SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART 57M**

Justice

----------X

ROSA ELENA GALLEGOS,

Plaintiff,

- v -

WC 28 REALTY LLC, PIZZAROTTI, LLC,

Defendant.

----------X

INDEX NO. 161238/2020

MOTION DATE 12/31/2024, 12/30/2024, 12/27/2024, 12/31/2024

MOTION SEQ. NO. 004 005 006 007

DECISION + ORDER ON MOTION

----------X

WC 28 REALTY LLC, PIZZAROTTI, LLC

Plaintiff,

-against-

PCC CLEANING SERVICES, INC., PCC CLEANING SOLUTIONS, INC, OPUS CLEANING SOLUTIONS INC., ACE-ATLAS CORP., R&S UNITED SERVICES, INC.

Defendant.

Third-Party
Index No. 595866/2021

----------X

PCC CLEANING SOLUTIONS, INC

Plaintiff,

-against-

SCL SERVICES CORP.

Defendant.

Second Third-Party
Index No. 595993/2021

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 236, 239, 242, 251, 252, 253, 254, 255

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 235, 241

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 006) 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 234, 240, 244, 245, 246, 247, 248, 249, 250, 256

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 007) 231, 232, 233, 237, 243

were read on this motion to/for SUMMARY JUDGMENT .

Motion Sequence Numbers 004, 005, 006 and 007 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction laborer on June 28, 2019, when, while working at a construction site located at 527 West 27th Street, New York, New York (the Premises), a stack of Masonite boards shifted and struck her.

In motion sequence number 004, defendants/third-party plaintiffs WC 28 Realty LLC (WC 28) and Pizzarotti, LLC (Pizzarotti) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims against them, and for summary judgment in their favor on their third-party claims against third-party defendant/second third-party plaintiff PCC Cleaning Solutions, Inc. (PCC).

In motion sequence number 005, third-party defendant Ace-Atlas Corp. (Ace) moves, pursuant to CPLR 3212, for summary judgment dismissing all third-party claims and crossclaims against it. Ace also seeks sanctions against defendants' counsel for the costs of this motion.

In motion sequence number 006, PCC moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all crossclaims against it, and for summary judgment in its favor on its second third-party claims for contractual indemnification and breach

of contract for the failure to procure insurance against second third-party defendant SCL Services Corp. (SCL).

In motion sequence number 007, SCL moves, pursuant to CPLR 3212, for summary judgment dismissing PCC's second third-party claims for common-law indemnification and contribution against it.

BACKGROUND

On the day of the accident, the Premises was owned by WC 28. WC 28 hired Pizzarotti to provide general contracting services for a project at the Premises that entailed the new construction of the Premises, a residential building (the Project). Pizzarotti subcontracted construction cleaning to PCC. PCC, in turn, subcontracted its work to SCL. Pizzarotti also hired Ace to provide plumbing services for the Project. Plaintiff was employed by SCL.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 226)

Plaintiff testified that on the day of the accident, she was a construction cleaner employed by SCL (plaintiff's tr at 38-39). Her duties included debris removal, "coverage of certain determined areas" and cleaning completed construction areas (*id.* at 41). Her supervisor "Pantoja" was an SCL employee (*id.* at 41). Pantoja gave her daily assignments and directed her work (*id.* at 42). Plaintiff testified that only Pantoja instructed her, but that Pantoja would be given instructions by the "supervisor of the contractor" (*id.* at 101), and those instructions would be relayed by Pantoja (*id.* at 102). This supervisor did not tell her how to do her job (*id.* at 110).

On the day of the accident, plaintiff was assigned to perform cleaning work on the third floor of the Premises along with another SCL employee named "Gladys" (*id.* at 46). At the time of the accident, plaintiff and Gladys were moving Masonite boards from one area in an apartment to another (*id.* at 49, 50). The Masonite boards were approximately "2 meters" by "a

meter and a half" and "an inch" thick (*id.* at 56). Each board weighed approximately 25 pounds (*id.* at 57).

Plaintiff testified that when she "entered the room where the Masonite boards were . . . the boards were lying there in a disorganized manner" (*id.* at 51). Plaintiff also testified that the boards were "just thrown around" the room "in a very disorganized manner" (*id.* at 59). She did not know who left the Masonite boards in this condition (*id.* at 53). She confirmed that the boards were located on the floor (*id.* at 60), and that the boards were stacked on top of each other in a "pile" (*id.* at 62-63, 66 ["there were many boards, one on top of the other"]). There were "more than 25" boards in the pile (*id.* at 63).

Plaintiff testified that the pile was "very high" (*id.* at 63). Specifically, she testified that the pile came up to her knee "more or less" (*id.* at 64). She also testified that the pile "reached up to [her] shoulders" (*id.* at 68).

Immediately before the accident, Gladys removed one piece of Masonite from the top of the pile and moved it to the next work area. Plaintiff then attempted to remove the next piece of Masonite when "all the [boards] fell on top of [her]" (*id.* at 67). "[M]ore than ten boards" fell on her, striking her left leg, part of her right leg, and both arms (*id.* at 70-71).

Deposition Testimony of Larry Greenberg (WC's Construction Manager) (NYSCEF Doc. No. 227)

Larry Greenberg testified that on the day of the accident he was employed by WC as a construction manager (Greenberg tr at 10). WC is a property development company. It owned plot of land and developed the construction of the Premises, a residential condominium (*id.* at 11). To facilitate the construction of the Premises, WC hired Pizzarotti as general contractor for the Project (*id.* at 15).

Greenberg's duties with respect to the Project included occasional visits to the worksite to "observe progress" for the purposes of validating invoices (*id.* at 19). WC did not have an employee on site daily (*id.* at 23). WC did not direct or provide instruction to any workers (*id.* at 24).

He was unaware of the accident prior to the initiation of the instant action.

Deposition Testimony of Yehuda Zicherman (PCC's Employee) (NYSCEF Doc. No. 228)

Yehuda Zicherman testified that on the day of the accident he was employed by PCC. PCC is a construction cleaning company (Zicherman tr at 18). His wife is the owner of the company (*id.* at 63). PCC was hired by Pizzarotti to provide cleaning services for the Project. PCC in turn hired SCL to perform the actual cleaning work on the Project (*id.* at 24).

Zicherman testified that he was not onsite regularly. When he went, it was for progress meetings with Pizzarotti's project manager (*id.* at 26). PCC did not have a superintendent on site. It did have a manager, Moisha Katz, who was responsible for making sure that Pizzarotti's work requests were being completed (*id.* at 29-30). Katz was not present on a daily basis. Katz would "make sure [SCL workers were] doing safety work and other stuff related" (*id.* at 35).

Zicherman did not witness the accident and had no personal knowledge about it. He learned of the accident from Katz (*id.* at 78). He did not know if SCL used Masonite (*id.* at 66).

At his deposition, Zicherman was shown a copy of an agreement between Pizzarotti and PCC. He confirmed that it was the contract for the Project and that he had signed it (*id.* at 41). Zicherman was also shown a copy of an agreement between PCC and SCL and confirmed that he had signed it (*id.* at 59). He also confirmed that the PCC/SCL agreement contained an executed rider with an indemnification clause (*id.* at 59, 60).

Deposition Testimony of Joseph Vessio (Ace's Master Plumber) (NYSCEF Doc. No. 204)

Joseph Vessio testified that on the day of the accident, he was employed by Ace as a master plumber. His duties included estimating and bidding for jobs (Vessio tr at 13). In the beginning of the Project, he oversaw Ace's work on a daily basis (*id.* at 24).

Vessio testified that most of Ace's work was limited to "the gas meter room" and "the stairwells" (*id.* at 19). Ace did not use Masonite, and its workers would not have moved or stacked Masonite (*id.* at 25). Ace did not perform any work in the bedrooms or living rooms of any apartments at the Premises (*id.* at 27).

DISCUSSION

"[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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002], citing *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim (Motion Sequence Number 004)

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim. Labor Law § 240 (1), known as the Scaffold Law, provides as relevant:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing 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) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1st Dept 2017], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one"

(*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]; *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [section 240 liability "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"). In addition, Labor Law § 240 (1) "must be liberally construed to

accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

That said, not all workers injured at a construction site fall within the scope of protections of section 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). Instead, liability is "contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a Labor Law § 240 (1) claim, a plaintiff "must show that the statute was violated, and that this violation was a proximate cause of [the plaintiff's] injuries" (*Anderson*, 146 AD3d at 402).

Initially, defendants, as owner and general contractor, do not challenge that they are proper Labor Law defendants.

Here, plaintiff testified that the accident occurred when a stack of Masonite boards lying on the floor fell on to her when she attempted to remove the topmost board. Accordingly, this accident, as alleged, was caused by falling objects.

> "[A] plaintiff establishes a prima facie entitlement to liability on a Labor Law § 240 (1) "falling object" claim where he shows that he was struck by a falling object, that such object required securing for the purposes of the undertaking, and that the lack of adequate overhead protection failed to shield against the falling of such

object and therefore proximately caused plaintiff's injuries"

Torres-Quito v 1711 LLC, 227 AD3d 113, 116 [1st Dept 2024]*; see also Cammon v City of New York,* 21 AD3d 196, 200 [1st Dept 2005]).

Defendants, relying on plaintiff's testimony, attempt to establish that the maximum height of the Masonite stack was 25 inches. They argue that a stack of that height, as a matter of law, would not require height-related protective devices contemplated by section 240 (1). This argument, however, mischaracterizes plaintiff's testimony. Plaintiff testified that there were "more than 25" 1-inch-thick boards in the stack (*id.* at 63), not a maximum of 25 boards. Given this testimony, defendants have not established, as a matter of law, the height of the allegedly unstable Masonite stack or that it did not need securing for the purpose of the undertaking.

To the extent that defendants argue that section 240 (1) does not apply because the Masonite only moved laterally and, therefore, did not constitute a falling object, the record does not sustain defendants' position. Plaintiff's testimony included statements that the Masonite boards fell from shoulder height and hit her in the knees (*see e.g.* plaintiff's tr at 71 ["All I know is that various boards fell on me"]; 72 ["All I know is that they fell on top of me suddenly"]).

Given the foregoing, defendants have not met their *prima facie* burden and are not entitled to summary judgment dismissing the Labor Law § 240 (1) claims against them.

The Labor Law § 241 (6) Claims (Motion Sequence Numbers 004)

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claims against them. In opposition, plaintiff only opposes on that part of the section 241 (6) claim premised on a violation of Industrial Code 12 NYCRR 23-2.1 (a) (1). Accordingly, all other claimed violations are deemed abandoned (*Kempisty v 246 Spring St., LLC,* 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails

to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-2.1 (a) (1)

Industrial Code 23-2.1 (a) governs the storage of materials. It is sufficiently specific to support a Labor Law § 241 (6) claim (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 [1st Dept 2013]). It provides, as relevant:

> "(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Defendants argue that this provision is inapplicable because the material pile was not located in a passageway, walkway, stairway or thoroughfare, but in an open work area. The First Department recently stated that section 23-2.1 (a) (1) only applies to materials stored in such areas (*Diaz v P&K Contr., Inc.*, 224 AD3d 405, 407 [1st Dept 2024] ["We have considered and rejected plaintiff's argument that Industrial Code § 23–2.1(a)(1) may be applicable regardless of whether the materials in question are being stored or whether they are obstructing a passageway]; *see also Cruz v PMG Constr. Group LLC*, 236 AD3d 402, 403 [1st Dept 2025] ["plaintiff fails to raise an issue of fact as to whether there was a violation because the evidence shows that 'the materials were not . . . obstructing a passageway'"]).

Here, the accident occurred inside of a room in an apartment, and not in a passageway, walkway, stairway or thoroughfare. Accordingly, section 23-2.1 (a) (1) is inapplicable to plaintiff's accident.

Thus, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claims against them.

Common-Law Negligence and Labor Law § 200 (Motion Sequence Number 004)

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

Here, defendants – as owner and general contractor – established that they did not exercise any supervision or control over the injury producing work (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [under the means and methods analysis, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]). Defendants also established that they did not create or have notice of the hazardous condition at issue, i.e. the material stack (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Plaintiff does not oppose dismissal of these claims.

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

Defendants' Third-Party Contractual Indemnification Claims Against PCC (Motion Sequence Number 004 and 006)

Defendants move for summary judgment in their favor on their third-party claim for contractual indemnification against PCC. PCC moves for summary judgment dismissing the same.

"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]).

"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 this claim

Pizzarotti and PCC entered into an "Agreement for Professional Services" dated January 11, 2018, governing the Project at the Premises (the Pizzarotti/PCC Agreement). It contains an indemnification provision that provides, as relevant:

> "[PCC] shall defend, indemnify, and hold harmless Pizzarotti as well as any other entity Pizzarotti may direct, in connection with the ownership and/or development of the Property . . . from and against all claims . . . arising out of or resulting from [PCC's] breach of this Agreement or a negligent act or omission in the rendering of the Services by [PCC] or its sub-consultants, except to the extent that such arises or results from a negligent act or omission of [Pizzarotti]"

(defendants' notice of motion, exhibit N; ¶ 9).

Here, the indemnification provision will trigger in two situations: a breach of the agreement, or a negligent act or omission by PCC or its subcontractor, SCL. Only the second situation is relevant to this action.

That said, the indemnification provision requires that the accident arise from a negligent act. Defendants do not set forth any argument regarding negligence; instead focusing solely on how the accident arose from SCL's work. As this indemnification provision requires a finding of

negligence against PCC, defendants have not met their *prima facie* burden for summary judgment on this claim.

Turning to PCC's motion for summary judgment dismissing this claim, PCC argues that the indemnification provision cannot be enforced because it requires that PCC indemnify defendants for their own negligence in violation of General Obligations Law (GOL) § 5-322.1. This is incorrect. The indemnification provision prohibits indemnification "to the extent that such arises or results from a negligent act or omission of [Pizzarotti]" (defendants' notice of motion, exhibit N). Accordingly, the indemnification provision does not run afoul of GOL § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Alvarado v SC 142 W. 24 LLC*, 209 AD3d 422, 424 [1st Dept 2022]).

PCC also argues that the provision cannot apply because there is no evidence that PCC itself was negligent – as it subcontracted out all of its work to SCL. However, the indemnification provision contemplates the negligent acts of PCC "or its subconsultants" (defendants' notice of motion, exhibit N; ¶ 9). PCC does not argue that SCL is not its "subconsultant" or otherwise unrelated to the action, nor does it argue that SCL was free from negligence. Accordingly, PCC has not established its prima facie entitlement to summary judgment dismissing defendants' contractual indemnification claim as against it.

Given the foregoing, defendants are not entitled to summary judgment in their favor on their third-party contractual indemnification claims against PCC. PCC is also not entitled to summary judgment dismissing this claim.

PCC's Second Third-Party Contractual Indemnification Claims against SCL (Motion Sequence Number 006)

PCC moves for summary judgment in its favor on its contractual indemnification claims against its subcontractor SCL.

