Feliz v Citnalta Constr. Corp
2017 NY Slip Op 33563(U)
September 27, 2017
Supreme Court, Kings County
Docket Number: Index No. 505238/2013
Judge: Loren Baily-Schiffman

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 27 day of September, 2017.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

GABRIEL FELIZ, Plaintiff, - against - CITNALTA CONSTRUCTION CORP and STV CONSTRUCTION, INC, Defendants.	Index No.: 505238/2013 Motion Seq. # 7, 8 & 9
CITNALTA CONSTRUCTION CORP, Third-Party Plaintiff, - against - STV CONSTRUCTION, INC, STV ARCHITECTS, PC and LJC DISMANTLING CORP, Third-Party Defendants.	DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

Notice of Motion by Citnalta (MS# 7; Doc# 88); Affirmation in Support of SJ Motion & Exhibits (Doc# 89-130); Affirmation in Support & Exhibits (Doc# 180-190); Affirmation in Opposition & Exhibits (Doc# 191-198) Affirmation in Opposition to STV's Motion and Reply in Further Support of Citnalta's SJ Motion & Exhibits (Doc# 216-217); Affirmation in Opposition to Plaintiff's Cross-Motion and Reply in Further Support of Citnalta's SJ Motion & Exhibits (Doc# 219-222); Reply Affirmation in Further Support of Citnalta's SJ Motion & Exhibits (Doc# 225-229); Reply Affirmation in Further Support of Citnalta's SJ Motion & Exhibits (Doc# 231-233); and Affirmation in Reply & Exhibits (Doc# 236-237)	1-9
Notice of Motion by STV Construction Inc. (MS# 8; Doc# 133); Affirmation in Support of STV Construction Inc.'s SJ Motion & Exhibits (Doc# 134-158); Affirmation in Opposition & Exhibits (Doc# 199-207); Affirmation in Opposition to STV's Motion and Reply in Further support of Citnalta's SJ Motion & Exhibits (Doc# 208 - 209); and Affirmation in Opposition and in Reply (Doc# 224)	10-14
Notice of Cross-Motion by Feliz (MS# 9; Doc# 159); Affirmation in Support of Cross-Motion and in Opposition to SJ Motions & Exhibits (Doc# 160-176); Affirmation in Opposition to Plaintiff's Cross-Motion and Reply in Further Support of Citnalta's SJ Motion & Exhibits (Doc# 211-215); and Affirmation in Reply by Plaintiff (Doc# 235)	15-18

Upon the foregoing papers Defendant and Third-Party Plaintiff, CITNALTA CONSTRUCTION, CORP (Cinalta) moves this Court for an Order granting summary judgment in their favor; 1)

dismissing Plaintiff's claims; 2) granting all claims against Third-Party Defendant, LJC DISMANTLING CORP (LJC); and 3) all cross-claims against and Defendant/Third-Party Defendant STV CONSTRUCTION, INC (STV). Defendant/Third-Party Defendant, STV Construction also moves for summary judgment; 1) dismissing Plaintiff's Second Amended Complaint and all third-party claims and cross-claims asserted against it; or, in the alternative; 2) granting STV Construction's motion for summary judgment on its claims for contribution, common law indemnity and contractual indemnity against Cinalta and LJC and for breach of contract and failure to procure insurance against LJC. Plaintiff cross-moves for summary judgment against Cinalta and STV Construction on liability pursuant to Labor Law §240(1) and 241(6).

BACKGROUND

STV was hired as the Construction Manager for a project at the South Beach Psychiatric Center located on Staten Island necessitated by the extensive damage caused by Superstorm Sandy. STV hired Cinalta as the General Contractor who subcontracted the demolition services for the project to LJC. Plaintiff, Gabriel Feliz, was an employee of LJC and was assigned to demolish interior concrete walls by hand using a sledgehammer. There was a sprinkler pipe overhead in the area where Plaintiff was working. Part of the pipe was bolted into the ceiling and part was supported laterally by a structural Kindorf[1] attached to an exterior wall on one side and on the other side the interior wall that was being demolished. According to Lockland Josiah ("Dee"), LJC's foreman, on July 25, 2013 he noticed that the Kindorf strap that was attached to the partially

