

Skolnik v 330 Hudson St. LLC
2019 NY Slip Op 32788(U)
September 19, 2019
Supreme Court, New York County
Docket Number: 150356/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

STEVEN SKOLNIK,

Index No. 150356/2016

Plaintiff

- against -

330 HUDSON STREET LLC and STRUCTURE
TONE, INC.,

Defendants

330 HUDSON STREET LLC and STRUCTURE
TONE, INC.,

Third-Party Index No.
595275/2016

Third Party Plaintiffs

- against -

SOUND REFRIGERATION & AIR CONDITIONING,
INC., and OH&M ELECTRICAL CORP.,

Third Party Defendants

SOUND REFRIGERATION AND AIR
CONDITIONING, INC.,

Second Third Party Plaintiff

- against -

PRECISION TESTING & BALANCING, INC.,
and TOBY MONTI,

Second Third Party Defendants

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained November 9, 2015, when he slipped on a cylindrical wire pull holder as he was working on premises owned by defendant 330 Hudson Street LLC on a construction project for which defendant Structure Tone, Inc., was the general contractor. Third party defendants Sound Refrigeration & Air Conditioning, Inc., and OH&M Electrical Corp. worked as subcontractors on the project. Sound Refrigeration & Air Conditioning hired second third party defendant Precision Testing & Balancing, Inc., plaintiff's employer, as its subcontractor.

Defendants commenced a third party action against Sound Refrigeration & Air Conditioning and OH&M Electrical Corp., C.P.L.R. § 1007, for contribution, implied and contractual indemnification, and breach of a contract to procure insurance. Sound Refrigeration & Air Conditioning commenced a second third party action against Precision Testing & Balancing and second third party defendant Monti, C.P.L.R. § 1011, also for

contribution, implied and contractual indemnification, and breach of a contract to procure insurance.

Defendants move for summary judgment dismissing plaintiff's claims and awarding defendants a judgment on their third party claims for indemnification, including defense expenses, and breach of a contract to procure insurance. C.P.L.R. § 3212(b) and (e). Sound Refrigeration & Air Conditioning and OH&M Electrical Corp. each separately move for summary judgment dismissing the claims and cross-claims in the third party action. C.P.L.R. § 3212(b). Sound Refrigeration & Air Conditioning also seeks summary judgment in second third party plaintiff's favor on its contractual indemnification claim against Precision Testing & Balancing, which separately moves for summary judgment dismissing plaintiff's claims under New York Labor Law §§ 240(1) and 241(6) and defendants' claims for indemnification against Sound Refrigeration & Air Conditioning. Precision Testing & Balancing also seeks summary judgment in second third party defendant's favor against OH&M Electrical Corp., but did not institute any third party action against OH&M Electrical Corp., and dismissal of cross-claims, of which there are none in the second third party action, since Monti is deceased and never answered. C.P.L.R. § 3212(b) and (e). In a stipulation dated May 21, 2019,

Sound Refrigeration & Air Conditioning discontinued its second third party claims against Monti and for contribution, implied indemnification, and breach of a contract to procure insurance against Precision Testing & Balancing.

II. PLAINTIFF'S LABOR LAW CLAIMS

In the stipulation dated May 21, 2019, plaintiff also discontinued his Labor Law § 240(1) claim, his Labor Law § 200 claim against 330 Hudson Street LLC, and his Labor Law § 241(6) claim based on regulations other than 12 N.Y.C.R.R. § 23-1.7(e)(1) and (2). Structure Tone contends that it also is not liable under Labor Law § 200 because it did not supervise or control plaintiff's work and did not create or receive notice of the condition that caused plaintiff's injury. Defendants and Precision Testing & Balancing contend that the regulations on which plaintiff relies do not support his claim under Labor Law § 241(6) because they do not give specific directives or are inapplicable. Plaintiff maintains that Structure Tone fails to demonstrate its noninvolvement in creating the condition that caused his injury or its lack of notice of the condition; that Structure Tone controlled the work that caused his injury, so as to support liability under Labor Law § 200; and that the violation of 12 N.Y.C.R.R. § 23-1.7(e) supports his Labor Law §

241(6) claim.

A. Labor Law § 200 Claim

Labor Law § 200 codifies a general contractor's duty to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.3d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). If a dangerous condition arising from a subcontractor's work caused plaintiff's injury, Structure Tone may be liable for negligently allowing that condition and violating Labor Law § 200, if Structure Tone supervised or exercised control over the activity that caused his injury. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). See Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014). If a dangerous condition on the work site caused the injury, liability depends on Structure Tone's creation or actual or constructive notice of the condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144.

Insofar as plaintiff's injury resulted from the means of his

work, the evidence that Rupert Heron, Structure Tone's superintendent, was at the work site daily, coordinated the subcontractors, and was authorized to direct that they clean up unused materials and to stop work due to a dangerous condition is insufficient to establish Structure Tone's direct control over the work that caused plaintiff's injury. Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d 404, 406 (1st Dep't 2018); Galvez v. Columbus 95th St. LLC, 161 A.D.3d 530, 531-32 (1st Dep't 2018); Varona v. Brooks Shopping Ctrs. LLC, 151 A.D.3d 459, 460 (1st Dep't 2017); McLean v. Tishman Constr. Corp., 144 A.D.3d 534, 535 (1st Dep't 2016). Plaintiff testified that only Precision Testing & Balancing's owners supervised his work. Howard v. Turner Constr. Co., 134 A.D.3d 523, 525 (1st Dep't 2015); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607, 608 (1st Dep't 2015).

Nevertheless, Structure Tone fails to demonstrate that it lacked actual notice of any dangerous condition. While Heron at his deposition denied receiving any complaints about the area where plaintiff fell, Structure Tone also employed a laborer, Danny Leddy, who cleaned that area, and no evidence establishes that he never observed any tool or material on the ground or received complaints about such a condition.

Structure Tone also fails to demonstrate its lack of

constructive notice through evidence of when Structure Tone last inspected the area where plaintiff was injured before his injury. Pereira v. New Sch., 148 A.D.3d 410, 412-13 (1st Dep't 2017); Velez v. City of New York, 134 A.D.3d 447, 447 (1st Dep't 2015); Ladignon v. Lower Manhattan Dev. Corp., 128 A.D.3d 534, 535 (1st Dep't 2015). Although Heron walked through the work area and Leddy cleaned it daily, no evidence establishes when a walkthrough or cleaning last occurred before plaintiff's injury. Since these issues regarding Structure Tone's notice remain, dismissal of plaintiff's Labor Law § 200 claim is premature. Johnson v. 675 Coster St. Hous. Dev. Fund, 161 A.D.3d 635, 636 (1st Dep't 2018); Burgos v. Premiere Props., Inc., 145 A.D.3d 506, 509 (1st Dep't 2016).

B. Labor Law § 241(6) Claim

Plaintiff limits his Labor Law § 241(6) claim to defendants' violation of 12 N.Y.C.R.R. § 23-1.7(e). Defendants and Precision Testing & Balancing contend that § 23-1.7(e) does not apply because plaintiff tripped over a tool or material that was being used and was not scattered.

12 N.Y.C.R.R. § 23-1.7(e)(1) specifically requires that:
"All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which

could cause tripping." 12 N.Y.C.R.R. § 23-1.7(e)(2) specifically requires that: "The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials"

Both provisions may apply. While the wire pull holder was not dirt or debris, 12 N.Y.C.R.R. § 23-1.7(e)(1) specifically requires that passageways also be free "from any other obstructions or conditions which could cause tripping." 12 N.Y.C.R.R. § 23-1.7(e)(2) further requires work areas to be free "from scattered tools and materials." See Matter of 91st St. Crane Collapse, 133 A.D.3d 478, 480 (1st Dep't 2015).

