

Vargas v Toll GC LLC
2021 NY Slip Op 33096(U)
December 16, 2021
Supreme Court, Queens County
Docket Number: Index No. 705083/20
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

JUAN F. VARGAS,

Plaintiff(s),

- against -

Index No.: 705083/20

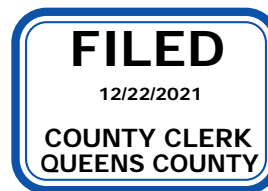
Motion Date: 9/28/21

Motion Cal. No.: 27, 28, 33

Motion Seq. No.: 05, 06, 08

TOLL GC LLC, TOLL FIRST AVENUE LLC, A L ONE INC., JM3 CONSTRUCTION LLC, and INDUSTRIAL CONSULTING & MARKETING, INC.,

Defendant(s).



The following papers numbered 1 - 46 read on these separate motions by the various defendants for summary judgment dismissing the complaint and all respective cross-claims as against them.

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Upon the foregoing papers, it is **ORDERED** that the above-referenced motions are decided as follows:

In this personal injury action, plaintiff alleges that on October 14, 2015, a stone countertop fell on him while working at the construction site of a 32-story residential condominium building at 959 1st Avenue, County, City and State of New York, owned by defendant Toll First Avenue, LLC ("Toll First"). Defendant Toll GC, LLC ("Toll GC"), the general contractor on the project, retained defendant JM3 Construction, LLC ("JM3") to perform drywall and foundation work. JM3 retained defendant A L One, Inc. ("A L One"), which, in turn, retained plaintiff's employer, non-party TNT Taping, Inc. ("TNT"), to perform the taping portion of the drywall work. Toll GC also retained defendant Industrial Consulting & Marketing, Inc. ("ICM") to manufacture, deliver, and install bathroom and kitchen countertops in the building's apartments.

According to plaintiff, on the morning of the accident, he reported to apartment 16C to perform taping work, at the direction of nonparty Thomas Giarusso, TNT's owner, who instructed him while he worked at the site. The apartment contained several "A-frame" carts, with marble countertops strapped to them, which defendant ICM had previously delivered, pursuant to an arrangement with defendant Toll GC, in which the apartments on each floor housing these items were to be secured by placing plywood barriers over the entrance, and marked with warning signs in English and Spanish. According to plaintiff, there were no barriers to apartment 16C's entrance, nor were there any signs warning him not to enter or move the carts. Plaintiff was injured when a countertop fell onto him, after he tried to move a cart that was blocking him from an area where he needed to work. None of the defendants' witnesses testified to having any knowledge that plaintiff was working on that floor, or in apartment 16C, until they learned of his accident. Plaintiff asserts causes of action under Labor Law §§ 200, 240(1), and 241(6), as well as for common law negligence.

Toll GC, Toll First, and JM3 (collectively, "the Toll defendants") now jointly move for summary judgment dismissing the complaint and all cross-claims against them. A L One and ICM also separately move for summary judgment, each seeking the same relief as the Toll defendants. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (see *Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of

the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (see *id.*). Courts must view the evidence in the light most favorable to the non-movant (see *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (see *Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

In support of summary judgment, the Toll defendants submit, *inter alia*, certified transcripts of the depositions of plaintiff and several persons employed by the various defendants in connection with the subject construction project, as well as copies of the written contracts entered into between Toll GC and JM3, between JM3 and A L One, and between Toll GC and ICM. Defendants A L One and ICM support their separate motions for summary judgment with similar evidentiary submissions.¹ In a separate decision and order dated December 8, 2021, this court ruled on plaintiff's motion for summary judgment. As the relevant evidentiary facts pertaining to the issue of liability are summarized within that decision, a detailed summary of same will not be repeated herein.

Plaintiff's Causes of Action

Labor Law § 240 (1)

As stated in this court's December 8, 2021 decision and order denying the branch of plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim, his accident cannot be reasonably viewed as belonging to the class of "gravity-related accidents" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]) to which Labor Law § 240 (1) is directed. The court, thus, awards summary judgment to all of the defendants, dismissing this cause of action against them (see CPLR 3212 [b]).

Labor Law § 241 (6)

The court now addresses whether the defendants have met their *prima facie* burdens on summary judgment to dismiss plaintiff's Labor Law § 241 (6) claim. As contrasted with the duty arising under the common law (see *Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]), Labor Law § 241 (6) "imposes a **nondelegable duty** of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed

¹The Toll defendants also submit an affidavit from site safety manager Alex Herceg, which was executed in another State, and lacks a certificate of conformity in order to render it admissible in New York (see CPLR 2309 [c]). The court, thus, did not consider it in support of the Toll defendants' motion for summary judgment (see *Zuckerman*, 49 NY2d at 562).

in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Simmons v City of NY*, 165 AD3d 725, 728-729 [2d Dept 2018] [emphasis added]). As a predicate to liability, a defendant must have violated a specific mandatory safety rule or regulation promulgated by the Commissioner of the Department of Labor, and the violation must have been a proximate cause of the plaintiff's injuries (see *id*; *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Plass v Solotoff*, 5 AD3d 365, 367 [2d Dept 2004]).

The Toll defendants and A L One, each, argue that all of the regulations cited in plaintiff's bills of particulars are facially inapplicable to the facts at bar. In opposition, plaintiff has not contested these showings, except as to Industrial Code § 23-1.7 (e)(2), which has been held to be sufficiently specific to sustain a cause of action under Labor Law § 241 (6) (see *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]). The court, thus, grants summary judgment to all of the defendants, dismissing plaintiff's claims arising under Labor Law § 241 (6) to the extent that they are predicated on any other regulation.

Plaintiff contends that Industrial Code § 23-1.7 (e)(2) is implicated because his slipping on garbage on the apartment floor prevented him from avoiding the falling countertop. The regulation generally mandates that the floors in a working area be kept free from dirt, debris, and materials "insofar as may be consistent with the work being performed." The Toll defendants argue that it is inapplicable because apartment 16C had been barricaded, with signs warning others not to enter, and, thus, was not a "work area" within the meaning of the regulation. However, the parties sharply dispute whether apartment 16C was, indeed, barricaded that day, and whether plaintiff had been instructed to enter and perform taping work inside, thereby making it his work area. Nor can the Toll defendants rely on site safety manager Herceg's averment that he did not see any garbage on the ground when he responded to the accident scene, since they failed to submit his affidavit in admissible form. In any event, this merely conflicts with plaintiff's testimony that the garbage was present. These triable issues of fact suffice to deny summary judgment to the Toll defendants for dismissal of plaintiff's Labor Law § 241 (6) claim.

Defendant A L One also seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim on the ground that it lacked supervisory control over plaintiff's work or the work site. Defendant ICM moves on similar grounds for the same relief. A subcontractor generally will not be liable for worksite injuries under the specific-duty provisions of Labor Law §§ 240 and 241 unless it also served as an agent of the owner or general contractor, *i.e.*, if it possessed the ability to supervise or control the work which gave rise to a plaintiff's accident (see *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). "When

the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor'" (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2d Dept 2007], quoting *Russin*, 54 NY2d at 318). The Court of Appeals' interpretation of "statutory agent" under Labor Law §§ 240 and 241 "limits the liability of a contractor as agent for a general contractor or owner for job site injuries to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created" (*Russin*, 54 NY2d at 318). As further explained by the Second Department,

"To impose such liability, 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. Thus, **a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right.** Once an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity"

(*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citations omitted] [emphasis added]).

Defendant JM3 was a subcontractor on the project, having been retained by general contractor Toll GC to perform drywall and foundation work. JM3, thus, became a statutory agent with respect to this work, and when it subcontracted the drywall work to defendant A L One, this delegation made A L One a statutory agent, as well (*see Lodato, supra*). That A L One may have subsequently subcontracted the taping portion of the drywall work to another entity is of no moment because, although a party can delegate the work which gives rise to a claimant's injury, the duty of care imposed by Labor Law §§ 240 (1) and 241(6) upon owners, general contractors, and their statutory agents is, itself, nondelegable. The record indicates that A L One assigned the entirety of the taping work to nonparty TNT, on whose behalf plaintiff was performing said work when he was injured. Therefore, this work was within the scope of the work that was delegated to A L One by JM3, and also was within the scope of the work delegated to JM3, as the statutory agent of general contractor Toll GC. As such, pursuant to this line of statutory agency from general contractor to subcontractor to sub-subcontractor, A L One had the authority to supervise and control plaintiff's work; that it may not have exercised same is irrelevant with respect to its potential statutory liability (*see Samaroo, supra*). The branch of A L One's motion for summary judgment dismissing plaintiff's Labor Law

§ 241(6) claim is, thus, denied.²

In contrast, the record makes clear that defendant ICM had no connection to plaintiff's employer, nonparty TNT, as ICM was outside of the line of agency with respect to drywall work, and, therefore, had no authority to supervise or control said work. Hence, there is no basis to impose Labor Law § 241(6) liability upon ICM, absent some evidence that it may have created the dangerous condition at issue (see *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2d Dept 2015] [subcontractor awarded summary judgment dismissing Labor Law §§ 200 and 241(6) claims, where "it did not exercise supervisory control over the injured plaintiff's work or have the authority to insist that proper safety practices be followed"; common-law claims survived due to questions regarding creation of the dangerous condition]). Although the parties dispute whether ICM may have created a dangerous condition by delivering the countertops on the carts (discussed below), the specific dangerous condition from which plaintiff's Labor Law § 241(6) claim arises is the purported garbage or debris on the floor, in violation of Industrial Code § 23-1.7 (e)(2). Since the record does not show that ICM had control over apartment 16C after it delivered the carts and countertops, plaintiff has failed to raise a triable issue of fact regarding ICM's liability under this statute. The court, thus, awards ICM summary judgment, dismissing the Labor Law § 241(6) claim as against it.

Common Law/Labor Law § 200

The Toll defendants and A L One also move to dismiss plaintiff's claims arising under Labor Law § 200 and the common law. Liability under Labor Law § 200 involves claims arising under two disjunctive standards: 1) those involving the means, methods or materials of the work, *i.e.*, the manner in which the work is performed; and 2) claims involving a dangerous or defective premises' condition at the work site (see *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Chowdhury*, 57 AD3d at 128). Plaintiff invokes both standards of liability.

With respect to the first standard, involving the means and methods, or manner of the work performed, it is well-settled that "[i]f the allegedly dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, liability does not attach under the common-law or under Labor Law § 200" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008]). Supervisory control is also necessary to impute liability under this standard to a general

²A L One does not address the applicability of Industrial Code § 23-1.7 (e)(2) in its moving papers-in-chief, and the court did not consider its argument on this issue, made for the first time in its reply papers.

contractor (see *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]), and a subcontractor (see *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016] [internal quotation marks and citations omitted]). However,

"[t]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence"

(*id* [internal quotation marks omitted]).

Although plaintiff contends that the A-frame carts containing the countertops constituted dangerous equipment because they were in the apartment in which he was assigned to work, it is undisputed that they were not provided to him to use as tools or equipment to perform his work. Nor does the record indicate that the carts malfunctioned, or that defendants' employees directed plaintiff to enter apartment 16C or move the carts. Moreover, plaintiff testified that he accepted instruction at the site only from his employer, nonparty TNT. The court, thus, finds, that the Toll defendants have shown that owner Toll First did not exercise supervisory control over the project in general, or over plaintiff's work, in particular, and, thus, cannot be held liable for his injuries under this theory. They have also shown that general contractor Toll GC and subcontractor JM3 did not exercise more than general supervisory control over the work site, and did not specifically oversee plaintiff's work, which is insufficient (see *Marquez*, 141 AD3d at 698). Similarly, A L One, as sub-subcontractor, made a *prima facie* showing of its lack of supervisory control or authority over the work site and plaintiff. In opposition, plaintiff has not raised a triable issue of fact as to the inapplicability of this standard as a basis for liability.

Under the second standard, involving dangerous conditions existing on the premises where the work was being undertaken,

"an owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 has the initial burden of making a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of its existence"

(*Costa v Sterling Equip., Inc.*, 123 AD3d 649, 650 [2d Dept 2014]). At times, plaintiff's papers assert that placing the countertops on

the A-frame carts constituted the dangerous condition, and at other points, plaintiff appears to contend that it was the failure to secure the apartments containing these items which was dangerous. With respect to the former, the witnesses with industry-specific knowledge testified that it is dangerous to place stone countertops on the ground, but, rather, it is standard and customary to secure them to A-frame carts for both transport and storage. Moreover, the Toll defendants' expert witness averred that such storage was proper and did not violate any safety rules or regulations. The court, thus, finds that the moving defendants have met their *prima facie* burden to establish that placing the countertops on the carts did not, in and of itself, constitute a dangerous condition under the facts of this case. Since plaintiff's expert also averred that this storage method would be safe if the items were barricaded in rooms with warning signs, the court finds that plaintiff has not raised a triable issue of fact on this specific issue.

However, to the extent that the claimed dangerous condition was the failure to secure the area in which the carts were stored, the Toll defendants have failed to make a *prima facie* showing that owner Toll First lacked constructive notice that the plywood barrier and warning signs had been removed from the entrance to apartment 16C. The record does not indicate how long the apartment may have been unsecured before plaintiff's accident. Although Toll GC and JM3's witnesses testified to having observed barriers on the entryways to the designated apartments on the upper floors, they could not say when they had last seen the barrier on apartment 16C.

The Toll defendants seek to establish the absence of constructive notice through the testimony of site safety manager Alex Herceg, but as noted above, their failure to submit his affidavit in admissible form precludes their reliance on it to make their *prima facie* showing. Even if the court were to consider the affidavit, it would not suffice, as Herceg averred that apartment 16C's barrier was up when he inspected on the day before the accident, but he did not specify when. Since plaintiff testified that the apartment was open when he arrived at 7:00 am, this leaves open the possibility that it had been unsecured for half-a-day or more before the accident. It cannot be said as a matter of law that this would not have been enough time to discover and remedy the condition. The movants' failure to affirmatively establish a lack of constructive notice requires denial of summary judgment dismissing the Labor Law § 200 and common-law claims against Toll First, regardless of the sufficiency of plaintiff's opposition.

The analysis differs with respect to defendant Toll GC, which was the general contractor on the project, and defendants JM3 and A L One, which served as subcontractor and sub-subcontractor, respectively. As contrasted with an owner, "[a] contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition only if it had

control over the work site and either created the dangerous condition or had actual or constructive notice of it" (*Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005 [2d Dept 2019] [internal quotation marks omitted] [emphasis added]). Since plaintiff testified that he took direction only from nonparty TNT, the record shows that the contractor defendants did not exercise control or authority over his work at the construction site, but, at most, exercised only general supervisory control over the site. Since this is insufficient to impose liability under Labor Law § 200 or the common law (see *Marquez*, 141 AD3d at 698), plaintiff has failed to raise a triable issue of fact, and these defendants are entitled to summary judgment dismissing this claim.

Defendant ICM is also entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law claims against it. It is well-settled that "an entity is not deemed to be an agent of an owner or contractor for purposes of Labor Law § 200 if it 'lacked sufficient control over the premises and the activity that brought about the injury'" (*Marquez*, 141 AD3d at 698-699, quoting *Navarro v City of NY*, 75 AD3d 590, 592 [2d Dept 2010]). As there was no connection between plaintiff and ICM, it necessarily lacked control over his activity. Nor do the parties cite any evidence showing that ICM had any control over the premises after it delivered the countertops. Hence, the usual prerequisites for imposing liability under Labor Law § 200 and the common law are missing, here.

Defendant ICM's primary argument in support of summary judgment is that it owed no duty of care to plaintiff because its only connection to the incident was its delivery of the countertops pursuant to its contract with Toll GC, to which plaintiff was not a party. The threshold issue in all tort cases is whether the defendant owed a duty of care to the injured party, and "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). A defendant who moves for summary judgment in this scenario satisfies its *prima facie* burden by offering proof that the injured plaintiff was not a party to the contract, which shifts the burden to the opponent to demonstrate the applicability of one or more of the three exceptions to the general rule espoused in *Espinal* (see *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810-811 [2d Dept 2013]). ICM has met its initial burden, as it is undisputed that plaintiff was not a party to its contract with Toll GC.

In opposition, plaintiff invokes the first factor: "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm" (*Espinal*, 98 NY2d at 140). This is equivalent to creating or exacerbating a harmful or dangerous condition (see *id* at 142-143), mirroring the general common-law principle that a subcontractor may still be held liable for negligence where the work it performed

created the condition that caused a plaintiff's injury (see *Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]). As discussed, there has been no showing that, within the context of this particular industry, the delivery of the countertops, secured to the A-frame carts, in and of itself, constitutes a dangerous condition. Rather, it is the alleged failure to secure the storage area and place warning signs that placed plaintiff at risk. However, Toll GC's witness testified that Toll GC decided to take an early delivery, store the items in designated apartments, and direct installation of the barriers. Moreover, although plaintiff and Toll GC now argue that it was ICM's duty to secure those areas after delivery, Toll GC and JM3's witnesses testified that they saw the barriers in place on all of the designated apartments before the day of the accident. Hence, even if the ICM-Toll GC contract placed that responsibility upon ICM, the record shows that the barriers were in place at some point post-delivery, and there is no allegation or evidence that ICM subsequently removed apartment 16C's barrier, or that it was responsible for performing ongoing site inspections and replacing any barriers which were removed. In the face of this showing, plaintiff and the Toll defendants have failed to raise a triable issue of fact as to whether ICM created the dangerous condition. ICM is, thus, entitled to summary judgment dismissing all of plaintiff's claims as against it.

Defendants' Cross-Claims

All of the defendants additionally move for summary judgment dismissing the cross-claims asserted against them by their respective co-defendants. The Toll defendants also move for summary judgment on their cross-claims against defendants A L One and ICM for contractual indemnification and failure to procure insurance.

At the outset, the branch of defendant ICM's motion for summary judgment dismissing the other defendants' cross-claims as against it is denied. ICM's motion papers do not proffer any legal argument in favor of dismissing any cross-claims, having focused solely on the viability of plaintiff's claims against it. As such, the court does not consider this issue to have been properly raised by ICM, thereby warranting summary denial of the requested relief.

The court, next considers the Toll defendants' request for affirmative relief on their cross-claims against A L One and ICM. Before addressing whether these movants have made a *prima facie* showing that either co-defendant must indemnify them pursuant to the respective agreements, the court must address the threshold issue of whether they have established that they may seek such relief at this procedural juncture. The Second Department has explained that

"[a] court may render a conditional judgment on the issue

of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed"

(*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930 [2d Dept 2016]). It is also well-settled that to obtain this relief,

"the one seeking indemnity need only establish that it was free from any negligence and may be held liable solely by virtue of ... statutory or vicarious liability. However, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature"

(*Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616 [2d Dept 2011] [internal quotation marks, citations, and brackets omitted] [ellipses in original]). As discussed above, there are triable issues of fact as to whether defendant Toll First, as owner of the premises, may be found negligent under Labor Law § 200 and the common law for allegedly failing to remedy a dangerous condition. Hence, the movants have necessarily failed to make a *prima facie* showing that Toll First is eligible to seek a conditional judgment on the issue of contractual indemnification purportedly owed by A L One or ICM. This branch of the Toll defendants' motion on behalf of Toll First is, thus, denied.

Since the court has concluded that Toll defendants Toll GC and JM3 cannot be found to have been actively negligent under Labor Law § 200 and the common law, they are eligible to seek a conditional judgment on the issue of contractual indemnification. "A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Hanna v Milazzo*, 179 AD3d 907, 909 [2d Dept 2020] [internal quotation marks omitted]). Moreover,

"a contractual indemnification provision must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances"

(*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255-1256 [2d Dept 2010] [internal quotation marks and citations omitted] [brackets in original]).

As regards the cross-claims against defendant ICM, it is noted that Toll defendant JM3 is not a signatory to the ICM-Toll GC subcontract, nor has it been argued that JM3 was an intended third-party beneficiary, like Toll First. Hence, although the Toll

defendants' joint answer generally asserts various cross-claims against the other defendants, in seeking summary judgment on the cross-claims for contractual indemnification and failure to procure insurance against ICM, they do not appear to have moved on behalf of JM3, nor does the court construe their moving papers to do so.

With respect to Toll GC's cross-claims against ICM, it is undisputed that their subcontract contains provisions requiring ICM to procure commercial general liability ("CGL") insurance naming both Toll GC and Toll First as additional insureds, and to indemnify them for claims arising out of, *inter alia*, the agreement or ICM's work. The ICM-Toll GC subcontract also specifies that

"[s]uch CGL coverage must provide for the indemnification and/or contribution of claims to the fullest extent permitted by applicable law ... regardless of whether the indemnitee is partially negligent, and excluding only liability created by the indemnitee's sole and exclusive negligence."

In seeking summary judgment against ICM, the Toll defendants allege that ICM's insurer has not responded to their tender of plaintiff's claim. Notwithstanding the insurer's purported failure, it appears to be uncontroverted on this record that ICM procured the insurance pursuant to the ICM-Toll GC subcontract. The Toll defendants have not called the court's attention to any contractual provisions requiring ICM to rectify potential disputes between its insurer and the additional insureds. The court, thus finds that the Toll defendants have not satisfied their *prima facie* burden to establish that ICM failed to honor either of the contractual obligations complained of. Hence, the branch of the Toll defendants' motion seeking summary judgment against ICM on the cross-claims for contractual indemnification and failure to procure insurance must be denied, regardless of the sufficiency of the opposing papers.

The Toll defendants also move for summary judgment on these cross-claims against defendant A L One. First, they argue that the A L One-JM3 subcontract required A L One to indemnify and procure insurance coverage for Toll GC, as an affiliate of Toll First. The right to contractual indemnification depends upon the specific language of the agreement (*see Hanna*, 179 AD3d at 907). Similarly, "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966-967 [2d Dept 2012]). As to indemnification, the A L One-JM3 subcontract provides, in pertinent part:

"To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, the Contractor (including its affiliates,

parents and subsidiaries) and all of their ... agents ... from and against all claims, costs, damages, losses and expenses, including attorney's fees incurred in defending third party actions or enforcing this Agreement against the Subcontractor, arising out of or resulting from the performance of the Subcontractor's work provided that ... Any such claim, damage loss or expense is attributable to ... the extent cause [sic] or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor, or anyone directly or indirectly employed by the Subcontractor, or anyone whose acts the Subcontractor may be liable, [sic] regardless of whether it is caused in part by a party indemnified hereunder."

The insurance provision provides that "the Subcontractor shall procure for the Subcontractor's work and maintain in force" multiple types of insurance, and that "[t]he Contractor and Owner shall be named as additional insureds on each of these policies except Workers' Compensation."

The Toll defendants argue that Toll GC, which is not a signatory to the A L One-JM3 subcontract, is entitled to benefit under it because Toll GC is an affiliate of the owner, Toll First, and both are also subsidiaries of the same parent company. However, the A L One-JM3 subcontract identifies JM3 as "the Contractor," and A L One as "the Subcontractor," and requires A L One to procure insurance only for the contractor and the owner (Toll First). Although the agreement requires A L One to indemnify the owner, contractor, and their agents, it does not identify Toll GC as an agent of Toll First or JM3. Rather, the "Contract Documents" paragraph refers to the owner's "General Contractor," but the indemnification and insurance provisions contain no such mention. That the agreement specifically refers to the general contractor by title in the former section, but omits this nomenclature in the latter sections, evinces the contracting parties' clarity as to which entities they intended the insurance and indemnification provisions to cover (*see Lipshultz v K & G Indus.*, 294 AD2d 338, 338-339 [2d Dept 2002] [general contractor's cross-claim dismissed, where contractual indemnification provision specifically included "the owner, contractor, and their agents," but not the general contractor, who was referred to elsewhere in the agreement]; *see also Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 690-691 [2d Dept 2017]). The court, thus, finds that the Toll defendants have not satisfied their *prima facie* burden to show that the A L One-JM3 subcontract obligated A L One to indemnify, or procure insurance coverage for, Toll GC.

The Toll defendants also argue that A L One was required to indemnify and procure insurance coverage for Toll GC because the A L One-JM3 subcontract was subordinate to the "prime contract" between Toll GC and JM3, which required JM3 and the subcontractors

it hired to provide such benefits to owner Toll First and its affiliates, including Toll GC. It is well-settled that

"[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor"

(*Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 833 [2d Dept 2012]). The A L One-JM3 subcontract provides, in pertinent part, within the "Contract Documents" paragraph, as follows:

"The contract documents consist of this agreement and the prime contract between the Owner and its General Contractor and/or [JM3] and any documents described therein or set forth hereafter. To the extent that they are applicable to the Subcontractor, or the Subcontractor's work, or both, the contract documents are binding upon the Subcontractor. The Prime Contract specifications and conditions are made part of this contract..."

The Toll defendants argue that this language serves to incorporate the JM3-Toll GC prime contract's indemnification and insurance procurement obligations into the A L One-JM3 subcontract, so as to bind A L One. However, such a non-specific reference is insufficient in light of the previously-cited principles that indemnification provisions must be strictly construed (see *Alfaro*, 74 AD3d at 1255-1256), a requirement to procure additional insured coverage must be "expressly and specifically stated" (see *Ramcharan*, 94 AD3d at 966-967), and a subcontract's incorporation by reference will bind a subcontractor only as to those prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor (see *Persaud*, 93 AD3d at 833). The Toll defendants do not contend that the JM3-Toll GC prime contract's indemnification and insurance procurement provisions relate to the scope, quality, character and manner of the work to be performed by A L One under the A L One-JM3 subcontract. Nor do they cite any other language specifically referring to, and purporting to incorporate, the prime contract's indemnification and insurance provisions into the subcontract, so as to bind A L One.

As to the cross-claim for failing to procure insurance, the Toll defendants acknowledge that A L One procured insurance listing Toll First and JM3 as additional insureds, but contend that A L One breached the subcontract, nonetheless, because it failed to procure coverage for Toll GC, whom its insurer expressly declined to cover, while reserving its rights as against Toll First and JM3. The

court finds that the Toll defendants have failed to establish, *prima facie*, how A L One's insurer's reservation of rights as against covering Toll First and JM3 constitutes a breach by A L One. In any event, the policy obtained by A L One contains an endorsement providing that any entity required to be named as an additional insured in a written contract will be granted additional insured status, thereby indicating that A L One obtained coverage for other entities potentially found to be contractually entitled to same.³ As this evidence rebuts the Toll defendants' contention that A L One failed to procure insurance coverage pursuant to the subcontract, or the prime contract (if applicable), this branch of their motion is denied.

Insofar as the Toll defendants seek summary judgment on JM3's behalf against defendant A L One on the cross-claims for contractual indemnification and insurance procurement, they have not met their *prima facie* burden. The A L One-JM3 subcontract's indemnification provision requires A L One to indemnify Toll First and JM3 only when a claim arises from an injury caused by a negligent act or omission of A L One, or anyone whose acts A L One would be liable for, including direct or indirect employees. As indicated above, A L One, itself, cannot be found to have been actively negligent under Labor Law § 200 and the common law, but the potential exists that others for whom A L One may be liable may be found to have been at fault. The Toll defendants argue that plaintiff's former employer, nonparty TNT, was negligent in directing him to work in apartment 16C, when it was unsafe to do so. Since A L One retained TNT for this project, it is possible that the indemnity provision may be triggered if a jury agrees with this theory, notwithstanding that plaintiff accepted workers' compensation benefits and did not sue TNT. However, triable issues of fact are evident from TNT's owner's testimony that he did not recall sending plaintiff to apartment 16C on the morning of the accident, and his denial of any knowledge of what was stored inside. The Toll defendants' failure to satisfy their *prima facie* burden requires denial of summary judgment on their cross-claims, regardless of the sufficiency of the opposing papers.

A L One separately moves for summary judgment dismissing the Toll defendants' cross-claims against it for contractual indemnification and failure to procure insurance. For the reasons discussed above, the court finds that the record establishes, *prima facie*, the following: A L One procured insurance listing Toll First and JM3 as additional insureds; the A L One-JM3 subcontract does not directly require A L One to provide indemnity or procure insurance for Toll GC, which is a non-signatory to the agreement;

³To the extent that the Toll defendants insist that Toll GC qualifies for this status under the A L One-JM3 subcontract and/or the prime contract, they are free to take whatever action they deem necessary against the insurer to enforce their alleged rights under this endorsement.

and even if A L One were so obligated due to incorporation of the JM3-Toll GC prime contract, the insurance policy's additional insured endorsement addresses that scenario. The Toll defendants' opposition failed to raise a triable issue of fact as to whether A L One procured insurance covering Toll First, JM3, and any other entity required to be so covered pursuant to a written agreement. However, as discussed above, the court finds that there are triable issues of fact as to whether A L One's subcontractor, nonparty TNT, was at least partially at fault for plaintiff's accident, thereby triggering its obligation under the A L One-JM3 subcontract to indemnify Toll First and JM3. The court, thus, grants summary judgment in favor of A L One, dismissing the cross-claim for failure to procure insurance, and denies summary judgment to dismiss the cross-claim for contractual indemnification.

A L One also moves for summary judgment dismissing all cross-claims against it for common-law indemnification and contribution. The former requires the proposed indemnitee to be free from negligence, and proof of some negligence by the proposed indemnitor that contributed to causing the plaintiff's injuries (see *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part"]; *Castillo v Port Auth. of NY & New Jersey*, 159 AD3d 792, 795 [2d Dept 2018] [obligation imposed "upon those actively at fault in bringing about the injury"]). Moreover, as specifically relevant here,

"a party's (e.g., a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. **Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision.** Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone."

(*McCarthy*, 17 NY3d at 377-378 [emphasis added]). Contribution is also predicated upon the proposed contributor's negligence in causing a plaintiff's injury, and, thus, is subject to dismissal in the absence of evidence that the contributor breached a duty of care to the contributee which is independent of its contractual obligations, or a duty of care owed directly to the injured plaintiff (see *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016] [both claims dismissed where proposed contributor/indemnitor had not "breached a duty owed to the injured plaintiff"]; *Proulx v Entergy Nuclear Indian Point 2, LLC*, 98 AD3d

492, 493-494 [2d Dept 2012] [contribution claim dismissed, no triable issue as to whether proposed contributor owed contributees a duty of care independent of contractual obligations, or a duty to the injured plaintiff]).

As discussed, A L One cannot be found to have been actively negligent under the common law, since the record shows that it did not exercise control or supervision over the site, in general, or plaintiff's work, in particular. A L One, has, thus, established its *prima facie* entitlement to dismissal of all cross-claims for common-law indemnification and contribution. In opposition, the Toll defendants argue that nonparty TNT's work "stands at the very center of the causation of [plaintiff's] accident," and "pursuant to contract, A L One is responsible for its subcontractor's negligence." This argument is unavailing, since it necessarily acknowledges that: 1) TNT, not A L One, exercised actual control over plaintiff's work; and 2) the purported duty of care owed by A L One arose from its contractual obligations. Since claims for common-law indemnification and contribution will not lie in these scenarios (see *Kane*, 145 AD3d at 869), the Toll defendants have failed to raise a triable issue of fact. In light of defendant ICM's failure to this motion, the court grants summary judgment, dismissing all of these cross-claims against A L One.

Accordingly, the above-referenced motions are decided, to the extent that, it is

ORDERED that the branch of the motion by defendant A L One, Inc. for summary judgment dismissing the complaint (***motion sequence #5***) is **GRANTED solely to the extent** of dismissing the complaint as against A L One, Inc., except for plaintiff's cause of action arising under Labor Law § 241 (6); and it is further

ORDERED that the branch of the motion by defendant A L One, Inc. for summary judgment dismissing the cross-claims as against it (***motion sequence #5***) is **GRANTED solely to the extent** of dismissing all cross-claims for common-law indemnification and contribution, and dismissing the cross-claim of defendants Toll GC, LLC, Toll First Avenue, LLC, and JM3 Construction, LLC for failure to procure insurance; and it is further

ORDERED that the motion by defendant Industrial Consulting & Marketing, Inc. for summary judgment dismissing the complaint and all cross-claims (***motion sequence #6***) is **GRANTED solely to the extent** of dismissing the complaint as against it; and it is further

ORDERED that the branch of the motion by defendants Toll GC, LLC, Toll First Avenue, LLC, and JM3 Construction, LLC for summary judgment dismissing the complaint and all cross-claims (***motion sequence #8***) is **GRANTED solely to the extent** of dismissing the complaint as against them, except for: 1) plaintiff's claim arising

under Labor Law § 241 (6); and 2) plaintiff's claim against Toll First Avenue, LLC, arising under the common law and Labor Law § 200 regarding a dangerous condition on the premises; and it is further

ORDERED that the branch of the motion by defendants Toll GC, LLC, Toll First Avenue, LLC, and JM3 Construction, LLC for summary judgment on their cross-claims against defendants A L One, Inc. and Industrial Consulting & Marketing, Inc. (***motion sequence #8***) is **DENIED**.

The foregoing shall constitute the decision and order of this court.

Dated: December 16, 2021



JANICE A. TAYLOR, J.S.C.

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