

Percoco v 140 W. 57th St. Build. LLC

2019 NY Slip Op 32107(U)

July 16, 2019

Supreme Court, New York County

Docket Number: 152386/2014

Judge: Gerald Lebovits

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

-----X

INDEX NO. 152386/2014

MATTHEW PERCOCO,
Plaintiff,

MOTION DATE 03/14/2019

- v -

MOTION SEQ. NO. 005

140 W. 57TH STREET BUILDING LLC,
NURMINEN CONSTRUCTION OF N.Y., INC., and
CRIMSON & WHITE, LLC,

Defendants.

140 W. 57TH STREET BUILDING LLC,

DECISION AND ORDER

Third-Party Plaintiff

- v -

CRIMSON & WHITE, LLC,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 197, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221

were read on this motion for

SUMMARY JUDGMENT

Lipsig, Shapey, Manus & Moverman, P.C. (Alan M. Shapey of counsel), for plaintiff.
Law Offices of James J. Toomey (Norman D. Lawrence of counsel), for defendant Crimson & White, LLC.
Law Offices of Safranek, Cohen & Krolian (Allison Sanders of counsel), for defendant Nurminen Construction of N.Y., Inc.

Gerald Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by a plumbing mechanic on September 7, 2012, when, while performing pipe installation work at a construction site located at 140 West 57th Street, New York, New York (the Premises), he fell from a makeshift scaffold that collapsed.

Defendant/third-party defendant Crimson & White, LLC (Crimson) moves, pursuant to CPLR 3212, for summary judgment in its favor on its cross claim for contractual indemnification against defendant Nurminen Construction of N.Y., Inc. (Nurminen).

Plaintiff Matthew A. Percoco cross-moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Nurminen and Crimson.

Nurminen cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and Crimson's cross claims against it.

BACKGROUND

On the day of the accident, defendant 140 W. 57th Street Building, LLC (140) owned the Premises where the accident occurred. Prior to the date of the accident, 140 leased the Premises to Crimson for use as a grocery store. Crimson contracted with nonparty Supermarket Technical Services (STS) to serve as the construction manager on a project which entailed performing certain alterations to the Premises for that grocery store (the Project). Crimson hired Nurminen to perform certain carpentry work on the Project, which included installing metal framework and hanging sheetrock. Crimson also hired nonparty MB Mechanical (MB), a plumbing subcontractor, to install piping. Plaintiff was employed by MB as a plumbing mechanic.

Plaintiff's Deposition Testimony and Affidavit

During his deposition, plaintiff testified that on the day of the accident, he was working at the Premises as a mechanic for MB, a subcontractor hired to install plumbing on each of the three floors of the building. Plaintiff's duties at the time of the accident included installing a line of four-inch drain piping in the ceiling of the basement. Plaintiff testified that Michael Burke, who owned MB, was his direct supervisor. Burke's son, Louie Burke, gave plaintiff his daily work instructions. Plaintiff testified that any scaffolding or ladders that he used at the job site were owned by MB. Plaintiff noted that, in the three-to-four months that he worked at the Premises, he never attended a safety meeting, nor was he ever given any safety literature. He also never observed any safety meetings underway at the Premises.

Plaintiff explained that, in order to reach the basement's ceiling to perform his work, it was necessary for him to utilize a makeshift scaffold which consisted of a wooden frame affixed to the wall. The makeshift scaffold was comprised of three levels of two- by four- foot pieces of wooden board; one on the bottom, one in the middle and one on the top. Plaintiff maintained that the uppermost piece of board was unsecured, as it was not fastened to the wall in any way. Plaintiff testified that he did not know who exactly installed the makeshift scaffold or how long it had been installed prior to the time of the accident. In addition, no one specifically told him to use it or to not use it to perform his work. Plaintiff maintained that he was not provided with any other safety devices to protect him from falling as he performed his work.

Plaintiff explained that his work required him to climb onto and work from the middle board of the makeshift scaffold, which was approximately 3 to 4 feet off the ground. His work

included clamping a bracket or hanger onto an "I" beam located approximately 10 to 12 feet off the ground. The accident occurred as he was holding onto the upper board in order to climb down off the scaffold. Suddenly and without warning, the upper board gave way from the framework and collapsed, causing plaintiff to fall backward and into a nearby unprotected escalator pit.

Specifically, plaintiff testified, "I went to climb down, and that's when I felt the 2-by-4 kind of like give way, and I fell backwards with the 2-by-4" (plaintiff's tr at 66). He also explained that, as he "was holding on to the top [board], and [he] kind of turned a little bit to go get down . . . it's when I fell backwards. Because, that 2-by-4 just pulled away" (*id.* at 68). Plaintiff maintained that he suffered injuries to his neck when his "neck kind of slid down into the pit with [him]" (*id.* at 84).