If plaintiff was not injured in a passageway, 12 N.Y.C.R.R. § 23-1.7(e)(1) would not apply. Guido v. Dormitory Auth. of the State of N.Y., 145 A.D.3d 591, 592 (1st Dep't 2016); Carrera v. Westchester Triangle Hous. Dev. Fund Corp., 116 A.D.3d 585, 585-86 (1st Dep't 2014); Johnson v. 923 Fifth Ave. Condominium, 102 A.D.3d 592, 593 (1st Dep't 2013). "Passageway" is undefined in the regulations, but is interpreted as "a defined walkway or pathway used to traverse between discrete areas as opposed to an open area." Prevost v. One City Block LLC, 155 A.D.3d 531, 535 (1st Dep't 2017) (quoting Steiger v. LPCiminelli, Inc., 104 A.D.3d 1246, 1250 (4th Dep't 2013)). Insofar as defendants

maintain that plaintiff was not injured in a passageway, plaintiff's testimony at his deposition that he was carrying a ladder through a space between electricians performing tests and their equipment rack describes a passageway. See Rossi v. 140 W. JV Mgr. LLC, 171 A.D.3d 668, 668 (1st Dep't 2019); Lois v. Flintlock Constr. Servs., LLC, 137 A.D.3d 446, 447 (1st Dep't 2016).

Even if plaintiff was not in a passageway, he was unquestionably in a work area, implicating 12 N.Y.C.R.R. § 23-1.7(e)(2). Tucker v. Tishman Constr. Corp. of N.Y., 36 A.D.3d 417, 417 (1st Dep't 2007); Maza v. University Ave. Dev. Corp., 13 A.D.3d 65, 65-66 (1st Dep't 2004). Moreover, even if the tool or material, the wire pull holder, had been in use, it did not constitute an integral part of the work being performed when plaintiff was injured, to which 12 N.Y.C.R.R. § 23-1.7(e)(2) would not apply, because the tool or material was on the ground serving no immediate purpose for plaintiff's, the electricians', or anyone else's work. Rossi v. 140 W. JV Mgr. LLC, 171 A.D.3d at 668; Lois v. Flintlock Constr. Servs., LLC, 137 A.D.3d at 448. See Saginor v. Friars 50th St. Garage, Inc., 166 A.D.3d 529, 529 (1st Dep't 2018). Instead, the lone wire pull holder resting on the ground that caused plaintiff's injury, which according to the

deposition testimony by Victor Pugliano, OH&M Electrical Corp.'s foreman, was to be placed in a box when the workers using the holder left for a break, may be considered a scattered tool or scattered material. See Kinirons v. Teachers Ins. & Annuity Assn. of Am., 34 A.D.3d at 238. Finally, even accepting that plaintiff was not looking where he was walking while carrying the ladder, these facts do not establish that he was the sole proximate cause of his injury, because the wire pull holder still was misplaced so as to pose a hazard. See Campbell v. Columbus Ctr. LLC, 48 A.D.3d 323, 324 (1st Dep't 2008); Vergara v. SS 133 W. 21, LLC, 21 A.D.3d 279, 281 (1st Dep't 2005). See Thome v. Benchmark Main Tr. Assoc., LLC, 86 A.D.3d 938, 939-40 (1st Dep't 2011).

III. DEFENDANTS' THIRD PARTY CLAIMS

Also in the stipulation dated May 21, 2019, defendants discontinued their claim for breach of a contract to procure insurance against Sound Refrigeration & Air Conditioning. Defendants' failure to authenticate OH&M Electrical Corp.'s contract with Structure Tone, as discussed below, precludes summary judgment on any of their contractual claims against OH&M Electrical Corp. Defendants still seek non-contractual, implied indemnification, however, against both third party defendants.

In seeking implied indemnification, defendants must demonstrate that they were not negligent and that the claimed indemnitors against which defendants seek recovery, third party defendants, were negligent. McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 377-78 (2011); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2013); Blank Rome, LLP v. Parrish, 92 A.D.3d 444, 445 (1st Dep't 2012). The court denies defendants summary judgment on their implied indemnification claims against third party defendants because defendants fail to show that they were not negligent, or that their negligence did not cause plaintiff's injury, Gardner v. Tishman Constr. Corp., 138 A.D.3d 415, 417 (1st Dep't 2016); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 480, or that either third party defendant's negligence or actual supervision of the work conclusively did cause plaintiff's injury. McCarthy v. Turner Constr., Inc., 17 N.Y.3d at 378; Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 479-80; Murigi v. Charmer Indus. Inc., 96 A.D.3d 535, 536 (1st Dep't 2012); Landgraff v. 1579 Bronx Riv. Ave., LLC, 18 A.D.3d 385, 387 (1st Dep't 2005).

