Avella v Sweeney & Conroy, Inc.
2026 NY Slip Op 30557(U)
February 6, 2026
Supreme Court, New York County
Docket Number: Index No. 160038/2020
Judge: Denis Reo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENIS REO **PART** 65

Acting Justice

----------X

INDEX NO. 160038/2020

MOTION DATE 05/16/2025

MOTION SEQ. NO. 007

RYAN AVELLA, ERICA AVELLA,

Plaintiffs,

-against-

SWEENEY & CONROY, INC, PRIMO REMODELING, LLC, ALTON, INC.,

Defendants.

DECISION + ORDER ON MOTION

----------X

SWEENEY & CONROY, INC,

Plaintiff,

-against-

FONDELCO INC,

Defendant.

Third-Party
Index No. 595167/2021

----------X

SWEENEY & CONROY, INC,

Plaintiff,

-against-

KINGS HOIST & SCAFFOLDING, INC.,

Defendant.

Second Third-Party
Index No. 595762/2021

----------X

SWEENEY & CONROY, INC,

Plaintiff,

-against-

PRIMO REMODELING, ALTON INC,

Defendant.

Third Third-Party
Index No. 595788/2022

----------X

FONDELCO INC,

Plaintiff,

-against-

PRIMO REMODELING,

Defendant.

Fourth Third-Party
Index No. 595703/2023

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The following e-filed documents, listed by NYSCEF document number (Motion Seq.No. 007) 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 324, 325, 326, 327, 328, 329

were read on this motion to/for SUMMARY JUDGMENT.

Defendant Fondelco, Inc. (Fondelco) moves pursuant to CPLR § 3212 for summary judgment in its favor dismissing i) Sweeney & Conroy, Inc.'s (S&C), Kings Hoist & Scaffolding, Inc. (KHSI), and Primo Remodeling's (Primo) claims for common law indemnification and contribution, ii) S&C and KHSI's claims for breach of contract and, iii) S&C and KHSI's claims for contractual indemnification. In response, third-party plaintiff S&C cross-moves for summary judgment against Ryan Avella (Plaintiff) claiming that Plaintiff has failed to meet its burden on its Labor Law § 200 claim and against Fondelco on its claim that it is entitled to contractual indemnification from Fondelco. For the reasons set forth herein, the various motions are GRANTED and DENIED in part.

BACKGROUND

A. *Relevant facts*

On October 27, 2020, Plaintiff fell off a scaffold that was erected and installed by KHSI. Prior to the accident, on October 16, 2020, S&C, a general contractor at a worksite, emailed its fire prevention contractor, Fondelco, and informed them of some issues at the worksite that needed "engineer judgment" (NYSCEF Doc No. 287). S&C and Fondelco agreed to schedule an

inspection, but they did not mutually select a date. S&C proposed October 26, 2020 as the inspection date, but Fondelco did not confirm (*id.*)

On October 27, 2020, Plaintiff, an employee of Fondelco, arrived at 19 70th Street, New York, New York (jobsite) to repair the items that needed to be addressed by Fondelco for the site to pass inspection. As part of Plaintiff's work, he went to a stairwell at the jobsite to inspect the fireproofing. Plaintiff accessed the areas in question by using a ladder and the scaffold that was installed by KHSI. While on the scaffold he walked two to four feet onto a platform and then fell through a gap between the wall and the ceiling fold.

As a result of his fall, Plaintiff sustained the following injuries:

- Severely comminuted compound acute type IV fracture of the right calcaneus with sever splaying of fragments and multiple fragments projecting through the medial skin surface;
- Depression and flattening of the calcaneum noted with decrease in Boehler's angle;
- Severely comminuted acute type IV intra-articular fracture of the left calcaneus;
- ORIF, left calcaneous;
- Closed reduction, right ankle;
- Fusion, right talar;
- Right foot and ankle reconstruction with free microvascular gracillis muscle flap transfer from the right thigh;
- Skin thickness graft reconstruction of the right foot and ankle from the right thigh;
- Irrigation and debridement, right calcaneous;
- Bilateral acute comminuted intra-articular fractures of the calcaneum;

- Flexion contracture, left foot, toes 2-5;
- Surgical contracture release, left foot, toes 2-5;
- Together with other complications and sequela. (NYSCEF Doc. Nos. 223 & 224)

B. *The contract between Fondelco and S&C*

Fondelco was working at the jobsite pursuant to the terms of a contract with S&C. The contract obligated Fondelco to perform firestopping work at the jobsite. The contract provided, in relevant parts, as follows:

"ARTICLE 10: INSURANCE

10.1. The Subcontractor shall, at its sole expense, purchase and maintain in effect until acceptance of the Project by the Owner, the following insurance:

1. Commercial General Liability ("CGL") with limits of insurance not less than $1,000,000 each occurrence and $2,000,000 annual aggregate.