Plaintiff testified that he never observed any barricades around the escalator pit, nor was he ever told not to work in the accident area. Although there may have been a 10-foot-tall A-frame ladder and a scaffold on the Premises, he was unable to use them in his workspace because "[t]here was no space" to set them up due to the close proximity of the escalator pit to the wall (*id.* at 101). To that effect, the distance between the subject wall and the escalator pit was only about "a foot" (*id.*).

In his affidavit, plaintiff reiterated that "[a]lthough there was a scaffold on the job site, and an A-frame ladder that was approximately 10" tall, neither of these devices could fit into the narrow space between the wall and the elevator pit. There were no climbing devices available" (defendants' notice of motion, exhibit H, plaintiff's affidavit). Further, he "was not provided with any ladders, scaffolds or other safety devices at the location where he was working that could fit into the space next to the uncovered escalator pit, to provide [him] with proper protection" (*id.*). Plaintiff also described the escalator pit as being three feet wide and one and one-half feet deep.

Deposition Testimony of Robert Adamski (Nurminen Foreman)

Robert Adamski testified that he was the carpenter foreman for Nurminen on the day of the accident. Nurminen's duties on the Project included performing metal framing, sheet rocking and installing the store's fixtures. He maintained that STS was the general contractor on the Project, and that STS gave him the carpentry plans for Nurminen's work. He specifically testified that Nurminen did not "have anything to do with the installation of the pipes (in the ceiling of the basement) or hangers on the ceiling of the basement" (Nurminen's Notice of Cross Motion, exhibit J, Adamski tr at 30). Rather, STS controlled and directed the work of the plumbing contractor, MB.

Adamski also explained that Nurminen filled out an incident report in regard to the subject accident, not because it was a general contractor, but because it was something that Nurminen typically did when there was a possibility that its materials or equipment might be involved. In this case, the panels which were leaning up against the wall belonged to Nurminen.

Deposition Testimony of William Sloan (Construction Consultant for Crimson)

William Sloan testified that Crimson was a tenant at the Premises, and that he hired Nurminen on behalf of Crimson. Sloan surmised that Nurminen served as the general contractor “from his perspective” because Nurminen would “run the job, control the job, open and close the doors, tell everyone what to do, make sure that things were run properly, coordinated properly, and to control all the people there” (Nurminen’s notice of motion, exhibit K, Sloan tr at 13-14). That said, Sloan acknowledged that he was not “qualified” to answer the question of whether an entity is a general contractor or not in the “legal” sense (*id.* at 52).

Sloan was not sure as to whether there was a written contract between Crimson and Nurminen regarding Nurminen’s scope of work, and he could not locate one. However, “certainly there was an oral agreement” (*id.* at 33). Sloan was able to locate a written indemnification agreement, which was an addendum to a contract that was never located (the Indemnification Addendum).

Pasi Nurminen’s Affidavit (Nurminen’s Owner)

In his affidavit, Pasi Nurminen (Pasi) stated that he owned Nurminen on the day of the accident. He asserted that “NURMINEN did not supervise, direct or control the work being performed by plaintiff Matthew Percoco, and had no responsibility for his safety at the time of the accident” (Nurminen’s notice of cross motion, exhibit N, Pasi aff). In addition, Nurminen had no part in hiring plaintiff, nor did it provide any “tools, equipment or instructions” to MB or any of its employees, and it did not supervise MB’s work. Further, Nurminen “did not contract with [MB] and had no supervisory role or authority over [MB] employees” (*id.*). To that effect, MB was not one of Nurminen’s subcontractors, nor did it hire MB.

Pasi explained that Nurminen was performing carpentry work on the Project, and that it was not serving as the general contractor. In addition, STS was in charge of directing the trades on the Project as the construction manager and owner’s representative. Pasi noted that “STS performed the duties of a general contractor to the extent that they supervised, controlled and scheduled NURMINEMN’s work. STS told Nurminen what to do and when to do it, and [he] understood that STS served the same function for [MB]” (*id.*). STS also held weekly scheduling and progress meetings on the Project.

Pasi also stated that Nurminen “did not monitor plaintiff or [MB’s] work or progress beyond the extent that it directly affected Nurminen’s carpentry duties,” explaining that “the progress of one trade, in this instance plumbing, can delay other trades such as NURMINEN’s separate and distinct carpentry duties” (*id.*). He noted that MB “was performing plumbing, which was unrelated to the carpentry work” (*id.*).

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 movant'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]; see also *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 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]).

The Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims Against Nurminen and Crimson

Initially, Nurminen cross-moves for dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it. As plaintiff does not oppose those parts of said cross motion which seeks to dismiss these claims, these unopposed claims are deemed abandoned (see *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *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, Nurminen is entitled to dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it.

