

**This opinion is uncorrected and subject to
revision in the Official Reports. This opinion
is not available for publication in any official
or unofficial reports, except the New York Law Journal,
without approval of the State Reporter or the
Committee on Opinions (22 NYCRR 7300.1)**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOHN A. MILANO
Justice

IA Part 3

<hr/>		x	Index	
MILAN HARABIN	:	:	Number	<u>3058</u> 1997
	:	:		
- against -	:	:	Motion	
	:	:	Date	<u>November 21,</u> 2000
	:	:		
20 EAST 9TH STREET CORP., et al.	:	:	Motion	
	:	:	Cal. Number	<u>21</u>
<hr/>		x		

The following papers numbered 1 to 14 read on the motion of defendant 20 East 9th Street Corp. for summary judgment awarding it conditional common-law indemnification as against defendant Tower Building Restoration, Inc.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Affirmation in Opposition - Exhibits	5 - 7
Reply Affidavits - Exhibits.....	8 - 10
Other	11 - 14

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff seeks to recover from defendants under Labor Law §§ 200, 240, and 241. However, in the main action it is evident that a disputed question of fact exists as to the precise circumstances of plaintiff's accident. Defendant 20 East 9th Street Corp. ("20 East 9th Street"), the owner of the premises, moves herein for an order of conditional common-law indemnification as and against defendant Tower Building Restoration, Inc. ("Tower") in the event it is subjected to liability in the main action. Plaintiff takes no position on the motion.

On this motion, defendant 20 East 9th Street maintains that it exercised no direction or control over plaintiff's work for purposes of liability under Labor Law § 200. (Rizzuto v Wenger Contr. Co., 91 NY2d 343; Ross v Curtis-Palmer Hydro-Elec., 81 NY2d 494.) With regard to plaintiff's claims under Labor Law § 240 and § 241, defendant 20 East 9th Street asserts that in the absence of a showing of active negligence on its part, any finding of liability against it would be solely vicarious. (Onorino v Halmar Equities, 267 AD2d 286; Negroni v East 67th Street Owners, 249 AD2d 79; Werner v East Meadow Union Free School, 245 AD2d 367.) Defendant 20 East 9th Street therefore relies on the well-established principle that where it is established that

liability would be vicarious only, an owner or general contractor is entitled to full common-law indemnification from the party whose negligence was the cause of the worker's injuries. (Mas v Two Bridges Assoc., 75 NY2d 680; Negroni v East 67th Street Owners, supra; Baker v Barron's Educ. Serv. Corp., 248 AD2d 655; Werner v East Meadow Union Free School, supra, at 368.)

In opposition to the motion, defendant Tower alleges that the motion is premature inasmuch as it has not been determined whether Tower or defendant Quality Building Contracting Corp. ("Quality") is liable for plaintiff's accident. Tower makes no argument and thus raises no issue of fact as to any active negligence on the part of defendant 20 East 9th Street. With regard to the identity of the company liable for plaintiff's injuries, Tower's arguments concerning the possible liability of Quality are inconsistent with the previous deposition testimony of Tower's own vice president, Nicholas Mamounas, who stated under oath that no other entity than Tower was working on the site; that Tower did not hire subcontractors to work on the site; and wherein he denied that Quality ever worked on the site. Thus, Tower is precluded by the doctrine of judicial estoppel from adopting in this motion a position contrary to its previous sworn statements. (Andrews v Porreca, 227 AD2d 940; Mohen v Mooney, 205 AD2d 670.)

Moreover, the deposition testimony of Mr. Mamounas clearly established that only Tower and its employees directed, supervised and controlled the worksite activities. Tower produces no copy of any contract between it and Quality for any work to be done on the subject premises. Nor does Tower dispute the terms of its contract with defendant 20 East 9th Street, which unequivocally states that no subcontractors were to be used upon the site without the specific authorization of 20 East 9th Street. Finally, the deposition testimony of Louis Gyuris, who was employed by Tower as a supervisor on the project, and is also the sole proprietor of defendant Quality, stated in his deposition testimony that at the time of the accident, plaintiff was not working for Quality.

Tower has failed to submit evidence sufficient to raise a triable issue of fact to support its claim that defendant Quality could have been liable for plaintiff's accident. (Zuckerman v City of New York, 49 NY2d 557.) Nor does Tower raise an issue of fact as to any active negligence on the part of defendant 20 East 9th Street. Accordingly, defendant 20 East 9th Street is entitled to a conditional order of summary judgment for common-law indemnification as and against Tower pending the determination of the main action. (Onorino v Halmar Equities, supra; Werner v East Meadow Union Free School, supra.)

Dated: February 22, 2001

John A. Milano, J.S.C.