to hire and fire, has an interest in the work performed by the employee, maintains workers' compensation for the employee, and provides some, if not all, of the employee's equipment" (*Cameli v Pace Univ.*,

131 AD2d 419, 420 [2d Dept 1987]). "While no single factor is determinative, 'a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work'" (*id.*, quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d 557, 558 [1991]). Additional factors to consider are "who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business'" (*id.* at 1142-1143, quoting *Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662 [2d Dept 2005]).

Here, Trancare/Atlantic Lube have made a prima facie showing that they are alter egos, namely that they were operating at the subject premises as a single integrated unit. In this regard, they assert, and the record reveals, that Trancare and Atlantic Lube are owned by one person; that they were located side by side and shared a wall with a door allowing passage by workers between each side; and that Mr. Aziz was the general manager for both Trancare and Atlantic Lube, had the same responsibilities as he had at Trancare after Atlantic Lube opened, received a paycheck from Trancare although he was working for Atlantic Lube, ran the day-to-day operations of Trancare, received instructions from the owner regarding the operation of Atlantic Lube, was "[r]unning back and forth between buildings" multiple times during the day, was responsible for making sure all Trancare and Atlantic Lube employees were wearing "proper safety items," was on the Trancare payroll in 2016,

and was the only person who gave plaintiff instructions when plaintiff worked first for Trancare and then for Atlantic Lube.[4]

The evidence also demonstrates that there was only one changing/locker room on the entire premises; that when plaintiff worked for Trancare and then Atlantic Lube, he used the bathroom on the Trancare side of the garage; that plaintiff received only one uniform (a shirt) containing the AAMCO emblem when he worked for Trancare, which he wore while working for Trancare and then Atlantic Lube; that when plaintiff worked for Trancare, he performed work for Atlantic Lube on the Atlantic Lube side of the garage three to four times a month, and that when plaintiff worked for Atlantic Lube, he worked for Trancare on the Trancare side of the garage one or two times a month; that when plaintiff stopped working for Trancare and began working for and receiving paychecks from Atlantic Lube, he did not sign any paperwork, received the same pay and worked the same hours; that while working at Atlantic Lube, plaintiff stored his tools in a cart which mostly remained on the Trancare side of the garage; that the fees for work done on the day of the accident were paid to Trancare; that the same three individuals (the owner, Mr. Aziz, and Cindy) had authority to sign checks and pay bills on behalf of both Trancare and Atlantic Lube; and that when the accident occurred, plaintiff had been asked by Mr. Aziz to work on a van on the Trancare side of the premises.

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[4]Mr. Aziz testified that he worked for Trancare as a technician from June, 1998 to the beginning of 2000; that in the beginning of 2000, he went to AAMCO manager school, and that in September, 2000, Atlantic Lube opened at 2896 Atlantic Avenue. At that time, Mr. Aziz became the general manager for Atlantic Lube, but still received his paychecks from Trancare. "Eventually" Mr. Aziz was transferred to the Atlantic Lube payroll. In 2004, he left the country. In 2007, he returned to the United States and was hired back by Trancare, and was paid on Trancare's payroll. On the date of his deposition (March 14, 2016), he was being paid by Trancare.

Finally, the evidence also demonstrates that certain equipment, such as a scanner, was purchased together by both Trancare and Atlantic Lube;[5] that the alignment machine was used by both entities; that there was one account for both entities for the gas and water meters; that Mr. Aziz would assign workers, including plaintiff, to do work for either Trancare or Atlantic Lube depending on the job that needed to be done; that Cindy, who was an assistant to Mr. Aziz, could sit at a desk at either Trancare or Atlantic Lube to do her work; that if a customer asked Trancare to perform work it was unable to do, the customer was sent to Atlantic Lube, but AAMCO would receive part of the fee; that if a customer asked Atlantic Lube to fix a transmission problem, Atlantic Lube gave the job to Trancare, "meaning AAMCO will do everything and bill through Atlantic Lube," where AAMCO gets part of the fee; and that at the time of plaintiff's accident, Trancare also performed general repairs like Atlantic Lube, although Trancare performed transmission work and Atlantic Lube did not.[6]

In opposition, plaintiff has raised a triable issue of fact as to whether the two entities are alter egos. In particular, plaintiff points out that Trancare and Atlantic Lube had separate garages (albeit connected by a door), separate leases, and separate employees (apart from Mr. Aziz and Cindy [working for both]); that while the owner was the sole shareholder of each corporation, neither owned stock of the other; that Atlantic Lube had borrowed money from

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[5]Mr. Aziz testified that various types of equipment, such as the wheel alignment machine, the inspection machine, oil containers, a pumping device for the engine oil, office equipment, air conditioning, a smoke test machine, cleaning items, and buckets and mops "are owned through both buildings." He also testified that shop tools and parts could be purchased by Trancare or Atlantic Lube because those purchases were "interchangeable."

