

Butler v Teachers Ins. & Annuity Assn. of Am.
2020 NY Slip Op 34202(U)
December 1, 2020
Supreme Court, Kings County
Docket Number: 520737/17
Judge: Ingrid Joseph
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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of December, 2020.

P R E S E N T:

HON. INGRID JOSEPH,

Justice,

-----X
PATRICK BUTLER,

Plaintiff,

Mot. Seq. 2, 3, 4, 5

- against -

Index No. 520737/17

TEACHERS INSURANCE AND ANNUITY
ASSOCIATION OF AMERICA and JONES
LANG LASALLE AMERICAS, INC.,

Defendants.

-----X
TEACHERS INSURANCE AND ANNUITY
ASSOCIATION OF AMERICA,

Third-Party Plaintiff,

- against -

DEPENDABLE GLASS & MIRROR CORP.,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Cross Motion and Affidavits (Affirmations)
and Exhibits Annexed.....

29-30, 42, 46-47, 58, 59-60, 78-79

97, 98, 99, 104, 105

Opposing Affidavits (Affirmations).....
Reply Affidavits (Affirmations).....

113, 119, 125, 136, 147, 148

149, 151, 152, 153, 160, 161

Upon the foregoing papers, third-party defendant Dependable Glass & Mirror Corp. ("Dependable") moves for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 2), dismissing all claims and cross-claims against it. Plaintiff, Patrick Butler ("plaintiff"), moves for partial summary judgment (Mot. Seq. 3) on his Labor Law § 240(1) cause of action against defendants, Teachers Insurance

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KINGS COUNTY CLERK

and Annuity Association of America (“TIAA”) and Jones Lang LaSalle Americas Inc. (“Jones Lang”). Defendant/third-party plaintiff, TIAA, moves for summary judgment dismissing the plaintiff’s complaint and its claim for common-law indemnification against Dependable (Mot. Seq. 4). Defendant, Jones Lang, also seeks summary judgment (Mot. Seq. 5), dismissing the plaintiff’s complaint and all cross claims against it and Jones Lang’s cross claim against TIAA for contractual indemnification.

Plaintiff alleges that he suffered injuries on December 6, 2016 when the ladder on which he was standing to install glass window panes moved and caused him to fall to the ground. The window at issue was located on the seventh floor of a building owned by TIAA and managed by Jones Lang. As part of its maintenance obligations, Jones Lang conducted periodic surveys of the building’s windows, and, upon finding that some of the windows were fogged or cracked, Jones Lang hired Dependable to replace the double pane glass in forty (40) insulated window units. Plaintiff, who was an employee of non-party Morris Glasser Glaze and Contractors Corp. (Morris Glasser), an entity associated with Dependable, arrived at TIAA’s building on the morning of December 6, 2016, with two coworkers to perform the window installations.

Plaintiff and his coworkers’ job consisted of lifting the bottom window sash to the top of the window frame, tilting the sash down and pulling it out of the shoes on the side of the window frame,¹ taking the old panes of glass out of the sash, putting in the new panes of glass, which Defendant had already cut and sealed at its shop, then follow the same process in reverse to install the windows with newly replaced panes. After replacing the glass panes for the windows on one or two floors, plaintiff and his coworkers, at around 11:00 a.m., started replacing the glass panes on the seventh floor. Unlike the other floors, this particular section had a six-foot tall room partition that abutted the middle of the window that needed glass panes, and the partition’s position required that the plaintiff and his coworkers lift the window sashes above the partition in order to remove and replace them.

¹ The steps for removing the upper window sashes were the same, except that plaintiff and his coworkers would pull the top window sash down to the bottom of the window frame before tilting it down and pulling it out of its shoes.

According to plaintiff's deposition testimony, the accident happened after he and his coworkers removed the sash from the window, installed the new glass panes, and were in the process of reinstalling the sash into the window frame in order to get the sash over the partition and back onto the window frame, plaintiff claims that he held the sash above the partition with one foot on the third or fourth step of a four-foot tall, A-frame step ladder and the other foot on top of a three foot tall radiator that was located under the window frame, while his coworkers held the sash up on the other side of the partition. Plaintiff and his coworkers had difficulty getting the window to sit back into the frame, and, as they attempted to snap it into place, the window came back towards plaintiff, which pushed plaintiff back from the window, causing the ladder and plaintiff to fall to the floor. Plaintiff asserted that the ladder moved, at least in part, because he was forced to position it so that the steps were perpendicular to the window since there was insufficient space between the partition and the cubicle to allow him to place it parallel, which plaintiff felt would have made it more secure. Plaintiff further asserted that there were no additional safety devices in his truck that would have allowed him to perform the work in a safer manner, and that, although he had a six-foot tall ladder in the truck, the taller ladder was too big for the space. By contrast, Dependable's witness, Daniel Peled, testified at his deposition that, when they discussed the accident, that the plaintiff told him that he took a bad step and fell.

Plaintiff commenced this action by the filing of the summons and complaint on October 26, 2017, alleging causes of action premised upon common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Jones Lang pleaded a cross claim against TIAA for contractual indemnification, and TIAA commenced a third-party action as against Dependable for common-law indemnification. Issue has been joined, discovery completed, and the parties' summary judgment motions are now before the court.

Labor Law § 240(1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with working at an elevation proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). With respect to falls from ladders, the Appellate Division, Second Department has emphasized that "[t]he mere

fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). In order to find the absence of proper protection, "[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Karanikolas*, 120 AD3d at 555 [internal quotation marks omitted]; *Hugo*, 108 AD3d at 745). The absence of proper protection is thus not shown where a plaintiff simply loses his or her balance and falls (*see O'Brien v Port Auth. Of N.Y. & N.J.*, 29 NY3d 27, 33-34 [2017]; *Gaspar v Pace Univ.*, 101 AD3d 1073, 1074 [2d Dept 2012]; *see also Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 1055 [2016]). Generally, absent evidence that a ladder slipped, moved or collapsed, the issue of whether the ladder provided proper protection and/or whether additional safety devices were required presents an issue of fact for the jury (*see Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722 [2d Dept 2010]; *Olberding v Dixie Contr.*, 302 AD2d 574, 575 [2d Dept 2003]; *see also Nazario*, 28 NY3d at 1055).

In this case, plaintiff's deposition testimony that the ladder shifted as he and his coworkers were attempting to reinstall the window sash constitutes evidence that the ladder was inadequately secured and is sufficient to establish plaintiff's prima facie entitlement to summary judgment (*see Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]; *Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1105 [2d Dept 2016]; *Florestal v City of New York*, 74 AD3d 875, 876 [2d Dept 2010]; *Ruiz v WDF Inc.*, 45 AD3d 758, 758 [2d Dept 2007]). In view of the movement of the ladder, plaintiff was not required to show that the ladder was defective in order to make out his prima facie burden (*see Messina*, 148 AD3d at 494; *Whalen v ExxonMobile Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008], *lv denied* 53 AD3d 1124 [4th Dept 2008]; *see also Baugh*, 140 AD3d at 1106).

However, in opposing the motion, defendants have submitted the above noted deposition testimony of Daniel Peled, an assistant director from Dependable, who stated that, when he asked plaintiff

about the accident, plaintiff told him that “he took a bad step and fell” (Peled, March 2, 2018 deposition, at 47, ln 2-5). Plaintiff’s admission to Peled suggests that the accident occurred simply because he lost his balance and fell, rather than a defective condition with the ladder or an inability to adequately secure such ladder. Thus, the court finds this presents a factual issue warranting denial of plaintiff’s motion with respect to his Labor Law §240 (1) cause of action (*see King v Villette*, 155 AD3d 619, 621-622 [2d Dept 2017]; *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d 799, 800-801 [1st Dept 2016]; *Hugo*, 108 AD3d at 745; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097-1098 [2d Dept 2012]; *Briggs v Halterman*, 267 AD2d 753, 754-755 [3d Dept 1999]).

The defendants, in moving for summary judgment and in opposing plaintiff’s motion, assert, among other things, that the plaintiff’s accident is not covered under Labor Law § 240 (1), because the plaintiff’s work in replacing the window panes constituted routine maintenance, rather than a repair, which has been distinguished from routine maintenance (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Joblon v Solow*, 91 NY2d 457, 465 [1998]; *Smith v Shell Oil Co.*, 85 NY2d 1000, 1002 [1995]). In fact, courts have held that an activity constitutes routine maintenance when the work involves “replacing components that require replacement in the course of normal wear and tear” (*Wass v County of Nassau*, 173 AD3d 933, 935 [2d Dept 2019] quoting *Esposito*, 1 NY3d at 528; *see Mammon v T.G. Nickel & Assoc., LLC*, 144 AD3d 761, 761 [2d Dept 2016]).

In this matter, the court finds that the defendants have failed to demonstrate entitlement to judgment as a matter of law on this ground. The defendants’ contention that fogging and cracks resulted from normal wear and tear is based solely upon the defendant’s contention that they periodically assessed windows for replacement. The defendants submitted no evidence related to the expected life span of the windows; whether the window panes being replaced were worn out; or other evidence relevant to whether the subject windows required replacement in the course of normal wear and tear (*see Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 815 [2d Dept 2018]; *Soriano v St. Mary’s Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526-527 [1st Dept 2014]; *Enright v Buffalo Tech. Bldg. B Partnership*, 278 AD2d 927, 927-928 [4th Dept 2000]; *see also Roth v Lenox Terrace Assoc.*, 146 AD3d 608, 608 [1st

Dept 2017]; *but see Chizh v Hillside Campus Meadows Assoc., LLC*, 3 NY3d 664, 665 [2004] and *Rogala v Van Bourgondien*, 263 AD2d 535, 536 [2d Dept 1999]).

The court has considered plaintiff's argument that removing the window sashes from the window frames, removing the old panes and inserting the new panes, when viewed in isolation, is akin to work that has been found to constitute component part replacement, such as replacing window screens (*see Chizh*, 3 NY3d at 665; *Rogala*, 263 AD2d at 536), patching a hole in a gutter pipe (*see Azad v 270 5th Realty Corp.*, 46 AD3d 728, 729-730 [2d Dept 2007], *lv denied* 10 NY3d 706 [2008]), replacing metal slats in a roll down grate (*see Cordero v SL Green Realty Corp.*, 38 AD3d 202, 202 [1st Dept 2007]), replacing air conditioner components (*see Esposito*, 1 NY3d at 528), or replacing ballast or other like components in a light fixture (*Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 [2d Dept 2017]; *Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511, 512 [1st Dept 2012]).

Nevertheless, the court finds that the plaintiff's work must be considered in view of the scope of the entire project, which involved a three-person crew replacing forty (40) window panes on several different floors of the building over the course of a few days.² In view of the scope of the project, the court finds that there exists a factual issue as to whether the work constituted a repair, as opposed to routine maintenance (*see Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 890 [2d Dept 2011]; *Fitzpatrick v State of New York*, 25 AD3d 755, 757 [2d Dept 2006]).

Additionally, the defendants assert that the plaintiff's claims are subject to dismissal, because plaintiff's actions constituted the sole proximate cause of the accident. This argument is based upon the defendants' contention that it was the plaintiff's decision to proceed with the work despite the presence of the partition that obstructed his access to the window at issue and led him to perform the work with one foot on a radiator and the other on a ladder. This court is cognizant that there can be no liability under Labor Law § 240(1), if a jury finds that the plaintiff's own actions were the sole proximate cause of the accident (*see Luna v 4300 Crescent, LLC*, 174 AD3d 881, 883-884 [2d Dept 2019]). However, the court

² While plaintiff's accident occurred on the morning of his first day on the job, reading plaintiff's testimony in conjunction with that of Peled, it is apparent that it would likely have taken plaintiff and his coworkers a few days to complete their work. In this respect, Peled noted that plaintiff would likely have only loaded 10 to 20 of the window panes onto the truck on each day.

finds that the defendants have failed to eliminate all triable issues as to whether the ladder could have been placed in a manner that would have allowed the plaintiff to safely perform the work, or that the plaintiff could have used safety devices that were readily available and plaintiff knew he was expected to use any such safety device, before proceeding with his work (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Orellana v 7 W.34th St., LLC*, 173 AD3d 886, 888 [2d Dept 2019]; *Gillett v City of New York*, 165 AD3d 1064, 1064-1065 [2d Dept 2018]; *Saavedra v 89 Park Ave. LLC*, 143 AD3d 615, 615 [1st Dept 2016]; *cf. Valente v Lend Lease (US) Constr. LMB, Inc.*, 29 NY3d 1104, 1105 [2017]).

Finally, the court rejects Jones Lang's assertion that it may not be held liable because it is not the owner of the building or contractor, or an agent of the owner or contractor. Paragraph 1.1 of the master agreement between Jones Lang and TIAA indicates that Jones Lang is an independent contractor and specifically disavows the existence of an agency relationship between Jones Lang and TIAA (Jones Lang Exhibit K, pg. 1). However, the analysis as to whether an agency relationship existed between Jones Lang and TIAA is not limited to the language contained in the Jones Lang/TIAA contract but rather, it is based on the evidence of the consent that one entity gave to the other to act on its behalf (*Fils-Aime v Ryder TRS, Inc.*, 40 AD3d 917 [2d Dept 2007]). Here, Jones Lang may be held liable as a statutory agent of the owner since its contract with TIAA delegated to it the general responsibility for insuring that the building was maintained, and, as the entity that contracted with Dependable to perform the work at issue, Jones Lang had the right to exercise control over plaintiff's work, even if it did not exercise such right (*Samaroo v Patmos Fifth Real Estate, Inc.*, 946 [2d Dept 2013]; *Corona v Metropolitan 298-308 Assoc.*, 281 AD2d 447, 447-448 [2d Dept 2001]).

Turning to plaintiff's Labor Law § 241 (6) cause of action, plaintiff's deposition testimony regarding the condition of the ladder and its placement demonstrates, prima facie, that the Industrial Code sections relied upon by plaintiff, 12 NYCRR 23-1.21 [b] [4] [ii] [bars the use of slippery surfaces and insecure objects as ladder footings] and 12 NYCRR 23-1.21 [e] [3] [requiring standing stepladders be used only on firm, level footings], are inapplicable to the facts of this case (*Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 461-462 [2d Dept 2008] and *see Campos v 68 East 86th St. Owners Corp.*,

117 AD3d 593, 594 [1st Dept 2014]; *Croussett v Chen*, 102 AD3d 448, 448-449 [1st Dept 2013]). While plaintiff testified that there was insufficient space to open the ladder and face it in the direction he wanted, nothing in his testimony suggests that the floor was slippery, that it was uneven or that there was any issue with the firmness of the footing. Plaintiff has failed to demonstrate the existence of a factual issue in this respect and therefore, the defendants are entitled to dismissal of plaintiff's Labor Law § 241 (6) cause of action.

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, the parties' respective motion papers and evidence annexed thereto demonstrate that the plaintiff's claims arise out of *plaintiff's* method and manner of performing his work rather than a dangerous property condition (see *Sanders v Sanders-Morrow*, 177 AD3d 920, 921-922 [2d Dept 2019]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671 [2d Dept 2018]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607-608 [2d Dept 2013]). The fact that the partition may have obstructed plaintiff's access to the window and made his work more difficult does not make the partition a dangerous property condition. Moreover, the height, width and location of the partition was an open and obvious condition that was safe for its intended purpose of dividing the workspace in the room at issue (see *Gasper v Ford Motor Co.*, 13 NY2d 104, 110-111 [1963]; *Monahan v New York City Dept. of Educ.*, 47 AD3d 690, 691 [2d Dept 2008]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434-435 [1st Dept 2013]).

Further, when common-law negligence and section 200 claims arise out of alleged defects or dangers in the methods or manner of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 635-636 [2d Dept 2010]). Without more, an owner or contractor's authority to stop the work or their general supervisory authority over the injury-producing work is insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (see *Poulin*, 166 AD3d

at 670-673; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]; *Sanchez v Metro Bldrs Corp.*, 136 AD3d 783, 787 [2d Dept 2016]).

In view of plaintiff's deposition testimony that, other than pointing out the location of the windows he was to replace, the building personnel gave him no instruction as to how he was to perform his work, defendants have demonstrated that they did not exercise more than general supervisory authority over the work and thus, have demonstrated their prima facie entitlement to dismissal of the Labor Law § 200 and common-law negligence causes of action. The plaintiff failed to present evidentiary proof demonstrating an issue of fact regarding the defendants' supervision and control of his work and thus, the defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action.

The court now turns to Dependable's motion for summary judgment dismissing TIAA's third-party complaint for contribution and common-law indemnification from Dependable and that branch of TIAA's motion seeking summary judgment on its common-law indemnification claim against Dependable. Dependable contends that those claims are barred by Workers Compensation Law §§ 11 and 29 (6), because plaintiff was a special employee of Dependable and/or Dependable and Morris Glasser were alter egos of each other for purposes of the exclusivity provisions of the Workers' Compensation Law (*see Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1218 [2d Dept 2019]).

In support of its motion, Dependable submits an affidavit from Walter Friedman ("Friedman"), who identifies himself as the president and sole owner of both Dependable and Morris Glasser, and who asserts that Dependable and Morris Glasser have a shared corporate purpose, do exactly the same work involving glass and window installation and replacement, work from the same offices, regularly share employees, vehicles, tools and materials, and assigns work for both companies from the same desk. While Friedman acknowledges that the plaintiff received his paycheck from Morris Glasser, he asserts that (1) plaintiff was a shared employee and regularly worked for both companies, (2) plaintiff received

his assignment to perform the work at TIAA's building based upon a Dependable work ticket, and (4) plaintiff was exclusively supervised by Dependable with respect to that work.

At his deposition, plaintiff similarly testified that, although he received his paycheck from Morris Glasser, for which he had worked for 13 years before the accident,³ he regularly worked for three companies that he understood to be owned by Friedman: Morris Glasser, Dependable and Midtown Glass. Plaintiff further testified that each of these companies did the same kind of work, and that, when he reported to work each morning, Friedman would give him work tickets for the jobs, which could be for any one of those companies, or even all three in the same day. Plaintiff indicated that he did not know which of the companies issued paychecks for his coworkers but testified that he observed his coworkers receiving work tickets for jobs from all three companies as well. Plaintiff testified he did not know which company owned the equipment he used but noted that the truck he used for his jobs for the majority of the time he worked for Morris Glasser had "Dependable" painted on its side.

Daniel Peled ("Peled"), Dependable's assistant director, testified that one of plaintiff's coworkers on the date of the accident was paid by Dependable and the other was paid by Morris Glasser, and that he and Dee Tirado, who were both primarily employed by Dependable,⁴ were plaintiff's direct supervisors. Peled further averred that plaintiff, as the most experienced worker on the job at issue here, would have supervised his coworkers. Like plaintiff, Peled testified that the workers employed by Morris Glasser and Dependable were used interchangeably on Morris Glasser and Dependable jobs, and with respect to the job at issue, Dependable did not hire Morris to perform the work and there is no document between Dependable and Morris Glasser relating to the work. While conceding that Dependable and Morris Glasser had separate bank accounts, and may have had separate general liability insurance policies, Peled asserted that the companies shared equipment in the shop and on the job.

³ Plaintiff also testified that he had done the same kind of window and glass work for many years before he was hired by Morris Glasser.

⁴ Peled testified that his regular salary was paid by Dependable, he received bonuses from Morris Glasser.

A special employee is “one who is transferred for a limited time of whatever duration to the service of another” (*Thompson v Grumman Aerospace, Corp.*, 78 NY2d 553, 557 [1991]). Courts have weighed many factors in deciding whether a special employment relationship exists, “but no one factor is decisive” (*Thompson*, 78 NY2d at 558). A significant and weighty factor is who controls and directs the manner, details, and ultimate result of the employee’s work (*Thompson*, 78 NY2d at 558). In other words, “who determines all essential locational and commonly recognizable components of the [employee’s] work relationship” (*Thompson*, 78 NY2d at 558; see *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007]). Courts have also considered “who is responsible for the payment of wages and the furnishing of equipment, who [had] the right to discharge the employee, and whether the work being performed was in furtherance of the special employer’s or the general employer’s business” (*Franco v Kaled Mgt. Corp.*, 74 AD3d 1142, 1142-1143 [2d Dept 2010] [internal quotation marks omitted]; see also *Fung*, 9 NY3d at 359). The overarching concept, however, is that [g]eneral employment is presumed to continue and this presumption can only be rebutted by a ‘clear demonstration of surrender of control by the general employer and assumption of control by the special employer’” (*Dube v County of Rockland*, 160 AD3d 807, 808 [2d Dept 2018], quoting *Thompson*, 78 NY3d at 557; see *Perkins v Crothall Healthcare, Inc.*, 148 AD3d 1189, 1190 [2d Dept 2017]).

When applying these principles to the facts of this case, the court finds that Dependable has failed to satisfy its burden of proof establishing as a matter of law that the plaintiff was its special employee. The parties have not disputed that the plaintiff was performing the work at TIAA’s building on behalf of Dependable, that plaintiff drove a Dependable truck to the site, and used tools that may have belonged to both companies. However, there exists questions of fact concerning the nature of Dependable’s control over plaintiff’s work, and which company ultimately retained control over plaintiff when he was performing such work. The Assistant Director of Dependable, Peled, testified that the plaintiff supervised the two employees who were with him at TIAA’s building and further that neither he, nor anyone he knew, provided the plaintiff with instructions regarding the job at TIAA’s building. Additionally, plaintiff testified that he would work for Morris Glasser or Dependable on any given day, or both within

one day. Also unresolved is which company actually exercised general supervisory authority over plaintiff with respect to decisions to fire or discipline him. Accordingly, this court finds that Dependable has failed to overcome the presumption that plaintiff was continually under the general employment of Morris Glasser by clearly demonstrating that Morris Glasser surrendered control over the plaintiff and Dependable assumed control over him (*see Holmes v Business Relocation Servs., Inc.*, 25 NY3d 955, 956 [2015], *affirming* 117 AD3d 468 [1st Dept 2014]; *Owens v Jea Bus Co., Inc.*, 161 AD3d 1188, 1191 [2d Dept 2018]; *Zupan*, 145 AD3d at 717-718; *Bostick v Penske Truck Leasing Co., L.P.*, 140 AD3d 999, 1000-1001 [2d Dept 2016]; *Warnick v 1211 S. Blvd. LLC*, 93 AD3d 402, 402-403 [1st Dept 2012]; *cf. Gonzalez v ARI Fleet, LT*, 83 AD3d 891, 892-893 [2d Dept 2011]; *Ribeiro v Dynamic Painting Corp.*, 23 AD3d 795, 795-796 [3d Dept 2005], *lv denied* 6 NY3d 707 [2006]).

With respect to whether Morris Glasser was Dependable's alter ego, "a defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 619 [2d Dept 2013]; *see Salinas*, 170 AD3d at 1218; *Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 [2d Dept 2013]; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595 [2d Dept 2010]). "[A] mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (*Samuel*, 75 AD3d at 595; *see Salinas*, 170 AD3d at 1218-1219).

The uncontroverted evidence that Dependable and Morris Glasser shared a single owner, shared offices, shared a shop and equipment, and used workers without regard to which entity employed them, supports a finding that they operated as a single entity (*see Pizarro v Dennis James Boyle, Inc.*, 180 AD3d 596, 596-597 [1st Dept 2020]; *Clark v First Student, Inc.*, 160 AD3d 921, 922 [2d Dept 2018]; *Quizhpe*, 103 AD3d at 619; *Crespo v Pucciarelli*, 21 AD3d 1048, 1049-1050 [2d Dept 2005]). However, as testified to by Peled, Dependable and Morris Glasser retained separate bank accounts and the revenue generated from the job at TIAA's building went to Dependable. Dependable also had its own certificate

of incorporation and general liability policy. Accordingly, the court finds that Dependable has failed to demonstrate that it is Morris Glasser's alter ego as a matter of law (*see Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 841 [2d Dept 2017]; *Henderson v Gyrodyne Co. of Am., Inc.*, 123 AD3d 1091, 1092 [2d Dept 2014]; *Andrade v Brookwood Communities, Inc.*, 97 AD3d 711, 711 [2d Dept 2011]; *Nunez v Park Plus, Inc.*, 146 AD3d 488, 489 [1st Dept 2017]; *Soodin v Fragakis*, 91 AD3d 535, 536 [1st Dept 2012]).

These factual issues preclude both the granting of Dependable's motion for summary judgment dismissing the third-party action and TIAA's motion for summary judgment on its common-law indemnification cause of action against Dependable.

The court will now address Jones Lang's contractual indemnification claim against TIAA. In light of this court's finding regarding plaintiff's common-law negligence and Labor Law § 200 causes of action, Jones Lang's prima facie showing turns solely on whether the indemnification provision of Jones Lang's contract with TIAA ("Contract") requires TIAA to indemnify Jones Lang under the facts of this case (*see Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 718 [2d Dept 2020]; *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1031 [4th Dept 2013]). This relevant provision provides that:

"Owner shall defend, indemnify and hold harmless Manager and its affiliates, principals, officers, directors, trustees, representative, employees and agents (each individually the 'Indemnitee' and collectively the 'Indemnitees') from and against any and all loss, liability, damage, cost and expense arising from a third-party claim (collectively a 'Claim') including reasonable attorneys' fees, suffered or incurred by an Indemnitee arising from: performance of its Obligations and Services, except to the extent such Claim is the result of Manager's (a) gross negligence, (b) willful misconduct, © criminal activity or (d) material breach of its obligations under this Agreement. Manager shall indemnify Owner from and against any Claim, including reasonable attorneys' fees resulting from Manager's (a) gross negligence, (b) willful misconduct, © criminal activity or (d) material breach of its obligations under this Agreement. Nothing contained herein shall be construed under any circumstances to relieve Manager from liability for its negligence or for its willful, tortuous or criminal acts or that of its sub-contractors, servants or employees. This Section 9.1 shall survive the expiration or earlier termination of this Agreement. The indemnities contained in this Section 9.1 are independent of, and will not be limited by, any insurance obligations in this Agreement (whether or not complied with)." (Contract § 9.1).

The express language allowing Jones Lang to obtain indemnification for a "third-party claim . . . arising from [Jones Lang's] performance of its Obligations and Services, except to the extent that such

Claim is the result of [Jones Lang's] (a) gross negligence, (b) willful misconduct, (c) criminal activity or (d) material breach of its obligations under this Agreement" unequivocally allows Jones Lang to obtain indemnification under the facts presented here. Contrary to TIAA's contention, Jones Lang's argument that plaintiff was the sole proximate cause of his injuries is in no way inconsistent with finding that the window replacement work plaintiff was performing at the time of his injury was work "arising" under Jones Lang's contractual obligations to maintain TIAA's building (*see Guido v Dormitory Auth. of State of N.Y.*, 145 AD3d 591, 592-593 [1st Dept 2016]; *Bellreng*, 106 AD3d at 1031; *see also Valdez v Turner Constr. Co.*, 171 AD3d 836, 840 [2d Dept 2019]).

The court rejects TIAA's argument that Jones Lang's failure to move the partition to allow plaintiff better access to the window constituted a "material breach" of its obligation to perform its management functions with the "highest standards of professional property management for properties similar to each Property in the market where such Property is located" (Contract § 4.2). The plain language of Section 4.2 relates to the condition of the building, and TIAA has submitted no evidentiary proof regarding building management standards that would suggest the existence of a factual issue regarding a material breach of that provision (*see Jara v Costco Wholesale, Corp.*, 178 AD3d 687, 691-692 [2d Dept 2019]). Even assuming that the "highest standard" language of section 4.2 may be deemed to apply to the monitoring of the safety of subcontractor employees, plaintiff testified that he never informed anyone from Jones Lang that the partition presented an impediment to his work, and there is no evidence that anyone from Dependable informed Jones Lang of such.

Finally, TIAA argues that Jones Lang is not entitled to indemnification because of the language in the indemnification provision providing that, "nothing contained herein shall be construed under any circumstances to relieve Manager from liability for its negligence or for its willful, tortuous or criminal acts or that of its sub-contractors, servants or employees" (Contract § 9.1). TIAA posits that, even if Jones Lang was not negligent, Dependable, and/or plaintiff, were negligent, and, under this language, the negligence of Jones Lang's subcontractor bars Jones Lang from obtaining indemnification. Jones Lang

submits that this language only precludes indemnification for the willful, tortious or criminal act of its subcontractors, and that the mention of negligence only relates to the acts of it, the manager, and since there was not willful, tortious or criminal conduct by plaintiff/Dependable, it is entitled to indemnification.

Both Jones Lang and TIAA have offered plausible alternative readings of Section 9.1 and yet, there is another question regarding the parties' intent when that section is read in the context of the entire indemnification provision. That is, whether the provision is intended to act as a restriction on third-party indemnification claims by Jones Lang. In this regard, the court notes that Jones Lang's right to indemnification appears to be fully addressed in the first sentence of section 9.1, and, as the language at issue would significantly alter the rights laid out in the first sentence, it can be plausibly argued that the language is solely intended to preserve TIAA's right to a direct claim against Jones Lang for damages based upon Jones Lang's "negligence, or for its willful, tortious or criminal acts or that of its subcontractors, servants or employees," rather than as a limit on third-party indemnification claims. Since there are at least three possible interpretations of the section and the parties' intent in including the language cannot be determined as a matter of law by reading it in the context of section 9.1 or the entire agreement, the court finds that there are factual issues with respect to the meaning of this language, which requires denial of Jones Lang's motion for summary judgment (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880-881 [1985]; *see Plainview Properties SPE, LLC v County of Nassau*, 181 AD3d 731, 734 [2d Dept 2020]; *County of Nassau v Technology Ins. Co., Inc.*, 174 AD3d 847, 849 [2d Dept 2019]; *cf. Currier McCabe & Assoc. v Maher*, 75 AD3d 889, 891-892 [3d Dept 2010]; *Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003]).

The court finds that Lang has failed to demonstrate its facie entitlement to summary judgment on its contractual indemnification claim. Thus, its motion in this respect must be denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The court notes that Jones Lang also requests that any cross claims be dismissed as against it but failed to address such cross claims in its motion papers

and consequently, Jones Lang has failed to demonstrate its prima facie entitlement to dismissal of such cross claims.

The court recognizes that, when the issue of contractual intent cannot be determined from the four corners of the contract, the issue of contractual intent is normally an issue of fact for the jury (*see Yizheng Zhao v Evans*, 154 AD3d 624, 626 [1st Dept 2017]). Nevertheless, the court is directing the parties to appear for a virtual conference to address whether, among other things, Jones Lang and TIAA will consent to having the issue of contractual intent be determined at a framed issue hearing before a judicial hearing officer or referee (*see CPLR § 3212 [c]; Deep v Boies*, 53 AD3d 948 [3d Dept 2008]). In this respect, the court notes that the discreet contractual intent issue is unrelated to the other issues that will be addressed at trial.

Based upon the foregoing, Dependable’s motion (Motion Sequence 2) is denied. Plaintiff’s motion (Motion Sequence 3) is denied. TIAA’s motion (Motion Sequence 4) is granted solely to the extent that plaintiff’s common-law negligence and Labor Law §§ 200 and 241 (6) causes of action are dismissed as against it. Jones Lang’s motion (Motion Sequence 5) is granted solely to the extent that plaintiff’s common-law negligence and Labor Law §§ 200 and 241 (6) causes of action are dismissed as against it.

The parties are further directed to appear for a virtual conference via Microsoft Office Teams on December 15, 2020 at 11:00 a.m. to address whether TIAA and Jones Lang consent to a framed issue hearing before a Referee to determine the meaning of certain language in section 9.1 of the Master Management Agreement between TIAA and Jones Lang.

This constitutes the decision and order of the Court.

ENTER:



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

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