[1] A Kindorf is a slotted strut used in the construction industry, usually formed from a metal sheet folded over into an open channel shape. It is perforated to facilitate, *inter alia*, fastening the strut to the underlying building structures.

demolished interior wall was loose. Dee further testified that he immediately stopped the demolition work in the area and reported the condition to Victor Vitale ("Vitale"), the project superintendent and site safety manager for Cinalta. On July 26, 2013, a section of the sprinkler pipe that was thirty-five (35) feet in length, four inches wide and made of iron, fell onto Plaintiff and a co-worker while they were clearing debris from the same area where work had been stopped the day before. The demolition of the interior wall that had been supporting the Kindorf strap compromised its stability thereby causing it to become loose.

LABOR LAW §240(1)

Labor Law §240(1) imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability, for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks. ***Rocovich v Consolidated Edison Co, 78 NY2d 509, 513 (1991); Saint v Syracuse Supply Co, 25 NY3d 117, 124 (2015).*** The "purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves." ***Saint, id at 124, citing Panek v County of Albany, 99 NY2d 452, 457 (2003), citing Martinez v City of New York, 93 NY2d 322, 325-326 (1999); and Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 (1985).*** Labor Law §240(1) "applies to both 'falling worker' and 'falling object' cases." ***Narducci v Manhasset Bay Assoc, 96 NY2d 259, 267–268 (2001)***. Courts have consistently held that Labor Law §240(1) protects workers from the hazards of building material falling on them during construction or demolition. ***Castillo v 62-25 30th Ave Realty, LLC, 47 AD3d 865, 866 (2d Dept 2008), citing Jiron v China Buddhist Assn, 266 AD2d 347, 349 (2d Dept 1999).***

Moving defendants argue that Labor Law §240(1) is inapplicable to the case at bar and rely upon the Court of Appeals decision in ***Fabrizi v 1095 Ave of the Americas LLC, 22 NY3d 658 (2014).*** In ***Fabrizi,*** the Court denied the plaintiff's motion for summary judgment and found that the object that fell on plaintiff did not require " . . . securing for the purposes of the undertaking . . . ". ***Fabrizi, Id at 663, citing Outar v City of New York, 5 NY3d 731, 732 (2005), Quattrocchi v FJ Sciame Constr Corp, 11 NY3d 757, 759 (2008).*** Additionally, the Court of Appeals held that the object did not fall ". . . *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute."***Fabrizi, supra at 663, citing Narducci, supra at 268.*** Alternatively, moving defendants argue that Labor Law §240(1) does not apply where ". . . there is evidence . . . that the sprinkler pipe in question was to be demolished and therefore an integral part of the work."[2] In ***Wilinski v 334 E 92nd Hous Dev Fund Corp, 18 NY3d 1 (2011)*** the Court of Appeals explained,

> ". . .where the objects that injured the plaintiffs were themselves the target of demolition when they fell . . . imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical." However, in a case where the pipes are not "slated for demolition" "securing the pipes in place as workers demolished nearby walls" clearly falls within the ambit of ***Labor Law §240(1). Salazar v Novalex Contr Corp, 18 NY3d 134, 139 (2011), citing Wilinski, supra at 11.***

STV submits as Exhibit "U" the "First Floor Fire Protection Plans" as proof that "the sprinkler pipe that caused Plaintiff's injury was slated for demolition at the time of the accident . . .[3]." The Fire Protection Plan submitted as Exhibit "U" is dated 2015. The Legend itself states as follows:

> 1. 4/17/2013 Issue for Construction

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[2] Reply Affirmation by James Espositio, Esq, page 3, paragraph 5.

[3] Affirmation in Support by Michele Newsome, Esq, page 18, Paragraph 64.