[6]Plaintiff incorrectly contends that Trancare only fixed transmissions.

Trancare (Plaintiff's Motion, Exh. H); that Trancare and Atlantic Lube's employees were paid by check through separate payrolls; that Trancare and Atlantic Lube had separate electric utility accounts; that Trancare and Atlantic Lube had separate checking accounts and filed separate tax returns, indicating that Trancare's gross income for 2013 was twice that of Atlantic Lube (Plaintiff's Opposition, Exhs. G and H); that Trancare and Atlantic Lube paid for certain items and equipment separately; that Trancare and Atlantic Lube had separate credit card machines and separate credit card accounts; that each entity had separate tools and machines, i.e. Trancare had a double lift which Atlantic Lube did not have and Atlantic Lube had a wheel alignment machine, which Trancare did not have (although Trancare used it); that in 2014, Trancare terminated plaintiff's employment with Trancare because it could no longer afford to keep him on its payroll, and plaintiff began to work for Atlantic Lube, where he no longer regularly worked on transmissions; and that each corporation borrowed money to finance itself by pledging their own equipment and accounts receivable as collateral for those separate loans (Plaintiff's Opposition, Exhs. O and P).

Given the above discussion, a material question of fact also exists as to whether plaintiff was a special employee of Trancare at the time of the accident. In this regard, Mr. Aziz, who was paid by Trancare, and who was the manger of both Trancare and Atlantic Lube, supervised and controlled plaintiff's work on the day of the accident; plaintiff, who was employed by Atlantic Lube, worked for Trancare on the Trancare side of the premises once or twice of month; at the time of the accident, plaintiff was performing work in furtherance of Trancare's business on the Trancare side of the premises, for which Trancare received the fee; and while plaintiff was paid by Atlantic Lube, his tools were generally

stored on the Trancare side of the premises, Trancare furnished his AAMCO shirt, and he used Trancare's facilities (i.e. the lifts) when working at Trancare. Accordingly, that branch of Trancare/Atlantic Lube's motion to dismiss plaintiff's complaint insofar as asserted against them is denied.

Trancare/Atlantic Lube also contend that plaintiff's claims against Trancare (and the cross claims asserted against it by 2900 Atlantic for contribution and common-law indemnification) must be dismissed because it (Trancare) provided fire extinguishers, which plaintiff knew were available but did not use, and it owed no duty to plaintiff to ensure that the mop bucket and its contents were a safe means to extinguish a fire because such use was unforeseeable.

In opposition, plaintiff asserts that Trancare/Atlantic Lube's foreseeability argument ignores their negligent acts, as well as the affidavit of his expert who opines, in substance, that plaintiff did not receive proper training in the use of an oxygen acetylene torch from Trancare ("his employer");[7] that the premises did not contain an enclosure or partition for so-called "hot work;" that plaintiff was not provided with protective equipment mandated by OSHA; and that Trancare permitted gas to be stored in an unsecured container and did not supply or properly inspect the fire extinguishers at the premises.

Trancare/Atlantic Lube have failed to make a prima facie showing that it provided plaintiff with a safe place to work. Defendants fail to address plaintiff's testimony that none

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[7]In his affidavit, the expert states that when he made his report, although he stated that plaintiff worked for Trancare, it was because he was told that plaintiff was working at a facility at 2900 Atlantic Avenue. However, he states: "I did not know then and do not know now, by whom Plaintiff was employed that day and any statement by me in my report referring to AAMCO as his 'employer' is simply my way of expressing that Plaintiff was working and injured in that facility on that day" (Vitulli Affidavit at ¶3).

of the free-standing fire extinguishers in the premises were located where he was working on the day of the accident; that heavy construction gloves and goggles were not available to him at the garage; and that the fire extinguisher he attempted to use was not capable of extinguishing a fire caused by a flammable solvent. Further, defendants did not show that the absence of the fire extinguishers and safety equipment were not a proximate cause of the accident. In addition, defendants do not address plaintiff's expert affidavit.[8] "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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). Even considering the testimony of Mr. Aziz, namely that there were nine fire extinguishers in the Trancare part of the premises which were capable of extinguishing the subject fire, and that there was a fire extinguisher between four and six feet away from where plaintiff was standing, this testimony merely raises a material question of fact as to whether Trancare provided plaintiff with a safe place to work. Under the circumstances, that branch of Trancare/Atlantic Lube's motion to dismiss plaintiff's claims insofar as asserted against it is denied.

Trancare/Atlantic Lube also move to dismiss 2900 Atlantic's cross claims and third party claims against them for contribution and common-law indemnification on the grounds that plaintiff did not sustain a grave injury under Workers' Compensation Law §11. In this

[8]As noted, plaintiff also testified that after he heard Mr. Aziz putting out the fire with a fire extinguisher, he ran to the other side of the garage to get a fire extinguisher, but was told it was the wrong kind to extinguish the subject fire.

regard, "[t]he Workers' Compensation Law shields both general and special employers from third-party actions seeking contribution or indemnification" (*id.*). Here, inasmuch as material questions of fact exist as to whether plaintiff was a special employee of Trancare (*id.*), as well as whether Trancare and Atlantic Lube are alter egos (*Nunez*, 146 AD3d at 489), and since Trancare has failed to establish that it was not negligent (*see e.g. Poalacin v Mall Props., Inc.*, ___AD3d___, 2017 NY Slip Op 08027 [2017]), that branch of Trancare/Atlantic Lube's motion to dismiss 2900 Atlantic's cross claims against Trancare for contribution and common-law indemnification is denied. However, inasmuch as plaintiff was employed by Atlantic Lube at the time of the accident, and since it is undisputed that plaintiff did not sustain a "grave injury" under Workers' Compensation Law § 11, that branch of Trancare/Atlantic Lube's motion to dismiss 2900 Atlantic's third-party claims against Atlantic Lube for contribution and common-law indemnification is granted (*Del Vecchio v Danielle Assoc., LLC*, 108 AD3d 583, 587-588 [2d Dept 2013]).

2900 Atlantic moves to dismiss the complaint insofar as asserted against it on the ground that it is an out-of-possession landlord. "Under New York common law, an out-of-possession landowner retains no general responsibility for keeping leased property in a reasonably safe condition" (*Keum Ok Han v Kemp, Pin & Ski, LLC*, 142 AD3d 688, 688 [2d Dept 2016]). Nevertheless, "an out-of-possession landlord may be liable for injuries occurring on the premises if 'it has retained control of the premises, is contractually obligated to perform maintenance and repairs, or is obligated by statute to perform such maintenance and repairs'" (*Yehia v Marphil Realty Corp.*, 130 AD3d 615, 616 [2d Dept 2015], quoting *Denermark v 2857 W. 8th St. Assoc.*, 111 AD3d 660, 661 [2d Dept 2013]). Further,

"[r]eservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when a specific statutory violation exists and there is a significant structural or design defect" (*Rhian v PABR Assoc., LLC*, 38 AD3d 637, 638 [2d Dept 2007] [internal citations and quotations marks omitted]; *Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988, 991 [2d Dept 2017]; *see also Keum Ok Han*, 142 AD3d at 688).

2900 Atlantic has made a prima facie showing that it "relinquished control of the leased premises and that it was not obligated under the terms of the lease to maintain or repair [it]" (*Sangiorgio v Ace Towing & Recovery*, 13 AD3d 433, 434 [2d Dept 2004]). The lease agreements permitted Trancare and Atlantic Lube to use respective parts of the premises for an "automobile maintenance and mechanical repair shop (¶3);" and obligated them to "make all non-structural repairs in and about the Demised Premises necessary to preserve them in good order and condition and comply with all laws, rules, ordinances, orders and regulations at any time issued or in force applicable to the Demised Premises (¶8);" to "promptly pay for all work performed," to "remedy all conditions complained of (*id.*)"; and to indemnify 2900 Atlantic for any liability arising from the failure to remedy those conditions (*id.*). Furthermore, the leases provide that 2900 Atlantic was only responsible "for all structural repairs not occasioned by Tenant's acts and include only the roof, exterior walls, foundation, sanitary and sewer lines outside of the Demised Premises" (*id.*).

