Zapeta v 5214 15 Ave Dev. LLC
2021 NY Slip Op 30767(U)
March 8, 2021
Supreme Court, Kings County
Docket Number: 516962/17
Judge: Ingrid Joseph

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 Civic Center, Brooklyn, New York, on the 8th day March, 2021.

PRESENT:

HON. INGRID JOSEPH

Justice.

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TOMAS V. ZAPETA,

Plaintiff,

- against -

Index No. 516962/17

5214 15 AVE DEVELOPMENT LLC, MR. DEMOLITION, INC., LLC AND SILVERCUP SCAFFOLDING 1 LLC,

Defendants.

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5214 15 AVE DEVELOPMENT LLC,

Third-Party Plaintiff,

- against -

PRESTIGE CONSTRUCTION NY, LLC,

Third-Party Defendant.

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PRESTIGE CONSTRUCTION NY, LLC,

Second Third-Party Plaintiff,

- against -

SIGNATURE ROOFING, INC.,

Second Third-Party Defendant.

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MR. DEMOLITION, INC.,

Third Third-Party Plaintiff,

- against -

PRESTIGE CONSTRUCTION NY LLC AND
SIGNATURE ROOFING, INC.,

Third Third-Party Defendants.

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The following e-filed papers considered herein:

	E-Filed Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	85-110, 119-144, 148-165, 190-213, 216-218, 225-247, 284, 248-270
Opposing Affidavits (Affirmations)	112-117, 292-298, 215, 276-282, 271-273, 275, 285
ReplyAffidavits(Affirmations)	219-223, 302, 289, 286-288, 290-291

Upon the foregoing e-filed papers, plaintiff Tomas V. Zapeta ("plaintiff") moves (Motion Sequence 4) for an order seeking leave to serve a Supplemental Summons and Amended Complaint upon proposed defendant/second third-party plaintiff/third third-party defendant Prestige Construction NY, LLC ("Prestige") and proposed defendant/second third-party defendant/third third-party defendant Signature Roofing, Inc., ("Signature"), deeming the Amended Summons and Complaint served and estopping the proposed defendants from asserting the Statute of Limitations defense. Prestige cross-moves (Motion Sequence 5) for an order: (1) pursuant to CPLR § 3211 (a) (5), dismissing plaintiff's proposed Amended Complaint based on the Statute of Limitations; (2) granting an extension of time to file a motion for summary judgment dismissing plaintiff's complaint and the third third-party complaint of defendant/third third-party plaintiff Mr. Demolition, Inc. ("Mr.

Demolition"); (3) granting Prestige permission to re-file its second third-party complaint against Signature; and (4) granting Prestige an extension of time to file a summary judgment motion on its second third-party complaint against Signature. Signature moves (Motion Sequence 6) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing Mr. Demolition's third third-party complaint, as well as all cross claims, as asserted against it, with prejudice. Mr. Demolition moves (Motion Sequence 7), pursuant to CPLR §§ 3212 and/or 3211(a)(7), for an order granting summary judgment dismissing plaintiff's entire complaint as against it, with prejudice, as well as any cross claims and/or counterclaims asserted against it. Prestige cross-moves (Motion Sequence 8), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's complaint as against Mr. Demolition, and dismissing Mr. Demolition's third third-party complaint as against Prestige. Prestige also cross-moves for summary judgement in its favor on its second third-party claims against Signature. Mr. Demolition cross-moves (Motion Sequence 9), pursuant to CPLR § 3212, for an order granting summary judgment on its third third-party claims against Signature for common-law indemnification and contribution. Mr. Demolition also cross-moves (Motion Sequence 10) for summary judgment on its third third-party claims against Prestige for common-law indemnification and contribution.

Factual Background and Procedural History

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff on October 5, 2016, when he fell from a scaffold at premises located at 5214 15th Avenue in Brooklyn, New York. The premises, which was owned by defendant/third-party plaintiff 5214 15 Ave Development, LLC ("5214 Development"), was undergoing construction at the time of the accident. Prestige had been retained by the owner to act as the general contractor on the project. Pursuant to a subcontract agreement dated September 16, 2016 (NYSCEF Doc. No. 105), Prestige retained Signature, a roofing subcontractor, to perform work on the project. Signature, in turn, hired NYS Construction Corp. ("NYS Construction"), not a party herein, to perform stucco work. At the

time of the accident, the plaintiff was employed by NYS Construction.

