Hogan v 590 Madison Ave., LLC
2020 NY Slip Op 31085(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 154493/2015
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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JOHN HOGAN and EVELYN HOGAN,

Plaintiffs,

Index No. 154493/2015

-against-

Motion Seq. No.
003 004 005 006

590 MADISON AVENUE, LLC, DELPHI FINANCIAL GROUP, INC, and COMMODORE CONSTRUCTION CORP.,

Defendants.

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590 MADISON AVENUE, LLC, and DELPHI FINANCIAL GROUP, INC,

Third-Party Plaintiffs,

-against-

OH&M ELECTRIC CORP.,

Third-Party Defendant.

---X

The following e-filed documents, listed by NYSCEF document number (Motion 001)

were read on this motion to/for SUMMARY JUDGMENT .

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff John Hogan's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240(1) claims insofar as asserted against defendants/third-party plaintiffs 590

Madison Avenue, LLC and Delphi Financial Group, Inc. is granted; and it is further

ORDERED that third-party defendant OH&M Electrical Corp.'s motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint asserted against it is granted and the third-party complaint is dismissed; and it is further

ORDERED that 590 Madison Avenue, LLC and Delphi Financial Group Inc.'s motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them in the main action, and for summary judgment in their favor on their cross claims against defendant Commodore Construction Corp. in the main action and on their third-party complaint against OH&M Electrical Corp., is granted to the extent that Commodore Construction Corp.'s cross claims against them in the main action are dismissed and OH&M Electrical Corp.'s cross claims against them in the third-party action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Commodore Construction Corp.'s motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted to the extent that the complaint is dismissed insofar as asserted against it, the cross

claims against it for contribution and common-law indemnification are dismissed, and the motion is otherwise denied.

DECISION

Motion sequence numbers 003, 004, 005, and 006 are hereby consolidated for disposition.

In this action, a construction laborer seeks to recover damages for personal injuries he alleges he sustained on May 9, 2014, when, while working on a renovation project at 590 Madison Avenue, New York, New York (the Premises), the ladder that he was using gave way, causing him to fall.

In motion sequence number 003, plaintiff John Hogan moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs 590 Madison Avenue, LLC (Madison) and Delphi Financial Group, Inc. (Delphi Financial).

In motion sequence number 004, third-party defendant OH&M Electrical Corp. (OH&M) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

In motion sequence number 005, Madison and Delphi Financial move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them in the main action, and for summary judgment in their favor on their cross claims against defendant Commodore Construction Corp.

(Commodore) in the main action and on their third-party complaint against OH&M.

In motion sequence number 006, Commodore moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it.

Background

On the day of the accident, Madison owned the Premises where the accident occurred. Delphi Capital Management (Delphi Capital), on behalf of Delphi Financial, leased the 30th floor and part of the 29th floor of the Premises from Madison. Delphi Financial was doing renovation work on the 30th floor which entailed converting two office spaces into one large conference room (the Project).

Delphi Capital, on behalf of Delphi Financial, hired non-party Structure Tone, Inc. (Structure Tone) to serve as the general contractor or construction manager for the Project. Structure Tone subcontracted with Commodore to provide lath, acoustics, and drywall work, and with OH&M to provide electrical work for the Project. Plaintiff was employed by Structure Tone as a laborer at the time of the accident.

In this action, plaintiff alleges causes of action against defendants sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Plaintiff's wife, Evelyn

Hogan, asserts a claim for derivative losses. Madison and Delphi Financial commenced a third-party action against OH&M.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed as a laborer by Structure Tone. Matthew Victor was Structure Tone's superintendent on the Project, which entailed the demolition of two offices in order to construct a large conference room. According to plaintiff's testimony, on the accident date, Victor supervised his work, which involved general clean-up duties, such as picking up debris from various trades.

Plaintiff asserted that Commodore was hired as a sub-contractor to, among other things, construct an acoustical ceiling consisting a grid and tiles. Plaintiff testified another subcontractor was hired to paint the new conference room, and that an electrical subcontractor was hired to run outlets and install light fixtures into the ceiling grid.

Plaintiff testified that on the accident date, Commodore had already installed the ceiling grid. He explained that when the electrician went to install one of the light fixtures into the grid, it "wouldn't fit in" because the "seam was a little off square" (plaintiff's Aug. 1, 2016 tr at 77). Victor directed plaintiff to "tweak" the ceiling grid so that "the

light fixture could go in" (*id.*). In order to do so, plaintiff "had to go up on a ladder" (id. at 78).

When asked where he got the ladder, plaintiff testified that it was there, already set-up in its open state, with its locking mechanisms down and locked. Plaintiff did not know whether the ladder had rubber footing. Plaintiff maintained that written on the ladder was, "Commodore Construction" and that it was the same wooden, A-frame ladder Commodore's taper had been using that day. Plaintiff did not ask the taper's permission to use the ladder.

Plaintiff testified there was also a conference table in the room, about three feet away from the ladder. Plaintiff maintained that he never stepped on the table before trying to tweak the ceiling grid.

Plaintiff testified that he was standing on the ladder's fourth step, with the ceiling grid approximately one foot above his head. He proceeded to try to tweak the ceiling grid using both hands above his head but was unable to do so because it was too tight. He testified: "That's when I fell" (id. at 89).

When asked what caused him to fall, plaintiff responded that the ladder "just gave way" (id.). Plaintiff did not know what caused the ladder to give way. It fell to the floor and plaintiff fell to the floor with it. Plaintiff testified that at some point, one of the light fixtures that had already been

installed, also fell from the ceiling and struck him on the head.

Deposition Testimony of Joseph Greisch (Property Manager for the Premises)

Joseph Greisch testified that on the date of the accident, he worked for Edward J. Minskoff Equities, Incorporated (Minskoff) as a property manager for the Premises, which is a commercial office building owned by Madison. Greisch explained that he is responsible for overseeing the day to day operation of the Premises. He testified that Delphi Capital leased the 30th floor and part of the 29th floor of the Premises.

According to Greisch, in 2014, Delphi Capital contracted with Structure Tone to perform renovations on the 30th floor. There were also various subcontractors hired for the Project. Neither Madison, nor Minskoff hired the subcontractors.

While Madison was made aware of the Project, it was not involved in the work. To that effect, it did not hire any people to do the work, it did not oversee the work, and it provided no equipment, tools, or materials in connection with the work.

Deposition Testimony of Cindi Pogue (Delphi Capital's Office Manager)

Cindi Pogue testified that on the date of the accident, she was employed by Delphi Capital as an office manager. Pogue testified that Delphi Capital is a tenant at the Premises, where

it does business on behalf of defendant Delphi Financial. While Delphi Capital entered into the lease, everything Delphi Capital did at the Premises was on behalf of Delphi Financial.

Pogue testified that she was familiar with Project taking place on the 30th floor of the Premises in May 2014. She maintained that Phil Mentesana, Delphi Capital's Chief Technology Officer, was responsible for arranging the renovations. According to Pogue, Mentesana, on behalf of Delphi Capital, with Structure Tone, contracted to perform the renovation work, pursuant to a written agreement. Pogue testified that Structure Tone's work was approved by Madison, and that Mentesana dealt with obtaining such approval.

Pogue asserted that Delphi Capital did not supply any equipment or supplies for the performance of the work and that it did not supervise any of the work at the job site.

Deposition Testimony of John McDonagh (Director of Carpentry for Commodore)

John McDonagh testified that he is the director of the carpentry division for Commodore. He explained that on the date of the accident, none of his responsibilities had anything to do with the Premises. He first became aware of the Project on the day before his deposition testimony, when Kin Tan, an employee at Commodore who handles "human resources and legal stuff," asked him to testify at a deposition.

