

Lorino v 224 W. 57th St., LLC
2018 NY Slip Op 30490(U)
March 20, 2018
Supreme Court, New York County
Docket Number: 150619/2013
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
THOMAS LORINO,

Plaintiff,

- against -

Index No. 150619/2013

224 WEST 57TH STREET, LLC, ARGONAUT 224, LLC,
and JT MAGEN & COMPANY, INC.,

Decision and Order

Defendants.

-----X
224 WEST 57TH STREET, LLC, ARGONAUT 224, LLC,
and JT MAGEN & COMPANY, INC.,

Third-Party Plaintiffs,

- against -

PIERMOUNT IRON WORKS, INC.,

Third-Party Defendant.

-----X
HON. GERALD LEBOVITS, J.:

Motion sequence numbers 003, 004, 005 and 006 are consolidated for disposition.

In this action for personal injuries asserting violations of the Labor Law, plaintiff Thomas Lorino moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants 224 West 57th Street, LLC (224 West), Argonaut 224, LLC (Argonaut), and JT Magen & Company, Inc. (JT Magen) (motion sequence 005).

Defendant JT Magen moves, pursuant to CPLR 3212, for an order dismissing plaintiff's common-law negligence and Labor Law § 200 claims; dismissing plaintiff's Labor Law § 241 (6) claim; granting it summary judgment on its contractual indemnity and failure to procure insurance claims as against third-party defendant Piermount Iron Works, Inc. (Piermount); and dismissing all claims of all parties as against it (motion sequence 006).

Defendants 224 West and Argonaut (together, the 224 defendants) cross-move, pursuant to CPLR 3212, for an order dismissing plaintiff's common-law negligence and Labor Law § 200 claims; dismissing plaintiff's Labor Law § 241 (6) claim; granting them summary judgment on their contractual indemnity and failure to procure insurance claims as against JT Magen and Piermount; and dismissing all claims of all parties as against them (motion sequence 006).

Piermount moves for an order vacating the note of issue or, in the alternative compelling, plaintiff to comply with outstanding discovery by a date certain (motion sequence 003). And JT Magen moves for identical relief (motion sequence 004).

BACKGROUND

Plaintiff was allegedly injured on November 20, 2012, while working as a union ironworker employee for Piermount on a construction project (the project) on the tenth-floor roof area of the Argonaut building located at 224 West 57th Street in Manhattan (plaintiff Feb. 1, 2016 tr at 47, 151). The Open Society Institute (OSI) leased the entire building, and on June 1, 2011, OSI hired JT Magen to provide construction management services in connection with the project (*see* JT Magen notice of motion, Pollack affirmation, exhibit H). JT Magen subcontracted with Piermount to perform steel demolition and installation for the project (*see* JT Magen notice of motion, Pollack affirmation, exhibit I [Purchase Order]).

Plaintiff testified that he was employed by Piermount for the project, and that Piermount directed and controlled his work (plaintiff tr at 81). On the morning of the accident, plaintiff and his coworker, Robert Chamberlin, met with the Piermount foreman to get their work assignments for the day (*id.* at 88-89). The foreman told plaintiff and Chamberlin to go up to the roof level and remove two screw jacks that were holding up a portion of the existing roof, which was in the process of being demolished (*id.*). When plaintiff got to the roof, Chamberlin and plaintiff climbed a ladder, got up on steel beams, and began removing tack welds which held the screw jacks in place (*id.* at 128-134). The plan was to remove the tack welds and then use a beater hammer to knock the plates of the screw jack away from the existing steel, so that it would come free and be removed (*id.*). Plaintiff and Chamberlin removed the first screw jack without incident (*id.* at 128-134). Then, they had difficulty removing the second screw jack as the top plate of the jack was stuck in place despite the removal of the tack welds (*id.*).

Chamberlin climbed down the ladder and went back to the gang box to obtain a larger beater hammer, as they were going to use it to knock the second screw jack free (*id.*). While Chamberlin was at the gang box, plaintiff tried to figure out what was holding the screw jack still in place and attempted to change his position to get onto the opposite side of where he was situated (*id.* at 136). He was standing on the flange of the beam (*id.*). After observing that a part of the weld had not fully been removed, he attempted to reposition himself into a safe working position (*id.* at 139). In the process of doing so, plaintiff slipped off the beam, falling to the ground, approximately 12 feet below, and onto a concrete slab, pile of steel, sand bags, wooden planks for hand rails, and orange mesh (*id.* at 149). Plaintiff testified that he fell off the beam accidentally and had no knowledge of anything deliberately causing him to slip off the beam (*id.* at 128-148).

