

Peranzo v WFP Tower D Co. L.P.
2020 NY Slip Op 32704(U)
August 14, 2020
Supreme Court, New York County
Docket Number: 154704/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

AMEDEO PERANZO,

Index No. 154704/2016

Plaintiff

- against -

WFP TOWER D CO. L.P., BROOKFIELD
FINANCIAL PROPERTIES L.P., STRUCTURE
TONE, INC., and TITANIUM SCAFFOLD
SERVICES, LLC,

Defendants

-----X
-----X

TITANIUM SCAFFOLD SERVICES, LLC,

Index No. 595094/2017

Third Party Plaintiff

- against -

PIER HEAD ASSOCIATES, LTD., and
COMMODORE CONSTRUCTION CORP.,

Third Party Defendants

-----X
-----X

STRUCTURE TONE, INC.,

Index No. 595128/2017

Second Third Party Plaintiffs

- against -

COMMODORE CONSTRUCTION CORP.,

Second Third Party Defendants

-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, an employee of third party defendant-second third party defendant Commodore Construction Corp., sues to recover damages for personal injuries sustained September 1, 2015, while working on a renovation project on premises at 250 Vesey Street, New York County, owned by defendants WFP Tower D Co. L.P. and Brookfield Financial Properties L.P.. Defendant-second third party plaintiff Structure Tone, Inc., the general contractor for the project, subcontracted with defendant-third party plaintiff Titanium Scaffold Services, LLC, to erect a scaffold on the work site. Titanium Scaffold subcontracted that work to third party defendant Pier Head Associates, Ltd.

Titanium Scaffold moves for summary judgment dismissing all claims and cross-claims against Titanium Scaffold and for summary judgment on Commodore Construction's liability for Titanium Scaffold's third party claims for contractual and implied indemnification and breach of a contract to procure insurance. C.P.L.R. § 3212(b) and (e). Commodore Construction cross-moves for summary judgment dismissing all claims and cross-claims

against Commodore Construction. C.P.L.R. § 3212(b). Pier Head cross-moves for summary judgment on Pier Head's counterclaims against Titanium Scaffold and cross-claims against Commodore Construction for contractual and implied indemnification, including defense expenses. C.P.L.R. § 3212(b) and (e).

WFP Tower D, Brookfield Financial Properties, and Structure Tone, the owner and general contractor (GC) defendants, separately move for summary judgment dismissing all claims and cross-claims against these defendants. C.P.L.R. § 3212(b). They also seek summary judgment on their claims for contractual defense and indemnification and breach of a contract to procure insurance against Titanium Scaffold and Commodore Construction. C.P.L.R. § 3212(b) and (e). Only Structure Tone, however, maintains a third party action against Commodore Construction. The owner and GC defendants seek the same relief against Pier Head, but it is not a co-defendant against which these defendants may cross-claim, and when they moved for summary judgment they maintained no third party action against Pier Head. Commodore Construction and Pier Head each separately cross-move for the same relief in opposition to the owner and GC defendants' motion as in opposition to Titanium Scaffold's motion. C.P.L.R. § 3212(b).

II. THE PERMISSIBILITY OF THE MOTIONS AND CROSS-MOTIONSA. The Prohibition Against a Party's Successive Summary Judgment Motions

