**Cruz v 451 Lexington Realty, LLC**

2019 NY Slip Op 34995(U)

December 16, 2019

Supreme Court, Kings County

Docket Number: Index No. 502710/13

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of December, 2019.

PRESENT:

HON. DEBRA SILBER,
Justice.

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JOHNNY CRUZ,
Plaintiff,

- against -

451 LEXINGTON REALTY, LLC and REGENT DEVELOPMENT ASSOCIATES, LLC,

Defendants.

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451 LEXINGTON REALTY, LLC and REGENT DEVELOPMENT ASSOCIATES, LLC,

Third-Party Plaintiffs,

- against -

CITY LIMITS GROUP, LLC,

Third-Party Defendant.

----------X

CITY LIMITS GROUP, INC.,

Second Third-Party Plaintiff,

- against -

SOUTHSIDE CONSTRUCTION GROUP INC. and FLINTLOCK CONSTRUCTION SERVICES, LLC,

Second Third-Party Defendants.

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**DECISION/ORDER**

Index No. 502710/13
Mot. Seq. 9, 10, 11

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| The following e-filed papers read herein: | NYSCEF Doc. No. |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 122-123, 140-141, 162-163 |
| Opposing Affidavits (Affirmations) | 136, 180 |
| Reply Affidavits (Affirmations) | 158, 176, 178, 183 |

Upon the foregoing papers, plaintiff moves for an order: (1) pursuant to CPLR 3212, granting him summary judgment in his favor with respect to liability pursuant to Labor Law §§ 240 (1) and 241 (6); and (2) restoring the action to "active" status and extending the time within which to file the note of issue (motion sequence number 9). Defendants/third-party plaintiffs 451 Lexington Realty LLC (451 Lexington), and Regent Development Associates, LLC (Regent), and second third-party defendant Flintlock Construction Services, LLC (Flintlock), cross-move for an order: (1) pursuant to CPLR 3212, dismissing all claims and cross claims as against 451 Lexington, Regent and Flintlock; or (2), in the alternative, pursuant to CPLR 3212, granting 451 Lexington and Regent summary judgment in their favor with respect to their third-party claims for contractual indemnification and breach of contract for failure to obtain insurance (motion sequence number 10). Third-party defendant/second third-party plaintiff City Limits Group, Inc. (City Limits) cross-moves for an order, pursuant to CPLR 3212, granting it summary judgement dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action, and dismissing the third-party complaint (motion sequence number 11).

Plaintiff's motion (motion sequence number 9) is granted to the extent that the action is restored to the active calender and is otherwise denied. 451 Lexington, Regent and Flintlock's cross motion (motion sequence number 10) is granted to the extent that the plaintiff's complaint and any cross claims are dismissed as against 451 Lexington and Regent. 451 Lexington, Regent and Flintlock's cross motion is otherwise denied. City Limits' cross motion (motion sequence number 11) is granted to the extent that the plaintiffs complaint is dismissed, the third-party claim for common-law indemnification is dismissed and the third-party claim for contractual indemnification is limited to expenses, costs and attorney's fees. City Limits' cross motion is otherwise denied.

In addition, as plaintiff's complaint has been dismissed, the action is severed

accordingly and the caption is amended to read as follows:

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451 LEXINGTON REALTY, LLC and REGENT DEVELOPMENT ASSOCIATES, LLC,

Plaintiffs,

- against -

CITY LIMITS GROUP, LLC,

Defendant.
----------X
CITY LIMITS GROUP, INC.,

Third-Party Plaintiff,

- against -

SOUTHSIDE CONSTRUCTION GROUP INC. and FLINTLOCK CONSTRUCTION SERVICES, LLC,

Third-Party Defendants.
----------X

451 Lexington and Regent are hereby directed to procure an index number from the County Clerk's office. The fee for procuring such number is hereby waived.

Finally, the remaining parties are directed to complete any outstanding discovery by February 14, 2020 and 451 Lexington and Regent are directed to file a note of issue on or before that date.

Plaintiff Johnny Cruz brings this action to recover damages for personal injuries sustained by him on October 29, 2011, when, as he walking toward the exit of a building in the process of being demolished, a ventilation duct partially fell from the ceiling and caused debris and dust to fall and strike him in the left eye. Plaintiff's complaint alleges causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). 451 Lexington was the owner of the site and it hired Flintlock as the general contractor for a project involving the demolition of the existing building on the site and the construction of a new building. Pursuant to a written contract, Flintlock hired City Limits as the

demolition subcontractor and City Limits, in turn, hired plaintiff's employer, second third-party defendant Southside Construction Group Inc. (Southside),[1] to assist in disposing of the demolition debris. Regent was a project developer and/or planner for the project, but it did not have a direct ownership interest in the property and did not directly enter into contracts with any of the contractors on the project.

During the demolition phase of the project, City Limits, and its subcontractor Southside, were the only entities performing work at the project site. Southside only worked during the night shift and its role was limited to removing and disposing of construction material. Southside did not perform any demolition work. Plaintiff, who started working with Southside around October 10, 2011, worked with five other laborers transporting the material, such as bricks and pipes, from piles placed on the first floor of the building being demolished into wheelbarrows and taking such material out to containers located on the street. Plaintiff only received instructions regarding this work from Southside's supervisors, Bolivar Almonte and his son.

According to plaintiff's deposition testimony, shortly before the accident, plaintiff and his coworkers went to an area that had been designated as a safe zone, took off their hard hats and safety goggles, placed these items on a shelf located in the safe area, and started heading toward an exit door in order to take a coffee break. As his coworkers were exiting the building, plaintiff, who was last in line, heard a loud bang above him, and then saw a large ventilation duct falling toward him. The duct fell approximately a foot and half, but did not fully detach, and stopped falling approximately two to three feet above plaintiff's head. Although the duct did not strike plaintiff, some dust and possibly some pieces of concrete or brick debris, fell and struck plaintiff in his left eye. While plaintiff asserted that the "debris"

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[1] The court, in an order dated November 20, 2017, granted City Limits' motion for a default judgment as against Southside.

was caused to fall from the duct when it fell, plaintiff could not identify where the dust and/or debris fell from.[2] Prior to this date, during the time he worked on this project, plaintiff said he had not observed anything fall from above in the area where he was walking at the time of the accident.

In his testimony, plaintiff asserted that he and his coworkers only worked on the first floor of the building. During his time on the project, plaintiff had observed other workers going up to the second floor of the building, and had heard sounds he associated with the sounds of a power saw coming from the second floor. Based upon these observations and sounds, plaintiff believed that those workers were performing demolition work. On the night of the accident, plaintiff did not recall hearing sounds emanating from the second floor before he heard the big bang, but he had observed workers go up to the second floor.

Joseph Nuara, who was City Limits' nighttime supervisor, testified at his deposition that City Limits did not perform demolition work at night, and that its only night work related to carting debris out to containers or garbage trucks. Nuara, however, did not provide any testimony relating to the duct at issue or whether City Limits performed demolition work near to or relating to the duct at other times before the plaintiff's accident.

Finally, as is relevant to the accident, City Limits has submitted the affirmed report of Maayan Keshet, M.D., a board-certified ophthalmologist, who reviewed plaintiff's medical records and examined plaintiff's left eye. Dr. Keshet notes that plaintiff's medical records relating to the examination at the hospital after the accident indicated that there was no foreign object left in plaintiff's eye, and identified the injury as a corneal abrasion.

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[2] At his deposition, plaintiff said "yes" when asked whether loose debris was caused to fall from the duct when it fell. Plaintiff said "no" when he was asked, "Do you know if this debris was on top of the vent, inside the vent, or?" When asked, "Do you know what the debris was made of? Was it crumpled concrete or?," plaintiff stated, "I'm not really sure. It was like mixed." When asked, "So could you see what came down? Was it this type of debris: Bricks and concrete and dust?," plaintiff stated, "Yeah, it was something like that" (Plaintiff's deposition tr at 142, lines 3-24).

