Morocho v City of New York
2020 NY Slip Op 32311(U)
July 13, 2020
Supreme Court, Kings County
Docket Number: 516712/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 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 13th day of July, 2020.

PRESENT:

HON. LAWRENCE KNIPEL

Justice.

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WILSON MOROCHO,

Plaintiff,

- against -

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CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK UNIVERSITY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY LAND DEVELOPMENT CORP., SKANSKA USA BUILDING, INC., UNITED HOISTING & SCAFFOLDING, CORP., SIMPLEXGRINNELL, LP, CARDOZA PLUMBING CORP. AND SAFWAY SERVICES, LLC,

Defendants.

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CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK UNIVERSITY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY LAND DEVELOPMENT CORP., SKANSKA USA BUILDING, INC., UNITED HOISTING & SCAFFOLDING, CORP., AND CARDOZA PLUMBING CORP.,

Third-Party Plaintiffs,

- against -

STATEWIDE CONTRACTING GROUP,

Third-Party Defendant.

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The following e-filed papers considered herein on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	102-119, 122-139
Opposing Affidavits (Affirmations)	144
Reply Affidavits (Affirmations)	145, 146, 148-150
______Affidavit (Affirmation)	
Other Papers Memoranda of Law	121, 141

Upon the above-referenced e-filed papers, in motion sequence number 005, defendants/third-party plaintiffs Skanska USA Building, Inc. (Skanska), City of New York (the City), New York City Development Corporation s/h/a New York City Land Development Corporation (NYC Dev. Corp.), New York City Transit Authority (NYCTA), New York City Economic Development Corp. (NYCEDC)[1], Metropolitan Transit Authority (MTA), New York University (NYU), United Hoisting & Scaffolding, Corp., (United) and Cardoza Plumbing Corp. (Cardoza) (collectively, defendants) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff Wilson Morocho's Labor Law § 200 and common-law negligence claims as against them, and for an order dismissing all claims as against the City, NYC Dev. Corp., NYCTA, NYCEDC and MTA on the ground they are not proper Labor Law defendants. Defendants also seek summary judgment in favor of Skanska and NYU on their third-party claims against third-party defendant Statewide Contracting Group (Statewide) for contractual indemnification, including reimbursement of all attorneys' fees, costs and expenses, or in the alternative, for an order granting them

[1] The court notes that while New York City Department of Education is listed as a movant in defendants' motion papers, it is not a named party to this action and, therefore, will not be addressed herein.

conditional contractual indemnity, and summary judgment on their breach of contract for failure to procure insurance claim against Statewide.

Statewide cross-moves, in motion sequence number 006, for an order (1) pursuant to CPLR 2201, staying defendants' motion pending a related declaratory judgment action on the issue of insurance coverage, or (2) pursuant to CPLR 603 and/or 1010, severing the third-party action, and/or (3) pursuant to CPLR 3212, granting summary judgment dismissing defendants's third-party common-law indemnity and contribution claims against it.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff Wilson Morocho (plaintiff) on July 7, 2015, at approximately 1:00 p.m., while working at premises known as 370 Jay Street, Brooklyn, New York (the premises or the property). The City is the fee owner of the premises, and had leased the property to NYC Dev. Corp. pursuant to a 99-year lease agreement. In or about March 2015, NYC Dev. Corp. assigned to NYU all of its rights as tenant under its lease with the City. The MTA and NYCTA, which operated a portion of the subway system under the premises, suspended their easement interests in the property pursuant to a Surrender Agreement, dated March 6, 2015. Sometime prior to the date of plaintiff's accident, NYU entered into a contract with Skanska for the latter to serve as the construction manager for an improvement project, which involved the total interior renovation of the 14-story building on the premises. Pursuant to the terms of the agreement, Skanska hired and coordinated the work of various subcontractors for the project. On or about February 13, 2015, Skanska entered into a subcontract with Statewide, a demolition contractor, for the latter to perform certain demolition work and hazardous material removal on the project. At the time of the accident, the plaintiff was employed by Statewide.

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During his 50-H hearing, conducted on February 1, 2016, and his deposition, conducted on November 19, 2018, the plaintiff testified that on the day of the incident, Statewide was in the process of performing interior demolition work at the premises. He had worked on the project for about three months before the accident occurred. Plaintiff testified that there were about fifteen Statewide employees working on the site during the course of the project. He only received daily instructions from either his Statewide supervisor, Antonio Barone, or other Statewide foremen. On the morning of the accident, plaintiff was initially on the 13th floor, when he received a call from Barone. Barone instructed the plaintiff to remove a halon gas compressed tank, which was located in the utility/mechanical room on the 14th floor in the building. Plaintiff described the tank as measuring three and a half to four feet tall and three feet wide, and recalled that it was very heavy. According to plaintiff, Barone brought a dolly to move the tank. At that point, plaintiff and four other Statewide workers put the tank on the dolly and proceeded to move it towards the staircase, which led to the 13th floor. Plaintiff and Barone were positioned at the back of the tank pushing it from behind, while one worker was in front, and the two others were on each side. They moved it slowly down a makeshift plywood ramp leading to the staircase. Plaintiff testified that he then told Barone that the tank was too heavy, but that Barone insisted on lowering it down the stairs. When plaintiff and his coworkers tried to lower the tank onto the first step, a distance plaintiff described as being somewhere between a foot and a half or six to eight inches, the tank "exploded" upon impact with the floor, followed by a loud bang and hissing noise. At the time, plaintiff and Barone were standing on the floor holding the tank, while the three other employees were on the first step. Plaintiff claimed that the tank never hit him, but that the force of the explosion and the escaping gas pushed him back up against the wall, which was located about six feet away from where they were lowering the tank. As a result,

plaintiff hit his head and lost consciousness for about a minute. Plaintiff did not know what caused the tank to explode, just that it occured as they tried to lower it onto the first step.

The resultant injuries were the basis of this action commenced by the plaintiff on or about September 21, 2016, alleging violations of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence. Defendants interposed an answer on or about December 9, 2016. Plaintiff subsequently served an Amended Verified Complaint on December 30, 2016, and defendants served their Verified Answer to Plaintiff's Amended Verified Complaint on March 2, 2017. Defendants subsequently filed a third-party action against Statewide, seeking contractual and common-law indemnity, contribution and breach of contract for failure to procure insurance. Statewide served an answer on or about November 30, 2017. The parties engaged in discovery and on February 4, 2019, plaintiff filed a note of issue with the clerk of the court. The following motions ensued and are timely.

Discussion

Defendants seek summary judgment dismissing plaintiff's complaint as asserted against the City, NYC Dev. Corp., NYCTA, NYCEDC and MTA on the ground that they are not proper Labor Law defendants. Defendants additionally seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them. The court notes that the defendants do not advance any arguments with respect to plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and therefore the court will not address said claims herein.

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986];

Zapata v Buitriago, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Proper Labor Law Defendants

As an initial matter, the court addresses that branch of defendants' motion seeking to dismiss all claims as against the City, NYC Dev. Corp., NYCTA, NYCEDC and MTA on the ground that they had no involvement with the plaintiff's accident, and therefore are not proper Labor Law defendants. Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law § 200 [1]; § 240 [1]; § 241). It is well established that, for purposes of Labor Law, "the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept. 1984]). Indeed, "'[the owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed'" (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept. 2011], *affd* 20 NY3d 194 [2012]). Thus, "[t]he key factor in determining whether a non-titleholder is an 'owner' is the 'right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control'" (*Ryba v Almeida*,

27 AD3d 718, 719 [2d Dept. 2006], quoting *Copertino*, 100 AD2d at 567; *see Guryev*, 87 AD3d at 614).

In addition, a party is deemed to be an "agent" of an owner or general contractor under the Labor Law when it has the "ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Guclu v 900 Eighth Ave. Condo., LLC*, 81 AD3d 592, 593 [2d Dept 2011]; *Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 99 [1st Dept 1999]).

Here, as to MTA, NYCTA and NYCEDC, defendants' submissions established that these entities neither contracted for nor supervised the work that brought about the injury, and had no authority to insist that proper safety practices were followed. In fact, there is no evidence in the record that these defendants had any involvement with the project or the plaintiff's accident. Moreover, in opposition, the plaintiff has failed to raise a triable issue of fact as to whether the MTA, NYCTA or NYCEDC were "owners" or "agents" within the meaning of the Labor Law (*see Guryev*, 87 AD3d at 614). Accordingly, that branch of defendants' motion seeking to dismiss all claims against NYCTA, MTA and NYCEDC is granted.

As to NYC Dev. Corp., the defendants have submitted documentary evidence establishing that, on or about March 6, 2015, the City, as the fee owner and landlord of the subject premises, entered into a 99-year lease agreement with NYC Dev. Corp. as the tenant. Concurrently with the execution of that lease (on March 6, 2015), NYC Dev. Corp. executed, with the City's consent, an "Assignment and Assumption of Lease" Agreement (the Assignment) with NYU, pursuant to which NYC Dev. Corp. assigned to NYU all of its "rights, title, interest and obligations as tenant" under its lease with the City. The

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Assignment specifically states that "Assignee [NYU] releases Assignor [NYC Dev. Corp.] . . . from any and all liability from claims or causes of action arising under the Lease and the assignment thereof, and the Premises" (NYSCEF Doc. No. 115, Mauro affirmation, exhibit L). Since the Assignment of the lease occurred prior to the date of the plaintiff's accident, NYC Dev. Corp. lacked an ownership interest in the premises during the relevant time. Further, there is no evidence in the record that NYC Dev. Corp. acted as a general contractor or agent thereof within the meaning of the Labor Law, and thus cannot be liable to the plaintiff under the Labor Law or for negligence. Accordingly, plaintiff's complaint and all cross-claims are hereby dismissed as against NYC Dev. Corp.

The City, however, is a proper Labor Law defendant. Although NYU was a tenant of the premises on which the accident occurred and clearly contracted for the renovation work, it is undisputed that the City was the fee owner and, as such, an "owner" within the meaning of the Labor Law. The Court of Appeals has unequivocally held that "[l]iability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant" (*Coleman v City of New York*, 91 NY2d 821, 822 [1997]; *see Sanatass v Consol. Investing Co.*, 10 NY3d 333, 342 [2008]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]; *Otero v Cablevision of New York*, 297 AD2d 632, 634 [2d Dept 2002]). Thus, that branch of defendants' motion seeking to dismiss all claims as against the City on the ground that it is not a proper Labor Law defendant is denied.

Plaintiff' Labor Law § 200/Common-law Negligence Claims

Defendants seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against the remaining defendants. In so moving, however, the court notes that the defendants' submissions make no reference to defendants United or Cardoza,, or in what capacity and/or role they had on the site, or whether they were involved

in the project. As such, the court will address plaintiff's Labor Law § 200 and common-law negligence claims only as they pertain to Skanska, NYU and the City.

"Where . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if he or she had 'the authority to supervise or control the performance of the work'" (*Forssell v Lerner*, 101 AD3d 807, 808 [2d Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed"(*Ortega*, 57 AD3d at 62). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010] [internal quotation marks omitted]; *see Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]; *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 832 [2d Dept 2012]; *Harrison v State of New York*, 88 AD3d 951, 954 [2d Dept 2011]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2d Dept 2008]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2d Dept 2006]).

Here, it is clear that the plaintiff's alleged injuries did not result from a physical defect at the construction site, but instead from the means and manner in which the plaintiff and his coworkers performed their work – moving the halon tank manually down a makeshift ramp and staircase (*see Gargan v Palatella Saros Builders Grp., Inc.*, 162 AD3d 988, 989 [2d Dept 2018]). Defendants have established, prima facie, that neither Skanska nor NYU had the authority to exercise supervision or control over the injury-producing work, and that Statewide actually exercised such control and supervision. Plaintiff himself testified

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that his Statewide supervisor, Barone, directed him to initially move the tank, and on how to manually move it down the staircase. He further testified that he only received instructions from Statewide employees (Barone or other Statewide foremen). In addition, defendants submitted the deposition transcript of Peter Musso, Statewide's president, wherein he testified that he was the one who directed his foreman, Barone, to take a crew up to the 14th floor in order to begin prep work and remove the subject tank. He further testified that he did not tell anyone from Skanska that his workers would be working on the 14th floor on the day of the accident.

In opposition, the plaintiff argues that Skanska was aware of a dangerous condition and points to the testimony of Skanska's representative, William Carson. Carson testifed that he was aware of the halon tanks located on the 14th floor, and that Statewide was supposed to remove them as part of its demolition work (NYSCEF Doc. No. 113, Carson tr at 25-26). Carson also testified that removal of he halon tank required specialized training, and that the halon gas was supposed to be removed first before any attempt to move the tank (*id.* at 103-104). Such testimony, however, fails to raise an issue of fact. Skanska's general knowledge of the work to be performed, and its exercise of general supervision over the construction site are insufficient to establish liability under Labor Law § 200 (*see Austin v Consolidated Edison, Inc.*, 79 AD3d at 684). Furthermore, "when the manner of work is at issue, 'no liability will attach to [a contractor] solely because [it] may have had notice of the allegedly unsafe manner in which work was performed'" (*Guallpa v Canarsie Plaza*, LLC, 144 AD3d 1088, 1092–93 [2d Dept 2016]; *see Ortega*, 57 AD3d at 61; *Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]). Thus, plaintiff's assertion that Skanska was aware that Statewide workers had to remove the halon tank and other hazardous materials from the property is insufficient to raise an issue of fact. Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against Skanska and NYU.

Plaintiff's Labor Law § 200 and common-law negligence claims are also dismissed as against the City as there is no evidence in the record that it exercised any supervision or control over the plaintiff's work, or the work of his employer (Statewide) at the time of the accident (*see Sullivan v New York Athletic Club*, 162 AD3d 955, 958 [2d Dept 2018] ["If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law"]; *LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]).

Contractual Indemnity

Defendants Skanska and NYU seek contractual indemnification against Statewide or, in the alternative, for an order granting them conditional contractual indemnification. The relevant indemnity provision set forth in the Skanska/Statewide Subcontract provides, in pertinent part, as follows:

> 18.1 <u>Indemnity</u>
> In addition to any other defense, indemnity or hold harmless obligation imposed on Subcontractor [Statewide] by the Subcontract or the Applicable Law, Subcontractor shall, to the fullest extent permitted by law, indemnify, defend and hold harmless the Indemnified Parties [Skanska and NYU][2] from and against any Damages involving the following:
>
> * * *

[2] Pursuant to the Skanska/Statewide Subcontract, Skanska is identified as the Contractor, Statewide is identified as the Subcontractor and NYU is identified as the Owner. Pursuant to the terms and conditions, the term "Indemnified Parties" means "the Owner, Contractor, and their respective directors, officers, employees, parents and subsidiaries of any tier" (NYSCEF Doc. No. 117, Mauro affirmation, exhibit N at exhibit E to Skanska/ Statewide Subcontract, Section 1.1 [m] and [n]).

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(b)[3] Any actual or alleged injury or death to any person or damage to or destruction of any property (including loss of use thereof) or any other damage or loss by whomever suffered resulting from or arising out of or in connection with or as a consequence of, the provision of the Work, as well as any additional, extra or add-on work, *which were caused, in whole or in part, by Subcontractor, or any person or entity employed, either directly or indirectly, by the Subcontractor, including any Sub-subcontractors and their employees*. (NYSCEF Doc. No. 117, Mauro affirmation, exhibit N, Skanska/Statewide Subcontract at exhibit N, Supplemental Terms and Conditions to Subcontract [emphasis supplied]).

"'The right to contractual indemnification depends upon the specific language of the contract'" (*Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 722 [2d Dept 2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*Alayev v Juster Associates, LLC*, 122 AD3d 886, 887 [2d Dept 2014]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). "In 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" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Further, "[a] court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be

[3] In support of their motion, the defendants rely on section 18.1(b) which appears on page 17 of the 19-page Exhibit "E" attachment to the Skanska/Statewide Subcontract. However, the court notes that this provision was modified and replaced with a revised Section 18.1(b) which is set forth in the Exhibit "N" attachment to the Subcontract entitled "Supplemental Terms and Conditions to Subcontract". Thus, the court will refer to the modified section in addressing defendants' arguments pertaining to contractual indemnification.

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reimbursed" (*Jamindar v Uniondale Union Free School. Dist.*, 90 AD3d 612, 616 [2d Dept 2011]).

The indemnification clause at issue requires Statewide to indemnify Skanska and NYU for all claims arising out of or in connection with the subcontracted work to the extent caused in whole or part by Statewide or its employees. The indemnification clause does not, by its terms, limit indemnification only to claims arising out of the negligence of Statewide in the performance of the work (*see e.g.*, *Tobio v Bos. Properties, Inc.*, 54 AD3d 1022, 1024 [2d Dept 2008]; *Santos v BRE/Swiss, LLC,* 9 AD3d 303, 304 [1st Dept 2004]; *Walsh v Morse Diesel, Inc.*, 143 AD2d 653, 655 [2d Dept 1988]). Here, there is no dispute that plaintiff's injuries resulted from his work at the construction site during the course of his employment with Statewide. Additionally, it is undisputed that Statewide's foreman, Barone, directed the plaintiff and his fellow co-workers to remove the halon tank, and on how to move it -- by manually lowering it down the staircase from the 14th floor to the 13th floor. Thus, the work plaintiff was performing at the time he was injured plainly constituted "Work" required under the Skanska/Statewide Subcontract, and plaintiff's injuries "arose out of" and were "caused, in whole or in part," by Statewide's actions. As such, the contractual indemnity provision at issue was triggered.

Moreover, the court finds that the defendants have demonstrated that there is no evidence in the record that anyone from Skanska or NYU directed, controlled or supervised plaintiff's work or was, in anyway, responsible for doing so. Nor was there any proof that Skanska was on notice of any dangerous condition regarding the process of moving the tank. Rather, the record shows that Statewide, as plaintiff's employer, was the entity that actually directed and supervised the plaintiff's work at the time of the injury (*see Torres v Morse Diesel Int'l, Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). During his deposition, Musso, Statewide's president, testified that he was personally on the site every other day to assess the daily progress of the work, and that he was the one who directed Barone to have a crew

start demolition prep work on the 14th floor, which involved removing the tank (NYSCEF Doc. No. 114, Musso tr at 44-45). Musso claimed that he gave instructions to have the tank moved out of the utility room and placed in the hallway (*id.* at 47). Additionally, Musso admitted that he did not tell anyone from Skanska that Statewide was going to be doing work on the 14th floor (*id.* at 46). He further testified that he never met with anyone from NYU regarding Statewide's work on the project from the time Statewide initially bid on the contract up to the date of the plaintiff's accident (*id.* at 128-129). In opposition, Statewide has failed to raise a triable issue of fact as to any negligence on the part of Skanska or NYU. Accordingly, that branch of defendants' motion seeking summary judgment in favor of Skanska and NYU on their contractual indemnity third-party claim against Statewide is granted.

Breach of Contract for Failure To Procure Insurance

That branch of defendants' motion seeking summary judgment in favor of Skanska and NYU on their breach of contract for failure to procure insurance claim against Statewide is denied as moot. Pursuant to a joint trial order of this court (Hon. Karen B. Rothenberg), dated June 27, 2019, defendants' claim for breach of contract for failure to procure insurance was severed from this action and added in a separate declaratory judgment action which is currently pending in New York County (*Mt. Hawley Insurance Company v Statewide Contracting Group and Skanska USA Building, Inc.* [Index No. 656069/16]) (NYSCEF Doc. No. 149). Thus, that claim is no longer a part of this action. In light of the foregoing, those branches of Statewide's cross motion seeking to stay defendants' current motion and/or sever defendants' third-party action against it pending a resolution of the declaratory judgment action are denied.

Statewide's Cross Motion

In its cross motion, Statewide seeks summary judgment dismissing defendants' common-law indemnity and contribution claims against it on the ground that said claims are barred by the exclusivity provisions of the Workers' Compensation Law.

