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 13th day of October, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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LUKE MC DONAGH,

Plaintiff,

- against -

55th AND 5th AVENUE CORPORATION, SHAWMUT WOODWORKING & SUPPLY, INC. d/b/a SHAWMUT DESIGN AND CONSTRUCTION and DAL ELECTRICAL CORP.,

Defendants.

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SHAWMUT WOODWORKING & SUPPLY, INC. D/B/A SHAWMUT DESIGN AND CONSTRUCTION,

Third-Party Plaintiff,

- against -

NORTH AMERICAN ELEVATOR,

Third-Party Defendant.

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DAL ELECTRICAL CORP.,

Second Third-Party Plaintiff,

- against -

K.A.N. ELEVATOR INC.,

Second Third-Party Defendant.

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DECISION / ORDER

Motion Seq. 11, 12 & 13

Index No. 517203/2016

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Cross Motion, Affidavits (Affirmations) and Exhibits Annexed	194-210; 213-232; 237-247
Opposing Affidavits (Affirmations) and Exhibits	252-256, 214-235; 257-261, 267-271; 251, 262-266
Reply Affidavits (Affirmations)	275-280, 277-280; 281-286

Upon the foregoing papers, third-party defendant North American Elevator Inc., a corporation organized in New Jersey and authorized to do business in New York (hereinafter "NAE") and second third-party defendant K.A.N. Elevator Inc., a New York corporation, (hereafter "KAN"), move jointly (in mot. seq. 11) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing both third-party complaints and any cross-claims.[1] Defendant 55TH and 5TH Avenue Corporation (hereafter "55th and 5th") and defendant/third-party plaintiff Shawmut Woodworking & Supply, Inc., d/b/a Shawmut Design and Construction, (hereafter "Shawmut") move (in mot. seq. 12), for an Order pursuant to CPLR 3212 granting them summary judgment dismissing the plaintiff's complaint and any cross-claims asserted against them. In the same motion, and presumably in the alternative, defendant/third-party plaintiff Shawmut moves for an order, pursuant to CPLR 3212, granting it summary judgment on its cross-claims claims for contractual indemnification and for failure to procure insurance asserted against defendant DAL Electrical Corp. (hereafter "DAL") and on its third-party claims for contractual indemnification and for failure to procure insurance asserted against third-party defendant

[1] There are no cross claims asserted against movants in the main action, as both are third-party defendants.

NAE. Lastly, plaintiff moves (in mot. seq. 13) for an order, pursuant to CPLR 3043(c) and 3025(b), granting him leave to serve an amended bill of particulars.

Background

Plaintiff commenced this action by electronically filing a summons and a verified complaint with this court on September 29, 2016. The complaint asserts causes of action for negligence and for the violation of Labor Law 200 and 241(6) against all three defendants. Defendant Shawmut promptly answered the complaint, asserting cross-claims against defendant DAL for contractual and common law indemnification and for contribution, and for breach of contract for failure to procure insurance. Shawmut shortly thereafter commenced a third-party action against NAE, plaintiff's employer. The third-party complaint asserts claims for contractual and common law indemnification and for contribution, and for breach of contract for failure to procure insurance. Defendant 55th and 5th also promptly answered the complaint but did not assert any cross-claims. Defendant DAL answered the complaint last, and asserted cross-claims against the other two co-defendants for common law indemnification and contribution. NAE then answered the third-party complaint commenced by Shawmut, and asserts therein [Doc 16] what is essentially described as a counterclaim for contribution against plaintiff and all of the defendants. Discovery ensued, which was protracted, and involved some nine motions. Plaintiff's counsel missed a court appearance, and the action was marked "disposed," then his motion to restore was granted. Plaintiff filed the note of issue on January 28, 2021, which prompted a motion to strike it, motion seq. 10, which was denied, but further discovery was directed [Doc 211]. This covers all of the preceding ten motions in this action. Defendant DAL filed the second

third-party complaint [Doc 145] against KAN on March 16, 2020, which was not answered until July 6, 2020, presumably due to the Covid-19 Pandemic. The second third-party complaint solely asserts claims for common law indemnification and for contribution. K.A.N. Elevator, Inc.'s (KAN) answer includes a counterclaim similar to DAL's counterclaim in its answer to the first third-party complaint. The first of the three motions currently before this court (#11) was timely filed on March 29, 2021. By the time that all three of the motions before this court were fully briefed, argued, and submitted, more than two years had passed since motion seq. #11 was filed. The case is on the trial calendar, and the next appearance is scheduled for November 14, 2023, to pick a jury and try the case.

As relevant to the instant motions, the pleadings indicate that on September 8, 2014, plaintiff was employed by NAE as an elevator mechanic. He was working at a construction site at 711 Fifth Avenue, in Manhattan. Plaintiff claims that defendant 55th & 5th was the property owner, and defendant Shawmut was the general contractor. Specifically, plaintiff claims that the accident occurred when he stepped out of a dumbwaiter shaft where he had been working and stepped onto a roll of BX cable that was on the floor. He alleges that he "tripped and fell on debris and materials which were improperly stored at the project, and, as a direct result of said fall, plaintiff suffered serious and permanent injuries" [Doc 1, ¶12].

NAE and KAN's Motion for Summary Judgment

Third-party defendants NAE and KAN support their motion (seq. #11) with an attorney's affirmation, copies of the pleadings, plaintiff's bill of particulars, the contracts

between the parties[2], the EBT transcripts for plaintiff [Doc 202], Mr. Deleon for defendant Shawmut [Doc 203], Mr. D'Alessio for defendant DAL [Doc 205], Mr. Curran for third-party defendant NAE [Doc 206], Mr. Heis for second third-party defendant KAN [Doc 208], and a copy of the insurance policy [Doc 209].

In support of their motion for summary judgment dismissing all third-party claims asserted against them, the third-party defendants contend that these claims lack merit and must be dismissed. The third-party complaints assert claims sounding in contribution, indemnity and, against only NAE, breach of contract for failing to procure insurance. Counsel, in her affirmation [Doc 196], avers that defendant 55th and 5th was the owner of the site and Shawmut was the general contractor retained by the owner for the project [*id.* ¶3]. She states that Shawmut hired DAL to perform the electrical work at the site and Shawmut hired NAE to perform the elevator installation, and that NAE in turn subcontracted the elevator installation work to KAN [*id.*]. There is no written subcontract with KAN.

Movants first argue that the defendants/third-party plaintiffs are not entitled to common-law indemnification or contribution because, at all relevant times, plaintiff was an employee of NAE and a special employee of KAN, and as such the Workers' Compensation Law bars defendant/third-party plaintiff Shawmut and second third-party plaintiff DAL's common-law claims for indemnification and contribution against NAE and KAN, the general employer and special employer of the plaintiff. Specifically, counsel avers that "The Courts in New York have determined that for the purposes of the Workers' Compensation law, a

[2] The contract between movant NAE and Shawmut [Doc 207] and the contract between Shawmut and the commercial tenant, Ralph Lauren, described therein as "owner" [Doc 204].

party may be deemed to have more than one employer. That is, there can be a general employer and a special employer for the purposes of Workers' Compensation. *See Thompson v Grumman Aerospace Corp.* 78 NY2d 553 (Ct. App. 1991). The Workers' Compensation law will shield both the general and special employer from third party actions" [Doc 196 ¶59].

Movants note that an exception to the Workers' Compensation Law prohibition exists if the employee sustained a "grave" injury, as that term is defined therein, but argues that plaintiff is not alleging that the subject accident caused such an injury. Plaintiff claims in his bill of particulars [Doc 201 Page 8] that he has suffered injuries to his lumbar spine, left knee and left leg, none of which, according to movants, qualifies as a "grave" injury for purposes of the Workers' Compensation Law prohibition against common-law contribution and indemnity. As such, movants argue that any claims against them for common-law contribution and/or indemnity must be dismissed.

Alternatively, movants contend that common-law contribution and indemnity against them is not available because the record establishes that movants were not responsible for the accident. Counsel notes that movants were not actively negligent, as "[t]here has been no evidence, from any source, that the cable that Plaintiff tripped over came from the elevator work at the site" [Doc 196 ¶6]. Movants' counsel states that the "elevator work" being performed by NAE included solely the installation of passenger elevators, a service elevator and a dumbwaiter, citing Rider B to the contract between Shawmut and NAE [Doc 207].

Movants note that common-law indemnification arises in favor of one who is compelled to pay for another's wrong, and point out that the doctrine applies when a party

who is vicariously liable for injuries seeks reimbursement from a party whose negligent acts and omissions were the proximate cause of the injuries. Movants contend that the record shows that neither NAE nor KAN committed any negligent act or omission that led to plaintiff's accident.

Movants' counsel describes the accident as follows: "Plaintiff's accident occurred in the kitchen area of the restaurant that was being built, sometime before noon (McDonagh Dep. 16:20-17:20; 132:16-25). He had been-working on the dumbwaiter that morning, taking the dimensions of the shaftway. (McDonagh Dep, 18:10-25). He was working alongside Angel Trevino, who worked for KAN, ELEVATOR's (NAE's) partner company that was also working on the elevator installation, during that time. (McDonagh Dep. 21:2-21). The platform for the dumbwaiter was in place at that point and to exit the dumbwaiter's shaftway, Plaintiff would step down - about one foot - from the platform onto the lobby floor. (McDonagh Dep. 22:19-21; 23:22-24:4; 25:7-22). His accident occurred while stepping off the platform, while facing forwards: there was a coil of silver BX cable on the lobby floor, about the size of a car tire, just outside the dumbwaiter shaftway opening, that Plaintiff stepped onto as he alighted from the platform, causing him to fall. (McDonagh Dep. 26:15-18; 34:14-36:10; 46:17-47:3; 50:20-23; 138:3-14)" [*id.* ¶13]. Counsel (for NAE and KAN) states that the BX cable was "DAL's material" [*id.* ¶16] and that "Neither Plaintiff nor Trevino were using BX cable as part of their work on September 8, 2014 or in the days leading up to the accident (McDonagh Dep. 180:20- 181:3) [*id.*]. In addition, counsel avers that "BX cable is not used in the elevator industry (Curran Dep. 59:16-17). Elevator companies on jobs such as at the 711 Fifth Avenue site would not utilize any form of silver cable (Curran Dep. 60:11-

21; 61:13-17)) [*id.* ¶23]. Further, counsel avers that "SHAWMUT had its own labor force on the site at the time, usually about four or five employees, who were responsible for managing debris, daily housekeeping and cleanup (DeLeon Dep. 38:14-39:20; 47:11-23) [*id.* ¶17]. Additionally, movants' counsel avers that "SHAWMUT's universal contract with DAL specified that DAL was responsible for cleanup of its own debris and to center-pile it at the site for removal by SHAWMUT's laborers (DeLeon Dep. 70:14-71:4)" [*id.* ¶18].