. . .

b. Coverage shall be written on the ISO CGL occurrence form policy, form number CG00O1 (10/01), or equivalent form that provides at a minimum all of the coverage, coverage extensions, and Supplementary Payments included in such policy form, including but not limited to coverage for liability arising from bodily injury, property damage, premises and operations, independent contractors, and products-completed operations hazards, and personal and advertising injury and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).
c. The Contractor, the Owner and all other parties required in connection with the Contractor's agreement with the Owner for the Project shall be included as Additional Insureds using ISO Additional Insured Endorsement CG20 10 (11/85) (ongoing and product completed operations) or both CG20 10 (10/01) (ongoing operations) and CG2037 (10/01) (product completed operations) or their equivalent. Coverage for the Additional Insureds shall be at least as broad as the coverage provided for the Subcontractor.
d. The subcontractor's CGL coverage shall apply as primary insurance on a non-contributing basis before any other insurance or self-insurance, including any deductible or self-insured retention, maintained by or provided to, the Additional Insureds.

3. Commercial Umbrella/Excess

a. Umbrella/excess liability insurance with occurrence and aggregate limits of not less than $5,000,000.
b. Umbrella coverage must follow form the CGL, be primary and non-contributory and include all entities that are required by this Agreement to be Additional Insureds on the underlying policy.

. . .

10.2 All said policies, both primary and excess, shall contain provisions naming the Contractor, Architect, Owner, and any other parties required for the Project by the Contractor as "Additional Insured." Subcontractor shall furnish Contractor with certificates of said insurance prior to commencing work (NYSCEF Doc No. 322 at 7-8).

. . .

ARTICLE 11: INDEMNIFICATION

11.1 To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and otherwise forever hold harmless . . . the Contractor . . . and employees . . . from and against any and all allegations, losses, claims, actions, proceedings, demands, damages, liabilities, or expenses (including but not limited to deductible amounts of any insurance, reasonable attorneys' fees, court costs, and the cost of appellate proceedings) ("Claims") arising directly or indirectly from the performance of Subcontractor's obligations under this Agreement, to the extent that such Claims are caused solely, in whole or in part, by any act or omission on the part of the Subcontractor, its employees, agents, or representatives, or any person or entity for whose acts the Owner, the Contractor or the Architect may be liable. If such indemnity is made void or otherwise impaired by any law controlling the construction thereof, such indemnity shall be deemed to conform to the fullest indemnity permitted by such law (NYSCEF Doc No. 322 at 9).

. . .

16.8 - SAFETY PRECAUTIONS AND PROCEDURES

16.8. The Subcontractor shall take reasonable safety precautions with respect to the performance of this Agreement, shall comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons or property in accordance with the requirements of the Subcontract Documents. The Subcontractor shall immediately report to the Contractor an injury to an employee or agent of the Subcontractor which occurred at the site.

. . .

16.8.4 Subcontractor acknowledges that it has been provided with the "Sweeney and

> Conroy, Inc. Project Safety Program, dated July 16, 2013". Subcontractor acknowledges that it, and all of its employees, have read such Safety Manual, are familiar with the contents thereof, and agrees that they will fully comply with the contents thereof. Subcontractor expressly agrees to cooperate with Contractor concerning all safety issues." (NYSCEF Doc No. 322 at 12 [emphasis omitted]).

C. *Relevant procedural history*

On February 24, 2025, Hon. Shlomo Hagler granted Plaintiffs' motion for summary judgment against S&C on Plaintiff's Labor Law §240 (1) claim (NYSCEF Doc No. 269). Thereafter, on March 18, 2025, Plaintiffs filed the note of issue. (NYSCEF Doc No. 272). Fondelco filed their instant motion for summary judgment on May 16, 2025 while S&C filed its cross motion on June 20, 2025 (NYSCEF Doc No. 298).

DISCUSSION

A. *Summary judgment standard*

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the moving party meets its burden, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). The function of the summary judgment procedure is issue-finding, not issue-determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). Further, "[s]ummary

judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019] [internal quotation marks and citations omitted]).

B. *Fondelco's motion for summary judgment*

i. S&C, KHSI, and Primo's common law contribution and indemnification claims against Fondelco

Fondelco moves for summary judgment dismissing all common law contribution and indemnification claims against it. Fondelco argues that Workers' Compensation Law § 11 precludes S&C, KHSI, and Primo from maintaining common law claims against it because Plaintiff did not suffer a grave injury as enumerated by the statute. In support, Fondelco submits copies of independent medical examination (IME) reports purporting to show that Plaintiff has not suffered a grave injury (NYSCEF Doc No. 286). Additionally, Fondelco's affirmation in support of its motion cites Plaintiff's bills of particulars which sets forth the injuries sustained by Plaintiff (NYSCEF Doc. Nos. 223 & 224).

S&C does not specifically oppose Fondelco's Workers' Compensation Law § 11 argument. S&C only addresses Fondelco's assertion that Plaintiff has not alleged a grave injury in its response to Fondelco's statement of facts. There, S&C characterizes Fondelco's allegation that Plaintiff has not alleged a grave injury as improper for a statement of facts and directs the court to Plaintiff's allegations in the bill of particulars (NYSCEF Doc No. 329 at 4). KHSI and Primo have not opposed Fondelco's motion.

Workers' Compensation Law § 11 provides, in relevant part:

> "For purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Under Workers' Compensation Law § 11, employers who provide worker's compensation coverage are immune from tort liability to third parties except in cases involving narrowly defined grave injuries or where there is a binding contractual agreement providing for contribution or indemnification (*Rubeis v Aqua Club Inc.*, 3 NY3d 408, 415 [2004]; *Castro v United Container Mach. Group, Inc.*, 96 NY2d 398, 401 [2001]; *Noel v 336 E 95th Realty LLC*, 227 AD3d 505 [1st Dept 2024]). Here, it was established that Plaintiff was an employee of Fondelco and that he received workers' compensation after the accident (NYSCEF Doc No. 314, tr at 102, lines 8-10; NYSCEF Doc No. 313, ¶ 10 [d]). Additionally, none of the parties have disputed Fondelco's factual allegations, supported by IME reports, and the bill of particulars that Plaintiff did not suffer a grave injury (*see Ironshore Indem., Inc. v W&W Glass, LLC*, 151 AD3d 511, 512 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 501 [1st Dept 2015] [finding that "[t]he court should have granted [subcontractor's] motion for summary judgment dismissing defendants' claim seeking common-law indemnification from [subcontractor]," where the subcontractor "met its initial burden to establish that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, and defendants failed to raise an issue of fact as to whether plaintiff's brain injury constituted a grave injury"]). S&C failed to raise a triable issue of fact in opposition

to Fondelco's factual allegations; thus, Workers' Compensation Law § 11 bars S&C's common law claims against Fondelco (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975] [holding, on summary judgment, that facts alleged in the moving papers "which the opposing party does not controvert, may be deemed to be admitted, and where there are cross motions for summary judgment, in the absence of either party challenging the verity of the alleged facts . . . there is, in effect, a concession that no question of fact exists" (internal citations omitted)]; *1140 LLC v Meis Studio Inc.*, 225 AD3d 516 [1st Dept 2024] ["Uncontested facts in a movant's papers are generally deemed admitted for purposes of a motion for summary judgment" (citations omitted)]). For the foregoing reasons, this branch of Fondelco's motion is GRANTED to the extent of dismissing S&C's third cause of action in its third-party complaint for common law contribution and indemnification.

Likewise, KHSI's and Primo's cross-claims for common law contribution and indemnification claims against Fondelco are dismissed as unopposed (*Jones v Vornado New York RR One L.L.C.*, 223 AD3d 467, 468 [1st Dept 2024] ["Because Con Ed did not oppose [its codefendants'] motion for summary judgment dismissing its cross-claim for indemnification, the cross-claim was properly dismissed"]; *Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016]). As noted above, Fondelco established that Plaintiff was its employee and that Plaintiff did not sustain a grave injury as a result of the accident in question. As such, Fondelco's motion seeking to dismiss all cross claims brought in common law for contribution and indemnification together with attorneys' fees is GRANTED.

ii. S&C and KHSI's breach of contract claims

a. S&C's breach of contract claims

Fondelco moves for summary judgment in its favor, seeking to dismiss S&C's second cause of action in its third-party complaint against it on the ground that Fondelco complied with the terms of its contract with S&C. Specifically, Fondelco argues that it purchased and maintained insurance policies totaling $6,000,000 in coverage as the contract required. Fondelco also maintains that its carrier has paid S&C's attorneys' fees.

In opposition, S&C concedes that Fondelco provided proof that Harleysville Insurance Company (Harleysville) accepted S&C's defense under a reservation of rights pursuant to the commercial general liability (CGL) policy Fondelco procured. S&C asserts, however, that Harleysville has denied any obligation to indemnify it. Additionally, S&C claims that the Endurance American Insurance Company (EAIC), Fondelco's excess policy, has not confirmed that S&C are additional insureds. S&C contends that the excess policy does not contain additional insureds forms or language as required by the contract. For these reasons, S&C objects to dismissal of its breach of contract claims.

It is well-settled that "a party moving for summary judgment dismissing a breach of contract claim for failure to procure insurance meets its prima facie burden by identifying the contract provision requiring the procurement of insurance and tendering the procured insurance policy that satisfies that requirement" (*Cooper v BLDG 7th St. LLC*, 231 AD3d 533, 534 [1st Dept 2024] [citations omitted]; *Nyanteh v 590 Madison Ave., LLC*, 238 AD3d 643, 644 [1st Dept 2025]).

Here, Fondelco submitted copies of the procured insurance policies in support of its motion. Upon review of Fondelco's CGL policy, its limits of insurance are in the amounts of

$1,000.000 for each occurrence and $2,000,000 as annual aggregate (NYSCEF Doc No. 283 form CG-7274), satisfying the required limits of insurance for CGL coverage pursuant to the contract. Fondelco's excess insurance policy provides excess liability coverage with an aggregate limit of $5,000,000 (NYSCEF Doc No. 284 form EXL 0001 0615) as required by the contract.

Further, to the extent that S&C argues that EAIC has not confirmed that S&C is an additional insured under its policy and that the EAIC policy does not contain additional insured forms or language required by the contract, the EAIC policy provides that "[t]he word 'insured' means any person or organization qualifying as such in the 'first underlying insurance' which is the controlling policy listed in Item 5 of the Declarations" (NYSCEF Doc No. 284 form EXL 0203 0813 at 1). Item 5 of the declarations refers to the attached schedule of underlying policies (NYSCEF Doc No. 284 form EXL 0001 0615). The schedule of underlying policies lists the Harleysville policy as the underlying general liability policy (NYSCEF Doc No. 284 form EXL 0102 0606). The Harleysville policy includes a blanket endorsement which provides, in relevant part, that "Section II – Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations only as specified under a written contract . . . that requires that such person or organization be added as an additional insured on your policy" (NYSCEF Doc No. 283 form CG 7254 1210 at 1). Harleysville's response letter to S&C's tender demand informing S&C that Harleysville will provide S&C with a defense cites to the blanket endorsement (NYSCEF Doc No. 285). Since S&C is an additional insured under the Harleysville policy, by the policies' plain language, S&C is also insured by EAIC. Consequently, pursuant to Fondelco's contract and the Harleysville and EAIC policies' terms, S&C is an additional insured under both policies (*Solorzano v Lophijo Realty Corp.*, 224 AD3d 487, 488 [1st Dept 2024] [finding a blanket endorsement that included as insured any additional insureds

as required by written contract sufficient to establish that a third-party defendant had fulfilled its contractual obligation to procure insurance]; *Payne v NSH Community Services, Inc.*, 203 AD3d 546 [1st Dept 2022] [finding that the trial court correctly dismissed a failure to procure insurance claim where the "insurance policy contained a blanket additional insured endorsement covering parties that [a subcontractor] had contractually agreed to name as additional insureds").

Addressing S&C's argument that Fondelco breached the portion of the contract requiring it to procure insurance because Harleysville reserved its rights on indemnity, "[w]hile an insurer's duty to defend arises when the claims asserted are within the policy's coverage, the duty to indemnify is determined by the actual basis for the insured's liability to a third person" (*New York City Hous. Auth. v Harleysville Worcester Ins. Co.*, 226 AD3d 804, 808 [2d Dept 2024] [internal quotation marks and citation omitted]; *see Auto. Ins. Co. of Hartford v Cook*, 7 NY3d 131, 138 [2006] ["[A]n insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course"]; *KMO-361 Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dept 1998] ["Obviously, [an] insurer's refusal to indemnify plaintiffs . . . is no basis for declaring . . . that the decedent's employer breached its agreement with the construction manager to procure liability insurance" (citation omitted)]). This argument does not rebut Fondelco's prima facie showing that it procured the insurance coverage required by the contract. S&C failed to raise a triable issue of fact in opposition to this branch of Fondelco's motion (*see Quintero v 240 Crossways Park Owner, LLC*, 241 AD3d 842, 844 [2d Dept 2025]). For these reasons, Fondelco's motion to dismiss S&C's second cause of action in its third-party complaint against Fondelco for breach of contract for failure to procure insurance is GRANTED.

b. KHSI's breach of contract claim

Fondelco seeks summary judgment dismissing KHSI's breach of contract cross-claim because it did not have a contract with these parties for the work Fondelco performed at the worksite. This branch of Fondelco's motion is also unopposed and KHSI did not establish the existence of an agreement between the parties. As there was no contract between Fondelco and KHSI, this portion of Fondelco's motion for summary judgment is GRANTED. Accordingly, KHSI's fourth cross-claim in its answer to S&C's third-party action (NYSCEF Doc No. 306) is dismissed against Fondelco.

iii. S&C and KHSI's claim for contractual indemnification and attorneys' fees

a. S&C's claim for contractual indemnification

Fondelco seeks summary judgment and dismissal of S&C's first cause of action in its third-party complaint based upon the Fondelco-S&C contract language. According to Fondelco, it is only obligated to indemnify S&C for claims arising out of Fondelco's work pursuant to the contract and caused, in whole or in part, by Fondelco's acts or omissions. Fondelco maintains that Plaintiff's accident did not arise from its work and that S&C caused the accident by failing to maintain a safe worksite and to ensure the scaffold was free of defects.

S&C opposes on the grounds that it is free from negligence and that Fondelco caused Plaintiff's accident by failing to provide Plaintiff with safety equipment and to familiarize Plaintiff with S&C's safety plans and procedures pursuant to the Fondelco-S&C contract. S&C insists that Plaintiff came to the worksite on a day he was not scheduled to be there, placed the ladder to access the defective scaffold himself, and, despite noticing that portions of the scaffold were missing, proceeded to utilize the scaffold without using proper safety equipment. As such, S&C claims that Fondelco's failure to provide Plaintiff with safety equipment and to properly

train Plaintiff regarding safety procedure were the acts and omissions that caused Plaintiff's fall, and that at the very minimum, these alleged failures raise questions of fact about Fondelco's liability for indemnifying S&C under the contract.

Unlike common law claims for contribution and indemnification, claims for contractual indemnification are not barred by Workers Compensation Law § 11. However, New York's General Obligation Law §5-322.1 prohibits general contractors from being indemnified for their own negligence. Even though an indemnification provision that purports to indemnify a party for its own negligence is void under General Obligations Law § 5–322.1, such an agreement will be partially enforced if the provision states "to the fullest extent permitted by law." (*Johnson v Chelsea Grand East, LLC,* 124 AD3d 542 [1st Dept. 2015]; *see also Brooks v Judlau Contr., Inc,* 11 NY3d 204, 210 [2008]). Where an overbroad indemnification provision contains the language "to the fullest extent permitted by law", a contractor's obligation to indemnify another will be limited to the contractor's own negligence (*see Brooks v Judlau Contr., Inc.*, 11 NY3d at 210-11). Notwithstanding, an indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence and its liability is merely imputed or vicarious (*see Brown v Two Exch. Plaza Partners,* 76 NY2d 172, 179; *Cavanaugh v 4518 Associates*, 9 AD3d 14 [1st Dept. 2004]).

With regards to interpretation of an indemnification provision, where an agreement to indemnify includes the words "caused, in whole or in part," they require proximate causation (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 322 [2017] [citations omitted]; *see Delgaudio v Townhouse Co. LLC*, 189 AD3d 429, 430 [1st Dept 2020]; *see also Vargas v City of New York*, 158 AD3d 523, 525 [1st Dept 2018]). Additionally, "[t]he inclusion of the phrase 'as a result of any act or omission' takes [an] indemnification clause out of the universe of 'arising

out of' . . . and requires that covered damages occur *'as a result of* any act or omission' of the other party" (*Delgaudio v Townhouse Co. LLC*, 2019 NY Slip Op 32505[U], *9-10 [Sup Ct, NY County 2019], *affd* 2020 NY Slip Op 07269 [1st Dept 2020]; *see Cooper v BLDG 7th St. LLC*, 231 AD3d 533, 533 [1st Dept 2024] [finding that the indemnification provision had a performance-of-the work trigger requiring the subcontractor to indemnify the contractor for accidents occurring in the course of the subcontractor's work]; *see also Winkler v Halmar Intl.*, LLC, 206 AD3d 458, 463 [1st Dept 2022]).

As the Court of Appeals restated in *Burlington*, when interpreting a contract provision, the courts are required "to interpret the language in a manner that gives full force and effect to the policy language and does not render a portion of the provision meaningless" (*Burlington Ins. Co*, 29 NY3d at 322 [internal quotation marks and citation omitted]). Thus, when "the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment" (*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991] [citation omitted]).

The indemnification clause in this contract obligates Fondelco to indemnify S&C, to the fullest extent permitted by law, against all claims arising directly or indirectly from the performance of Fondelco's work but only to the extent that these claims are caused, in whole or in part, by any act or omission of Fondelco or its employees. Fondelco's argument that Plaintiff's accident did not trigger the indemnity clause due to S&C's alleged negligence in causing the accident is based on a misreading of the contract and misapplication of the relevant caselaw. The Fondelco-S&C contract provides for indemnification whether Fondelco's acts or omissions cause the claim in whole or in part. The words "in whole or in part" mean that Fondelco is obligated to indemnify S&C even where Fondelco's acts or omissions only partially give rise to a claim.

Thus, S&C's alleged negligence does not excuse Fondelco from its contractual duty to indemnify S&C. However, if this court were to find that Fondelco's acts and omissions caused Plaintiff's accident in part, Fondelco would only be liable for the portion of fault not attributable to S&C (*Alvarado v SC 142 W. 24 LLC*, 209 AD3d 422, 424 [1st Dept 2022] ["The extent to which the defendants are entitled to indemnification from (subcontractor) will depend on the extent to which the defendants' negligence is determined to have contributed to plaintiff's accident"]; *Yang v City of New York*, 207 AD3d 791, 797 [2d Dept 2022] ["[C]ontractor is entitled to contractual indemnification for the portion of damages that is not attributable to its own negligence"]; *see Brooks v Judlau Contr., Inc.*, 11 NY3d at 210 [holding that the phrase "to the fullest extent permitted by law" limits rather than expands a promisor's indemnification obligation and creates a partial obligation on behalf of the subcontractor promisor]).

Fondelco also misinterprets the meaning of "arising from" and claims that Plaintiff's accident did not arise from his performance of Fondelco's obligations under the contract but from Plaintiff's use of the defective scaffold. Fondelco's reliance on *Sternkopf v 395 Hudson New York, LLC*, 227 AD3d 579 (1st Dept 2024) in support of this contention is unavailing and is based on a misreading of that decision. The facts in *Sternkopf* are readily distinguishable. In *Sternkopf*, the plaintiff was walking in a hallway at a construction site when he slipped on a piece of discarded carpeting (*Sternkopf*, 227 AD3d at 580). The *Sternkopf* court found that the discarded carpeting was not integral to the work the plaintiff performed at the accident site and that the plaintiff's accident did not arise from the performance of his duties (*id.* at 580).

Pursuant to the contract, Fondelco agreed to conduct firestopping work throughout the worksite (NYSCEF Doc No. 322 at 2). At the time of the accident that caused Plaintiff's injuries, Plaintiff was performing firestopping work as contemplated by the contract (NYSCEF Doc No.

314 at 31, lines 18-23; at 32, lines 4-12). Plaintiff's testimony that he ascended the scaffold to investigate a mechanical penetration above the scaffold belies Fondelco's claim that his accident did not arise from the performance of Plaintiff's duties (*id.* at 40, lines 4-22). Plaintiff also testified that there was no other way to get to the area he went to observe (*id.* at 40, lines 19-22). Thus, the scaffold's missing planks were not like the debris in *Sternkopf* in that the scaffold was integral to the performance of plaintiff's work but was missing parts that made up its structure, exposing a gap and creating a defect. As such, the court finds that Plaintiff's accident arose from his firestopping work pursuant to the Fondelco-S&C contract.

Having addressed Fondelco's arguments concerning contractual interpretation, the court finds that Fondelco has not established its entitlement to summary judgment as a matter of law as it has not eliminated all questions of fact regarding its liability for Plaintiff's injuries. Peter Benchimol (Benchimol), superintendent in charge of running construction sites for S&C (NYSCEF Doc No. 315, Benchimol tr at 28, lines 19-25; at 24, lines 2-8), testified in his deposition that he was in charge of safety at the worksite (*id.* at 106, lines 4-6) and that he completed at least one safety inspection of the project each day (*id.* at 158, lines 2-6). Benchimol averred that he was aware that the planks were missing from the scaffold before Plaintiff's accident (*id.* at 52, lines 9-23). Benchimol also testified that he knew there was a penetration above the scaffold that Fondelco would need to address, and that S&C was communicating with Fondelco to set up a meeting with a third-party inspector regarding the firestopping work (*id.* at 76, lines 6-25; at 77, lines 9-23). It is undisputed that the planks were still missing on the day of the accident. Based upon this testimony there is an issue of fact concerning whether S&C bears any liability for its actions in failing to inform Fondelco of the dangers of the scaffold and its policies concerning its use. These are all issues for a jury to decide.

With regards to Fondelco's potential liability, the contract required Fondelco to "take reasonable safety precautions with respect to the performance of [the] Agreement, [and to] comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons or property in accordance with the requirements of the Subcontract Documents" (NYSCEF Doc No. 322 at 12). The contract additionally required Fondelco to acknowledge "that it has been provided with the 'Sweeney and Conroy, Inc. Project Safety Program, dated July 16, 2013' [and] . . . that it, and all of its employees, have read such Safety Manual, are familiar with the contents thereof, and [to agree] that they will fully comply with the contents thereof" (*id.*). Here, John Morasco, Fondelco's project consultant and chief estimator, who was at the worksite with Plaintiff on the day of the accident, testified that he did not know whether Fondelco gave Plaintiff a copy of S&C's safety plan and that he had no recollection of seeing it himself before the instant litigation (NYSCEF Doc No. 316 at 134, lines 12-25; at 135, lines 2-4). Benchimol also testified that:

> "[E]very worker that comes on the site has to fill out a worker safety orientation, and as part of that safety orientation, it lists the rules and regulations . . . and one of the points on that is that anyone who's accessing a scaffold needs to have a four-hour scaffold-user card. When Mr. Avella . . . came onto the job site, he did not have a four-hour scaffold-user card, so he said that he would be accessing all of his work from a ladder and not from a scaffold" (NYSCEF Doc No. 315, Benchimol tr at 89, lines 13-25; at 90, lines 2-6).

Morasco's and Benchimol's testimony and the fact that Plaintiff accessed the defective scaffold on the day of his accident demonstrate that there are issues of fact as to whether Fondelco failed to comply with and to inform Plaintiff concerning S&C's safety plan pursuant to the contract and the extent to which these alleged failures caused Plaintiff's injuries. Again, these are issues to be decided by a jury.

Thus, Fondelco's motion seeking summary judgment on S&C contractual indemnification claim is DENIED as there are issues of fact to be decided by a jury concerning the parties' liability. As contractual indemnification cannot be decided at this time, claims concerning attorneys' fees associated with the ongoing litigation must also be DENIED (*see Gonzalez v DOLP 205 Props II, LLCA*, 206 AD3d 468, 471-472 [1st Dept 2022]).

b. KHSI's claim for contractual indemnification

Fondelco also seeks summary judgment on KHSI's claim for contractual indemnification. As there was no contract between Fondelco and KHSI, there is no claim for contractual indemnification. Also, KHSI did not oppose this portion of Fondelco's motion. As such, Fondelco's claim for summary judgment on KHSI's claim for contractual indemnification is GRANTED and KHSI's cross claim for contractual indemnification as against Fondelco is dismissed.

C. *S&C's cross motion for summary judgment*

i. Plaintiff's Labor Law §200 claims

S&C cross moves for summary judgment seeking to dismiss Plaintiff's Labor Law §200 claims. Plaintiff objects to the dismissal of his Labor Law §200 claims. Plaintiff takes the position that S&C mischaracterized the portion of the motion against him as a cross-motion, where Plaintiff has not moved for any relief. As such, Plaintiff argues, among other things, that S&C's motion for summary judgment against him is untimely because S&C moved for summary judgment more than 60 days after plaintiff filed the note of issue in violation of the part rules...

It is well-settled that "[i]n the absence of a court order or rule to the contrary, CPLR §3212(a) requires summary judgment motions to be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*Filannino v*

Triborough Bridge and Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006] [internal quotation marks and citation omitted]; *Brill v City of New York*, 2 NY3d 648, 651 [2004]). The Court of Appeals has found that "'good cause' in CPLR §3212 (a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy. . . . No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" (*Brill*, 2 NY3d at 652). However, a court may consider an untimely cross-motion for summary judgment in response to a timely summary judgment motion on nearly identical grounds (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]; *Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013] "[A]n untimely *but correctly labeled* cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause" (citations omitted)]; *see Crawford v 14 E. 11th St., LLC*, 191 AD3d 461 [1st Dept 2021]). A cross-motion is "merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (*Kershaw*, 114 AD3d at 87 [1st Dept 2013] [citations omitted]). In *Kershaw*, the Appellate Division reiterated the rule "that a cross motion is an improper vehicle for seeking relief from a nonmoving party" (*id.* at 88; *see Muqattash v Choice One Pharm. Corp.*, 162 AD3d 499, 500 [1st Dept 2018]).

Here, plaintiff filed the note of issue on March 18, 2023 (NYSCEF Doc No. 272). On May 16, 2025, Fondelco filed its motion for summary judgment seeking dismissal of S&C's third-party complaint against it (NYSCEF Doc No. 304). On June 20, 2025, S&C cross-moved for summary judgment dismissing plaintiff's Labor Law §200 claims against it and for a finding that Fondelco was contractually bound to indemnify it pursuant to the contract. It is undisputed that the part rules required summary judgment motions to be filed within 60 days of the filing of

the note of issue and that S&C's motion was filed three months after the note of issue. It also undisputed that S&C's motion for summary judgment is styled as a cross-motion and that plaintiff did not move for relief.

S&C has not made any showing of good cause for its belated summary judgment motion against plaintiff. Upon inspection, S&C's motion does not merely rely on Fondelco's arguments and the documents Fondelco submitted in support of the main motion. Instead, the motion includes arguments and evidence aimed at dismissing the non-moving plaintiff's Labor Law §200 claims. Plaintiff's Labor Law §200 claims are not directly related to Fondelco's motion seeking dismissal of S&C's third-party claims against it pursuant to Workers' Compensation Law § 11 (*see Kershaw*, 114 AD3d at 89). The branch of S&C's motion seeking to dismiss plaintiff's Labor Law §200 claims is not a true cross-motion and does not merely raise issues that are nearly identical to the issues raised in Fondelco's timely motion (*Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017]). As such, this portion of S&C's motion is DENIED.

ii. S&C's claims for contractual indemnification

Fondelco joins plaintiff in opposing S&C's motion as untimely. However, S&C's cross-motion for summary judgment on its contractual claims against Fondelco may be properly considered by this court because it was served on June 20, 2025, six days before Fondelco's summary judgment motion was noticed to be heard, in compliance with CPLR § 2215.

Considering this portion of S&C's motion on the merits, S&C's argument that it did not negligently cause plaintiff's accident and is entitled to full contractual indemnification is unavailing. To the extent S&C argues that Fondelco was obligated to provide plaintiff with equipment to safely perform its work, "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction

workers" (*Chuqui v Amna, LLC*, 203 AD3d 1018, 1021 [2d Dept 2022] [internal quotation marks and citations omitted]). Additionally, S&C's superintendent admitted responsibility for monitoring the safety of the worksite. Thus, S&C cannot claim that it was not, at least partially, liable for plaintiff's accident (*see Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [1st Dept 2004]). Further, S&C's argument that it was free from negligence due to its alleged lack of knowledge that Fondelco would be performing work on the day of the accident is unpersuasive as it was foreseeable that plaintiff, whose presence S&C requested at the worksite, would need to access the area of penetration requiring firestopping immediately above the scaffold. More significantly, Benchimol testified that he knew that the scaffold was defective but took no steps to remedy the defect. Whether S&C is entitled to complete or partial indemnification can only be determined when percentages of liability are established by a jury. Thus, S&C failed to eliminate issues of fact regarding its liability for plaintiff's accident (*see Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 627 [1st Dept 2015]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept 2015]). For the foregoing reasons and for the reasons set forth in this decision and order concerning Fondelco's motion for summary judgment on the issue of S&C's contractual indemnity claim, S&C's motion for summary judgment on the issue of contractual indemnity is DENIED.

All remaining arguments are either without merit or need not be addressed given the findings above.

CONCLUSION

Accordingly, it is

ORDERED that Fondelco, Inc.'s motion for summary judgment seeking to dismiss Sweeney & Conroy, Inc.'s third third-party cause of action for common law contribution and indemnification is GRANTED and the claim is dismissed; and it is further

ORDERED that Fondelco, Inc.'s motion for summary judgment seeking to dismiss Kings Hoist & Scaffolding, Inc. and Primo Remodeling's cross claims for common law contribution and indemnification is GRANTED and the claims are dismissed; and it is further

ORDERED that Fondelco, Inc.'s motion for summary judgment seeking to dismiss Sweeney & Conroy, Inc.'s second third-party cause of action for breach of contract is GRANTED and the claim is dismissed; and it is further

ORDERED that Fondelco, Inc.'s motion for summary judgment seeking to dismiss Kings Hoist & Scaffolding, Inc.'s cross claim for breach of contract is GRANTED and the claim is dismissed; and it is further

ORDERED that Fondelco, Inc.'s motion for summary judgment seeking to dismiss Sweeney & Conroy, Inc.'s first third-party cause of action for contractual indemnification is DENIED; and it is further

ORDERED that Fondelco, Inc.'s motion for summary judgment seeking to dismiss Kings Hoist & Scaffolding, Inc.'s cross claim for contractual indemnification is GRANTED and the claim is dismissed; and it is further

ORDERED that Sweeney & Conroy, Inc.'s cross motion for summary judgment seeking to dismiss Ryan Avella's Labor Law §200 claim is DENIED; and it is further

ORDERED that Sweeney & Conroy, Inc.'s cross motion for summary judgment on its claim for contractual indemnification as against Fondelco, Inc. is DENIED; and it is further

ORDERED that all other relief not specifically addressed herein is DENIED.

2/6/2026
DATE

Denis Reo
HON. DENIS REO, A.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