Thus. Even if defendants demonstrated that they were not negligent, they still must demonstrate that third party

defendants' negligence contributed to plaintiff's injury. Evidence that OH&M Electrical Corp. was the only subcontractor that used the wire pull holder on which plaintiff slipped would demonstrate that OH&M Electrical Corp. left the wire pull holder on the ground or at least that the tool was there in the electricians' presence. See Gardner v. Tishman Constr. Corp., 138 A.D.3d at 417. Plaintiff testified that the wire pull holder on which he fell held BX cable, which he photographed and presents as his Exhibits A and B. Viewing Exhibit A, Luis Cruz, Sound Refrigeration & Air Conditioning's project manager, testified at his deposition that the equipment depicted looked like electricians' equipment. Heron testified that electricians typically used BX cable and that no other subcontractors used it.

Pugliano testified, however, that the photographs depicted spooled flexible conduit that may have been used by other subcontractors as well as OH&M Electrical Corp. This conflicting testimony leaves factual issues whether OH&M Electrical Corp. created or received notice of the condition that caused plaintiff's injury. Radelejc v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Carrera v. Westchester Triangle Hous. Dev. Fund Corp., 116 A.D.3d at 587; Beltran v. Navillus Tile, Inc., 108 A.D.3d 414, 415 (1st Dep't 2013); Seda

v. Epstein, 72 A.D.3d 455, 455 (1st Dep't 2010). See Moura v. City of New York, 165 A.D.3d 434, 435 (1st Dep't 2018); Masiello v. 21 E. 79th St. Corp., 126 A.D.3d 596, 597 (1st Dep't 2015); Vargas v. Peter Scalamandre & Sons, Inc., 105 A.D.3d 454, 456 (1st Dep't 2013).

Insofar as the means of plaintiff's work caused his injury, Sound Refrigeration & Air Conditioning merely advised plaintiff where to work and did not direct the tools or equipment he was to use to perform his job. See Affri v. Basch, 13 N.Y.3d 592, 596 (2009); Francis v. Plaza Constr. Corp., 121 A.D.3d at 428; Marcano v. Hailey Dev. Group, LLC, 117 A.D.3d 518, 518 (1st Dep't 2014); Foley v. Consolidated Edison Co. of N.Y., Inc., 84 A.D.3d 476, 477 (1st Dep't 2011). An instruction where to work does not amount to supervision or control over the method or means of plaintiff's work, particularly since Cruz did not instruct plaintiff where to traverse to reach his assigned task. Moura v. City of New York, 165 A.D.3d at 435; Morales v. Avalon Bay Communities, Inc., 140 A.D.3d 533, 534 (1st Dep't 2016); Howard v. Turner Constr. Co., 134 A.D.3d at 525. Cruz testified further that he was not responsible for any electrical equipment.

Insofar as the wire pull holder on the ground that caused plaintiff's injury arose from the work of a contractor other than

Sound Refrigeration & Air Conditioning, Pugliano testified that he instructed OH&M Electrical Corp.'s workers. Cruz testified that he reported any tripping hazards he observed to Structure Tone, because it was responsible for ensuring that objects did not pose a tripping hazard. This combined testimony thus shows that Sound Refrigeration & Air Conditioning did not supervise the work that caused the wire pull holder to be left on the ground in plaintiff's pathway or work area and raises questions whether OH&M Electrical Corp. and Structure Tone did supervise that work, precluding summary judgment for defendants on their implied indemnification claims.

IV. THE PARTIES' CONTRACTUAL INDEMNIFICATION CLAIMS

As part of their separate motions, defendants and Sound Refrigeration & Air Conditioning move for summary judgment in their favor on their contractual indemnification claims. OH&M Electrical Corp. and Precision Testing & Balancing in their separate motions seek dismissal of Sound Refrigeration & Air Conditioning's contractual indemnification cross-claim against OH&M Electrical Corp. in the third party action and its second third party contractual indemnification claim against Precision Testing & Balancing.

Joseph Ciccarella, Precision Testing & Balancing's owner,

authenticated his signature on the Master Agreement and the Purchase Order between Sound Refrigeration & Air Conditioning and Precision Testing & Balancing. Both contracts provide for his corporation's indemnification of Sound Refrigeration & Air Conditioning, but the Purchase Order specifies that the Master Agreement controls, and it triggers the indemnification obligation as long as plaintiff's injury occurred in connection with Precision Testing & Balancing's work. Since plaintiff's employer raises no question that his injury occurred as plaintiff was carrying a ladder for his assigned work, even if his injury also arose from the work of another contractor that left the wire pull holder on the ground, Sound Refrigeration & Air conditioning is entitled to summary judgment on Precision Testing & Balancing's liability for contractual indemnification. Best v. Tishman Constr. Corp. of N.Y., 120 A.D.3d 1081, 1082 (1st Dep't 2014); Ranier v. Gray-Line Dev. Co., LLC, 117 A.d.3d 634, 635-36 (1st Dep't 2014); Naughton v. City of New York, 94 A.D.3d at 12.

No other witness authenticates the documents that include the indemnification provisions on which the parties rely. B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AO Asset Mgt. LLC v. Levine., 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl.

Ltd, 84 A.D.3d 637, 638 (1st Dep't 2011); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992). Cruz did not recognize the signature of Sound Refrigeration & Air Conditioning's president on its contract with Structure Tone. Pugliano did not review or sign OH&M Electrical Corp.'s contract with Structure Tone and did not know who did. Heron testified that he was uninvolved with Structure Tone's contracts, which its purchasing agent handled. Recitation of these unauthenticated contracts' contents is inadmissible hearsay. People v. Joseph, 86 N.Y.2d 565, 570 (1995); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014).

Thus defendants fail to meet their burden to entitle them to summary judgment on their contractual indemnification claims. Sound Refrigeration & Air Conditioning and OH&M Electrical Corp., on the other hand, fail to establish the absence of a contract for their indemnification of defendants under the circumstances of plaintiff's injury, to be entitled to dismissal of those contractual indemnification claims. The unauthenticated contract between Structure Tone and Sound Refrigeration & Air Conditioning triggers its indemnification of defendants if plaintiff's injury occurred in connection with its subcontractor Precision Testing & Balancing's work. The unauthenticated contract between Structure

Tone and OH&M Electrical Corp. triggers its indemnification of defendants if plaintiff's injury arose from its work that left the wire pull holder on the ground: a factual issue that neither defendants nor OH&M eliminates. Lois v. Flintlock Constr. Servs., LLC, 137 A.D.3d at 448; McCullough v. One Bryant Park, 132 A.D.3d 491, 493 (1st Dep't 2015); Arner v. RREEF Am., L.L.C., 121 A.D.3d 450, 450-51 (1st Dep't 2014); Beltran v. Navillus Tile, Inc., 108 A.D.3d at 416. See Francis v. Plaza Constr. Corp., 121 A.D.3d at 428.

V. SOUND REFRIGERATION & AIR CONDITIONING'S MOTION

As set forth above, in the stipulation dated May 21, 2019, Sound Refrigeration & Air Conditioning discontinued its second third party claims against Precision Testing & Balancing for contribution, implied indemnification, and breach of a contract to procure insurance. Sound Refrigeration & Air Conditioning still seeks summary judgment dismissing the third party complaint for indemnification and contribution and cross-claim for contribution against Sound Refrigeration & Air Conditioning because it was not the owner or general contractor of the construction project or a statutory agent of the owner or general contractor.

Even though Sound Refrigeration & Air Conditioning was

neither an owner nor a general contractor, this subcontractor may be liable as the owner's or general contractor's statutory agent under Labor Law §§ 200 and 241(6) if the subcontractor maintained the authority to control the activity that caused plaintiff's injury. Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d 426, 434 (2015); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005); Santos v. Condo 124 LLC, 161 A.D.3d 650, 653 (1st Dep't 2018); Coretto v. Extell W. 57th St., LLC, 137 A.D.3d 677, 678 (1st Dep't 2016). As discussed above, however, Sound Refrigeration & Air Conditioning did not control the work that caused plaintiff's injury, whether that work was plaintiff's or another contractor's, and was not otherwise negligent. Therefore Sound Refrigeration & Air Conditioning is entitled to dismissal of defendants' implied indemnification claims against this third party defendant. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Wilk v. Columbia Univ., 150 A.D.3d 502, 503-504 (1st Dep't 2017); Howard v. Turner Constr. Co., 134 A.D.3d at 525. For the same reason, the court dismisses defendants' claim and OH&M Electrical Corp.'s cross-claim for contribution against Sound Refrigeration & Air Conditioning. Canty v. 133 E. 79 th St., LLC, 167 A.D.3d at 549; Rubino v. 330

Madison Co., LLC, 150 A.D.3d at 604; Wilk v. Columbia Univ., 150 A.D.3d at 503-504; Martinez v. 342 Prop. LLC, 89 A.D.3d 468, 469 (1st Dep't 2011).

VI. PRECISION TESTING & BALANCING'S MOTION

Precision Testing & Balancing seeks dismissal of plaintiff's Labor Law § 241(6) claim, defendants' indemnification claims against Sound Refrigeration & Air Conditioning, and any cross-claims against Precision Testing & Balancing. A "third-party defendant may assert against the plaintiff in his or her answer any defenses which the third-party plaintiff has to the plaintiff's claim" and may enforce "the rights of a party adverse to the other parties in the action." C.P.L.R. § 1008. Thus Precision Testing & Balancing may seek dismissal of plaintiff's Labor Law § 241(6) claims against defendants and their indemnification claims against Sound Refrigeration & Air Conditioning. Giandana v. Providence Rest Nursing Home, 8 N.Y.3d 859, 860 (2007); Houston Cas. Co. v. Cavan Corp. of NY, Inc., 158 A.D.3d 536, 539 (1st Dep't 2018); Muniz v. Church of Our Lady of Mt. Carmel, 238 A.D.2d 101, 102 (1st Dep't 1997). As set forth above, the court granted summary judgment dismissing defendants' implied indemnification claims against Sound Refrigeration & Air Conditioning, but denied it summary judgment dismissing their

contractual indemnification claims, and denied defendants summary judgment dismissing plaintiff's Labor Law § 241(6) claim.

Precision Testing & Balancing does not present any basis for dismissing defendants' contractual indemnification claims against Sound Refrigeration & Air Conditioning or plaintiff's Labor Law § 241(6) claim not already addressed. Nor does Precision Testing & Balancing show any cross-claims by co-second third party defendant Monti.

VII. OH&M ELECTRICAL CORP.'S MOTION

OH&M Electrical Corp. seeks dismissal of the third party complaint and Sound Refrigeration & Air Conditioning's cross-claims on the ground that the electrical subcontractor was not responsible for the wire pull holder, and plaintiff was the sole proximate cause of his injury. The court also addressed these issues above and found factual questions regarding OH&M Electrical Corp.'s responsibility for the wire pull holder that caused plaintiff's fall, precluding dismissal of the implied indemnification and contribution claims by defendants and Sound Refrigeration & Air Conditioning against OH&M Electrical Corp. Berihuete v. 565 W. 139th St., L.P., 171 A.D.3d 667, 667 (1st Dep't 2019); Lois v. Flintlock Constr. Servs., LLC, 137 A.D.3d at 448; McCullough v. One Bryant Park, 132 A.D.3d at 493; Arner v.

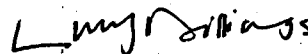
RREEF Am., L.L.C., 121 A.D.3d at 450-51. See Rubino v. 330

Madison Co., LLC, 150 A.D.3d at 604. Even though there may be no contract between Sound Refrigeration & Air Conditioning and OH&M Electrical Corp., it nowhere addresses Sound Refrigeration & Air Conditioning's cross-claims for contractual indemnification or breach of a contract to procure insurance, so as to establish a basis for their dismissal.

VIII. CONCLUSION

In sum, for the reasons explained above, the court grants the motion by Sound Refrigeration & Air Conditioning, Inc., for summary judgment to the extent of dismissing defendants' third party claims for implied indemnification and contribution and awarding summary judgment on Precision Testing & Balancing's liability for contractual indemnification, in an amount to be determined. C.P.L.R. § 3212(b) and (e). The court otherwise denies that motion and denies the other parties' motions for summary judgment. C.P.L.R. § 3212(b). This decision constitutes the court's order. The Clerk shall enter a judgment accordingly.

DATED: September 19, 2019



LUCY BILLINGS, J.S.C.