Counsel for NAE and KAN further states that plaintiff testified that he was the only NAE employee on site at the time of his accident, that Trevino was the only KAN employee on site at the time, and that plaintiff took his instructions from Trevino. Counsel avers that Mr. Curran of NAE testified that plaintiff was the only NAE employee assigned to the jobsite, and that plaintiff was on NAE's payroll and Workers' Comp policy, but took all of his direction from Mr. Heis or from other KAN workers [*id.* ¶22]. Therefore, movants reason that they cannot be considered negligent, that a party (third-party plaintiff Shawmut and second third-party plaintiff DAL) may not be indemnified for their own negligence, and that the third-party plaintiffs are not entitled to common-law indemnification or contribution from either movant.

Turning to the branch of the motion seeking to dismiss Shawmut's third-party claims against NAE for contractual indemnification,[3] movants maintain that the court should dismiss these claims as well. Movants argue that third-party plaintiff Shawmut is not entitled to

[3] There is apparently no contract with KAN, and thus DAL's second third-party complaint does not assert claims for contractual indemnification against KAN.

contractual indemnification against NAE because plaintiff's claims do not implicate the indemnity provision contained in the applicable written contract.

Counsel cites the contract between movant NAE and Shawmut, specifically, §5(P) [Doc 207] which states, in its entirety, as follows:

> "To the full extent permitted by applicable law Subcontractor agrees to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contractor and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of Subcontractor or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder." [emphasis added].

Movant NAE acknowledges that the subject indemnity provision was in effect and enforceable at all relevant times, but contends that the provision is not broadly worded. Specifically, movant points out that the indemnity provision requires NAE to hold the indemnitee (Shawmut) harmless only if the alleged negligent acts of NAE (or its subcontractors) at the worksite resulted in an injury claim. In contrast, movant argues that the record shows that movant's employees and agents (NAE and KAN) committed no negligent act or omission that could have led to plaintiff's accident. Specifically, counsel states "The indemnity language purportedly asserted by SHAWMUT is written in the conjunctive, that is, in order to trigger the indemnity provision not only must the claim have arisen out of ELEVATOR's [NAE] work, but the claim must also have been caused by ELEVATOR's act or omission" [Doc 196 ¶37]. Therefore, counsel argues, "[t]he proximate cause of Plaintiff's accident in this case was undeniably the negligence of SHAWMUT and

(55th and 5th) CORPORATION in failing to uphold their non-delegable duty in providing a safe space for the workers at the site while coordinating the activities between the trades. The accident cannot be said to have arisen from ELEVATOR's [NAE] work and be[en] caused by ELEVATOR's act or omission. As such, SHAWMUT's claims for contractual indemnification as to ELEVATOR [NAE] must be dismissed" [Doc 196 ¶51]. Accordingly, movant argues that the court should grant NAE summary judgment dismissing Shawmut's third-party claim for contractual indemnification on the additional ground that the written indemnity provision was not triggered.

Addressing third-party plaintiff Shawmut's breach of contract claim for NAE's alleged failure to procure insurance, movant NAE contends that the record belies this claim and offers a copy of a general commercial liability policy and a copy of the declaration of insurance that identifies Shawmut as an additional insured [Doc 209]. Based upon the foregoing, movant NAE argues that it has complied with any contractual provisions requiring it to obtain insurance coverage to protect defendant/third-party plaintiff Shawmut.

Opposition to NAE and KAN's Motion

In opposition, defendant/third-party plaintiff DAL argues that its third-party claims for contribution and common law indemnification against KAN should not be dismissed as movants have not established that they were not negligent, and that "there are factual issues as to both NORTH AMERICAN and KAN directing and controlling plaintiff's work. Further, KAN cannot avail itself to a special employee Worker's Compensation defense for among several reasons including: (a) a factual issue as to which if not both of the aforesaid companies

were directing his work, (b) that NORTH AMERICAN did not relinquish complete control over plaintiff, (c) since there has been no proof offered that KAN had the authority to terminate plaintiff, and (d) since the work that was being performed was not solely in furtherance of KAN" [Doc 252 ¶3]. DAL argues that *Thompson v Grumman Aerospace Corp.,* 78 NY2d 553 1991) sets forth the factors to consider to determine if the plaintiff was a special employee of KAN, and that here, the factors are not satisfied. Counsel acknowledges that DAL "does not have a claim as against NAE due to the "Worker's Compensation exclusivity principles", but he argues that DAL has a valid claim against KAN which is not barred by Worker's Compensation. Counsel proceeds to claim that "plaintiff had no accident on September 8, 2014" and avers that plaintiff was instead injured in a motor vehicle accident and not at the subject work-site.

Defendant/third-party plaintiff Shawmut also opposed the motion, but the court only determined this when it saw that a reply affirmation had been filed by movants' counsel [Doc 277]. Although counsel for Shawmut filed the opposition papers [Doc 214], he did not designate them as such in NYSCEF, and chose, instead, to include the opposition in his affirmation in support of his own motion on behalf of both 55th and 5th and Shawmut (#12). As such, it is not in the NYSCEF virtual motion folder for motion Seq. #11. In addition, NYSCEF indicates that 55th and 5th has no attorney appearing for it, as counsel did not correctly file his appearance in the system.

After first arguing the branch of its motion seeking dismissal of the plaintiff's complaint, Shawmut then proceeds to address its motion for summary judgment against co-

defendant DAL on its cross claim for contractual indemnification, discussed *infra*, and further claims, at Point IV, that "Shawmut and 55th are entitled to summary judgment on their claim for contractual indemnity as against third party defendant North American." To be clear, 55th and 5th do not have a claim for contractual indemnification against NAE, as the only third-party plaintiff is Shawmut. Shawmut's counsel then cites the same contract provision cited by NAE, arguing that "The terms of the foregoing indemnification clause are clear and unambiguous. NORTH AMERICAN, agreed to indemnify and hold harmless SHAWMUT and 55th from any liability 'arising out of or resulting from any work of and caused in whole or in part by any act or omission of Subcontractor, or those employed by it, or working under those employed by it at any level…' It is undisputed that plaintiff was an employee of third-party defendant, NORTH AMERICA; that at the time of the subject incident, plaintiff was in the process of doing work for KAN that was within the scope of the foregoing written agreement. Thus, the indemnity obligation of NORTH AMERICAN to SHAWMUT is triggered" [Doc 214 ¶50]. Counsel concludes by arguing that "[i]t is apparent that the incident resulted from the 'means and methods' utilized by plaintiff's employer, NORTH AMERICAN; that SHAWMUT and 55th did not exercise any direction, control, or supervision over the plaintiff; did not provide plaintiff with any tools or materials; and were not in any other manner actively negligent. It is therefore respectfully submitted that the aforementioned 'indemnity provision' is valid and enforceable and it is requested that this Court enforce the plain and unambiguous language of the agreement by granting SHAWMUT and 55th summary judgment on their indemnity claim against NORTH AMERICAN" [Doc 214 ¶51-52].

Movants' Replies

In reply to DAL's opposition [Doc 275], counsel for NAE and KAN repeat the two arguments in the motion, that "DAL is precluded under the exclusivity provision of New York State's Workers' Compensation Law from bringing a claim against KAN in the absence of a grave injury or a written contract providing for indemnification in favor of DAL, because Plaintiff is a special employee of KAN" and also because "there has been no evidence in this case that KAN was responsible for the placement of the BX cable that resulted in Plaintiff's injury, warranting dismissal of the claims for common law indemnification and contribution against KAN." Counsel makes the same arguments with regard to NAE.

NAE and KAN next reply to 55th and 5th and Shawmut's opposition [Doc 277]. Counsel's arguments are the same as in the motion papers. She adds that as they "take issue with ELEVATOR and KAN's motion which points out that the copy of the subcontract provided by SHAWMUT containing the indemnification language at issue was never authenticated by any party. If SHAWMUT and CORPORATION concur that the document is inadmissible evidence then their claims for contractual indemnification must absolutely be dismissed as the copy of the subcontract contained in ELEVATOR's file (annexed hereto as Exhibit "A" for reference) does not contain the indemnity provisions" [Doc 277 ¶¶7-8].

Defendants 55th and 5th and Shawmut's Motion for Summary Judgment

As stated above, these two defendants move, in motion seq. #12, for summary judgment dismissing the plaintiff's complaint in its entirety, along with all cross-claims and/or third-party claims, "or," if that branch of the motion is not granted, for summary judgment

solely to Shawmut on its contractual indemnification and failure to procure insurance cross claims against defendant DAL and its third-party claims against third-party defendant NAE.

Movant's counsel also apparently failed to check the court rules before making this motion. He avers, at Paragraph 9 of his affirmation in support of this motion [Doc 214], filed May 19, 2021, that "Plaintiff filed his Note of Issue on January 28, 2021. As such, the instant motion is timely made." This is not accurate, as the Kings County Rules require motions for summary judgment to be filed within 60 days of the filing of the note of issue. [*See* NY Kings County Supreme Court Uniform Civil Term Rules, Pt. C, Rule 6]. This has been true for at least twenty years. Due to this error, movants fail to request leave to make a late motion. *See Brill v City of New York*, 2 NY3d 648 (2004).

Co-defendant DAL specifically opposes the motion based on its untimeliness [Doc 257 ¶58]. Plaintiff simply argues that the motion is "fatally defective" [Doc 238 ¶45]. It is well settled that "an untimely cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (see *Snolis v Clare*, 81 AD3d 923, 925 [2011]; *see also Lennard v Khan*, 69 AD3d 812, 814 [2010]). Here, the branch of the co-defendants' motion for summary judgment dismissing plaintiff's complaint is clearly not in any way related to motion seq. #11. The court declines to entertain it, as it would be reversable error to do so (see *Caiola v Allcity Ins. Co.*, 277 AD2d 273, 273 [2d Dept 2000] ["The Supreme Court improvidently exercised its discretion in entertaining the defendant's motion for summary judgment made on the eve of trial, inasmuch as the defendant failed to demonstrate good cause for the delay in making the motion"]).

However, the branch of the motion for summary judgment on their contractual indemnification and failure to procure insurance claims against co-defendant DAL and third party defendant NAE, are nearly identical to NAE and KAN's motion (#11) to dismiss these claims, and thus the court elects to decide this branch of the motion herein.

DAL also opposes the motion on the merits, starting at Document 257. This opposition is to all three motions, and the same document was filed in each of the three motions. With regard to insurance, counsel avers that DAL obtained the required insurance [Doc 257 ¶4]. Counsel also avers that as this relief is not requested in the notice of motion, which only asks for summary judgment on their claims for contractual indemnification, it should not be granted. Paragraph 2 of the affirmation in support [Doc 214] states that the motion is for "summary judgment on its contractual indemnification and failure to procure insurance claims against defendant DAL ELECTRICAL CORP., and third party defendant, NORTH AMERICAN ELEVATOR," but counsel makes no further mention of this request for relief. He continues to discuss some of plaintiff's medical records, and concludes that this accident did not happen, and that plaintiff made it up. The court cannot decide issues of credibility, and in any event, the only issue before the court in this branch of the motion is whether DAL had the proper insurance as agreed to in its contract.

In reply, counsel for movants 55th and 5th and Shawmut [Doc 283] make absolutely no reference to the insurance issue, so the court must conclude that either DAL had the insurance it was supposed to have, or that the motion was not intended to include this claim. The court

notes that this breach of contract cross claim against DAL is asserted in Shawmut's answer, provided at Doc 217, but not in 55th and 5th's answer, at Doc 218.

NAE also opposes the motion, at document 267, but with regard to the insurance issue, counsel is silent. In reply, movants' counsel is, similarly, silent.

Accordingly, the branch of the motion for summary judgment in favor of 55th and 5th and Shawmut against NAE and DAL for breach of contract for failing to procure insurance as required by the contract is denied. Movants have failed to make a prima facie case for this relief.

The next issue is the movant Shawmut's request for summary judgment on its claims for contractual indemnification against NAE and DAL. The above discussion, with regard to NAE's motion to dismiss this claim, describes all the relevant information in the record and need not be repeated here. Turning to Shawmut's motion for summary judgment on its cross claim against DAL for contractual indemnification, as well as breach of the covenant to procure insurance, which is discussed above, the court has confirmed that this cross claim is actually asserted in Shawmut's answer [Doc 217], in addition to the cross claims asserted by Shawmut for common law indemnification and contribution from DAL, which are not addressed in any of the motions.

In support of the motion, Shawmut provides the pleadings, various EBT transcripts, and a copy of the subcontract between Shawmut as contractor and DAL as subcontractor, which is dated November 11, 2009 [Doc 229]. The signatures are dated June 21, 2010. It is described as applying to future "job orders." Document 230 is the job order for this job. It

specifically incorporates by reference the "universal" subcontract executed November 11, 2009. The contract is identical to the one between Shawmut and NAE discussed above. The indemnification clause is also the same. It provides, at section 5 (P), that

> "To the full extent permitted by applicable law Subcontractor agrees to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contractor and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of Subcontractor or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder."

There is no factual dispute with regard to which trade was using BX (or MC) cable. It was the electricians. Counsel for Shawmut summarizes the EBT testimony of DAL's witness, Mr. D'Alessio, in his affirmation in reply [Doc 283 ¶8], as follows:

> "On this job, DAL used MC cable (Ex. K, p. 58), which was similar in appearance to BX cable. (Ex. K, p. 74). MC cable was often stored and used in a coil. (Ex. K, p. 73-74). He stated that the procedure was for DAL to take MC cable from its gang box and place it on the floor where they needed it. (Ex. K, p. 58). He stated it would be possible for DAL to place MC cable on a floor in an area where they might need it later in the day. (Ex. K, p. 73). Finally, he stated that the work DAL was doing at the bar area, near the dumbwaiter on the first floor would require MC cable, (Ex. K, p. 70), and that a coil of such cable, approximately the size of a car tire would not be considered debris, but rather would be considered usable material. (Ex. K, p. 77-78)."

DAL's opposition consists of an attorney's affirmation, the EBT transcript of third-party defendant KAN Elevator, an inadmissible insurance letter, and inadmissible medical records [Doc 269]. The court has reviewed the medical records, despite the fact that they are not in admissible form, as counsel argues that plaintiff was injured in a motor vehicle

accident, not this work related accident. The first record is for an urgent care visit plaintiff made the evening of the subject accident because his knee was swollen and painful. He did not attribute the pain to the accident. They gave him Doxycycline, thinking he might have Lyme disease. Plaintiff was 22 years old at the time. Two days later, on September 10, 2014, he went to an orthopedist for the knee pain. Then, on September 13, 2014, he was involved in a motor vehicle accident. He was taken to the emergency room, and his "history" states that he complained of pain in his left knee, and said that he was already scheduled for left knee surgery. By September 24, 2014, he reported to his doctor that he injured his left knee at work, but didn't "notify people at the time." It appears that plaintiff had left knee surgery a few years before this accident, and he had left knee surgery again after this accident. Whether the subject accident exacerbated his knee injury, or whether the motor vehicle accident exacerbated his knee injury, are jury questions. The records counsel provides indicate that plaintiff sought treatment prior to the motor vehicle accident for his left knee, which was painful and swollen. This contradicts counsel's claim that the accident did not happen.

DAL, it must be noted, provides only one affirmation for all three motions. On the issue of contractual indemnification, counsel argues that "55TH & 5TH/SHAWMUT are not entitled to summary judgment on the claim for contractual indemnification as against DAL as it has not been proven that DAL was negligent and in turn the movant's own negligence precludes a contractual indemnity finding" [Doc 257 ¶4]. Counsel further argues that Shawmut has not proven that they were not negligent, that Shawmut has not proven that the incident arose out of the work of DAL, that Shawmut has not proven that the alleged

incident was caused by an act or omission of DAL, and that there are "issues as to whether the alleged electrical coil was integral to the work" [*id.* ¶70].

Plaintiff's Motion for Leave to Amend His Bill of Particulars

On August 31, 2021, plaintiff filed the instant cross motion (#13) seeking leave to amend his bill of particulars. The affirmation in support [Doc 238] is combined with the plaintiff's opposition to defendants' 55th & 5th and Shawmut's summary judgment motion to dismiss his complaint [motion sequence #12], which is both improper and confusing. Plaintiff seeks to amend his bill of particulars to allege a violation of an additional Industrial Code section, which he cites in his affirmation as 12 NYCRR 12-7 (e) (2), which is clearly a typo. The proposed amended bill of particulars is located at Document 247, is dated July 28, 2021, omits the second third-party action from the caption, and is not red-lined. It is not a supplemental bill, but an amendment, clearly intended to entirely replace the one dated September 27, 2017 [Doc 244]. By paragraph 19 of the affirmation, counsel figures out that it is section 23-1.7 (e) (2) that he wishes to add, and he acknowledges that it was unintentionally and inadvertently omitted from the plaintiff's original bill of particulars, which listed §23-1.17 instead of 1.7 in error. He also acknowledges that the sections cited in the original bill of particulars (23-1.5, 23-1.16, 23-1.17, 23-1.21 and 23.5) are either inapplicable or insufficiently specific to support a cause of action under Labor Law 241(6).

Defendants' Arguments in Opposition

In opposition to plaintiff's motion, defendants 55th and 5th and Shawmut argue that the motion was not timely made after the note of issue was filed. They also oppose the request on the merits, arguing that the section plaintiff seeks to add is inapplicable. Counsel also avers that plaintiff provided "a self-serving affidavit which is clearly submitted to create feigned issues of fact and also seeks to change his prior testimony and must not be considered," referring to Doc 239. In essence, counsel is arguing that a tire-sized roll of BX cable cannot be debris.

DAL also opposes the motion [Doc 262], and also combines its opposition with its opposition to co-defendants' 55th and 5th and Shawmut's motion (#12). Counsel argues that since the case is on the trial calendar, the motion is late. He also claims that since plaintiff testified that he fell over a coil of wire the size of a vehicle tire, which he knew was related to the electrical work being done for the kitchen area of the restaurant, that it cannot be debris.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986],

citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]). Then, the court must evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126

AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Nevertheless, summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman*, 3 NY2d at 404 [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]).

However, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364). Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). With these principles in view, the court turns to the substance of the motions.

NAE and KAN's Motion for Summary Judgment

The first branch of the motion is to dismiss the common law claims for indemnification and contribution on the grounds that the movants were plaintiff's employer and special employer, and as such, these claims are barred by the Workers' Compensation Law. In New York, "while special employee status is an issue of fact, summary judgment is appropriate where 'undisputed facts' establish that the general employer retained no control over the employee" (*Forjan v Leprino Foods, Inc.*, 209 F App'x 8, 10 [2d Cir 2006]). Movants have

successfully established this here. In *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991], the Court of Appeals held that the plaintiff was a special employee of Grumman Aerospace Corp. as a matter of law because "Grumman exerted comprehensive control over every facet of [the plaintiff's] work." *Thompson*, 78 NY2d 553 at 555. The Court of Appeals also noted that the plaintiff "reported daily to a Grumman supervisor . . . who assigned, supervised, instructed, oversaw, monitored and directed his work duties on a daily basis." *Id.* at 556. In *Thompson*, "all essential, locational and commonly recognizable components of the work relationship were between [the plaintiff] and Grumman."

Also, "a special employee is 'one who is transferred for a limited time of whatever duration to the service of another'" (*Fung v Japan Airlines Co, LTD.*, 9 NY3d 351, 364 [2007], quoting *Thompson*, 78 NY2d at 557). The action against a special employer is barred, "regardless of the general employer's responsibility to pay the employee's wages and maintain workers' compensation and other benefits" (*Gonzalez v Ari Fleet, Ltd.*, 25 Misc 3d 1235[A], 2009 NY Slip Op 52418[U] [Sup Ct, Queens County 2009], *affd* 83 AD3d 891 [2d Dept 2011], citing *Thompson*, 78 NY2d at 557; *Jaynes v County of Chemung*, 271 AD2d 928, 930 [2d Dept 2000], *lv denied* 95 NY2d 762 [2000]).

"Although a person's status as a special employee is generally a question of fact, it may be determined as a matter of law 'where the particular undisputed critical facts compel that conclusion and present no triable issue of fact'" (*Degale-Selier v Preferred Mgt. & Leasing Corp.*, 57 AD3d 825, 826 [2d Dept 2008], quoting *Thompson*, 78 NY2d at 557; *see also Fajardo v Mainco El. & Elec. Corp.*, 143 AD3d 759, 763-764 [2d Dept 2016] [holding that "(t)he evidence submitted indicated that Bronx Center Management, Inc. was nothing

more than a payroll company, established to pay employee salaries and maintain Workers' Compensation, and was the plaintiff's general employer (and) Bronx Center demonstrated, prima facie, that it was the plaintiff's special employer"]).

To determine whether a party is a special employee, courts consider (1) the right to control the employee's work; (2) the method of payment; (3) the furnishing of equipment; (4) the right to discipline and discharge; and (5) the relative nature of the work. A "significant and weighty" factor is "who controls and directs the manner, details, and ultimate result of the employee's work." (see *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]; *Flanagan v. Kajima USA, Inc.*, 163 AD3d 775 [2d Dept 2018]).

Here, plaintiff was employed by and paid by NAE for a few years [Doc 202 Page 105] and had been assigned to work, a few months prior to the day of his accident, for KAN. Plaintiff testified that there were no other NAE employees at the job site [*id.* Page 28]. Thus, there is no evidence that NAE supervised the plaintiff's work, trained him, or provided the equipment he used. It is not necessary for movants to prove that KAN is a wholly owned subsidiary of NAE, or vice versa, as was the case in *Maldonado, above,* to prevail. In that case, the alter ego status resulted in the finding that the worker was an employee, or "at the very least" a special employee.

Here, based on the undisputed facts, defendants NAE and KAN have established that dismissal of the common law indemnification and contributions claims is warranted, as a matter of law. The burden then shifts to the third-party plaintiffs to raise a triable issue of fact that would require a jury, as opposed to the court, to determine if he was a special employee of third-party defendant KAN.

DAL opposes this branch of the motion, and argues that all of the factors which the court must consider have not been proven. Shawmut does not really oppose this branch of the motion.

Since plaintiff did not sustain a "grave injury," and since movants were plaintiff's general and special employer at all relevant times, the third-party plaintiffs' common-law indemnification and contribution claims against NAE and KAN are unsustainable (*see e.g., Spiegler v Gerken Bldg. Corp.*, 36 AD3d 715 [2006]; *Angwin v SRF Partnership*, 285 AD2d 568, 569 [2001]).

The court finds that there is nothing in the opposition papers which overcomes the movants' prima facie showing that, as a matter of law, plaintiff was a special employee of KAN and a general employee of NAE. Therefore, the third-party claims for contribution and common law indemnification must be dismissed. As there is no written contract between Shawmut and KAN or 55th and 5th and KAN, and the only claims asserted in the second third-party action are for common law indemnification and contribution, the second third-party complaint is dismissed in its entirety.

The next branch of the motion seeks to dismiss the claims for contractual indemnification and breach of the contract for failure to procure insurance asserted against NAE by Shawmut. With regard to the failure to procure insurance claim, counsel for Shawmut, who states in his affirmation that the motion is for "summary judgment on its contractual indemnification and failure to procure insurance claims against defendant DAL ELECTRICAL CORP., and third-party defendant, NORTH AMERICAN ELEVATOR" [Doc 214 ¶2], fails to mention the word "insurance" again in the affirmation, and thus, that

part of NAE's motion is entirely unopposed and is granted. NAE has provided copies of the applicable policy and the declaration of insurance. As such, the record shows that, contrary to the third-party plaintiff's claim, NAE has complied with its contractual obligation to procure and maintain insurance coverage for the defendant/third party plaintiff Shawmut.

With regard to the contractual indemnification issue, the court finds that the indemnification provision was not triggered by the plaintiff's accident. It requires that the injury be caused by a negligent act or omission on the part of NAE's employees. In support of its motion to dismiss the contractual indemnification claim against it, NAE notes that the indemnification provision in the contract between it and Shawmut only requires that it indemnify the owner and the general contractor for injuries arising out of NAE's work, and only to the extent that said injuries were caused by NAE's negligence. Here, NAE maintains that plaintiff's injuries did not arise out of its work and were not caused by its negligence inasmuch as it did not leave the coil of BX cable on the floor that caused plaintiff to trip, and that it was a different contractor that was using the cable for their work.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3de 925, 930 [2009]). A party seeking contractual indemnification must demonstrate that it was free of negligence, since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]).

Here, plaintiff's accident clearly arose out of NAE's work under the subcontract inasmuch as plaintiff was installing a dumbwaiter at the time he was injured. However, given plaintiff's uncontradicted deposition testimony that NAE did not use BX cable, and the evidence that it was the negligence of another trade which caused the plaintiff's accident, NAE's motion for summary judgment dismissing the defendants/third-party plaintiffs' contractual indemnification claim against it is granted.

Defendants 55th and 5th and Shawmut's Motion for Summary Judgment

As set forth above, the branch of defendants 55th and 5th and Shawmut's motion for summary judgment, dismissing the plaintiff's complaint in its entirety, along with all cross-claims and/or third-party claims, is denied as it was not timely made. The branch of Shawmut's motion for summary judgment on its claims that DAL and NAE breached the contract with regard to insurance is denied for failing to make a prima facie case for this relief. The final branch of Shawmut's summary judgment motion is on its claims for contractual indemnification against NAE and DAL. As discussed above regarding NAE's motion to dismiss the third-party claim for contractual indemnification, the court found that the indemnification clause was not triggered by the accident, and dismissed the claim.

Regarding Shawmut's motion for summary judgment on its claim for contractual indemnification from DAL, the court finds that it has made a prima facie case, which has not been overcome by DAL's opposition. The four reasons stated by counsel in his affirmation in opposition for denying the motion are that "Shawmut has not proven that they were not negligent, that Shawmut has not proven that the incident arose out of the work of DAL, that Shawmut has not proven that the alleged incident was caused by an act or omission of DAL,

and that there are "issues as to whether the alleged electrical coil was integral to the work" [Doc 257 ¶70]. With regard to the first argument, the court finds that Shawmut has established that its liability, if any, for plaintiff's accident, would be purely vicarious. Shawmut did not purchase or use coils of electrical cable in its role as the general contractor, and, as the coil was not "debris" but was being used by the electrical trade, it was not something they were supposed to have cleaned/removed at the end of the workday.

The court further finds that Shawmut has proven that if the plaintiff tripped over the coil of cable, that the cable was being used by DAL in its work, and thus the incident triggered the indemnification clause. Finally, whether the coil of cable was "integral to the work" has nothing to do with the issue of contractual indemnification.

The court finds that the defendant Shawmut is entitled to summary judgment with respect to contractual indemnification against DAL. "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 demonstrates that DAL must hold the property owner and general contractor harmless for all personal injury claims arising out of or resulting from the subcontractor's work. It is not disputed that the instant claims arose from DAL's work. Since the applicable indemnity provision was in effect at all relevant times, and since there is no indication that Shawmut is attempting to have DAL indemnify it for their own negligence, and as their liability is purely vicarious, Shawmut is awarded summary judgment on the issue of contractual indemnification against DAL.

Plaintiff's Motion to Amend His Bill of Particulars

CPLR 3025 (b) provides that leave to amend a pleading, including a bill of particulars, "shall be freely given." "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957 [1983]). "[L]eave should be given where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party" (*US Bank, N.A. v Primiano*, 140 AD3d 857 [2d Dept. 2016]; *Citimortgage, Inc. v Rogers*, 203 AD3d 1125, 1126, quoting *U.S. Bank N.A. v Singer*, 192 AD3d 1182, 1185; *see also Onewest Bank, FSB v N & R Family Trust*, 200 AD3d 902; *Bridgehampton Ntl. Bank v D & G Partners, L.P.*, 186 AD3d 1310, 1311). The burden of establishing prejudice is on the party opposing the amendment (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411; *see also GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 49). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Shields v Darpoh*, 207 AD3d 586, 587 [internal quotation marks omitted]).

Here, there is no reasonable basis to for this court to find prejudice or surprise. The original bill of particulars included the allegation that defendants violated section 23-17 (which concerns life nets—clearly an error) of the Industrial Code, instead of 1.7; it is hardly prejudicial or surprising that plaintiff might seek to correct the error. Industrial Code § 23-1.7 (e) requires that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." The court must note that one person's debris may be another person's equipment and materials. A pile of

diamonds on the floor would be a violation of §23-1.17, as it would be a slippery pile of debris if you were the one to slip and fall on it.

Here, as the proposed amendment is neither palpably insufficient, patently devoid of merit, nor prejudicial, the plaintiff's cross-motion seeking leave to amend his bill of particulars to assert a violation of 12 NYCRR 23-1.7 (e) (2) is granted. Plaintiff's proposed amended bill of particulars [Doc 247] is deemed served.

Conclusions of Law

Accordingly, it is hereby

ORDERED that the third-party defendants NAE and KAN's motion (MS #11) to dismiss the third-party actions against them is granted, and both third-party actions, along with NAE and KAN's "counterclaims" are dismissed; and it is further

ORDERED that the branch of defendants 55th and 5th and Shawmut's motion (MS #12) for summary judgment dismissing the plaintiff's complaint in its entirety, along with all cross-claims and/or third-party claims, is denied as the motion was not timely made; and it is further

ORDERED that the branch of defendant Shawmut's motion for summary judgment on its cross claim and third-party claim for breach of the covenant to procure insurance asserted against DAL and NAE is denied; and it is further

ORDERED that the branch of the defendant Shawmut's cross motion for summary judgment on their third-party claim for contractual indemnification against third-party defendant NAE is denied; and it is further

ORDERED that the branch of defendant Shawmut's motion for summary judgment on their cross claim for contractual indemnification against defendant DAL is granted, and DAL is directed to immediately assume Shawmut's defense and to reimburse it for legal fees and disbursements incurred thus far; and it is further

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

ORDERED that the plaintiff's cross-motion (MS #13) seeking leave to amend his bill of particulars to assert a violation of 12 NYCRR 23-1.7 (e) (2) is granted. Plaintiff's proposed amended bill of particulars [Doc 247] is deemed served. And it is further

ORDERED that the caption is amended to correct the name of NAE to be: North American Elevator Inc. [see Doc 194].

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

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.