Alexander v 330 Hudson Owner, LLC
2020 NY Slip Op 32429(U)
July 23, 2020
Supreme Court, Kings County
Docket Number: 501864/13
Judge: Kathy J. King
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At an IAS Term, Part 64 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 23rd day of July, 2020.

PRESENT:
HON. KATHY J. KING
Justice.

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ROY ALEXANDER,

Plaintiff,

- against -

Index No. 501864/13

330 HUDSON OWNER, LLC, PAVARINI MCGOVERN, LLC, AND ATLANTIC HOISTING & SCAFFOLDING, INC.,

Defendants.

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PAVARINI MCGOVERN, LLC,

Third-Party Plaintiff,

- against -

ATLANTIC HOISTING & SCAFFOLDING, Inc.
And Martin Associates, Inc

Third-Party Defendants.

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The following papers numbered 1 to 19 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-6, 7-8
Opposing Affidavits (Affirmations)	9, 10, 11, 12, 13, 14, 15, 16, 17
Reply Affidavits (Affirmations)	18, 19

Upon the foregoing papers, Motion Sequence Numbers 004, 005, 006, and 007 are hereby consolidated for purposes of disposition.

Mot. Seq. No. 4

Plaintiff Roy Alexander's motion, pursuant to CPLR 3212, for summary judgment on the issue of liability pursuant to Labor Law 240(1) and 241(6) against defendants 330 Hudson Owner LLC[1] and Pavarini McGovern LLC (collectively "330 Hudson/Pavarini")[2]. 330 Hudson/Pavarini submits opposition to the requested relief.

Mot. Seq. No. 5

Defendant/Third Party Plaintiff 330 Hudson/Pavarini's motion for summary judgment pursuant to CPLR 3212:

1) dismissing plaintiff's claims under Labor Law 200 and common law negligence, Labor Law 240(1) and Labor Law 246(1). Plaintiff submits opposition to the requested relief; and,

2) dismissing the cross claims of defendant/third-party defendants Atlantic Hoisting and Scaffolding Inc ("Atlantic") and Martin Associates, Inc ("Martin") for common law and contractual indemnification. Atlantic submits opposition. Martin submits partial opposition to the requested relief.

Mot. Seq. No. 6

Defendant/Third-party defendant Atlantic's motion for summary judgment pursuant to CPLR 3212:

1) dismissing plaintiff's Labor Law causes of action arising under Labor Law 200 and common law negligence, Labor Law 240(1) and Labor Law 246(1). Plaintiff submits opposition to the requested relief; and,

2) dismissing the third-party plaintiff complaint of Pavarini McGovern LLC ("Pavarini") and all claims and cross claims. Pavarini submits opposition to the requested relief.

Mot. Seq No. 7

Third-Party defendant Martin's cross motion for partial summary judgment pursuant to CPLR 3212 dismissing:

1) plaintiff's Labor Law 240(1) and Labor Law 246(1) causes of action. Plaintiff submits opposition to the requested relief.; and,

2) the sixth, seventh, and eighth causes of action in the third-party complaint of Pavarini McGovern and the third-party Verified Amended Complaint of 330 Hudson/Pavarini; dismissing the first, third, and fourth cross claims in 330 Hudson's Answer; and dismissing the first and second cross claims in Atlantic's Answer. Pavarini and Atlantic submit opposition to the requested relief.

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[1] Plaintiff's motion notices 330 Hudson Owner, LLC ("330 Hudson Owner") for the relief requested. The Court notes that the within action was discontinued as to 330 Hudson Owner by stipulation dated August 6, 2013, and plaintiff filed a Supplemental Summons and Verified Complaint against 330 Hudson Street ("330 Hudson") on August 21, 2013. Thus, the Court finds plaintiff's notice to be incorrect, and deems the requested relief to be against 330 Hudson Street.

[2] While 330 Hudson and Pavarini interposed answers to the Summons and Verified Complaint and to Supplemental Summons and Verified Complaint, respectively, unless otherwise indicated, reference to 330 Hudson/Pavarni refers to their joint application and/or opposition to the motions herein.

Background and Procedural History

On March 26, 2013, plaintiff Roy Alexander, an apprentice steamfitter, allegedly sustained personal injuries when he slipped and fell on ice, during the course of his employment, at a jobsite consisting of both new construction and renovation of an existing building. At the time of the accident, plaintiff was transporting oxygen and acetylene tanks secured to a cart down a wooden ramp on the 17th floor roof located at 330 Hudson Street, New York, when he slipped and fell. 330 Hudson Owner, LLC ("330 Hudson Owner") was the owner of the subject premises. Pavarini McGovern LLC ("Pavarini") was the construction manager for the project. The ramp was built by Pavarini subcontractor Atlantic, who was retained to erect hoisting and scaffolding on the jobsite. Pavarini subcontractor Martin was retained to perform HVAC work at the jobsite.

Plaintiff testified at his deposition that on the morning of the accident, he was working with co-worker Tom Niblock ("Niblock"), another steamfitter. He further testified that they were instructed by Michael Pforte ("Pforte"), plaintiff's supervisor and a Martin foreman, to go to the ground level of the building and retrieve oxygen and acetylene tanks, for welding work on the roof. Plaintiff secured the tanks with a chain in a two-wheeled cart, and then wheeled the cart to an exterior hoist, to be lifted to the 17th floor roof. Niblock rode with plaintiff in the hoist.

When the hoist arrived at the roof level, Niblock exited first, and plaintiff followed behind him. Upon exiting the hoist, there was a wooden walkway, approximately 20 feet long. At the end of the walkway, a wooden ramp was constructed which connected the walkway to the roof of the building. Plaintiff testified that the differential between the end of the walkway and surface of the roof was about 10 to 12 inches. Plaintiff followed Niblock, and pushed the cart along the walkway, and as he approached the ramp, he pushed the cart in front of him by tilting the top of the cart back towards him and pushing the cart forward.

According to plaintiff, as he maneuvered the cart back toward him and began descending the ramp, his feet slipped out from under him and he fell onto his backside and the cart came down on his left leg. Plaintiff testified that he fell because the "ramp was slippery with ice." Plaintiff testified that he did not see ice before the accident, however, after he fell he saw ice on his feet, between his legs, and on his side.

After the accident, plaintiff testified that he told Pforte that he slipped and fell on ice. On the date of the accident, plaintiff completed an Employee Report of Injury Form and an Employee Claim form ("C-3 form"), where he stated that he was "transporting oxygen and acetylene cylinders to work area" when he "slipped on icy ramp and cylinders and cart came down on my legs." Plaintiff testified that he also completed an Employer's Report of Work Related Injury Illness Form ("C-2 Form").

Niblock witnessed plaintiff's fall. He testified that the oxygen and acetylene tanks weighed about 150 pounds and indicated that when the hoist got up to 17th floor, plaintiff began pushing the tanks out of the hoist by himself. Niblock testified that he was standing two feet from the bottom of the ramp, and saw plaintiff pushing the cart while walking down the ramp, when he fell back about six inches onto the ramp and landed in a sitting position. According to Niblock, [the cart] did not fall on [plaintiff], it did not impact him, it just rested on him. Niblock further testified that plaintiff pushed up the cart, got up, and walked and that he and plaintiff returned to work. Niblock testified that he did not recall any issues with ice at the job. However, at his deposition, Niblock also acknowledged completing an Incident Investigation Report, at the time of the accident, which he stated that "Roy and I [were] bringing Oxy and acetylene tanks to the building roof." He was rolling it down a steep wood ramp approximately 4 feet long and it was covered in ice. His feet slipped out from under him and the tanks landed on his legs.

Peter Redmond, testified that he was an employee of Pavarini, and that, among other things, he was responsible for maintaining a safe workplace. Redmond testified that it was the responsibility of Pavarini's superintendents to inspect the areas that were exposed to the elements prior to starting work, and rectify any hazardous conditions. Redmond testified that he had the ability to stop work if he came across an unsafe condition, but also testified that he was not on the jobsite on the date of the accident. Redmond further testified that Pavarini's superintendents complete a daily report at the end of the workday. At his deposition, Redmond identified a daily report for March 25, 2013, which indicated that there was rain/snow in the "AM" period of the day. In a written statement contained in the report of the accident, Redmond stated that plaintiff had fallen. At his deposition, he acknowledged that the ramp was wet, but could not explain why he did not include this information in his report.

Martin Hanley, a general foreman for Atlantic, testified that the Atlantic was responsible for installing sidewalk bridging, shoring, ramps, and exterior hoisting at the jobsite. He testified that the ramp from the hoist platform to the roof level was constructed with 2x9 planks, and a one-foot fall. He had been on the roof of the 330 Hudson building and was aware of the ramp from the hoist platform to the roof at that level. According to Hanley, after installing the ramp, Atlantic was not responsible for maintaining it. Instead, he testified, that Pavarini was responsible for ensuring that the ramp was clear of snow and ice. He further testified that Atlantic would not alter the ramp unless it received a specific request from Pavarini.

Eric Griffin ("Griffin"), testified that he worked as a Manager for Site Safety LLC, a non-party consultant, who had been retained by Pavarini to assist in site safety and accident prevention. Griffin testified that he reported to Pavarini's superintendents. Griffin testified that prior to plaintiff's accident, a complaint was made that the ramp was too steep. Griffin further testified that he recommended in his daily log that non-slip strips should be provided on the hoist ramp

where the accident occurred, and further testified that he did not believe that non-slip strips had been placed on the hoist ramp. After speaking with plaintiff on the day of the accident, Griffin completed a Site Safety Accident Report, which stated that plaintiff lost his footing while descending the ramp and the cart fell on his legs. Griffin testified that he did not ask plaintiff whether there was ice on the ramp.

On April 12, 2013, plaintiff commenced the within action by the filing of a Summons and Verified Complaint against 330 Hudson Owner, LLC and Pavarini McGovern LLC. Thereafter, Pavarini commenced a third-party action against Atlantic and Martin, on June 5, 2013, for contractual defense and indemnity, common law negligence, attorneys fees and failure to procure insurance.[3] Martin also asserted cross claims against Atlantic for indemnification and contribution. Further, by stipulation dated August 6, 2013, plaintiff's claims against 330 Hudson Owner were discontinued, and pursuant to the terms of the stipulation, plaintiff was permitted to bring the instant action against 330 Hudson Street. On February 13, 2017, plaintiff filed a Second Supplemental Summons and Amended Verified Complaint ("Second Amended Complaint") adding Atlantic as a direct defendant. The parties now move for summary judgment pursuant to CPLR 3212 on their respective claims, counterclaims and cross claims in the direct and third party actions.

Standard for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his day in court and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*see Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept. 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a

[3] Subsequently, 330 Hudson Street and Pavarini filed a Third-Party Supplemental Summons and Verified Third Party Amended Complaint on March 13, 2014.

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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*see Di Mena & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*see Phillips v Kantor & Co.*, 31 NY2d 307 [1972], *Museums at Stony Brook v Vil. Of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]).

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*, 49 NY 2d at 562).

DISCUSSION

I. Labor Law 240(1)

Labor Law §240 (1) provides, in pertinent part, 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, [or] altering . . . 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 duty imposed by Labor Law 240(1) is non-delegable and . . . an owner is subject to liability for violation thereof regardless of whether actual supervision or control over the work" has been exercised (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). To

achieve that goal, the statute imposes absolute liability where the failure to provide [proper] protection is a proximate cause of a worker's injury" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015]; *see Wilinksi v 334 92nd Hous. Dev. Fund. Corp.*, 18 NY3D 1, 7 [2011]).