McDonagh testified that Tan informed him that "a ladder was borrowed, and a Structure Tone employee was injured" (McDonagh tr at 10). Based on his conversation with Tan, McDonagh understood Tan to mean that this was an accident by a Structure Tone employee involving a Commodore-owned ladder. When McDonagh was asked whether Commodore had any way of identifying its ladders, he responded that they are all marked either with labels saying "Commodore" or spray painted with the initials "CCC" (id. at 19). McDonagh noted that Commodore's ladders are all fiberglass, as wooden ladders are not allowed.

When McDonagh was asked whether in 2014 Commodore had a practice of lending out its ladders to other trades, he responded, "Absolutely no" and that this was "taboo" (id. at 30).

Deposition Testimony of Michael Levy (Electrician for OH&M)

Michael Levy testified that on the date of the accident he was an employee of OH&M. Levy testified that Structure Tone, the general contractor, hired OH&M to do the electrical work for the Project. Levy acted as the foreman for OH&M for the Project.

Levy testified that carpenters from another company installed the ceiling grid for the Project. OH&M installed light fixtures into the ceiling grid. Levy did not recall any instances where there were issues with respect to how the

fixtures fit into the grid. Levy further testified that OH&M did not have anyone present at the jobsite at the time the accident occurred.

Structure Tone's Accident Report

A Structure Tone "Injury/Accident Report," filled out by Victor on May 10, 2014, states:

> "[Plaintiff w]as on a ladder stepping between a desk and the ladder putting ceiling tiles in, his ladder gave out and he grabbed onto the ceiling grid. When the ceiling grid gave out a light came down creating the laceration on the top right side of his head and scraped his face. He was immediately removed from property and was taken (walk in) to the ER. He got 3 staples on the top of his head and 3 stitches on his face. He will return to work on Monday"

(Structure Tone Injury/Accident Report at page 2 [attached as exhibit A to exhibit M of Affirmation in Support of Plaintiff's Motion]).

Workers' Compensation Board Report

In a Workers' Compensation Board report, entitled "First Report of Injury Report Type (MTC) 00-Original," the accident is described as follows:

> "AS THE EE WAS INSTALLING CEILING TILES ON THE 30TH FLOOR,THE LADDER HE WAS STANDING ON GAVE OUT, CAUSING HIM TO GRAB THE CEILING GRID TO KEEP HIM FROM FALLING, THIS CAUSED THE LIGHT FIXTURE TO FALL AND CUT THE TOP RIGHT SIDE OF HIS DEAD AND SCRAPE HIS FACE"

(Workers' Compensation Board Report at page 2 [exhibit C to exhibit A of Commodore's Attorney Affirmation in Partial Opposition to Madison and Delphi Financials' Motion]).

DISCUSSION

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The "movant bears the heavy burden of establishing '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'" (Deleon v New York City Sanitation Dept., 25 NY3d 1102, 1106 [2015], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Once this showing 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 material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d at 324; see Zuckerman v City of New York, 49 NY2d at 562).

"[T]he court's function is issue finding rather than issue determination" (Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC, 157 AD3d 479, 481 [1st Dept 2018]). "[S]ummary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues" (Aguilar v City of New York, 162 AD3d 601, 601 [1st Dept 2018]).

The Labor Law ' 240 (1) Claim (motion sequence numbers 003, 005, and 006)

Plaintiff moves for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against Madison and Delphi Financial. Madison and Delphi Financial move for summary judgment dismissing the Labor Law § 240 (1) claim as asserted against them. Commodore also moves for summary judgment dismissing the Labor Law § 240 (1) claim as asserted against it.

Labor Law § 240 (1), commonly referred to as the Scaffold Law, provides, in 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."

"[T]he statute places absolute liability upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed" (Hill v Stahl, 49 AD3d 438, 441-442 [1st Dept 2008]).

> "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. To impose such liability, the defendant must have the authority to

> control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (Samaroo v Patmos Fifth Real Estate, Inc., 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citations omitted]). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (Walls v Turner Constr. Co., 4 NY3d 861, 864 [2005]).