Plaintiff testified that Piermount did not supply any of its workers with harnesses or lanyards and that he was not wearing a harness at the time of the accident (*id.* at 130-131). Plaintiff also testified that he was never given a safety orientation and was never instructed regarding tying off on the project (*id.* at 49-50). All of his training as an ironworker instructed him to follow OSHA sub part R for tying off, which states that ironworkers are not required to tie off when working under 30 feet (*id.* at 73).

Plaintiff commenced this action on January 22, 2013 by filing a summons and complaint against defendants 224 West, Argonaut, and JT Magen, seeking recovery for violations of Labor Law §§ 200, 240 (1), 241 (6), and for common-law negligence. Defendants subsequently brought a third-party action for contractual indemnification, breach of contract for failure to procure insurance, common-law indemnification, and contribution against Piermount.

Deposition Testimony of Patrick Ward (Laborer for JT Magen)

Patrick Ward testified that he was employed as a laborer for JT Magen and was assigned to the project (Ward tr at 7, 10). On the date of the accident, Ward was on the roof in the general area where the accident occurred and had seen plaintiff walking on a beam seconds before the accident (*id.* at 28, 31). Ward did not see plaintiff fall because his back was turned, but he heard plaintiff fall (*id.* at 33-34). He went to assist plaintiff and saw plaintiff was lying on his backside and that plaintiff was in pain (*id.* at 33-35).

Ward testified that he could not recall if any safety cables or systems were set up in the elevated location to tie off (*id.* at 50). When shown photographs of the location where the accident occurred, Ward confirmed that there were no safety cables or safety nets in place (*id.*).

Deposition Testimony of Sean White (Piermount Filed Supervisor)

Sean White testified that he was the field supervisor for Piermount at the project, and that Piermount gave directions to and controlled its own employees (White tr at 9, 17-18). White was not at the project at the time of the accident but was nearby and immediately rushed to the project (*id.* at 27). White was told that plaintiff fell from a height (*id.* at 32). White did not know where plaintiff was standing or working when the accident occurred (*id.* at 67). White testified that there were no independent safety lines or cables in the area where plaintiff fell (*id.* at 73).

Deposition Testimony of Robert Chamberlin (Piermount employee)

Robert Chamberlin, plaintiff's coworker, testified that he was also employed by Piermount, and that Piermount directed its own employees and provided its employees with the tools and equipment used by ironworkers at the project (Chamberlin tr at 12-14, 60). Chamberlin testified that Piermount provided harnesses and lanyards which were kept in various gang boxes (*id.* at 15-16, 19-21, 26). During the project, he used a Piermount provided harness and a six-foot lanyard to tie-off to the existing steel (*id.* at 16). At the time of the accident, he did not see plaintiff fall as he was approximately 50-60 feet away from where the accident occurred (*id.* at 27-28).

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden

then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; accord *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 issue of 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]).

Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Limauro v City of N.Y. Dept. of Envtl. Protection*, 202 AD2d 170, 171 [1st Dept 1994]).

Plaintiff argues that he is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim because he has sufficiently established that, due to defendants' failure to provide safety cable systems or safety nets, he fell approximately 12 feet from an unguarded steel beam and was injured.

In opposition to plaintiff's motion, defendants assert that there are issues of fact regarding whether plaintiff's conduct was the sole proximate cause of his accident. Defendants contend that there are questions of fact as to whether plaintiff was provided a safety harness by his employer; whether plaintiff could have tied off to the steel flange had he been wearing a safety harness; whether plaintiff could have performed his work from a ladder instead of working on a

steel beam without wearing fall protection; and, whether plaintiff was working where he should not have been working.

Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). It should be noted that a plaintiff will be determined to have been recalcitrant when "(a) [the] plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them, he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *accord Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

But, as put forth by plaintiff, it is undisputed that plaintiff fell approximately 12 feet off an unguarded steel beam while performing structural steel ironworking duties. The lack of protection around the steel beam to prevent plaintiff from falling was a more proximate cause of the accident (*see Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [holding that "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"]). Moreover, plaintiff testified that all his training as an ironworker was to follow OSHA subpart R, which requires ironworkers to only tie off when working over 30 feet, or something lower only if instructed by a supervisor that this was a specific job rule (*see* plaintiff tr at 73-74). White, plaintiff's supervisor, testified that OSHA subpart R is the general rule that ironworkers follow for tying off, unless a contractor on a project states otherwise; no one told the ironworkers on the project to follow anything different (White tr at 61). Thus, plaintiff did not know he had to tie-off while working on a steel beam from which he fell approximately 12 feet. Therefore, defendants have failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident (*see Anderson v MSG Holdings, LP*, 146 AD3d 401, 404 [1st Dept 2017] ["Regardless of whether the raker beam was an appropriate tie-off point, because defendants point to no evidence that plaintiff knew to tie off to it, his failure to do so cannot be the sole proximate cause of the accident"]; *Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 650 [1st Dept 2014] ["Defendants failed to raise a triable issue of fact whether plaintiff's failure to use a safety harness was the sole proximate cause of his injuries, since the record demonstrates that plaintiff was not expected to use any fall protection devices when working less than 30 feet above the ground"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]). Although defendants argue that there are questions of fact about whether plaintiff could have used a ladder or was not working where he was supposed to, defendants submitted no proof that plaintiff received instructions regarding these issues (*see Zimmer*, 65 NY2d at 524 ["The mere presence of ladders or safety belts

somewhere at the worksite does not establish ‘proper protection’”]; *Ganger v Anthony Cimato / ACP Partnership*, 53 AD3d 1051, 1053 [4th Dept 2008] [“(the) defendants contended that (the) plaintiff should have covered the skylight holes with two-by-six scaffolding planks, but they presented no evidence that they provided the planks to (the) plaintiff or instructed him to use them to cover the skylight holes”]).

Any alleged negligence on plaintiff’s part goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *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] [finding that “(e)ven 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] [holding that “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’”). Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants.

Labor Law § 241 (6) Claim

Defendant JT Magen moves, and the 224 defendants cross-move, for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim as 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’ to workers” (*Ross*, 81 NY2d at 501-502). But 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 505).

Plaintiff has not opposed the branch of defendants’ respective motion or cross-motion for summary judgment seeking dismissal of plaintiff’s Labor Law § 241 (6) claim. Regarding a Labor Law § 241 (6) claim, “[w]here a defendant so moves, it is appropriate to find that a

plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section” (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]). Therefore, this claim has been abandoned and this branch of defendants’ motion and cross motion is granted (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [internal citations omitted] [“The Labor Law § 241 (6) claim predicated on a violation of Industrial Code [12 NYCRR] § 23-1.7 [b] must be dismissed As to the remaining Industrial Code regulations on which [the] plaintiff predicates his 241 (6) claim, his failure to address them indicates that he has abandoned them as bases for liability”]; *Rivera v Anilesh*, 32 AD3d 202, 204–205 [1st Dept 2006], *aff’d* 8 NY3d 627 [2007] [“Neither plaintiff’s brief nor her opposition papers in the motion court discuss her second cause of action based on lack of informed consent; accordingly, we deem her appeal from the dismissal of that cause of action abandoned”]).

Labor Law § 200 and Common-law Negligence

Defendant JT Magen moves, and the 224 defendants cross-move, for summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence claims as against them. Labor Law § 200 (1) provides:

“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. The board may make rules to carry into effect the provisions of this section.”

Labor Law § 200 is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]), and, therefore, the same standards apply to both Labor Law § 200 and common-law negligence theories of recovery. To prevail on a claim under Labor Law § 200 and common-law negligence, where the injury arises out of the means or methods of the construction work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). Nonetheless, general supervision over the work, including coordination of the trades and inspection of quality of the work, is insufficient to impose liability under either theory (*Hughes*, 40 AD3d at 306).

Plaintiff’s Labor Law § 200 and Common-law Negligence Claims Against JT Magen

JT Magen argues that it did not supervise, direct or control plaintiff’s work. JT Magen points out that plaintiff testified that his accident occurred while he was performing work for Piermount; involved equipment (or alleged lack of equipment) provided by Piermount; and no one other than Piermount directed his work, including, where to work and what work he was to do.

In opposition, Piernount contends that JT Magen's construction management agreement (CMA) with OSI raises issues of fact as to the negligence of JT Magen precluding summary judgment. According to Piernount there are questions of fact as to whether JT Magen supervised or controlled plaintiff's work because the CMA required the following: JT Magen was to hold meetings to discuss procedures on the job site; JT Magen was to have sole responsibility to supervise and control the construction means and methods on the job site; JT Magen was to be liable for any act or omission of any of its subcontractors on the project; and, JT Magen was to supervise all safety programs, provide a safe place to work, and comply with all laws, codes and regulations. Plaintiff does not oppose this branch of JT Magen's motion.

Here, there is no evidence that JT Magen exercised supervision or control over plaintiff's work. Plaintiff testified that he was employed by Piernount for the project, and that Piernount directed and controlled his work (plaintiff tr at 81). JT Magen's general safety and supervisory duties in the CMA are insufficient to raise a triable issue of fact with respect to Labor Law § 200 and common-law negligence claims (see *Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011] ["To the extent that the injured plaintiff's Labor Law § 200 and common-law negligence claims are based on the method of work . . . , it is undisputed that [the defendant] did not tell him how to do his work; therefore, those claims should have been dismissed"]; *De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 192 [1st Dept 2003] ["A general duty to supervise the work and ensure compliance with safety regulations is insufficient to constitute the requisite supervision and control under Labor Law § 200"]; *accord Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] ["(The defendant's) contractual duties to supervise and enforce general safety standards at the work site did not create an issue of fact as to its negligence"]; *Walker v Trustees of Univ. of Pa.*, 262 AD2d 175, 176 [1st Dept 1999] ["The general contractor's authority under its contract with the owner to enforce general safety standards did not amount to the requisite supervision or control of plaintiff's work"]). Therefore, JT Magen is entitled to dismissal of the common-law negligence and Labor Law § 200 claims as against it.

Plaintiff's Labor Law § 200 and Common-law Negligence Claims Against The 224 Defendants

No party, including plaintiff, has opposed the branch of the cross-motion by the 224 defendants seeking dismissal of Labor Law § 200 and common-law negligence claims as against them. Therefore, these claims are deemed abandoned and this branch of defendants' cross-motion is granted (see *Rivera*, 32 AD3d at 204 – 205). The court need not address any remaining contentions.

Contractual Indemnity Claims

Defendant JT Magen moves for summary judgment in its favor on its third-party contractual indemnification claim against Piernount. The 224 defendants cross-move for summary judgment in their favor on their claim for contractual indemnification against JT Magen and Piernount. "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*, 14

AD3d at 403). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*De La Rosa*, 303 AD2d at 193 [internal quotations and citation omitted]; *accord Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

JT Magen's Third-Party Claim for Contractual Indemnification Against Piermount

The indemnification provision contained in paragraph 18 of the purchase order contract (Purchase Order) between JT Magen and Piermount provides:

“To the fullest extent permitted by law. Subcontractor [Piermount] agrees to fully indemnify, defend and hold harmless JTM [JT Magen], Owner, . . . their respective agents, officers, directors, employees and partners (hereinafter collectively "Indemnitees") from and against any and all claims, loss, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements, whether arising before or after completion of the Subcontractors' Work, related to death, personal injuries, property damage (including loss of use thereof) or the alleged violation of any environmental laws, statutes, rules or ordinances brought or assumed against any of the Indemnitees by any person, entity or firm, *arising out of or in connection with or as a result of or as a consequence of (a) the performance of the Work* as well as any additional work, extra work or add-on work, whether or not caused in whole or part by the Subcontractor or any person or entity employed, either directly or indirectly, by the Subcontractor including any sub-subcontractors and sub tier contractors thereof and their employees or (b) any breach of this Agreement. The parties expressly agree that this indemnification agreement contemplates (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 the 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 of the indemnitees whether by statute, operation of law or otherwise. Where partial indemnity is provided under this agreement, attorneys' fees, costs, court costs, expenses and disbursements shall be indemnified on a pro rata basis. Recovery of attorneys' fees costs, court costs, expenses and disbursements hereunder shall include all those attorneys' fees, court costs, expenses and disbursements incurred in defense of any underlying claim, in the enforcement of this indemnity agreement, in the prosecution of any claim for indemnification hereunder and in pursuit of any claim for insurance coverage required under paragraph 19 & 20 hereof”

(Purchase Order [emphasis added]).

As noted previously, plaintiff was employed by Piermount on the day of the accident, and Piermount supervised plaintiff's work on the project. Accordingly, the accident arose directly from Piermount's work on the project. Further, there is no evidence in the record establishing

that any negligence on the part of JT Magen caused or contributed to the accident. Thus, pursuant to the Purchase Order, JT Magen is entitled to summary judgment in its favor on its third-party contractual indemnification claim against Piermount. The court need not address any remaining contentions.

The 224 Defendants' Claim for Contractual Indemnification Against JT Magen and Piermount

Section 26 of the Supplementary General Conditions of the CMA provides:

"To the fullest extent permitted by law, the Contractor agrees to indemnify and save the . . . Landlord . . . and other parties with an interest in the Building . . . harmless against and from any and all liabilities and claims of . . . injury to person . . . violations of building codes and ordinances . . . including attorneys' fees . . . arising from or in any way connected with the services, Work and obligations to be performed . . . under the Contract (including, without limitation, those arising from any breach . . . by the Contractor under the Contract and any act . . . of Contractor, or any of its subcontractors, servants or employees) . . . and against all counsel fees, expenses and liabilities incurred as a result of any such claim."

(JT Magen notice of motion, Loiacano affirmation, exhibit L [CMA]).

Where an entity is held strictly liable based solely on its status as owner of the premises pursuant to the Labor Law, the owner is entitled to contractual indemnification where such has been agreed to between the parties (*see Crimi v Neves Assoc.*, 306 AD2d 152, 153 [1st Dept 2003]). Per the CMA, JT Magen is required to defend, indemnify and hold harmless the 224 defendants and their agents, servants, and employees when, as here, the claim arises out of its work on a project, even in the absence of its negligence. As previously stated, plaintiff's accident arose out of, was connected with, and was the result of the work agreed to be performed by Piermount for JT Magen (*see* Purchase Order). Thus, Piermount is obligated to indemnify the 224 defendants. There is no evidence that the 224 defendants acted negligently, contributed to, or caused plaintiff's accident. Further, there is no evidence that the 224 defendants directed or controlled Piermount or any of its employees, including plaintiff, in the performance of the work. Nor is there any evidence that the 224 defendants gave directions to or provided equipment to Piermount or its employees to perform work. Thus, the 224 defendants are entitled to summary judgment in their favor on their contractual indemnification claims against JT Magen and Piermount.

JT Magen's argument, that the 224 defendants have not proven as a matter of law that Argonaut is an indemnitee, in that there is no evidence of clear and unambiguous intent in the CMA that JT Magen is required to indemnify Argonaut, is unavailing.¹ JT Magen contends that, because Argonaut has not demonstrated that it was the fee owner of the subject premises at the

¹ Although JT Magen initially argues that per the CMA, it is not required to indemnify either Argonaut or 224 West, JT Magen only presents its argument for Argonaut (*see* 224 defendants cross motion, Pollack opposition affirmation at 4-7). Thus, by omission, JT Magen concedes that 224 West is entitled to indemnity under the CMA.

time of the accident, it was not a “party with an interest in the building” (*see* the 224 defendants notice of motion, Pollack opposition affirmation at 6). For similar reasons, Piermount’s argument that the Purchase Order does not define or name the “Owner,” “Landlord” or “Agent” anywhere in the contract, and that there is no proof or allegation that, when the contract was entered into, Piermount was made aware that it would have any requirement to defend and indemnify the 224 defendants, is also unavailing.

The CMA documents specifically identify Argonaut as an entity to be indemnified. The CMA documents include, as part of the scope of the agreement per section 12.2.5 of the CMA, the lease between 224 West and OSI (*see* CMA). Section 1.34 of the lease identifies Argonaut as the “Ground Landlord” (*see* JT Magen notice of motion, Pollack affirmation, exhibit K). The recitals section of the lease defines “the building” as 224 West 57th Street (*see id.*). The lease was made part of the CMA because it was attached as Exhibit F to the CMA (*see id.*). Thus, JT Magen was aware that Argonaut was the ground lessor and had an “interest in the building.” In addition, Argonaut is specifically listed as an additional insured on the certificate of insurance issued to JT Magen because the insurance provision of the CMA required JT Magen to name the owner as an additional insured; this is further evidence that JT Magen knew Argonaut was the owner and had an “interest in the building” (*see* JT Magen notice of motion, Pollack affirmation, exhibit N).

As for Piermount, in paragraph 18 of the Purchase Order, Piermount agreed to indemnify the “building owner” and “landlord.” Piermount was responsible under paragraph 2 of the Purchase Order, to request the pertinent portions of the CMA in order to identify the “building owner” and “landlord” that it agreed to indemnify. Had Piermount reviewed the CMA documents, it would have clearly identified the entities it agreed to indemnify, i.e. 224 West as “landlord” and Argonaut as “building owner.” The court need not address any remaining contentions.

Failure to Procure Insurance Claims

Defendant JT Magen moves for summary judgment in its favor on its third-party claim for breach of contract for failure to procure insurance against Piermount. The 224 defendants cross-move for summary judgment in their favor on their claim for breach of contract for failure to procure insurance against JT Magen and Piermount.

The branches of the motion by JT Magen and the cross-motion by the 224 defendants for summary judgment for breach of contract for failure to procure insurance against Piermount are denied because the court has not been provided with certified copies of the relevant insurance policies for their respective claims against Piermount. Defendants submitted the certificates of insurance for the relevant policies, but this is not sufficient. A “certificate of insurance is evidence of an insurer’s intent to provide coverage, but it is not a contract to insure . . . , nor is it conclusive proof, standing alone, that such a contract exists” (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]; *accord Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996]; *Morrison-Knudsen Co. v Continental Cas. Co.*, 181 AD2d 500, 500 [1st Dept 1992]). Therefore, JT Magen’s branch of the motion and the 224 defendants’ branch of the cross-motion seeking summary judgment on their respective claims that Piermount

failed to procure insurance is denied (*see JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC*, 101 AD3d 1089, 1090 [2d Dept 2012] [upholding denial of summary judgment to contractor / insurance company for declaratory judgment finding that “certificates of insurance which were informational only” were insufficient to demonstrate that movant maintained the requisite insurance]; *McGill v Polytechnic Univ.*, 235 AD2d 400, 402 [2d Dept 1997] [upholding grant of summary judgment to owner / etc. finding that “submission of a certificate of insurance which expressly stated that it was ‘[a] matter of information only and confer[red] no rights on the [movant]’ is insufficient, by itself, to show that contractor purchased the required insurance”).

The 224 defendants’ branch of the cross-motion seeking summary judgment on their claims that JT Magen failed to procure insurance is also denied. According to the 224 defendants, section 23(b) of the supplementary general conditions in the CMA required that JT Magen procure comprehensive general liability primary insurance policy with per occurrence limit of \$1 million and an aggregate limit of at least \$2 million per year, plus an excess umbrella liability policy with per occurrence limit of \$25 million and an aggregate limit of at least \$25 million per year. The 224 defendants argue that they are listed as additional insureds on the certificate of insurance, which is proof of JT Magen’s acknowledgment that they are supposed to be named as additional insureds, and that JT Magen breached the Purchase Order by failing to procure the required insurance (*see JT Magen notice of motion, Pollack affirmation, exhibit N*). The court should not consider this argument as the 224 defendants failed to attach the relevant policy (*see McGill*, 235 AD2d at 401). In opposition, JT Magen submitted portions of the relevant policy. The portions of the policy, showing primary coverage of \$2 million per occurrence and \$4 million in the aggregate and naming the 224 defendants as additional insureds, are sufficient to raise an issue of fact as to JT Magen’s compliance with any alleged insurance procurement obligations.

The 224 Defendants’ and Piermount’s Cross-Claims for Common-Law Indemnity and Contribution Against JT Magen

JT Magen moves for summary judgment in its favor dismissing the cross-claims for contribution and common-law indemnification by the 224 defendants and Piermount as 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] [internal quotation marks and citations omitted]).

“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]).

There is no evidence in the record to suggest that any negligence on the part of JT Magen had anything to do with plaintiff's injury. Therefore, JT Magen's branch of the motion seeking dismissal for contribution and common-law indemnity claims is granted.

The 224 Defendants' Remaining Claims as Against Them

The 224 defendants cross-move for summary judgment seeking dismissal of any other claims as against them. This branch of their motion is granted. Any claims for common-law indemnification or contribution by any party against the 224 defendants are dismissed as the record establishes that the 224 defendants were not actively negligent. Also, any breach of contract claims against the 224 defendants are dismissed, as the 224 defendants did not enter into any contracts with Piermount or JT Magen.

Motions to Vacate Note of Issue or Compel Plaintiff to Comply with Discovery

Piermount moves for an order vacating the note of issue or, in the alternative, compelling plaintiff to comply with outstanding discovery by a date certain. JT Magen moves for identical relief. Piermount argues that the note of issue should be vacated because plaintiff has failed to comply with discovery demands annexed to its motion as exhibits H, I, J, K, L, M, N, Q, R and S, and that plaintiff also failed to appear for an Independent Medical Examination (IME) with Dr. Jonathan Garay scheduled for June 21, 2017. JT Magen joins in Piermount's argument. In opposition, plaintiff argues the note of issue should not be vacated because plaintiff has complied with depositions, submitted over 300 authorizations, and agreed to scheduled IMEs at later dates even though the IMEs were to be held within 30 days of designation. Plaintiff also notes that four out of the five IMEs have been held, and that it would be prejudicial for plaintiff to wait extended periods of time to have this case on the trial calendar given that the case has been in discovery for four years.

22 NYCRR 202.21 (e) provides:

"Vacating note of issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

"Where a party timely moves to vacate a note of issue, it need show only that 'a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect'" (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006] [citation omitted]; *accord Ortiz v Arias*, 285 AD2d 390, 390 [1st Dept 2001] [holding that a note of issue should be vacated where it is based upon erroneous facts]; *Cromer v Yellen*, 268 AD2d 381, 381 [1st Dept 2000] [same]). But "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced" (*Cabrera v Abaev*, 150 AD3d 588, 588 [1st Dept 2017] [internal quotation marks and citation omitted]).

In the instant matter, the court permits post-note of issue discovery as neither party will be prejudiced. Therefore, plaintiff is directed to provide all outstanding discovery referenced in the motions by Pierrmount and JT Magen (motion sequences 003 and 004) within 45 days. The court need not reach any remaining contentions.

Accordingly, it is hereby

ORDERED that the motion of third-party defendant Pierrmount Iron Works, Inc to vacate the note of issue and compel plaintiff to comply with outstanding discovery is granted only to the extent of directing plaintiff to comply with all outstanding discovery referenced in the motion in 45 days, and the motion is otherwise denied (motion sequence 003); and it is further

ORDERED that the motion of defendant / third-party plaintiff JT Magen & Company Inc. to vacate the note of issue and compel plaintiff to comply with outstanding discovery is granted only to the extent of directing plaintiff to comply with all outstanding discovery referenced in the motion in 45 days, and the motion is otherwise denied (motion sequence.004); and it is further

ORDERED that plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim against defendants is granted on the issue of liability, with the issue of damages to await the trial of this action (motion sequence 005); and it is further

ORDERED that defendant / third-party plaintiff JT Magen & Company Inc.'s motion for summary judgment is granted to the extent of dismissing 1) plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6) causes of action as against it; 2) granting summary judgment on its contractual indemnity claim against third-party defendant Pierrmount Iron Works, Inc; and 3) dismissing the cross-claims asserted against it for common-law contribution and indemnification by defendants 224 West 57th Street, LLC, Argonaut 224, LLC, and third-party defendant Pierrmount Iron Works, Inc; and the motion is otherwise denied (motion sequence 006); and it is further

ORDERED that the cross-motion for summary judgment by defendants 224 West 57th Street, LLC and Argonaut 224, LLC is granted only to the extent of dismissing 1) plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6) causes of action; 2) granting summary judgment on their contractual indemnity claims against defendant JT Magen & Company Inc. and third-party defendant Pierrmount Iron Works, Inc.; and 3) dismissing the claims for breach of contract and common-law contribution and indemnification asserted against it by JT Magen and Pierrmount Iron Works, Inc; and the motion is otherwise denied (motion sequence 006).

Dated: March 20, 2018



J.S.C.

HON. GERALD LEBOVITS
J.S.C.