Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

VICTOR CHANG HWAN PARK,

Index No. 709885/2014

Plaintiff,

-against-

Motion
Date: March 6, 2019

Motion Cal. No.: 44

HOME DEPOT U.S.A., INC., FREEPORT VF, LLC. and NU-TEK ROOF SYSTEMS, INC,

Motion Sequence No.: 4

Defendants.

The following e-file papers numbered 78-93, 100-103 and 105-108 submitted and considered on this motion by defendants HOME DEPOT U.S.A., INC. (hereinafter referred to as "Home Depot") and FREEPORT VF, LLC. (hereinafter referred to as "Freeport") both seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment in favor of Home Depot dismissing all claims and cross claims against it and in favor of Freeport dismissing plaintiff VICTOR CHANG HWANG PARK's (hereinafter referred to as "Plaintiff") claims of common law negligence and Labor Law §200 and granting it's cross claims against defendant NU-TEK ROOF SYSTEMS, INC. (hereinafter referred to as "NuTek") for contractual indemnification and breach of contract, including all costs and attorneys' fees incurred by Freeport in their defense of this action.

	Papers Numbered
Notice of Motion- Affirmation in Support	EF 78-93
Affirmation in Opp- Exhibits.....	EF 100-103
Stipulation.....	EF 105
Reply Affirmation.....	EF 106-108

The initial action arises out of an incident that occurred at a Home Depot on October 7, 2014. Freeport the owner of the building where the incident allegedly occurred contracted with NuTek

(general contractor) to perform work in the form of a roofing project at the premises where Home Depot was the tenant. NuTek subsequently entered into a subcontract with Plaintiff's employer to perform roof removal and asbestos remediation. Plaintiff alleges that he was instructed by his supervisor (non-party subcontractor) to work in the machine room with a co-worker named Chris after lunch doing "knife and tape" work. Plaintiff alleges his supervisor instructed him to continue working on the same ladder that he and the supervisor set up in the machine room earlier in the shift. The ladder was provided by the non-party subcontractor. According to Plaintiff, he is not sure whether his co-worker was holding the ladder, however once he was two-thirds up the ladder "it slipped" and Plaintiff was injured.

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]. citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center*. 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff's cause of action

In his Verified Complaint Plaintiff alleges the defendants were negligent and that they violated New York Labor Law §§ 200, 240(1), 241(6) and are liable under common law negligence.

Labor Law §200 sets forth a general duty to protect the health and safety of employees.

Labor law § 240(1) states:

> Scaffolding and other devices for use of employees
> 1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 § 241(6) states:

> Construction, excavation and demolition work
> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Home Depot

According to Home Depot it was merely a tenant and is not liable to Plaintiff.

Home Depot points to *Miguel A. Guzman v. L.M.P. Realty Corp,* in order to establish its prima facie entitlement to summary judgment. In *Guzman,* a landlord contracted with the third party defendant contractor to perform restoration work to a building. (*Miguel A. Guzman v. L.M.P. Realty Corp.et al,* 262 A.D.2d 99 [1st Dept 1999]). During the construction, the plaintiff an employee of the third party defendant subcontractor was injured "when he fell from a ladder whose legs gave way" evidenced by the bent state of the ladder legs after the incident. (*Id*). The tenant defendant moved for summary judgment. The court stated a lessee is liable under Labor Law § 240(1) "only where it can be shown it was in control of the work site (for instance where it hires the general contractor)". (*Id*). The court held the lessee did not hire the general contractor, did not supervise the renovation work, had no authority over safety measures at the job site, nor did it supply any equipment specifically the ladder at issue. (*Id*). Therefore, the lessee's motion for summary judgment was granted.(*Id*).

Here, Home Depot did not contract with NuTek or its non-party subcontractor. Home Depot employees did not perform any work related to the roof replacement or asbestos abatement. At most, Home Depot employees may have provided instruction on where to unload a truck. The Plaintiff testified that his supervisor (the non- party subcontractor) gave him all of his job instructions (page 63 lines 4-7). When asked if he ever spoke to anyone who was employed by or worked at Home Depot, Plaintiff responded that he spoke with a lift driver, however he stated he never received instructions on how to do his job from anyone who worked at Home Depot. (Page 280 lines1-21).

The elements of common law negligence are duty, breach, causation and damages. Here, Home Depot alleges it had no duty to the Plaintiff. In *Garcia v. Market Assoc.*, the defendant owner contracted with a defendant general contractor to complete demolition work at a shopping center. (*Garcia v. Market Assoc.*, 123 A.D.3d 661, 662 [2nd Dept 2014]). Plaintiff was a laborer employed by the defendant contractor to spray the site with water from a water truck to control dust. (*Id*). Plaintiff was injured when the water truck drove over a concrete slab at the premises. (*Id).* Plaintiff sued under New York Labor Law §§ 200, 240(1), 241(6) and common law negligence. (*Id*). The court held the tenant defendant established its prima facie entitlement to judgment as a matter of law because "it neither contracted for nor supervised and controlled the demolition work on the premises and, therefore, was not an owner or agent within the meaning of the Labor Law". (*Id* at 665). In order to establish lack of liability as to common law negligence the defendants were required to prove that they neither created the alleged dangerous condition nor had actual or constructive notice of it.(*Id*).

Here, Plaintiff alleges that the ladder slipped and caused his injuries. Home Depot did not provide tools or equipment for the roof replacement or asbestos abatement. When asked whether anyone at anytime who worked for Home Depot provided him with tools and equipment to use for his work the Plaintiff responded "No" (page 126 lines 18-23).

Therefore, defendant Home Depot has established its prima facie entitlement to summary judgment. Due to the lack of opposition, Home Depot's motion for summary judgment is granted.

Freeport *(Dismissal of Plaintiff's claims)*

According to Freeport, it is not liable to Plaintiff under its Labor Law §200 claim and its common law negligence claim. In *Cook v Orchard*, the court established the manners in which liability can be found under Labor Law §200. The court states "[w]hen an alleged defect or dangerous condition arises from [a] contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200". (*Cook v. Orchard,* 73 A.D.3d 1263, 1264 [3rd Dept 2010]). Additionally, the court states "when "a worker's injuries result from an unsafe or dangerous condition existing at a work site, rather than from the manner in which the work is being performed, the liability of a general contractor, and of an allegedly negligent subcontractor, depends upon whether they had notice of the dangerous condition and control of the place where the injury occurred". (*Id*). In *Cook,* Plaintiff an employee of the defendant subcontractor was injured when he slipped on plastic covered by snow at the job site. (*Id* at 1263).

Freeport alleges it did not control nor did it supervise the work Plaintiff was performing.

In support of its position Freeport points to *Fiorentino v. Atlas Park, LLC (*95 A.D.3d 424 [1st Dept 2012]*)*. In *Fiorentino*, the defendant owner contracted with the defendant contractor to perform construction work at the premises. The defendant contractor contracted with two subcontractors one to perform carpentry work and the other to perform electrical work. (*Id* at 424). Plaintiff worked for the defendant carpentry subcontractor. Plaintiff alleges he was installing metal tiling into the ceiling while standing on a scaffold when he noticed an armored electrical cable dangling from the ceiling. (*Id* at 425). Whilst holding the metal tile plaintiff grabbed the cable intending to place it back in the ceiling and received an electrical shock. (*Id*). Plaintiff testified that he never had any contact with the defendant owner or the defendant contractor. (*Id* at 424). The aforementioned parties moved for summary judgment as to plaintiff's Labor Law §200 claims. (*Id* at 425). The court stated that absent ability to supervise or control the work neither a owner nor general contractor will be found liable under Labor Law §200. (*Id* at 426). The court found the fact that the owner "or its site safety inspector had the authority to stop the work if he observed a subcontractor engaging in an unsafe activity is insufficient to establish the requisite supervision or control". (*Id* at 425). Furthermore, the court found the owner's ability to expedite the work was not enough to establish the requisite control under Labor Law §200. (*Id*).

Here, Freeport points to Plaintiff's testimony that he received all of his instructions from his supervisor an agent of the non-party subcontractor. Freeport also points out that it did not have an asbestos license and therefore could not provide the non-party subcontractor with instruction on how to perform its day to day activities. When Mr. Degiorgio, who was Vice President of operations at Vornado Realty Trust (parent company of Freeport) in 2014, was asked at his May 1, 2018 deposition if Freeport an unlicensed entity could tell asbestos contractors how to do their work, he responded "No" (Degiorgio Dep. 41:19-22).

As established earlier, in order to establish lack of liability as to common law negligence the defendants were required to prove that they neither created the alleged dangerous condition nor had actual or constructive notice of it.(*Garcia* at 665). Freeport alleges it had no prior notice of the defective ladder and furthermore, never provided the ladder to the Plaintiff.

Freeport has established its prima facie entitlement to summary judgment. Due to a lack of opposition Freeport's motion for summary judgment as to Plaintiff's Labor Law §200 and common law negligence claim is granted.

Freeport *(Breach of Contract and Contractual Indemnity as to Defendant NuTek)*

Contractual Indemnification

As stated earlier Freeport and NuTek entered into a contractual agreement for roof replacement services.

Paragraph 7 of the Purchase Order states in relevant part:

> 7. Indemnification: To the fullest extent permitted by law, Vendor shall defend, indemnify and hold harmless Vendee, the owner of the Building, and the land upon which it sits (such owner, the "Owner") and any affiliates...from and against any and all claims, lawsuits, damages, losses costs and expenses (including, without limitation, legal fee and other expenses of litigation in connection with this indemnification and enforcement thereof) (collectively a "Claim") arising out of or in connection with (i) the performance of the Work; (ii) this Purchase Order; and (iii) any act or omission of Vendor or Vendor's employees, agents, subcontractors, supplies, worse, invitees, successors or assigns, including, without limitation, any Claim with respect to bodily injury, death, persona; injury or property damage, and all other Claims by any person, firm or corporation. This indemnification shall survive the later to occur of the completion of the Work and the Completion Date.

Freeport alleges the underlying lawsuit has triggered the indemnity provision because the Plaintiff has brought suit against Freeport for bodily injuries he sustained while working for the non-party subcontractor in performance of the "Work" (defined in the Purchase Order). Now Freeport is moving for summary judgment finding that the Contract Indemnity provision has been triggered, warranting NuTek to "defend indemnify and hold [Freeport] harmless".

In *Rainer v. Gray-Line Dev. Co., LLC.*, plaintiff was injured when he fell of a ladder at a job site due to a defect in the floor. Plaintiff was performing ceiling work before the alleged injury. (*Rainer v. Gray-Line Dev. Co., LLC.*, 117 A.D.3d 634, 635 [1st Dept 2014]) The defendant construction manager sued for enforcement of the indemnification provision in its contract with the defendant subcontractor. (*Id*). The provision provides "for indemnification from Sorbara where, inter alia, an accident is claimed to have occurred 'as a result of or connected with Sorbara's work on the subject construction project'." (*Id*). The court found the indemnification provision was clear and unambiguous, triggered by plaintiff's claim his fall was partially caused by a defect connected to the defendant, subcontractor's, work. (*Id*). The court held in part, that the defendant construction manager's motion for summary judgment should be granted unconditionally since, due to the dismissal of the Labor Law § 200 and common law negligence claim the defendant's liability would only be vicarious. (*Id* at 636).

Here, this Court has granted Freeport's motion for summary judgment related to Plaintiff's Labor Law §200 and common law negligence claim therefore, any liability on the part of Freeport would be vicarious.

Freeport has established its prima facie entitlement to summary judgment as it relates to its claim for contractual indemnity against NuTek.

In opposition, NuTek claims the indemnification clause was never triggered. NuTek alleges there are questions of fact as to whether or not the accident actually occurred. Furthermore, NuTek alleges there are questions of fact as to whether it arose out of "(a) the performance of the Work; (ii)

this purchase order; and (iii) any act or omission of Vendor or Vendor's employees, agents, subcontractors..."

Whether or not there is an issue of fact as to whether the accident occurred is not a question before this Court. NuTek's burden is to raise an issue of fact as it relates to the contractual indemnity provision within its contract with Freeport. NuTek argues there are questions of fact as to whether or not the accident arose out of (a) the performance of the Work; (ii) this purchase order; and (iii) any act or omission of Vendor or Vendor's employees, agents, subcontractors..." however it fails to raise a substantive issue of fact. The Plaintiff claims he was an employee of the non-party subcontractor hired by NuTek in connection with the roof replacement. Plaintiff contends he was injured in the course of following the instructions of his supervisor (another employee of the non-party subcontractor). Finally, Plaintiff alleges that he was injured when the ladder (provided by the non-party subcontractor) slipped. Plaintiff brought a claim against Freeport in connection with the aforementioned injuries he sustained.

Therefore, NuTek's argument that the contractual indemnity provision was not triggered fails.

NuTek alleges the indemnification provision violates the General Obligations Law. Specifically, NuTek alleges the provision violates GOL § 5-322.1.

GOL §5-322.1 states in relevant part:

> 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a **promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent**

NuTek points to *Brown v. Two Exchange Plaza Partners,* in which an owner hired a general contractor (Fuller) to complete work on the lobby of the premises. (*Brown v. Two Exchange Plaza Partners,* 146 A.D.2D 129, 133 [1ST Dept 1989]). Fuller hired two subcontractors Heydt to construct a scaffolding and A &M to erect walls and ceilings. (*Id*). A&M hired a sub subcontractor, Furring a drywall company which was plaintiff's employer. (*Id).* Plaintiff was injured when the scaffolding collapsed.*(Id*). At trial no one could establish why the scaffolding collapsed. (*Id*). Directed judgment was entered against Fuller, he in turn moved for directed verdict against Heydt and A&M arguing

that each was liable to it by virtue of an indemnification clause in their subcontracts and that each were its statutory agent under Labor Law §240 (1). (*Id*). Due to the absolute penalty imposed by Labor Law §240(1) with no regard to whether due care was exercised the trial court did not allow the jury to apportion liability and Fuller was found liable under Labor Law §240(1). (*Id* at 134). Fuller appealed arguing it should be indemnified due to the indemnification clauses in the subcontracts and that Heydt is liable as its statutory agent under Labor Law §240(1). (*Id* at 135). The First Department held plaintiff's accident did not arise out of, in connection with or as a consequence of the performance of Heydt's work therefore the indemnification clause within Heydt's contract was not triggered. (*Id*). Furthermore, Heydt would only be liable under Labor Law §240(1) as a statutory agent if at the time of the incident it had the authority to supervise and control the work. (*Id* at 136). The First Department held Heydt no longer had control over the scaffold and was not a statutory agent when the incident occurred. (*Id*). Regarding A&M, the First Department found a close reading of A&M's performance obligations revealed that the indemnification clause was triggered. A&M was required to indemnify Fuller. (*Id* at 137).

A&M argued such a clause violated GOL § 5-322.1 because Fuller was found liable under Labor Law §240(1). (*Id*). The First Department confirmed that "a general contractor who is 1% responsible for an accident is, by reason of the statute, barred from enforcing an indemnification agreement and is limited instead to 99% contribution from his co-tortfeasors; a general contractor free of negligence, on the other hand, may enforce his subcontractor's agreement to indemnify, the latter's freedom from negligence notwithstanding." (*Id*). However, the First Department states liability under Labor Law §240(1) does not automatically translate to negligence. (*Id* at 138). As stated earlier, no one could establish why the scaffolding collapsed, the record did not indicate what Fuller did or did not do to make the workplace unsafe for plaintiff. The burden is on the subcontractor to submit evidence to establish negligence. (*Id*). Therefore, the First Department held in the absence of proof of negligence, regardless of whether or not the party was found liable under Labor Law §240(1), the limitation of the force of the parties' indemnification agreement which results from application of GOL § 5-322.1 is inapplicable.(*Id*). The Court of Appeals affirmed the decision *see Paul Brown et al. v. Two Exchange Plaza Partners,* 76 N.Y.2d 172 (1990).

In *Jose Marulanda v. Vance Associates, LLC.*,the Second Department applied a similar holding to the owner of the premises. (*Jose Marulanda v. Vance Associates, LLC.*, 160 A.D.3d 711 [2nd Dept 2018]). Plaintiff was employed by the general contractor and was performing his work when he fell from a scaffold.(*Id).* Plaintiff, among other things, sued the owner claiming it violated Labor Law §240(1). (*Id* at 712). Plaintiff established its prima facie case simply by establishing he was injured when he fell from a scaffold, that lacked guard rails. (*Id*). The owner defendant failed to raise a triable issue of fact. (*Id*). Owner moved to enforce the indemnification clause in its contract with the general contractor. The general contractor argued that GOL § 5-322.1 prohibits indemnification. The Second Department held indemnification is not barred under the circumstances of the case because the defendant owner is liable under Labor Law §240(1) based solely upon its status as the owner of the premises. (*Id* at 713). Evidence was not presented to establish negligence on the part of the owner. Therefore the indemnification provision did not violate GOL § 5-322.1.(*Id*).

Here, NuTek reiterates where there is evidence of negligence on the part of the party seeking to be indemnified, GOL § 5-322.1 prohibits indemnification. However, the record here presents no evidence that Freeport was negligent. In fact, NuTek presented no opposition to Freeport's motion for summary judgment related to Plaintiff's Labor Law §200 claim and common law negligence claim, which this Court has granted in favor of Freeport herein.

Therefore, this Court holds the indemnification clause located in Freeport's Purchase Order with NuTek does not violate GOL § 5-322.1. The contractual indemnification clause located in the Purchase order between Freeport and NuTek has been triggered and Freeport is entitled to indemnification.

Breach of Contract

Freeport argues that paragraph 8 of the Purchase Order required NuTek to obtain a commercial general liability policy, with limits of $1,000,000 for the primary layer, and $5,000,000 for the excess policy, and to name Freeport as an additional insured for both. Also, that these policies were to be considered "primary". However, according to Plaintiff, NuTek has failed to disclose any document indicating that Freeport was an additional insured on its policy.

Defendant NuTek in its Exhibit B presents a copy of its certificate of insurance with the sufficient policy limits. Named as additional insured is "Vornado Realty Trust.... their owned or partially controlled subsidiaries and their members...". The Testimony of Mr. Degiorgio, who was Vice President of operations at Vornado Realty Trust (parent company of Freeport) in 2014, reveals that the request for proposal of the roof job mislabels the owner. The owner is labeled as Vornado Realty Trust Co. (Page 15 lines 8-16). Any confusion related to who was to be named as additional insured may at least be partially attributed to Freeport itself. Therefore, Freeport is not entitled to summary judgment as it relates to its cross claim for breach of contract. Therefore it is,

ORDERED, that Home Depot's motion for summary judgment is granted in its entirety; and it is further,

ORDERED, that Freeport's motion for summary judgment to dismiss Plaintiff's Labor Law §200 claim and common law negligence claim is granted; and it is further,

ORDERED, that the branch of Freeport's motion for summary judgment related to the Indemnification Clause contained in its Purchase Order with NuTek is granted; and it is further,

ORDERED, that an Inquest will be held to determine the defense costs and expenses incurred by Freeport associated with defending this action and NuTek's responsibility of the same in the Trial Scheduling Part, Courtroom 25, located at 88-11 Sutphin Boulevard, Jamaica, New York on March 20, 2019 at 9:30 a.m.; and it is further,

ORDERED, that the branch of Freeport's motion for summary judgment to deem NuTek in breach of their contract is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: March 14, 2019

Hon. Cheree A. Buggs, JSC