"[T]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 500). In order to prevail on a section 240 (1) claim, plaintiff must show that the statute was violated and that the violation was a proximate cause of his or her injuries (see Barreto v Metropolitan Transp. Auth., 25 NY3d 426, 433 [2015]; *Felker v Corning, Inc.*, 90 NY2d 219, 224-225 [1997]; Santos v Condo, 124 LLC, 161 AD3d 650, 654 [1st Dept 2018]).

"Liability is contingent upon the existence of a hazard contemplated in section 240 (1) and a failure to provide, or the inadequacy of, a safety device of the kind enumerated in the statute" (Fernandez v BBD Developers, LLC, 103 AD3d 554, 555 [1st Dept 2013]; see Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). "[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no

apparent reason'"(Quattrocchi v F.J. Sciame Constr. Corp., 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], aff'd 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff" (Nelson v Ciba-Geigy, 268 AD2d 570, 572 [2d Dept 2000]).

Initially, it must be determined whether defendants may be liable for plaintiff's injuries under Labor Law § 240 (1). Madison "as the fee owner of the subject premises, is liable for any Labor Law violation occurring on the premises, regardless of whether it lacked knowledge of the work or control over how it was performed" (Nava-Juarez v Mosholu Fieldston Realty, LLC, 167 AD3d 511, 513 [1st Dept 2018]; see Sanatass v Consolidated Inv. Co., Inc., 10 NY3d 333, 339-342 [2008]; Gonzalez v 1225 Ogden Deli Grocery Corp., 158 AD3d 582, 583 [1st Dept 2018]).

As to Delphi Financial, "[a] lessee is liable under [Labor Law ' 240(1)] only where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor" (Guzman v L.M.P. Realty Corp., 262 AD2d 99, 100 [1st Dept 1999]; see Sanatass v Consolidated Inv. Co., Inc., 10 NY3d at 335). Here, the record demonstrates that Delphi Capital, on behalf of Delphi Financial, hired plaintiff's employer, Structure Tone, as the general

contractor for the Project. Therefore, Delphi Financial may be liable for plaintiff's injuries under Labor Law ' 240 (1).

As to Commodore, plaintiff does not oppose that part of Commodore's motion seeking to dismiss the Labor Law § 240 (1) claim against it. Therefore, such claim is deemed abandoned.

Thus, Commodore is entitled to dismissal of the Labor Law ' 240 (1) claim against it (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; Musillo v Marist Coll., 306 AD2d 782, 783, n* [3d Dept 2003]; Brown v Dynamic Installation Corp., 65 Misc 3d 1225[A], 2019 NY Slip Op 51850 [U], *8 [Sup Ct, New York County 2019]; Galgan v Brookfield Props. One WFC Co. LLC, 2016 NY Slip Op 32334[U], **6 [Sup Ct, New York County 2016]; Glynn v 42nd and 10th Associates, L.L.C., 2016 NY Slip Op. 30055[U], *3 [Sup Ct, New York County 2016]).

As to Madison and Delphi Financials' liability under the Labor Law § 240 (1). plaintiff met his prima facie burden of establishing that Labor Law § 240 (1) was violated, through his uncontested testimony that, while he performed his assigned work, which required him to have both hands over his head, the ladder on which he was working "gave way" under him, causing him to fall to the ground and become injured. Importantly, "'[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to

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

Evidence that a ladder collapses or malfunctions for no apparent reason raises the presumption that the ladder "was not good enough to afford proper protection" (Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 n 8 [2003]; see Panek v County of Albany, 99 NY2d 452, 458 [2003]; Quattrocchi v F.J. Sciame Constr. Corp., 44 AD3d 377, 381 [1st Dept 2007]).

Plaintiff is not required to prove that the ladder was somehow defective (see Estrella v GIT Indus., Inc., 105 AD3d 555 [1st Dept 2013]; Orellano v 29 E. 37th St. Realty Corp., 292 AD2d 289, 290-291 [1st Dept 2002]).

In opposition to plaintiff's motion, Madison and Delphi Financial argue that plaintiff is not entitled to summary judgment on the Labor Law § 240 claims against them because an issue of fact exists as to the proximate cause of the accident. In this regard, they point out that the Structure Tone's Accident Report, submitted by plaintiff in support of his own motion, states that plaintiff was "on a ladder stepping between a desk and the ladder putting ceiling tiles in" when the ladder "gave out." Madison and Delphi Financial contend that, in the event that plaintiff's accident was caused due to him stepping between a desk and the ladder, he would be the sole proximate cause of his accident and the statute would not apply.

Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (see Robinson v East Med. Ctr., LP, 6 NY3d 550, 554 [2006]). Additionally, "[w]here credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441, 442, 936

NYS2d 39 [1st Dept 2012]; see Perez v Folio House, Inc., 123 AD3d 519, 520 [1st Dept 2014]).

Here, however, the accident report relied upon by these defendants in opposition to plaintiff's motion is insufficient to overcome plaintiff's clear and consistent testimony that the accident happened as a result of the ladder's collapse. In any event, at most it raises an issue of comparative negligence, which is not a defense to a Labor Law § 240 (1) claim (see Stolt v General Foods Corp., 81 NY2d 918, 920 [1993]; Hill v City of New York, 140 AD3d 568, 569 [1st Dept 2016]; Romanczuk v Metropolitan Ins. & Annuity Co., 72 AD3d 592, 593 [1st Dept 2010]), because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; Velasco v Green-Wood Cemetery, 8 AD3d 88, 89 [1st Dept 2004]["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (Hernandez v Bethel United Methodist Church of N.Y., 49 AD3d 251, 253 [1st Dept 2008], quoting Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 290).

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

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Madison and Delphi Financial. However, Madison and Delphi Financial are not entitled to dismissal of such claim against them.

The Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims (motion sequence numbers 005 and 006)

Madison and Delphi Financial move for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them. Commodore moves separately for the same relief. Plaintiff does not oppose dismissal of such claims against these defendants.

Thus, they are entitled to dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them.

The Third-Party Complaint against OH&M (motion sequence numbers 004 and 005)

OH&M moves for summary judgment dismissing Madison and Delphi Financials' third-party complaint against it, sounding in common-law and contractual indemnification, including indemnification for their attorney's fees and defense costs, and

breach of contract for failure to procure insurance. Madison and Delphi Financial move for summary judgment in their favor on their third-party contractual defense and indemnification claim against OH&M.

Common Law-Indemnification

"Implied [,or common-law,] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (McCarthy v Turner Construction, Inc., 17 NY3d 369, 374-375 [2011][internal quotation marks and citations omitted]). "Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer" (id. at 375 [internal quotation marks and citation omitted]). "To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (Naughton v City of New York, 94 AD3d 1, 10 [1st Dept 2019]; see McCarthy v Turner Construction, Inc., 17 NY3d at 377-378).

Here, OH&M argues that the events that resulted in plaintiff falling from the ladder were not caused by its negligence, nor did it exercise actual supervision or control

over the injury-producing work. Madison and Delphi do oppose this branch of OH&M's motion.

On such basis, OH&M is entitled to the summary dismissal of Madison and Delphi Financials' claim for common-law indemnification against it.

Contractual Indemnification

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (see Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987][internal quotation marks and citation omitted]; see Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]). "[I]t is well settled that [i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (De La Rosa v Philip Morris Mgmt. Corp., 303 AD2d 190, 193 [1st Dept 2003] [internal quotation marks and citation omitted]; see Keena v Gucci Shops, 300 AD2d 82, 82 [1st Dept 2002]).

Here, Madison and Delphi Financial contend that they are entitled to contractual defense and indemnification from OH&M pursuant to a Purchase Order, executed by Joseph Lynch,

President of OH&M, on April 18, 2014, and a Blanket Insurance/Indemnity Agreement between Structure Tone and OH&M, executed by Joseph Lynch, on November 4, 2009.

In pertinent part, the Terms and Conditions of the Purchase Order state the following:

> "11. ***The insurance and indemnification provisions are set forth in the separate Blanket Insurance/Indemnity Agreement signed by Subcontractor, the terms of which are incorporated herein. In the absence of said Agreement, the following indemnification and insurance provisions shall apply.***
>
> 11.2 To the Fullest extent permitted by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc. ('STI') and Owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs ***arising in whole or in part and in any manner from the acts and omissions, breach or default of Subcontractor . . . in connection with the performance of any Work by Subcontractor pursuant to this Purchase Order and/or a related Proceed Order.*** Subcontractor will defend and bear all costs of defending any action or proceedings brought against STI and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(Purchase Order annexed to Affirmation in Opposition to OH&M's Motion for Summary Judgment as exhibit A [emphasis added]).

As is relevant here, the Blanket Insurance/Indemnity Agreement referred to in paragraph 11 of the Purchase Order, states:

> "6. To the fullest extent permitted by law, and except to the extent of Structure Tone, Inc. and owner's negligence, Subcontractor agrees to hold Structure Tone, Inc. and owner, its trustees, officers, members,

> directors, agents, affiliates, and employees, harmless against any and all claims, suits, liens, judgments, damages, losses, liability, expenses, or costs including but not limited to, all reasonable legal fees . . . incurred because of the injury to . . . any person . . . or any other claim ***arising out of or in connection with or as a consequence of the performance of the work under this agreement***, the rental of any equipment, the acts, omissions, or breaches of this agreement, or default as to this agreement by the Subcontractor . . . Subcontractor will defend and bear all costs of defending any actions or proceedings brought against Structure Tone, Inc. or owner, their officers, trustees, directors, members, agents, affiliates, and employees arising in whole or in part out of any such acts, omissions, breaches or defaults. This indemnification agreement contemplates that Structure Tone, Inc. and owner are entitled to full indemnification from the Subcontractor to the fullest extent permitted by law"

(Blanket Insurance/Indemnity Agreement annexed to Affirmation in Opposition to OH&M's Motion for Summary Judgment as exhibit A [emphasis added]).

Initially, pursuant to paragraph 11 of the Purchase Order, the indemnification provisions in paragraph 11.2 only apply "in the absence of" a Blanket Insurance/Indemnity Agreement. Since a Blanket Insurance/Indemnity Agreement exists between Structure Tone and OH&M, the indemnification provisions set forth in that agreement are controlling. It is further noted that the "arising out of" language in the Blanket Insurance/Indemnity Agreement does *not* include the language in the Purchase Order stating that OH&M would assume liability for claims "arising in whole or in part and in any manner from [OH&M's] *acts and*

omissions." Rather, it applies to claims "arising out of or in connection with or as a consequence of the performance of" OH&M's work under the agreement. Therefore, no showing of negligence on the part of OH&M is needed in order to trigger its indemnity obligations under the Blanket Insurance/Indemnity Agreement (see generally Brown v Two Exchange Plaza Partners, 76 NY2d 172, 178 [1990]).

For a claim to fall under the phrase "arising out of" the performance of a party's work, the party seeking indemnification must show "a particular act or omission in the performance of such work causally related to the incident" (Brown v Two Exch. Plaza Partners, 146 AD2d 129, 136 [1st Dept 1989], affd, 76 NY2d 172, [1990]; see Regal Constr Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38 [2010] [interpreting "arising out of" in the additional insured context "to mean originating from, incident to, or having connection with"] [internal quotation marks and citation omitted]; Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 415 [2008] ["The phrase 'arising out of' has been interpreted by this Court to mean originating from, incident to, or having connection with, and *requires only that there be some causal relationship between the injury and the risk for which coverage is provided*"] [internal quotation marks and citations omitted][emphasis added]).

Here, the performance of OH&M's work has no causal relationship with the accident. To that effect, OH&M's work had nothing to do with the ladder giving way. Although OH&M was responsible for installing a light fixture into the ceiling grid that plaintiff was attempting to "tweak" when the ladder gave way, OH&M had nothing to do with the installation of that ceiling grid and Levy testified that no OH&M employees were even present at the worksite at the time of the incident. Moreover, while a light fixture installed by OH&M hit plaintiff during the accident, there is no evidence that the light fixture dropping from the ceiling had anything to do with the performance of OH&M's work. Rather, Levy's testimony, as well as Structure Tone's accident report, indicate that the light fixture dropped as a result of plaintiff pulling down the ceiling grid in the midst of his fall. There is no evidence that a particular act or omission in the performance of OH&M's work on the Project was causally related to the ladder giving way, or the light fixture dropping. Therefore, OH&M's indemnification obligations under the Blanket Insurance/Indemnity Agreement are not triggered.

Thus, OH&M is entitled to summary judgment dismissing this third-party claim against it, and Madison and Delphi Financial are not entitled to summary judgment in their favor on such claim.

Breach of Contract for Failure to Procure Insurance

That branch of OH&M's motion which is for summary judgment dismissing the cause of action in the third-party complaint seeking damages for failure to procure insurance is unopposed. Thus, OH&M is entitled to the summary dismissal of this claim against it.

The Cross Claims against Commodore (motion sequence numbers 005 & 006)

Commodore moves for summary judgment dismissing Madison and Delphi Financials' cross claims against it, which seek contribution and common-law and contractual indemnification against Commodore. Commodore also seeks to dismiss a claim for contribution asserted against it by OH&M. In addition, Madison and Delphi Financial move for summary judgment in their favor on their cross claim against Commodore seeking contractual indemnification.

As an initial matter, Madison and Delphi Financial do not oppose that branch of Commodore's motion seeking dismissal of their cross claims for contribution and common-law indemnification against Commodore. In addition, OH&M does not oppose that branch of Commodore's motion seeking dismissal of its contribution claim against Commodore.

Thus, Commodore is entitled to the dismissal of Madison and Delphi Financials' cross claims for contribution and common-law indemnification, and OH&M's contribution claim against it.

In support of their argument that they are entitled to summary judgment in their favor on their contractual indemnification claim against Commodore, Madison and Delphi Financial rely on a Purchase Order, executed by Commodore's President on May 1, 2014, and a Blanket Insurance/Indemnity Agreement between Structure Tone and Commodore, executed by Gerald Boyle, Commodore's Executive Vice President on October 28, 2009 (Purchase Order and Blanket Insurance/Indemnity Agreement annexed to Affirmation in Support of Madison and Delphi Financials' Motion for Summary Judgment as exhibit C).

Notably, the indemnification provisions in these documents are identical to those set forth in the Purchase Order and Blanket Insurance/Indemnity Agreement between Structure Tone and OH&M. As such, the applicable indemnification provision is the one set forth the Blanket Insurance/Indemnity Agreement, which provides for Commodore to indemnify "Structure Tone, Inc. and owner, its trustees, officers, members, directors, agents, affiliates, and employees" against any claims "arising out of or in connection with or as a consequence of the performance of" Commodore's work. Accordingly, no showing of negligence on the

part of Commodore is needed in order to trigger its indemnity obligations under the Blanket Insurance/Indemnity Agreement.

Here, there is a question of fact as to whether plaintiff's accident arose out of the performance of Commodore's work. To that effect, at the time of the accident, plaintiff was tweaking a ceiling grid installed by Commodore. However, on this record, it cannot be determined whether the condition of the grid or its placement in the ceiling had anything to do with the happening of the accident.

Thus, that branch of Madison and Delphi Financials' motion which is for summary judgment in their favor on their cross claim seeking contractual indemnification against Commodore is denied. That branch of Commodore's motion which is for summary judgment dismissing said claim is also denied.

The court has considered the parties' remaining contentions with respect to this issue and finds them to be without merit.

The Cross Claims against Madison and Delphi Financial (motion sequence number 005)

Finally, Madison and Delphi Financial move for summary judgment dismissing Commodore's cross claims against them in the main action and OH&M's cross claim against them in the third-party action. These branches of their motion are unopposed.

Thus, Madison and Delphi Financial are entitled to dismissal of Commodore's cross claims against them in the main

action and OH&M's cross claim against them in the third-party action.

04/27/2020
DATE

DEBRA A. JAMES, J.S.C.

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