Additional facts relevant to this claim

PCC and SCL entered into a standing "Subcontractor Agreement" (i.e. it is not specific to any one project). It is the framework contract that governs any purchase orders between PCC and SCL (the PCC/SCL Agreement) (PCC's notice of motion, exhibit L; NYSCEF Doc. No. 181).[1] The executed rider to the PCC/SCL Agreement contains a contractual indemnification provision that provides the following:

> "[T]o the fullest extent permitted by law, [SCL] shall defend and shall indemnify . . . [PCC], all entities [PCC] 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"

(*id.* at 3).

Here, the accident arose from SCL's work. It is undisputed that plaintiff was an SCL employee. It is also undisputed that plaintiff was working at the Premises for SCL, on behalf of PCC. As this provision only requires that the accident "aris[e] out of or result[] from the Work" the provision is triggered, and PCC is owed indemnification from SCL.

Given the foregoing, PCC is entitled to summary judgment in its favor on its' contractual indemnification claim against SCL.

Defendants' Third-Party Common-Law Indemnification and Contribution Claims Against PCC (Motion Sequence Number 006)

PCC moves for summary judgment dismissing defendants' common-law indemnification and contribution claims against it.

[1] Notably, a purchase order for the Project is not made part of PCC's motion. Nevertheless, it is undisputed that SCL was present at the Premises on behalf of SCL and SCL does not oppose the motion or otherwise raise objection to the validity of the instant claim.

To establish a claim for common-law indemnification, the party seeking such "must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident" (*Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 752 [2d Dept 2021] [citations omitted]; *Correia,* 259 AD2d at 65). Accordingly, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.* 17 NY3d 369, 377-378 [2011]).

Similarly, contribution is only "available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such [entity]" (*Godoy v Abamaster of Miami,* 302 AD2d 57, 61 [2d Dept 2003]).

Here, PCC argues that it did not direct any of SCL employees' work (including plaintiff's work), did not supply any materials or tools to SCL, and was not present at the Premises at the time of the accident. Therefore, they argue, PCC's actions did not cause or contribute to the accident (*see Ramos v Pet Mkt. W. 57th St., Inc.,* 114 ad3d 423, 424 [1st Dept 2014]).

In opposition, defendants argue that a question of fact exists regarding whether PCC supervised SCL's work. They argue that Zicherman testified that a PCC employee, Moishe Katz, would occasionally hold safety meetings where he would "make sure [SCL workers were] doing safety work and other stuff related" (Zicherman tr at 35).

This testimony is insufficient to raise a question of fact, as it only evinces a general supervisory control (*see e.g. Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [liability under the Labor Law does not attach where there was no evidence that the defendant exercised supervisory control or had any input into the method of moving the object that caused the accident]; *Bisram v Long Island Jewish Hosp*., 116 AD3d 475, 476 [1st Dept

2014] [the authority to coordinate work or review onsite safety "do[es] not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries"]).

Accordingly, PCC is entitled to summary judgment dismissing the common-law negligence and contribution claims against them.

PCC's Second Third-Party Common-Law Indemnification and Contribution Claims Against SCL (Motion Sequence Number 007)

SCL moves for summary judgment dismissing the common-law indemnification and contribution claims as against them on the ground that Workers' Compensation Law (WCL) § 11 bars such claims against it. The motion is unopposed.

SCL is correct that WCL § 11 "limits an employer's liability to third parties for contribution or indemnity to those cases of workplace injury where its employee has suffered a grave injury" (*Boles v Dormer Giant, Inc.*, 4 NY3d 235, 237 [2005]).[2] It is undisputed that plaintiff did not suffer a grave injury as defined in WCL § 11.

Accordingly, SCL is entitled to summary judgment dismissing the common-law indemnification and contribution claims as against them.

Defendants' Third-Party Breach of Contract for the Failure to Procure Insurance Claim Against PCC (Motion Sequence Number 006)

PCC moves for summary judgment dismissing defendants' claim for breach of contract for the failure to procure insurance. However, PCC raises no argument on this issue. Accordingly, that part of PCC's motion for summary judgment is denied.

[2] Contractual indemnification is carved out from this provision (WCL § 11).