The Labor Law § 240 (1) Claim Against Nurminen and Crimson

Plaintiff cross-moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants Nurminen and Crimson. Nurminen cross-moves for dismissal of said claim against it.

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]).

Here, it must be determined as to whether Crimson, as 140's tenant, and Nurminen, as the carpentry subcontractor, may also be liable under the statute as either owners, general contractors and/or as an agents of the same.

As to Crimson, it should be noted that “[t]he meaning of ‘owners’ under Labor Law § 240 (1) . . . has not been limited to titleholders but has ‘been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for its benefit’” (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). “[O]wnership of the premises where the accident occurred - standing alone - is not enough to impose liability under [the] Labor Law . . . where the property owner did not contract for the work resulting in the plaintiff's injuries Rather, . . . [there must be] some nexus between the owner and the worker” (*Morton v State of New York*, 15 NY3d 50, 56 [2010] [internal quotation marks and citations omitted]; *Abbate v Lancaster Studio Assoc.*, 3 NY3d 46, 52 [2004]).

It is undisputed that Crimson not only had a lease interest in the Premises, it fulfilled the role of an owner by contracting with Nurminen and MB to have the subject construction work performed for its benefit. Accordingly, Crimson is a proper Labor Law defendant and may be held liable for plaintiff's injuries under Labor Law § 240 (1).

As to Nurminen, it is important to note that

“[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] 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”

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

Initially, the only evidence that plaintiff puts forth in support of his argument that Nurminen was hired to be the general contractor on the Project is Sloan’s testimony, wherein he merely surmised that Nurminen must have been a general contractor based upon some of its duties on the Project. However, Sloan’s memory was often faulty, and he later admitted that he was not qualified to make a determination as to whether an entity was, in fact, a general contractor. In addition, no contract was produced to establish that Nurminen was hired to serve as general contractor on the Project.

Further, a review of the evidence in this case reveals that Nurminen may not be held liable under Labor Law § 240 (1) as an agent of the owner, because he did not supervise and/or control the injury-producing work, i.e., plaintiff’s pipe installation work or the installation and maintenance of the defective makeshift scaffold. As put forth by Pasi in his affidavit, Nurminen’s duties were limited to building metal framing, installing sheetrock and installing store fixtures, and its carpentry work was wholly unrelated to MB’s plumbing work. Nurminen did not hire plaintiff, nor did it have any input into how plaintiff performed his work. He further noted that STS performed the duties of general contractor, even giving Nurminen its work instructions.

Plaintiff testified that his employer, MB, supervised his work, as well as supplied him with any scaffolding and/or ladders that he needed to perform it. Adamski testified that Nurminen had nothing to do with the installation of the subject pipes, and that STS controlled and supervised MB’s work. Notably, “Labor Law § 240 (1) does not make each subcontractor liable for all injuries occurring on a jobsite in the absence of the subcontractor’s ability to direct, supervise and control the work giving rise to the injury” (*Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]).

Thus, as plaintiff failed to “present evidence of [Nurminen’s] supervision and control of the activity which resulted in his injury,” Nurminen is not a proper Labor Law defendant (*id.* at 320-321]). Accordingly, Nurminen is entitled to dismissal of the Labor Law § 240 (1) claim against it. Therefore, in the remainder of this decision, the Labor Law § 240 (1) claim will be addressed in regard to Crimson only.

Crimson is not entitled to dismissal of the Labor Law § 240 (1) claim because, while plaintiff was working at an elevation, the unsecured makeshift scaffold, which was in use as a safety device to protect plaintiff from falling as he performed his work on the ceiling, collapsed. Notably, “[w]hether 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]; *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [Labor Law § 240 (1) liability where the makeshift scaffold failed to protect the plaintiff from falling]; *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101, 1102 [2d Dept 2012] [Labor Law § 240 (1) liability where “(t)he collapse of the makeshift scaffold . . . failed to afford the injured plaintiff proper protection for the work being performed, and . . . this failure was a proximate cause of his injuries”]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801 [2d Dept 2010] [“Since the scaffold collapsed, the plaintiff established, prima facie, that he was not provided with an adequate safety device to do his work, as required by Labor Law § 240 (1)”].

In addition, as the makeshift scaffold proved unstable, and, thus, inadequate to protect plaintiff from falling, additional safety devices, such as a harness, lanyard and place to tie off were necessary to prevent him 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, 762-763 [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 v Vornado Realty Trust Co.*, 29 AD3d at 762, quoting *Conway v New York State Teachers’ Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

It should be noted that the fact that plaintiff may have only fallen a few feet is of no consequence, because plaintiff was injured due to the failure of a provided protective device specifically listed in the statute and intended to protect plaintiff from falling in the first place (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003] [Court noted that, while the scaffold at issue was only four feet above the ground, this did not constitute a basis for ignoring the requirements of section 240 (1), especially when liability is based upon a defect in a protective device specifically listed in the statute]; *Gettys v Port Auth. of N.Y. & N.J.*, 248 AD2d 226, 227 [1st Dept 1998] [in a case where the exact height of the makeshift platform that the plaintiff fell from was in dispute, the court noted that “even a platform elevated only 2 feet from the ground would be subject to the protection of the statute”]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Crimson, and Crimson is not entitled to dismissal of said claim against it.

Crimson’s Cross Claim for Contractual Indemnification Against Nurminen

Crimson moves for summary judgment in its favor on its cross claim for contractual indemnification against Nurminen, and Nurminen cross-moves for dismissal of said cross claim.

The Timeliness of Nurminen's Cross Motion

Crimson argues that Nurminen's cross motion is not timely, in that it was made after the November 1, 2018 deadline set by the court for bringing such motions. and, thus, it should not be considered by the court. However, as Nurminen argues,

"[a] cross motion for summary judgment made after the expiration of the . . . period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; see also *Gualpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

As conceded by Crimson in its opposition to Nurminen's cross motion, the issue of contractual indemnification raised by Nurminen in its cross motion is timely. Here, said issue is "nearly identical" to that same issue raised by Crimson in its motion. Therefore, the court will consider Nurminen's request for summary judgment dismissing Crimson's cross claim for contractual indemnification against it.¹

It should be noted that, as Crimson did not move for summary judgment in its favor on the cross claims for contribution and common law indemnification against Nurminen, those parts of Nurminen's cross motion seeking dismissal of these cross claims are untimely, and thus, their dismissal will not be considered by the court.

Crimson's Cross Claim for Contractual Indemnification Against Nurminen

Crimson moves for summary judgment in its favor on its cross claim for contractual indemnification against Nurminen. Nurminen cross-moves for dismissal of Crimson's cross claim for contractual indemnification against it. "A party is entitled to full contractual indemnification

¹It should be noted that plaintiff makes no argument that the parts of Nurminen's cross motion seeking dismissal of the Labor Law claims are untimely.

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]).

Additional Facts Relevant To This Issue:

Crimson and Nurminen entered into the Indemnification Addendum on March 12, 2012. It states, in pertinent part, that

“To the fullest extent permitted by law, [Nurminen] agrees to indemnify, defend and hold harmless [Crimson] from and against any and all suits, actions, liabilities, damages . . . including attorneys’ fees . . . arising out of or in connection with the performance of the Work of [Nurminen], its agents, servants, subcontractors or employees”

(Nurminen’s notice of cross motion, exhibit L, the Indemnification Addendum).

Pursuant to the Indemnification Addendum, Nurminen is not obligated to indemnify Crimson because it has not been established that the accident was associated in any way with Nurminen’s work on the Project or the work of any subcontractor hired by Nurminen. In fact, it is undisputed that plaintiff worked for MB, Crimson’s subcontractor, and that MB supervised plaintiff’s work and supplied him with his tools and equipment.

Thus, Nurminen is entitled to dismissal of Crimson’s cross claim against it for contractual indemnification. The court has considered Crimson’s remaining arguments on this issue and finds them unavailing.

Accordingly, it is hereby

ORDERED that Percoco’s CPLR 3212 motion for partial summary judgment as to liability on the Labor Law § 240 (1) claim against defendant Crimson is granted, and the cross motion is otherwise denied; and it is further

ORDERED that the branch of defendant Nurminen’s CPLR 3212 cross motion for summary judgment dismissing plaintiff’s complaint as against Nurminen is granted; and the complaint is dismissed as against Nurminen, with costs and disbursements to Nurminen as taxed

by the Clerk of Court; and the Clerk is directed to enter judgment in favor of Nurminen with respect to plaintiff's claims against it; and it is further

ORDERED that defendant Crimson's CPLR 3212 cross motion for summary judgment on Crimson's cross claim against Nurminen for contractual indemnification is denied; and it is further

ORDERED that the branch of defendant Nurminen's cross motion, pursuant to CPLR 3212, for summary judgment dismissing Crimson's cross claim for contractual indemnification against it is granted; and this cross claim is dismissed as against Nurminen, with costs and disbursements to Nurminen as taxed by the Clerk of Court; and the Clerk is directed to enter judgment on this cross claim in favor of Nurminen; and it is further

ORDERED that Nurminen's cross motion is otherwise denied; and it is further

ORDERED that the parties appear for a status conference in Part 7 of this court, Room 345, 60 Centre Street, on September 4, 2019, at 10:00 a.m.

7/16/2019

DATE

HON. GERALD LEBOVITS

J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE