SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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INDEX NO. 155870/2012

LUIS ROJAS, ROJAS MERCHAN,

MOTION DATE 05/18/2018

Plaintiff,

MOTION SEQ. NO. 004 005

- v -

CAULDWELL-WINGATE COMPANY, LLC, THE CITY OF NEW YORK, and FOREST ELECTRICAL CORP.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 138, 139, 140, 141, 142, 143, 155, 156, 158, 159, 160, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 176, 177, 178

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 146, 147, 148, 149, 150, 151, 152, 153, 154, 157, 161, 162, 163, 174, 175

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the part of defendants/third-party plaintiffs Cauldwell-Wingate Company, LLC and defendant the City of New York's (together, the Cauldwell defendants) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing those parts of the Labor Law § 241 (6) claim against them which are predicated on alleged violations of Industrial Code 12 NYCRR 23-1.13 (b) (8) and the abandoned provisions, is granted, and such alleged Industrial Code

violations are dismissed as against the Cauldwell defendants; and it is further

ORDERED that the part of the Cauldwell defendants' motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against the City is granted, and such claims are dismissed as against the City, and the motion is otherwise denied; and it is further

ORDERED that third-party defendants W5 Group LLC and Calvin Maintenance, Inc.'s (together the W5 defendants) cross motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all defendant/third-party defendant Forest Electric Corp.'s (Forest) cross claims against them is granted, and the third-party complaint and all Forest's cross claims against the W5 defendants are dismissed as against these defendants with costs and disbursements to the W5 defendants as taxed by the Clerk of Court and the Clerk is directed to enter judgment in favor of the W5 defendants; and it is further

ORDERED that the part of plaintiffs Luis Rojas and Rosa Merchan's motion (motion sequence number 005), pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against the Cauldwell defendants is granted; and it is further

ORDERED that the part of plaintiffs' motion (motion sequence number 005), pursuant to CPLR 3212, for partial summary judgment in their favor on those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-1.13 (b) (3) and (4) is granted as against the Cauldwell defendants; and it is further

ORDERED that the part of plaintiffs' motion (motion sequence number 005), pursuant to CPLR 3212, for partial summary judgment in their favor on the common-law negligence and Labor Law § 200 claims as against Cauldwell is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of Forest's cross motion, pursuant to CPLR 3212, for summary judgment dismissing those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-1.13 (b) (8) and the abandoned provisions is granted, and these alleged Industrial Code violations are dismissed as against Forest; and it is further

ORDERED that the part of Forest's cross motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party claim for common-law indemnification against it is granted, and this third-party claim is dismissed as against Forest, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DECISION

In this action, plaintiff laborer seeks to recover damages for personal injuries allegedly sustained on August 14, 2012, when, while he performed demolition work at the Brooklyn Museum in Brooklyn, New York (the Museum). Plaintiff sustained injuries, when a coworker kicked the ladder that plaintiff was standing on, in order to extricate him from an overhead conduit that was electrocuting him.

In motion sequence number 004, defendant/third-party plaintiff Cauldwell-Wingate Company, LLC (Cauldwell) and defendant the City of New York (the City) (together, the Cauldwell defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

Third-party defendants W5 Group LLC (W5) and Calvin Maintenance, Inc. (Calvin) (together, the W5 defendants) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all defendant/third-party defendant Forest Electric Corp.'s (Forest) cross claims against them.

In motion sequence number 005, plaintiffs Luis Rojas (plaintiff) and Rosa Merchan move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against the Cauldwell

defendants and Forest and its common-law negligence and Labor Law § 200 claims against Cauldwell and Forest.

Forest cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint and all cross claims against it.

Background

On the day of the accident, the City owned the Museum where the accident occurred. Pursuant to a written agreement, the City leased the property to nonparty the Brooklyn Institute of Arts and Sciences (the Brooklyn Institute). The Brooklyn Institute hired Cauldwell, pursuant to a construction management agreement, to serve as the construction manager and/or general contractor for a project underway at the Museum, which entailed the renovation of the Museum's café (the Project). Brooklyn Institute also hired Forest to serve as the electrical subcontractor on the Project and W5 to serve as the demolition subcontractor. In turn, W5 hired Calvin to provide laborers to perform the demolition. Plaintiff was an employee of Calvin.

Analysis

The Labor Law § 240 (1) Claim Against the Cauldwell Defendants and Forest (motion sequence numbers 004 and 005 and Forest's cross motion)

In their separate motions, the Cauldwell defendants move and Forest cross-moves to dismiss the Labor Law § 240 (1) claim

against them. Plaintiffs move for summary judgment in their favor as to liability on such claim as against these 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'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; Hill v Stahl, 49 AD3d 438, 442 [1st Dept 2008]; Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 267 [1st Dept 2007]).

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 (Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe Coll., 12 AD3d 261, 262 [1st Dept 2004]).

Initially, as the owner of the Premises where the accident occurred, the City may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined whether Cauldwell as the construction manager, and Forest, as the electrical subcontractor on the Project, may also be liable for plaintiff's injuries as an agent of the owner and/or general contractor.

As for Cauldwell, while

> "a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury"

(Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]; Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]).

Here, it is unclear from the record whether Cauldwell served as the general contractor or the construction manager for the Project. While Cauldwell was hired pursuant to a construction management agreement, various witnesses testified that it operated as a general contractor on the Project. In any

event, even if Cauldwell was merely the construction manager, Cauldwell is not entitled to dismissal of the Labor Law § 240 (1) claim against it because it supervised or controlled the injury-producing work at issue in this case, i.e., it was the entity responsible for making sure that the electrical circuits were properly de-energized before demolition work was performed. Therefore, Cauldwell may be liable for plaintiff's injuries under the statute.

As to Forest,

> "[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(Russin, 54 NY2d at 318).

Here, a review of the record reveals that a question of fact exists as to whether it was also responsible for making sure that the subject conduit was fully de-energized before plaintiff began his demolition work on the morning of the accident. To that effect, Forest's foreman testified that Forest was only responsible for de-energizing the demolition areas after Cauldwell's superintendent notified it as to where and when the demolition was going to take place. In addition, at least a question of fact exists as to whether Forest was ever notified that the accident area needed to be de-energized by such superintendent. To that effect, in contrast to Cauldwell's

superintendent's testimony on the matter, Forest's foreman testified that Cauldwell's superintendent never walked the accident area with him to identify the next day's demolition spots, nor did he ever advise him as to specifically what circuits needed to be shut off. It should be noted that, while Cauldwell's superintendent maintained that he had, in fact, instructed Forest's foreman to "make sure [to] have everything safed off in the morning . . . for the [next day's] demolition," a review of the testimony of Cauldwell's superintendent reveals that his recollection was vague in regard to exactly when this conversation allegedly took place, and where and when the subject demolition was to take place.

Thus, at this juncture, as a question of fact exists as to whether Forest is a proper Labor Law defendant, Forest is not entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it, and plaintiffs are not entitled to summary judgment in their favor on such claims as against Forest.

The court now moves to such claims against the Cauldwell defendants.

As stated previously, plaintiff was injured when he fell from the ladder while demolishing a ceiling as part of a renovation project. Importantly, "'[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to

properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of an unsteady ladder, the plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting Kijak v 330 Madison Ave. Corp., 251 AD2d 152, 153 [1st Dept 1998]; Hart v Turner Constr. Co., 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]; Rodriguez v New York City Hous. Auth., 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (Quattrocchi v F.J. Sciame Constr. Corp., 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], affd 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves,

falls, or otherwise fails to support the plaintiff and his materials" (Nelson v Ciba-Geigy, 268 AD2d 570, 572 [2d Dept 2000]; Cuentas v Sephora USA, Inc., 102 AD3d 504, 504 [1st Dept 2013]; Melchor v Singh, 90 AD3d 866, 869 [2d Dept 2011] [where the plaintiff was injured when the top of the ladder that he was working on slid away from the house, Court held that "[t]he defect in the ladder, and the fact that it was not secured, were substantial factors in causing plaintiff to fall"]).

Initially, the Cauldwell defendants argue that there is no violation of Labor Law § 240 (1) under the facts of this case because the accident was not caused by a defective or improperly placed ladder. Rather, plaintiff's accident was caused by W5's supervisor's superseding, intervening and intentional act of kicking plaintiff's ladder out from underneath him, in order to free him from the pipe that was electrocuting him. As such, plaintiff's accident arose "from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance" (Nieves v Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914, 916 [1999]).

However, due to the nature of the task at hand, which included the risk of electrocution, it was foreseeable that it might become imperative for the W5 supervisor to kick out the ladder in order to free plaintiff from the pipe that was electrocuting him (DelRosario v United Nations Fed. Credit

Union, 104 AD3d 515, 515 [1st Dept 2013] [the plaintiff was entitled to partial summary judgment on the Labor Law § 240 (1) claim, where "[t]he record establishe[d] that the ladder provided to [the] plaintiff was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was a proximate cause of his injury"]). Therefore, an additional and/or different safety device, such as a rope to tie off plaintiff or a bakers scaffold with rails, was required to prevent plaintiff from falling (see Ortega v City of New York, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; Nimirovski v Vornado Realty Trust Co., 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (Nimirovski, 29 AD3d at 762, quoting Conway v New York State

Teachers' Retirement Sys., 141 AD2d 957, 958-959 [3d Dept 1988]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, the Cauldwell defendants are not entitled to dismissal of the Labor Law § 240 (1) claim against them, and plaintiffs are entitled to partial summary judgment in their favor as to liability on such claim against the Cauldwell defendants.

The Labor Law § 241 (6) Claim Against the Cauldwell Defendants (motion sequence numbers 004 and 005)

The Cauldwell defendants move for dismissal of the Labor Law § 241 (6) claim against them. Plaintiffs move for summary judgment in their favor as to liability on said claim against these defendants.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *

> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (Ross, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id. at 503-505).

Initially, although plaintiffs allege multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.13 (b) (3), (4) and (8), plaintiffs do not move for summary judgment in their favor, nor does they oppose dismissal of these sections, and therefore, they are deemed abandoned (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, the Cauldwell defendants are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 23-1.13 (b) (3), (4) and (8)

Sections 23-1.13 (b) (3), (4) and (8) state, in pertinent part, as follows:

> "(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.
>
> "(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.
>
> * * *
>
> "(8) Defective Insulation. Any wiring found to have cracked insulation or insulation deteriorated in any other way shall be immediately removed from service and discarded."

As to sections 23-1.13 (3) and (4), these sections are sufficiently specific to support a Labor Law § 241 (6) claim (see DelRosario, 104 AD3d at 516). In support of their motion to dismiss these alleged Industrial Code violations, the

Cauldwell defendants argue that, since Industrial Code (12 NYCRR) 23-1.13 (b) specifically refers to "employers," as the owner and/or construction manager/general contractor of the Project, the statute does not apply to them. However, "[i]t has been recognized that provisions of the Industrial Code (see 12 NYCRR part 23) - - like the one on which plaintiff relies, i.e., 12 NYCRR 23-1.13 - - which refer only to the duty of employers, also impose a duty upon owners" (Rice v City of Cortland, 262 AD2d 770, 773 [3d Dept 1999]).

In any event, as to section 23-1.13 (b) (3), by asking someone else to investigate and confirm that the area to be demolished was de-energized, rather than doing it himself, at least a question of fact exists as to whether Cauldwell's superintendent did enough to ensure that plaintiff would be safe from electrocution. Thus, the Cauldwell defendants are not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.13 (b) (3), and plaintiffs are not entitled to summary judgment in their favor on the same.

With respect to section 23-1.13 (b) (4), as the accident was the result of the conduit not being properly de-energized, grounded or guarded while plaintiff was working in proximity to it, this section applies to the facts of this case (see Lorefice

v Reckson Operating Partnership, 269 AD2d 572, 573 [2d Dept 2000]).

Thus, plaintiffs are entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.13 (b) (4), and the Cauldwell defendants are not entitled to dismissal of the same.

As to section 23-1.13 (b) (8), as plaintiffs do not assert that the accident was caused due to cracked or deteriorated insulation, but, rather, they attribute the proximate cause of the accident to the fact that the subject live conduit was not properly de-energized, the Cauldwell defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.13 (b) (8), and plaintiffs are not entitled to summary judgment in their favor on such section.