According to Dr. Keshet, a corneal abrasion will generally heal within three to five days and will rarely leave scars. Dr. Keshet opines that plaintiff's eye issues were primarily caused by keratoconus, a genetic condition which causes thinning of the cornea, and which is not triggered by a single traumatic event.

With respect plaintiff's Labor Law § 240 (1) cause of action, that section imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).[3] For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the

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[3] As is relevant here, Labor Law § 240 (1) provides that,
"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."

absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663).

In applying these legal principles, the court finds that 451 Lexington, Regent, Flintlock and City Limits have demonstrated, prima facie, that the dust (and/or small pieces of debris) that may have struck plaintiff in his left eye was not an object that required securing for the purposes of the undertaking. In this respect, nothing in plaintiff's own deposition testimony suggests that the object that struck plaintiff in the eye was of any significant size. Even if his testimony, that what struck him was made up of concrete or brick debris, could be read to imply that he was struck by a larger object, the actual injury identified in the medical records, reviewed by Dr. Keshet, was a corneal abrasion, an injury that is inconsistent with plaintiff having been struck by anything other than very small pieces of debris. The dust and/or small pieces of debris that hit plaintiff, while material that would warrant the need for eye protection or safety helmets under Labor Law § 241 (6) (*see* 12 NYCRR 23-1.8 [a] [eye protection], [c] [1] [safety helmet]), it was not the kind of material that warranted any of the safety devices identified in Labor Law § 240 (1). Indeed, it is hard to imagine how any of the listed section 240 (1) safety devices which might be used to prevent an object from falling (i.e. hoists, stays, slings, hangers, blocks, pulleys, braces, irons, ropes), could have been used to prevent this dust and/or debris from falling and striking plaintiff (*cf. Galarza v Lincoln Ctr. for the Performing Arts, Inc.*, 32 Misc 3d 1226 [A], 2011 NY Slip Op 51435, 7-10 [U] [Sup Ct, New York County 2011]).

Plaintiff, nevertheless, asserts that the dust and/or debris fell as a consequence of the partial fall of the ventilation duct. The Court of Appeals has recognized that "the applicability of the statute in a falling object case . . . does not . . . depend upon whether the object has hit the worker" (*Runner*, 13 NY3d at 604). "The relevant inquiry . . . is rather whether the harm flows directly from the application of the force of gravity to the object" (*id.*

at 604). Here, however, it cannot be said – without engaging in unwarranted speculation – that it was the partial fall of the ventilation duct that caused the debris or dust to fall onto plaintiff. In this respect, plaintiff, while previously asserting that the dust and debris came down from the duct, also testified that he could not identify where the dust or debris came from. Moreover, even if plaintiff's testimony is sufficient to connect the debris that struck him with the displacement of the duct, the record demonstrates that the duct, which was not being worked on at the time of the accident, was not an object that required securing for the purposes of the undertaking (*see Narducci*, 96 NY2d at 268-269; *see also Fabrizzi*, 22 NY3d at 663; *Djuric v City of New York*, 172 AD3d 456, 456 [1st Dept 2019]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]; *Natale v City of New York*, 33 AD3d 772, 774 [2d Dept 2006]; *cf. Wilinski*, 18 NY3d at 10-11).[4]

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, plaintiff, in his bill of particulars, premises his section 241 (6) cause of action on violations of Industrial Code sections 12 NYCRR 23-1.7, 23-1.8, 23-1.10, 23-1.11, 23-1.17, 23-1.19, 23-1.20, 23-1.30, 23-1.31, 23-1.32, 23-2.1, 23-3.1, 23-3.2, 23-3.3, 23-3.4, 23-4.1, 23-4.2, 23-4.4, 23-4.5, and 23-6.2. Defendants and third-party defendants have demonstrated, prima facie, that sections 12 NYCRR 23-1.8, 23-1.10, 23-1.11, 23-1.17, 23-1.19, 23-1.20, 23-1.30,

[4] As the parties have not made any arguments addressing the issue of whether the fact that plaintiff was leaving the building for a coffee break has any impact on the applicability of the Labor Law sections at issue, the court has not considered that issue in determining the motion and cross motions.

23-1.31, 23-1.32, 23-2.1, 23-3.1, 23-3.2, 23-3.3, 23-3.4, 23-4.1, 23-4.2, 23-4.4, 23-4.5, and 23-6.2 are inapplicable to the instant facts and/or were not violated under the facts herein. Plaintiff has abandoned reliance on those sections by failing to address them in his moving and opposition papers (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]) and by failing to identify the specific subdivisions of those sections that are alleged to have been violated (*see Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 441 [1st Dept 2018]).

In moving for summary judgment and in opposing the cross motions by defendants and the third-party defendants, plaintiff only specifically addresses the applicability of 12 NYCRR 23-1.7 (a), which applies to overhead hazards, but only in areas "where persons are required to work or pass that is normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a]). The defendants and third-party defendants have demonstrated, prima facie, that section 23-1.7 (a) is inapplicable, through plaintiff's deposition testimony that he had never seen an object fall in the subject area prior to his accident (*see Millette v Tishman Constr. Corp.*, 144 AD3d 1113, 1115 [2d Dept 2016]; *Moncayo*, 106 AD3d at 965; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2d Dept 2009]) and plaintiff, in opposition, has failed to submit evidentiary proof demonstrating an issue of fact in this respect (*see Moncayo*, 106 AD3d at 965; *Marin*, 60 AD3d at 826). As such, defendants and third-party defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action.[5] For the same reasons, plaintiff has failed to demonstrate, prima facie, that Labor Law § 241 (6) was violated, and his motion must thus be denied with

[5] Aside from these findings that Labor Law §§ 240 (1) and 241 (6) are inapplicable, Regent has also demonstrated, prima facie, that it is not an owner, general contractor or agent thereof and plaintiff has failed to demonstrate the existence of a factual issue in that respect (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Luis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]).

respect to his section 241 (6) cause of action.

Turning to plaintiff's common-law negligence and Labor Law § 200 causes of action, the allegations in the bill of particulars limit any liability under those sections to the parties' method and manner of performing the work they were hired to perform rather than a dangerous property condition (*see Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]; *cf. Garcia v Market Assoc.*, 123 AD3d 661, 664-665 [2d Dept 2014]). As such, recovery against defendants "cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (*Ross*, 81 NY2d at 505; *see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018]). Here, plaintiff testified that he received supervision only from his employer. In addition, 451 Lexington and Regent's witnesses both testified that they did not supervise any of the demolition work. As a result, defendants have demonstrated their prima facie entitlement to dismissal of the common-law negligence and Labor Law § 200 causes of action (*see Poulin*, 166 AD3d at 670-673; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]; *Sanchez v Metro Builders Corp.*, 136 AD3d 783, 787 [2d Dept 2016]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]). Contrary to plaintiff's contentions in opposition, 451 Lexington's contractual retention of the authority to stop the work or the authority to ensure compliance with safety regulations or the terms of a contract is insufficient to impose liability under Labor Law § 200 or under common-law negligence principles (*see Messina*, 147 AD3d at 749-750; *Sanchez*, 136 AD3d at 787; *Gonzalez*, 110 AD3d at 959; *see also Lombardi v City of New York*, 175 AD3d 1521, 1523 [2d Dept 2019]). As plaintiff has failed to demonstrate the existence of a factual issue in this respect, 451 Lexington and Regent are entitled to dismissal of plaintiff's common-law

negligence and Labor Law § 200 causes of action.[6]

With respect to the indemnification and contribution claims, as some form of vicarious liability on the part of 451 Lexington and Regent is a necessary predicate for a common-law indemnification claim (*see Cunha v City of New York*, 12 NY3d 504, 508-509 [2009]; *Board of Mgrs. of Olive Park Condominium v Maspath Props., LLC*, 170 AD3d 645, 647 [2d Dept 2019]; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]), and as some form of wrongdoing by 451 Lexington and Regent is necessary for a contribution claim (*see Rosado v Proctor & Schwartz*, 66 NY2d 21, 23-24 [1985]; *Trustees of Columbia Univ.*, 109 AD2d at 454), the dismissal of plaintiff's direct action as against 451 Lexington and Regent has rendered their common-law indemnification and contribution claims against City Limits academic (*see Reece v J.D. Posillico, Inc.*, 164 AD3d 1285, 1289 [2d Dept 2018]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536, 538-539 [2d Dept 2005]).

On the other hand, the dismissal of the main action does not affect 451 Lexington and Regent's right to reimbursement of expenses, including attorneys' fees, under the contractual indemnification provision contained in Flintlock's contract with City Limits (*see Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1435 [4th Dept 2015]; *Hennard v Boyce*, 6 AD3d 1132, 1133-1134 [4th Dept 2004]; *see also McCoy v Medford Landing L.P.*, 164 AD3d 1436, 1439 [2d Dept 2018]; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 554 [2d Dept 2007]).[7] Further, contrary to City Limits' assertions, the testimony of Joseph

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[6] The court notes that, even if plaintiff's bill of particulars had sufficiently alleged that the dust/debris fell as the result of a dangerous property condition, defendants may not be held liable for it under the facts here, where City Limits was tasked with the demolition of the entire structure, including the vent at issue (*see Hanson v Trustees of M.E. Church of Glen Cove*, 51 AD3d 725, 726 [2d Dept 2008]; *Narducci v Manhasset Bay Assoc.*, 270 AD2d 60, 62-63 [1st Dept 2000], *reversed* 96 NY2d 259 [2001]).

[7] As is relevant here, the provision relied upon by 451 Lexington and Regent, provides that:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, . . . and agents and employees of any of them from and against claims, damages, losses and expenses, including but not

Naura, who remembered few details about the performance of City Limits' demolition work, and whose testimony did not exclude work performed by City Limits during the daytime as a possible cause of the material falling on plaintiff, fails to demonstrate, prima facie, that the accident was not one "arising out of or resulting from" performance of City Limits' work or that City Limits was not negligent. On the other hand, 451 Lexington and Regent have failed to present evidentiary proof demonstrating, as a matter of law, that the accident arose out of or resulted from City Limits' performance of the work or that City Limits was negligent as matter of law (*see McCoy*, 164 AD3d at 1440; *Hennard*, 6 AD3d at 1333-1334). As such, in view of these factual issues, both 451 Lexington and Regent's cross motion and City Limits' cross motion must be denied with respect to the third-party contractual indemnification claims.

451 Lexington and Regent's third-party insurance procurement claims are likewise not barred by the dismissal of the main action as against them (*see Cardozo*, 16 AD3d at 538-539). Nevertheless, their cross motion in this respect must be denied because they have not provided any evidentiary proof that City Limits failed to comply with the insurance procurement provisions of Flintlock's contract with City Limits (*see Tingling v C.I.N.H.R., Inc.*, 74 AD3d 954, 955-956 [2d Dept 2016]; *Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2d Dept 2009]), regardless of the sufficiency of City Limits' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). As City Limits did not address the insurance procurement claim in its moving papers, it has likewise failed to demonstrate its

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> limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury . . . , but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable. . ." (Contract § 4.6.1).

The court notes that the parties have not addressed the applicability of the separate hold harmless provision contained in section 13.5 of the contract.

prima facie entitlement to dismissal of the insurance procurement claims.

Finally, as 451 Lexington, Regent and Flintlock only address City Limits' second third-party claims against Flintlock in their reply papers, they have failed to demonstrate their prima facie entitlement to any relief with respect to Flintlock (*see Lopez v Bell Sports, Inc.*, 175 AD3d 1524, 1526 [2d Dept 2019]; *Dankenbrink v Dankenbrink*, 154 AD3d 809, 810 [2d Dept 2017]).

This constitutes the decision, order and judgment of the court.

**E N T E R,**

**Hon. Debra Silber, J. S. C.**

Hon. Debra Silber
Justice Supreme Court

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