Serrano v Maimonides Med. Ctr.

2023 NY Slip Op 32387(U)

July 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 511024/2016

Judge: Debra Silber

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At an IAS Term, Part 9 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 12th day of July, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JORGE SERRANO AND ROSA SERRANO,

Plaintiffs,

-against-

MAIMONIDES MEDICAL CENTER,
and AMERICON CONSTRUCTION INC.,

Defendants.

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MAIMONIDES MEDICAL CENTER,

Third-Party Plaintiff,

-against-

BROOKLYN HEALTHCARE INVESTORS, LLC.,

Third-Party Defendant.

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DECISION / ORDER

Index No.: 511024/2016
Mot. Seq. # 3, 4 & 5
Submitted: 4/27/23

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affidavits (Affirmations) and Exhibits Annexed	60-78; 79-97; 98-118
Opposing Affidavits (Affirmations)	122-124; 136-137, 138-140; 134-135
Affirmations in Reply	144; 142

Defendant Maimonides Medical Center (hereafter "Maimonides") moves (in motion sequence number three) for an order, pursuant to CPLR 3212(a), granting it partial

summary judgment and dismissing plaintiff's Labor Law §200 and common law negligence claims against it, and for summary judgment on its cross-claims and third-party claims for contractual and common law indemnification against co-defendant Americon Construction (hereafter "Americon") and against third-party defendant Brooklyn HealthCare Investors Inc. (hereafter "BHI").

Plaintiff[1] moves (in motion sequence number four) for an order, pursuant to CPLR 3212(a), granting him partial summary on the issue of liability under Labor Law § 240(1) against both defendants, the general contractor and the property owner, respectively,[2] and granting him summary judgment solely against defendant Americon on his Labor Law 200 and common law negligence claims.

The third-party defendant BHI moves (in mot. seq. no. five) for an order, pursuant to CPLR 3212(a), granting it conditional summary judgment on its cross-claims against Americon for contractual indemnity.

BACKGROUND

On February 11, 2016, the day of plaintiff's accident, defendant Maimonides was the owner of the property located on 9th Avenue between 48th and 49th Streets, in Brooklyn, New York (hereinafter "the premises"). Defendant Americon was the general contractor hired to oversee the construction project, a new building at the site. BHI was given a ground lease by Maimonides and entered into a contract with Maimonides to build a new seven story building at the site for Maimonides, which the parties refer to as a developer

[1] As co-plaintiff's claims are derivative, the court will refer to plaintiff in the singular, for clarity.
[2] At oral argument plaintiff's counsel acknowledged that the notice of motion contained a typographical error, and that plaintiff is not seeking summary judgment on his Labor Law 241(6) claim.

agreement. In addition, a contract was entered into between BHI and Maimonides, referred to as a building leasing agreement, in which BHI agreed to manage the new building and lease it back to Maimonides as the tenant. These documents are provided as exhibit O to motion sequence 5 [Doc 114]. Pursuant to the developer agreement, BHI contracted with Americon to be the general contractor. In the contract, Americon is referred to as the general contractor, BHI is referred to as the owner, and Maimonides is referred to as the tenant [Doc 115].

Plaintiff testified that he was employed by non-party The LaQuilla Group (hereafter "LaQuilla"). This company was hired by Americon to perform the foundation work for the new building. Plaintiff testified that he was in the process of cutting a piece of plywood when he was struck by a plywood "pack-out form" and sustained injuries.

Plaintiff commenced this action by filing a summons and verified complaint on June 29, 2016, and issue was joined by the filing of defendants' answers on July 29, 2016, and August 4, 2016, respectively. The plaintiff's complaint contains causes of action alleging violations of Labor Law §§ 240(1), 241(6), 200 and common law negligence. The third-party action was commenced on October 12, 2019. The third-party defendant answered on December 13, 2019. Plaintiff filed his note of issue on December 29, 2021, and these motions timely followed.

Plaintiff's Motion

The court, for a more logical order, elects to discuss plaintiff's motion first. Plaintiff was deposed twice. The transcripts are at Documents 70 and 71. The first one was held on July 10, 2017. He testified that he has been a member of Local 157 United Brotherhood of

Carpenters since 1998. He has been a carpenter since the 1980's. He had been constructing forms for about thirty years by the date of his accident. He said he was paid Workers' Compensation for this accident, which stopped, and he is collecting Social Security Disability and has not worked since the subject accident. On the day of the accident, he was working for LaQuilla Group, a subcontractor which had been contracted to do the foundation at the premises. He worked eight hours a day, six days per week. There was a superintendent, a general foreman and a foreman, all employed by LaQuilla. His assignments all came from the foreman, and nobody else [Doc 70 Page 34]. He was building forms for the concrete work. On the day of his accident, he was working in an open pit, which was exposed to the elements. The floor for the foundation (basement) had been poured, and they were working on constructing the forms for the foundation walls and the partition walls. The forms were made from large (12 foot) plywood sheets and 2 x 4s. There was a crane on site, operated by LaQuilla's crane operator, to move materials and to move forms after they were constructed. He did not remember if the crane operator was there at the time of his accident. The LaQuilla crew had been working at this site for several months.

Plaintiff testified that on the day of his accident, he had entered the basement by climbing down a ladder. There were somewhere between ten and twenty LaQuilla workers on site. All of the workers on the site that day were LaQuilla employees [Doc 70 Page 40]. He had a work bench on site, and he was cutting plywood sheets with a circular power saw. He was positioned with his back to the wall of the foundation. The wall was about four to six feet behind him. The day of his accident was a cold and windy February day.

Plaintiff was wearing a hard hat over a wool hat, goggles, and work boots. He was also wearing an orange reflective vest and warm gloves. One co-worker, Genaro, was working with him as his helper. Plaintiff testified that he was suddenly hit from behind by something. He said "the wind picks up and then I feel the thing fell on my back" [id. Page 59]. It hit him in the head and knocked him over onto his table. He quickly determined that it was a wood form, 2 feet by 12 feet and four inches in width, that he had just finished cutting the wood for, which had been leaned against the foundation wall behind him. He said he had constructed it just a short while before, and his co-worker Genaro had placed it behind him against the wall [id. Pages 55-56]. He clarified that he had cut the wood, and Genaro had nailed it together and moved it to the location where it was when it fell/blew over onto plaintiff. Plaintiff estimated that it weighed one hundred pounds. He said that he had created six or seven of these forms that morning before his accident occurred.

When asked how the forms were supposed to be stored after they were assembled, plaintiff responded that they were supposed to be stacked, on the ground, flat on the floor [id. Page 58]. The form which fell on him had been placed upright and was not laid flat. When asked why this form had been placed upright, plaintiff said "because they were going to install it" [id. Page 59]. He said the "they" he referred to were other LaQuilla workers. He testified that he was able to get the form off of his back, and then went directly to the trailer to report the accident to his superintendent and the general foreman. They apparently filled out an accident report after he left to go home, which he was not asked to sign, and he had never seen it. He also testified that the form which fell on him was supposed to have been secured by a rope until it was moved into position [id. Page

63]. Plaintiff did not know if the form was in the process of being installed at the time that it hit him [id.].

Plaintiff's second EBT was held on January 14, 2021. The first one was conducted before the third-party defendant was brought into the case. Plaintiff was still not working. He said he was receiving Social Security Disability and a pension from his union. This deposition was held virtually, and plaintiff had a lot of difficulty understanding the questions. He was asked many of the same questions that he was asked in the first deposition. He did add that he thought that Genaro was going to put the form he had finished nailing together "onto the stack that we were putting [them]" [Doc 71 Page 48] but he hadn't. "Maybe two, three minutes later I just feel the thing fell on my head" [id. Page 51].

Plaintiff moves for partial summary judgment against both defendants on the issue of liability under Labor Law § 240(1), which provides, in pertinent part, as follows:

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

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id*. at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, "[t]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500). Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident, as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

In falling object cases, "a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc*., 96 NY2d 259, 268 [2001]), "or that the falling object required securing for the purposes of the undertaking" (*Simmons v City of New York*, 165 AD3d 725, 727 [2018], quoting *Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2013]). Here, it is claimed by plaintiff that the object, the form, required securing for the purpose of the undertaking, if it was going to be placed upright so it could be readily used.

Edward Weiner was deposed on behalf of Maimonides on February 15, 2018 [Doc 90]. He is the associate general counsel for the hospital. He was contacted by the director

of risk management to attend the deposition. He did not know about plaintiff's accident before that. He did not ask about it and came to the EBT without any knowledge of the accident.

Norman Dietrich was deposed on behalf of BHI on October 29, 2021. He is a vice president of Welltower Inc. He testified that has worked for them since 2007. His office is in Brentwood, Tennessee. He testified that BHI was "formed by our company when this project began. So I still worked for our company at that time, which was named Healthcare REIT, not Welltower." Mr. Dietrich then said he was not involved in this project at the time of plaintiff's accident, and when he was asked which staff person was, he said "Ian Greenwood" [Doc 93 Page 52].

Ian Greenwood was then deposed on behalf of BHI, on February 7, 2022. He testified that Americon was responsible for safety issues, and was responsible for overseeing the means, methods, and manner of the subcontractors' work. He is employed as vice president of construction and development of MedCraft Healthcare Real Estate. His office is in Minneapolis, Minnesota. He said he was responsible for the management of the design and construction of the project. The relationship with BHI is "MedCraft has a management agreement with Brooklyn Healthcare Investors for the management of the design and construction" [Doc 76 Page 6]. He was asked about the plaintiff's accident, and he said that he had received the incident report from Americon, but he did not remember when, and he did not remember if he did anything about it once he received it [id. Page 19]. He said there were no safety meetings at the site when only the foundation work was being done, and "I am not aware there was a site safety manager working on the project" at

that time [id. Page 30]. When asked "Do you have any memory of there being any indication in the report as to a remedy or how to avoid the circumstance going forward after the Serrano accident?" he responded "I don't recall" [id. Page 36]. He testified that he was not on site on the day of the plaintiff's accident [id.].

Jonathan Cadle was deposed on behalf of Americon on October 23, 2019 [Doc 89]. He testified that he is a project executive at HITT Contracting. He testified that he has never worked for Americon. Americon is now owned by HITT Contracting and is called Americon HITT. They purchased Americon in 2016 and took over all of their contracts [id. Page 20]. He worked on the project for Maimonides. He said "My duties are oversight of the entire project; both field staff and office staff. Everything associated with the job; client relationship, et cetera" [Doc 89 Page 9]. He testified that he did not start on this project until March of 2017, a year after plaintiff's accident [id. Page 14]. He testified that he does not know about plaintiff's accident, did not see the accident report, and only obtained some general information from the in-house insurance staff before he came to the deposition. He also testified that he had not been to the worksite until well after plaintiff's accident. He also stated that the Americon superintendent, Mr. Johnson, resigned from the job shortly after he arrived in March of 2017.

Mr. Cadle testified for Americon as well. He said that LaQuilla Group was contracted by Americon to do excavation and structural concrete work. There is a written contract. By the time he started at the job, LaQuilla was finished with their work and were not on the job any longer. He said LaQuilla left the job before their work was completely finished. Asked why, he said "There was a structural issue on the project in late 2016 and

we were holding them partially accountable" [id. Page 27]. When asked if Americon had a safety manual before HITT took over, he said he had never seen it [id. Page 25]. When asked "how did Americon ensure that the trades were performing their work in a safe manner?" he replied "I don't have specific knowledge of that prior to my arrival on the site in March of 2017" [id. Page 35].

Bernadette Barnett was also deposed on behalf of Americon, on July 29, 2021 [Doc 94]. She testified that she is a vice president of Americon. At the time of plaintiff's accident, she worked for another company. Ms. Barnett said she had not been involved with the subject project until March of 2021 [Doc 94 Page 11]. She reviewed some documents before the EBT, including the incident report, and said she learned that plaintiff "was hit with a constructed wooden box" [id. Page 18]. She did not know if Americon hired the subcontractors, or what the safety procedures were at the project. She was shown the daily log that mentioned plaintiff's accident, dated a week after the accident and prepared by Mr. Johnson, and she stated that she did not know who he is. She could not authenticate it, and could not state that this is the accident reporting form Americon used at the time. She did not know if there was a site safety plan at the time. She was unaware of the contract with LaQuilla. She did not know if there were any witnesses to the accident, or any photographs.

Both defendants separately oppose plaintiff's motion with affirmations from counsel and no other exhibits. Defendant Americon argues [Doc 138] that plaintiff's testimony is speculative, as he did not see his helper place the form against the wall, and also that Labor Law §240(1) is inapplicable, as plaintiff was sure that it was the wind, not

gravity, that caused the form to fall. That is not a logical argument, as gravity was involved too. Counsel concludes "defendants, YUCO CONSTRUCTION CORP. and YUCO BUILDERS, LLC, [sic] respectfully request that this Court deny plaintiffs' motion."

Defendant Maimonides also contends that Labor Law §240(1) is inapplicable, because "based upon plaintiff's speculative account of the accident, the pack-out form fell over due to a 'gust of wind' (see Exhibit 5 to plaintiff's motion papers, pp. 54, 59, 64, 117). Plaintiff specifically denied that the pack-out form was in the process of being hoisted at the time of the incident (see Exhibit 6 to plaintiff's motion papers, pp. 60-61). It was not the force of gravity that caused the pack-out form to strike Serrano, it was the lateral force of the wind. Consequently, as plaintiff's injuries were not the result of the direct application of gravity upon the pack-out form being hoisted or lowered, no violation of Labor Law §240(1) exists herein" [Doc 136 ¶¶12-13].

Counsel further avers that "[t]here is no evidence in the record explaining how the pack-out form was unsecured or for that matter the absence of any proper protection - especially, where as here, plaintiff does not know how the pack-out form fell other than his speculative account" [id. ¶19]. Defendant Maimonides further argues that the motion cannot be granted because plaintiff "fails to present evidence-for example from an expert-that he should have been provided with additional safety devices and that the failure to do so was a contributing cause of the accident". Defendant concludes that "[b]y plaintiff's own testimony, the subject section of pack-out form was in an upright position - while also denying that his co-employees were in the process of hoisting these forms into position.

Plaintiff's counsel has not presented any evidence of the absence of 'proper protection' as required under Labor Law §240(1)" [id. ¶21].

The court finds that plaintiff makes a prima facie case for summary judgment on his claim that the owner and general contractor violated Labor Law §240(1), and that this violation was the proximate cause of his injury. Here, there is no evidence submitted in opposition to plaintiff's motion which disputes that the object that fell on plaintiff, a plywood "pack-out" form, "required securing for the purpose of the undertaking." Plaintiff testified that it was twelve feet long and two feet wide and weighed about one hundred pounds, and it was supposed to have been laid down on the ground in a stack after it was assembled by his helper, and instead it was leaned against the wall only a few feet behind plaintiff. The wind caused it to tip over and hit plaintiff from behind. Plaintiff testified that if it was to be placed against the wall, it should have been secured by a rope.

There is not one shred of evidence which in any way disputes or controverts plaintiff's description of how the accident occurred. Defendants and third-party defendants produced a plethora of witnesses who were not working on this project on the date of this accident, in some cases not until a year later, and none of them had any non-hearsay information about the accident whatsoever.

An expert's affidavit is not needed for the court to determine, based on the testimony in the record, that a twelve-foot by two-foot form that weighed about one hundred pounds should not have been leaned vertically against an exterior wall only four to six feet from where plaintiff was operating a power saw, and which was subject to the elements, including wind. It is mere common sense. Further, plaintiff clearly testified that

when such a form needed to be placed against the wall vertically because it was ready to be used, it required securing for the purposes of the undertaking (see *Rincon v New York City Hous. Auth.*, 202 AD3d 421 [1st Dept 2022]; *Tinti v Alpha Omega Bldg. and Consulting Corp.*, 208 AD3d 1120 [1st Dept 2022]; *Pados v City of New York*, 192 AD3d 596 [1st Dept 2021]). There is no evidence in opposition to this statement from plaintiff, a union worker with some thirty-years of experience in the trade.

Accordingly, the branch of plaintiff's motion for summary judgment against both defendants on his Labor Law 240(1) claim is granted.

Turning to the branch of plaintiff's motion that seeks summary judgment with respect to plaintiff's Labor Law § 200 and common-law negligence claims, the court notes that Labor Law § 200 states, in applicable part:

"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 protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical*

Bank, 260 AD2d 432, 433 [1999]). This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). "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'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

"Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those involving the manner in which the work was performed" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Here, the instant matter should be analyzed as a "means and methods of work" case, not as a "hazardous premises condition" case.

Under the "manner of work" analysis, "[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" either the work that was performed by plaintiff or the work that produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, the record establishes that defendant Americon did not control or supervise plaintiff, his work, or any LaQuilla workers performing concrete-related tasks. Plaintiff specifically testified that he did not know who or what defendant Americon is. He testified [Doc 87 Page 32] that he thought LaQuilla was the general contractor. Plaintiff's testimony shows that he did not take instruction from defendant's agents, and that only LaQuilla workers supervised his work and assigned him tasks. The testimony also indicates that the only subcontractor on site while the foundation was being poured was LaQuilla. There was no testimony from any of defendants' witnesses to the contrary. Therefore, if plaintiff's injuries are considered a consequence of the manner of his work of constructing concrete forms, then defendant Americon is not subject to liability for causes of action sounding in common-law negligence and/or for violations of Labor Law § 200.

Accordingly, plaintiff's motion for partial summary judgment against defendant Americon with regard to Labor Law §200 and common law negligence is denied.

Defendant Maimonides' Motion

Plaintiff has not opposed the branch of Maimonides' motion which seeks to dismiss his cause of action for a violation of Labor Law §200 and for common law negligence, and

thus, that portion of defendant's motion is granted. In fact, counsel for plaintiff so states in his affirmation responding to BHI's motion [Doc 134 ¶2].

The remainder of Maimonides' motion is addressed to its request for an order granting it a defense, past attorneys' fees, and summary judgment on its claims for contractual and common law indemnification against Americon and BHI.

Only BHI opposes this branch of defendant Maimonides' motion, arguing that "there is no evidence of independent negligence against Brooklyn (BHI) and a question of fact remains" [Doc 122 ¶4]. Counsel argues that plaintiff testified that his foreman was the only person who directed and controlled the plaintiff's work, and therefore BHI was not "negligent in the occurrence of plaintiff's accident as it did not direct, supervise or control the plaintiff's work . . . and the accident was not caused by a dangerous condition or defect on the job site" [id. ¶7]. BHI additionally argues that this request for relief is premature, as Maimonides "has not been assessed a judgment nor has paid any monies toward settlement" [id. ¶9].

Americon has not opposed Maimonides' motion for contractual and common law indemnification as against it, and that Americon has similarly not opposed BHI's motion for conditional contractual indemnification from Americon. This is not surprising, as a general contractor is usually required to indemnify the property owner for accidents which arise from the work it is contracted to perform. Because of the unusual nature of the legal organization of this project, both BHI and Maimonides were described as "owner" by the documents, and the contractors agreed to treat both as "owner," and as such, they are both entitled to be indemnified by the general contractor. Further, BHI's contract with

Americon requires that Americon indemnify both BHI and Maimonides, thereby making Maimonides a third-party beneficiary of the contract. However, as there is no privity between Americon and Maimonides, the branch of Maimonides' motion for common law indemnification from Americon must be denied.

Maimonides also seeks contractual and common law indemnification from BHI, which BHI opposes. "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 Co.*, 70 NY2d 774, 777 [1987]). Here, the applicable written agreement [Doc 78 Developer Agreement Section 2.3] demonstrates that the parties agreed that BHI, as "developer" must obtain insurance for the job [id. Section 2.5] and hold the property owner[3] harmless for all "injury to person arising out of or related in any way to the Project." In the contract between BHI and Americon [Doc 77 Section3.18] there is a provision for indemnity as required by the Developer Agreement. Since the applicable indemnity provisions were in effect at all relevant times, and since there is no indication that defendant Maimonides is attempting to have BHI indemnify it for its own negligence, and as Maimonides' liability, if any, would be purely vicarious, defendant Maimonides is awarded conditional summary judgment on its third-party claim for contractual indemnification against BHI. If the fact finder finds BHI to have been negligent, defendant Maimonides is entitled, as it would only be vicariously liable, to contractual

[3] Doc 78, Section 1.1.34 defines the indemnified party referred to in Section 2 as "Maimonides Medical Center, and its affiliates, officers, trustees, directors, shareholders, partners, members, employees, agents, consultants, attorneys, representatives, and successors-in-interest."

indemnification. It is noted that both BHI and Maimonides are both entitled to be indemnified by Americon, pursuant to their respective contracts.

The court finds that Maimonides has made a prima facie case for contractual indemnification, which Americon has not opposed, and BHI has not overcome, and thus this branch of its motion is granted to the extent reflected above.

BHI's Motion for Conditional Summary Judgment Against Americon

The third-party defendant BHI moves (in mot. seq. no. five) for an order, pursuant to CPLR 3212(a), granting it conditional summary judgment on its cross-claims against Americon for contractual indemnity.

The only papers submitted in opposition to this motion are from plaintiff. Counsel states that [Doc 134] he disagrees with BHI's argument that the plaintiff's work was exclusively directed, supervised and/or controlled by LaQuilla, as is fully set forth in plaintiff's motion for summary judgment against Americon on his Labor Law 200 and common law negligence claims, and plaintiff does not want the court to determine BHI's motion for contractual indemnification against Americon by concluding that it was, because "Americon undisputedly had the authority to supervise and control the injury-producing work and had the ability to avoid and/or correct the unsafe condition."

Thus, the court finds that BHI is entitled to summary judgment on its claim for conditional contractual indemnity against Americon, in the absence of any opposition from Americon.

Conclusions Of Law

Accordingly, it is hereby

ORDERED that the branch of defendant Maimonides' motion (motion seq. three) for partial summary judgment dismissing plaintiff's Labor Law §200 and common law negligence claims against it is granted; and it is further

ORDERED that the branch of defendant Maimonides' motion for summary judgment on its cross claims for contractual and common law indemnification against defendant Americon is granted as to contractual indemnification and denied as to common law indemnification; Americon is directed to immediately assume Maimonides' defense and reimburse their legal fees and disbursements incurred thus far; and it is further

ORDERED that the branch of defendant Maimonides' motion for summary judgment on its third-party claims for contractual and common law indemnification against third-party defendant BHI is granted to the extent that Maimonides is awarded conditional contractual indemnification against BHI, as described above, and its request for common law indemnification is denied; and it is further

ORDERED that the branch of plaintiff's motion (mot. seq. four) for partial summary judgment on his Labor Law § 240(1) claim as against defendants Maimonides and Americon is granted; and it is further

ORDERED that the branch of the plaintiff's motion (mot. seq. four) for partial summary judgment on his Labor Law § 200 and common law negligence claims against Americon is denied; and it is further

ORDERED that the branch of the third-party defendant BHI's motion (motion seq. five) for an order granting it an award of conditional summary judgment on its cross claim for contractual indemnification against defendant Americon is granted; and it is further

ORDERED, that any dispute as to the amount of the attorneys' fees and disbursements which Maimonides has incurred and is entitled to reimbursement for, for the period from the date the action was commenced to the date that defendant Americon assumes their defense, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and disbursements to be awarded for reimbursement.

Any other relief requested not specifically granted herein has been considered and is denied.

The foregoing constitutes the decision, order, and judgment of the court.

E N T E R:

Hon. Debra Silber, J.S.C.