Successive motions for summary judgment are not permitted unless the moving party justifies the subsequent motion. Landis v. 383 Realty Corp., 175 A.D.3d 1207, 1207 (1st Dep't 2019); Ferolito v. Vultaggio, 99 A.D.3d 19, 29 (1st Dep't 2012); Jones v. 636 Holding Corp., 73 A.D.3d 409, 409 (1st Dep't 2010); Turner Constr. Co. v. H.E.L.P. Social Serv. Corp., 43 A.D.3d 731, 732 (1st Dep't 2007). Justification for a successive summary judgment motion includes previously unavailable evidence, Fleming & Assoc., CPA, PC v. Murray & Josephson, CPAs, LLC, 127 A.D.3d 428, 428 (1st Dep't 2015); Brown Harris Stevens Westhampton LLC v. Gerber, 107 A.D.3d 526, 527 (1st Dep't 2013); Whalen v. New York City Dept. of Env'tl. Protection, 89 A.D.3d 416, 417 (1st Dep't 2011); Turner Constr. Co. v. H.E.L.P. Social Serv. Corp., 43 A.D.3d at 732; an intervening appellate decision affecting applicable law, Amill v. Lawrence Ruben Co., Inc., 117 A.D.3d 433, 433-34 (1st Dep't 2014); superseding pleadings, Healthcare I.Q., LLC v. Tsai Chung Chao, 118 A.D.3d 98, 103 (1st Dep't 2014); or the court's permission. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015). See Bruckner Realty LLC v.

Cruz, 139 A.D.3d 413, 414 (1st Dep't 2016), aff'd, 28 N.Y.3d 1138 (2016).

Pier Head fails to justify its current cross-motion to Titanium Scaffold's motion after previously moving for summary judgment dismissing all claims against Pier Head, which the court granted in an order dated March 20, 2020. Pier Head's cross-motion to the owner and GC defendants' motion is impermissible for the same reason. Commodore Construction served two identical cross-motions for summary judgment, the first against the motion by Titanium Scaffold, and the second against the motion by the owner and GC defendants, and provides no explanation for the second summary judgment motion.

Titanium Scaffold, on the other hand, previously cross-moved to Pier Head's motion for summary judgment and thus was limited to cross-moving for summary judgment on Titanium Scaffold's third party claims against Pier Head and summary judgment dismissing Pier Head's claims against Titanium Scaffold. Therefore the court considers Titanium Scaffold's motion to the extent that it seeks summary judgment on Titanium Scaffold's claims against other parties and summary judgment dismissing claims by parties other than Pier Head.

B. Permissible Cross-Motions

C.P.L.R. § 2215's provision that a "party may serve upon the moving party a notice of cross-motion demanding relief" refers to relief against the moving party and thus does not allow a cross-motion as a vehicle for relief against a non-moving party. Puello v. Georges Units, LLC, 146 A.D.3d 561, 561 (1st Dep't 2017); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014). Although C.P.L.R. § 2215(b) provides that the "relief need not be responsive to that demanded by the moving party" and thus may relate to distinct claims or defenses, a cross-motion still must demand relief against the moving party.

Pier Head's cross-motion to the owner and GC defendants' motion, which is an impermissible subsequent summary judgment motion, is also an impermissible cross-motion because Pier Head seeks summary judgment against Titanium Scaffold and Commodore Construction, neither of which is a moving party against which Pier Head cross-moves. C.P.L.R. § 2215. Therefore the court denies both Pier Head's cross-motions.

Commodore Construction's cross-motion to Titanium Scaffold's motion is permissible only to the extent that it seeks summary

judgment dismissing Titanium Scaffold's third party claims against Commodore Construction, because Titanium Scaffold is the moving party. Similarly, Commodore Construction's cross-motion against the owner and GC defendants' motion is permissible only to the extent that it seeks summary judgment dismissing Structure Tone's third party claims against Commodore Construction, because Structure Tone is a moving party. Therefore the court considers Commodore Construction's cross-motions for these distinct purposes.

C. Timeliness of Commodore Construction's Cross-Motion

Since plaintiff filed a note of issue December 11, 2018, the deadline for summary judgment motions was April 10, 2019.

C.P.L.R. § 3212(a). Both Titanium Scaffold and the owner and GC defendants timely served their summary judgment motions April 10, 2019. C.P.L.R. § 2211; Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706, 706 (1st Dep't 2013); Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't 2009); Ageel v. Tony Casale, Inc., 44 A.D.3d 572, 572 (1st Dep't 2007); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007). Commodore Construction's cross-motion against Titanium Scaffold, served June 26, 2019, and cross-motion against the owner and GC defendants, served June 27, 2019, were untimely. C.P.L.R. § 3212(a). The court may consider

Commodore Construction's cross-motions, however, to the extent that they respond to and address claims "nearly identical" to the Titanium Scaffold's and the owner and GC defendants' timely motions for summary judgment. Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp., 161 A.D.3d 691, 692 (1st Dep't 2018); Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 449 (1st Dep't 2013).

Titanium Scaffold's motion seeks summary judgment on Commodore Construction's liability for Titanium Scaffold's third party claims. Commodore Construction's untimely cross-motion, which seeks summary judgment dismissing claims on which Titanium Scaffold seeks judgment against Commodore Construction, satisfies this requirement.

The owner and GC defendants' motion seeks summary judgment on Commodore Construction's liability for Structure Tone's third party claims. Commodore Construction's untimely cross-motion, which seeks summary judgment dismissing claims on which Structure Tone seeks judgment against Commodore Construction, likewise responds to and addresses claims nearly identical to the owner and GC defendants' motion.

III. PLAINTIFF'S CLAIMS

A. Labor Law § 240(1) Claim

Plaintiff was injured when he tripped over the horizontal bracing holding up a scaffold and fell onto the floor. He attempted to step over the horizontal bar, which was approximately 14 inches above the floor on which he was walking, to traverse the floor rather than walk around the perimeter of the scaffolding. Since this injury is unrelated to height at which plaintiff or any materials or equipment was positioned, he fails to sustain his claim under New York Labor Law § 240(1).

Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 99-100 (2015); Reyes v. Magnetic Constr., Inc., 83 A.D.3d 512, 513 (1st Dep't 2011); Cabrera v. Sea Cliff Water Co., 6 A.D.3d 315, 316 (1st Dep't 2004).

B. Labor Law § 241(6) Claim

Plaintiff bases his Labor Law § 241(6) claim on violations of 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, and 23-1.21. 12 N.Y.C.R.R. § 23-1.5 merely sets forth an employer's responsibility for health and safety, without specific commands, and thus fails to support plaintiff's Labor Law § 241(6) claim. Gasques v. State of New York, 15 N.Y.3d 869, 870 (2010); Martinez v. 342 Prop. LLC, 128 A.D.3d 408, 409 (1st Dep't

2015); Kochman v. City of New York, 110 A.D.3d 477, 478 (1st Dep't 2013); Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906 (1st Dep't 2011). While 12 N.Y.C.R.R. § 23-1.5(c)(3) includes a specific directive that may support a claim under the statute, Becerra v. Promenade Apts. Inc., 126 A.D.3d 557, 558 (1st Dep't 2015), plaintiff makes no allegations within the scope of this regulatory provision nor otherwise relies on it to support his Labor Law § 241(6) claim. Rodriguez v. Dormitory Auth. of the State of N.Y., 104 A.D.3d 529, 530 (1st Dep't 2013); Cardenas v. One State St., LLC, 68 A.D.3d 436, 438 (1st Dep't 2009).

12 N.Y.C.R.R. §§ 23-1.15, 1.16, and 1.17 set standards for safety measures that are inapplicable to the activity in which plaintiff was engaged when he was injured, carrying metal pieces that he had cut across the work site to a co-worker to be installed as parts of window frames. Varona v. Brooks Shopping Centers LLC, 151 A.D.3d 459, 460 (1st Dep't 2017); Phillip v. 525 E. 80th St. Condo., 93 A.D.3d 578, 579 (1st Dep't 2012); Dzieran v. 1800 Bos. Rd., LLC, 25 A.D.3d 336, 337 (1st Dep't 2006); D'Acunti v. New York City Sch. Const. Auth., 300 A.D.2d 107, 107-08 (1st Dep't 2002). 12 N.Y.C.R.R. § 23-1.21 is also inapplicable because it governs ladders and ladderways that were

uninvolved in plaintiff's injury. Maldonado v. Townsend Ave. Enterprises, 294 A.D.2d 207, 208 (1st Dep't 2002). See Croussett v. Chen, 102 A.D.3d 448, 448-49 (1st Dep't 2013); Egan v. Monadnock Const., Inc., 43 A.D.3d 692, 694 (1st Dep't 2007).

12 N.Y.C.R.R. § 23-1.7(e) (1) and (2) requires that passageways and work areas be kept clear of dirt, debris, and scattered tools and materials. Since the scaffold's horizontal bracing over which plaintiff tripped was an integral part of the work at the site and not dirt, debris, or scattered tools or materials, 12 N.Y.C.R.R. § 23-1.7(e) does not apply either. Krzyzanowski v. City of New York, 179 A.D.3d 479, 481 (1st Dep't 2020); Thomas v. Goldman Sachs Headquarters, LLC, 109 A.D.3d 421, 422 (1st Dep't 2013); Johnson v. 923 Fifth Ave. Condo., 102 A.D.3d 592, 593 (1st Dep't 2013).

C. Labor Law § 200 and Negligence Claims

Titanium Scaffold and the owner and GC defendants contend that they are not liable for violating Labor Law § 200 or for negligence because they did not control the work that produced plaintiff's injury and did not create or receive notice of the condition that produced his injury. Titanium further contends that, because it was completely uninvolved in erecting the scaffold, its subcontract with Structure Tone imposed no duty on

Titanium Scaffold toward plaintiff.

Labor Law § 200 codifies the owners' and general contractor's duty to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). If a dangerous condition arising from a subcontractor's work caused plaintiff's injury, the owner and GC defendants may be liable for negligently allowing that condition and violating Labor Law § 200, if they supervised or exercised control over the activity that caused his injury. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). See Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014). If a dangerous condition on the work site caused plaintiff's injury, liability depends on these defendants' creation or actual or constructive notice of the condition. Jaycoxe v. VNO Bruckner Plaza, LLC, 146 A.D.3d 411, 412 (1st Dep't 2017); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144. Because the scaffold's horizontal bracing and not

plaintiff's work caused his injury, the standard governing work site conditions applies. Armental v. 401 Park Ave. S. Assocs., LLC, 182 A.D.3d 405, 405 (1st Dep't 2020); DeMercurio v. 605 W. 42nd Owner LLC, 172 A.D.3d 467, 467 (1st Dep't 2019); Prevost v. One City Block LLC, 155 A.D.3d 531, 534 (1st Dep't 2017).

The deposition testimony by William Murphy, Structure Tone's project superintendent, that Titanium Scaffold installed, dismantled, and repaired the scaffold, contradicts the deposition testimony by Richard Heller, Titanium Scaffold's president, that it sub-subcontracted the work to Pier Head and bore no responsibility for the scaffold work. Heller also admitted that Titanium Scaffold employees repaired the scaffold a few weeks before plaintiff's injury.

The inconsistent testimony whether Titanium Scaffold erected the scaffold leaves factual issues whether Titanium Scaffold created the absence of openings through the scaffold's horizontal bracing and diagonal intersecting cross-bracing to allow workers to traverse the work site, the condition that plaintiff claims caused his injury. See Balbuena v. New York Stock Exch., Inc., 49 A.D.3d 374, 376 (1st Dep't 2008). While the evidence indicates that Titanium Scaffold, Pier Head, or both erected the scaffold, no evidence indicates that the owner and GC defendants

performed any work on the scaffold to create the dangerous condition that plaintiff claims. Bradley v. HWA 1290 III LLC, 157 A.D.3d 627, 631 (1st Dep't 2018), aff'd, 32 N.Y.3d 1010 (2018); Prevost v. One City Block LLC, 155 A.D.3d at 534; DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 626 (1st Dep't 2015).

The owner and GC defendants contend that they also lacked notice of any dangerous condition in the scaffold because there was no such condition, and no one complained about the scaffold. Murphy, one of three Structure Tone superintendents, however, conducted daily walkthroughs at the work site. Structure Tone advised Titanium Scaffold and Pier Head that openings without horizontal bracing or diagonal intersecting cross-bracing were required for workers to traverse the construction site safely and approved both the design and the completed installation of the scaffold. Thus, to the extent that the horizontal bracing and cross-bracing in areas under the scaffold constituted a dangerous condition, Structure Tone fails to demonstrate that it lacked constructive notice. DeMercurio v. 605 W. 42nd Owner LLC, 172 A.D.3d at 467-68; DaSilva v. Everest Scaffolding, Inc., 136 A.D.3d 423, 424 (1st Dep't 2016); Rainer v. Gray-Line Dev. Co., LLC, 117 A.D.3d 634, 635 (1st Dep't 2014).

Although the owner and GC defendants also maintain that

there was no defect in the scaffold of which to receive notice, they fail to demonstrate the absence of such a defect. See Santiago v. Burlington Coat Factory, 112 A.D.3d 514, 514 (1st Dep't 2013). The deposition testimony by Murphy and by Christopher Trager, Commodore Construction's carpentry foreman, establishes only that there was an opening in the scaffold at its entry point at one end or at either end of a floor that was approximately 300 feet wide. If a worker was in the middle of the floor, the opening would be at least 100 feet away, so that if the worker's destination was only 20 feet away over horizontal bracing 14 inches high, for example, stepping over the bracing was a far more direct route, albeit more risky, particularly when carrying materials. Murphy further admitted that he did not inspect the scaffold for compliance with specifications, regarding the openings or any other components of the installation.

No evidence, however, shows that employees of WFP Tower D or Brookfield Financial Properties were at the site to receive notice of any dangerous condition. Prevost v. One City Block LLC, 155 A.D.3d at 534; DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d at 626; Phillip v. 525 E. 80th St. Condo., 93 A.D.3d at 579; Rich v. 125 W. 31st St. Assocs., LLC, 92 A.D.3d 433, 435 (1st Dep't

2012). See Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 627.

Therefore the owner defendants are not liable for negligence or a violation of Labor Law § 200.

Titanium Scaffold and Structure Tone further maintain that plaintiff was the sole proximate cause of his injury because he tried to step over the horizontal bracing despite the other routes around the floor unobstructed by horizontal bracing or cross-bracing. Plaintiff would be the sole proximate cause of his injury only if he disobeyed specific instructions. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39 (2004). While Murphy testified that Structure Tone instructed all foremen in turn to instruct their workers to pass through the openings, plaintiff at his deposition denied that anyone instructed him where to traverse through the scaffold and testified that a fellow employee showed plaintiff the route that he took when he was injured. Trager testified that he did not instruct Commodore Construction employees which openings to use to traverse the scaffold structure. Since defendants fail to demonstrate that plaintiff disobeyed a specific instruction, they fail to establish that he was the sole proximate cause of his injury. White v. 31-01 Steinway, LLC, 165 A.D.3d 449, 451-52 (1st Dep't 2018); Gutierrez v. 451 Lexington Realty LLC, 156 A.D.3d 418,

418-19 (1st Dep't 2017); Cardona v. New York City Hous. Auth., 153 A.D.3d 1179, 1179 (1st Dep't 2017); Noor v. City of New York, 130 A.D.3d 536, 540 (1st Dep't 2015). Therefore factual issues remain whether Structure Tone and Titanium Scaffold were negligent and violated Labor Law § 200.

IV. CROSS-CLAIMS AND THIRD PARTY CLAIMS

The parties stipulated that the subcontracts between Structure Tone and Titanium Scaffold and between Titanium Scaffold and Pier Head were authenticated and admissible for purposes of the motions and cross-motions for summary judgment.

A. Titanium Scaffold's Third Party Claims

Titanium Scaffold seeks summary judgment on its third party claim against Commodore Construction for contractual indemnification based on an indemnification agreement dated June 26, 2015, that is inadmissible. Trager was unfamiliar with the agreement and did not authenticate the signature by Commodore Construction's president. Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); B & H Florida Notes LLC v. Ashkenasi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011). Absent any contract, Titanium

Scaffold also fails to establish its claim against Commodore Construction for breach of contract to procure insurance. Given the dispute whether Titanium Scaffold was at fault, Gardner v. Tishman Constr. Corp., 138 A.D.3d 415, 417 (1st Dep't 2016); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013), and absent any showing that plaintiff suffered a "grave injury" under New York Workers' Compensation Law § 11, N.Y. Workers' Comp. Law § 29; Isabella v. Hallock, 22 N.Y.3d 788, 793 (2014); New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d 501, 505 (2014); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Sotarriba v. 346 W. 17th St. LLC, 179 A.D.3d 599, 601 (1st Dep't 2020), Titanium Scaffold further fails to establish its claim against Commodore Construction for implied indemnification.

B. The Owner and GC Defendants' Cross-Claims and Third Party Claims

The owner and GC defendants seek summary judgment on their cross-claims against Titanium Scaffold and Structure Tone's third party claims against Commodore Construction for contractual defense and indemnification and breach of a contract to procure insurance. Although the owner and GC defendants also seek summary judgment on cross-claims against Pier Head, as set forth

above, it is not a co-defendant against which these defendants may cross-claim, and when they moved for summary judgment they maintained no third party action against Pier Head. Therefore the court does not consider these defendants' claims against Pier Head. Although the owner defendants also seek summary judgment on third party claims against Commodore Construction, as also set forth above, only Structure Tone maintains a third party action against Commodore Construction. Therefore the court does not consider the owner defendants' claims against Commodore Construction.

The owner and GC defendants rely on Structure Tone's subcontract with Titanium Scaffold for their cross-claims and on Structure Tone's separate subcontract with Commodore Construction for Structure Tone's third party claims. At his deposition Heller identified his signature on the subcontract dated February 9, 2015, between Structure Tone and Titanium Scaffold. Trager recognized the signature on the subcontract dated August 4, 2015, between Structure Tone and Commodore Construction. Structure Tone thus authenticates the subcontracts on which it relies for indemnification. Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 122 A.D.3d 481, 482 (1st Dep't 2014); Batista v. City of New York, 108 A.D.3d 484, 485 (1st Dep't

2013); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001).

Term and Condition 11.2 of Structure Tone's subcontracts with Titanium Scaffold and Commodore Construction requires Titanium Scaffold and Commodore Construction to indemnify Structure Tone and the owners for the subcontractors' "acts, omissions, breach or default . . . in connection with the performance of any Work." Aff. of Patrick Kenny Ex. CC, at 3, Ex. EE, at 3. As provided in the subcontracts, Titanium Scaffold and Commodore Construction need not be negligent to trigger their indemnification obligations. Both subcontracts limit the defense and indemnification to the fullest extent permitted by law, thus do not indemnify Structure Tone for its own negligence, and therefore are enforceable. N.Y. Gen. Oblig. Law § 5-322.1; Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210-11 (2008); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018).

Structure Tone is entitled to contractual indemnification against Commodore Construction because plaintiff's injury arose

from Commodore Construction employees' acts and omissions in connection with their work for Structure Tone. Plaintiff was injured in connection with carrying metal pieces across the work site for the installation of window frames and as a result of foreman Trager failing to instruct Commodore Construction employees which openings to use to traverse the scaffold structure. Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 413-14 (1st Dep't 2019); Adagio v. New York State Urban Dev. Corp., 168 A.D.3d 602, 603 (1st Dep't 2019); Wilk v. Columbia Univ., 150 A.D.3d 502, 503 (1st Dep't 2017); Best v. Tishman Constr. Corp. of N.Y., 120 A.D.3d 1081, 1082 (1st Dep't 2014).

Titanium Scaffold maintains that co-defendants fail to identify the act, omission, breach, or default that triggers Titanium Scaffold's obligation to indemnify. The extent of Titanium Scaffold's responsibility for the scaffold structure that caused plaintiff's injury defines Titanium Scaffold's acts or omissions that would trigger its duty to indemnify the owner and GC defendants. Its subcontract with Structure Tone required Titanium Scaffold to provide all material, labor, and supervision for the scaffold's erection and maintenance. The extent to which Titanium Scaffold did not undertake responsibility for the scaffold would constitute a breach or default under its

subcontract with Structure Tone to undertake that responsibility. For this reason, even though a factual issue remains regarding the extent to which Titanium Scaffold undertook responsibility for the scaffold, if its dangerous condition caused plaintiff's injury, the injury arose either from Titanium Scaffold's act or from its omission or its breach or default of its subcontract in connection with the erection or maintenance of the scaffold.

Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d at 413-14; Adagio v. New York State Urban Dev. Corp., 168 A.D.3d at 603; Wilk v. Columbia Univ., 150 A.D.3d at 503; Best v. Tishman Constr. Corp. of N.Y., 120 A.D.3d at 1082.

Since WFP Tower D and Brookfield Financial Properties are not at fault, they are entitled to summary judgment against Titanium Scaffold on their contractual indemnification cross-claims. Since a factual issue remains whether Structure Tone is at fault, it is entitled to summary judgment against Titanium Scaffold on Structure Tone's contractual indemnification cross-claim and against Commodore Construction on Structure Tone's contractual indemnification third party claim to the extent that Structure Tone was not at fault. Ohadi v. Magnetic Constr. Group Corp., 182 A.D.3d 474, 477 (1st Dep't 2020); Higgins v TST 375 Hudson, L.L.C., 179 A.D.3d 508, 511 (1st Dep't 2020).

Finally, the owner and GC defendants do not show how Titanium Scaffold or Commodore Construction failed to procure required insurance. Therefore the owner and GC defendants are not entitled to summary judgment against Titanium Scaffold on their cross-claims for breach of a contract to procure insurance, nor is Structure Tone entitled to summary judgment against Commodore Construction on Structure Tone's third party claim for breach of a contract to procure insurance. Rodriguez v. Heritage Hills Socy., Ltd., 141 A.D.3d 482, 483 (1st Dep't 2016); Amante v. Pavarini McGovern, Inc., 127 A.D.3d 516, 517 (1st Dep't 2015); Harasim v. Eljin Constr. of N.Y., Inc., 106 A.D.3d 642, 644 (1st Dep't 2013); Urban v. No. 5 Times Sq. Dev., LLC, 62 A.D.3d 553, 557 (1st Dep't 2009).

VI. COMMODORE CONSTRUCTION'S CROSS-MOTION

Workers' Compensation Law §§ 11 and 29 bar the cross-claim and third party claims for implied indemnification and contribution based on Commodore Construction's negligence in causing plaintiff's injury, unless plaintiff suffered a "grave injury" under § 11. Isabella v. Hallock, 22 N.Y.3d at 793; New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d at 505); Fleming v. Graham, 10 N.Y.3d at 299; Sotarriba v. 346 W. 17th St. LLC, 179 A.D.3d at 601. Since plaintiff's

rotator cuff tear and elbow sprain are not grave injuries, N.Y. Workers Comp. Law § 11, Titanium Scaffold, Pier Head, and Structure Tone may not seek implied indemnification or contribution against Commodore Construction. Brooks v. Judlau Contr., Inc., 11 N.Y.3d at 208; Sotarriba v. 346 W. 17th St. LLC, 179 A.D.3d at 601; Cashbamba v. 1056 Bedford LLC, 168 A.D.3d 638, 639 (1st Dep't 2019); Clavin v. CAP Equip. Leasing Corp., 156 A.D.3d 404, 404 (1st Dep't 2017).

Titanium Scaffold and Pier Head base their contractual indemnification claims against Commodore Construction on the indemnification agreement dated June 26, 2015, between Titanium Scaffold and Commodore Construction. As discussed above, the agreement between Titanium Scaffold and Commodore Construction presented in support of Titanium Scaffold's motion for summary judgment is not authenticated. In opposition to Commodore Construction's cross-motion for summary judgment Titanium Scaffold further fails to authenticate the agreement. Pier Head maintains that Trager authenticated the contract, but Trager, who was unfamiliar with the agreement, testified merely that Gerald Boyle was Commodore Construction's president. Titanium Scaffold and Pier Head present no evidence rebutting Commodore Construction's showing that no admissible, enforceable contract

supports their contractual indemnification claims. The indemnification agreement, even if admissible, lacks the consideration required for a binding indemnification agreement. Benitez v. Church of St. Valentine Williamsbridge New York, 171 A.D.3d 593, 594 (1st Dep't 2019). See GG Managers, Inc. v. Fidata Tr. Co. New York, 215 A.D.2d 241, 242 (1st Dep't 1995); Indem. Ins. Co. of N. Am. v. Levine, 168 A.D.2d 323, 325-26 (1st Dep't 1990). Structure Tone, not Titanium Scaffold, hired Commodore Construction to perform carpentry work, unrelated to Titanium Scaffold's scaffold work, on the project.

As set forth above, the subcontract dated August 4, 2015, between Structure Tone and Commodore Construction is authenticated. Since plaintiff's injury arose from Commodore Construction's work, Commodore Construction owes a duty to indemnify Structure Tone and to pay its defense expenses and is not entitled to summary judgment dismissing Structure Tone's third party claim for contractual indemnification. Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d at 414; Adagio v. New York State Urban Dev. Corp., 168 A.D.3d at 603; Wilk v. Columbia Univ., 150 A.D.3d at 503; Best v. Tishman Constr. Corp. of N.Y., 120 A.D.3d at 1082.

The subcontract also required Commodore Construction to

"purchase, maintain and provide evidence of Insurance with the coverages, types and limits specified at www.certfocus.com under the above Project Number." Kenny Aff. Ex. EE, at 2. While Commodore Construction presents an insurance policy effective November 1, 2014, to November 1, 2015, Commodore Construction does not show that the policy met the requirements listed on the website to which the subcontract refers. Commodore Construction thus fails to satisfy its burden to demonstrate procurement of the required insurance. Ortega v. Goldman Sachs Headquarters LLC, 150 A.D.3d 469, 470-71 (1st Dep't 2017). See Aramburu v. Midtown W. B. LLC, 126 A.D.3d 498, 501 (1st Dep't 2015). Nor does Commodore Construction present any grounds for dismissing Titanium Scaffold's third party claim against Commodore Construction for breach of a contract to procure insurance.

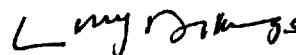
VII. CONCLUSION

In sum, for the reasons explained above, the court grants the motions for summary judgment by defendant Titanium Scaffold Services, LLC, and by defendants WFP Tower D Co. L.P., Brookfield Financial Properties L.P., and Structure Tone, Inc., to the extent of dismissing plaintiff's claims for violation of Labor Law §§ 240(1) and 241(6). The court grants the motion for summary judgment by WFP Tower D Co. L.P. and Brookfield Financial

Properties L.P. to the further extent of dismissing plaintiff's claims against these defendants for violation of Labor Law § 200 and for negligence and awarding them contractual indemnification against Titanium Scaffold Services, LLC. The court grants the motion for summary judgment by Structure Tone to the further extent of awarding this defendant contractual indemnification against Titanium Scaffold Services, LLC, and second third party defendant Commodore Construction Corp. to the extent that Structure Tone, Inc., was not at fault. The court also grants the cross-motions for summary judgment by third party defendant and second third party defendant Commodore Construction Corp. to the extent of dismissing the contribution and implied indemnification claims and the contractual indemnification claim by Titanium Scaffold Services, LLC, against Commodore Construction Corp. The court otherwise denies these motions and cross-motions and denies the cross-motions for summary judgment by Pier Head Associates, Ltd., in their entirety.

This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: August 14, 2020



LUCY BILLINGS, J.S.C.

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