2. 5/10/2013 Consolidated addendum
3. 5/23/2013 Addendum

Since the accident in the instant action occurred on January 26, 2013 these plans dated 2015 have no relevance to the issues raised in this motion. Accordingly, STV's Exhibit "U", the alleged proof that the sprinkler pipe was slated for demolition, creates more questions of fact than it eliminates. Plaintiff argues that both Dee on behalf of LJC and Vitale on behalf Cinalta testified that the sprinkler pipe that fell on Plaintiff was not slated for demolition.[4] However, contrary to Defendants' contention, even if the sprinkler pipe was supposed to be demolished at some point, the law clearly establishes that unless it was the "intended target of the demolition at the time it collapsed on plaintiff", liability will still attach to moving Defendants pursuant to the statute. ***Raqubir v Gibralter 146 AD3d 563, 565 (2d Dept 2017).*** Plaintiff was clearing debris from the area when the sprinkler pipe collapsed on him.

The evidence submitted by the defendants in support of their motions did not eliminate any question of fact that Plaintiff was exposed to a gravity related hazard within the meaning of Labor Law §240(1). ***Tylutki v Tishman Tech, 7 AD3d 696, 696 (2d Dept 2004), citing Salinas v Barney Skanska Constr Co, 2 AD3d 619 (2d Dept 2003); Heidelmark v State of New York, 1 AD3d 748 (3d Dept 2003); Thomas v 2 Overhill Rd Assoc, 1 AD3d 174 (1s Dept 2003); Van Eken v Consolidated Edison Co of New York, 294 AD2d 352, 353 (2d Dept 2002).*** Defendants also fail to demonstrate that the sprinkler pipe that fell on Plaintiff was not ". . . a load that required securing for the purposes of the undertaking at the time it fell."***Mora v Boston Properties, Inc, 79 AD3d***

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[4] Dee and Vitale's deposition testimony page 96, Exhibit "H" & page 55, Exhibit "I", respectively, annexed to Plaintiff's Affirmation in Support of Notice of Cross-Motion by Barry Weiss, Esq

1109, 1109–10 (2d Dept 2010), citing Narducci, supra at 268; Outar, supra at 732 ; Portillo v Roby Anne Dev, LLC, 32 AD3d 421, 422 (2d Dept 2006); Costa v Piermont Plaza Realty, Inc, 10 AD3d 442, 444 (2d Dept 2004).

Additionally, contrary to Defendants' contention, the falling debris presented a significant risk of injury and not a general work-site hazard. Given the nature and purpose of the work that was being performed at the time the accident occurred, Defendants were obligated under Labor Law §240(1) to provide appropriate safety devices to safeguard against the risk of injury from falling objects. ***Sarata v Metro Transp Auth, 134 AD3d 1089, 1091–92 (2d Dept 2015),citing Sung Kyu–To v Triangle Equities, LLC, 84 AD3d 1058, 1060 (2d Dept 2011); Vargas v City of New York, 59 AD3d 261 (1s Dept 2009); Narducci, supra at 268.***

STV argues separately that its motion for summary judgment should be granted because it is not an owner or contractor and therefore there can be no finding of liability as against STV pursuant to Labor Law 240(1). The label of construction manager versus general contractor is not necessarily determinative in a Labor Law case. ***Walls v Turner Const Co, 4 NY3d 861, 864 (2005); Linkowski v City of New York, 33 AD3d 971, 975 (2d Dept 2006)***. Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240(1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute if the manager had the ability to control the activity which brought about the injury. ***Walls, supra at 863-864,citing Russin v Picciano & Son, 54 NY2d 311, 317–318 (1981); Comes v New York State Elec & Gas Corp, 82 NY2d 876, 878 (1993).*** Courts have often found that a construction manager is the agent of the owner and denied their motions for summary judgment. ***Gonneman v Huddleston,***

48 AD3d 516 (2nd Dept, 2008); Soles v Brentwood Union Free School District, 47 AD3d 804 (2nd Dept, 2008);

A copy of the contract between the New York State Office of General Services ("OGS"), owner of South Beach Psychiatric Center, and STV has been submitted for this Court's review.[5] That contract provides in relevant part that STV will supply the personnel, supervision, equipment and labor of every kind required to manage, oversee and strictly supervise the entire project and bear responsibility for any and all acts or omissions of those engaged in the Construction Work(Article 3 and Article 7.1[C]). STV was paid separately for its design services and its construction management service pursuant to the contract (Article 1.1). The contract also required STV's strict compliance with the "target project schedule" for the construction work as a precedent to receiving payment (Article 7.1 [F]).

