

Bradley v NYU Langone Hosps.

2023 NY Slip Op 30007(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 161006/2018

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

NACORRA BRADLEY,

Plaintiff,

- v -

NYU LANGONE HOSPITALS, HUNTER ROBERTS
CONSTRUCTION GROUP, L.L.C., EXTERIOR WALL AND
BUILDING CONSULTANTS, INC.,

Defendants.

-----X

NYU LANGONE HOSPITALS, HUNTER ROBERTS
CONSTRUCTION GROUP, L.L.C.

Third-Party Plaintiffs,

-against-

ASR ELECTRICAL CONTRACTING, INC.,

Third-Party Defendant.

-----X

INDEX NO. 161006/2018

MOTION DATE 08/27/2021,
08/27/2021,
08/27/2021

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595521/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107,
108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 156, 159, 163,
164, 165, 166, 167, 168, 177, 179, 180, 181, 184, 185, 191, 194, 195

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 128, 129,
130, 131, 132, 133, 134, 135, 136, 137, 138, 157, 162, 182, 186, 187, 188, 193, 196

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 139, 140, 141, 142,
143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 158, 161, 169, 170, 171, 172, 173, 174,
175, 176, 178, 183, 192, 197

were read on this motion to/for JUDGMENT - SUMMARY

In this Labor Law personal injury action plaintiff alleges she was working as an electrician for her employer third-party defendant ASR Electrical Contracting, Inc. (ASR) when she was injured during the course of her work at 5718 2nd Avenue, Brooklyn, New York (the premises). Defendant NYU Langone Hospitals (NYU) owned the premises and defendant Hunter Roberts Construction Group, LLC (HR) was the general contractor for construction of a radiation oncology center at the premises (the project). Third-party defendant ASR was a subcontractor on the project providing electrical work. Second third-party defendant Exterior Wall and Building Consultants, Inc. (EWBC) was a subcontractor on the project providing labor and clean up, including water remediation. Plaintiff's causes of actions are for common law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

In motion sequence number 003 NYU and HR move for summary judgment dismissing the complaint and all cross claims. They also seek summary judgment on their claims for contractual indemnification against ASR, and on their claims for contractual indemnification and breach of contract against EWBC.

In motion sequence number 004 ASR moves for summary judgment dismissing plaintiff's Labor Law § 240 claim, all third-party claims and cross claims for common law indemnification and contribution brought by defendants/third-party plaintiffs, and claims for contractual indemnification and breach of contract brought by NYU.

In motion sequence number 005 EWBC moves for summary judgment dismissing the second third-party complaint and all cross and counterclaims.

Plaintiff cross-moves under motion sequence numbers 003 and 005 for partial summary judgment on the issue of liability for violation of Labor Law § 241(6) of Labor Law against

NYU and HR and for dismissal of defendants' affirmative defenses based on plaintiff's comparative fault and/or culpable conduct.

BACKGROUND

Plaintiff's deposition testimony

Plaintiff testified that her accident occurred on July 25, 2018 while she working as an electrician for ASR and that she had been working at the premises for approximately three months prior to the accident (plaintiff's tr at 12-15, NYSCEF Doc No 119). Plaintiff's job was to install temporary lighting on the second floor and ASR supplied all of plaintiff's equipment and materials (*id.* at 18-19, 25). According to Plaintiff, when she arrived at work on the date of accident it was raining heavily and the building did not have a roof or side walls in certain areas (*id.* at 23, 80). To access the second floor, there was a set of temporary stairs that went between the first and second floors and then from the second floor to the roof (*id.* at 26). Plaintiff testified that her accident occurred at approximately 9:00 a.m. as she was returning from her break, climbing up the temporary stairs between the first and second floors when she slipped on water causing her to strike her left knee on the stairs (*id.* at 28 -29, 36 - 44). It was raining when plaintiff took her break that morning and all the stairs were wet when she went down the stairs for her break (*id.* at 29-30, 81). Plaintiff testified that the water was on the stairs because the roof was open and it was raining, and that the water on the stairs was the reason she slipped and fell (*id.* at 39, 70-71, 81). No one witnessed plaintiff's accident (*id.* at 36-44).

HR's superintendent, Jason Silverstein's deposition testimony

Silverstein testified that he is a superintendent for HR, the general contractor for the project (Silverstein tr at 11-14, 19, NYSCEF Doc No 120). ASR and EWBC were

subcontractors on the project and subcontractors were required to have their own safety meetings with their employees, HR did not host daily safety meetings (*id.* at 25-28, 39).

Silverstein further testified that the roof above the temporary staircase (or “system stairs” as referred to by Silverstein) where plaintiff alleges her accident occurred was never opened or removed during the project (*id.* at 54-55). This staircase provided access from the first floor to the mezzanine (*id.* at 47). The temporary stairs were built with holes in the treads, so in the event any water got on the stairs, it would drain through the holes. Because of these holes, water did not build up on the stairs, and the stairs should never need to be swept or vacuumed to remove moisture (*id.* at 59-60). No one complained about a water condition on the stairs prior to plaintiff’s accident, but EWBC was responsible for all water and debris removal at the site (*id.* at 58-59).

ASR’s foremen, Richard Glebocki and Charles Barrele’s deposition testimony

Richard Glebocki was the ASR foreman at the project (Glebocki tr at 14, NYSCEF Doc No 122). He was on vacation on the date of accident but worked up until July 20th, five days before the accident (*id.* at 13). Glebocki confirmed that prior to his going on vacation, he recalled that in July 2018 there were times that rainwater would get into the building because the roof was missing, and that this water would sometimes be at the bottom of the temporary staircase (*id.* at 23-24). But the roof directly above the temporary staircase was never open (*id.* at 46-47). EWBC laborers were responsible for water remediation at the site (*id.* at 20-25). Glebocki recalled that EWBC laborers were very efficient about cleaning any water accumulation (*id.*). He never felt that the site was unsafe and to his knowledge, no one had fallen on the temporary staircase before due to water accumulation (*id.*). Glebocki noted that the temporary staircase was

made of metal and had holes in it and therefore, water could not accumulate on the steps (*id.* at 47-48).

Charles Barrelle testified that he was serving as the ASR foreman at the time of the alleged accident for one week while ASR's regular foreman, Richard Glebocki, was out on vacation (Barrelle tr at 17-18, NYSCEF Doc No 121). Plaintiff reported the accident to Barrelle but he did not witness it and does not know anyone who witnessed the accident (*id.* at 53-54). Plaintiff told Barrelle that her accident occurred when she slipped and fell on the temporary staircase while returning from a coffee run because the stairs were wet (*id.* at 57-58). Throughout the time Barrele was on site, he never complained of any safety issues, and no one ever complained to him (*id.* at 73-75). Barrele used the staircase where plaintiff's accident occurred on a regular basis and did not recall seeing any water collect on the temporary staircase (*id.* at 74-76). If there had been water on the stairs, EWBC was responsible for water remediation at the site (*id.* 75-76).

EWBC's foreman, Michael Zeh's deposition testimony and its daily logs

Michael Zeh was EWBC's foreman for this project (Zeh tr at 12-13, NYSCEF Doc No 123). EWBC's duties on the site were "housekeeping and taking care of general conditions," such as vacuuming up any water and picking up debris and other materials around the job site (*id.* at 16). EWBC's responsibilities also included removing water from the site, including from the temporary staircase (*id.* at 18-19). However, Zeh noted that "it would be almost impossible for there to be any type of water on those stairs because it was like a grate system. So it would be impossible for water to be built up on those stairs" (*id.* at 19). Zeh conducted daily walkthroughs where he would double check the site for hazardous or unsafe conditions (*id.* at 24-25). These

walkthroughs required him to use the temporary staircase to go from the first floor to the mezzanine, so checking the temporary staircase was part of his daily routine (*id.* at 25). During his time on the project, Zeh never observed water on the temporary staircase (*id.* at 66). He explained that “water was never pouring on [that] staircase. It was almost impossible, it is underneath an electrical switch room where this staircase is. This is not even close to the area where the water was coming from the roof” (*id.* at 65-66).

EWBC’s record for July 24th, one day before the accident, show that EWBC “pumped and vacuumed water out of building (no roof) due to heavy rain” (cross-motion Ex. 2, NYSCEF Doc No 167). On July 25th, the date of plaintiff’s accident, EWBC again “pumped and vacuumed water out of building – due to heavy rain and no roof” (*id.*).

DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The

evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 241 (6)

NYU and HR move for summary judgment and plaintiff cross moves for summary judgment on plaintiff’s Labor Law § 241 (6) claim.

Labor Law § 241 (6) provides, in relevant part, as follows:

All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). “The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, “[t]he [Industrial Code] provision relied upon by [a]

plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, “a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct” (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

To support her cross-motion on her Labor Law § 241(6) claim, plaintiff relies on Industrial Code 12 NYCRR 23-1.7(d)¹ which provides that “[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

“12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles . . .” (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 351[1998]; *see also Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]).

A violation of 12 NYCRR 23-1.7 (d), while not conclusive on the question of negligence, would thus constitute *some evidence of negligence* and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances”

(*Rizzuto*, 91 NY2d at 351 [emphasis in original]).

¹ Plaintiff includes other Industrial Code sections in her bill of particulars but does not address them in her moving and opposition papers. Therefore, plaintiff has abandoned reliance on the remaining provisions in her bill of particulars (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [“Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . .”]).

NYU and HR argue that plaintiff was not engaged in a “protected activity” at the time of the accident because she was returning from a coffee break when her accident occurred and that there is no evidence showing that the temporary staircase was in a dangerous condition. According to NYU and HR “all” the witnesses testified that it was impossible for water to accumulate on the staircase because it was a steel grate system that allows water to fall through the steps. ASR argues in opposition to plaintiff’s motion that the regulation is not applicable because staircases are not “passageways” within the meaning of 12-NYCRR 23-1.7 (d). Plaintiff counters that because her accident occurred on the job site, she afforded the protections of the Labor Law and NYU and HR “arguably” violated 12-NYCRR 23-1.7 (d). Plaintiff does not respond to ASR’s argument.

NYU and HR’s argument that plaintiff was not engaged in a “protected activity” when she slipped on the staircase since she was returning from a break, is unavailing because accidents occurring on the job site while a worker is entering or leaving the site or on a break come within the protections of Labor Law § 241 [6] (*accord Hoyos v NY-1095 Ave. of the Americas, LLC*, 156 AD3d 491, 494 [1st Dept 2017] [applying the principle to Labor Law 240 (1)]). As to ASR’s argument that 12 NYCRR 23-1.7 (d) is not applicable because the staircase where plaintiff’s accident occurred is not a “passageway,” “a staircase used to provide access to a job site is not a passageway or other working surface within the meaning of the provision unless it is the sole means of access” (*Ohadi v Magnetic Construction Grp. Corp.*, 182 AD3d 474, 476 [1st Dept 2020]). Here the uncontradicted testimony by plaintiff and Silverstein was that the temporary stairs were the means by which workers gained access to the second floor or mezzanine. Since ASR does not offer any testimony or other evidence to contradict plaintiff and Silverstein, the

temporary staircase where plaintiff's accident occurred is a passageway or other working surface within the meaning of 12 NYCRR 23-1.7 (d).

Nevertheless, there are other issues of fact as to whether the provision was violated and was a proximate cause of plaintiff's accident. Plaintiff testified that she slipped on the wet stairs because the roof was open, and it was raining. Silverstein, and ASR's foreman Glebockie testified the roof was not open above the temporary staircase and that in any event the metal stairs had holes in them to allow water to drain through them. These issues of fact must be resolved at trial and therefore preclude granting summary judgment to any party on plaintiff's Labor Law § 241 (6) claim. Likewise, these issues of fact preclude granting plaintiff's summary judgment on defendants' comparative defense (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2nd Dept 2009] [holding plaintiff not entitled to summary judgment on comparative fault defenses where issues of fact remain on his Labor Law § 241 (6) claim]).

Accordingly, NYU and HR's motion for summary judgment and plaintiff cross motion for summary judgment on plaintiff's Labor Law § 241 (6) claim and on defendants' comparative fault defense must be denied.

Labor Law § 240 (1)

NYU and HR and ASR move for summary judgment on plaintiff's Labor Law § 240 (1) claim. Plaintiff concedes that the facts of this case do not support a Labor Law § 240 (1) claim. Accordingly, plaintiff's Labor Law 240 (1) claim must be dismissed as abandoned/withdrawn.

Labor Law § 200 and common law negligence

NYU and HR and EWBC move for summary judgment on plaintiff's Labor Law § 200 and negligence claims.

Labor Law § 200, “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” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]; citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states in pertinent part, as follows:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

(Labor Law § 200 [1]).

“Claims under the statute and common-law fall into two general categories: ‘those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed’” (*Winkler v Halmar Intl., Inc.*, 206 AD3d 458, 459 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144, [1st Dept 2012]). The statute is governed by the “generally applicable standards of the prudent [person], the foreseeability of harm, and the rule of reason” (*Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 382 [1st Dept 1959]).

There are two distinct standards for liability under section 200 and the common law:

Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.²

(*Cappabianca*, 99 AD3d at 144). Generally, “[t]hese two categories should be viewed in the disjunctive” (*Ortega v Puccia*, 57 AD3d 54, 61 [2^d Dept 2008]).

² Often referred to as the “means and method” theory of liability (*Nicholson v Sabey Data Center Properties, LLC*, 205 AD3d 620, 621 - 622 [1st Dept 2022]).

NYU and HR and EWBC argue that they did not exercise control over or supervise plaintiff's work emphasizing that plaintiff testified that her work was directed by ASR. NYU and HR further posit that plaintiff has not established that there was a dangerous condition at the premises. In opposition, plaintiff and ASR correctly argue that this is not a means and method case but rather one premised on a dangerous condition theory of liability and that NYU and HR and EWBC have failed to meet their prima facie burden as to whether a dangerous condition existed on the premises.

NYU and HR and EWBC have failed to submit any evidence that they did not create the condition at the premises that allowed rain water to enter plaintiff's work area nor when they last inspected the areas where the accident occurred and thus whether they had actual or constructive notice of the presence of water (*Padilla v Touro College University System*, 204 AD3d 415, 416 [1st Dept 2022] [holding movants failed to establish that they neither created nor had notice of the dangerous condition at the project therefore the Labor Law § 200 and common law negligence]; *Pawlicki v 200 Park, LP*, 199 AD3d 578, 579 [1st Dept 2021] [same]). Indeed, there is some evidence that NYU and HR created the condition by removing the roof and having ASR commence work before a new roof was installed and while there was a heavy rain (*see Silverstein tr at 65 & 56-57, NYSCEF Doc No 120*).

Accordingly, NYU and HR and EWBC have failed to meet their prima facie burden to establish summary judgment on plaintiff's Labor Law § 200 and negligence claims and therefore, their motion as to these claims must be denied.

Contractual Indemnification

NYU and HR move for summary judgment on their claims for contractual indemnification as against ASR, and EWBC. And ASR moves for summary judgment on NYU's contractual indemnification claim as against it and EWBC moves for summary judgment on HR's contractual indemnification claims as against it.

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). “The right to contractual indemnification depends upon the specific language of the contract” (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and indemnity contracts “must be strictly construed so as to avoid reading unintended duties into them” (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification provision that authorizes partial indemnification “to the fullest extent permitted by law,” as here, is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]).

To establish entitlement to contractual indemnification, “the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). While a court may also grant conditional summary judgment on a contractual indemnification claim such relief must be denied as premature “where a triable issue of fact exists regarding the indemnitee’s negligence” (*Spielmann v 170 Bdwy. NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]).

Prior to July 25, 2018, HR and ASR entered into a contract containing an indemnification provision. It provides:

8.1 To the fullest extent permitted by law and to the extent not caused in whole or in part by the negligence of a party to be indemnified herein, the Subcontract shall indemnify, defense, save and hold harmless Hunter Roberts, the Owner, and their respective members, partner, parents, affiliates, agents, officers, employees, landlords, sublandlords property managers, tenants, joint venturers, joint ventures, licensees, invitees, other contractors or subcontractors, and anyone else acting for or on behalf of any of them and any other indemnitee required under the General Contract or others reasonably requested to be named, whether or not Subcontractor has a direct contract with any indemnitee, from and against any and all claims, suits subpoenas, liabilities, losses, obligations, damages, penalties, claims, costs, charges, losses of use, business interruption expense (whether or not groundless), including with limitation reasonable attorney’s fees, settlement costs or expenses, and court costs related therein or in enforcement of the indemnity obligation hereunder, which may be imposed or incurred or asserted against Indemnitees arising out of or related to any of the following:

- (i) the Subcontractor’s failure to perform any covenant or agreement under this Subcontract;
- (ii) The work (including without limitation any extension, modification or change to the Work, by change order or otherwise) or the preparation or performance of such Worker, bodily injury or death to persons or damage to property; or
- (iv) the acts or omissions of Subcontract [sic] or any entity acting on its behalf.

(NYSCEF Doc No 124).

As ASR notes, NYU is not a party to this contract and it is not identified as a third-party beneficiary since the “Owner” is identified in the contract as “NYU Hospital Center” not the NYU entity party to this case, “NYU Langone Hospitals” (*id.* at 5).

“When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Tonking v. Port Auth. of NY and NJ.*, 3 N.Y.3d 486, 490 [2004] [internal quotation marks and citations omitted]). Here the language of the contract is not clear enough to enforce the indemnity provision in favor of the NYU entity sued herein. If HR and ASR intended to include the NYU entity sued herein in the indemnification provision, they needed to explicitly say so in their contract (*id.*).

Accordingly, NYU and HR’s summary judgment motion on NYU’s indemnification claim as against ASR is denied and ASR’s summary judgment motion on this same claim is granted and the claim will be dismissed.

As to HR’s indemnity claim against ASR there are issues of fact as to whether it created a dangerous condition by removing the roof and having ASR work during a heavy rainfall and whether they had actual or constructive notice of the alleged slippery condition on the temporary staircase. Accordingly, HR is not entitled to summary judgment on its contractual indemnification claims as against ASR.

While NYU and HR and EWBC seek summary judgment on a purported claim by NYU and HR for contractual indemnification as against EWBC, there is no such claim by NYU and HR. When plaintiff initiated this action, she only sued NYU and HR (NYSCEF Doc No 1). NYU and HR answered plaintiff’s original complaint (NYSCEF Doc No 6 & 15). NYU and HR then commenced a third-party action against ASR (NYSCEF Doc No 22). ASR answered NYU and HR’s third-party complaint (NYSCEF Doc No 26). ASR commenced a second third-party action against EWBC (NYSCEF Doc No 29). EWBC answered the second third-party complaint against it (NYSCEF Doc No 33). Plaintiff then amended her complaint adding EWBC as a

direct defendant (NYSCEF Doc No 40). ASR answered the amended complaint (NYSCEF Doc No 44). EWBC answered the amended complaint (NYSCEF Doc No 46). NYU and HR then answered the crossclaims asserted against them by ASR (NYSCEF Doc No 47). None of NYU and HR's pleadings contain a claim or crossclaim against EWBC and they only brought a third-party action against ASR not EWBC.

Accordingly, to the extent that NYU and HR and EWBC move for summary judgment on purported contractual indemnification claim by HR as against EWBC, the motions are denied as there is not such claim to render judgment upon nor dismiss.

Breach of contract for failure to procure insurance

Likewise, NYU and HR move summary judgment on a purported claim by HR against EWBC for failure to procure insurance for NYU and HR. The parties' pleadings are detailed above, and neither of NYU and HR's pleadings contains any claims or cross claims against EWBC. NYU and HR only filed two pleadings in this action; an answer to the original complaint which did not name EWBC as a defendant, and an answer to the crossclaims against them by ASR, neither of which contains a claim against EWBC.

Accordingly, to the extent that NYU and HR move for summary judgment on a purported breach of contract claim by HR as against EWBC, the motion is denied as there is not such claim to render judgment upon.

Common law indemnification or contribution

ASR and EWBC move for summary judgment on the common-law indemnification and contribution claims asserted against them.

“To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2)

that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; see also *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377–378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]).

“Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). “The ‘critical requirement’ for apportionment by contribution under CPLR article 14 is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought’” (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

ASR argues that plaintiff did not suffer a “grave injury,” and therefore as plaintiff’s employer it is immune from third-party claims pursuant to Worker’s Compensation Law §11. However, ASR, does not offer any evidence that it procured workers’ compensation insurance for plaintiff. “[A]n employer may not benefit from [Workers’ Compensation Law] section 11’s protections against third-party liability unless it first complies with section 10 and secures workers’ compensation for its employees” (*Boles v Dormer Giant, Inc.*, 4 NY3d 235, 239 [2005]; see also *Sarmiento v Klar Realty Corp.*, 35 AD3d 834, 837 [2d Dept 2006]). There are also questions of fact as to whether ASR knew about the water condition on the temporary stairs.

EWBC argues that HR was responsible for inspecting the premises for slipping hazards and then informing an EWBC employee to remove it, but that HR testified that it did not know of the water condition that caused plaintiff’s accident. However, EWBC testified that it was

responsible for water remediation at the premises including making sure it was dry. Therefore, a question of fact remains whether EWBC failed to exercise reasonable care in the performance of its duties thereby launching the “force or instrument of harm” that caused plaintiff’s accident (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007] [breach of contractual obligation may impose tort liability where the “contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm” (internal quotation marks and citations omitted)]).

Accordingly, ASR and EWBC’s motions for summary judgment on the common-law indemnification and contribution claims asserted against them must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendants NYU Langone Hospitals and Hunter Roberts Construction Group L.L.C.’s motion and plaintiff’s cross motion for summary judgment (Motion Sequence Number 003) on plaintiff’s Labor Law § 241 (6) claim are denied; and it is further

ORDERED that plaintiff’s cross motions for summary judgment (Motion Sequence Number 003 and 005) on defendants’ comparative fault defense are denied; and it is further

ORDERED that plaintiff’s Labor Law § 240 (1) claim is permitted to be withdrawn; and it is further

ORDERED that NYU Langone Hospitals and Hunter Roberts Construction Group L.L.C. (Motion Sequence Number 003) and Exterior Wall and Building Consultants, Inc.’s (Motion Sequence Number 005) motions for summary judgment on plaintiff’s Labor Law § 200 and negligence claims are denied; and it is further

ORDERED that NYU Langone Hospitals and Hunter Roberts Construction

Group L.L.C. motion for summary judgment on NYU's contractual indemnification claim as against ASR Electrical Contracting, Inc. (Motion Sequence Number 003) is denied and ASR Electrical Contracting, Inc.'s motion for summary judgment on this same claim (Motion Sequence Number 004) is granted and this claim as against ASR is dismissed; and it is further

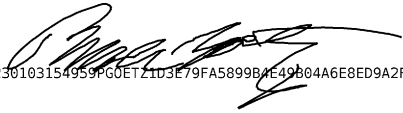
ORDERED that NYU Langone Hospitals and Hunter Roberts Construction Group L.L.C. motion for summary judgment on HR's contractual indemnification claim as against ASR Electrical Contracting, Inc. (Motion Sequence Number 003) is denied; and it is further

ORDERED that NYU Langone Hospitals and Hunter Roberts Construction Group L.L.C. (Motion Sequence Number 003) and Exterior Wall and Building Consultants, Inc.'s (Motion Sequence Number 005) motions for summary judgment on a purported contractual indemnification claim by NYU and HR as against EWBC are denied; and it is further

ORDERED that NYU Langone Hospitals and Hunter Roberts Construction Group L.L.C. motion for summary judgment (Motion Sequence Number 003) on a purported breach of contract claim by HR as against Exterior Wall and Building Consultants, Inc. is denied; and it is further

ORDERED that ASR Electrical Contracting, Inc.'s motion for summary judgment (Motion Sequence Number 004) and Exterior Wall and Building Consultants, Inc.'s (Motion Sequence Number 005) motion for summary judgment on the common-law indemnification and

contribution claims asserted against them are denied.


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1/3/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: