

Sanchez v Madison 79 Assoc., Inc.

2022 NY Slip Op 33041(U)

August 26, 2022

Supreme Court, Kings County

Docket Number: Index No. 510165/2016

Judge: Karen Rothenberg

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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of August, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

-----X

FABIAN VINICIO SANCHEZ,

Plaintiff,

-against-

Index No.: 510165/2016

MADISON 79 ASSOCIATES, INC., GOOD GUYS
NYC CONSTRUCTION CORP., JONATHAN
JACOBSON, FRAN JACOBSON, MAXWELL-
KATES, INC.,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>153-169,170-191,192-208,212-217</u>
Opposing Affidavits (Affirmations) _____	<u>211, 218-220, 221, 223</u>
Affidavits/ Affirmations in Reply _____	<u>224, 225</u>
Other Papers: _____	_____

Upon the foregoing papers, defendants Jonathan Jacobson and Fran Jacobson (the Jacobsons) move, in motion sequence 7, for an order granting them summary judgment, pursuant to CPLR 3212, dismissing plaintiff Fabian Vinicio Sanchez’s complaint and all cross claims asserted against them. The Jacobsons further move for an order awarding them conditional indemnification against defendant Good Guys NYC Construction Corp. (Good Guys).

Plaintiff moves, in mot. seq. 8, for an order awarding him summary judgment under Labor Law § 240 (1) against defendants Madison 79 Associates, Inc. (Madison), Maxwell-Kates, Inc. (MKI), and Good Guys.

Madison and MKI move, in mot. seq. 9, for an order awarding them summary judgment dismissing plaintiff's complaint and all cross claims asserted against them,¹ and for conditional summary judgment for common-law indemnification against Good Guys. In addition, Madison and MKI move for conditional summary judgment for contractual indemnification and breach of contract against the Jacobsons.

Plaintiff moves, in mot. seq. 10, for an order granting him leave to serve an amended bill of particulars.

On April 26, 2016, plaintiff was injured while performing demolition work on a gut renovation of a cooperative apartment unit at 50 East 79th Street, NYC. The building in which the apartment is located is owned by Madison and managed by MKI. The Jacobsons own shares in Madison and hold a proprietary lease for the unit. Before the work commenced, the Jacobsons entered into an Alteration Agreement with Madison. The proprietary lease specifically required that the Jacobsons execute and comply with the terms of the Alteration Agreement prior to the commencement of any work in the apartment unit. The Alteration Agreement contained a clause in which the Jacobsons agreed to indemnify Madison and MKI "against any damages suffered to persons or property as a result of the Work." The Alteration Agreement also contained a clause

¹ Madison and MKI's notice of motion states that they are moving to dismiss plaintiff's entire complaint against them. However, the motion itself does not address plaintiff's Labor Law § 240 (1) claim.

whereby the Jacobsons agreed to procure from the contractor insurance policies which listed Madison and MKI as additional insureds.

Prior to the accident, the Jacobsons hired Good Guys as the general contractor on the renovation project. Subsequently, Good Guys subcontracted with plaintiff's employer, non-party World Class Demolition (WCD), to perform demolition work on the project. On the day of the accident, plaintiff was directed by his WCD supervisor, Giovanni Hurtado, to demolish a plaster ceiling in one of the rooms in the apartment. In this regard, plaintiff testified that he was supervised solely by Hurtado while performing work in the apartment. In order to do the work, plaintiff and a coworker stood on the platform of a bakers scaffold which had lockable wheels on each of its four legs. According to plaintiff, he complained to Hurtado about the scaffold before performing the work. In particular, plaintiff testified that he told Hurtado that the scaffold was too narrow and lightweight for the work that they were performing, and Hurtado told him that it was the only scaffold available. Plaintiff also testified that there were no guardrails around the scaffold platform. The accident occurred when a section of the ceiling that plaintiff and his coworker were not demolishing broke free and struck the scaffold causing the scaffold to fall over. Plaintiff's coworker was able to jump free but plaintiff remained on the apparatus and struck the floor, causing him to suffer various injuries.

On or about May 20, 2016, plaintiff commenced the instant action against Madison, Good Guys, and the Jacobsons by filing a summons and complaint alleging violations of Labor Law §§ 240 (1), 241 (6), 200, as well as common-law negligence. Plaintiff also

commenced a separate action against MKI alleging the same claims and that action was ultimately consolidated with the instant case.

The Jacobsons' Motion for Summary Judgment

The Jacobsons move for summary judgment dismissing plaintiff's claims against them and further move for summary judgment on their common-law and contractual indemnification cross claims against Good Guys. In moving to dismiss plaintiff's claims against them, the Jacobsons claim that they are exempt from liability under Labor Law §§ 240 (1) and 241 (6) since the work took place on their single-family apartment unit and they did not control or supervise plaintiff's work, or have notice of any unsafe condition that may have caused the accident. Similarly, the Jacobsons argue that plaintiff's Labor Law § 200 and common-law negligence claims against them must be dismissed. In support the Jacobsons point to the undisputed fact that plaintiff was injured while performing construction work on their single-family apartment. Furthermore, plaintiff's own deposition testimony, indicated that he was supervised solely by his WCD supervisor, Mr. Hurtado. Finally, Jonathan Jacobson's deposition testimony, indicated that he did not exercise any control or supervision over plaintiff's work and was unaware that WCD was performing demolition work on the project.

No opposition has been submitted to the Jacobsons' motion to dismiss plaintiff's complaint against them. To the contrary, plaintiff has submitted an affirmation by his attorney stating that "plaintiff voluntarily withdraws his claims against [the Jacobsons]."²

² The court notes that plaintiff's stipulation withdrawing his claims against the Jacobsons is not effective since post-answer claims may only be dismissed by a court order or by a stipulation signed by all of the parties (CPLR 3217 [a][2]; *C.W. Brown, Inc. v HCE, Inc.*, 8 AD3d 520 [2004]).

Both Labor Law §§ 240 (1) and 241 (6) specifically exempt one and two-family homeowners from liability provided that the defendant/homeowner demonstrates that the underlying work was conducted at a dwelling that is a residence for only one or two families, and that the defendant/homeowner did not direct or control the work (*Chowdhury v Rodriguez*, 57 AD3d 121, 126-127 [2008]; *Ortega v Puccia*, 57 AD3d 54, 58-59 [2008]). “The statutory phrase ‘direct and control’ is construed strictly and refers to situations where the owner supervises the method and manner of the work” (*id.* at 59).

Here, the Jacobsons have made a prima facie showing of their entitlement to summary judgment dismissing plaintiff’s Labor Law §§ 240 (1) and 241 (6) claims against them, and no opposition has been offered. Accordingly, plaintiff’s Labor Law §§ 240 (1) and 241 (6) claims against the Jacobsons are dismissed as they are barred by the one and two-family homeowner exemption to such statutes.

In support of their motion to dismiss plaintiff’s Labor Law § 200 and common-law negligence claims the Jacobsons again offer deposition testimony, which indicates that the Jacobsons did not control or supervise plaintiff’s work, or have notice of any unsafe condition in the ceiling.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury*, 57 AD3d at 127-128). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff’s work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866,

868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

Here, the court has already determined that the Jacobsons did not exercise supervision and control over the work, or have any specific authority to exercise such supervision and control. Further, to the extent that the accident was caused by a dangerous condition in the form of the loose ceiling piece that struck the scaffold, it is undisputed that the Jacobsons did not create or have notice of this condition. Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims against the Jacobsons are dismissed.

The Jacobsons move for summary judgment under their common-law and contractual indemnification cross claims against Good Guys noting that the accident was not caused by any negligence on their part and that they did not have any authority or control over the work performed by plaintiff at the time of the accident. The Jacobsons further point to a clause in the construction contract that they entered into with Good Guys in which Good Guys agreed to indemnify them for any injuries "caused in whole or in part by any negligent act or omission of [Good Guys] or anyone directly or indirectly employed by [Good Guys] or for anyone whose acts [Good Guys] may be liable." Good Guys has not submitted opposition to the Jacobsons' motion for summary judgment.

Although the Jacobsons have established that the accident was not caused by their own negligence, they have failed to establish that the accident was caused by Good Guys' negligence or that Good Guys controlled and supervised plaintiff's work. Accordingly, the Jacobsons' motion for summary judgment under their common-law indemnity claim against Good Guys is denied without regard to the sufficiency of the opposition.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3de 925, 930 [2009]).

Here, the Jacobsons have demonstrated that the accident was not caused by any negligence on their part. Moreover, it is undisputed that that accident was caused by the acts and omissions of Good Guys' subcontractor WCD, Good Guys' obligation to indemnify the Jacobsons pursuant to the clause in the construction contract between the parties was triggered. Accordingly, the Jacobsons' motion for summary judgment under their contractual indemnification cross claim against Good Guys is granted.

Plaintiff's Labor Law § 240 (1) Claim Against Madison, MKI and Good Guys

Plaintiff moves for summary judgment against Madison, MKI and Good Guys under Labor Law § 240 (1). In support of his motion, plaintiff points to the undisputed facts that the building was owned by Madison and that MKI was the managing agent for the building. Plaintiff further notes that Good Guys served as the general contractor on the project and hired the subcontractor, WCD, to perform demolition work. Accordingly, plaintiff maintains that all three of these defendants are subject to liability under Labor Law § 240 (1). In further support of his motion, plaintiff's deposition testimony indicates that he was injured when a piece of the ceiling unexpectedly broke free and struck the scaffold that he was standing upon, which caused the scaffold to collapse. Plaintiff maintains that the collapse of the scaffold establishes a violation of Labor Law § 240 (1) as a matter of law

inasmuch as the device failed to protect him from the hazards associated with the force of gravity. He further claims that Madison, MKI and Good Guys violated Labor Law § 240 (1) in failing to protect him by securing the section of the ceiling that fell and struck the scaffold. According to plaintiff, the defendants should have used securing devices to prevent the ceiling section from falling.

In opposition, Madison and MKI submit an expert affidavit from Angela Levitan, a “Biomechanist” who holds a Master of Science degree in Industrial and Systems Engineering. According to Ms. Levitan, the scaffold used by plaintiff was “proper, adequate, and a suitable safety device for the work task being performed”, and the ceiling did not require securing with safety devices as the section of ceiling that struck the scaffold “was intended to swing down and hinge along the uncut side.”

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

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

Labor Law § 240 (1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety

devices on owners, general contractors, and their agents who “are best situated to bear that responsibility” (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, “[t]he duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross*, 81 NY2d at 500).

With respect to plaintiff’s Labor Law § 240 (1) claim against MKI, as previously noted, MKI served as Madison’s managing agent for the building. A managing agent of a building undergoing construction may only be held liable as a statutory agent if there is evidence that it had the authority to supervise and control the underlying construction work (*Reyes v Bruckner Plaza Shopping Center*, 173 AD3d 570, 571-572 [2019]; *Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [2009]). Here, plaintiff has not pointed to any evidence which indicates that MKI had the authority to control or supervise his work. Accordingly, plaintiff has failed to make a prima facie demonstration of his entitlement to summary judgment and, as a result, this branch of his motion is denied without regard to the sufficiency of the opposition papers.

Turning to plaintiff’s Labor Law § 240 (1) claim against Madison and Good Guys, it is undisputed that, as the respective building owner and general contractor on the underlying renovation project, these defendants are subject to liability under the statute. Further, plaintiff has submitted uncontroverted evidence demonstrating that he sustained injuries while performing demolition work when the scaffold upon which he was standing toppled over and otherwise collapsed. It is well-settled that the collapse of a scaffold or

ladder constitutes prima facie proof that the apparatus did not afford proper protection against gravity-related hazards as required under Labor Law § 240 (1) (*Debenedetto v Chetrit*, 190 AD3d 933, 936 [2021]; *Cruz v Roman Catholic Church of St. Gerard Magella*, 174 AD3d 782, 783 [2019]; *Tapia v Mario Genovesi & Sons*, 72 AD3d 800, 801 [2010]; *Dos Santos v State of New York*, 300 AD3d 434 [2002]). Accordingly, plaintiff has made a prima facie showing of his entitlement to summary judgment and the burden shifts to these defendants to raise a triable issue of fact regarding this claim.

Madison and Good Guys have failed to meet this burden. Good Guys has not submitted opposition to plaintiff's motion. Madison's expert's conclusory statement that the scaffold was adequate for the work being performed is contradicted by the evidence and is insufficient to raise a triable issue of fact since the scaffold would not have collapsed when struck by the piece of the ceiling if it provided adequate protection. Accordingly, plaintiff's motion for summary judgment against Madison and Good Guys under his Labor Law § 240 (1) cause of action is granted.

Plaintiff's Labor Law § 241 (6) Claim

Madison and MKI move for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action against them. In support of this branch of their motion, the moving defendants maintain that the New York State Industrial Code provisions upon which plaintiff relies are either too general, inapplicable given the circumstances of the accident, or were not violated.

In opposition to this branch of Madison and MKI's motion, plaintiff moves, in mot. seq. 10, for an order, pursuant to CPLR 3025 (b), granting him leave to serve an amended

bill of particulars which alleges that his accident and injuries were caused by violations of 12 NYCRR §§ 23-3.3 (c) and 23-5.18 (b). In support of this motion, plaintiff notes that 23-3.3 (c) requires that continuing inspections be made during hand demolition operations “to detect any hazards to any persons resulting from ... loosened material.” Plaintiff further notes that 23-5.18 (b) requires that manually-propelled mobile scaffolds be provided with a safety railing. Given his testimony that he was working on a mobile bakers scaffold without a railing and that the scaffold collapsed during manual demolition work when a piece of the ceiling unexpectedly broke loose and struck the scaffold, plaintiff maintains that these Industrial Code regulations are clearly applicable in this case and are sufficient to support his Labor Law § 241 (6) claim.

In opposition to plaintiff’s motion to amend, and in further support of their motion for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim, Madison and MKI argue that they would be prejudiced by allowing the proposed amended bill of particulars since discovery is complete and allegations contained in the new pleading constitute an entirely new theory of liability.

It is well settled that leave to amend a pleading is freely granted as long as it is meritorious and will not unfairly prejudice the opposing parties (*Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2012]). In the context of Labor Law § 241 (6) causes of action, courts permit plaintiffs to allege new Industrial Code violations after the completion of discovery and in opposition to summary judgment motions so long as the subject Industrial Code provisions are specific and applicable giving the circumstances of the accident, and do not involve new factual allegations or set forth new theories of liability

(*Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2013]); *Ortega v Everest Realty LLC*, 84 AD3d 542, 545 [2011]; *Kelleir v Supreme Industrial Park, LLC*, 293 AD3d 513, 513-514 [2002]).

Here, both of the Industrial Code provisions in the proposed amended bill of particulars are sufficiently specific to support a Labor Law § 241 (6) cause of action (*Ortega*, 84 AD3d at 545; *Ritzer v 6 East 43rd Street Corp.*, 57 AD3d 412, 413 [2008]). Moreover, both of these regulations are applicable in this case. With respect to 23-5.18 (b), plaintiff testified that at the time of the accident, he was working on a wheeled bakers scaffold that lacked a railing. Further, the lack of such a railing arguably contributed to plaintiff's injuries. With respect to 23-3.3 (c), plaintiff was performing hand demolition work at the time of the accident when a section of the ceiling unexpectedly broke off and caused the scaffold to collapse. Thus, there is an issue as to whether the accident would have been prevented had the subject section of ceiling been inspected prior to performing the work. Finally, it cannot be said that the defendants will be prejudiced by the proposed amendments since they involve no new factual allegations and the theories that the accident and injuries would not have occurred if the proposed regulations were followed is consistent with plaintiff's preexisting deposition testimony (*Ortega*, 84 AD3d at 545).

Accordingly, plaintiff's motion to serve an amended bill of particulars is granted and the proposed amended bill of particulars attached to the motion papers is deemed served. Moving defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is denied to the extent that plaintiff relies upon violations of §§ 23-3.3 (c) and 23-5.18 (b).

Plaintiff's Labor Law § 200/Common-Law Negligence Claim

Madison and MKI move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them maintaining that they did not exercise any control or authority over the means and methods of the demolition work. The moving defendants further argue that they did not create or have notice of any dangerous condition that may have caused the accident. In support of these arguments, the moving defendants point to plaintiff's deposition in which he stated that he was directed and supervised solely by his WCD foreman, Mr. Hurtado. The moving defendants also argue that as they did not control the demolition work and were not present on the worksite, they did not create or have notice of any dangerous condition presented by the falling piece of the ceiling. Plaintiff has not submitted opposition to this branch of Madison and MKI's motion.

Accordingly, as no opposition has been submitted to this branch of their motion, Madison and MKI's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them is granted.

Madison and MKI's Third-Party Claims

Madison and MKI move for summary judgment on their common-law and indemnification claim against Good Guys. The moving defendants also move for summary judgment under their contractual indemnification and breach of contract claims against the Jacobsons.

In support of their motion for common-law indemnification against Good Guys, the moving defendants maintain that the accident was not caused by any negligence on their

part and any liability they face will be strictly vicarious. Accordingly, Madison and MKI argue that they are entitled to common-law indemnification against the general contractor Good Guys.

In support of their motion for contractual indemnification against the Jacobsons, Madison and MKI point to the aforementioned clause in the Alteration Agreement in which the Jacobsons agreed to indemnify Madison and MKI “against any damages suffered to persons or property as a result of the Work.” In addition, the moving defendants maintain that this provision is fully enforceable since the accident was not caused by any negligence on their part. As plaintiffs injuries were caused by the work on the apartment, Madison and MKI argue that the Jacobsons are contractually obligated to indemnify them against any liability they face in this action.

Finally, in support of their motion for summary judgment against the Jacobsons under their breach of contract claim, Madison and MKI point to the clause in the Alteration Agreement in which the Jacobsons agreed to procure (from Good Guys) insurance policies which listed Madison and MKI as additional insureds. According to the moving defendants, the Jacobsons failed to procure such insurance coverage.

In opposition to Madison and MKI’s motion, and in support of their own motion for summary judgment dismissing the moving defendants’ cross claims against them, the Jacobsons argue that the contractual indemnification claim must fail as the indemnification clause in the Alteration Agreement is unenforceable pursuant to General Obligations Law § 5-321. In this regard, the Jacobsons note that the clause was not negotiated at arm’s length by two sophisticated business entities, was not limited to the lessee’s acts or

omissions, failed to make exception for the lessor's own negligence, and did not limit the cooperative corporation's recovery to the proceeds of the lessee's insurance proceeds. Further, the Jacobsons contend that they did comply with the insurance coverage provision in the Alteration Agreement. In support of this contention, Jonathan Jacobson testified that he received a copy of a certificate of insurance from Good Guys which he sent to Madison and MKI and no one from the building contacted him regarding the certificates of insurance after the accident.

In reply, moving defendants maintain that the indemnification provision is fully enforceable since the Alteration Agreement contained an insurance clause and Mr. Jacobson, who is an antitrust attorney, is a sophisticated party. The moving defendants also cite to Appellate Division, First Department authority which arguably stands for the proposition that an indemnification provision in a lease agreement does not run afoul of General Obligations Law § 5-321 so long as the owner was not actually negligent. Here, the moving defendants maintain that it is undisputed that the accident was not caused by any negligence on their part.

As an initial matter, Madison and MKI have failed to meet their prima facie burden in moving for summary judgment under their common-law indemnification cross claim against Good Guys. As previously noted, a party seeking summary judgment on a common-law indemnity claim in a Labor Law case must make a prima facie showing that the underlying accident was not caused by its own negligence and that the accident was caused by the negligence of party against whom it is seeking indemnification or that such party exercised control and supervision over the work (*Guaman*, 127 AD3d at 456; *Lelek*,

54 AD3d at 586). Here, there has been no showing that Good Guys controlled or supervised plaintiff's work or that it was negligent. Accordingly, defendants' motion for common-law indemnification against Good Guys is denied without regard to the sufficiency of the opposition papers.

Turning to Madison and MKI's motion for contractual indemnification against the Jacobsons, the Appellate Division, Second Department has repeatedly held that an indemnification clause in an alteration agreement made in connection with a proprietary lease not negotiated at arm's length by two sophisticated business entities is unenforceable pursuant to General Obligations Law § 5-321 where the agreement: (1) does not limit the cooperative corporation's recovery to the proceeds of the proprietary lessee's insurance coverage; (2) fails to make exceptions for the cooperative corporation's own negligence; or (3) is not limited to the proprietary lessee's acts or omissions (*N.A. [Anonymous] v Hillcrest Owners Assoc. Inc.*, 165 AD3d 1153 [2018]; *Nolasco v Soho Plaza Corp.*, 129 AD3d 924, 925 [2015], *lv dismissed* 27 NY3d 1062 [2016]; *Hadzihanovic v 155 East 72nd Street Corp.*, 70 AD3d 637, 638-639 [2010]; *DeSabato v 674 Carroll Street Corp.*, 55 AD3d 656, 659 [2008]).

Here, the subject lease and Alteration Agreement were not negotiated at arm's length by two sophisticated business entities. In this regard, the Jacobsons are not a business entity, but rather individuals who entered into the proprietary lease and Alteration Agreement with the intention of establishing their residence in the cooperative apartment unit after the completion of renovation work. Furthermore, the subject indemnification provision is broad and is not limited to the Jacobsons' own acts or omissions. In addition,

the indemnification does not make an exception for Madison and MKI's own negligence. Finally, while the Alteration Agreement contained a separate insurance coverage clause, nothing in the indemnification clause limits Madison and MKI's recovery to insurance proceeds. Thus, the indemnification provision is unenforceable pursuant to General Obligations Law § 5-321. Accordingly, the moving defendant's motion for summary judgment under their contractual indemnity claim against the Jacobsons is denied and the Jacobsons' motion for summary judgment dismissing this claim is granted.³

As a finally matter, with respect to Madison and MKI's breach of contract to procure liability insurance claim against the Jacobsons, the court finds that neither the moving defendants nor the Jacobsons have made a prima facie showing of their entitlement to summary judgment with respect to this cross claim. Accordingly, the moving defendants' motion for summary judgment against the Jacobsons under this cross claim and the Jacobsons' motion for summary judgment dismissing this cross claim are denied.

Summary

In summary, the court rules as follows:

(1) those branches of the Jacobsons' motion, mot. seq. 7, which seek summary judgment dismissing plaintiff's complaint and Madison and MKI's contractual indemnification cross claim against them, and awarding them summary judgment under their contractual indemnification cross claim against Good Guys are granted. Those branches of the Jacobson's motion which seek an order awarding them summary judgment

under their common-law indemnification claim against Good Guys and dismissing Madison and MKI's breach of contract cross claim against them are denied;

(2) Plaintiff's motion, mot. seq. 8, which seeks an order awarding summary judgment under Labor Law § 240 (1) against Madison, MKI, Good Guys is granted with respect to Madison and Good Guys and denied with respect to MKI;

(3) That branch of Madison and MKI's motion, mot. seq. 9, which seeks an order awarding them summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against them is denied. That branch of Madison and MKI's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them is granted. Those branches of Madison and MKI's motion which seek summary judgment under the common-law indemnification cross claim against Good Guys, and their contractual indemnification and breach of contract cross claims against the Jacobsons are denied; and

(4) Plaintiff's motion, mot. seq. 10, which seeks an order granting leave to amend his bill of particulars to allege violations of 12 NYCRR §§ 23-3-3 (c) and 23-5.18 (b) is granted and deemed served.

This constitutes the decision and order of the court.

ENTER,



J. S. C.