Labor Law 240(1) relates only to special hazards involving elevation-related risks (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]). Rather, the special hazards referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*see Melber v 6333 Main St., Inc.*, 91 NY2d 759, 763 [1998][internal citations omitted]. Liability may, therefore, be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential (*see id.* at 90; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009][internal citations omitted]).

Plaintiff and defendant 330 Hudson/Pavarini both move for summary judgment under Labor Law 240(1). Plaintiff contends that the cart used to transport the tanks was insufficient to protect plaintiff from the elevated related risk of transporting two tanks on a ramp that was covered in ice, in violation of Labor Law 240(1). Plaintiff also argues that the defendants failed to provide an adequate safety device to protect the plaintiff against the unsafe slippery condition of the ramp. Plaintiff's contention that the ramp was icy and steep is supported by Niblock's written statement contained in the Incident Investigation Report, which stated that the "ramp was to [sic] steep and was very slippery because of rain & cooled [sic]weather." Niblock wrote that they should "HAVE SAFETY REP CHECK FOR ICY CONDITIONS on cold days. Change ramp so it is not so steep." Further, on the issue of the lack of inadequate protection, plaintiff points to Griffin's testimony that he did not believe that there were non-slip strips on the ramp on the date of the accident.

330 Hudson/Pavarini asserts that the special protections afforded by Labor Law 240(1) are inapplicable to the case at bar, and rely on the accident reports to show that plaintiff's fall while pushing a cart down a ramp, was not gravity related and did not require fall protection. The reports, however, are not dispositive on the circumstances of the fall since there is conflicting evidence as to whether snow and/or ice was on the ramp, and whether or not the ramp was steep.

Accordingly, based on the testimonial and documentary evidence, the Court finds that there are issues of material fact raised by plaintiff and 330 Hudson/Pavarini, as to whether the circumstances resulting in plaintiff's fall on the ramp is covered under Labor Law 240 (1). As a result, summary judgment is not warranted, and the respective motions of plaintiff and 330 Hudson/Pavarini are denied.

Atlantic moves for summary judgment on the basis that it is not a proper defendant under Labor Law 240(1), since it was not an owner, general contractor, or agent thereof that directed, supervised, or controlled the construction site or plaintiff's work. While Atlantic's trade contract with Pavarini has established prima facie that Pavarini was responsible for maintaining the safety of the ramp, plaintiff, in opposition, raises a triable issue of fact by showing that Atlantic controlled the means and methods of constructing the ramp. In *Eliassian v G.F. Construction, Inc*, the Second Department found that a subcontractor may be held liable for violations of the Labor Law if the owner or general contractor delegates to the subcontractor the "duty to conform to the requirements of the Labor Law by granting the subcontractor the authority to supervise and control the work which brought about the injury" (*Eliassian v G.F. Construction, Inc*, 163 AD3d 528 [2d Dept 2018]).

Accordingly, defendant Atlantic's motion for summary judgment dismissing plaintiff's Labor Law 240(1) is denied.

II. Labor Law § 241(6)

Labor Law § 241(6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-02 [1993]). To sustain a cause of action under Labor 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles (*see id.*). "The former gives rise to a nondelegable duty, while the latter does not." (*id.*)

Plaintiff's bill of particulars include violations of Industrial Code of 23-1.5, 23-1.7(d), 23-1.7(f), 23-2.1, 23-1.30, 23-1.15, 23-1.22, and 23.1.23 as the basis for his motion for summary judgment under Labor Law 241(6). As the moving papers fail to include any facts in support of defendant's alleged violations of Industrial Codes 23-1.5, 23-2.1, 23-1.30, 23-1.15, 23-1.22, and 23.1.23, these sections of the code will not be considered by the Court, and the Court shall address plaintiff's motion for summary judgment under Labor Law 241(6) as to solely as to violations of Industrial Code 23-1.7(d) and 23-1.7(f).

330 Hudson/Pavarini and Atlantic also move for summary judgment against plaintiff dismissing the claimed Industrial Code violations.

Industrial Code 23-1.7(d) provides that employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform, or other elevated working surface which is in a slippery condition. Ice, snow, water, grease, and any other foreign

substance which may cause slippery footing shall be removed, sanded, or covered to provide safe footing.

Industrial Code 23-1.7(f) provides, "Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Plaintiff contends that Industrial Code 23-1.7(d) is applicable since his fall resulted from an ice-covered ramp that caused the accident and 23-1.7(f) applies since a safety device was not provided as a safe means of access from the ramp. In support of the motion, plaintiff cites his deposition testimony where he specifically states that he fell because the "ramp was slippery with ice." Further, the Court notes that the testimony of Redmond and Griffin shows that there was wetness or dampness on the ramp, at the time of plaintiff's fall, which could have played a role in the accident. 330 Hudson/Pavarini contend that, generally, the claimed sections of the Industrial Code are inapplicable, and cite the accident reports which show that plaintiff slipped but do not specify what caused the slip. Further, defendants 330/Pavarini submits the expert report from Dr. Raymond L Lee, Jr., research professor of the U.S. Naval Academy, Mathematics and Science Division, who opined with a reasonable degree of scientific certainty, that there was no ice present on the rooftop hoist ramp where plaintiff slipped and fell at the time of the accident. Atlantic also contends that Section 23-1.7(f) is inapplicable since plaintiff was not an Atlantic employee, and that clearing snow and ice conditions from the ramp was the responsibility of Pavarini.

The Court finds that material issues of fact are raised by the moving parties regarding the claimed violations of Industrial Code 23-1.7(d) and Industrial Code 23-1.7(f) as to whether there was ice on the ramp, whether a safety device was required, and which entity had the responsibility to maintain the ramp. Thus, the motions of plaintiff, 330 Hudson/Pavarini and Atlantic are denied.

III. Common Law Negligence and Labor Law 200 Claims

Labor Law §200 (1) provides, in pertinent part, that:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons".

Labor Law 200 is a codification of the common-law negligence imposing a duty upon owners and general contractors or their agents to provide workers with a safe place to work (NY Labor Law 200). It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation "have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition" (*Russin v Picciano & Son,* 54 NY2d 311, 317 [1981][emphasis supplied][internal citations omitted]; *see also, Ross v Curtis-Palmer Hydro-Elec. Co., supra,* at 505-506; *Lombardi v Stout,* 80 NY2d 290, 295 [1992]).

330 Hudson/Pavarni move to dismiss plaintiff's common law negligence and Labor Law 200 claims. In support of their motion, 330 Hudson/Pavarni, assert that they did not create the alleged icy condition on the ramp, did not perform any construction work at the premises, nor did they direct or control work on the jobsite. Here, contrary to 330 Hudson/Pavarni's assertions, the March 25, 2013 daily report of Pavirini's superintendent states there was rain/snow in the "AM" which establishes that 330/Pavarini had actual and/or constructive notice of the alleged icy conditions causing plaintiff's accident. Where a defendant property owner provides a worker with a dangerous or defective piece of equipment, having either created the dangerous or defective condition or having actual or constructive notice of it, the defendant is possessed of the authority, as owner, to remedy the condition (*see Chowdhury v Rodriguez*, 57 AD3d 121, 130 [2d Dept 2008]).

The Court finds that material issues of fact exist as to whether there was a defective condition and notice thereof, thus, 330/Pavarini has not establish prima facie entitlement to summary judgment on plaintiff's Labor Law 200/common law negligence claim, and this branch of the motion is denied.

Atlantic also moves to dismiss plaintiff's Labor Law 200/common law negligence. The record shows that it was Pavarini's responsibility to maintain the ramp, including clearing snow/ice, and that Atlantic did not direct, supervise, or control the manner in which plaintiff performed his work or jobsite conditions. Notwithstanding, this prima facie showing, plaintiff raises an issue of fact as to whether Atlantic created the condition causing plaintiff to fall. While Atlantic's contract with Pavarini provides required Atlantic to provide "protection of work and labor from winter conditions" ...and "when using ¾ inch plywood, mesh, friction pads are required," Griffin testified that there were no non-slip pads on the ramp at the time of the accident. The case law is well settled that a subcontractor may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Thomas v Benton*, 112 AD3d 812, 813 [2d Dept 2013] citing *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2011] [internal quotation marks omitted]; *see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2010]).

Accordingly, defendant Atlantic's motion for summary judgment as to plaintiff's Labor Law 200/ common law negligence claim is denied.

IV. Third Party Claims

330 Hudson/Pavarini's Motion to Dismiss Atlantic and Martin's Cross Claims

330 Hudson/Pavarini move for summary judgment on the cross claims against Atlantic and Martin for common law and contractual indemnification, and insurance procurement.

Firstly, while 330 Hudson/Pavarini's notice of motion states that they seek summary judgment on the common law indemnification cross claims of Atlantic and Martin, the moving papers refer solely to contractual indemnification only. Thus, 330/Pavarini's motion is denied as to their cross claim for common law indemnification.

The Court finds, however, that 330 Hudson/Pavarini's has established prima facie entitlement for contractual indemnification. According to its contract with Pavarini, Atlantic was required to perform "protection of work and labor from winter conditions." Item 35 states "when using ¾ inch plywood mesh, friction pads are required." In this regard, the Court notes that Griffin testified about the need for non-slip strips on the ramp. It is well settled that a party's right to contractual indemnification is governed by the specific language of the controlling contract (*see Tolpa v One Astoria Square,* 125 AD3d 755, 756 [2d Dept 2015]). The General Conditions provision set forth in Article 9(A)(1) of the contract between 330 Hudson/Pavarini and Atlantic requires defense and indemnification for any accidents "arising in whole or in part and in any manner from the acts, omissions, breach or default of the [subcontractor]...in connection with the performance of any Work." Notwithstanding this provision, Atlantic raises a question of fact as to whether its work on the jobsite complied with the contract and thus, whether the contractual indemnification clause was triggered. Thus, 330 Hudson/Pavarini's motion is denied as to contractual indemnification.

Additionally, that branch of 330 Hudson/Pavarini's motion for summary judgment regarding Atlantic's failure to procure insurance is denied as moot.[4]

The Court now addresses 330 Hudson/Pavarini's cross claims against Martin.

[4] Atlantic moves for summary judgment on this issue, which the Court discusses below.

Firstly, 330 Hudson/Pavarini's motion for common law indemnification against Martin is denied, since plaintiff did not suffer a grave injury, and Martin, as plaintiff's employer, cannot be held liable under the Workers' Compensation Law §11.

As to 330 Hudson/Pavarini's motion for contractual indemnification, the Court finds that 330 Hudson/Pavarini has established prima facie entitlement to summary judgment based on the clear and unambiguous contract language, set forth in the General Conditions provision set forth in Article 9(A)(1) of the contract between the parties, which names 330 Hudson and Pavarini as additional insureds in Martin's certificate insurance. Notwithstanding this provision, the record indicates that 330 Hudson's defense is being provided for by the insurer of Pavarini, thus, there is no liability for which Martin must defend. Further, the Court finds that there are issues of fact raised as to whether there have been violations of the Labor Law by 330 Hudson/ Pavarini, and whether the indemnification clause set forth in the contract is triggered.

Additionally, that branch of 330 Hudson/Pavarini's motion for summary judgment regarding Martin's failure to procure insurance is denied as moot.[5]

Atlantic's Motion to Dismiss the Third-Party Complaint of Pavarini and 330/Pavarini

Atlantic's motion for summary judgment to dismiss the third-party complaint of Pavarini and 330/Pavarini has not established prima facie entitlement to contractual indemnification, since the record shows, that there is a material issue of fact as to whether Atlantic breached its contract with 330 Hudson/Pavarini by failing to provide slip protection on the ramp as required by Article 1.1 and Item 35 of the contract between the parties. The Court notes that when a contract requires indemnification for injuries that arise out of the performance of work by a subcontractor, the subcontractor is entitled to a finding of summary judgment dismissing the contractual

[5] Martin moves for summary judgment on this issue, which the Court discusses below.

indemnification claims if there is no causal connection between any act or omission of the subcontractor and the accident (*see Murray v City of New York, et. al.*, 43 AD3d 429, 431 [2d Dept. 2007]). Atlantic contends that the anti-subrogation rule bars 330 Hudson/Pavarini from seeking indemnity from Atlantic (*see Pennsylvania General Insurance Company v Austin Powder Company, et.al.*, 68 NY2d 465, 467 [1986]), since Atlantic and 330 Hudson/Pavarini are insured by the same insurer for the same risk. In the case at bar, the Court finds that the anti-subrogation rule does not apply since there is a question of fact as to Atlantic's liability, and which will determine whether Atlantic has a duty to indemnify. Accordingly, Atlantic's motion for contractual indemnification is denied.

As to the branch of Atlantic's motion for failure to procure insurance, Atlantic has established its prima facie entitlement to summary judgment since Atlantic procured insurance with an endorsement for "Additional Insured-Owners, Lessees or Contractors" which names as additional insureds "any person or organization whom [Atlantic] has agreed to include as an additional insured under a written contract..." Consistent therewith, the Certificate of Insurance annexed to the moving papers, identifies 330 Hudson/Pavarini as additional insureds pursuant to the contract between Atlantic and Pavarini McGovern LLC. The policy, bearing number HDO G25533847, was issued by ACE American Insurance Company, effective January 1, 2013 through January 1, 2014 at $5,000,000 per occurrence/aggregate. Atlantic has established prima facie entitlement to summary judgment by submitting proof in admissible form of insurance coverage. Since no opposition has been submitted, that branch of Atlantic's motion is granted on this issue.

Martin's Cross Motion For Partial Summary Judgment

Firstly, contrary to 330 Hudson/Pavarini's arguments in opposition, the Court deems Martin's cross motion to be timely, since it was filed within 120 days of the note of issue.

The Court finds that the branch of Martin's cross motion seeking dismissal of plaintiff's Labor Law 240(1) and 241(6) is granted, since there is no opposition to the requested relief.[6]

Further, Martin's cross motion seeks dismissal of 330 Hudson/Pavarini's sixth (common law negligence), seventh (attorney fees), and eighth (failure to procure insurance) causes of action set forth in its third-party complaint, together with the cross claims of 330 Hudson and Atlantic.

Martin has demonstrated prima facie entitlement to summary judgment as to its sixth cause of action, since 330 Hudson/Pavarini's is barred from recovery because plaintiff did not suffer a "grave injury" as defined by Workers' Compensation Law §11, was an employee of Martin for whom Workers' Compensation benefits and has been paid said benefits. As a result, 330 Hudson/Pavarini's sixth cause of action for common law negligence is dismissed. Martin has also established prima facie entitlement for dismissal of 330 Hudson/Pavarini's seventh cause of action for attorneys' fees. The Court finds that the relief requested in the seventh cause of action is pled in 330 Hudson/Pavarini's fifth cause of action for contractual defense and indemnification which seeks "all costs, expenses, disbursements, and attorney fees." In opposition, 330 Hudson/Pavarini, fails to raise an issue of fact regarding Martin's prima facie showing. Therefore, defendant Martin's cross motion dismissing seventh cause of action in its third-party complaint is granted.

Finally, Martin has established prima facie entitlement to summary judgment for dismissal of its eighth cause of action based on failure to procure insurance. Annexed to the moving papers is a copy of Martin's certificate of insurance which identifies 330 Hudson/ Pavarini as an additional insured, pursuant to its contract with 330 Hudson/Pavarini requiring procurement of a commercial general liability insurance policy. The policy, bearing number

[6] The Court notes that while plaintiff's motion notices opposition to third party defendant's Martin motion for summary judgment, however, plaintiff opposition papers contain no arguments, as to Martin's motion to dismiss plaintiff's Labor Law claims. Additionally, 330Hudson/Pavarini this branch of Martin's motion.

4TCO3A053288TIA2, was issued by Travelers Indemnity Company, effective June 30, 2012 through June 30, 2013 at $2,000,000 per occurrence/$4,000,000 per aggregate. The Court notes that 330 Hudson/Pavarini concedes, in opposition, that Martin has produced a certificate of insurance which identifies Pavarini as an "additional insured" pursuant to the contract between Martin and Pavarini. Thus, Martin has demonstrated its compliance with the contractual agreement to procure liability insurance on behalf of the third-party plaintiffs. Therefore, defendant Martin's cross motion for summary judgment dismissing eighth cause of action asserted by Pavarini in its third-party complaint is granted.

As to Martin's cross motion for partial summary judgment seeking dismissal of the first and second causes of action cross claims of Atlantic in its answers to the third party complaint and third party amended complaint, respectively, the Court finds that Martin has established prima facie entitlement to partial summary judgment.

Atlantic's first cross claim for common law indemnity is barred since plaintiff did not suffer a "grave injury" as defined by the Workers' Compensation Law §11, was an employee of Martin and was paid Workers' Compensation benefits. Similarly, based on the same reasoning, the second cross-claim asserted in Atlantic's answer is also barred. No triable issues of fact have been raised by Atlantic.

Accordingly, the sixth, seventh, and eighth causes of action in the third party complaint is dismissed; the first, third, and fourth causes of action as set forth by 330 Hudson in its cross-claims are dismissed; and the first and second cross claims as set forth by Atlantic are dismissed.

Based on the foregoing, it is hereby;

ORDERED, that Plaintiff's motion granting summary judgment on liability pursuant to Labor Law 240(1) and 246(1) against 330 Hudson/Pavarini is denied (Mot. Seq.#4); and it is further,

ORDERED, that Defendant/Third Party Plaintiff 330 Hudson/Pavarini's motion for summary judgment dismissing Plaintiff's claims under Labor Law 240(1), 246(1), and 200/common law negligence and dismissing Defendant/Third-party Defendants Atlantic and Martin's cross claims is denied (Mot. Seq.#5); and it is further.

ORDERED, that Defendant/Third-party Defendant Atlantic's motion for summary judgment dismissing Plaintiff's Labor Law Causes of Action under Labor Law 240(1), 246(1) and 200/common law negligence and the Third-Party Complaint of 330 Hudson/Pavarini, together with all claims, and Cross Claims is granted to the extent of dismissing 330 Hudson/Pavarini's cross-claim for failure to procure insurance. In all other respects, defendant Atlantic's motion is denied (Mot. Seq.#6); and it is further,

ORDERED, that Third-Party Defendant Martin's cross motion for partial summary judgment is granted dismissing plaintiff's Labor Law 240(1), and Labor Law 246(1) claims; dismissing the Sixth, Seventh, and Eighth causes of action in the Third-Party Complaint of Pavarini and the Third-Party Amended Complaint of 330 Hudson/Pavarini; dismissing 330 Hudson Street, LLC's First, Third, and Fourth Cross Claims in its answer; and dismissing Third Party Defendant Atlantic's First and Second Cross Claims. (Mot. Seq.#7).

This constitutes the decision/order of the Court.

ENTER,

HON. KATHY J. KING
J.S.C.

HON. KATHY J. KING
J.S.C.