INDEMNIFICATION AND CONTRIBUTION CLAIMS IN LITIGATION

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I. BASIC RULES OF CONSTRUCTION FOR CONTRACTUAL INDEMNITY CLAUSES

A. Indemnity Agreements are Strictly Construed

Cahn v Ward Trucking, Inc.
(101 AD3d 458, 955 NYS2d 583 [1st Dept., 2012])
Loss did not Arise from the Conduct Described in the Indemnity Agreement
Plaintiff was injured when he was struck by barrels that fell off of a hand truck. At the time of the incident, plaintiff was at work in the lobby of a building owned by his employer, 450 Park. Plaintiff commenced the above action against the delivery company and trucking company that were in the process of unloading the barrels at the time of the incident. Those entities, in turn, commenced an action against Chemtreat as the vendor/packer of the barrels.

Chemtreat ultimately moved for summary judgment dismissing the common law and contractual indemnity claims that had been asserted against it. With regard to the common law indemnity claim, Chemtreat noted that there was no proof offered that it was "actively at fault" for causing the incident. Thus, under McCarthy v Turner Construction, Inc. there was no basis for a common law indemnity claim.

The contractual indemnity claim was dismissed where Chemtreat established that the provision in question was inapplicable to the facts of this case. Specifically, the Chemtreat indemnity agreement only triggered where the loss arose from the use Chemtreat's patented devices, processes, materials and equipment. In the instant case, barrels falling from a hand truck during delivery did not fit within any of the enumerated areas giving rise to a valid indemnity claim.

Perales v First Columbia 1200 NSR, LLC
(88 AD3d 1213, 932 NYS2d 211 [3d Dept., 2011])
Facts of the Case DO NOT Trigger Indemnity Obligations Per the Terms of the Contract
Plaintiff slipped and fell in the parking lot of a premises owned and operated by defendant First Columbia. The instant lawsuit against First Columbia and co-defendant Gallivan Corporation (the snow plow contractor) resulted. Upon answering, First Columbia asserted cross-claims for contractual and common law indemnification against Gallivan.

At some point in the litigation, Gallivan moved to dismiss First Columbia's cross-claims. Gallivan argued, first, that it only owed contractual indemnification to the extent the incident was "caused by or sustained in connection with the performance of this Service Agreement or conditions created thereby." In support of its motion, Gallivan argued that it had performed all required duties under the contract, including the removal of snow as required by the timeframe established in the contract and by placing the snow piles in the areas designated by the contract. Where the contract was not breached, and First Columbia could not establish that the incident occurred due to Gallivan's failure to adhere to its duties under the contract, the contractual indemnity claim was dismissed.

Further, First Columbia's common law indemnity claim was dismissed. The claims against First

Columbia were that (a) it failed to properly configure the parking lot and walkways and (b) that the snow piles were negligently created. Where, as here, Gallivan had no role in configuring the property and where, as here, Gallivan placed the snow piles exactly where it was directed under the contract, Gallivan had no negligence in this case. As such, the only liability facing First Columbia was its own, active, negligence. As a party cannot be indemnified under common principles for its own negligence, the cross-claim was dismissed.

B. Negligence Requirements

Bellreng v Sicoli & Massaro, Inc
(108 AD3d 1027, 969 NYS2d 629 [4th Dept., 2013])
Where Contract Requires Negligence To Trigger, the Burden Falls on the Party Seeking Indemnification

Plaintiff, an employee of Innovative, fell through the deteriorated gypsum roof decking onto scaffolding that had been erected inside the building to prevent debris from falling into the pool. At the time of his fall, plaintiff had unhooked his safety harness from the steel lifeline that had been placed on the roof.

Defendant Board of Education hired third-party plaintiff Sicoli as the general contractor on the project, who subcontracted with third-party defendant Guard to remove the existing roof. Guard subcontracted that work to fourth-party defendant Innovative.

Plaintiff filed this action for Labor Law violations and common-law negligence. Sicoli moved for judgment dismissing plaintiff's complaint and for judgment on its third-party complaint. Guard moved for partial judgment on its contractual indemnification claim. Plaintiff cross-moved for partial judgment on his §§ 240(1), 240(3) and 241(6) claims, and Guard cross-moved to dismiss the §§ 200, 240(1) and 241(6) claims.

The trial court denied defendants' motion and Guard's cross-motion regarding the § 200 claim; denied all motions concerning the § 240(1) claim; granted defendants' motion to dismiss the § 241(6) claim except as it related to 12 NYCRR 23-1.16; and denied defendants' motion for judgment on the third-party complaint.

The motion relative to plaintiff's Labor Law 200 claim was granted where it was established that neither Lockport, nor Sicoli, exercised actual supervision, direction or control over plaintiff's work. In so holding, the Court noted that at most, these defendants engaged in monitoring and oversight of the timing and quality of work, which is insufficient to raise a triable issue of fact with respect to supervision or control for the purposes of Labor Law 200.

As such, Sicoli's motion for contractual indemnity was also granted due to the fact that it had no actual negligence.

Finally, the Court denied Guard's motion for contractual indemnity on the basis that it did not conclusively establish that Innovative was negligent. Apparently, the clause at issue in the Guard/Innovative contract only provided indemnification where Innovative's negligence caused the loss.

C. "Acts or Omissions" Language Without a Negligence Trigger

Anton v West Manor Const. Corp.
(100 AD3d 523, 954 NYS2d 76 [1st Dept., 2012])
Negligence Triggered Needed Before Indemnity Provision Applied
Plaintiff was employed by Tiegre. During the course of his employment, plaintiff was struck by a falling cinderblock. As a result of his injuries, plaintiff commenced suit against West Manor Construction Corp., who, in turn, commenced a third-party action against Tiegre.

West Manor sought both common-law and contractual indemnity against Tiegre. The former, common law indemnity, claim was dismissed by application of Workers' Compensation Law § 11. In so holding, the Court noted that daily headaches and frustrating loss of focus did not rise to the level of a grave injury.

With regard to the contractual indemnity claim, the Court likewise affirmed dismissal of West Manor's claims against Tiegre. Although not explicitly stated, it appears as though the contract only provided West Manor protection from losses that were occasioned out of Tiegre's negligence. Here, although the plaintiff was in an area that he was instructed not to use, his "violation" of the workplace rule only furnished the occasions for the occurrence. It was not, however, the proximate cause of the loss. As such, the indemnity clause at issue was not triggered.