PCC's Third-Party Breach of Contract for the Failure to Procure Insurance Claim Against SCL (Motion Sequence Number 006)

PCC moves for summary judgment in its favor on its breach of contract for the failure to procure insurance claim against SCL. However, PCC raises no argument on this issue. Accordingly, this part of PCC's motion for summary judgment is denied.

Defendants' Third-Party Claims Against Ace (Motion Sequence Number 005)

Ace moves for summary judgment dismissing the third-party complaint against it. The third-party complaint consists of three claims – contractual indemnification, common-law indemnification/contribution, and breach of contract for the failure to procure insurance.

Contractual Indemnification and Breach of Contract for the Failure to Procure Insurance

Ace, the plumbing contractor, argues that the active agreement between it and Pizzarotti did not include an indemnification provision or an insurance procurement provision. It provides a copy of an executed "Proposal" between Ace and Pizzarotti, which does not include those provisions (Ace's notice of motion, exhibit Q; NYSCEF Doc. No. 205). Defendants do not oppose the dismissal of these claims.

Accordingly, Ace is entitled to summary judgment dismissing these claims.

Common-law indemnification/contribution

Ace argues that, as the plumbing contractor, it did not use Masonite and, therefore, could not be liable for any proximate cause of the accident.

Here, Ace has established that its' work did not involve Masonite, that Ace did not perform work in apartments at the Premises, and that Ace workers did not move or stack Masonite (Vessio tr at 25 and 27). Vessio's testimony establishes that Ace's work did not cause or contribute to plaintiff's accident (*Cando,* 200 AD3d at 752). Importantly, defendants do not contest Ace's motion and do not oppose dismissal of these claims.

Accordingly, Ace is entitled to summary judgment dismissing these claims as against it.

Given the foregoing, Ace is entitled to summary judgment dismissing the third-party complaint as against it.

Ace's Request for Sanctions Against Counsel for Defendants (Motion Sequence Number 005)

In its motion, counsel for Ace requests sanctions against counsel for defendants for failing to discontinue the third-party action against Ace when counsel was presented with Vessio's unrebutted deposition testimony that Ace did not work in the accident area and did not use Masonite in its work (Vessio tr at 24, 27).

Specifically, between October 10, 2023 and September 26, 2024, counsel for Ace sent four emails to counsel for defendants (Ace notice of motion, exhibit U; NYSCEF Doc. No. 209). In the emails, Ace's counsel – referencing Vessio's testimony – requested that defendants stipulate to discontinue the third-party complaint as against it, so as to forestall "unnecessary dispositive motion practice" (*id.*, email dated October 10, 2023) and to "avoid having to interpose a motion for summary judgment" (*id.*, email dated September 19, 2024).

Defendants' counsel did not respond to any of the emails. Ace then prepared and filed the instant motion, which defendants failed to oppose.

Rule 130-1.1 of the Rules of the Chief Administrator grants courts authority to sanction a party or its counsel for frivolous conduct, such as conduct that is "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1 [c] [2]). "Rule 130 sanctions . . . are useful in deterring future frivolous conduct. . . . The goals include preventing the waste of judicial resources and deterring vexatious litigation and dilatory or malicious litigation tactics" (*13 East 124 LLC v J&M Realty Servs. Corp.*, 222 AD3d 446, 448 [1st Dept 2023] [internal quotation marks and citations omitted]).

Notably, in motion sequence number 002 of this action, third-party defendant R&S United Services, Inc. (R&S) sought sanctions for defendants' counsel's failure to discontinue the third-party action as against it. There, defendants counsel opposed R&S's motion but, in doing so, ignored several causes of action. At that time, this Court declined to issue sanctions. However, it admonished defendants' counsel against such conduct, as follows:

> "Finally, the court declines to impose sanctions against Pizzarotti and WC 28 based on their failure to discontinue the action. For most of the claims, the court finds that the third-party plaintiffs made good faith arguments.
>
> "There is however, one glaring exception to [defendants' opposition papers], which pertains to the contractual indemnification claims and breach of contract claims which [defendants] do not even address in their opposition papers. **While the court declines to issue sanctions at this time, counsel is cautioned that in the future if counsel is aware that there are no good faith arguments to make, or that no such contract exists, counsel should acknowledge this to the court in its opposition papers rather than simply ignoring the claims and forcing a ruling**"

(prior order on motion sequence number 002, at 9; NYCSEF Doc. No. 114).

Here, in motion sequence number 005, counsel for defendants WC28 and Pizzarotti have undertaken this conduct, again. Except here, unlike in sequence 002, defendants' counsel has not opposed any part of Ace's motion, nor have they raised claims against Ace in their own dispositive motion. Such failures serve as defendants' counsel's acknowledgement that their claims against Ace were meritless. As such, defendants' counsel's failure to discontinue this action did nothing but "forc[e] a ruling" (*id.* at 9) from this Court at the expense of judicial resources and did nothing but "prolong the resolution" of the third-party action against Ace, forcing Ace to prepare and file the instant motion (22 NYCRR 130-1.1 [c] [2]).

Most notably, defendants counsel did not oppose Ace's request for sanctions. Further, defendants counsel had fair notice that sanctions were being requested as such a request is explicitly set forth in Ace's moving papers (*see e.g. Zappin v Comfort*, 146 ad3d 575 [1st Dept 2017] [finding sufficient notice that sanctions were being considered where the request was located in a moving affirmation]).

Given the foregoing, it is determined that defendants' counsel has engaged in frivolous conduct against Ace as defined in Section 130-1.1 (c) of the Rules of the Chief Administrator. Accordingly, Ace is entitled to reimbursement of its counsel's actual expenses incurred and reasonable attorneys' fees from defendants' counsel in making this motion.

The parties remaining arguments have been considered and were unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants/third-party plaintiffs WC 28 Realty LLC and Pizzarotti, LLC (defendants) (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims against them, and for summary judgment in their favor on their third-party claims against third-party defendant/second third-party plaintiff PCC Cleaning Solutions, Inc. (PCC) is granted to the extent that the common-law negligence and Labor Law §§ 200 and 241 (6) claims are dismissed against it, and the motion is otherwise denied; and it is further

ORDERED that the motion of third-party defendant Ace-Atlas Corp. (Ace) (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing all third-party claims and crossclaims against it is granted, and the third-party complaint is severed and dismissed as against it; and it is further

ORDERED that the part of PCC's motion (motion sequence number 006), pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and all crossclaims against it is granted to the extent that defendants' third-party common-law indemnification and contribution claims are dismissed and that part of the motion is otherwise denied; and it is further

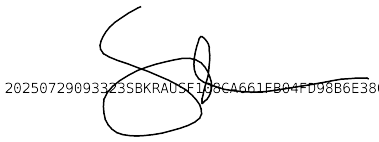
ORDERED that the part of PCC's motion, pursuant to CPLR 3212, for summary judgment in its favor on its second third-party claims for contractual indemnification and breach of contract for the failure to procure insurance against second third-party defendant SCL Services Corp. (SCL) is granted as to the contractual indemnification claim, and that part of the motion is otherwise denied; and it is further

ORDERED that SCL's motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing PCC's second third-party claims for common-law indemnification and contribution is granted; and it is further

ORDERED that counsel for Ace's request for sanctions against counsel for defendants is granted; and it is further

ORDERED that, within 10 days of the date of this order, counsel for Ace is directed to submit to the court via NYSCEF, supplemental papers setting forth its costs incurred in making the instant motion, and documentation supporting such costs, with opposition papers (if any) due 10 days thereafter; and it is further

ORDERED that the remainder of this action shall continue. This constitutes the decision and order of the Court.



07/28/2025
DATE

SABRINA KRAUS, 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