Thomas Columbo ("Columbo") was the senior project officer and Anthony Franzese ("Franzese") was the mechanical, engineering and plumbing superintendent both on behalf of STV. Franzese testified at his deposition that he was on the work site every single day and part of STV's responsibility was to oversee construction and manage the project.[6] Columbo testified at his deposition that he was also on the work site every single day and that once the design portion of the project was completed, STV served as the construction manager for the job.[7] Accordingly, contrary to STV's contention, pursuant to the contract the owner delegated supervison and control

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[5] Annexed to Affirmation by James Espositio, Esq, as Exhibit "X".

[6] Exhibit "L" annexed to affirmation by Barry Weiss, Esq, page 6, paragraph 20.

[7] Exhibit "M" annexed to affirmation by Barry Weiss, Esq, page 9, paragraph 13-15.

over all aspects of the work and therefore STV was an agent of the owner. The law is clearly established that the determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right." ***Johnsen v City of New York, 149 AD3d 822 (2d Dept 2017), citing Williams v Dover Home Improvement, 276 AD2d 626, 626 (2d Dept 2000); Samaroo v Patmos Fifth Real Estate, Inc, 102 AD3d 944, 946 (2d Dept 2013).***

STV had a project executive and superintendent present every day at South Beach during the construction project. STV's contract with OGS made it responsible for every aspect of the construction work. In fact, STV's payment each month was held to the progress of the construction. The contract therefore gave STV the authority and responsibility to "demand compliance" with applicable safety requirements and to stop the work upon detecting any unsafe practice or condition." ***Lodato v Greyhawk N Am, LLC, 39 AD3d 491, 493 (2d Dept 2007).*** STV argues that Cinalta as general contractor had its own responsibility to maintain workplace safety and was present at the work site. Cinalta's presence and responsibilities, however, did not negate STV's independent duties under the Labor Law, as it assumed those duties and became "vicariously liable as an agent of the property owner." ***Pino v Irvington Union Free School Dist, 43 AD3d 1130, 1131–32 (2d Dept 2007), citing Walls, supra at 863; Lodato, supra at 493.*** Both STV and Cinalta have failed to establish their entitlement to judgment as a matter of law dismissing the Plaintiff's claims brought pursuant to Labor Law 240 (1) and accordingly, their motions are DENIED.

PLAINTIFF'S MOTION

Plaintiff submits an affidavit by Herbert Heller, Jr., Professional Engineer, in support of his motion for summary judgment. Mr. Heller is a civil engineer, licensed and registered in New York,

New Jersey and Pennsylvania. He has forty years of experience and has been qualified as an expert in site safety, construction procedures and OSHA compliance. Mr. Heller's expert opinion is based upon his review of the following documents in the instant action:

- Pleadings;
- Bills of particulars;
- Carlos Iberis' affidavit (a co-worker and eyewitness);
- Three (3) videos of the accident scene taken immediately after the occurrence;
- Pictures taken immediately after the occurrence as well as of the component parts of the sprinkler pipe support that existed before the accident;
- The Design-Build agreement between the owner/operator of the facility, New York State, Office of General Services and STV Construction, Inc;
- The contract between STV and Citnalta and the contract between Citnalta and its demolition sub-contractor LJC;
- Deposition testimony by Plaintiff, Dee, Vitale, Thomas Columbo and Anthony Franzese of STV.[8]

After reviewing all of the above, Mr. Heller opines in his affidavit that "Cinalta & LJC needed to provide statutorily enumerated safety devices to ensure that the entire elevated sprinkler pipe was secured to the ceiling slab to prevent it from falling."[9] Additionally, Mr. Heller states that good and proper construction method required "...the use of pipe hangers, straps or slings sufficient to support the heavy weight of the elevated, thirty-five foot iron pipe, to securely bolt the pipe to the concrete ceiling slab, regardless of what other utilities were overhead."[10] This is known as a

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[8] Affidavit by Herbert Heller, Jr., PE, page 2-3 paragraph 4, annexed to Plaintiff's Affirmation in Support by Barry Weiss, Esq.

