Maurizaca v 201 Water St., LLC.
2023 NY Slip Op 31786(U)
May 25, 2023
Supreme Court, New York County
Docket Number: Index No. 159770/2015
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

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JUAN M. MAURIZACA,

Plaintiff,

- v -

201 WATER STREET, LLC., DCHM, A JOINT VENTURE BETWEEN DANYA CEBUS CONSTRUCTION, LLC AND HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,

Defendants.

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INDEX NO. 159770/2015

MOTION DATE 09/28/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

201 WATER STREET, LLC., DCHM, A JOINT VENTURE BETWEEN DANYA CEBUS CONSTRUCTION, LLC AND HUDSON MERIDIAN CONSTRUCTION GROUP, LLC

Plaintiffs,

-against-

APEX RESTORATION CORP.

Defendant.

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Third-Party
Index No. 595628/2017

201 WATER STREET, LLC., DCHM, A JOINT VENTURE BETWEEN DANYA CEBUS CONSTRUCTION, LLC AND HUDSON MERIDIAN CONSTRUCTION GROUP, LLC

Plaintiffs,

-against-

RED HOOK CONSTRUCTION GROUP - II, LLC

Defendant.

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Second Third-Party
Index No. 595162/2018

The following e-filed documents, listed by NYSCEF document number (Motion 005) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 223, 225, 227, 228, 229, 230, 231, 233, 234, 235, 240, 244

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

This is an action to recover damages for personal injuries allegedly sustained by a union painter on June 12, 2015, when, while working at a construction site at 51 Jay Street, Brooklyn, New York (the Premises), he was struck in the eye by a piece of flying wood.

In motion sequence number 005, defendants/third-party plaintiffs/second third-party plaintiffs 201 Water Street LLC (201 Water) and DCHM, a Joint Venture between Dayna Cebus Constructions, LLC and Hudson Meridian Construction Group, LLC (DCHM) (collectively, defendants) move, pursuant to CPLR § 3212, for summary judgment dismissing (1) the common-law negligence and Labor Law § 200 and 241 (6) claims as against them and (2) the counterclaims of third-party defendant Apex Restoration Corp. (Apex), as well as for summary judgment in their favor on their third-party contractual indemnification and breach of contract for the failure to procure insurance claims against Apex.

Apex cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing defendants' contractual indemnification and breach of contract for the failure to procure insurance claims against it.

BACKGROUND

On the day of the accident, the Premises was owned by 201 Water. 201 Water hired DCHM to perform work at the Premises. DCHM in turn hired non-party Bay Restoration (Bay) to perform restoration work at the Premises. Bay hired Apex to perform masonry work at the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was working as a mason for Bay (plaintiff's tr at 26, 35). He also stated that he worked as a mason for Apex (*id.* at 26). Plaintiff later testified that he "didn't know of the existence of Apex" and that he "only kn[e]w of Bay

Restoration (*id.* at 160 and 221). He only learned of Apex when he applied for workers compensation (*id.* at 222).

He explained that both companies had "[t]he same boss" (*id.* at 27). Whether he worked for Bay or Apex, he was paid in cash by his foreman, Floresmilo Caguana (*id.* at 29). He only took direction from Caguana (*id.* at 69).

Plaintiff purchased his own hard hat, harness and hand tools. He did not have eye protection, and he was not provided with any (*id.* at 71, 82). He also never asked for any eyewear (*id.* at 81). He also was unaware of whether any eyewear was available for use and he never saw any at the Project (*id.* at 84).

At the Project, plaintiff's work primarily included removing debris and "screen protection" (*id.* at 58), but he was expected to perform demolition work as well (*id.* at 66). In the morning on the day of the accident, Caguana assigned plaintiff to construct a pipe scaffold (*id.* at 51). He and two other coworkers began doing so.

Plaintiff also testified that there was a wooden stairway, made of two-by-fours at the Premises (the Stairs) (*id.* at 61). Later in the day, after erecting the pipe scaffold, he was tasked with dismantling the Stairs (*id.* at 76). Plaintiff explained that while he was walking towards the Stairs, his coworker – who had already started the demolition – swung a hammer and struck a small piece of wood off the Stairs. This piece of wood struck plaintiff in the eye.

Plaintiff described the size of the piece of wood as "small" (*id.* at 102), and as approximately the size of a "highlighter" (*id.* at 103).

Deposition Testimony of Tomer Yogev (201 Water's Witness)

Tomer Yogev testified that on the day of the accident, he was employed by non-party Adam America LLC (Adam America) as its head of development. Adam America provided

representatives to real estate owners to assist in construction projects; by hiring general contractors and overseeing the quality of the work and scheduling (Yogev tr at 10). These representatives act as project managers. Yogev was the supervisor for the project manager at the Project (*id.* at 16).

Yogev reviewed a contract between 201 Water and DCHM and confirmed that the person who signed the contract on behalf of 201 Water was also an owner of Adam America (*id.* at 20). He confirmed that 201 Water hired DCHM. Adam America and 201 Water did not hire any other contractors and did not supply any materials or equipment for the Project (*id.* at 29). He was unaware of the names of any subcontractors hired by DCHM.

Yogev would visit the Premises once every two weeks. He did not have any authority to stop work. DCHM had that authority (*id.* at 26). He also had not heard about plaintiff's accident prior to the start of this litigation.

Deposition Testimony of William Craig Booth (Hudson Meridian's Project Manager)

William Craig Booth testified that on the day of the accident, he was the project manager for the Project at the Premises. He was directly employed by Hudson Meridian, but worked on the Project on behalf of DCHM, the joint venture. DCHM did not employ any workers directly and did not supply any equipment or protective gear. It subcontracted all work to other companies. DCHM hired Bay as the "general mason" for the Project (Booth tr at 19). He could not recall whether Bay also handled demolition. He was unaware that Bay had subcontracted some of its work to Apex (*id.* at 47), and he assumed that all workers performing Bay's work were Bay employees (*id.* at 47-48).

Booth was only present at the Premises once a week or so. DCHM had superintendents at the Project, who were present every day. They were responsible for coordinating work and

confirming work was performed to contract drawings and specifications. DHCM's superintendents "don't delegate or direct any work" (*id.* at 23). DCHM employees had the authority to stop work if they saw an unsafe condition (*id.* at 30).

Booth was not present at the Premises at the time of the accident and did not learn of it until much later. He also did not know how the accident happened and did not investigate. He was unaware of any accident reports. Booth also did not know who was working for Bay and who was working for Apex.

Deposition Testimony of Ramon Garcia (Apex's Owner)

Ramon Garcia testified that on the day of the accident, he was the owner of Apex. He also acted as Apex's supervisor at projects. Apex was a masonry subcontracting company. Bay was its "only customer" (Garcia tr at 10). Bay and Apex entered into an agreement for masonry work at the Project (*id.* at 12). According to Garcia, Apex work did not include demolition (*id.* at 18). He later testified that Apex could have performed some demolition work if the demolition company asked for help (*id.* at 60 ["could I see it happen, yes"]), and confirmed that Hudson Meridian had asked Bay to perform some demolition work. Apex would have performed that work for Bay (*id.* at 66).

Garcia testified that he was Apex's supervisor at the Project (*id.* at 18). He was also Bay's "acting supervisor" (*id.* at 27).

Garcia confirmed that plaintiff was employed by Apex. He did not know for certain whether plaintiff was simultaneously employed by Bay (*id.* at 15). He also did not know about the accident until "[a]fter a couple of weeks" (*id.* at 19). He never prepared an accident report.

Garcia also testified that Hudson Meridian was the general contractor for the Project, and that they coordinated Apex's work with other trades and directed where they would work (*id.* at

21). Hudson Meridian never instructed Apex's workers on how to perform their own work (*id.* at 21). Hudson Meridian did not provide any tools or equipment to Apex. Bay provided protective equipment to Apex workers, including "[s]afety glasses" (*id.* at 25, 46).

Garcia testified that he would attend the site meetings and represent Bay (*id.* at 55). He also noted that he was never personally employed by Bay (*id.* at 20), however "all [the] licenses [he] had were under Bay Restoration" (*id.* at 55). He never told anyone that he was not actually employed by Bay because "they never asked" (*id.* at 55).

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 (*id.*).

The Labor Law § 241 (6) Claims

Defendants moves for summary judgment dismissing the Labor Law § 241 (6) claims against them.

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

> All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]; *Corona v HHSC 13th Street Dev. Corp.*, 197 AD3d 1025, 1026 [1st Dept 2021]).

Here, plaintiff alleges violations of Industrial Code 12 NYCRR 23-1.8 (a) and violations of the Occupation Safety and Health Administration (OSHA) regulations as against defendants.

Initially, a violation of an OSHA regulation "do[es] not provide a basis for liability under Labor Law § 241 (6)" (*Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]). Accordingly, defendants are entitled to dismissal of this part of plaintiff's Labor Law § 241 (6) claim.

Industrial Code 12 NYCRR 23-1.8 (a)

Section 23-1.8 (a) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Willis v Plaza Constr. Corp.,* 151 AD3d 568, 568 [1st Dept 2017]). Section 23-1.8 (a) provides, in pertinent part, the following:

> Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while . . . engaged in any other operation which may endanger the eyes.

Defendants raise three arguments. First, they argue, essentially, that demolition work is not the kind of work that "may endanger the eyes" as required under section 23-1.8 (a). Demolition work is not specifically enumerated in the provision. However, "[w]hether an activity is protected by 12 NYCRR 23-1.8 (a) requiring the furnishing of eye protection equipment is a jury question that turns on whether a particular activity involves a foreseeable risk of eye injury" (*Fresco v 157 E. 72nd St. Condominium,* 2 AD3d 326, 328 [1st Dept 2003]). Here, defendants provide no proof that the demolition work, as a matter of law, did not foreseeably endanger workers' eyes.

Next, defendants argue that this provision cannot apply to plaintiff's accident because he was only walking towards the stairs he was tasked with – but had not yet begun – demolishing. Specifically, defendants argue that for section 1.8 (a) to apply, plaintiff must be "actively

engaged" in the hazardous work (defendants' reply memorandum, ¶ 24) – i.e. actually swinging a hammer at the time of the accident. This argument is unpersuasive. Section 23-1.8 (a) does not contain the word "actively" and it will not be interpreted as including such. Moreover,

> [t]o myopically focus on . . . the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the 'spirit of the statute' which requires a liberal construction in order to accomplish its purpose of protecting workers.

(*Aguilar v Henry Mar. Serv., Inc.,* 12 AD3d 542, 544 [2d Dept 2004] [internal quotation marks and citation omitted]). The uncontested facts are that plaintiff (1) was tasked by his supervisor with demolition work and (2) was approaching that area to begin his work when he was injured. These facts do not establish, as a matter of law, that plaintiff was not engaged in an operation where it was unforeseeable that he could receive an eye injury (*Fresco,* 2 AD3d at 328).

Finally, defendants argue that plaintiff has failed to establish that safety glasses were not available to him. Plaintiff testified that he was not given safety glasses and never saw safety glasses at the Project (plaintiff's tr at 71, 82, 84). Garcia testified that eyewear was available (Garcia tr at 25). Garcia's testimony does not establish that plaintiff was, in fact, provided with eyewear, knew about it, or was directed to use it; his testimony merely raises a question of fact.

Accordingly, in light of the foregoing, defendants have not established their prima facie entitlement to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 23-1.8 (a).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. 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]). Labor Law § 200 (1) 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.

There are two distinct categories of section 200 cases. The first applies where the accident is the result of the means and methods used by a contractor to do its work. The second applies where the accident is the result of a dangerous condition that is inherent in the premises (*see Ruisech v Structure Tone, Inc.*, 208 AD3d 412, 414 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless "it actually exercised supervisory control over the injury-producing work" (*Jackson v Hunter Roberts Constr, L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]). "General supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site

and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Notably, "[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, plaintiff was injured when he was struck in the eye by a flying piece of wood generated during the demolition of a staircase. Therefore, his accident arose from the means and methods of the work – specifically, the manner the demolition work was undertaken and performed.

Defendants – the owner and general contractor – argue that they did not have actual supervision or control over any demolition work. The record supports their argument (plaintiff's tr at 61 [noting that he only took direction from his foreman, Caguana – a Bay or Apex employee]; Booth tr at 23 [DHCM's supervisors did not "delegate or direct any work"]; Garcia tr at 21 [stating that Hudson Meridian "coordinated" Apex workers with other contractors but did not "instruct" them]). Therefore, defendants have established, prima facie, that they did not actually direct or supervise the demolition work that caused plaintiff's injury (*Jackson*, 205 AD3d at 543).

Plaintiff argues that Garcia testified that DCHM directly supervised Apex's workers. As noted above, Garcia's testimony does not support that argument (Garcia tr at 21). To the extent that plaintiff argues that DCHM had general supervisory control (the ability to coordinate the trades) and the authority to stop work, such general control is insufficient to impute liability under section 200 (*Hughes,* 40 AD3d at 309 ["That [defendants] may have had the authority to

stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [they] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence"]; *accord Bisram v Long Is. Jewish Hosp.,* 116 AD3d 475, 476 [1st Dept 2014])

Accordingly, defendants are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them.

Defendants Third-Party Contractual Indemnification Claim Against Apex

Defendants move for summary judgment in their favor on their third-party claim for contractual indemnification claim against Apex. Apex cross-moves for summary judgment dismissing this claim.

"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'" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018], quoting *Drzewinski* v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987]; *see also Tonking* v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]).

"In 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" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Lexington Ins. Co. v Kiska Dev. Group LLC,* 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee "has not established that it was free from negligence"]).

Further, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

Additional facts relevant to defendants' motion

In support of their motion, defendants provide a copy of an AIA standard form agreement between Bay and Apex that governs Apex's work at the Project, dated January 5, 2015 (the Bay/Apex Agreement) (defendants' notice of motion, exhibit S). The Bay/Apex Agreement notes that a copy of "the Prime Contract and the other Contract Documents . . . has been made available to [Apex]" (*id.*, p. 1). It also contains an indemnification provision that provides the following:

> To the fullest extent permitted by law, [Apex] shall indemnify and hold harmless the Owner, [Bay], Architect, Architect's consultants, and agents and employees of any of them from and against claims . . . arising out of or resulting from performance of [Apex's] Work under this Subcontract . . . but only to the extent caused by the negligent acts or omissions of [Apex] . . . .

(*id.,* § 4.6.1). Therefore, before this indemnification provision is triggered, there must be a finding that Apex was, in fact, negligent with respect to plaintiff's accident.

Here, defendants argue only that plaintiff's accident arose from Apex's work. They do not address the negligence prong. To the extent that they raise other arguments in their reply papers, these arguments will not be considered (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.,* 218 AD2d 624, 626 [1st Dept 1995] ["Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion"]). Therefore, defendants have failed to meet their prima facie burden.

Accordingly, defendants are not entitled to summary judgment in their favor on their third-party contractual indemnification claim as against Apex.

Apex's Cross-motion

In its cross-motion, Apex argues that defendants' contractual indemnification claim must be dismissed because Apex was not a party to a contract with 201 Water or DCHM and the Bay/Apex Agreement's indemnification provision does not specifically identify them.

In opposition, defendants provide, for the first time, a copy of an agreement between DCHM and Bay for the Project (defendants affirmation in opposition to cross-motion, exhibit A; NYSCEF Doc. No. 227) (the DCHM/Bay Agreement). It identifies 201 Water as the owner, DCHM as the contractor and Bay as a subcontractor. Defendants argue that this agreement was incorporated into the Bay/Apex Agreement and all its terms should be binding on Apex.

Additional facts relevant to Apex's cross-motion

Defendants identify an indemnification provision in the DCHM/Bay Agreement, which states, as relevant:

> [T]o the fullest extent permitted by law, [Bay] shall defend and shall indemnify . . . [DCHM] and all entities [DCHM] is required to indemnify and hold harmless, the Owner of the property . . . from and against all liability or claimed liability for bodily injury . . . arising out of or resulting from the Work covered by this Contract Agreement to the extent that such Work was performed by or contracted through [Bay] or by anyone for whose acts [Bay] may be held liable . . .

(*id.* exhibit A, contract-exhibit C, ¶ 1 [the DCHM/Bay Indemnification Provision]).

Defendants also identify, for the first time in their opposition to Apex's cross-motion, an endorsement in the Bay/Apex Agreement that further governs Apex's indemnification obligations. It provides the following:

> [T]o the fullest extent permitted by law, [Apex] shall defend and shall indemnify, and hold harmless . . . [Bay], all entities [Bay] is required to indemnify and hold harmless, the Owner of the property . . . from and against all liability or claimed liability for bodily injury . . . arising out of or resulting from the Work covered

> by this Contract Agreement to the extent such work was performed by or contracted through [Apex] . . .

(notice of motion, exhibit S, endorsement A, ¶ 1; NYSCEF Doc. No. 193) (the Endorsement Indemnification Provision).

As an initial matter, the Bay/Apex Agreement's indemnification provision explicitly requires Apex to indemnify the "Owner" of the Premises. It is undisputed that 201 Water is the owner of the Premises. Therefore, as the Bay/Apex Agreement specifically requires indemnification of the owner, Apex has failed to establish that the Bay/Apex indemnification provision does not apply to 201 Water.

Apex makes no other argument regarding dismissal of 201 Water's contractual indemnification claim against it. Accordingly, Apex is not entitled to summary judgment dismissing defendants' contractual indemnification claim as it pertains to 201 Water.

Turning to DCHM, the primary indemnification provision in the Bay/Apex Agreement does not explicitly refer to DCHM. However, the Endorsement Indemnification Provision requires Apex to indemnify all entities that Bay is required to indemnify (*id.*). And, under the DCHM/Bay Agreement, Bay is required to indemnify DCHM.

Apex's only argument is that the Bay/Apex Agreement never mentions DCHM and, therefore, cannot apply to DCHM. This argument, essentially, asks that the language of the Endorsement Indemnification Provision, discussed above be ignored. Doing so would alter the Bay/Apex Agreement (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 156 [1st Dept 2016], *affd* 31 NY3d 131 [2018] [internal quotation marks and citations omitted] [A court "may not by construction add or excise terms, nor distort the meaning of the terms used and thereby make a new contract for the parties under the guise of interpreting

the writing"]). Therefore, Apex has failed to establish that the indemnification provisions in the Bay/Apex Agreement, as a matter of law, do not apply to DCHM.

Given the foregoing, Apex has not established its prima facie entitlement to summary judgment dismissing defendants' contractual indemnification claims against it.

Accordingly, defendants are not entitled to summary judgment in their favor on their contractual indemnification claims against Apex and Apex is not entitled to summary judgment dismissing this claim as against it.

Defendants' Breach of Contract for the Failure to Procure Insurance Claim Against Apex

Defendants move for summary judgment in their favor on their breach of contract for the failure to procure insurance claim against Apex. Apex cross-moves for summary judgment dismissing this claim.

Defendants note that Apex procured insurance with respect to the Project at the Premises, but that Apex's insurer denied coverage (defendants' notice of motion, exhibit U; NYSCEF Doc. No. 195). Defendants argue, therefore that Apex failed to procure insurance covering them for plaintiff's accident.

This argument is unavailing because where an insurance company has refused to indemnify under an insurance policy, the indemnifying party will not be not liable to another for breach of contract for the failure to procure insurance if that party "fulfilled its contractual obligation to procure proper insurance on behalf of" the indemnified party (*Martinez v Tishman Constr. Corp.,* 227 AD2d 298, 299 [1st Dept 1996]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [denying a breach of contract for the failure to procure insurance claim, noting that "[t]he insurer's refusal to indemnify [the indemnitor] under the coverage purchased by [the indemnitee] does not alter this conclusion"]). Defendants do not deny that

Apex procured insurance. The issues of whether defendants are properly additional insureds under that policy, or whether certain exclusions apply that otherwise prevent coverage, are not before this court; and Apex's insurer is not a party to this action.

In opposition and in support of its own cross-motion, Apex argues that it had no contractual obligation to procure insurance for defendants. This argument is unpersuasive considering the Bay/Apex Agreement's Endorsement, which contains an insurance procurement provision that requires Apex to "procure . . . such insurance as will protect [Bay], all entities [Bay] is required to indemnify and hold harmless [and] the Owner" (notice of motion, exhibit S, Endorsement A, ¶ 2; NYSCEF Doc. No. 193).

Notably, Apex does not include a copy of the insurance policy.[1] Therefore, it cannot be determined whether, as a matter of law, the policy sufficiently meets the requirements of the Endorsement's insurance procurement provision and as a result, Apex has failed to meet its prima facie burden on its summary judgment motion (*see Simmons v Berkshire Equity, LLC*, 149 AD3d 1119, 1121 [2d Dept 2017] [denying motion seeking dismissal of breach of contract for the failure to procure insurance claim where movant "did not submit any evidence demonstrating that it procured an insurance policy as required by the [agreement]").

Accordingly, defendants are not entitled to summary judgment in their favor on their breach of contract for the failure to procure insurance claim against Apex and Apex is not entitled to summary judgment dismissing this claim.

[1] Defendants do not annex a copy of the policy either.

Apex's Cross-Claims Against Defendants

Defendants move for summary judgment dismissing Apex's cross-claims for contractual and common-law indemnification and breach of contract for the failure to procure insurance claims against them.

Defendants have established entitlement to judgment dismissing these claims because there is no contractual provision requiring defendants to indemnify Apex or to procure insurance in Apex's favor. As to common-law indemnification, as discussed above, defendants are free from liability under the common-law and Labor Law § 200 (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010] [Common-law indemnification requires, *inter alia*, proof that "the proposed indemnitor's negligence contributed to the causation of the accident").

Notably, Apex does not oppose the dismissal of these claims.

Accordingly, defendants are entitled to summary judgment dismissing Apex's cross-claims for contractual and common-law indemnification and breach of contract for the failure to procure insurance.

The parties remaining arguments have been considered and are unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants/third-party plaintiffs/second third-party plaintiffs 201 Water Street LLC and DCHM, a Joint Venture between Dayna Cebus Constructions, LLC and Hudson Meridian Construction Group, LLC (together, defendants) (motion sequence number 005), pursuant to CPLR § 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 and 241 (6) claims as against them and the

counterclaims of third-party defendant Apex Restoration Corp. (Apex), as well as for summary judgment in their favor on their third-party contractual indemnification and breach of contract for the failure to procure insurance claims against Apex is granted to the extent that the common-law negligence and Labor Law § 200 claims, as well as Apex's counterclaims are dismissed; and the remainder of the motion is denied; and it is further

ORDERED that Apex's cross-motion, pursuant to CPLR § 3212, for summary judgment dismissing defendants' contractual indemnification and breach of contract for the failure to procure insurance claims against it is denied; and it is further

ORDERED that the remainder of the action is severed and shall continue.

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5/25/2023						
DATE				PAUL A. GOETZ, J.S.C.		
CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE