SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

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JONATHAN MOROCHO VASQUEZ,

Plaintiff,

- v -

450 PARTNERS LLC,TISHMAN CONSTRUCTION CORPORATION, W5 GROUP, LLC,FRED GELLER ELECTRICAL, INC.,ALLRAN ELECTRIC OF N.Y., LLC,

Defendant.

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450 PARTNERS LLC, TISHMAN CONSTRUCTION CORPORATION, W5 GROUP, LLC

Plaintiff,

-against-

W5 GROUP LLC, FRED GELLER ELECTRICAL, INC.,

Defendant.

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INDEX NO. 156387/2016

MOTION DATE _____

MOTION SEQ. NO. 007 008 009 010 011

DECISION + ORDER ON MOTION

Third-Party
Index No. 595545/2017

The following e-filed documents, listed by NYSCEF document number (Motion 007) 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 306, 307, 308, 309, 350, 351, 352, 353, 354, 355, 357, 360, 361

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 301, 302, 303, 304, 305, 348, 349, 358, 362

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 356, 363

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 359, 364, 365

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427

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

Upon the foregoing documents, the motions are determined as follows:

In this action, Plaintiff, Juan Morocho, seeks to recover for injuries sustained on July 13, 2016, while present at a construction project at 450 West 33rd Street, New York, New York. Plaintiff claimed at the time of his accident he was employed as a laborer with Waldorf Demolition ("Waldorf"), s/h/a Defendant W5 LLC ("W5")[1]. Defendant 450 Partners LLC ("Partners") was the owner of the premises at issue, and it retained Defendant Tishman Construction Corporation ("Tishman") as the general contractor to perform an extensive renovation of the interior and exterior of the premises. In addition to contracting with W5 to provide demolition services, Tishman retained Third-Party Defendant Allran Electric of NY, LLC ("Allran") to perform an upgrade to the electrical infrastructure at the building. Tishman also contracted with Third-Party Defendant Fred Geller Electrical, Inc. ("Geller") to provide electrical construction services at the project, including disconnect of electrical systems on certain floors and reinstallation of same after a curtain wall was replaced.

On the day of the accident, Plaintiff was on the first floor at the site and was tasked with removing electrical pipe conduit hung from the ceiling. The conduit subject to removal was painted red and marked with the word "out". At that time, Plaintiff was working with Juan Medina ("Medina"), also a W5 employee. Plaintiff and Medina were stationed atop a scissor lift which was used to reach the conduits. Removal of the conduits was accomplished with the use of an electric reciprocating tool referred to as a "Sawzall". As Plaintiff was cutting a conduit, which he was informed was "de-energized", there was a loud explosion and a bright flash, followed by smoke and fire. It is undisputed that these occurrences were the result of Plaintiff cutting into live electrical wire with the Sawzall. As a result, Plaintiff averred he received an electrical shock, that the Sawzall was thrown into his body and that he was propelled onto guardrail of the lift.

Plaintiff commenced this action to recover for injuries he sustained and pled in his amended complaint causes of action for violation of Labor Law §§ 240[1], 241[6] and 200 as well as common law negligence. Defendant Partners appeared and pled in its amended answer nineteen affirmative defenses as well as crossclaims against Defendants Tishman and W5 for common-law indemnification and contribution, contractual indemnification and breach of contract for failure to obtain insurance. Defendant Tishman answered and asserted twenty affirmative defenses as well as crossclaims against Defendants Partners, W5, Geller and Allran for common-law indemnification and contribution and contractual indemnification. Defendant W5 answered and pled eleven affirmative defenses as well as a crossclaim against Partners and Tishman for common-law indemnification and contribution.

Defendants Partners and Tishman commenced a third-party action against W5[2], Geller and Allran that pled causes of action for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to obtain insurance. W5, Geller and Allran answered the third-party complaint separately and raised the customary counterclaims and crossclaims for indemnity, contribution and breach of contract. Plaintiff amended their complaint to add Geller and Allran as direct defendants. Allran answered and pled seven affirmative defenses as well as crossclaims against Tishman, W5, Geller and Allran for common law indemnification and contribution. Geller's answer to the amended complaint was absent from the Court file.

Now, Plaintiff moves (Mot Seq No 7) pursuant to CPLR §3212 for partial summary judgment on the Labor Law §241[6] cause of action against Partners and Tishman. Defendants Partners and Tishman oppose Plaintiff's motion. W5, Geller and Allran partially oppose the motion.

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[1] In its answer to the third-party complaint, W5 admitted it was "d.b.a. WALDORF DEMOLITION" and "s/h/a W5 GROUP LLC".
[2] Naming W5 as a third-party Defendant seems pointless given the existing cross claims asserted by Partners and Tishman against W5.

Geller moves (Mot Seq No 8) pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint as well as the third-party action and cross claims. Defendant Allran moves (Mot Seq No 9) for summary judgment dismissing as against it all claims, crossclaims and third-party claims. No opposition was filed to either the motion. W5 moves (Mot Seq No 10) for summary judgment dismissing all crossclaims and third-party claims as well as summary judgment against Partners on its common law indemnification claims. No opposition was filed to Motion Sequence Number 10, but it appears Partners and Tishman proffered arguments to this motion in their opposition to Plaintiff's motion (NYSCEF Doc No 354). Partners and Tishman move (Mot Seq No 11) for summary judgment on its claim against W5 and Allran on its claims for breach of contract for failure to procure insurance. Allran and W5 oppose this motion.

On all these applications, "'the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff's Motion (Mot Seq 7)

Section 241[6] of the Labor Law provides that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). The duty under Labor Law §241[6] "imposes on owners, general contractors, and their agents a nondelegable duty to provide 'reasonable and adequate protection' to workers engaged in construction, demolition, and excavation activities by complying with Industrial Code regulations that specify concrete safety directives, regardless whether they exercised supervision or control over the work" (*Lapinsky v Extell Dev. Co.*, 202 AD3d 478, 479 [1st Dept 2022] [internal citations omitted]; *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). The regulation cannot "simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007], quoting *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 297 [1978] [stating that owners and contractors must comply with rules promulgated by the Commissioner of Labor, "but only where the regulation in question contains a "'specific, positive command[ ]'"").

To establish entitlement to summary judgment under Labor Law §241[6], Plaintiff was required to establish *prima facie* he sustained an injury that was proximately caused by a violation of an applicable section of the Industrial Code (*see Bucci v City of New York*, 223 AD3d 453, 454-455 [1st Dept 2024]; *see also Misicki v Caradonna*, supra at 515; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec Co*, 81 NY2d 494, 501-505 [1993]). Comparative or contributory negligence is a valid defense (*see Misicki*, supra at 515; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 n 4 [1993]), but a claimant is not required to demonstrate freedom from comparative fault to establish a *prima face* case (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940, 941 [2d Dept 2019]; *see also Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

Plaintiff predicates the Labor Law § 241[6] claim on alleged violations of Industrial Code §§ 23-1.13 (a)(b)(c) and (d); 23-1.5; 23-1.7; 23-1.7(f); 23-1.15; 23-1.16; 23-1.16(a)(b); 23-1.17, 23-1.21; 23-1.21(b)(1) and

23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv); 23-1.21(e); 23-1.16; 23-1.17; 23-5; and 23-9.6. Plaintiff also cites in the bill of particulars certain violations of Occupational Safety and Health Administration ("OSHA") rules and ANSI/ASSE safety requirements. However, in support of the motion, and in opposition to Defendants motions, Plaintiff only posits arguments in support of sections 23-1.13(b)(3) and (b)(4). By failing to raise any argument in support of the other sections, Plaintiff abandoned reliance on same (*see Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573 [1st Dept 2022]; *Digirolomo v 160 Madison Ave LLC*, 294 AD3d 640 [1st Dept 2021]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]).

Section 23-1.13(b)(3) provides, among other things, that where the performance of the work may bring any person into physical or electrical contact with an electric power circuit, the employer "shall advise [their] employees of the locations of such lines, the hazards involved and the protective measures to be taken". Section 23-1.13(b)(4) requires, as applicable here, that employees who may come into contact with an electric power circuit be protected against electric shock "by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means". These regulations "are clear and specific in their commands" and actionable under the circumstances (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515 [1st Dept 2013]; *see also Snowden v New York City Tr. Auth.*, 248 AD2d 235, 236 [1st Dept 1998]).

In this case, Plaintiff established entitlement to partial summary judgment on liability on his Labor Law § 241(6) claim predicated on these sections since defendants did not adequately ascertain whether there were live wires in the vicinity of plaintiff's work location and permitted him contact an electrical circuit that had not been de-energized (*see Britt v Levgar Equities Corp.*, 227 AD3d 437 [1st Dept 2024]; *Navedo v VNO 225 W. 58th Street LLC*, 203 AD3d 406, 408 [1st Dept 2022]; *Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 510 [1st Dept 2020]; *Wolodin v Lehr Constr. Corp.*, 177 AD3d 496, 497 [1st Dept 2019]). This liability fell not only on Tishman, but also Partners as "[t]hese regulations, which refer to the duty of employers, also impose a duty upon owners" (*Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 734 [2d Dept 2024]). In opposition, no issue of fact was raised by either Partners or Tishman.

Geller's and Allran's Motions (Mot Seq 8 and 9)

As these motions were unopposed, all claims, cross claims and counterclaims against Geller and Allran are dismissed.

Defendant W5's Motion (Mot Seq 10)

The branches of W5's motion to dismiss Plaintiff's causes of action as well as any cross claims and counter claims pled by Partners, Geller and Allran are granted. As against Tishman, argument is posited by W5 only on its claims for contractual indemnification and contribution against W5. The common-law indemnification and contribution claims by Partners and Tishman against W5, were abandoned when they failed to proffer any argument in support of same.

A claim for contractual indemnification claim is dependent upon the specific language of the contract (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel* Service, 194 AD3d 675, 678 [2d Dept 2021]). "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], *quoting Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Wai Cheung v 48 Tenants' Corp.*, 192 AD3d 503 [1st Dept

2021]). Where there is no legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, supra).

Generally, "[t]o obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability" (*see Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020][internal quotation marks and citations omitted]). This is because "to the extent [a party's] negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 A.D3d 660, 662 [2d Dept 2009]; *see* General Obligations Law § 5–322.1).[3]

Additionally, the proof necessary to establish a *prima facie* case on a claim for contractual indemnification depends on scope of the provision at issue. Broad indemnity clauses which are triggered when an accident arose out of or was related to a contractor's work are "triggered solely by virtue of an accident occurring in the course of the employee's work" (*see Pimentel v DE Frgt. LLC*, 205 AD3d 591, 594 [1st Dept 2022]). Narrowly drawn indemnification provisions, for instance where negligence or some other act or omission by a contractor is compulsory, will require proof in the first instance of the indemnitor's neglect or causal connection to the accident (*see Quiroz v. New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010]).

Section 7 of the contract between Tishman and W5 provides, in pertinent part, as follows:

> To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager, such other Indemnitees as may be defined herein, and their respective parent companies, corporations, members, limited liability companies and/or partnerships and their owned, controlled, associated, affiliated and subsidiary companies, corporations, members, limited liability companies, and/or partnerships, and the respective agents, consultants, principals, members, partners, servants, officers, stockholders, directors and employees thereof, from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), arising out of or resulting from (i) the acts or omissions of Contractor, or anyone for whom Contractor may be liable, in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations, including, the performance of the obligations set forth in this clause, or (ii) any breach of this Agreement by Contractor. To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee. The Contractor acknowledges that specific consideration has been received by it for this indemnification and that same shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefit payable by or for the Contractor or any subcontractor and/or delegates under Workers Compensation acts or other employee benefits acts. As used in this paragraph, "Contractor" shall mean Contractor and its representatives, employees, servants, agents, subcontractors, delegates, or suppliers. This indemnification obligation shall survive the terminations or expiration of the Agreement and the completion of the Project.

[3] However, if contemplated by the indemnity provision, partial indemnification may be available (see *Frank v 1100 Avenue of Americas Associates*, 159 AD3d 537, 538 [1st Dept 2018]).

. . .

> The foregoing indemnity shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the benefit of the Contractor under any applicable workers compensation, disability benefits or other similar employee benefit acts, in the event the Owner or any of the other Indemnitees incur any losses or any Claim is asserted or instituted against the Construction Manager or any of the other Indemnitees, the Construction Manager shall be entitled to withhold from any payments then due or thereafter becoming due to the Contractor under this Agreement such amount as may be deemed sufficient, in the reasonable judgment of the Construction Manager, to protect it and the other Indemnitees against any losses that they may incur and are not paid for by the Contractor's insurance, and the Construction Manager shall also be entitled to apply any such withheld amount to compensate itself and the other Indemnitees for any losses that they actually incur. The Contractor shall include in each of its subcontracts an indemnity provision substantially similar to the provisions in this Section, which shall also expressly provide that the subcontractor thereunder shall defend, indemnify and hold harmless the Indemnitees, in addition to the Contractor, and that the Indemnitees are third party beneficiaries of said provision.

The above contract language obligated W5 to indemnify Tishman, even absent its negligence, based on "the acts or omissions of [W5] . . . in connection with the Contract Documents, the performance of, or failure to perform, the Work" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1st Dept 2018]). Here, the accident occurred while Plaintiff was performing work that W5 was contracted to complete. W5's assertion to the contrary is without merit as "that obligation was triggered by the claim of plaintiff, an employee of [W5], for damages for injuries he sustained while performing [W5's] work" (*Paulino v Bradhurst Assoc., LLC*, 144 AD3d 430, 431 [1st Dept 2016]; *see also Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555 [1st Dept 2022]; *Cackett v Gladden Props., LLC*, 183 AD3d 419 [1st Dept 2020]; *Rudnitsky v Macy's Real Estate, LLC*, 189 AD3d 490 [1st Dept 2020]). As such, W5 has not demonstrated Plaintiff's accident did not arise its work and its motion for summary judgment dismissing Tishman's claims for contractual indemnification fails. Nevertheless, since Tishman has not demonstrated its freedom from negligence nor W5 was the sole proximate cause of the accident, compete or conditional summary judgment on their claims for contractual indemnification is not appropriate (*see Pawlicki v 200 Park, L.P.*, 199 AD3d 578, 579 [1st Dept 2021; *Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298 [1st Dept 2007]).

Partners and Tishman's Motion (Mot Seq 11)

This motion is untimely as it was filed more than seven months after the stipulated deadline (NYSCEF Doc No 281) which was "so-ordered" by the Court (*see* CPLR §3212[a]). Moreover, Movants failed to proffer sufficient justification for the patently late filing (*see Brill v City of New York*, 2 NY3d 648 [2004]; *Muqattash v Choice One Pharmacy Corp.*, 162 AD3d 499 [1st Dept 2018]; *see also Miral, Inc. v Kovac Media Group, Inc.*, 212 AD3d 479 [1st Dept 2023]).

Accordingly, it is

ORDERED that the branch Plaintiff's motion (MS #7) for partial summary judgment on the issue of liability on the Labor Law §241[6] cause of action is granted, and it is

ORDERED that the motions by Geller and Allran (MS #8 and #9) for summary judgment are granted and all claims against these Defendants are dismissed, and it is

ORDERED that the branches of W5's motion (MS #10) for summary judgment are granted and all crossclaims and counterclaims pled by Partners, Geller and Allran, as well as the common-law indemnification and contribution claims of Partners and Tishman, against W5 are dismissed, otherwise the motion is denied, and it is

ORDERED that the motion by Partners and Tishman (MS #11) for summary judgment is denied in its entirely as untimely.

11/14/2025
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III 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