[9] Affidavit by Herbert Heller, Jr., PE, page 10, paragraph 16, annexed to Plaintiff's Affirmation in Support by Barry Weiss, Esq.

[10] Affidavit by Herbert Heller, Jr., PE, page 10-11 paragraph 16, annexed to Plaintiff's Affirmation in Support by Barry Weiss, Esq.

"trapeze conduit support system." Finally in Mr. Heller's expert opinion:

> "the fact that using the proper construction method would have been onerous, labor intensive or time consuming in light of the presence of the other overhead utilities is of no moment here. Worker safety is paramount. There can be no doubt that had such a proper safety device of the kind enumerated in the Statute been furnished and properly constructed so as to prevent the sprinkler pipe from falling, this accident would never have occurred. The failure to furnish and construct these safety devices was a proximate cause of this accident."[11]

Cinalta and STV oppose Plaintiff's motion for summary judgment relying upon the decision in ***Romero v 2200 Northern Steel, LLC, 148 AD3d 1066 (2nd Dept 2017).*** In that case the Second Department reversed the lower court and denied Plaintiff's motion. The Second Department found that the expert's affidavit submitted in support of plaintiff's summary judgment motion failed to establish that a safety device to secure the object that fell was ". . . necessary or even expected." ***Romero, Id at 1067, citing Narducci, supra at 268***. The facts of the instant case stand in stark contrast to Mr. Heller's affidavit which makes clear that a safety device was necessary and would have prevented Plaintiffs injury.

Plaintiff relies upon the recent decision in ***Ragubir v Gibraltar Management Co, Inc, 146 AD3d 563, (1st Dept 2017)*** to support his motion. Contrary to Cinalta's contention, the decision does set forth enough facts to determine its applicability to the facts in the instant action. In ***Ragubir***, the plaintiff was injured during demolition work when the roof of an adjoining bay, forty feet away, collapsed. The First Department reasoned that the ". . . testimony established that the roof above plaintiff was not the intended target of the demolition at the time it collapsed on him . . ." thereby entitling plaintiff ". . . to judgment as a matter of law on the issue of liability on his

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[11] Affidavit by Herbert Heller, Jr., PE, page 11 paragraph 16.

Labor Law 240(1) claim." ***Ragubir, id at 564***.

In the instant case even if a question of fact exists as to whether the sprinkler pipe was slated for demolition it was not the intended target at the time the Plaintiff was injured by the falling pipe. Plaintiff has submitted evidence demonstrating that his injury was "the direct consequence of a failure to provide adequate protection against [the] risk" of harm posed by the falling pipe. ***Sarata, supra at 1091–92, citing Runner v New York Stock Exch, Inc, 13 NY3d599 (2009); Wilinski, supra at 11***. Plaintiff has therefore met its prima facie burden of entitlement to judgment as a matter of law on the Labor Law 240(1) claim. Defendants have failed to raise a triable issue of fact in opposition. Plaintiff's motion pursuant to Labor Law §240(1) is, therefore, GRANTED.

LABOR LAW §241(6)

Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. ***Grant v City of New York, 109 AD3d 961, 963 (2d Dept 2013); Misicki v Caradonna, 12 NY3d 511, 515 (2009); Rizzuto v LA Wenger Contr Co, 91 NY2d 343, 348 (1998).*** An action brought pursuant to Labor Law §241(6) must allege a violation of a specific and concrete provision of the Industrial Code. ***Klimowicz v Powell Cove Assoc, LLC, 111 AD3d 605 (2d Dept 2013); Ross v Curtis-Palmer Hydro-Elec Co, 81 NY2d 494, 503 (1993); Kowalik v Lipschutz, 81 AD3d 782, 783 (2d Dept 2011); Samuel v ATP Dev Corp, 276 AD2d 685, 686 (2d Dept 2000)***. The provision relied upon must set forth specific positive commands rather than general safety standards. ***Ross, supra at***

501-502; Rizzuto, supra at 349.

Plaintiff has withdrawn the claims based upon violations of the following the Industrial Code sections 23-1.5; 23-1.7(a); 23-1.8(c)(1); 23-3.2(a)(3); 23-3.2(b); 23-3.3(f) and 23-3.3(g). Only 12 NYCRR §23-3.3(b)(3) and 23-3.3 (c) are in dispute. Cinalta and STV have moved for an Order granting summary judgment dismissing these claims and therefore have the burden of demonstrating that 12 NYCRR 23-3.3 (b) and (c)are inapplicable to the facts of this case and that the alleged violation of these regulations was not a proximate cause of the accident that occurred on July 26, 2013. ***Melchor v Singh, 90 AD3d 866, 870 (2d Dept 2011); Harris v Arnell Constr Corp, 47 AD3d 768 (2d Dept 2008) ; Carriere v Whiting Turner Contr, 299 AD2d 509, 511 (2d Dept 2008); Blair v Cristani, 296 AD2d 471, 472 (2d Dept 2002); Beckford v 40th St Assoc [NY Partnership], 287 AD2d 586, 587 (2d Dept 2001).*** Moving Defendants contend that liability pursuant to 12 NYCRR § 23-3.3(b)(3) and 23-3.3 (c) requires that the hazard complained of is the result of structural instability caused by the progression of the demolition rather than the demolition itself. ***Garcia v Market Assoc, 123 AD3d 661 (2d Dept 2014); Maldonado v AMMM Properties Co, 107 AD3d 945, 968 (2d Dept 2013).*** According to the deposition testimony given on behalf of moving Defendants, there is no dispute that the sprinkler pipe fell onto Plaintiff as the result of the structural instability caused by the progression of the demolition. In fact there was no demolition being performed at the time the pipe fell on Plaintiff.

Moving Defendants also argue specifically that Industrial Code § 23-3.3(b)(3) is inapplicable to the case at bar because that regulation states in relevant part that a structure that is in the process of hand demolition must be guarded against the possibility that parts "may fall, collapse

or be weakened by wind pressure of vibrations." The law is well established that the statute requires a liberal construction to achieve the goals intended by the legislature in enacting these provisions. ***Panek, supra at 457, citing Gordon v Eastern Ry Supply, 82 NY2d 555, 559 (1993).*** In furtherance of achieving the goal intended by the legislature, courts have specifically held that requiring a plaintiff to show that an object fell due to wind pressure or vibration contradicts the purpose of the regulation. ***Wilinski, supra at 12, citing Wilinski v 334 E 92nd Hous Dev Fund Corp, 71 AD3d 538,539 (1st Dept 2010).*** The Court of Appeals affirmed this interpretation of the statute and found that a plaintiff is no longer required to show that the pipes fell due to wind pressure or vibration to state a claim. ***Wilinski, Id at 12.***

Industrial Code, Section 23-3.3(c) requires that during hand demolition, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any persons resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not he suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means. In the case at bar, Dee issued a stop work order the day prior to the accident because of the hazard posed from the insufficiently supported and dangling sprinkler pipe.

Mr. Heller addresses this issue in his affidavit and opines that Defendants violated Industrial Code, Section 23-3.3(c) because even though the inspection conducted a day prior to the accident revealed that the Kindorf support was in a weakened condition, Dee directed Plaintiff to return to work in that area. There is no evidence that a subsequent inspection was performed prior to directing Plaintiff and his co-workers to clear the debris from the same area. More

importantly, Defendants have failed to submit any evidence that any protection was provided to Plaintiff and his co-workers as required by the regulation. Moving Defendants have failed to show that they either complied with the provisions ". . .or that their noncompliance did not cause Plaintiff's accident." ***Wilinski, Id at 12-13; Korostynskyy v 416 Kings Highway, 136 AD3d 758, 760 (2d Dept 2016), citing Ginter, supra at 843; Desena v North Shore Hebrew Academy, 119 AD3d 631, 634 (2d Dept 2014).*** Accordingly, Defendants' motions for Summary Judgment dismissing Plaintiff's Labor Law §241(6) claim are DENIED.

LABOR LAW §200

Cinalta and STV move for Orders granting summary judgment dismissing Plaintiffs Labor Law §200 and common law negligence causes of action. Labor Law §200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work. ***Ortega v Puccia, 57 AD3d 54, 60–61 (2d Dept 2008), citing Rizzuto v LA Wenger Contr Co, 91 NY2d 343, 352 (1998); Comes v New York State Elec & Gas Corp, 82 NY2d 876, 877 (1993); Lombardi v Stout, 80 NY2d 290, 294 (1992); Brown v Brause Plaza, LLC, 19 AD3d 626, 628, 798 (2d Dept 2005).*** An owner or contractor may be held liable for a violation of Labor Law §200 if the claim is based upon a defect or dangerous condition and it: 1) created the dangerous condition or defect that caused the accident, or had actual or constructive notice of the dangerous condition or defect; or 2) had authority to supervise or control the methods or materials of a plaintiff's work. ***Vazquez v Humboldt Single Lofts, 145 AD3d 709, 710 (2d Dept 2016), citing Pacheco v Smith, 128 AD3d 926 (2d Dept 2015); Rojas v Schwartz, 74 AD3d 1046 (2d Dept 2010).*** The law is clearly established that liability pursuant to Labor Law §200 also applies to agents of owners or

contractors. ***Romang v Welsbach Elec Corp, 74 AD3d 789 (2d Dept 2008); Paladino v Society of NY Hosp, 307 AD2d 343, 344-345 (2d Dept 2003); Yong Ju Kim v Herbert Constr Co, 275 AD2d 709, 712-713 (2d Dept 2000).*** "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done when a plaintiff is injured." ***Vazquez v Humboldt Single Lofts, 145 AD3d 709 (2d Dept 2016), citing Delahaye v Saint Anns School, 40 AD3d 679, 683 (2d Dept 2007), quoting Linkowski v City of New York, 33 AD3d 971, 974–975 (2d Dept 2006); Bennett v Hucke, 131 AD3d 993, 994 (2d Dept 2015), lv to appeal granted, 27 NY3d 904 (2016), and affd, 28 NY3d 964 (2016), citing Walls, supra at 863-864; Pino v Irvington Union Free School Dist, 43 AD3d 1130, 1131 (2d Dept 2007).***

Mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common law negligence and liability pursuant to Labor Law §200. ***Zupan v Irwin Contracting, 145 AD3d 715, 716 (2d Dept 2016), citing Natale v City of New York, 33 AD3d 772, 773 (2d Dept 2006); Perri v Gilbert Johnson Enters, Ltd, 14 AD3d 681, 683 (2d Dept 2005); Dos Santos v STV Engrs, Inc, 8 AD3d 223, 224 (2d Dept 2004).*** Even if a Defendant had notice that the work was being performed in an unsafe manner, liability will not be imposed pursuant to Labor Law §200 unless the Defendant also had the authority to supervise or control that work. ***Ortega, supra at 61–62, citing Rizzuto, supra at 352; Gallello v MARJ Distrib, Inc, 50 AD3d 734, 735 (2d Dept 2008); Dooley v Peerless Importers, Inc, 42 AD3d 199, 204–205 (2d Dept 2007); Guerra v Port Auth of NY & NJ, 35 AD3d 810, 811 (2d Dept 2006); Perri, supra at 683.***

The burden is on the moving Defendants to submit evidence that it did not have the

authority to supervise or control the work. ***Grant, supra at 961, citing Cambizaca v New York City Tr Auth, 57 AD3d 701, 702 (2d Dept 2008); McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts, 41 AD3d 796, 798 (2d Dept 2007); Haider v Davis, 35 AD3d 363, 364 (2d Dept 2006).*** Vitale testified at his deposition that

> ". . .the design was an ongoing, accelerated process requiring an immediate response. Since it was a fast paced project, it was more hands-on involvement due to the need for answers to the ambiguities in the design"... "There was no phasing on which walls should come down first. . ." "Once the finished ceiling was demolished, Cinalta did not make any inspection of the pipes that were above the finished ceiling . . ." "If the project had not been so 'fast paced' hypothetically the pipes would have been observed. (p.135-137)"[12]

Accordingly, Defendants' motion for Summary Judgment dismissing Plaintiff's Labor Law §200 and common law negligence claims are DENIED.

INDEMNIFICATION

Cinalta moves for an Order granting summary judgment on its third party claims against LJC for contractual indemnification, contribution and LJC's failure to procure insurance pursuant to their contract. LJC's contract with Cinalta includes an indemnification clause requiring LJC to defend and indemnify Cinalta and STV. The indemnification clause in the contract between Cinalta and STV requires Cinalta to indemnify STV. Pursuant to its contract with OGS, STV is required to defend and indemnify New York State. "While owners and general contractors owe non-delegable duties under the Labor Law to plaintiffs who are employed at their work sites, these defendants can recover in indemnity, either contractual or common-law, from those considered responsible for the accident." ***Shea v Bloomberg, LP, 124 AD3d 621, 622 (2d Dept 2015), citing Kennelty v***

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[12] Exhibit "I" p.133-137 annexed to Affirmation by Barry Weiss, Esq.

Darlind Constr, 260 AD2d 443, 445 (2d Dept 1999); Brown v Two Exch Plaza Partners, 76 NY2d 172 (1990); Bermejo v New York City Health & Hosps Corp, 119 AD3d 500, 503 (2d Dept 2014); Lazzaro v MJM Indus, 288 AD2d 440, 441 (2d Dept 2001).

A party's right to contractual indemnification depends upon the specific language of the relevant contract. ***Shea, supra at 622; Sawicki v GameStop Corp, 106 AD3d 979, 981 (2d Dept 2013); Alfaro v 65 W 13th Acquisition, LLC, 74 AD3d 1255 (2d Dept 2010)***. A promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. ***Bleich v Metropolitan Mgt, LLC, 132 AD3d 933, 934 (2d Dept 2015), quoting Roldan v New York Univ, 81 AD3d 625, 628 (2d Dept 2011); Shea, supra at 622, citing Hooper Assoc v AGS Computers, 74 NY2d 487, 491-492 (1989)***. The law is clearly established that "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." ***Shea, supra at 622, citing Cava Constr Co, Inc v Gealtec Remodeling Corp, 58 AD3d 660, 662 (2d Dept 2009); see General Obligations Law § 5-322.1***.

LJC opposes the motions by Cinalta and STV for summary judgment and claims it has procured the requisite insurance. LJC submits a copy of the declarations page to its policy. It is unclear from the submissions whether both STV and Cinalta are listed as additional insureds on the policy. While the policy is not for the requisite amount of coverage, there are references to excess and umbrella policies. Whether those policies are applicable to the claims by STV and Cinalta is a question of fact.

There are questions of fact regarding STV and Cinalta's possible negligence. Accordingly,

the request for indemnification is premature. Since it has not been determined whether the plaintiff's injuries were caused in whole or in part by LJC, Cinalta and STV have failed to establish their prima facie entitlement to judgment as a matter of law on their claims for contractual indemnification against LJC. ***Shaughnessy v Huntington Hosp Ass'n, 147 AD3d 994 (2d Dept 2017), citing Langner v Primary Home Care Servs, Inc, 83 AD3d 1007,1010 (2d Dept 2011); D'Angelo v Builders Group, 45 AD3d 522, 525 (2d Dept 2007); Rodriguez v Savoy Boro Park Assoc Ltd Partnership, 304 AD2d 738 (2d Dept 2003)***. Accordingly, the motions for Summary Judgment on the Third Party claims against LJC for contractual indemnification contribution and the failure to procure insurance are DENIED.

The parties' remaining contentions are without merit. Cinalta and STV's motions are DENIED in their entirety. Plaintiff cross-motion is GRANTED in its entirety.

ENTER,

LOREN BAILY-SCHIFFMAN

HON. LOREN BAILY-SCHIFFMAN

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