2900 Atlantic has also made a prima facie showing that it cannot be held liable under Labor Law § 200 or plaintiff's common-law negligence claims. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide

a safe place to work" (*Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017]). Where injuries arise from the manner in which the work is performed, "a defendant must have the authority to exercise supervision and control over the work" in order to be held liable under the statute (*Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017]). "Where a plaintiff's injuries stem . . . from a dangerous condition on the premises, a [property owner] may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*Esquivel v 2707 Creston Realty, LLC*, 149 AD3d 1040, 1041-1042 [2d Dept 2017] [internal citations and quotation marks omitted]).

Here, to the extent plaintiff's injuries arose from the means and methods of his work, namely plaintiff's use of the acetylene torch to loosen the ball joint, 2900 Atlantic has submitted the affidavit of its property manager affirming that it did not supervise or control or have the authority to supervise and control any employees who worked at the subject premises (Motion of 2900 Atlantic, Exh. I, Affidavit of Ryan Mehra at ¶¶8-9). 2900 Atlantic also notes that plaintiff testified that his activities at the site were supervised and controlled by Mr. Aziz and other employees of Trancare or Atlantic Lube (Max [Atlantic Lube] and Cindy [Trancare/Atlantic Lube]); that he used his own tools and those owned by Trancare and Atlantic Lube; and that Mr. Aziz testified that 2900 Atlantic did not have any power over how the employees of Trancare or Atlantic Lube performed their day-to-day duties or have any involvement in the day-to-day operations of Trancare or Atlantic Lube.

To the extent plaintiff's injuries arose from a dangerous condition, namely the mop bucket and its contents, the evidence demonstrates that 2900 Atlantic did not create the

condition. In this regard, Mr. Aziz testified that representatives of 2900 Atlantic had only been on the premises to inspect it three times within a year and a half after it purchased the property; that 2900 Atlantic had nothing to do with the day-to-day operations of Trancare or Atlantic Lube; that a man who lived next door to the garage, who did not have any relationship with 2900 Atlantic, mopped the floor of the offices in the premises with the subject mop pail, Monday through Friday at 4:30 p.m.; that otherwise, "the technicians [were] responsible for their own messes;" and that he (Mr. Aziz) dumped out the pail the Friday night before the accident.

Further, 2900 Atlantic notes that it did not have actual notice of the pail because plaintiff testified that he never made any complaints about his working conditions, or about the contents of the subject pail; and that it did not have any constructive notice of the pail because plaintiff testified that the first time he saw the pail was on the date of his accident, after the ball joint caught fire; that he did not know who put the pail there; and that the liquid in the bucket looked like water and did not have an odor.

Plaintiff fails to oppose this branch of 2900 Atlantic's motion. Thus, this branch of 2900 Atlantic's motion to dismiss the complaint insofar as asserted against it is granted.

2900 Atlantic moves for summary judgment on its cross claims against Trancare for common-law and contractual indemnification and on its third-party claims against Atlantic Lube for contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance, based upon the contractual indemnification and insurance provisions in the subject leases, and a provision in the leases which states that they are enforceable by successors and assigns of the parties (i.e. the Landlord and the Tenant).

Trancare/Atlantic Lube move to dismiss 2900 Atlantic's cross claim against it for contractual indemnification and to dismiss 2900 Atlantic's third-party claims against Atlantic Lube for contractual indemnification and damages for breach of contract for failure to procure insurance.

In support of its motion, 2900 Atlantic submits the affidavit of its property manager, who avers that 2900 Atlantic became the owner of record of the subject premises on September 23, 2014, having purchased the premises from the prior owner, Ms. Annette Vitucci; that as landlord, on September 23, 2014, it assumed both the Trancare and Atlantic Lube leases that these two entities had entered into with Ms. Vitucci on September 1, 2010 (ending June 30, 2020); and that on February 28, 2015, the date of the accident, the premises had been leased to Trancare and Atlantic Lube, which were operating their businesses out of the subject premises (Mehra Affidavit, ¶¶2-5). 2900 Atlantic contends that it is entitled to contractual indemnification against Trancare and Atlantic Lube and damages from Atlantic Lube based upon paragraph 32 of these leases, which each provide that "[t]his Lease shall be binding upon and inure to the benefit of and be enforceable by the respective successors and assigns of the Parties hereto," wherein the parties are defined in the leases as the "Landlord" and the "Tenant," and that there is no dispute that Ms. Vitucci's "successor" or "assign" was 2900 Atlantic.

With respect to its claims for contractual indemnification, 2900 Atlantic relies on the indemnification provision in the subject leases which provide, at paragraph 18, that:

> "The Tenant shall indemnify and hold Landlord harmless from and against all liabilities, obligations, claims, damages, fines, penalties, interest, causes of action, costs and expenses including attorneys' fees . . . imposed upon or incurred or asserted against Landlord or the Demised Premises by reason of the occurrence or existence of any of the following, whether or not resulting from any negligent act or omission by Landlord, except if resulting from the sole negligent act of the Landlord . . . any accident, injury to or death of persons (including workmen) or loss of or damage to property occurring, or claimed to have occurred, on or about the Demised Premises or any part thereof . . . failure on the part of the Tenant promptly and fully to comply with or perform any of the terms, covenants or conditions of this Lease; or performance of any labor or services or the furnishing of any materials or other property in respect of the Demised Premises or any part thereof."

With respect to its third-party claim for breach of contract for failure to procure insurance, 2900 Atlantic relies upon paragraph 16 of the leases to support its claim that Trancare and Atlantic Lube were required to purchase several insurance policies insuring the demised premises, naming the landlord as an additional insured, but failed to do so. Paragraph 16 provides that:

> "Tenant shall, during the term of this Lease, keep in full force and effect at its sole cost and expense a broad form comprehensive general liability insurance policy upon the Premises, including a blanket contractual and product liability coverages [sic] in combined single limits of $1,000,000. Tenant shall also keep in full force and effect during the term of this Lease an umbrella liability insurance policy upon the Premises in an amount not less than $3,000,000.00. *The said policies shall name Landlord as an additional insured party thereunder*. Tenant shall deliver to Landlord, prior to the commencement of the term of this Lease, a memorandum or certificate of insurance as evidence of the above coverage. Renewals of such policies, as evidenced by memorandum or certificate shall be delivered to the Landlord from time to time, at least thirty (30) days before expiration thereof" (emphasis added).

In support of their own motion dismissing the cross claim against Trancare for contractual indemnification and granting Atlantic Lube summary judgment dismissing the

third-party claims against it for contractual indemnification and breach of contract, and in opposition to this branch of 2900 Atlantic's motion, Trancare and Atlantic Lube argue that the leases define the landlord as Ms. Vitucci and that the provisions noted immediately above do not contain any language specifically requiring them to indemnify 2900 Atlantic or any successors or assigns of Ms. Vitucci. They also contend that since 2900 Atlantic has insurance, it agreed not to pursue any claims against Trancare or Atlantic Lube based upon paragraph 30 of the subject leases, entitled "Destruction, Fire and Other Casualty."

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 [2014] [internal citations and quotation marks omitted]). "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" (*De Souza v Empire Tr. Mix*, Inc., ___AD3d___, 2017 NY Slip Op 07588, *1 [2017] [internal citations and quotation marks omitted]). Finally, "[t]he party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (*id.*).

Here, 2900 Atlantic has made a prima facie showing entitling it to contractual indemnification from Trancare and Atlantic Lube. In this regard, the court has already determined that 2900 Atlantic is free from negligence. In addition, both leases provide that

they "shall be binding and inure to the benefit of and be enforceable by the respective successors and assigns of the Parties hereto." Further, the "Parties" are defined in the leases as the "Landlord" and "Tenant." Finally, is it undisputed that Ms. Vitucci's "successor" or "assign" was 2900 Atlantic, which was the landlord at the time of the accident. Thus, contrary the argument of Trancare/Atlantic Lube, the intention to indemnify can be clearly gleaned from the express language of the indemnification provision and the purposes of the entire agreement and the surrounding facts and circumstances (*id.*). Accordingly, Trancare and Atlantic Lube are obligated to indemnify and hold 2900 Atlantic harmless from and against any and all claims, including costs, expenses and attorneys' fees, occurring on the demised premises, including claims for bodily injury asserted by an employee "workmen" of either entity, namely plaintiff. Thus, that branch of 2900 Atlantic's motion for summary judgment on its cross claim against Trancare and its third-party claims against Atlantic Lube for contractual indemnification is granted, and those branches of Trancare/Atlantic Lube's motion to dismiss 2900 Atlantic's claim for contractual indemnification are denied.

The same reasoning applies with respect to the provision in the leases requiring Trancare and Atlantic Lube to purchase insurance policies insuring the demised premises naming the "Landlord" as an additional insured. Here, it is undisputed that Trancare and Atlantic Lube were insured under one insurance policy naming Ms. Vitucci as an additional insured with respect to liability arising out of the ownership, maintenance or use of 2894-2900 Atlantic Avenue; that they were required to name the "Landlord" as an additional insured

(here 2900 Atlantic), and that the lease was binding upon and enforceable by "the receptive successors and assigns of the Parties" thereto, namely 2900 Atlantic.

Trancare and Atlantic Lube nevertheless contend that 2900 Atlantic waived its right to recovery against them, including its claims for common-law indemnification and contribution, because 2900 Atlantic has insurance in effect that is collectible, based upon the following provision, entitled "Destruction, Fire and Other Casualty." This provision, at paragraph 30 of the leases, states that:

> "Notwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire *or other casualty*, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or any one claiming through or under each of them by way of subrogation or otherwise" (emphasis added).

However, this provision only applies to claims relating to property damage, not bodily injury claims made against the landlord. Further, while Trancare and Atlantic Lube contend, based upon dictionary definitions, that the term "other casualty" encompasses claims for personal injury, the first sentence of this provision (as well as the remainder of the clause), clearly relates only to property damage, namely:

> *"(a) If the Demised Premises or any part thereof shall be damaged by fire or other casualty,* Tenant shall give immediate notice thereof to Owner and this Lease shall continue in full force and effect except as hereinafter set forth" (emphasis added).

Moreover, as 2900 Atlantic contends, the remainder of the indemnification provision obligates Trancare and Atlantic Lube to provide the landlord with a defense "at Tenant's expense," namely:

> "In the case . . . any suit, action or proceeding is brought against Landlord or filed against the Demised Premises or any part thereof by reason of any such occurrence, Tenant upon Landlord's request and at Tenant's expense shall resist and defend such suit, action or proceeding or cause the same to be resisted and defended by counsel designated by Tenant and approved by Landlord."

Thus, that branch of 2900 Atlantic's motion for summary judgment on its claim against Atlantic Lube for breach of contract for failure to procure insurance is granted "to the extent of out-of-pocket damages caused by the breach, i.e. the purchase cost of the insurance [2900 Atlantic] procured for itself, the premiums and any additional costs such as deductibles, co-payments, and increased future premiums" (*McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 470 [1st Dept 2013]), and that branch of Trancare/Atlantic Lube's motion to dismiss this claim is denied.

Finally, those branches of 2900 Atlantic's motion for contribution and common-law indemnification from Trancare and Atlantic Lube are denied. While 2900 Atlantic has made a prima facie showing that it was not negligent, it has failed to demonstrate that Trancare/Atlantic Lube were negligent. Those branches of Trancare/Atlantic Lube's motion to dismiss 2900 Atlantic's cross claim against Trancare and third-party claims against Atlantic Lube for contribution and common-law indemnification are denied as Trancare/Atlantic Lube have failed to demonstrate that they were not negligent.

In summary, that branch of the motion of Trancare/Atlantic Lube to dismiss 2900 Atlantic's third-party claims against Atlantic Lube for contribution and common-law indemnification is granted and the remainder of their motion is denied. Those branches of the motion of 2900 Atlantic to dismiss plaintiff's complaint against it, for summary judgment against Trancare on its cross claim for contractual indemnification, for summary judgment against Atlantic Lube on its third-party claims for contractual indemnification and breach of contract for failure to procure insurance, and for an order directing Atlantic Lube to reimburse it for legal fees, are granted, and the remainder of its motion is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. BERNARD J. GRAHAM