> "Section 10 (1) of the Workers' Compensation Law provides that '[e]very employer subject to this chapter shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury
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> "Section 11, entitled 'Alternative Remedy,' is composed of several undesignated paragraphs, the first of which specifies that '[t]he liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee ... or any person otherwise entitled to recover damages, contribution or indemnity ... except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee ... may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury . . .' "
> (*Boles v Dormer Giant, Inc.*, 4 NY3d 235, 238-239 [2005]).

Based upon the foregoing language, "an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits" (*Fleming v Graham*, 10 NY3d 296, 299 [2008]; *see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412 [2004]). However, when an employee sustains a "grave injury[4]," as enumerated in Workers' Compensation Law § 11,

[4] Workers' Compensation Law § 11 defines a "grave injury" as the following: "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in

"a primary defendant may commence a third party action against the injured plaintiff's employer for common-law indemnification and/or contribution" (*Fleming v Graham*, 10 NY3d at 299).

Here, Statewide argues that the third party claim for common-law indemnity and contribution are barred by the exclusivity provisions of Workers' Compensation Law § 11 because the plaintiff has not sustained a "grave injury." In support of this contention, Statewide refers to plaintiff's verified bill of particulars, and points out that it fails to state any injuries that could be categorized as a "grave injury" under the Workers' Compensation Law. Statewide, however, fails to mention or proffer any proof of Workers' Compensation coverage, or whether the plaintiff applied for and received such compensation following his accident. In fact, in support of its cross motion, Statewide makes no reference to Workers Compensation insurance at all. Under these circumstances, Statewide has failed to demonstrate an entitlement to the protections of Workers' Compensation Law § 11 (*see Boles v Dormer Giant, Inc.*,4 NY3d at 238-239 ; *see also Sibrian v 244 Madison Realty Corp.*, 2019 NY Slip Op 33726[U], [Sup Ct, Queens County 2019] [motion to dismiss third-party complaint denied because movants failed to establish that they secured workers' compensation benefits for plaintiff]). Accordingly, that branch of Statewide's cross motion seeking summary judgment dismissing Skanska and NYU's third party claims for common-law indemnity and /or contribution is denied.

Conclusion

Motion Sequence No. 005

ORDERED that the branch of defendants' motion seeking to dismiss all claims as against NYC Dev. Corp., NYCTA, MTA and NYCEDC is granted; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against

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permanent total disability."

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Skanska, NYU and the City is granted and said claims are hereby dismissed as against said defendants; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment in favor of Skanska and NYU on their third party claim against Statewide for contractual indemnity, including reimbursement of all attorney's fees, costs and expenses, is granted; and it is further

ORDERED that the remainder of defendants' motion is otherwise denied; and it is further

Motion Sequence No. 006

ORDERED that the branch of Statewide's cross motion for summary judgment dismissing defendants' common-law indemnity and/or contribution claims against it is denied; and it is further

ORDERED that the remainder of Statewide's cross motion is otherwise denied; and it is further

ORDERED that the action is severed accordingly and the new caption is hereby amended to reflect the above-mentioned dismissals and shall read as follows:

--X

WILSON MOROCHO,

Plaintiff,

- against -

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CITY OF NEW YORK, NEW YORK UNIVERSITY, SKANSKA USA BUILDING, INC., UNITED HOISTING & SCAFFOLDING, CORP., SIMPLEXGRINNELL, LP, CARDOZA PLUMBING CORP. AND SAFEWAY SERVICES, LLC,

Defendants.

--X

CITY OF NEW YORK, NEW YORK UNIVERSITY,
SKANSKA USA BUILDING, INC., UNITED HOISTING
& SCAFFOLDING, CORP., AND CARDOZA PLUMBING CORP.,

Third-Party Plaintiffs,

- against -

STATEWIDE CONTRACTING GROUP,

Third-Party Defendant.
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The foregoing constitutes the decision, order and judgment of the court.

ENTER

J. S. C.

Justice Lawrence Knipel

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