Mosley v 75 Plaza LLC
2020 NY Slip Op 33492(U)
October 22, 2020
Supreme Court, New York County
Docket Number: 162922/2015
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ISAAC MOSLEY

- v -

75 PLAZA LLC et al.

INDEX NO. 162922/2015

MOT. DATE

MOT. SEQ. NO. 003 & 004

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).
Replying Affidavits NYSCEF DOC No(s).

This is a personal injury action arising from an accident on a construction site located at 75 Rockefeller Plaza (the "building" or "site"). Specifically, plaintiff was injured when he stepped on a stone on the C level of the building, twisted his ankle and fell onto his shoulder. Plaintiff alleges violations of Labor Law §§ 240[1], 241[6] and 200 and common law negligence against defendants RXR Atlas LLC ("RXR Atlas"), RXR Realty LLC ("RXR Realty"), RXR Construction & Development, LLC ("RXR Construction" and collectively, "RXR"), 75 Plaza LLC ("75 Plaza") and All State Interior Demolition, Inc. ("All State"). United Interior Renovations, LLC ("United") is the third-party defendant, against which the defendants have asserted claims for contractual indemnification, common law indemnification, contribution and breach of contract for failure to procure insurance.

There are two motions pending. The first (motion sequence 3) is by defendants for summary judgment dismissing plaintiff's claims and on their third-party claims for contractual and common law indemnification as well as for breach of contract. Plaintiff opposes the motion and cross-moves for partial summary judgment in his favor and dismissing defendants' and United's affirmative defenses.[1] United partially opposes the motion to the extent that the defendants seek relief against it and opposes plaintiff's cross-motion.

In motion sequence 4, United moves for summary judgment in its favor. Plaintiff opposes that motion and defendants partially oppose as to their third-party claims. Issue has been joined and note of issue was filed. The motions were timely brought as per a stipulation so ordered by the court on May 21, 2020. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

Many of the relevant facts are not in dispute. At the time of his accident, plaintiff was employed by United and worked at the site as a laborer who would typically load garbage into a truck outside the site. Defendant 75 Plaza is the fee owner of the site and defendant RXR Atlas was the tenant in possession who contracted for an interior gut demolition of the building with All State. The scope of the work included vacating the tenants, removal of interior spaces including concrete walls and piping, leave the core and shell and replace mechanical systems throughout. RXR Realty was the developer of the site and RXR Construction was the construction manager for the site. RXR is comprised of related entities.

All State's Vice President, Anthony Persico, testified at a deposition that All State entered into a contract to perform demolition work at the site sometime in 2014 or 2015. In August of 2015, All State had no employees other than the officers of the corporation. Persico explained that All State would ob-

[1] Plaintiff made the same cross-motion in connection with motion sequence 4 as well.

tain contracts for demolition work and then subcontract that work, typically to United. All State entered into a contract with United to perform demolition work at the site. A copy of the contract has been provided to the court.

Persico testified that he had the authority to stop the work if he observed dangerous work conditions, premises conditions or work practices. Otherwise, Persico stated that he would go to the site to oversee change orders or billing and his co-owner would go looking for change order work or any work that would happen on site.

Persico further testified that his nephew, Alex Persico ("Alex"), was employed by United as a laborer, although he would sometimes perform job functions like a foreman. Nonetheless, Persico maintained that there was no relationship other than contractor and subcontract between All State and United.

Moving on to plaintiff, as part of his job, plaintiff testified at his deposition that he would push containers of garbage to a truck where the container was dumped and then he would push the empty container back to the building. Plaintiff explained that his job was to be outside, not inside. Plaintiff further testified that he was directed by his foremen, either Alex or Vinny, to perform his job and no one else.

On the date of the accident, August 19, 2015, plaintiff went to the second floor of the site where Alex assigned him to do truck loading. Plaintiff specifically stated:

Q. What was your assignment?
A. Trucks.
Q. Same as before?
A. Yes, every day.

Two days before his accident, plaintiff had been instructed by Alex to go down to the C level to bring up pipes. Plaintiff testified that he couldn't do it that day because they were too heavy. Plaintiff told Alex something to that effect, and Alex responded that "he would try to find somebody to help [plaintiff]." Plaintiff testified that on the date of his accident, after they finished loading garbage onto the truck, Alex again asked him to go to the C level to bring up the pipes:

Q. Alex asked you to come inside?
A. Alex told me after we finished the truck. He asked me to go inside to help the guys bring up pipes.
Q. You said the guys.
A. Well, the workers.
Q. Those were the United [] workers?
A. Yes.
Q. It was to help them bring up pipes.
A. Yes.
Q. Was that garbage?
A. Yes.
Q. Was United in the process of demolishing the interior of the building?
A. It was already demolished already (sic).
Q. Do you know who did the demolition?
A. Everybody does the work in the building – all the workers.
Q. Okay. Do you know who demolished the pipes that you were picking up?
A. No.

Plaintiff described the condition of the C level, where his accident occurred, as follows.

Q. When was the last time prior to your accident that you had been to the C level?

A. Like two days before.
Q. Can you describe the C level that you saw two days before?
A. It was demo'd. It was doing demo.
Q. Can you describe that?
A. Knocking down debris, stone and everything.
…

Q. … You testified that a couple of days before your accident you were on the C level. Do you recall that?
A. Yeah.
Q. Okay. What were you doing on the C level?
A. Bringing up pipes.
…

Q. I'm asking you what the area on the C level looked like a couple of days before the accident?
A. Garbage was done (sic) there – debris.
Q. And was it debris on the ground?
A. Yes.
Q. Can you describe that?
A. What you mean describe it? It was all over the place.
Q. What was all over the place?
A. The pipes wasn't cut then. They just had the stones and bricks all on the ground.
Q. Did it appear similar two days later when you had your accident?
A. Did I appear?
Q. Did the area look the same?
A. It looked the same, yes.
Q. Was there lighting?
A. No. No light.
Q. How did you get around?
A. When I got off the elevator it had lights. Then as I walked, that's when it happened.
Q. Were there lights where it happened?
A. No – lights on the other side.
Q. Could you see where you were walking?
A. No.

Plaintiff admitted that he never complained about the condition of the C level and he was unaware if anyone else ever had. Plaintiff explained that he walked in two different directions the day of his accident and two days prior thereto. Two days prior, plaintiff went left and testified that he could see where he was walking and that there were lights overhead where he walked. On the date of his accident, plaintiff walked straight from the elevator and maintained that this area was dark:

Q. Elevator door's open?
A. Yes.
Q. You walk out, right?
A. Yes.
Q. Seven or eight feet in front of you you could see mini containers?
A. Yes.
Q. Did you walk straight to them?
A. I didn't have time to.
Q. Did you walk at all?
A. Yeah, a couple of feet.
Q. Then what happened?

A. I stepped on the stone and twisted my ankle and fell.
Q. How do you know you stepped on the stone?
A. Because when I was on the ground, I looked to see what I stepped on and it was right there.
Q. No other stones were there?
A. There was more garbage around, but that's the only one I seen my foot step on.
Q Did you feel the stone underneath your foot when you stepped on it?
A. Yes.
Q. And this is your left foot, correct?
A. Yes.
…

Q. How far did you fall? Did you fall straight down?
A. I fall on my shoulders.
…

Q. Was there any other debris in the area at all?
A. Yes.
Q. What else was there?
A. A little stone laying around on the other side, you know – right in the front.
…

Q. You could see it despite the fact that it was dark?
A. Yes. You could see.
Q. Do you know what the stones were from?
A. I guess the ceiling or the wall.

Plaintiff described the stone that he stepped on as "sharp" and about three or four inches high and two to three inches wide. Plaintiff believed that it was made of concrete and had come from the wall. Plaintiff yelled out in pain after his accident, and another United employee named Brandon Pollack who was working on the subcellar level heard plaintiff and responded by coming upstairs. According to a "Witness Sheet" which has been submitted to the court by plaintiff, Pollack observed plaintiff "standing in a bent over position with his left foot raised up." Pollack asked plaintiff what happened, and plaintiff replied "that he couldn't walk & need help." Pollack helped plaintiff get to the elevator, took him up to the lobby and "got Alex"

RXR Realty produced Marcelo Renzi for a deposition, its senior vice president of construction and development. Renzi testified that he would visit the site every one or two weeks to check in with the construction team but did not have anything to do with safety provisions. According to Renzi, "[e]ach individual subcontractor is responsible to provide their own site safety plans, and also monitor associated site safety." Further, a third party called CRS Group monitored the subcontractors and site safety. Renzi further testified that each subcontractor was required "to do cleanup and consolidate" ... "[a]t the end of the shift" to "prevent tripping hazards."

United produced Steve Srnic for a deposition. He confirmed that United foreman directed United employees on what work to do and were able to tell the United employees to stop working if they saw something unsafe. United also produced Dario Calzona for a deposition. Calzona observed plaintiff on the first floor "screaming because was in pain" (sic). Calzona stated that someone had brought plaintiff up from the C level by this point and that plaintiff had told him "he lost balance because there was something on the floor. He was walking."

Approximately 15-20 minutes thereafter, Calzona went down to the basement with Persico:

Q. What did you go down to look at and what did you see in the basement?

A. We went in the basement and the building 75 Rockefeller Plaza has a cellar and subcellar, so we went on the cellar as [plaintiff] say to look around if there was something on the floor, but actually we didn't see nothing.
Q. So you went down to the cellar and you didn't see anything there?
A. Not really. Okay, the floor was not like regular, was not smooth because the demo was done at the moment, so, you know, when you walk on the concrete is not smooth once you do demo.
Q. So it was unlevel?
A. Yes, a little bit unlevel, like somewhere there was a little step like a quarter inch, half inch. It was not perfectly regular.
Q. Was there any debris down there?
A. I don't remember debris.
Q. How was the lighting conditions down there?
A. It was good.
Q. You could see well?
A. Yes.
…

Q. When you went down there, did you walk around the whole basement?
A. We walked more around the area that [plaintiff] told us. I mean, he described the accident like it happened close to the freight car, so we went around that, so we didn't walk all the cellar complete.
Q. Were there any other workers down there?
A. I believe so, but from other trades.
Q. Other trades?
A. Yes.
Q. Any demolition working?
A. Not that day.
…

Q. Do you have any idea what [plaintiff] was doing inside the building at the time of the accident?
A. No.

RXR Construction produced Claude Pierre-Louis for a deposition, a construction supervisor for RXR Realty. According to Pierre-Louis, the demolition of the cellar levels should have been completed by February 9, 2015. Pierre-Louis further explained that the demolition debris from cellar levels should have been removed daily by being put in containers, taken into the elevator and wheeled out to the street. Pierre-Louis identified Marc Losquadro as being the construction supervisor for the cellar floors and testified that he did a walkthrough of his area every day. He further testified that the site safety contractor would walkthrough the site daily and generate a report and at no point did anyone advise Pierre-Louis of any safety issues involving debris on the cellar levels.

Losquadro appeared for a non-party deposition as he is no longer employed by RXR Construction. He admitted that he was responsible for the cellar levels and further testified that when they did walkthroughs, they would only look at parts of the building where work was going on.

The parties have also submitted an accident form generated in connection with plaintiff's accident that indicates that plaintiff "fell on a stone"… "felt his ankle turn and afterwards was carried by his coworkers to the elevator and subsequently to an area where he could stay seated in the lobby level to wait for an ambulance. The parties have further submitted plaintiff's Workers' Compensation submissions which provides that plaintiff "tripped on debris causing unspecified injury to left foot, ankle, and leg." Finally, the parties have submitted site safety logs generated by the non-party site safety monitor in connection with the site.

Parties' arguments

At the outset, plaintiff does not oppose dismissal of his Labor Law § 240 [1] claim. Defendants argue that plaintiff cannot make out a prima facie case of negligence nor a violation of New York Labor Law §§200, 240(1) and 241(6) against them. They further maintain that plaintiff cannot establish proximate causation. Finally, they seek summary judgment against United on their claims for contractual indemnification, common law indemnification, contribution and breach of contract as the injury arose out of the work being performed by United while Plaintiff was on his way to perform a task he was given by his United supervisor. Defendants point to a decision/order by the Honorable David B. Vaught in Byron Galarza v. Commet 380, Inc., et al., Supreme Court, Kings County Index Number 5374/2015, and contend that indemnity regarding a contract between All State and United with an identical indemnity provision has already been granted in their favor.

Meanwhile, plaintiff argues that he is entitled to partial summary judgment on liability because tripped on debris where demolition of stone and concrete had been completed well before and Defendants admitted that any debris should have been cleaned up by the end of the shift or the day it was done. Plaintiff maintains that he is entitled to partial summary judgment against RXR Atlas and RXR Construction on his Labor Law § 241[6] cause of action predicated upon the violation of Industrial Code § 23-1.7[e][2] which mandates that floors and similar areas where persons either work or pass be free from debris, materials and sharp projections. Alternatively, plaintiff argues that issues of fact preclude summary judgment on this claim. Finally, plaintiff maintains that the defendants and United have failed to meet their burden on their motion as to his Labor Law § 200 and common law negligence causes of action because they have not shown lack of notice and there is a question of fact as to whether All State should have cleaned up the stone as part of its responsibilities.

United argues that plaintiffs' claims must be dismissed because he tripped over an object that was an integral part of the work being performed. United further argues that All State and the other third-party plaintiffs cannot obtain contractual indemnification to the extent that they were negligent because All State exercised supervisory control over the work done by plaintiff and his co-workers at United. United further argues that plaintiff did not suffer a grave injury thereby barring the claims against it for contribution and common law indemnification. Finally, United asserts that it procured the required insurance coverage as to the claim against it for breach of contract for failure to procure insurance.

In opposition to the motion as to their third-party claims, defendants dispute United's claim that any of them supervised plaintiff's work, that at most they had general supervisory authority and the presence of site safety managers does not give rise to liability. As for the breach of contract claim, defendants maintain that since United "has refused to recognized [them] as an additional insured in this matter, as evidenced by the correspondence denying the tender of defense and indemnification of [defendants]" United has breached its contractual obligation to procure commercial general liability additional insured coverage on behalf of defendants.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue

(*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Preliminary issues

At the outset, defendants and United's motions for summary judgment dismissing plaintiff's Labor Law § 240[1] claim is granted without opposition, as the claim is inapplicable to the facts of this case. The court further dismisses all of plaintiff's Labor Law § 241[6] claims premised upon Industrial Code violations except Section 23-1.7[e][2] as plaintiff has also failed to oppose the related portions of the instant motions and such claims are deemed abandoned.

Plaintiff concedes that All State is not a proper labor law defendant. Therefore, the Labor Law claims against All State are also severed and dismissed. Defendants further argue that RXR Construction is not a proper Labor Law defendant because it was just a construction manager rather than a contractor or owner within the meaning of the Labor Law. Plaintiff opposes this branch of the motion.

"The label of construction manager versus general contractor is not necessarily determinative" (*Rodriguez v. Dormitory Auth. Of the State of N.Y.*, 104 AD3d 529 [1st Dept 2013] quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). A construction manager can be deemed a statutory agent of the owner under the Labor Law where it has "supervisory authority over the project and specific duties with regard to safety" (*Minorczyk v. Dormitory Auth of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010]). Further, a construction manager that "was responsible for planning and coordinating construction activity throughout the project, providing safety supervision of all contractors and subcontractors on the project, and conducting daily safety walkthroughs on the site, an issue of fact exists as to whether it was the functional equivalent of a general contractor so as to hold it liable under" the Labor Law (*Rodriguez, supra* at 531; *see also Tomyuk v. Junefield Assoc. et al.*, 57 AD3d 518 [2d Dept 2008]).

As plaintiff's counsel points out, RXR Construction was "contractually obligated to maintain daily logs identifying, among other things, problems that might affect the progress of the work as well as accidents and injuries (Ex. V, section 2.3.2.6), and had laborers, construction supervisors, a senior project manager, project manager and assistant project manager (Ex. Q, pp. 22-23, 26)." There was no general contractor at the site. Further, Pierre-Louis and Losquadro testified that his duties included walking the site daily to look for unsafe conditions and he had the authority to stop the work if they observed any unsafe conditions or unsafe work practices. Upon these facts, RXR Construction can be held liable as the functional equivalent of a general contractor under the Labor Law. Accordingly, defendants' argument on this point is rejected.

The court now turns to the parties' substantive arguments as to plaintiff's claims.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.7[e][2] was violated as a matter of law.

Industrial Code § 23-1.7[e][2] states in pertinent part as follows:

> [e] Tripping and other hazards. …
>
> > [2] Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

The court denies the parties' motions for summary judgment as to plaintiff's Section 241[6] claim premised upon this Industrial Code provision for the reasons that follow. The argument that the stone or cement debris on the floor which plaintiff claims he tripped upon was the byproduct of ongoing demolition fails. On this record, there is evidence from which a reasonable factfinder could determine that no demolition was occurring on the C level at the time of plaintiff's accident. Therefore, it remains a question of fact on this record whether the debris upon which plaintiff tripped was "an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability" (*Bond v. York Hunter Constr., Inc.* 270 AD2d 112 [1st Dept 2000]).

Otherwise, the court rejects defense counsel's mischaracterization of plaintiff's testimony, to wit: "[w]hether or not there was demolition recorded in the daily reports, it is clear from plaintiff's testimony that he observed the debris he claims caused his accident two days before the subject occurrence" (emphasis removed). Plaintiff's testimony about the area he observed two days prior to his accident is, at best from defendants' point of view, unclear, and otherwise describes a different area than the location of his accident. To the extent that the movants argue that plaintiff was on the C level to move the debris that he ultimately tripped over, that argument is also not supported by the record.

While plaintiff seeks partial summary judgment on liability as to Industrial Code § 23-1.7[e][2], there is a triable issue of fact as to whether plaintiff actually tripped on debris, and as previously noted, whether such debris was the inherent result of ongoing work at the site. As to the former, plaintiff allegedly stated to his coworker that he lost his balance. Further, plaintiff's coworker inspected the area of plaintiff's accident shortly after it occurred and testified that he did not observe any debris on the floor. This testimony is sufficient to raise a triable issue of fact as to how plaintiff's accident occurred.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

On this record, it is clear that plaintiff was only supervised by his employer. That one of plaintiff's foremen wore a vest that said All State on it does not change that fact. Persico clearly testified that while he had the authority to stop work at the site, he didn't exercise it. "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (Hughes v. Tishman Constr. Corp., 40 AD3d 305 [1st Dept 2007]).

Therefore, absent notice or proof that the defendants created the injury-producing condition, plaintiff's Section 200 and common law negligence claims must be dismissed. The court disagrees with plaintiff's counsel that the defendants have not established a lack of notice as matter of law.

Plaintiff did not testify that he observed the debris which he tripped on prior to his accident. Further, defendants' employees testified that they did daily site inspections where work took place. Indeed, as defense counsel points out, plaintiff relies on the fact that demolition work had been completed on the C level long before plaintiff's accident occurred. Plaintiff cannot alternatively argue that defendants should have been inspecting an area where no work was even taking place in an attempt to establish a triable fact on the issue of constructive notice.

As for the issue of inadequate lighting, the court finds it to be a red herring. While plaintiff may have described parts of the C level as being dark, he testified that his accident occurred within steps outside of the elevator, that the area near the elevator was adequately lit and that if he had looked down he would have observed the piece of debris that he tripped upon.

Finally, plaintiff's attempt to raise a triable issue of fact as to whether All State left the debris on the floor that he tripped on is unavailing. There are no facts on this record from which a reasonable fact-finder could conclude in plaintiff's favor on this point. Accordingly, plaintiff's Labor Law § 200 and common law negligence claims are severed and dismissed.

The court now turns to the third-party complaint.

Contractual Indemnification

Defendants seek summary judgment on their claim for contractual indemnification against United. The contract between All State and United provides in relevant part as follows:

> INDEMNITY: To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Contractor, the Contractor's other subcontractors, the Architect/Engineer, the Owner and their agents, consultants and employees involved in the Project (the "Indemnitees") from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, costs and expenses arising out of or resulting from the Subcontractor's performance of the Work

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

There can be no dispute that plaintiff's accident occurred while he was working for United and that plaintiff's claims arise out of or result from United's performance of the work set forth in the contract between United and All State. As the Second Department has explained, "[a] party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (*Arriola v. City of New York*, 128 AD3d 747 [2d Dept 2015]). Since defendants have met their burden, they are entitled to summary judgment against United on their third-party claim for contractual indemnification.

Common law indemnification and contribution

United argues that since it employed plaintiff and plaintiff is not alleging a grave injury since he merely suffered an ankle sprain and fracture of the calcaneus, United cannot be held liable for contribution or common law indemnification under Worker's Compensation Law §11.

Workers' Compensation Law § 11 provides:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of 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 or 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 permanent total disability.

Under this statute, claims for contribution and common law indemnification against an employer arising from the employee's injuries do not lie unless the employee suffers a grave injury as defined thereunder (*see generally Rubeis v. Aqua Club Inc.*, 3 NY3d 408 [2004}).

Neither plaintiff nor defendants raise any arguments in opposition to this branch of the motion. Therefore, United is granted summary judgment dismissing defendants' claims for common law indemnification and contribution. Defendants' related motion as to these claims is denied.

Breach of contract

The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]). The contract between All State and United provided in relevant part as follows:

> Subcontractor shall purchase and maintain, at its own expense, the following insurances as will protect it, Contractor and Owner (as defined in the Purchase Order), and their respective officers, directors, shareholders, affiliates, partners, agents and employees from the claims set forth below which may arise out of or as a result of the Subcontractor's obligations under this Purchase Order…

United represents that it obtained Scottsdale primary policy number CPS2066343, with policy limits of $1 million per occurrence and $2 million aggregate, Scottsdale umbrella policy number NXS0001503, with policy limits of $1 million per occurrence and $2 million aggregate and National Union excess policy number BE 035459452, with policy limits of $9 million per occurrence and $9 million aggregate. Therefore, United argues that it met its obligations under the contract. In turn, defendants contend that United breached the contract when its insurer failed to tender a defense. The court disagrees with defendants. Any claim that defendants have regarding the tender does not give rise to a claim for breach of contract against United, since the record is clear that United performed as it was required to do by obtaining the necessary insurance in favor of defendants.

Accordingly, United's motion is also granted to the extent that it is entitled to summary judgment dismissing the third-party claim for breach of contract as well. Defendants' motion as to these claims is also denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendants' motion for summary judgment (sequence 3) and United's motion for summary judgment (sequence 4) are granted in part as follows:

[1] Plaintiff's Labor Law claims against All State are severed and dismissed;

[2] Plaintiff's Labor Law § 240[1] claim is severed and dismissed;

[3] Plaintiff's Labor Law § 241[6] claim premised upon all but the violation of Industrial Code § 23-1.7[e][2] is severed and dismissed;

[4] Plaintiff's Labor Law § 200 and common law negligence claims are severed and dismissed;

[5] Defendants are granted summary judgment on their third-party claim for contractual indemnification against United; and

[6] United is granted summary judgment dismissing defendants' third-party claims against United for common law indemnification, contribution and breach of contract and said claims are severed and dismissed.

And it is further

ORDERED that that the issue of the amount for which United should reimburse the defendants for the defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee to hear and determine; and it is further

ORDERED that the defendants' counsel shall, within 60 days from the date of entry this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that defendants' motion and United's motion are otherwise denied; and it is further

ORDERED that plaintiff's cross-motions are denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/22/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☒ REFERENCE