Sierra v Roc-Fifth Ave. Assoc., LLC
2022 NY Slip Op 34020(U)
November 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 506594/19
Judge: Joy F. Campanelli
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At an IAS Term, Part 6 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 28th day of November, 2022.

P R E S E N T:

HON. JOY F. CAMPANELLI,
Justice.

----------X

EUSEBIO SIERRA,

Plaintiff,

-against-

ROC-FIFTH AVENUE ASSOCIATES, LLC, PHOENIX SUTTON STR, INC., D&E REFRIGERATION AND AIR CONDITIONING d/b/a TRADEMARK MECHANICAL and D&E REFRIGERATION AND AIR CONDITIONING,

Defendants.

----------X

ROC-FIFTH AVENUE ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

FIVE STAR CARTING, LLC,

Third-Party Defendant.

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DECISION AND ORDER

Index No. 506594/19

Mot. Seq. Nos. 3-5

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion, Affirmations (Affidavits), and Exhibits Annexed	100-121; 122-136; 150-173
Affirmations (Affidavits) in Opposition and Exhibits Annexed	139, 141; 174-180; 181-186; 187-188; 191-193; 195-198
Reply Affirmations (Affidavits) and Exhibits Annexed	147; 199; 200; 201
Other Papers Stipulations of Discontinuance as to Phoenix	207, 221

In this action to recover damages for personal injuries, the following motions have been consolidated for disposition:

In motion (mot.) sequence (seq.) number (no.) 3, plaintiff Eusebio Sierra ("plaintiff") moves for partial summary judgment on the issue of liability under Labor Law § 240 (1), as well as under Labor Law § 241 (6), to the extent predicated on the alleged violations of Industrial Code §§ 23-1.7 (a) (1) and 23-3.3 (c), as against defendant/third-party plaintiff Roc-Fifth Avenue Associates, LLC ("Roc-Fifth"), defendant Phoenix Sutton Str, Inc. ("Phoenix"), and defendants D&E Refrigeration and Air Conditioning, individually and doing business as Trademark Mechanical (collectively, "D&E");

In mot. seq. no. 4, D&E moves for summary judgment dismissing all claims and cross claims as against it; and

In mot. seq. no. 5, Roc-Fifth moves for partial summary judgment on liability on its third-party claims for contractual indemnification and breach of contract to obtain insurance as against third-party defendant Five Star Carting, LLC ("Five Star").

Following the service of the aforementioned motions, the movants have stipulated to the dismissal of Phoenix from this action, thereby rendering moot the branch of plaintiff's motion which sought relief as against Phoenix. On July 7, 2022, the Court heard oral argument and reserved decision on the remainder of plaintiff's motion, as well as on the entirety of the other two motions.

Background

On August 1, 2018, demolition was ongoing in the fifth-floor mechanical room of the commercial building, owned by Roc-Fifth, at 130 Fifth Avenue in Manhattan (the "mechanical

room"). Two air-conditioning units, both located in the mechanical room – the larger unit mounted on the concrete pad on the floor (the "floor unit") and the smaller unit mounted near the ceiling and on the wall opposite the larger unit (the "ceiling unit" and, collectively with the floor unit, the "units") – were being disassembled and removed by plaintiff and two other Five Star employees. At the time, the floor unit was worked on by plaintiff and his colleague Rajino Ramos ("Ramos"), with plaintiff then standing on top of the floor unit approximately 3 to 4 feet above the floor and using a drill (positioned at his chest level) to remove the upper portions of the floor unit. As plaintiff was removing the portions of the floor unit at his chest level, he was handing them down to Ramos who was standing on the floor next to the floor unit. While plaintiff and Ramos were working on the floor unit, they were joined by a Five Star coworker named Eric (no last name appears in the record) who had been assigned to the mechanical room by their foreman Gabriel Mendez ("Mendez") to disassemble the ceiling unit.[1] On arrival at the mechanical room, Eric ascended an A-frame ladder (supplied by Five Star) and began removing the ceiling unit from the wall by cutting its supports with a "Sawzall" saw. With all three men then working in the 10 x 15 x 10 feet mechanical room, their elbow-to-elbow working space was tight. Above them, a fluorescent light fixture (the "light fixture"), suspended from the ceiling by two chains (with one chain attached to each of the two long ends of the light fixture), was providing permanent lighting in the mechanical room. As Eric was cutting in (and around) the ceiling unit, the latter, together with one of its supporting beams, crashed to the floor. The crash happened so suddenly and unexpectedly that neither Eric nor Ramos had time to warn plaintiff.

[1] Five Star's sign-in sheet for the date of the accident showed two "Erics": Eric Vasquez and Eric Refugio (part of NYSCEF Doc No. 171).

In their crash to the floor, either the ceiling unit or one of its supporting beams (or both) struck the light fixture. In turn, one long end of the light fixture dislodged from its corresponding ceiling chain and struck plaintiff (who was still standing on the floor unit) in the back. The light fixture itself did not fall down to the floor, although one of its long ends (*i.e.*, the one which had struck plaintiff in the back) moved from its original parallel-to-the-ceiling (and floor) position to the perpendicular-to-the-floor position.[2] That much is undisputed.

What followed, however, cannot be considered established as a matter of fact at the summary judgment stage when "the court's function is one of issue finding rather than issue determination" (*Matter of Salvatore L. Olivieri Irrevocable Tr.*, 208 AD3d 489, 490-491 [2d Dept 2022]). According to plaintiff's pretrial testimony, as the result of being struck by the light fixture, he fell off the floor unit and dropped 3 to 4 feet to the concrete floor below where he landed on his right side. In contradiction to plaintiff's pretrial testimony, Five Star's accident report, which plaintiff cosigned (along with Five Star's off-site supervisor) on August 3, 2018 (two days post-accident), failed to mention his subsequent fall from the floor unit after being struck by the light fixture.[3] No statements (by way of an affidavit or pretrial testimony) were taken from either of the eyewitness, Ramos and Eric.

The narrative is not complete without a brief description of the pre- and post-accident involvement of defendant D&E with the floor and ceiling units in the mechanical room. Separately hired by Roc-Fifth, D&E had drained freon from the units in the mechanical room

[2] Post-accident photographs, marked into evidence on July 29, 2020 as plaintiff's Exhibits 2, 3, and 5 (part of NYSCEF Doc No. 118).

[3] Employee Report of Accident/Injury (part of NYSCEF Doc No. 171).

before Five Star began its demolition operations. After Five Star finished with its demolition operations, D&E installed the replacement units in the mechanical room.

In March 2019, plaintiff commenced this action against, as relevant herein, Roc-Fifth and D&E for personal injuries which he allegedly sustained in the accident. Roc-Fifth, in turn, impleaded plaintiff's employer, Five Star, for, among other things, contractual indemnification and breach of contract to obtain insurance. After discovery was completed and a note of issue was filed, the aforementioned motions, each for summary judgment, were served.

Discussion[4]

Plaintiff's Labor Law §§ 240 (1) and 241 (6) Claims As Against Roc-Fifth

Labor Law § 240 (1) imposes a nondelegable duty on building owners and general contractors engaged in, among other activities, demolition, to provide appropriate safety devices to workers who are subject to elevation-related risks (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]).[5] "'[F]alling object' liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758-759 [2008]). "Rather, liability [under the 'falling object' category of Labor Law § 240 (1)] may be imposed where an object or material that fell,

[4] In the interest of brevity, the recitation of the well-established standard of review in the summary judgment context has been omitted (*see e.g. Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]).

[5] It is true, as plaintiff contends, that "Labor Law § 240 (1) applies to both 'falling *worker*' and 'falling *object*' cases" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [emphasis added]). In this case, however, plaintiff is not entitled to partial summary judgment on the issue of liability as against Roc-Fifth on his additional/alternative theory of liability under the "falling *worker*" category of his Labor Law § 240 (1) claim. As noted, plaintiff's pretrial testimony, on the one hand, and Five Star's accident report cosigned by him, on the other hand, are conflicting as to whether (or not) he fell off the floor unit after the light fixture had struck him. This leaves for consideration plaintiff's principal theory of liability under the "falling *object*" category of his Labor Law § 240 (1) claim.

causing injury, was a load that required securing for the purposes of the undertaking at the time it fell" (*Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 887 [2d Dept 2021] [internal quotation marks omitted]). "[T]o prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Fabrizi v 1095 Ave. of Ams., L.L.C.*, 22 NY3d 658, 662 [2014] [internal quotation marks omitted]).

Here, plaintiff has established, prima facie, his entitlement to judgment as a matter of law on the issue of liability under the "falling *object*" category of his Labor Law § 240 (1) claim, by showing that while he was working on the floor unit, the ceiling unit (together with one of its supporting beams) above him struck (and broke one of the two supporting chains on) the light fixture which, in turn, swung out, and struck him in the back (*see Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020]). In opposition, however, Roc-Fifth's submissions have raised a triable issue of fact as to whether the light fixture was an object that required securing (*id.*; *compare Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 1301 [2d Dept 2020] [granting summary judgment to the worker who, while engaged in demolition work, was injured when an unsecured HVAC duct fell and hit him, causing him to fall to the ground]).[6]

In addition, Roc-Fifth's submissions in opposition have raised a further triable issue of fact as to whether the partial fall (and the resulting swinging out) of the light fixture itself (rather than the fall of the ceiling unit and one of its supporting beams) and, in turn, the need for the

[6] Where, as here, plaintiff seeks partial summary judgment on the issue of liability, "the facts [must be viewed] in the light most favorable to defendants" (*Valente v Lend Lease [US] Const. LMB, Inc.*, 29 NY3d 1104, 1105 [2017]).

safety devices to protect the plaintiff from that particular hazard (*i.e.*, the partial fall and the resulting swinging out of the light fixture), were foreseeable (*see Paguay v Cup of Tea, LLC*, 165 AD3d 964, 966-967 [2d Dept 2018]; *Martins v Board of Educ. of City of New York*, 82 AD3d 1062, 1063 [2d Dept 2011]). Accordingly, the branch of plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim *as against Roc-Fifth* is *denied*.[7]

As the alternative to the rights conferred by Labor Law § 240 (1), plaintiff further relies on Labor Law § 241 (6), "which requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993] [quoting Labor Law § 241 (6)]). To succeed on a Labor Law § 241 (6) claim, plaintiff must demonstrate that: (1) "defendant violated an Industrial Code regulation that sets forth a specific standard of conduct" (*Toussaint v Port Auth. of NY & NJ*, 38 NY3d 89, 94 [2022] [internal quotation marks omitted]); and (2) "his or her injuries were proximately caused by a violation of [the Industrial Code regulation] that is applicable under the circumstances of the accident" (*Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 1364 [2d Dept 2020]).

Although Industrial Code §§ 23-1.7 (a) (1) and 27-3.3 (c) are sufficiently specific to support plaintiff's Labor Law § 241 (6) claim (*see Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]; *Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1006 [2d Dept 2019]), plaintiff

[7] In so holding, the Court has disregarded, as devoid of probative value, the affidavit of Roc-Fifth's expert Andrew R. Yarmus, P.E. (NYSCEF Doc No. 179) (*see Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490, 491 [1st Dept 2015]).

has failed to establish, prima facie, that either of the two cited regulations applied to the circumstances of his case. The first of the two cited regulations – Industrial Code § 23-1.7 (a) (1) ("Protection from general hazards" – Overhead hazards") – requires that "[e]very place where persons are required to work or pass that is *normally exposed* to falling . . . objects shall be provided with suitable overhead protection" (emphasis added). The record before the Court is devoid of evidence that the mechanical room was "normally exposed" to falling objects, thus rendering § 23-1.7 (a) (1), at least at this stage of litigation, inapplicable (*see Crichigno*, 186 AD3d at 665; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]; *Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733-734 [2d Dept 2007]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 422 [2d Dept 2006]).[8]

The second of the two cited regulations – Industrial Code § 23-3.3 (c) ("Demolition by hand" – "Inspection") – mandates continuing inspections during hand demolition operations "by designated persons *as the work progresses* to detect any hazards to any person resulting . . . from loosened material" (emphasis added). Here, plaintiff has failed to eliminate a triable issue of fact as to whether the specific hazard (*i.e.*, the partial fall and the resulting swinging out of the light fixture which, in turn, struck plaintiff in the back) arose from the structural instability caused by the *progress* of the demolition, rather than from Eric's (*i.e.*, plaintiff's coworker)

[8] Plaintiff's reliance on *Amerson v Melito Const. Corp.* (45 AD3d 708 [2d Dept 2007]) is unavailing. There, a worker was tasked with removing the mortar which fell to the loading dock floor of the new supermarket as a result of the construction of the concrete block wall some 12 to 20 feet above him. As he was working, he was struck by a concrete block (or portion thereof) falling off the concrete-block wall under construction. In denying summary judgment to defendants on plaintiff's Labor Law § 241 (6) claim, to the extent predicated on the alleged violation of Industrial Code § 23-1.7 (a) (1), the Second Judicial Department held (at page 709) that "the area where the plaintiff was required to work was one which was 'normally exposed to falling material or objects' (12 NYCRR 23-1.7 [a] [1]) and therefore came within the ambit of the regulation applied to the accident in that case."

actual performance of the demolition work itself (*see Flores v Crescent Beach Club, LLC*, 208 AD3d 560, 562 [2d Dept 2022]; *Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1191 [2d Dept 2020]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013]; *Campoverde v Bruckner Plaza Assoc., L.P.*, 50 AD3d 836, 837 [2d Dept 2008]; *cf. Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005-1006 [2d Dept 2019]; *Sierzputowski v City of New York*, 14 AD3d 606, 607 [2d Dept 2005]; *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622-623 [2d Dept 2003]). Additionally, plaintiff's contention that his accident was proximately caused by the lack of continuing inspections in the course of the ongoing demolition in the mechanical room is based on speculation (*see Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 734 [2d Dept 2007]). Accordingly, the branch of plaintiff's motion which is for partial summary judgment on the issue of liability *as against Roc-Fifth* on his Labor Law § 241 (6) claim, as predicated on the alleged violations of Industrial Code §§ 23-1.7 (a) (1) and 27-3.3 (a), is *denied*.[9]

Plaintiff's Claims as Against D&E

"As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker" (*Barrios v City of New York*, 75 AD3d 517, 518 [2d Dept 2010]). "However, where a separate prime contractor has been delegated the authority to

[9] This determination renders academic Roc-Fifth's contention that the Industrial Code regulations at issue were not correctly or fully cited in plaintiff's Verified Bill of Particulars as to Roc-Fifth, dated September 5, 2019 (NYSCEF Doc No. 110).

supervise and control the plaintiff's work, the contractor becomes a statutory 'agent' of the owner or general contractor" (*id*. [internal quotation marks omitted]).

Here, plaintiff has failed to make a prima facie showing that D&E possessed any authority to supervise or control plaintiff's work. To the contrary, D&E's General Contractor's Agreement, dated as of May 31, 2018 with Roc-Fifth (the "D&E contract"), as amplified by pretrial testimony of D&E's president and part owner Danny Lynch, have made it clear that D&E's supervision and control were confined to its *pre*-demolition removal of the freon from (among other units) the units at issue, as well as its *post*-demolition installation of the replacement units in (among other areas) the mechanical room – and had nothing to do with the *demolition* of the units at issue (*see* D&E contract, definition of terms "Project" and "Work" in the first "Whereas" clause and in § 1.1.15, respectively; Exhibit A to D&E contract, "Proposal," at pages 1-2) (NYSCEF Doc No. 119). Accordingly, the branch of plaintiff's motion which is for partial summary judgment on the issue of liability *as against D&E* on his Labor Law § 240 (1) claim and on his Labor Law § 241 (6) claim, to the extent predicated on the alleged violation of Industrial Code §§ 23-1.7 (a) (1) and 3.3 (c), is *denied*. Conversely, the branch of D&E's motion which is for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it is *granted* (*see Flores*, 208 AD3d at 561-562; *Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 720 [2d Dept 2014]).[10]

[10] Plaintiff's reliance on *Padilla v Park Plaza Owners Corp.* (165 AD3d 1272 [2d Dept 2018]) is misplaced. There, unlike the case here, the moving defendant's involvement with the project was extensive. In *Padilla*, the moving defendant had hired the plaintiff's employer to remove the oil from the temporary tank and to connect the latter to the building. Further, the plaintiff was injured when he fell from the top of that tank.

Turning to plaintiff's Labor Law § 200/common-law negligence claim as against D&E, the Court starts with the hornbook principle that "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "An implicit precondition to this duty . . . is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). "Where the alleged defect or dangerous condition arises from the subcontractor's methods and the owner or general contractor exercise no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200" (*Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006], *lv dismissed* 8 NY3d 841 [2007]).

Here, plaintiff was injured from the manner in which his coworker Eric was removing the ceiling unit, rather than as a result of any dangerous condition in the mechanical room (*see Ferrero*, 33 AD3d at 850). In opposition to D&E's prima facie showing of entitlement to judgment as a matter of law regarding plaintiff's Labor Law § 200/common-law negligence claim as against it, he has offered no evidence that D&E exercised any supervisory control over the work then performed by plaintiff or by any other members of the Five Star demolition crew at the time of the accident, or had any input into how the units at issue were to be removed from the mechanical room (*see Ferrero*, 33 AD3d at 851). Rather, all demolition work in the mechanical room was supervised by plaintiff's foreman Mendez (*see Mohammed v Islip Food Corp.*, 24 AD3d 634, 637 [2d Dept 2005]; *Salinas*, 2 AD3d at 623). Accordingly, the remaining

branch of D&E's motion which is for dismissal of plaintiff's Labor Law § 200/common-law negligence claim as against it is *granted*.

Roc-Fifth's Third-Party Claims as Against Five Star

As noted, Roc-Fifth has moved for partial summary judgment on liability on its third-party claims as against plaintiff's employer, Five Star, for contractual indemnification and breach of contract to obtain insurance (the "contractual indemnification claim" and the "insurance-procurement claim," respectively). Consideration of the contractual indemnification claim starts with the reference to the mutually executed "Purchase Order," dated as of May 11, 2018, between Roc-Fifth (spelled as "ROC Fifth" and designated as "Owner" in the Purchase Order) and Five Star (designated as "Vendor" in the Purchase Order) (the "Purchase Order"), which provides (in ¶ 8) as follows:

> "Vendor hereby agrees, to the fullest extent permitted by law and at its own cost and expense, to assume the entire responsibility and liability for the defense of and to pay and indemnify and hold the Owner . . . harmless against any loss, cost[,] expense, liability or damage (including, without limitation, statutory liability, judgment, attorney's fees, court costs, and the cost of appellate proceedings) because of . . . injury to . . . any person . . . *arising out of, in connection with, or as a consequence of the performance of the services or the furnishing of the equipment and supplies and/or any acts or omissions of Vendor* or any of its . . . employees . . . or anyone directly or indirectly employed by Vendor or anyone for whom it may be liable *as it relates to the scope of this Purchase Order*. . . . The provisions of this Section . . . shall survive the expiration or sooner termination of this Purchase Order and the work." (part of NYSCEF Doc No. 154 [emphasis added]).

It is well established that "[a] court may render a *conditional* judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active

negligence" (*George v Marshalls of MA, Inc.*, 61 AD3d 931, 932 [2d Dept 2009] [emphasis added]). "To obtain *conditional* relief on a claim for contractual indemnification, 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" (*Winter v ESRT Empire State Bldg., LLC*, 201 AD3d 844, 845 [2d Dept 2022] [internal quotation marks omitted; emphasis added; alterations in the original]).

Here, Roc-Fifth has made a prima facie showing that: (1) the aforementioned indemnification obligation was triggered because the Purchase Order was in effect at the time of the accident; (2) plaintiff's alleged injuries indisputably arose out of the performance of Five Star's work under the Purchase Order; and (3) Roc-Fifth was free from negligence in the happening of the accident, and that it can only be held liable to plaintiff based on its statutory liability as the owner of the building in which the accident occurred.[11] In opposition, Five Star has failed to raise a triable issue of fact (*see Graziano v Source Builders & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]). Accordingly, the initial branch of Roc-Fifth's motion which is for summary judgment on its contractual indemnification claim is *granted to the extent* of granting it *conditional* summary judgment on that claim as against Five Star (*see Winter*, 201 AD3d at 846; *Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931 [2d Dept 2016]).

Concluding with the review of Roc-Fifth's insurance-procurement claim, the Court observes that "the insurance procurement clause is entirely independent of the indemnification

[11] Five Star admitted in its October 5, 2020 "Response to [Roc-Fifth's] Notice to Admit[,] Dated September 16, 2020" that: (1) the Purchase Order was in effect at the time of plaintiff's accident; and (2) "the work that plaintiff was performing on the date and time of his accident was work done pursuant to the [Purchase Order]" (NYSCEF Doc No. 155).

provisions in the contract" (*Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 575 [1st Dept 2012]). "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" (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]). Here, Roc-Fifth has met this burden by submitting: (1) a copy of the Purchase Order which required, among other things, that "Commercial General Liability Insurance via combined single limit . . . coverage shall be maintained [by Vendor for the benefit of Owner as an additional insured] for not less than $1,000,000 per occurrence for Bodily Injury" (Purchase Order, ¶ 9 [a] [bold-faced type omitted]); and (2) a copy of the endorsement reflecting that Five Star's insurance coverage was limited to $250,000 per occurrence of Bodily Injury, instead of the required $1,000,000 per occurrence (*see* New York/New Jersey Contractors Endorsement, Commercial General Liability, GRIDGLN-010 10 16, page 1 of 2 [part of NYSCEF Doc No. 171]). In opposition, Five Star has failed to raise a triable issue of fact as to the facial insufficiency of the amount of obtained insurance coverage. Accordingly, the remaining branch of Roc-Fifth's motion which is for summary judgment on its insurance-procurement claim as against Five Star is *granted* (*see DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). Five Star's insurer's refusal of Roc-Fifth's insurer's tender of defense does not alter this determination (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).[12]

[12] *See* Letter from Pamela J. Planeta, Senior Claims Representative at Allianz Global Corporate & Specialty, dated June 17, 2019, to Julio Urribiera, Claims Examiner at Greater New York Mutual Insurance Company (NYSCEF Doc No. 172).

To the extent not otherwise addressed, the parties' remaining contentions have been rendered academic by the Court's decision, or have been considered and rejected as without merit.[13]

Conclusion

Accordingly, it is

ORDERED that in mot. seq. no. 3, plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1), as well as under Labor Law § 241 (6), as predicated on the alleged violations of Industrial Code §§ 23-1.7 (a) (1) and 23-3.3 (c), *as against Roc-Fifth and D&E* is *denied in its entirety*; and it is further

ORDERED that in mot. seq. no. 4, D&E's motion for summary judgment dismissing all claims and cross claims as against it is granted; the complaint is dismissed *with costs and disbursements to D&E as taxed by the Kings County Clerk*; the Kings County Clerk is directed to enter judgment accordingly in favor of D&E; and the action is severed and continued as against the remaining defendant, Roc-Fifth Avenue Associates, LLC; and it is further

ORDERED that in mot. seq. no. 5, Roc-Fifth's motion for partial summary judgment on liability on its third-party claims for contractual indemnification and breach of contract to obtain insurance as against third-party defendant Five Star is *granted to the extent* that: (1) Roc-Fifth is granted *conditional* summary judgment on its contractual indemnification claim as against

[13] The Court has disregarded the parties' post-deposition affidavits (NYSCEF Doc Nos. 112, 134, 176, 177, and 179) either as self-serving or as subjectively (and improperly) embellishing their pretrial testimony (*see Haxhia v Varanelli*, 170 AD3d 679, 682 [2d Dept 2019]; *Choi Ping Wong v Innocent*, 54 AD3d 384, 385 [2d Dept 2008]; *Mayancela v Almat Realty Dev., LLC*, 303 AD2d 207, 208 [1st Dept 2003]).

Five Star, and (2) Roc-Fifth is further granted summary judgment on its insurance-procurement claim as against Five Star; and it is further

ORDERED that to reflect the prior stipulated dismissal of defendant Phoenix from this action, as well as the dismissal of D&E from this action as directed herein, the caption is amended to read in its entirety as follows:

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EUSEBIO SIERRA,

Plaintiff,

-against- Index No. 506594/19

ROC-FIFTH AVENUE ASSOCIATES, LLC,

Defendant.
----------X
ROC-FIFTH AVENUE ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

FIVE STAR CARTING, LLC,

Third-Party Defendant.
----------X

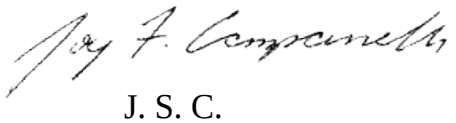
; and it is further

ORDERED that D&E's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the remaining parties are reminded of their next scheduled appearance in JCP-1 on January 27, 2023 at 10:00 am.

This constitutes the decision and order of the Court.

E N T E R,



J. S. C.