During his deposition, plaintiff testified that he worked for a man named Eddie and his company, which was later determined to be NYS Construction. Plaintiff stated that Eddie was the only one who instructed him on what work he needed to do on the job site and supervised his work. On the date of the accident, plaintiff had been instructed by Eddie, via text, to go to the subject location to finish stucco work on the exterior right side of the building. Plaintiff arrived at the site at 8:00 a.m. In order to perform the work, plaintiff utilized a hanging scaffold, which had been installed by NYS Construction. The scaffold was already hanging when plaintiff arrived at the site. He entered the scaffold through a window and began working alone while his co-workers worked beneath him on the ground level. Plaintiff was wearing a harness, but it was not tied off to a rope line. According to plaintiff, no rope line had been installed at the site despite his numerous requests for his supervisor, Eddie, to buy rope. Just before the accident occurred, plaintiff recalled being on the scaffold and facing the building wall just before he fell. He could not remember how or why he fell and claims he lost consciousness. It was not until the plaintiff woke up in the hospital that he realized he had fallen. Plaintiff recalled his boss, Eddie, who had come to the hospital, was the one who told him that he had fallen from the scaffold.

Plaintiff subsequently commenced the within action on or about August 31, 2017, naming 5214 Development, Mr. Demolition and Silvercup Scaffolding 1, LLC as defendants, alleging violations of Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence. 5214 Development, Mr. Demolition and Silvercup[1] all interposed answers in a timely manner. On or about December 1, 2017, 5214 Development commenced a third-party action against Prestige asserting claims for common-law indemnity, contribution and contractual indemnity. On or about April 2, 2018, Prestige interposed an answer to 5214 Development's third-party complaint. On July 9, 2018, Mr. Demolition served and filed a cross claim against Prestige for common-law indemnity and/or

[1] Plaintiff's action was subsequently discontinued as against Silvercup Scaffolding 1, LLC, pursuant to a Stipulation of Discontinuance dated March 27, 2018.

contribution. Prestige subsequently commenced a second third-party action against Signature on or about October 19, 2018, wherein it asserted claims for common-law indemnity, contribution, contractual indemnity and breach of contract for failure to procure insurance. Signature interposed an answer to the second third-party complaint on or about June 24, 2019, and asserted cros sclaims against 5214 Development, Mr. Demolition and Prestige for contribution, common-law indemnity and contractual indemnity. Pursuant to a Final Conference Order dated August 15, 2019, 5214 Development was found to be in default and all of its pleadings were stricken. Mr. Demolition subsequently filed a third third-party action against Prestige and Signature on October 21, 2019 asserting claims for common-law indemnity, contribution, contractual indemnity and breach of contract to procure insurance. On October 31, 2019, Prestige and Signature both filed their answers to Mr. Demolition's third third-party complaint. The parties engaged in discovery, and on February 17, 2020, plaintiff filed the note of issue and certificate of readiness with the court. The following motions ensued.

Mr. Demolition's Motion and Cross Motions

Plaintiff's complaint alleges violations of Labor Law §§ 240 (1), 241 (6) and 200, as well as common-law negligence. Mr. Demolition moves for summary judgment dismissing plaintiff's complaint as against it arguing that it was neither the owner of the site, nor a general contractor, or an agent thereof, and further, that it had no involvement with any of the work related to plaintiff's accident. In this regard, Mr. Demolition maintains that it had completed its work at the site months before the plaintiff's alleged accident occurred. In addition, Mr. Demolition contends that it did not retain any subcontractors to work on the site, and had nothing to do with the stucco work that plaintiff was performing at the time of the accident. Mr. Demolition maintains it had no role whatsoever in directing or controlling the means and methods of plaintiff's work; nor did it provide plaintiff with tools or building materials, or have anything to do with scaffolding at the site. As such, Mr. Demolition argues that the dismissal of plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and

common-law negligence claims against it is warranted.

In support of this contention, Mr. Demolition relies upon the deposition testimony of its President, Joel Perlstein, as well as his sworn affidavit. Perlstein testified that Mr. Demolition was retained by a man named Mr. Meisels to perform demolition and rubbish removal work on the premises. Perlstein assumed Mr. Meisels was affiliated with 5214 Development, the owner of the premises. According to Perlstein, Mr. Demolition was hired to demolish an old house that existed on the premises, which he claimed had been completed approximately a half year to a year prior to the date of plaintiff's accident. He claimed that no one else performed any work on behalf of Mr. Demolition after they had completed such work, with the exception of possibly picking up garbage. Perlstein averred that Mr. Demolition only had a contract with the owner of the building and no other entity. In addition, he stated that Mr. Demolition did not retain any subcontractors, perform any scaffolding work, or hire any scaffolding subcontractors; nor did it retain any parties to perform any stucco or roofing work at the premises.

In his affidavit, Perlstein averred that Mr. Demolition last performed work at the premises on July 27, 2016, which involved the demolition of a structure and the removal of debris containers from the premises, and that it did not return thereafter to perform any further work (NYSCEF Doc. No. 209). He further avers that Mr. Demolition never had any ownership interest in the premises, was never an owner's representative, and was not the general contractor for the project on October 5, 2016. Perlstein affirmed that it was his understanding that Prestige was the general contractor for the premises when the incident occurred, and that Mr. Demolition never directed, controlled, or supervised the work of any other contractor or subcontractor at the premises. Mr. Demolition has also submitted copies of all the invoices documenting its work with respect to the premises, indicating that it last performed work at the premises on July 27, 2016, which involved the removal of debris (NYSCEF Doc. No. 210).

In opposition, plaintiff argues that Mr. Demolition has failed to make a prima facie showing

entitling it to summary judgment dismissing his complaint. In this regard, plaintiff contends that Mr. Demolition's role at the site was not limited to merely demolition and debris removal. He argues that Mr. Demolition's contention is contradicted by a New York City Department of Buildings Permit issued to Mr. Demolition for its work at the premises (NYSCEF Doc. No. 282).

In reply, Mr. Demolition contends that the permit proffered by plaintiff was related to the prior work it had performed well before the plaintiff's accident. In addition, Mr. Demolition points out that subsequent permits were issued to both Prestige, which was listed as the general contractor, and non-party Silvercup Scaffolding, which were in effect on the date of the plaintiff's accident (NYSCEF Doc. Nos. 287-288).

It is well settled that "the proponent of a summary judgment motion must make 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

It is well settled that claims under Labor Law §§ 240 (1), 241 (6) and 200 may be brought only against owners, contractors and their agents (*see* Labor Law § 240 [1] [applying to "[a]ll contractors and owners and their agents"]; § 241 [sub-provisions applying to "[a]ll contractors and owners and their agents"]; *Hill v Mid Island Steel Corp.*, 164 AD3d 1425, 1426 [2d Dept 2018]; *Merino v Cont'l Towers Condo.*, 159 AD3d 471, 472 [1st Dept 2018]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and

authority over the work being done where a plaintiff is injured" (*Diaz v Trevisani*, 164 AD3d 750, 754 [2d Dept 2018 [quotations omitted]; *see Linkowski v City of New York*, 33 AD3d 971, 974–975 [2d Dept 2006]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). "To impose . . . liability [under the Labor Law], the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Linkowski v City of New York*, 33 AD3d at 975; *see Rodriguez v Mendlovits*, 153 AD3d 566, 568 [2d Dept 2017]; *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013]).

Here, Mr. Demolition has made a prima facie showing of its entitlement to judgment as a matter of law dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action insofar as asserted against it. It has submitted evidence demonstrating that it was not the owner of the premises, and did not have the requisite authority to control or supervise the means or methods of plaintiff's work or that of his employer, NYS Construction. Specifically, Mr. Demolition has established that its role at the work site was demolition and debris removal and, more importantly, that such work was completed months before the plaintiff's accident even occurred. In addition, Perlstein testified that none of Mr. Demolition's work involved any scaffolding at the site, and that it had no workers onsite at the time of the accident. Based upon the foregoing, Mr. Demolition has made a prima facie showing that it had no control or supervisory authority over the plaintiff's work and, therefore, was not a "statutory agent" within the meaning of the Labor Law (*see Lamar v Hill Int'l, Inc.*, 153 AD3d 685, 686 [2d Dept 2017]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 [2d Dept 2016]).

In opposition, the plaintiff has failed to raise a triable issue of fact. That Mr. Demolition was issued a building work permit, without more, is insufficient to raise a triable issue of fact as to whether, for purposes of the Labor Law, Mr. Demolition was either the "contractor" at the subject work site or an "agent" thereof within the meaning of the Labor Law (*see Martinez v 408-410*

Greenwich St., LLC, 83 AD3d 674, 675 [2d Dept 2011]; *Huerta v Three Star Constr. Co., Inc.*, 56 AD3d 613 [2d Dept]; *Kelly v Bruno & Son, Inc.*, 190 AD2d 777, 778 [2d Dept 1993]). Accordingly, plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are hereby dismissed as against Mr. Demolition.

Plaintiff's Labor Law § 200 claim against Mr. Demolition must also be dismissed. Inasmuch as Mr. Demolition is not an owner or general contractor and did not possess any authority to supervise and control the work area, it also cannot be held liable under Labor Law § 200 (*see Thomas v Benton,* 112 AD3d 812, 812-813 [2d Dept 2013]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 698–99).

Plaintiff's common-law negligence claim is also dismissed as against Mr. Demolition. A subcontractor "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011] [internal quotation marks omitted]; *see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2d Dept 2010]). An award of summary judgment in favor of a subcontractor on a negligence cause of action is improper "where the 'evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries'" (*Erickson v Cross Ready Mix, Inc.*, 75 AD3d at 523, *quoting Marano v Commander Elec., Inc.*, 12 AD3d 571, 572–573 [2d Dept 2004]). Here, Mr. Demolition has demonstrated, prima facie, that it did not create the condition that allegedly caused the plaintiff's injury in that it had completed its work at the site months before the accident occurred, and that its work did not involve any scaffolding at the site (*see Sledge v S.M.S. Gen. Contractors, Inc.*, 151 AD3d 782, 783 [2d Dept 2017]; *Palacios v 29th St. Apts, LLC*, 110 AD3d 698, 699 [2d Dept 2013]). Thus, it is undisputed that Mr. Demolition had no involvement with the subject scaffold or plaintiff's usage of it at the time of the accident. The plaintiff has failed to raise a triable issue of fact in opposition. Accordingly, plaintiff's common-law negligence claim is also dismissed as against Mr.

Demolition.

Inasmuch as plaintiff's entire complaint has been dismissed as against Mr. Demolition, Mr. Demolition's third third-party claims against Signature and Prestige for common-law indemnification, contribution and contractual indemnification have been effectively rendered moot, and said claims are hereby dismissed (*see Hoover v Int'l Bus. Machines Corp.*, 35 AD3d 371, 372 [2d Dept 2006]). Although Mr. Demolition's claims against Prestige and Signature for breach of contract for failure to procure insurance are not automatically rendered moot due to the dismissal of the plaintiff's complaint against it (*see Natarus v Corp. Prop. Investors, Inc.*, 13 AD3d 500 [2d Dept 2004] [court held third-party claim that defendant failed to procure contractually mandated insurance coverage was not academic notwithstanding dismissal of the underlying complaint]), those claims are also dismissed as it is undisputed that there were no contracts and/or written agreements between the parties obligating Prestige or Signature to procure insurance on behalf of Mr. Demolition. Accordingly, Mr. Demolition's cross motions (Motion Sequence Nos 9 & 10) for summary judgment on its third third-party claims against Signature and Prestige are denied as moot.

Plaintiff's Motion For Leave to File
Supplemental Summon and Amended Complaint

Plaintiff seeks leave to file and serve a Supplemental Summons and Amended Complaint upon both Prestige and Signature (collectively, "proposed defendants") naming them as direct defendants. The proposed amended complaint asserts claims under Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence (NYSCEF Doc. No. 87). Plaintiff alleges that his accident occurred on October 5, 2016 and, therefore, concedes that the applicable three-year statute of limitations for his claims against the proposed defendants expired on October 5, 2019. Plaintiff, however, argues that the "relation-back" doctrine, pursuant to CPLR § 203(f), and existing case law render his claims timely commenced against both Prestige and Signature. In this regard, plaintiff contends that Prestige was first put on notice of his potential claims against it on December 1, 2017,

before the statute of limitations period expired, when Prestige was served with 5214 Development's third-party complaint, which included a copy of plaintiff's original summons and complaint. In addition, as to Signature, plaintiff contends that it first had notice of his potential claims on or about October 19, 2018 when it was served with Prestige's second third-party complaint against it, which was also before the statute of limitations lapsed. Since the third party actions gave the proposed defendants "actual notice" of the occurrence on which plaintiff's main action is based (the construction-related accident) within the statute of limitations time period, plaintiff contends his proposed claims relate back to those asserted in the third party actions, and therefore are deemed timely. Further, plaintiff argues that there is no discernable prejudice to the proposed defendants if his amendment is granted as they have been active participants in this litigation since their initial appearances, and are fully aware of plaintiff's claims that he suffered an unprotected fall from a scaffold.

In opposition, Signature argues that the relation-back doctrine does not apply. In this regard, Signature contends that the statute of limitations in this matter expired on October 5, 2019, at which point Signature maintains it was not a party to this action. Signature contends that Prestige's second third-party complaint against it was dismissed on August 15, 2019 when 5214 Development's pleadings were stricken by the court and, thus, maintains there were no active third-party actions against Signature at the time the statute of limitations expired.

In addition, Signature argues that the plaintiff is unable to establish that the relation-back doctrine applies in that there is no showing that the three-part criteria has been satisfied: that (1) both claims arose out of the same conduct, transaction or occurrence, (2) that the new party is united in interest with an original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) that the new party Signature knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties,

the action would have been brought against that party as well (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]). In this regard, Signature contends that it had no notice prior to the expiration of the statute of limitations that potential negligence and Labor Law claims would have been asserted against it. It also avers that the plaintiff knew of Signature's identity as early as October 19, 2018 (one year prior to the expiration of the statute of limitations), and has provided no explanation for his failure to name it as a direct defendant within the time allotted by the statute of limitations, which constitutes bad faith on the part of plaintiff's counsel and lack of diligence. Signature further agues that plaintiff's proposed Labor Law claims against it lack merit in that it was an intermediate subcontractor at the site, not an owner, general contractor, or an agent thereof and, therefore, not a proper Labor Law defendant.

Prestige also opposes and argues that the relation-back doctrine does not apply herein since 5214 Development's third-party complaint against it was dismissed more than seven months before plaintiff sought leave to amend. In addition, Prestige points out that Mr. Demolition's third third-party complaint against it was commenced on October 21, 2019, which was after the statute of limitations had lapsed. Prestige, therefore, argues that neither third-party pleading can serve as a predicate for the filing of plaintiff's proposed amended complaint against it directly. In addition, Prestige joins in Signature's argument that the plaintiff has failed to satisfy the three-part test necessary to relate the proposed amended complaint back to the third-party pleadings. Prestige further argues that the plaintiff failed to provide a reasonable excuse for his delay in moving for leave to amend the complaint after the statute of limitations lapsed and after note of issue had been filed. Prestige also avers that the plaintiff was aware early in the litigation that Prestige was the general contractor and could be named as a direct defendant, but that he chose not to do so during the statute of limitations period. Thus, Prestige argues that plaintiff's belated attempt to add it as a first party defendant now is in bad faith and would result in irreparable prejudice. In this regard, Prestige maintains that it was wholly within its rights to defend only the claims filed against it by 5214

Development, and to rely upon the dismissal of such claims as ending the case against it.

In reply, plaintiff argues that the proposed defendants erroneously rely upon the wrong relation-back criteria that only applies under circumstances where the proposed defendants are complete strangers to the litigation (i.e., where a third-party action was not initiated within the statute of limitations time frame). Instead, plaintiff argues that a different set of relation-back doctrine requirements apply here where a third-party action (against Prestige) and a second third-party action (against Signature) were commenced before the statute of limitations expired. Plaintiff further argues that this Court's Order striking 5214 Development's pleadings did not dismiss Prestige or Signature from this action. In fact, plaintiff contends that Mr. Demolition's cross claims against Prestige, Prestige's second third-party claims against Signature, as well as Signature's cross claims against Prestige, which were pending, all survived this Court's August 15, 2019 Order. Plaintiff notes that the same Court Order also set forth a discovery schedule, including deposition dates, for all parties including Prestige and Signature. Thus, plaintiff argues that neither proposed defendant is a complete stranger to this action, but rather have remained active parties in this litigation since their initial appearances. Consequently, plaintiff argues that his motion to amend should be granted since both Prestige and Signature were named as third-party defendants and actually appeared and served answers within the statute of limitations period.

It is well established that "'[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" (*Catnap, LLC v Cammeby's Mgmt. Co., LLC*, 170 AD3d 1103, 1105 [2d Dept 2019], *quoting Mannino v Wells Fargo Home Mtge., Inc.*, 155 AD3d 860, 862 [2d Dept 2017]; *see* CPLR § 3025[b]; *CDx Labs., Inc. v Zila, Inc.*, 162 AD3d 972, 973 [2d Dept 2018]; *see also O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017]). The relation-back doctrine, codified in CPLR § 203 (f), provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed,

unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading" (CPLR § 203 [f]; *see Catnap, LLC*, 170 AD3d at 1105; *O'Halloran*, 154 AD3d at 86). This doctrine "enables a plaintiff to correct a pleading error- by adding either a new claim or a new party- after the statutory limitations period has expired," and gives courts the "sound judicial discretion to identify cases that justify relaxation of limitations strictures . . . to facilitate decisions on the merits if the correction will not cause undue prejudice to the plaintiff's adversary" (*Buran v Coupal*, 87 NY2d 173, 177–178 [1995] [citation and internal quotation marks omitted]; *see Catnap, LLC*, 170 AD3d at 1105–1106). The Court of Appeals has recognized that a more relaxed standard applies where a plaintiff seeks to use the relation-back doctrine by adding a new claim against a defendant who is already a party to the litigation up to the point of the requested amendment, as opposed to adding a new defendant who is a complete stranger to the suit (*see Buran*, 87 NY2d at 178; *see also Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985] [Court of Appeals reasoned that "[a]n amendment which merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation clearly does not conflict with the( ) policies" underlying the Statutes of Limitations because "(a) party is likely to have collected and preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action"]).

In *Duffy v Horton Mem. Hosp.* (66 NY2d 473), the Court of Appeals acknowledged that a third party defendant has "actual notice" of the plaintiff's potential claim when it is served with the third-party complaint, and all prior pleadings in the action as required by CPLR § 1007, and as such,"must gather evidence and vigorously prepare a defense. There is no temporal repose." (*id.* at 478). Under these circumstances, an amendment of the complaint may be permitted, in the court's discretion, and a direct claim asserted against the third-party defendants, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaints (*see id.*; *see also Peretick v City of New York*, 263 AD2d 410 [1st Dept.1999] ["As third-

party defendants had notice of these claims, . . . the amended complaint relates back to the time of service."]).

In contrast, where a plaintiff seeks to add a direct defendant who was a stranger to the action prior to the running of the statute of limitations, the relation-back doctrine allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted where three criteria are met: "(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining his defense on his merits, and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Buran v Coupal*, 87 NY2d at 178).

Applying the foregoing principles, it is undisputed that Prestige and Signature were both timely impleaded into this action before the expiration of the statute of limitations on plaintiff's claims and thus, were not "complete strangers" to the facts and allegations of the instant action. As such, "the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted" (*O'Halloran v Metro. Transp. Auth.*, 154 AD3d at 86–87; *see* CPLR § 203 [f]; *see also Duffy v Horton Mem. Hosp.*, 66 NY2d at 477).

Prior to the expiration of the statute of limitations, Prestige was served with 5214 Development's third-party summons and complaint, which included a copy of the plaintiff's complaint. Plaintiff's proposed Labor Law and negligence claims against Prestige clearly arise out of the same transaction or occurrence, namely plaintiff's October 5, 2016 workplace accident (*see* Third-Party Complaint, NYSCEF No. 92, ¶¶ 2-3, 10; *compare* Plaintiff's Amended Complaint, NYSCEF No. 87, ¶¶ 41-43). While 5214 Development's third-party complaint was subsequently dismissed as against Prestige, contrary to its assertion, Prestige remained an active participant in the

litigation in that Prestige's second third-party claims against Signature, as well as Signature's claims against Prestige, all survived this Court's Order striking 5214 Development's pleadings and are therefore still pending. More importantly, it is undisputed that Prestige received actual and timely notice of the underlying factual occurrences which form the basis of plaintiff's proposed claims. Therefore, plaintiff's proposed claims against Prestige, for the purposes of computing the statute of limitations, relate back to when Prestige was initially served as a third-party defendant and thus, the claims are timely (*see Deputron v A & J Tours, Inc.*, 93 AD3d 629, 629-30 [2d Dept 2012] [Second Department affirmed court's granting plaintiff's application to amend, made ten (10) months after lapse of statute of limitations where amended complaint "arose of out the same conduct, transaction, or occurrence" as the third-party complaint which was served before statute of limitations expired]; *Richards v Passarelli*, 77 AD3d 903, 905 [2d Dept 2010] [affirming the granting of a motion to amend where the third-party defendant, "which had been impleaded as a third-party defendant prior to the expiration of the limitation period applicable to the plaintiff's claim, was fully aware that a claim was being made against it with respect to the plaintiff's accident, and was a participant in the litigation"]; *Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 413-14 [1st Dept 2010] [holding that, "[b]ecause the second third-party complaint was properly filed and served, plaintiffs' claims against [the second third-party defendants], asserted in the amended complaint, relate back, for statute of limitation purposes, to the date of service of the second third-party complaint"]; *Rodriguez v Paramount Dev. Assoc.*, LLC, 67 AD3d 767, 768 [2d Dept 2009] ["The plaintiffs demonstrated the applicability of the relation-back doctrine, since [proposed defendant] had actual notice of their potential claim and was already a third-party defendant in the action"]; *Tyz v Integrity Real Estate & Dev., Inc.*, 43 AD3d 1038 [2d Dept 2007]).

Similarly, when Signature was served with Prestige's second third-party complaint, it had actual notice of the plaintiff's potential claims against it within the applicable limitations period (*see Duffy v Horton Mem. Hosp.*, 66 NY2d at 477; *Rodriguez v Paramount Dev. Assoc., LLC*, 67 AD3d at

768). Contrary to Signature's contention, the second third-party action was never dismissed or discontinued and therefore Signature remained an active party to this litigation. Therefore, plaintiff's proposed direct claims against Signature relate back to when Signature was initially served as a second third-party defendant, and are timely (*see Tyz v Integrity Real Estate & Dev., Inc.*, 43 AD3d at 1038; *Vincente v Roy Kay, Inc.*, 35 AD3d 448, 452 [2d Dept 2006] [leave to amend summons and complaint to add third-party defendant and second-third party defendant as direct defendants granted, despite expiration of statute of limitations where third-party defendant and second third-party defendant had timely notice of plaintiffs' claims by virtue of being impleaded by defendant involving claims arising out of same occurrence]).

Furthermore, the proposed defendants have failed to establish that plaintiff's proposed Labor Law §§ 240 (1), 241 (6), 200 and negligence claims are palpably insufficient or patently devoid of merit. The contention that the plaintiff cannot establish certain elements of the proposed causes of action are insufficient to deny the plaintiff's motion for leave to amend. Indeed, the fact that plaintiff could not remember how he fell from the scaffold does render his Labor Law § 240 (1) claim patently devoid of merit (*see Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490, 491 [1st Dept 2015]; *see also Gallagher v Resnick*, 107 AD3d 942 [2d Dept. 2013]). In any event, "'[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt'" (*see MBIA Ins. Corp. v J.P. Morgan Sec., LLC*, 144 AD3d 635, 639 [2d Dept 2016] quoting *Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]; *see Zacma Cleaners Corp. v Gimbel*, 149 AD2d 585, 586 [2d Dept 1989]; *accord Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]). On this record, it cannot be said that such is the case here with respect to any of plaintiff's proposed claims.

Furthermore, this court can discern no undue prejudice or surprise to Prestige or Signature if permission to serve an amended complaint is granted. "Prejudice is more than 'the mere exposure of the [party] to greater liability'" (*Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411 [2014], *quoting*

Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981]). "Rather, 'there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position'" (*Kimso Apts., LLC v. Gandhi*, 24 NY3d at 411 [internal citation omitted]). Moreover, the burden of establishing prejudice is on the party opposing the amendment (*see Kimso Apts., LLC v Gandhi*, 24 NY3d at 411). The proposed defendants have failed to make such a showing. The amendment is premised upon the same facts and occurrences as alleged in the third-party pleadings served upon them, and it is undisputed that both Prestige and Signature have been active participants at each court conference since their initial appearances, attended all EBTs and have received all discovery exchanged to date.

Nor does the court find bad faith on the part of the plaintiff. The depositions of Signature and Prestige took place on February 13, 2020 and February 19, 2020, respectively. The plaintiff filed the within motion to amend on February 28, 2020. Under these circumstances where the plaintiff sought to add the proposed defendants no more than two (2) weeks after each party appeared for a deposition, the court does not find any prejudicial delay or bad faith on the part of the plaintiff. Accordingly, plaintiff's motion for leave to file a Supplemental Summons and Amended Complaint adding Prestige and Signature as direct defendants is granted.

Prestige's Second Third-Party Claims Against Signature

As noted above, Prestige's second third-party action against Signature was not dismissed by Judge Colon's Order which struck 5214 Development's pleadings. Therefore, Prestige's second third-party claims against Signature remain pending. In its cross motion (motion seq. no. 8), Prestige seeks summary judgment on its second third-party claim against Signature for contractual indemnification. This claim is based upon the subcontract agreement that Prestige entered into with Signature, dated September 16, 2016, pursuant to which the latter was hired to perform work on the project. The subcontract contains an indemnity clause which states as follows:

> To the fullest extent permitted by law, the Subcontractor [Signature] agrees to indemnify, defend and hold harmless the Owner and the

> Contractor [Prestige] . . . from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, bodily injury or property damage (including loss of use thereof) brought against any of the Indemnitees by any person or entity, ***arising or alleged to be arising out of or in connection with or as a result or consequence of the performance of the Work of Subcontractor*** or independent contractor, as well as any additional work, extra work or add-on work, ***whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly by the Subcontractor including any subcontractors or independent contractor thereof and their employees***. The parties expressly agree that this indemnification agreement contemplates 1) full indemnity in the event of liability imposed against the Indemnitees without negligence; and 2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim which negligence is expressly excepted from the Subcontractor's obligation to indemnify. ***Attorneys' fees, court costs, expenses and disbursements shall be defined without limit to include those fees, costs, etc. incurred in defending the underlying claim and those fees, costs, etc. eincurred in connection with the enforcement of this Agreement.***" (NYSCEF Doc. No. 129, Prestige/Signature Subcontract, pg 3 [emphasis supplied]).

Prestige contends the contract terms required Signature to defend and indemnify it for claims arising out of Signature's work for which it hired plaintiff's employer, NYS Construction, to perform. Prestige maintains it is undisputed that the plaintiff's accident arose out of Signature's contracted "work," and, therefore, it is entitled to contractual indemnity from Signature. In addition, Prestige maintains it was entirely free from culpability for plaintiff's alleged injuries. In support, Prestige refers to the deposition testimony of Joyel Mandel, the President of Signature. Mandel testified that Signature was a roofing company hired by Prestige to perform roofing work at the construction site, and that Signature retained NYS Construction, plaintiff's employer, to perform stucco work on the exterior of the building. Mandel acknowledged that the stucco work was within the scope of Signature's contracted work at the site (NYSCEF Doc. No. 104, at pgs 13-14).

In addition, Prestige refers to the deposition testimony of David Sofer, the cofounder of Prestige. Prestige's counsel avers that Sofer stated, among other things, that Prestige "did not control the means or methods of the work" and specifically cites to pages 9-12 of Sober's deposition transcript (NYSCEF Doc. No. 217, Bundock Affirmation, at ¶ 15). A review of those cited pages, however, reveals no such testimony. Briefly summarized, Sofer testified that Tovia Kohen was the other founder of Prestige. He confirmed that Prestige was the general contractor, and that it hired subcontractors to perform the work at the site. He also testified that he visited the site all the time to make sure everything was working and to conduct safety meetings, and that he had the ability to stop work if he observed an unsafe condition. He further testified that Prestige did not install any scaffolding at the site.

It is well settled that "[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 Tanking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). "The 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" (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931 [2d Dept 2016]; *see Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015).

Here, the subcontract between Prestige and Signature clearly obligated Signature to indemnify Prestige and hold it harmless for any claims arising from its work at the premises. While Prestige has demonstrated that plaintiff's accident clearly arose out of and/or resulted from the performance of Signature's contracted work at the job site, it has failed to make a prima facie showing that it was free from negligence in that it failed to establish that it lacked supervisory control over the plaintiff's work (*see Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1101 [2d Dept 2009];

Weitz v Anzek Const. Corp., 65 AD3d 678, 681 [2d Dept 2009]). Consequently, that branch of Prestige's cross motion seeking summary judgment on its third-party claim for contractual indemnification as against Signature is denied.

That branch of Prestige's cross motion for summary judgment on its third-party claim against Signature for breach of contract for failure to procure insurance is also denied. "'A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with'" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011], *quoting Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]; *see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 701; *Ginter v Flushing Terr., LLC*, 121 AD3d 840, 844 [2d Dept 2014]).

Here, the Prestige/Signature subcontract clearly required Signature to procure certain insurance naming Prestige as an additional insured. However, aside from pointing to the relevant insurance procurement provision, Prestige has failed to submit any evidence substantiating its claim that Signature failed to comply with said provision. As such, Prestige has failed to establish its entitlement to judgment as a matter of law in connection with this issue (*see Ginter v Flushing Terrace, LLC*, 121 AD3d at 844; *Mathey v Metropolitan Transp. Authority* 95 AD3d 842, 845 [2d Dept 2012]).

The court notes that Prestige has failed to address its common-law indemnity and contribution cross-claims against Signature and therefore, that branch of its cross motion seeking judgment in its favor on said claims is denied.

Conclusion

Based upon the foregoing, regarding Motion Sequence 4, it is hereby

ORDERED that plaintiff's motion seeking leave to file and serve a Supplemental Summons and Amended Complaint adding Prestige and Signature as party defendants is granted, and the

Amended Complaint in the proposed form annexed to plaintiff's moving papers (NYSCEF Doc. No. 87) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Prestige and Signature shall serve an answer to the Amended Complaint or otherwise respond thereto within 20 days from the date of said service; and, regarding Motion Sequence 5, it is

ORDERED that branch of Prestige's cross motion for an order, pursuant to CPLR § 3211(a)(5), dismissing plaintiff's proposed Amended Complaint is denied; and it is further

ORDERED that branch of Prestige's cross motion seeking permission to re-file its second third-party complaint is denied as moot; and it is further

ORDERED that branch of Prestige's cross motion seeking an extension of time to file summary judgment motions related to the Amended Complaint is hereby granted to the extent of extending the time for the parties herein to move for summary judgement until sixty (60) days after the newly added defendants Prestige and Signature have either interposed an answer or otherwise responded herein; and, regarding Motion Sequence 6, it is

ORDERED that Signature's motion is granted to the extent that Mr. Demolition's third third-party complaint is dismissed as against Signature; and, regarding Motion Sequence 7, it is

ORDERED that Mr. Demolition's motion for summary judgment dismissing plaintiff's entire complaint as well as all crossclaims asserted against it is granted, and the action as against Mr. Demolition is hereby severed and dismissed; and, regarding Motion Sequence 8, it is

ORDERED that Prestige's cross motion is granted to the extent that Mr. Demolition's third third-party complaint as against it is dismissed; and it is further

ORDERED that the remainder of Prestige's cross motion seeking summary judgement on its second third-party claims against Signature is denied; and, regarding Motion Sequences 9 and 10, it is

ORDERED that Mr. Demolition's cross motions for summary judgment in its favor on its third third-party claims against Signature (MS # 9) and Prestige (MS #10) are denied as moot.

The foregoing constitutes the decision, order and judgment of the Court.

ENTER

HON. INGRID JOSEPH, J. S. C.

Hon. Ingrid Joseph
Supreme Court Justice