The Common-Law Negligence and Labor Law § 200 Claims Against the Cauldwell Defendants and Forest (motion sequence numbers 004 and Forest's Cross Motion)

In their separate motions, the Cauldwell defendants move and Forest cross-moves for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Cruz v Toscano, 269 AD2d 122, 122

[1st Dept 2000] [internal quotation marks and citation omitted]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: where the accident is the result of the means and methods used by the contractor to do its work, and where the accident is the result of a dangerous condition (see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 (1st Dept 2012); Murphy v Columbia Univ., 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work,

"because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

On the other hand, it is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (Hughes v Tishman Constr. Corp., 40 AD3d 305, 311 [1st Dept 2007]; see also Bednarczyk v Vornado Realty Trust, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; Burkoski

v Structure Tone, Inc., 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; Smith v 499 Fashion Tower, LLC, 38 AD3d 523, 524-525 [2d Dept 2007]).

The accident in this case was caused because the power source to the subject live conduit was not properly de-energized before plaintiff touched it, and because plaintiff was not provided with the appropriate safety device to keep him from falling while performing demolition work in the proximity of live electricity. Therefore, the accident was caused due to the means and methods of the work.

Initially, it should be noted that plaintiffs have abandoned the common-law negligence and Labor Law § 200 claims against the City. Thus, the City is entitled to dismissal of such claims against it. As to Cauldwell, a review of the evidence in the record reveals that it had sufficient authority to supervise and control the aforementioned injury-producing work, i.e., it was responsible for making sure that plaintiff's work area was properly de-energized before allowing his demolition work to begin.

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

plaintiffs are entitled to summary judgment in their favor on such claims as against Cauldwell.

As to Forest, as discussed previously, a question of fact exists as to whether it was also responsible for making sure that the electrical circuits at the site were de-energized before demolition work was allowed, or, rather, whether it was only responsible for de-energizing the demolition areas after being instructed to do so by Cauldwell.

Thus, Forest is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it, and plaintiffs are not entitled to summary judgment in their favor on said claims against Forest.

Cauldwell's Third-Party Claims and Forest's Cross Claims for Contribution and Common-law Indemnification Against the W5 Defendants (the W5 Defendants' Cross Motion)

The W5 defendants cross-move for summary judgment dismissing Cauldwell's third-party claims and Forest's cross claims for contribution and common-law indemnification against them. "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 [internal quotation marks and citations omitted]" (Godoy v Abamaster of Miami, 302 AD2d 57, 61 [2d Dept 2003]).

"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]).

As to W5, it is entitled to dismissal of Cauldwell's third-party claims and Forest's cross claims for contribution and common-law indemnification against it, as there is no indication in the record that W5 was guilty of any negligence that contributed to or caused the accident. As noted previously, Cauldwell was the entity responsible for making sure that the accident area was de-energized before giving the W5 workers the go-ahead to proceed with the demolition work. As to Cauldwell's third-party claims and Forest's cross claims for contribution and common-law indemnification as against Calvin, as plaintiff was an employee of Calvin, relevant to this issue is Workers'

Compensation Law § 11, which prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (Rubeis v Aqua Club, Inc., 3 NY3d 408, 412-413 [2004]).

Here, plaintiff did not sustain a grave injury for the purposes of Workers' Compensation Law § 11. Thus, Calvin is entitled to dismissal of Cauldwell's third-party claims and Forest's cross claims for contribution and common-law negligence against it.

Cauldwell's Third-Party Claims for Contractual Indemnification and Breach of Contract for Failure to Procure Insurance Claim Against the W5 Defendants (the W5 Defendants' Cross Motion)

The W5 defendants cross-move for summary judgment dismissing Cauldwell's third-party claims for contractual

indemnification and breach of contract for failure to procure insurance as against them. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]; see Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]; Torres v Morse Diesel Intl., Inc., 14 AD3d 401, 403 [1st Dept 2005]).

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 "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; Keena v Gucci Shops, 300 AD2d 82, 82 [1st Dept 2002]).

As to W5, during oral argument on April 17, 2018, Cauldwell conceded that, as W5 has supplied the defense and insurance sought by Cauldwell, it considered the subject third-party claims moot as against W5. Thus, W5 is entitled to dismissal of Cauldwell's third-party claims for contractual indemnification and breach of contract for failure to procure insurance.

As to Cauldwell's third-party claims for contractual indemnification and breach of contract for failure to procure insurance against Calvin, it should be noted that "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (Mentesana v Bernard Janowitz Constr. Corp., 36 AD3d 769, 771 [2d Dept 2007]; see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc., 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427, 433 [2005]; Tullino v Pyramid Cos., 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (Meabon v Town of Poland, 108 AD3d 1183, 1185 [4th Dept 2013]; Mikulski v Adam R. West, Inc., 78 AD3d 910, 911 [2d Dept 2010]).

Here, there is no written contract in existence requiring Calvin to indemnify Cauldwell or provide insurance coverage on behalf of Cauldwell. Therefore, Calvin is entitled to dismissal of Cauldwell's third-party claims for contractual

indemnification and breach of contract for failure to procure insurance against it.

Forest's Cross Claim for Contractual Indemnification Against the W5 Defendants (the W5 Defendants's Cross Motion)

The W5 defendants cross move for dismissal of Forest's cross claim for contractual indemnification against them. As there was no written contract in existence requiring the W5 defendants to indemnify Forest, these defendants are entitled to dismissal of Forest's cross claim for contractual indemnification against them.

Cauldwell's Third-Party Claims for Contribution and Common-law Indemnification Against Forest (Forest's Cross Motion)

Forest cross-moves for dismissal of the third-party claims for contribution and common-law indemnification against it. Here, Cauldwell's negligence in failing to confirm that plaintiff's work location was properly de-energized before allowing his demolition to begin proximately caused the accident. Thus, Forest is entitled to dismissal of Cauldwell's third-party claim for common-law indemnification against it.

In addition, as a question of fact exists as to whether any negligence on the part of Forest caused or contributed to the accident, Forest is not entitled to dismissal of Cauldwell's third-party claim for contribution against it.

Cauldwell's Third-Party Claims for Contractual Indemnification Against Forest (Forest's Cross Motion)

Forest cross-moves for dismissal of Cauldwell's third-party claim for contractual indemnification against it.

Additional Facts Relevant To This Issue:

The contract between the Brooklyn Institute and Forest (the Brooklyn Institute/Forest Contract) contains an indemnification provision which requires that Forest defend and indemnify Cauldwell for claims arising out of Forest's work on the Project (the Forest Indemnification Provision). Specifically, the Forest Indemnification Provision states, in pertinent part, as follows:

> "[Forest] shall, to the fullest extent permitted by law . . . indemnify and defend . . . [Cauldwell] . . . the Owner, The City of New York . . . from and against any and all claims . . . allegedly arising out of or in any way related to the operations of [Forest] or its subcontractors in the performance of this Contract or allegedly arising out of, or in connection with, in whole or in part, any act, error or omission . . . by [Forest]"

Initially, as the electrical subcontractor in charge of de-energizing the work areas, plaintiff's injuries can be said to have arisen out of or in connection with Forest's work on the Project. Forest argues that it is entitled to dismissal of Cauldwell's contractual indemnification claim against it, in any event, because the Forest Indemnification Provision violates General Obligations Law § 5-322.1, which declares void any

agreements purporting to indemnify a contractor for its own negligence. To that effect, under General Obligations Law § 5-322.1, a contract or agreement, relative to the construction or repair of a building, purporting to "indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons" caused by the negligence of the promisee, his agents or employees, "whether such negligence be in whole or in part, is against public policy and is void and unenforceable" (see Carriere v Whiting Turner Contr., 299 AD2d 509, 511 [2d Dept 2002]; Castrogiovanni v Corporate Prop. Invs., 276 AD2d 660, 661 [2d Dept 2000] [General Obligations Law prohibits enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent]).

However, a review of the Forest Indemnification Provision reveals that, in fact, it contains the savings language, "to the fullest extent permitted by law," and, therefore, it does not violate General Obligations Law § 5-322.1 (see Murphy v Columbia Univ., 4 AD3d 200, 203 [1st Dept 2004]).

Thus, as the Forest Indemnification Provision follows the General Obligations Law, under the circumstances of this case, partial indemnification by Forest based on the parties' relative degrees of fault is in order.

The Cross Claims Against Forest (Forest's Cross Motion)

Finally, Forest moves for dismissal of any and all cross claims against it. However, since Forest has not offered any evidence in support of this request, nor has it even identified these alleged cross claims against it, Forest is not entitled to dismissal of the cross claims asserted against it.

4/15/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE