Mazzarisi v New York Socy. for the Relief of the Ruptured & Crippled
2020 NY Slip Op 33837(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 155022/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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LOUIS MAZZARISI, DANIELLE MAZZARISI,

Plaintiff,

- v -

NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED, MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY,

Defendant.

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INDEX NO. 155022/2016

MOTION DATE 10/30/2020, 10/30/2020

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED, MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY

Plaintiff,

-against-

FRESH MEADOW CHILLER SERVICES, LLC

Defendant.

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Third-Party
Index No. 595493/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 129, 130, 132, 135, 136, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 133, 134

were read on this motion to/for DISMISS.

ORDERED that the branch of Defendant Relief of the Ruptured and Crippled, Maintaining the Hospital for Special Surgery ("HSS") (Motion Seq. 002), pursuant to CPLR 3211, for summary judgment dismissing Plaintiff's Labor Law claims is granted to the extent that Plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed; and it is further

ORDERED that the branch of the HSS's motion, pursuant to CPLR 3211, for summary judgment on its Third-Party Complaint against Fresh Meadow Chiller Services LLC ("Fresh Meadow") for contractual and common law indemnification, contribution and breach of contract is denied; and it is further

ORDERED that the cross-motion of Plaintiff Louis Mazzarisi and co-plaintiff Danielle Mazzarisi pursuant to CPLR 3211, for summary judgment granting the complaint in its entirety is denied; and it is further

ORDERED that the motion of Third-Party Defendant Fresh Meadow (Motion Seq. 002), pursuant to CPLR 3211, for summary judgment dismissing HSS's Third-Party Complaint is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that the counsel for third-party defendant Fresh Meadow shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

NON FINAL DISPOSITION

MEMORANDUM DECISION

In this Labor Law action, the following motions are consolidated for disposition.

In Motion Seq. 002, defendant New York Society for the Relief of the Ruptured and Crippled, Maintaining the Hospital for Special Surgery ("HSS") moves, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff Louis Mazzarisi's[1] complaint against it, and summary judgment granting its third-party complaint against Fresh Meadow Chiller Services LLC ("Fresh Meadow") for contractual and common law indemnification, contribution and breach of contract.

In Motion Seq. 003, Fresh Meadow moves, pursuant to CPLR 3212, for summary judgment dismissing HSS's third-party complaint in its entirety.

BACKGROUND FACTS

Defendant HSS owns a hospital (the "Hospital") located at 535 East 70th Street, New York, New York. Through a Preventative Maintenance Agreement entered into on January 15, 2013 ("PMA"; NYSCEF doc No. 89), HSS engaged Fresh Meadow to provide maintenance of certain equipment, including two large industrial chillers (the "Chillers") which provided cold water to the MRI machines in the Hospital.

At the time of Plaintiff's accident on November 10, 2015, he was employed as a chiller technician by Fresh Meadow (NYSCEF doc No. 90, p. 18:20-25). On said date, Plaintiff and his co-worker, Mr. Joe Humphries, were tasked to power wash the coils on the Chillers (*Id.*, pp. 33:7-9; 49:24 to 50:3).

The Location of the Chillers

The Chillers were located outside the Hospital, in a utility area (the "Utility Area") geographically located between the Hospital and the New York Presbyterial Hospital, next to the

[1] Co-plaintiff Danielle Mazzarisi is the spouse of plaintiff Louis Mazzarisi. She has brought a claim for loss of services.

Franklin D. Roosevelt Drive ("FDR") (*Id.*, p. 55; NYSCEF doc No. 93, 19:12-17; NYSCEF doc No. 96, ¶ 5). The Utility Area was partially covered by a roadway overhead and partially exposed to the elements through grates in the roadway (NYSCEF doc No. 96. ¶ 15). When it rained, precipitation can come into the Utility Area through the grates (NYSCEF doc No. 93, 33:6-12). The flooring of the Utility Area was somewhat sloped (NYSCEF doc No. 93, 39:4-7).

HSS's plant manager, Mr. Brian Moran, testified that the Chillers were mounted on an elevated platform which had a walkway and perimeter guardrail (*Id.*,40:5-22). He further testified that "because there's a grade [on the floor], the west side [of the elevated platform was] probably 3 feet off the ground and the east side [was] probably 6 feet off the ground." (*Id.*, 40:5-17). While the platform was used to walk around the Chillers, Mr. Humphries testified that the north side of the elevated platform close to the FDR drive was not large enough to walk (NYCEF doc No. 91, 78:22 to 79:10).

The Night of the Accident

At his deposition, Plaintiff testified that he and Mr. Humphries started their task to clean the chiller coils at around 8:00 p.m. (NYSCEF doc No. 90, 79:2-4). Plaintiff recounted that the coils they were supposed to clean that night were located in the middle of the Chillers and protected by rubber coated aluminum covers (*Id.*, pp. 62-63). Thus, to access the coils, the covers had to be removed (*Id.*).

At the time of his accident, Plaintiff testified that they had completed cleaning the coils of one of the Chillers and was in the process of putting the cover back on (*Id.*, p. 67). According to Plaintiff, due to the limited platform space on the northern side of the eastern chiller, he had to use a ladder he found in the premises to remove and reinstall the coil cover in that area (NYSCEF doc No. 96, ¶ 22; NYSCEF doc No. 90, p. 43:7-16; 44:13-15). However, while he was ascending the

ladder with the cover in one hand and holding the side of the ladder with his other hand, the ladder wobbled and caused the Plaintiff to slip and fall to the ground (NYSCEF doc No. 90, pp. 100-101). As a result of the accident, Plaintiff allegedly sustained injuries to his left leg and ankle requiring three operations, including open reduction internal fixation surgery and insertion of hardware into the ankle (NYSCEF doc No. 96, ¶ 2).

This Proceeding

Plaintiff and his spouse commenced this action on June 15, 2016 against HSS. Plaintiff seeks damages under New York Labor Law §§ 200, 240(1) and 241 (6), while his spouse seeks damages for loss of services.

On June 19, 2017, HSS brought a third-party complaint against Fresh Meadow for contractual and common law indemnification, contribution and breach of contract for Fresh Meadow's alleged failure to procure insurance naming HSS as additional insured.

HSS now moves, by way of summary judgment, to dismiss the complaint against it and grant its third-party complaint against Fresh Meadow (Motion Seq. 002). Fresh Meadow opposes while Plaintiff cross-moves for summary judgment granting the complaint in its entirety. HSS and Fresh Meadow oppose the cross-motion.

Separately, Fresh Meadow seeks an order granting summary judgment dismissing HSS's third-party complaint in its entirety (Motion Seq. 003). HSS opposes.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.,* 15 NY3d 297, [Ct App 2010], quoting *Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [Ct App 1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [Ct App 1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [Ct App 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [Ct App 2008] quoting *Alvarez*, 68 NY2d at 324).

Here, since each side seeks summary judgment, each side bears the burden of making a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217[A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50729[U] [Sup. Ct., N.Y. County 2012], aff d, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra, Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474 [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*Id.*). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible

argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Here, the parties dispute whether the activity Plaintiff was engaged in at the time of the accident is covered by Labor Law 240 (1). HSS argues that 240 (1) does not cover routine maintenance done outside the context of construction work. HSS cites to *Rukaj v Eastview Holdings, LLC* (36 AD3d 519 [1st Dept 2007]), where the First Department, relying on *Broggy v Rockefeller Group Inc.*, (30 AD 3d 204 [1st Dept 2006]), ruled that the plaintiff therein had "no

cause of action under Labor Law § 240(1), there being no claim of any ongoing construction or demolition activity at the site at the time of the accident, and the record establishing that plaintiff fell off the ladder while engaged in the cleaning of air conditioning units routinely performed pursuant to a preventive maintenance contract." (NYSCEF doc No. 84, ¶ 25) HSS also cites to *Esposito v New York City Indus. Dev. Agency* (NY3d 526 [2003]) where the Court of Appeals upheld the finding of the First Department that replacement of air conditioning components in the course of normal wear and tear constituted routine maintenance not covered by 240 (1) (*Id.*, ¶ 27).

Plaintiff, on the other hand, argues that *Rukaj* relies on a discrete pronouncement by the First Department in *Broggy* that was ubsequently rejected by the Court of Appeals upon review. Plaintiff asserts that the Court of Appeals in *Broggy* in fact held that "cleaning" falls within the ambit of 240 (1). Plaintiff maintains that while the Court of Appeals ultimately upheld the First Department's dismissal of the 240(1) cause of action in *Broggy*, it was not because the plaintiff's cleaning work was not a covered activity, but because his work did not involve an elevation-height risk. (NYSCEF doc No. 96, ¶ 69). Plaintiff also asserts that the cleaning of coils was not routine maintenance given that the evening of the incident was only the third occasion in nearly three years that this work was performed by Fresh Meadow (*Id.*, ¶ 59).

Fresh Meadow opposes Plaintiff's cross-motion and echoes HSS's position that Plaintiff was engaged in routine maintenance at the time of his accident. Fresh Meadow also argues that *Rukaj* is still a good law.

The Court agrees with HSS and Fresh Meadow that Plaintiff's work at the time of his accident is outside the scope of 240 (1).

In *Rukaj*, the First Department dismissed a 240 (1) claim of a plaintiff who was "pressure washing" condenser coils of a building's external air conditioning units pursuant to a preventative

maintenance contract. The *Rukaj* court held that plaintiff had no cause of action under 240 (1) "there being no claim of any ongoing construction or demolition activity at the site at the time of the accident, and the record establishing that plaintiff fell off the ladder while engaged in the cleaning of air conditioning units routinely performed pursuant to a preventive maintenance contract." In so holding, the *Rukaj* court relied on the First Department decision in *Broggy*. In *Broggy*, the court dismissed a 240 (1) claim of a plaintiff who was performing a commercial interior window cleaning on two alternative grounds: (i) that the cleaning was unrelated to any construction or alteration work; or (ii) that there was no evidence that plaintiff was exposed to elevation-related risk. Upon review, the Court of Appeals granted the dismissal of the 240 (1) claim on the basis of the second ground set forth by the First Department. The Court of Appeals impliedly rejected the first ground when it held that ""cleaning" is expressly afforded protection under section 240 (1) whether or not incidental to any other enumerated activity."

Following the Court of Appeals' holding in *Broggy*, Plaintiff is correct that older appellate decisions holding that cleaning activities are not protected under 240 (1) if done outside the context of a construction work is no longer good law (*see also Soto v J. Crew* (21 NY3d 562 [2013]). However, the Court of Appeals in *Broggy* did not overturn, but rather re-affirmed, the doctrine that routine maintenance falls outside the scope of 240 (1) ("As a result, in *Brown v Christopher St. Owners Corp.* [] we did not preclude liability on the ground that the exterior window cleaning was not part of a construction, demolition, or repair project. Rather, we concluded that "routine, household window washing" was "not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240.") Thus, HSS and Fresh Meadow are in turn correct that the holding in *Rukaj* is still good law to the extent that the dismissal therein was based on a finding that plaintiff was engaged in routine maintenance not protected under 240 (1).

Having clarified the above case law, this Court now turns to the question of whether the cleaning of the coils here is the type of cleaning afforded protection under section 240 (1). In addressing this question, this Court finds guidance from *Soto v J. Crew* (21 NY3d 562 [2013]), which was notably cited by all parties here to support their respective propositions.

In *Soto*, the Court of Appeals was presented with the issue of whether an employee of a commercial cleaning company could recover under 240 (1) for falling from a four-foot ladder while dusting a top shelf of a retail store. The *Soto* Court laid down four factors to help determine which cleaning activities are *excluded* from the ambit of 240 (1), thus:

> "Outside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as "cleaning" under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project."

In making the determination, the court must weigh all of the factors and look at the totality of circumstances (*Id.*)

The work involved here is outside the scope of 240 (1). The evidentiary record reflects that the cleaning of the chiller coils was part of the maintenance work that Fresh Meadow contracted to provide HSS under the PMA (*see* NYSCEF doc No. 89, p. 2; see also NYSCEF doc No. 92, pp. 104-105; *see also Rukaj, supra).* That the cleaning of coils was not performed on a "daily" "weekly" or "relatively frequent" basis is of no moment as the work was performed on a "recurring basis" at a frequency of once a year (*see* Fresh Meadow's Daily Service and Repair Report [NYSCEF doc No. 112]). It is for this very reason that the night of the incident was only the third

time that the chiller coils were cleaned as the year of Plaintiff's accident (2015) was year 3 of 5 of the life of the PMA between HSS and Fresh Meadow (NYSCEF doc No. 132, ¶ 13).

The cleaning of the chiller coils also did not require specialized equipment or expertise. None of the cases cited by Plaintiff concludes or makes any finding that a power washer is specialized equipment as Plaintiff suggests. The power washing in *Fox v Bozman-Arrcher Realty Services, Inc.* (266 AD 2d 97 [1st Dept 1999]) was found to be covered by 240 (1) because the activity "does not fall under the rubric of '"truly domestic"' household cleaning", while the pressure cleaning from a ladder in *Ekere v Briker Corp.* (249 Ad2d 104 [1st Dept 1998]) was found to be protected because "no block, wood or rubber guards were placed under the ladder". The courts in these cases made no pronouncement that the work in question necessitated the use of a specialized equipment. Plaintiff also cannot rely on *Gordon v Eastern Ry. Supply Inc.* (82 NYS2d 555 [1993]) as the sandblaster in that case is not comparable to the pressure washer used by Plaintiff in this case. As to expertise, Plaintiff only argues that "experience" was required for the work, without showing that experience is tantamount to "expertise" as contemplated by *Soto*. Plaintiff's reliance on Fresh Meadow's Environmental Health and Safety Plan ("HASP") is misplaced. As pointed out by Fresh Meadow, the only reference to any specialized training in the HASP has to do with the handling of hazardous chemicals, which is certainly not at issue here (NYSCEF doc No. 132, ¶ 25).

More crucially, the Court finds that the subject accident did not involve extraordinary elevation risks envisioned by 240 (1) so as to bring this case within the ambit of the protections afforded by the statute. HSS and Fresh Meadow presented evidence that Plaintiff's work could have been completed without any elevation risk. Mr. Humphries confirmed in his testimony that there was no need to take the coil covers at the north side of the chillers as Plaintiff could have

gained access to the coils from underneath the machine using the east and west side platforms (NYSCEF doc No. 91. pp. 88:9-24). Mr. Moran also testified that the coils were previously cleaned from the ground by shooting the pressure washer up (NYSCEF doc No. 93, 63:5-15). The work therefore did not necessarily require Plaintiff to use a ladder at the north side of the chillers or to work at an elevated height at all.

Based on the foregoing, the Court finds that the totality of the circumstances militates in favor of categorizing Plaintiff's work at the time of his accident to be outside the scope of 240 (1). Therefore, the branch of HSS's summary motion to dismiss Plaintiff's Labor Law 240 (1) claim is granted and said claim is served and dismissed. Consequently, the branch of Plaintiff's cross-motion for summary judgment related to this claim is denied.

Labor Law § 241(6)

Labor Law § 241 (6) entitled "Construction, excavation and demolition work," provides, in relevant part:

> "All 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."

In *Nagel v D & R Realty Corp.* (99 NY2d 98 [2002]), the Court of Appeals affirmed the dismissal of 241 (6) claim of plaintiff who was performing a two-year safety test on an elevator, holding that the protections of 241 (6) "do not apply to claims arising out of maintenance of a building or structure outside of the construction context." In *Nagel*, the Court of Appeals also painstakingly went through the history of the statute to show the deliberate intention of the Legislature to protect workers from industrial accidents specifically in connection with construction, demolition or excavation work. New York courts have since limited the application of 241 (6) in accordance with *Nagel* (*see e.g.*, *Amendola v Rheedlen* 125th St., LLC 105 AD3d 426

[1st Dept 2013] and *Barnes v City of New York*, 77 AD 481 [1st Dept 2010]). In this case, it is undisputed that the cleaning of chiller coils was not connected to any construction, demolition or excavation of a building or structure and is therefore not within the statute's coverage. Accordingly, HSS is entitled to dismissal of Plaintiff's Labor Law § 241 (6) claim and the branch of Plaintiff's motion for summary judgment on this claim is denied.

Labor Law § 200 and Common Law Negligence

Plaintiff claims negligence against HSS under both the common law and Labor Law § 200. Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Dunham v Hilco Constr. Co.*, 89 NY 2d 425 [1996], *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d [1993]). Unlike Labor Law § 241 (6), Labor Law § 200 "does not require that the plaintiff be engaged in construction, excavation or demolition" (*Mejia v Levenbaum*, 30 AD3d 262 [1st Dept 2006]). Thus, this Court's dismissal of Plaintiff's Labor Law § 241 (6) claim does not prevent this Court from proceeding to analyze Plaintiff's Labor Law § 200 claim.

Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev.,* LLC, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory

control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*Id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc.*, IX, LLC, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Plaintiff claims that his accident arose from a dangerous condition on the work site. Particularly, he alleges that there was "insufficient service area around the chillers, which required the use of a ladder in the subjacent floor, which was uneven and slippery." (NYSCEF doc No. 96, ¶ 103). He further points out that HSS's plant manager, Mr. Moran, knew that the floor at the north side of the chillers was sloped, that precipitation rain water would come into the area, and that Plaintiff's work would create a slippery and dangerous work area (*Id.*, ¶ 104). Plaintiff also relies on his expert witness, Mr. Robert Fushs, who submitted an affidavit (NYSCEF doc No. 113) saying that the work area around the chillers and the sloped floor underneath the northside of the chillers failed to comply with industry standards (*Id.*, ¶¶ 109-110).

The Court finds that there are issues of fact that render summary judgment against HSS improper at this juncture. To impute actual and/or constructive notice of the dangerous condition at the work site, Plaintiff relies on Mr. Moran's testimony that to access the coil covers, "you use

a ladder" (NYSCEF doc No. 96, ¶ 110). However, Mr. Moran did not testify that to complete the work, he knew that one has to use a ladder. Mr. Moran had never cleaned the chiller coils. He testified that he once observed the chillers being cleaned, but no ladder was used as the coils were cleaned by shooting the pressure washer up from the ground.

There is nothing else on the record which suggests that HSS had actual or constructive notice that cleaning the coils maybe accomplished by removing their covers at the north side through the use of a ladder. As there remains issues of fact, HSS is not entitled to dismissal of the part of Plaintiff's Labor Law § 200 and common law negligence claim, nor is Plaintiff entitled to summary judgment at this juncture. Accordingly, co-plaintiff's derivative suit also cannot be granted or dismissed at this juncture.

HSS's Contractual Indemnification Claim Against Fresh Meadow

HSS moves for summary judgment in its favor on its claim for contractual indemnification as against Fresh Meadow. Fresh Meadow moves for summary judgment dismissing said claim against it.

"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]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a

finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

HSS argues that the relevant provision under the PMA is the section entitled "Limitations of Liability" which provides the following:

> "FMCS shall not be liable for personal injuries or property damage arising from causes beyond its reasonable control or without its fault or negligence. FMSC shall not be liable for any delay or default in performing if such delay or default is caused by any condition or circumstance beyond FMSC's reasonable control, such as governmental restrictions, strikes or other labor troubles, acts of God, interruption or irregularities in electrical power or telephone services, embargoes, or unavailability of materials or parts etc. *In no event shall FMCS liability for direct or compensatory damages exceed the payments received by FCMS from Customer under this contract.* FMCS shall not be liable for any special, indirect, consequential or incidental damages. The foregoing limitations on damages shall apply under all liability or causes of action, including, warranty, tort (excluding obvious negligence) and strict liability." (italics added for reference below)

According to HSS, an addendum to the PSA replaced the italicized portion of the section with the following:

> "Except for third party claims arising from personal injuries or property damage arising from FMCS fault or negligence, or willful misconduct, and any indemnification or contribution claim by Customer against FMCS with respect thereto, in no event shall (i) FMCS liability for direct or compensatory damages exceed the payments received by FMS from Customer under this contract, and (ii) FMCS be liable to Customer for any special indirect, consequential or incidental damages."

HSS reads the addendum as requiring Fresh Meadow to indemnify HSS for any claim for personal injuries arising from Fresh Meadow's fault or negligence (NYSCEF doc No. 84, ¶ 60). However, it is the position of Fresh Meadow that while the "except for" language indicates when the limitation of liability under subsections (i) and (ii) do not apply, nothing in the "except for" portion of the sentence affirmatively or expressly states that Fresh Meadow is obligated to indemnify HSS (NYSCEF doc No. 117, ¶ 44).

The Court agrees with Fresh Meadow. The provision in question is found under the "Limitation of Liability" section of the PMA's addendum; thus, the "except for" clause should be construed as defining the circumstances when such limitation does not apply. In this case, the provision only means that in case HSS claims for indemnification or contribution for third party claims arising from personal injuries, Fresh Meadow's liability will not be capped as would normally be the case if a claim does not fall under the exceptions enumerated. There is nothing in the provision though that evinces a clear intent to indemnify HSS in such a case. As the language of the PSA's addendum does not express a clear and unmistakable manifestation of intent to indemnify, HSS's claim against Fresh Meadow for contractual indemnification is unwarranted. Accordingly, the branch of HSS's motion for summary judgment granting its contractual indemnification claim against Fresh Meadow is denied and the branch of Fresh Meadow's motion seeking summary dismissal of said claim is granted.

Fresh Meadow's Motion for Dismissal of all Third-Party Claims Against It

Fresh Meadow has established its *prima facie* entitlement to summary dismissal of HSS's common law indemnification and breach of contract claims against it.

Regarding the common law indemnification claim, Worker's Compensation § 11 provides in pertinent part the following:

> "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 and total disability."

Plaintiff, an employee of Fresh Meadow who acted within the scope of his employment during the accident, did not suffer a "grave injury" as defined under the Workers' Compensation Law § 11 (*Anton v West Manor Const. Corp.*, 100 AD3d 523, [1st Dept 2012] (granting summary judgment motion by defendant/employer Tiegre Mechanical Corp. to dismiss West Manor Construction Corp. and Bradhurst 100 Development LLC's claims for common-law indemnification and contribution against it where Tiegre established that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, and opponents failed to raise an issue of fact]). Plaintiff alleges in his Bill of Particulars that he sustained injuries on his left ankle and leg which, "upon information and belief" are "of a permanent and/or lasting nature." (NYSCEF doc No. 88, ¶ 11). This allegation, however, is short of the "permanent and total loss of use" of a leg so as to characterize the same as "grave injury" under Workers Compensation § 11. Moreover, Plaintiff admits in his Bill of Particulars that he was incapacitated from employment for only 6 ½ months (*Id.*, ¶ 13) and further testified that he returned to work thereafter (NYSCEF doc No. 90, ¶ 158: 14-17). Plaintiff further testified that he now works for a new company without any accommodations resulting from his accident (*Id.*, 160:16-21). In view of the foregoing, the common law indemnification claim against Fresh Meadow must be dismissed.

As to HSS's breach of contract claim, Fresh Meadow argues that the only insurance provision in its contract with HSS is found in the addendum, but said provision does not require Fresh Meadow to either obtain insurance for the benefit of HSS or name HSS as an additional insured.

The insurance provision in the addendum provides in pertinent part the following:

> "Insurance. Each party shall, at all times during the term of this contract, maintain, Commercial General Liability insurance ("CGL") written on an occurrence form covering liability arising from premises, operations, personal injury, products and completed

operations (for FMCS only), and liability assumed under an insured contract with limits of not less than $3,000,000 each occurrence and $5,000,000 aggregate…"

In its opposition, HSS avers that the provision above requires Fresh Meadow to maintain insurance to cover "liability assumed under an insured contract" and, as relevant here, Fresh Meadows allegedly assumed liability for "third party claims arising from personal injuries or property damage arising from FMCS fault or negligence, or willful misconduct."

The Court finds for Fresh Meadow. What HSS is trying to do is to connect the limitation of liability provision, which the Court discussed in the preceding subsection, to the insurance provision in the addendum to show that Fresh Meadow was somehow required to obtain insurance for HSS benefit. This attempt must fail. The limitation of liability provision is not an assumption of liability by Fresh Meadow. As discussed above, it simply means that if and when found liable for "third party claims arising from personal injuries or property damage arising from FMCS fault or negligence, or willful misconduct", including "any indemnification or contribution claim" by HSS, Fresh Meadow's liability will not be capped.

In any event, Fresh Meadow has submitted (NYSCEF doc No. 134) an insurance policy with Travelers for the period of 07/01/15-07/01/16, which includes the November 10, 2015 accident date (*Id.*, p. 3). Par. 2(b)(2) of Section I provides that the insurance does not apply to contractual liability except for liability for damages "[a]ssumed in a contract or agreement that is an 'insured contract'..." (*Id.*, p. 15). Par. 9(f) of Section V, on the other hand, defines an "insured contract" as "[t]hat part of any other contract or agreement...under which [Fresh Meadow] assume the tort liability of another party to pay for 'bodily injury'...to a third person. Tort liability means a liability that would be imposed by law". Thus, even if this Court assumes that HSS is an entity required to be indemnified, the policy submitted by Fresh Meadow shows that it procured the

insurance it was required to procure. Therefore, HSS' breach of contact for failure to procure insurance claim should be dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of Defendant Relief of the Ruptured and Crippled, Maintaining the Hospital for Special Surgery ("HSS") (Motion Seq. 002), pursuant to CPLR 3211, for summary judgment dismissing Plaintiff's Labor Law claims is granted to the extent that Plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed; and it is further

ORDERED that the branch of the HSS's motion, pursuant to CPLR 3211, for summary judgment on its Third-Party Complaint against Fresh Meadow Chiller Services LLC ("Fresh Meadow") for contractual and common law indemnification, contribution and breach of contract is denied; and it is further

ORDERED that the cross-motion of Plaintiff Louis Mazzarisi and co-plaintiff Danielle Mazzarisi pursuant to CPLR 3211, for summary judgment granting the complaint in its entirety is denied; and it is further

ORDERED that the motion of Third-Party Defendant Fresh Meadow (Motion Seq. 002), pursuant to CPLR 3211, for summary judgment dismissing HSS's Third-Party Complaint is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that the counsel for third-party defendant Fresh Meadow shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

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11/18/2020
DATE

CAROL R. EDMEAD, J.S.C.

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