Simone v. Liebherr Cranes, Inc.
(90 AD3d 1019, 935 NYS2d 337 [2d Dept., 2011])
Contract Means What It Says: No Requirement of Negligence for Indemnity Purposes
In this action, Beys Contracting ("Beys") sought an award of contractual indemnification from third-party defendant Resun Leasing, Inc. ("Resun"). Resun appears to have opposed the demand by arguing that neither it, nor its subcontractors, were negligent.

In affirming the trial court, the Second Department started by reviewing the language of the indemnity clause at issue. Upon review, the Court noted that Resun was obligated to indemnify Beys so long as the loss was "caused in whole or in part by any act or omission of the Subcontract." Where there was no obligation in the contract that the acts or omissions be negligent, any argument that Resun (or its subcontractors) was free of negligence was irrelevant. Accordingly, because the incident arose from the work of Resun's contractors, the protections of the indemnity clause were triggered.

D. Indemnity Claims Cannot be "Generally" Incorporated Into Sub-Contracts

Persaud v. Bovis Lend Lease, Inc.
(93 AD3d 831, 941 NYS2d 208 [1st Dept., 2012])
Words to Remember – "Incorporation Clauses" in Subcontracts Bind a Subcontractor Only to the Quality, Character and Manner of Work and NOT the Insurance and Indemnity Requirements
Persaud worked at Gessin Electrical Contractors, Inc. ("Gessin"). Gessin was a sub-subcontractor to BTG. When Persaud was injured, he sued Bovis and other defendants

(collectively referred to as "Bovis"). Bovis sued Gessin, alleging claims for contribution, common-law indemnification, and contractual indemnification, and to recover damages for breach of contract for failure to procure insurance.

A third-party action against an employer for contribution and indemnity can survive only if employee has sustained a grave injury as defined by the Workers' Compensation Law or when there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant. Gessin established that there was no grave injury so the common law claims for contribution and common-law indemnity must be dismissed.

As to the written contract for indemnity, the claims were based not on the sub-sub contract but on a promise found in the prime agreement between the subcontractor BTG, and Bovis to which Gessin was not a signatory. Even though the construction subcontract signed by Gessin incorporated the main agreement by reference, "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor'" and not to insurance or contractual indemnification. Accordingly, the contract claim is dismissed, thus leading to the dismissal of the entire third-party claim.

Baillargeon v Kings County Waterproofing Corp.
(91 AD3d 686, 936 NYS2d 298 [2d Dept., 2012])
Indemnity Provision can Only be "Incorporated" by Specific Provision in the Prime Contract

Plaintiff slipped and sustained injury while in the course of installing carpet at the Jacob Javits Convention Center. It was alleged that plaintiff was caused to slip due to the existence of water that entered the facility due to a recurrent roof leak. Defendant Kings had previously been retained by the Convention Center to repair the leak. Defendant Gordon H. Smith Company had been retained by the Convention Center to identify the problem, and formulate plan to remedy the situation.

Plaintiff named both Kings and Gordon as defendants in the instant proceeding. Upon answering, Gordon asserted cross-claims against King for contractual indemnification. Gordon later moved for summary judgment seeking an award of contractual indemnity against Kings. Kings opposed the motion on the basis that it did not have a contract with Gordon.

In affirming the trial court, the Second Department noted that Kings contract was limited to the Convention Center. There was no obligation within the Kings/Convention Center Contract which required Kings to indemnity non-party Gordon. In addition, the Kings/Convention Center Contract did not **explicitly** incorporate the terms of the Convention Center/Gordon Contract. Accordingly, Gordon had no basis to assert a contractual indemnity claim.

E. No "Implied Third-Party Beneficiary Status" in Contractual Indemnity Claims

Galvin Bros. Inc. v Town of Babylon, NY
(91 AD3d 715, 936 NYS2d 563 [2d Dept., 2012])
Movant Fails to Meet Burden to Establish Third-Party Beneficiary Status
Plaintiff commenced the instant action seeking to recover alleged economic loss on a breach of contract theory against the Town of Babylon. In its Answer, the Town asserted cross-claims against co-defendant Hanes Geo Components. Haynes moved to dismiss the cross-claims for failure to state a cause of action resulting in this appeal.

Haynes first argued that the Town's claims for contribution must be dismissed where, as here, the complaint only seeks economic damages. In affirming the trial court's dismissal of the Town's claim for contribution, the Second Department noted that there is no viable claim for contribution under CPLR 1401 where only economic damages are sought.

In addition, Haynes also moved to dismiss the Town's indemnity claim on the basis that the Town was not in privity of contract with it. In affirming the dismissal of the contractual indemnity claim, the Second Department noted that there was no direct contract between Haynes and the Town. In addition, the Court noted that the Town had failed to establish the existence of third-party beneficiary status under any other contract entered into by Haynes.

F. Unsigned Contracts

Seales v Trident Structural Corp.
(142 AD3d 1153; 38 NYS3d 49 [2nd Dept., 2016])
Unsigned Contract May Yet Prove to be Enforceable for Indemnity Purposes
Plaintiff was installing a new sprinkler system as part of a renovation project at a building owned by defendants 138 West and 2794 Broadway (collectively the owners). Defendant Trident was the contractor responsible for carpentry, structural work, framing, roofing and sheetrock installation. While ascending a staircase from the fifth to the sixth floor, plaintiff allegedly was struck in the head and rendered unconscious by a piece of falling sheetrock.

Third-party defendant Trident's president testified that shortly after the accident, he observed several 4x8 feet sheets of sheetrock leaning against the wall on the sixth floor. One sheet had fallen away from the wall and was leaning against a railing, and a portion of that sheet was broken away. A jagged piece of sheetrock 8-12 inches was on the landing of the fifth floor on the stairs. Conversely, plaintiff's coworker testified that the piece of sheetrock that fell onto the stairwell in the vicinity of plaintiff was approximately the size of an entire sheet of sheetrock.

The trial court denied plaintiff's motion for summary judgment on his Labor Law § 240(1) claim, and denied the owners' cross-motion for summary judgment dismissing the Labor Law §§ 240(1), 241(6), 200 and common-law negligence claims. The trial court also denied the owners' cross-motion on their third-party claims for common-law and contractual indemnification against Trident, and granted Trident's cross-motion to dismiss all third-party claims against it.

The owners and Trident both moved for summary judgment on the contractual indemnity piece of this case. Owners argued that they were entitled to an aware of contractual indemnity, while Trident argued that the unsigned contract was unenforceable. With regard to the question of whether the contract was properly enforceable, the Court noted that a question of fact existed as to whether the parties wished to be bound by its terms. While an unsigned contract may be enforceable, it was owners' obligation to come forward with evidence demonstrating both parties intent to be bound by the operative language therein.

Even if the contract was enforceable, a question still existed as to whether the events of the case at bar triggered the indemnity provision. The contract only obligated Trident to indemnity owners where Trident (or Trident's subcontractors) negligent acts or omissions contributed to the loss. Here, Trident was unable to establish itself free of negligence, or the negligence of its subcontractors.

Lastly, the unresolved factual issues regarding negligence also precluded either side from prevailing upon motions for common law indemnification.

II. BREADTH OF CONTRACTUAL INDEMNIFICATION UNDER NY LAW

A. Absent a Statutory Provision, a Party May Be Indemnified for its Own Negligence

Cortes v Town of Brookhaven
(78 AD3d 642, 910 NYS2d 171 [2d Dept., 2010])
Contractual Indemnity For One's Own Negligence Is Permissible So Long as There is No Statutory Prohibition
Plaintiff was injured when the truck he was operating overturned while at defendant's landfill facility. As a result, he commenced the instant action against Brookhaven.

In response, Brookhaven commenced a third-party action against DF Stone and the Town of Hempstead. Apparently, DF Stone was engaged to transport certain items from Hempstead's landfill to Brookhaven's landfill. In any event, per the terms of the contract, Brookhaven sought contractual indemnification from DF Stone.

At the conclusion of trial, Brookhaven was found to be 40% liable for plaintiff's injuries (plaintiff was deemed 60% responsible for the incident). As a result, DF Stone opposed Brookhaven's contractual indemnity claim on the basis that Brookhaven could not be indemnified for its own negligence.

The Appellate Division disagreed, and held that absent a specific statutory prohibition (i.e., GOL § 5-322.1 [construction contracts] and GOL § 5-321 [commercial leases]) parties were free to contract for indemnification for their own negligence. Here the contract provided indemnity for "any and all claims." Given the breadth of this agreement, the Second Department ruled that DF Stone had agreed to indemnify Brookhaven for all losses, including those occasioned due to Brookhaven's own negligence.

B. General Obligations Law § 5-322.1 Prohibits Certain Contracts that Indemnify for Another Party's Own Negligence

1. GOL § 5-322.1 Provides

5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases

1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promise requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

2. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to condition a subcontractor's or materialman's right to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy is against public policy and is void and unenforceable; provided that this subdivision shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer.

2. However, "Fullest Extent Permitted by Law" or Other "Savings" Language, permits "Partial Indemnification"

Alarcon v UCAN White Plains Hous. Dev. Fund Corp.
(100 AD3d 431, 954 NYS2d 13 [1st Dept., 2012])
Saving Language Provides Basis for "Partial" Indemnity
Plaintiff allegedly sustained injury in the course of his employment with MSI. At the time of the incident, MSI was performing work as the masonry contractor at a jobsite owned by UCAN.

Thereafter, plaintiff commenced the instant lawsuit seeking recovery against UCAN under Labor Law § 240(1) & (2) and/or Labor Law § 241(6).

In turn, UCAN commenced a third-party action seeking contractual indemnification against MSI. MSI opposed on the ground that the indemnity provision at issue was in violation of General Obligations Law § 5-322.1. In affirming the trial court's decision, the First Department noted that the disputed clause at issue had "saving" language which indicated that the provision should be read "to be limited only to the extent necessary to comply with…law."

Moreover, the Court also noted that even if the indemnity clause did not contain "saving" language UCAN would still be entitled to summary judgment. This is because, regardless of the anticipated scope of the provision, there was no evidence submitted which established any negligence on UCAN. As noted by the Court, no one from UCAN was at the site at the time of the incident. Likewise, no one from UCAN supervised, directed or controlled plaintiff's activities.

Charney v. LeChase Construction
(90 AD3d 1477, 935 NYS2d 392 [4th Dept., 2011])
Fullest Extent Permitted by Law Saves Contractual Indemnity Claim
This incident arose from the collapse of a steel canopy, and resulted in a claim under Labor Law 240(1). As part of that litigation, defendants moved for Summary Judgment against third-party defendant Contour Erection ("Contour") pursuant to an indemnity clause found within the Contour contract.

In modifying the trial court's decision, the Fourth Department notes that any provision that purports to provide indemnification for a negligent party is void by operation of General Obligations Law § 5-322.1. The Court also notes, however, that an indemnity clause can be saved from the reaches of the GOL by simply inserting the term of art "to the fullest extent permitted by law." The inclusion of such language then requires the Court (or the jury) to make a determination as to the active negligence of the purported indemnitee. If negligence is found, then no indemnity right will exist for that portion of liability attributable to the negligent conduct of the party seeking indemnification.

3. The Preclusive Effects of GOL § 5-322.1 are also Avoided if the Party Seeking Indemnification is Not Actually Negligent

These cases remind us that an indemnity clause is not voided simply because it does not have "fullest extent permitted by law" savings language (or some other carve out for the indemnitee's own negligence). Rather, in addition to language which violates the statute, the party seeking to void the indemnity agreement must also establish negligence on behalf of the party seeking indemnity.

Brooks v. Judlau Construction, Inc.
(11 NY3d 204, 898 NE2d 549, 869 NYS2d 366 [2008])
Court Upholds Claims for Partial Indemnification, and Avoids the Application of GOL § 5-322.1

In this case, plaintiff was injured as a result of a workplace fall. Not surprisingly, he commenced an action under Labor Law § 240(1) of the Labor Law against the general contractor on the site (Judlau). Judlau, as you can imagine, immediately commenced third-party practice against plaintiffs employer (Thunderbird) for contractual indemnification.

Importantly, the contract between Judlau and Thunderbird contained an indemnification clause which began [t]he Subcontractor [Thunderbird] shall, to the fullest extent permitted by law, hold the Contractor [Judlau]…harmless. Thunderbird argued that this clause contemplated Judlau being indemnified for losses which arose from its own negligence which would have been in violation of General Obligations Law § 5-322.1s prohibition of the same.

The Court of Appeals noted that the fullest extent permitted by law language actually implied the exact opposite when it came to the breadth of the indemnity agreement at issue. In so holding, the Court of Appeals acknowledged that a party may be entitled to partial indemnity for any percentage of liability that was not attributable to the direct negligence of the party seeking indemnification.

Thus, for example, in this case, if Judlau was held 20% negligent in the underlying action, it would still be entitled to be indemnified for 80% of the total verdict.

Grant v. City of New York
(109 AD3d 961, 972 NYS2d 86 [2d Dept., 2013])
No GOL § 5-322.1 Protection Where No Proof of Negligence of the Purported Indemnitee
Plaintiff sustained injury when he fell from a ladder while in the course of his employment with A&S Electric. At the time of the fall, plaintiff was working on a building owned by the City of New York. NYC, in turn, commenced a third-party action against A&S Electric for contractual indemnification.

Importantly, at the motion stage of this case, NYC established that it did not supervise, direct or control the work of the plaintiff. As such, it was not liable to plaintiff for common law negligence. It followed that NYC was, in fact, entitled to contractual indemnity against A&S Electric.

A&S Electric argued that because the indemnity clause conceivably provided indemnification for NYC's own negligence, the provision was voided by operation of General Operations Law § 5-322.1. That argument failed where, as here, it was established that NYC was not negligent. In so holding, the Court also reminded us that liability under Labor Law § 240(1) is statutory. It does not, contrary to A&S' argument, establish any degree of negligence against NYC.

Mathews v Bank of America
(107 AD3d 495, 968 NYS2d 15 [1st Dept., 2013])
Dismissal of Labor Law § 200 Clears the Way for Contractual Indemnification
Plaintiff, an employee of EFI, was injured while at work at a project site owned by Bank of America ("BOA"). Thereafter, plaintiff commenced suit against BOA and a subcontractor, JVN, alleging violations of Labor Law § 240(1). BOA & JVN, subsequently, both moved to dismiss

the suit. As part of the same motion, both entities also sought an award of contractual indemnification against EFI.

Defendant JVN's motion for summary judgment was granted where, as here, it was able to establish that it was not an owner, general contractor, or agent of either. To be an agent, the First Department noted that plaintiff needed to establish JVN had actual authority to supervise, direct or control the actual work at the project site. Here, JVN had no such authority.

In this vein, it followed that the Court denied and dismissed plaintiff's Labor Law § 200/Common Law Negligence claims. In so holding, the Court again reiterated that neither BOA, nor JVN, had exercised any supervision, direction or control over the methods and manners of plaintiff's activities. As BOA and JVN were absolved of negligence, it followed that both parties were entitled to contractual indemnity against EFI (plaintiff's employer). The fact that the indemnity clause at issue may have been in violation of GOL § 5-322.1 was irrelevant given the dismissal of negligence claims against the proposed indemnitees.

Picaso v 345 E. 73 Owners Corp.
(101 AD3d 511, 956 NYS2d 27 [1st Dept., 2012])
Question of Fact on Labor Law § 200 Claim Precludes Contractual Indemnity Claim
Plaintiff commenced this action after he tripped and fell on a staircase at a jobsite owned by defendant. As part of the lawsuit, plaintiff asserted a Common Law Negligence/Labor Law § 200 claim against defendant therein alleging that the owner had constructive notice of a defective condition prior to the incident.

Upon reviewing the motion papers, the Court noted that a question of fact existed as to owner's notice of the allegedly defective condition. As such, defendant/owner's motion to dismiss the Labor Law § 200 claim was denied.

At the same time, third-party defendant Tower's motion to dismiss the common law indemnity claim asserted by owner was granted. Clearly, plaintiff had not sustained a grave injury.

Moreover, the Court noted that the contractual indemnity clause relied upon by the owner was in violation of GOL § 5-322.1 Thus, the Court noted that if owner is assigned any percentage of negligence its claims for contractual indemnity will be voided.

Dwyer v Central Park Studios
(98 AD3d 882, 951 NYS2d 16 [1st Dept., 2012])
GOL 5-322.1 Does Not Preclude an Indemnity Claim Unless the Party Seeking Indemnity is Actually Negligent
Plaintiff sustained injury during the course of his employment with DPS. Prior to the incident, DPS had been retained by Michael and Janet Slosberg to perform some construction work in condo they owned. The condo was located in a building owned by Central Park Studios (CPS). Plaintiff commenced an action sounding in Labor Law against CPS. In turn, CPS commenced a third-party action against the Slosberg's therein asserting a claim for contractual indemnification. The Slosberg's opposed the contractual indemnification claim by asserting that the clause in question potentially provided CPS with indemnification for its own negligence. Thus, the

Slosberg's argued that the clause was in violation of GOL 5-322.1 and was void as a matter of law.

As noted by the Appellate Division, the trial court previously dismissed Mr. Dwyer's Common Negligence/Labor Law 200 claim against CPS. The result of which meant that CPS was not negligent. Accordingly, where, as here, the only liability facing CPS was vicarious in nature, the prohibitions of GOL 5-322.1 were inapplicable.

Ventimiglia v. Thatch, Ripley & Co., LLC
(96 AD3d 1043, 947 NYS2d 566 [2d Dept., 2012])
Question of Fact on Negligence = Question of Fact on Contractual Indemnity
Plaintiff, an employee of a third-party defendant subcontractor, was allegedly injured when he fell while he was working on a project to construct a new condominium building. According to the plaintiff, a trench approximately 10 feet wide and 8 feet deep surrounded the work site and three or four 10 foot planks were placed across the trench at a "slight decline," and served as the only way into and out of the site. The plaintiff alleged that he was instructed by his foreman to bring some lumber onto the site. As he was walking across the planks, carrying lumber on his shoulders, the planks "opened up," causing him to fall into the trench.

The Second Department reversed the trial court and denied summary judgment to the owner on common-law negligence/Labor Law § 200 claims, finding that the plaintiff raised a triable issue of fact as to whether the owner had constructive notice of a dangerous premises condition by adducing evidence that the trench and planks from which plaintiff allegedly fell had existed for approximately six months prior to the occurrence of the accident.

Where there remains a question as to the defendant's own negligence, it follows that any motion for contractual indemnity is likewise premature. Recall, that under General Obligations Law 5-322.1 a contractor may not be indemnified for its own negligence. Where, as here, that negligence is still at issue, it follows that relief under an indemnity claim cannot be afforded.

C & M 345 North Main Street, LLC v. Nikko Construction Corp.
(96 AD3d 794, 946 NYS2d 241 [2d Dept., 2012])
Question of Fact on Negligence = Question of Fact on Contractual Indemnity
The owner of a warehouse commenced the instant action after its building was severely damaged by fire. Plaintiff named, among others, the tenant D'Agostino and the sprinkler company, Allstate, as direct defendants. Allstate eventually moved for summary judgment on the basis of the age old argument that it was simply a service contractor, and thus did not owe any duty to plaintiff. In the alternative, Allstate sought contractual indemnification from D'Agostino pursuant to its sprinkler service contract.

In denying Allstate's motion, the Court noted that plaintiff was a third-party beneficiary of the sprinkler service agreement entered into between D'Agostino and Allstate. Simply stated, the agreement, which presumably protected plaintiff's structure, was directly for the benefit of plaintiff. In addition, the Court also noted that a question of fact existed as to whether plaintiff detrimentally relied upon Allstate to provide monitor services as the facility per the terms of the aforementioned agreement. In noting a question of fact existed, the Court noted in particular the

fact that Allstate had failed to inspect the sprinkler system for several months prior to the incident, and had failed to notify authorities on previous occasions when it discovered the system was non-operational.

Given the questions of fact as to Allstate's direct negligence, the Court likewise concluded that Allstate's claims for contractual indemnity over and against D'Agostino were likewise premature. Under the terms of the contract, Allstate was not entitled to receive a windfall for losses occasioned out of its own negligence.

4. GOL § 5-322.1 applies to "Services" Contracts

Bell v City of New York
(104 AD3d 484, 961 NYS2d 121 [1st Dept., 2013])
GOL Prohibition Against Indemnity for One's Own Negligence Can Apply to Service Contracts
In 2007, NYU closed down its boiler room as part of an ongoing asbestos abatement project. As an alternative, NYU contracted with Mobile to supply a portable boiler unit for the premises. The portable boiler was housed in a truck that was to be parked, per NYC Order, on 5th Avenue.

At the same time, the City of New York was engaged in a milling project on 5th Avenue. When the subsequent repaving occurred, the mobile boiler was sitting on a milled section of the street. Accordingly, rather than move the boiler, the City elected to pave around the mobile boiler. That resulted in a large area of unpaved road that was 2 or 3 inches below grade.

Plaintiff was injured when she tripped over the uneven surfaces, and the instant lawsuit followed as a result. Mobile's motion for summary judgment, as a third-party service contractor, was denied on a question of fact. Specifically, the court was unable to state with certainty that Mobile had not exercised control over the affected area during the abatement project.

In addition, the Court found a question of fact regarding whether NYU was negligent. As such, its motion for contractual indemnification against Mobile was likewise denied on a question of fact.

Mesler v. Podd, LLC
(89 AD3d 1533, 933 NYS2d 493 [4th Dept., 2011])
Snow Plow Contract Gets Section 5-322.1 Protection
Lots of good stuff in this one. Plaintiff commenced the instant action against defendant Podd, LLC, among other parties, as a result of a slip and fall incident that occurred at a Weight Watcher's, Inc. site. Plaintiff allegedly slipped on ice that had apparently formed as a result of run-off from the roof of the premises. Upon being named in the lawsuit, owners BG Developers and BG BCF, LLC commenced a third-party action against JJK Management. JJK Management had provided snow removal services for the premises pursuant to a written contract. Thereafter, plaintiff amended his Complaint to assert a direct cause of action against JJK.

JJK moved to dismiss plaintiff's amended Complaint insofar as it asserted a claim against a third-party contractor. Under the Court of Appeals' famous *Espinal* decision, JJK argued that it owed no duty the plaintiff because it did not "launch an instrument of harm." In reversing the Trial Court, the Appellate Division noted that even if JJK was negligent in the performance of its obligations under its contract with the owners of the premises, at a minimum, its actions "amount to a finding that [JJK] may have failed to become an instrument of good." It followed that absent a specific duty, ala *Espinal*, plaintiff had no viable basis to proceed in a direct claim against JJK as the snow removal contractor.

In addition, JJK also sought reversal of the trial court's decision which granted the owners conditional contractual indemnification. Upon review of the contract between the owners and JJK, the Appellate Division noted that, per the clear language of the contract, JJK only owed an indemnity duty if it was established that the loss occurred due to its own negligence. Here, the owners had failed to make any showing of negligence on behalf of JJK. Accordingly, the owners failed to meet their burden for summary judgment, and the order of conditional indemnification was reversed.

As part of this holding, the Appellate Division also noted that the owners also were required to show that they were free from negligence in order to enforce the agreement. The Court relied upon the language of General Obligations Law 5-322.1 to reach this conclusion. Of course, by its terms, GOL § 5-322.1 only applied to construction contracts. In reaching this decision, the Appellate Division confirms that a snow plow contract is, in fact, entitled to the protections of the GOL.

Weight Watchers, as the tenant at the premises, also moved on the basis that it had no snow removal obligations. Indeed, a review of the lease between Weight Watchers and owners revealed that Weight Watchers has no contractual duties to keep the front of the premises free snow and ice. In granting Weight Watchers' application for summary judgment, the Court noted that the occasional removal of snow from the front of the premises did not establish that Weight Watchers had exerted "control over the sidewalk."

Finally, plaintiff's motion against defendant owners was denied on a question of fact as to whether the owners' had sufficient knowledge of the allegedly defective condition.

Mak v Silverstein Props., Inc.
(81 AD3d 520, 916 NYS2d 592 [1st Dept., 2011])
Maintenance Agreement Seeking Indemnity for One's Own Negligence Is Barred by Application of GOL 5-322.1
Plaintiff commenced the instant Labor Law claim against Silverstein (as the property manager) and 120 Broadway Holdings (as the owner). In response, Silverstein moved for summary judgment dismissing plaintiff's claims under Labor Law 200/Common Law Negligence. This motion was denied where, as here, the Court ruled that questions of fact existed relative to whether Silverstein created, or had notice of, the allegedly defective condition which caused plaintiff's injury.

Notably, however, the Court dismissed Silverstein's motion for contractual indemnification against 120 Broadway on the basis that the management agreement was in violation of General Obligations Law 5-322.1. In addition, due to the plain language of the management agreement, the Court also noted that Silverstein had no obligation to defend/indemnify 120 Broadway because the indemnity agreement only required indemnity for Silverstein's violation of the agreement or gross negligence. Neither requirement was found in this case.

C. General Obligations Law § 5-321 Prohibits Certain Indemnity Claims Based Upon a Lease Agreement

1. GOL § 5-321 Provides

5-321. Agreements exempting lessors from liability for negligence void and unenforceable
Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

Hadzihasanovic v 155 E. 72nd St. Corp.
(70 AD3d 637, 896 NYS2d 83 [2d Dept., 2010])
Contractual Indemnity Clause Within Lease Agreement Voided by Operation of GOL § 5-321
Plaintiff commenced the instant action as a result of allegedly sustaining injuries while in course of performing construction work at defendants' apartment building. Defendants then asserted a claim for contractual indemnification against the tenant of the apartment where plaintiff sustained injury. The tenants opposed on the basis that the indemnity provision found within the lease was unenforceable.

The Trial Court dismissed the cross-claim for contractual indemnification, and the Second Department affirmed. In so holding, the Second Department ruled that "[a] broad indemnification provision in a lease, such as the alteration agreement here, which is not l limited the lessee's acts or omissions, fails to make exceptions for the lessor's own negligence, and does not limit the lessor's recovery under the lessee's indemnification obligation to insurance proceeds, is unenforceable pursuant to GOL § 5-321."

2. However, "Fullest Extent Permitted by Law" or Other "Savings" Language, permits "Partial Indemnification"

Mendieta v 333 Fifth Avenue Association, et al.
(65 AD3d 1097, 885 NYS2d 350 [2d Dept., 2009])
Landlord's Indemnity Clause Fails Where It Provides Indemnification for Landlord's Own Negligence, and Does Not Contain "Fullest Extent Permitted By Law" Language
Plaintiff, an employee of SPN, sustained injury when he fell down an elevator shaft at a premises owned by defendant/owner. At the time of the incident, plaintiff was in the course of his employment with SPN, and SPN was a tenant at the premises at issue. Thereafter,

defendant/owner commenced a third-party action seeking contractual indemnification from SPN for any losses related to plaintiff's fall.

As a condition to obtaining a key to access the elevator where plaintiff sustained injury, defendant/owner required the tenant requesting access to agree to indemnify defendant/owner for all injuries related to its use. The indemnification clause was not limited to damages resulting from the tenant or a third-party's negligence. Rather, the clause could be read to provide indemnity protection for the defendant/owner even if the defendant/owner's negligence caused or contributed to the accident. Further, the indemnity clause at issue did not contain the familiar "fullest extent permitted by law" that we have all grown accustomed to seeing.

As a result, SPN moved to dismiss the contractual indemnification claim on the basis that it violated General Obligations Law § 5-321. As the clause at issue purported to provide indemnity protection to the defendant/owner for its own negligence, the clause, as written, was unenforceable. In turn, SPN's motion to dismiss was granted accordingly.

3. The Preclusive Effects of GOL § 5-321 May be Avoided Where the Agreement Was Negotiated "At Arm's Length", Between "Sophisticated Parties" and Where Insurance was Provided

Otero v L & M Hub Associates, LLC
(68 AD3d 444, 889 NYS2d 582 [1st Dept., 2009])
Conditional Order of Indemnity Ok Where the Contract Complies with General Obligations Law
In this matter, L&M moved for contractual indemnification from co-defendant Great American Construction Company (Great American). In granting L&Ms motion for contractual indemnity, the trial court failed to condition L&Ms recovery upon a showing that L&Ms negligence did not contribute to the bodily injuries sustained by the plaintiff. In modifying the trial court decision, the First Department conditioned the Order so that L&M could not recover indemnity for its own percentage (if any should be proven) of negligence.

Because the contract between L&M and Great American also contained an insurance procurement requirement. As such, according to the First Department, the indemnity clause was enforceable under General Obligations Law 5-321 because it was coupled with the insurance requirement.

Berger v 292 Pater Inc.
(84 AD3d 461, 922 NYS2d 346 [1st Dept., 2011])
Movant Must Establish Lease Was Negotiated at Arm's Length Between Two Sophisticated Entities to Avoid the Application of GOL § 5-321
Plaintiff commenced the instant action seeking damages for injuries she allegedly sustained in a slip and fall accident in front of the premises owned by 292 Elizabeth Street Realty and rented by defendant 292 Pater Inc. 292 Elizabeth Street moved for summary judgment dismissing plaintiff's claim, and also seeking an award of contractual indemnification against 292 Pater Inc. The motion as against plaintiff was denied on a question of fact. With regard to the indemnity motion, 292 Pater Inc. opposed on the basis that 292 Elizabeth Street could not be indemnified

for its own negligence pursuant to General Obligations Law § 5-321. The trial court denied 292 Elizabeth Street's indemnity motion, without prejudice, on an outstanding factual issue.

The Appellate Division affirmed the denial of 292 Elizabeth Street's motion on the basis that the movant had failed to adequately support its motion for summary judgment. In so holding, the Court noted that the General Obligations Law did not preclude a landlord from being indemnified for its own negligence so long as the contract under which the indemnity provision arose was negotiated at arm's length. Here, the Court noted, the Record was devoid of the relative barging powers of the two entities at the time the lease agreement was executed.

DiBuono v. Abbey, LLC
(95 AD3d 1062, 944 NYS2d 280 [2d Dept., 2012])
Allocation of Losses Between Sophisticated Landlord and Tenant, Couple with Insurance Coverage, Is Enforceable and Not Against Public Policy
Plaintiffs claimed property damage alleging that Abbey, the purchaser of a service station was responsible for contamination caused by gasoline leaks. The damage took place on or before July 25, 2005. Abbey purchased the property from LMC subject to a lease on the property to Palisades and after the purchase, Abbey renewed the lease with Palisades. Palisades was obligated to provide Abbey with liability insurance coverage and agreed to a hold harmless agreement running in Abbey's favor.

The indemnification provisions in the lease were enforceable even in light of General Obligations Law § 5-321, which provides that an agreement which purports to exempt a lessor from its own negligence is void and unenforceable. This lease only allocated the responsibility between two sophisticated parties and was coupled with an insurance procurement requirement." The court found that to the extent one of the leases required indemnification, it also required reimbursement for defense costs.

DiBuono v Abbey, LLC
(83 AD3d 650, 922 NYS2d 101 [2d Dept., 2011])
GOL 5-321 Does Not Prohibit a Party to a Lease from Being Indemnified for Its Own Negligence
Plaintiff commenced this action against Abbey, LLC after its land was contaminated by gasoline storage tanks on land owned by Abbey. Abbey, in turn, commenced a third-party action against its tenant Palisades Resources, Inc. In the third-party action, Abbey alleged that Palisades breached the lease agreement by failing to procure insurance under which Abbey was named as an additional insured. In addition, Abbey also sought an award of contractual indemnification against Palisades.

The Second Department held that the lease agreement required Palisades to name Abbey as an additional insured, and the evidence submitted to the Court revealed that no such policy was obtained by Palisades.

In addition, the Second Department also held that Abbey was entitled to an award of contractual indemnification pursuant to the agreement in the lease. In so holding, the Court noted that GOL 5-321 does not preclude a party from being indemnified for its own negligence. Rather, GOL 5-

321 only prohibits a party from absolving itself from liability to the injured party.

Finally, with regard to Palisades' duty to defend and indemnify, the Court noted that Abbey must only defend, and indemnify (if necessary) those damages sustained during the term of the lease agreement. As such, the Court noted that Palisades is not obligated to pay for, nor defend, damages that occurred before or after Abbey's occupancy of the premises.

(a) Some Court's May Require "Waiver of Subrogation" to Avoid Application of GOL § 5-321

Ben Lee Distributors, Inc. v Halstead Harrison Partnership
(72 AD3d 715, 899 NYS2d 301 [2d Dept., 2010])
Contractual Provision Providing Indemnity to Owner/Landlord Too Broad Under General Obligations Law § 5-321
In the instant matter, defendants sought an award of contractual indemnification for property damage allegedly sustained at a premises they rented to plaintiff. Plaintiff, Ben Lee, opposed said request for contractual indemnification on the basis that the indemnity clause at issue was in violation of General Obligations Law § 5-321, and therefore void.

The Appellate Division, Second Department affirmed the Trial Court's holding that the clause at issue was in violation of the General Obligations Law's prohibition of agreements which provide indemnity for an owner or landlord's own negligence. The Court noted that parties may choose to allocate risk through insurance, but in doing so each such party must agree to waive subrogation claims against the other or agree that the loss will totally be enveloped by procured insurance.

(b) The Fourth Department Requires an "Additional Insured" Clause

Wagner v. Ploch
(85 AD3d 1547, 925 NYS2d 273 [4th Dept., 2011])
Indemnity Clause in a Commercial Lease Voided Per GOL § 5-321
Plaintiff sustained injury while in the course of her employment with 1680 Elmwood Avenue, Inc. ("Elmwood"). As a result, plaintiff commenced a lawsuit against the owner of the premises where she was working. The owner was/is defendant Ploch. In response to being named in a lawsuit, Mr. Ploch commenced a third-party action seeking contractual indemnification against Elmwood.

Elmwood moved for summary judgment against Ploch on the basis that the contractual indemnification clause at issue was in violation of the General Obligations Law. Essentially, Elmwood argued that the clause was void because it provided for Ploch's complete indemnification even if Ploch, himself, was the negligent party. Where the indemnity clause at issue contemplated "complete rather than partial shifting of liability from [Ploch] to [Elmwood]", the Fourth Department found in violation of New York Public Policy.

In so holding, the Court noted Ploch's argument that this was a contract negotiated at arm's length, between sophisticated entities, did not save the indemnity clause from being voided.

Although it did not explain why, the Fourth Department unequivocally noted that the contract was not, contrary to Ploch's contention, negotiated at arm's length between sophisticated parties. Lastly, the Court also refused to be swayed by Ploch's argument that the existence of an insurance procurement clause within the lease removed the indemnity clause from the reaches of the General Obligations Law. Here, the insurance clause at issue only required Elmwood to purchase a policy of insurance. It did not, however, require that Elmwood provide additional insured status to Ploch on such policy of insurance. Accordingly, the Court noted that the insurance clause did not evidence an intent to circumvent the scope of the GOL.

D. Failure to Procure Insurance May Give Rise to Indemnity Claim

LaMorte v City of New York
(107 AD3d 439, 967 NYS2d 331 [1st Dept., 2013])
Court Hints that Indemnity Provision Might Apply to Failure to Procure Claims
Plaintiff was injured while riding a bicycle in Manhattan on May 26, 2002. Second third-party defendant Roadway Contracting (Roadway) performed road work in that spot pursuant to a contract with second third-party plaintiff Consolidated Edison Co. (Con Ed). The contract consisted of a term purchase order agreement (the purchase order) and a document entitled "Standard Terms and Conditions of Construction Contracts" (the standard terms) wherein Roadway agreed to install underground conduits and equipment boxes as needed for two years.

The standard terms contained both a contractual indemnification provision and an insurance procurement provision. The indemnification provision required Roadway to defend and indemnify Con Ed for any liability arising out of Roadway's work and to pay for Con Ed's legal expenses associated with that work. The insurance provision obligated Roadway to carry products/completed operations liability insurance "for at least one year after completion of performance hereunder."

Plaintiffs sued Con Ed to recover damages for personal injuries. At trial, Con Ed took the position that Roadway's work had caused the accident. The jury returned a verdict for $660K in plaintiffs' favor, apportioning liability 40% to plaintiff, 35% to Con Ed ($231K), and 25% to Roadway ($165K). Con Ed argued it was entitled to indemnification from Roadway because Roadway breached the contract by failing to obtain insurance naming it as an additional insured. In opposition, Roadway took the position that assuming there was a valid contract, Roadway did not breach the insurance procurement provision because it had no obligation to maintain insurance one year after it completed the alleged injury-causing road work. Moreover, Con Ed ordered them off the worksite on January 26, 2001 as their work caused a water leak and Roadway performed no further work.

Despite the fact that the jury had apportioned 35% of the fault against Con Ed, it nonetheless moved for full indemnification against Roadway. Although Con Ed recognized that GOL § 5-

322.1 prohibited a party to a construction contract from being indemnified for its own negligence, Con Ed argued that it was seeking indemnification as a remedy to Roadway's breach of contract.

Con Ed premised its argument on the fact that Roadway was required to provide completed operations coverage for a period of one year after its work was completed. Such coverage was required to name Con Ed as an additional insured. Where, as here, Con Ed was not provided with additional insured status, it argued that it was entitled to indemnity as a contractual remedy due to Roadway's failure to procure and maintain proper coverage.

Roadway opposed the motion by arguing, principally, that its obligations to procure insurance ceased when it was removed from the jobsite. As that date was more than one year prior to the incident giving rise to the current lawsuit, it followed that Roadway owed no obligation to Con Ed on the date of loss.

The appellate division agreed by acknowledging that Roadway performed no work at the project site for more than a year prior to the incident. Where Roadway's work ceased more than a year prior, its contractual obligation to provide completed operations coverage (and name Con Ed as an additional insured thereunder) had expired.

In so holding, the Court rejected Con Ed's argument that the obligation ran until the completion of the project. On the contrary, per the language of the agreement at issue, the one year time limit began to run immediately after Roadway completed the "performance" of its work.

III. COMMON LAW INDEMNIFICATION

A. Common Law Claims Against Employer Barred by Workers' Compensation Section 11

McGlinchey v Vassar College
(88 AD3d 626, 931 NYS2d 503 [1st Dept., 2011])
Lack of Grave Injury = Dismissal of Common Law Indemnity Claim Against Employer
McGlinchey commenced the instant action after being injured in the course of his employment with Kirchhoff Construction Management. Plaintiff filed suit against Vassar College, presumably as the owner of the project where he was working at the time of the incident. Vassar responded by filing a third-party action against Kirchhoff alleging both common-law and contractual indemnity. Vassar then moved for summary judgment against Kirchoff on both theories.

Kirchhoff opposed the motion and was successful in defeating Vassar's common law indemnity claim. Because Vassar had not proven the injury to be "grave" under Workers' Comp. Law Section 11, the action against Kirchhoff was barred. However, because Vassar had no common law liability (read Labor Law Section 200 liability) to plaintiff, its claim for contractual indemnity was entitled to be upheld. This is because the Court of Appeals has long held that

General Obligations Law 5-322.1 does not void an otherwise invalid contractual indemnity provision where the proposed indemnittee is free from negligence (see, e.g., the *Judlau Contracting* case).

B. If Common Law Indemnity Sought From an Employer, Movant Must Establish Grave Injury Under Workers' Compensation § 11

Cullin v. Makely
(80 AD3d 1042, 914 NYS2d 788 [3d Dept., 2011])
Attorney Affirmation in Opposition to "Grave Injury" Claim Was Insufficient to Defeat Summary Judgment
Plaintiff, Ted Cullin, sustained an injury to his lower leg and ankle when he fell from a scaffold while in the course of his employment. As a result of the incident, coupled with the fact that the same area of Mr. Cullin's body had been traumatically injured in a previous accident, Mr. Cullin's foot was amputated. The treating physician opined that the amputation was necessary where the plaintiff was being subjected to continued pain and that other conservative treatments were not viable options.

Armed with this evidence, defendant Makely commenced a third-party action seeking common law indemnity from Mr. Cullin's employer. The Court noted the well- known rule that common law indemnification is available against an employer of an injured party so long as the injury qualifies as a "grave injury" under Section 11 of the Workers' Compensation Law. Here, based upon the statements provided by Mr. Cullin's treating physician, it was clear that the burden of establishing a grave injury had been met. In reply, the Court noted that a self-serving attorney affirmation on behalf of the employer was not enough to rebut the objective medical evidence provided by Makely.

C. Common Law Indemnification Claim Must Establish (a) Lack of Negligence on Indemnitee and (b) At Least 1% of Negligence Party from Whom Indemnity is Sought

McCarthy v. Turner Construction Co.
(17 NY3d 369, 953 NE2d 794, 929 NYS2d 556 [2011])
Court of Appeals Rules That Vicariously Liable Owner Is Not Entitled to Common Law Indemnification from Non-Negligent Vicariously Liable General Contractor Which Did Not Actually Supervise Work
In McCarthy, the plaintiff sustained injury from a fall while in the course of performing his job duties for his employer Samuel Datacom, Inc. ("Samuel"). Samuel had been retained by Linear as the electrical subcontractor on the jobsite. Linear had previously been retained to provide electrical services at the jobsite by the General Contractor, Gallin.

As a result of the incident, McCarthy commenced a suit against the owners of the building where the incident occurred, as well as against Gallin (as the general contractor on the project). McCarthy's claims were based in violations of Labor Law Sections 240(1), 241(6) and 200. The owner commenced a cross-claim against Gallin for common law indemnity on the basis that Gallin, as the general contractor, had overall authority to supervise and direct all work at the premises. Gallin opposed on the basis that, as it did not actually supervise, direct or control the work, it could not be held negligent. Without active negligence, Gallin argued that it would be improper to force Gallin to indemnify the owner under common law principles.

In a unanimous decision, the Court of Appeals agreed. Where Gallin was able to establish that it did not provide "actual supervision and/or direction over the work," the Court of Appeals noted "Galin was not required to indemnify the property owners for bringing about plaintiff's injury."

As succinctly stated by the Court in *McCarthy*, the hard and fast rule for common law indemnification is "[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who **exercise actual supervision**" (emphasis added). As such, the Court went on to explain that "if a party with contractual authority to direct and supervise the work at a jobsite never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, **a common law indemnification claim will not lie against that party on the basis of its contractual authority alone**" (emphasis supplied).

What does this mean, you ask? It means that common law claims against a general contractor will be extinguished if, and when, the general contractor is able to extract itself from underneath a Labor Law Section 200 claim. When taken a step further, one could (and perhaps should) argue that if actual direction and control is necessary to establish common law indemnification, it follows that "actual direction and control" is also required to establish common law/Labor Law Section 200 liability. Indeed, several courts have already employed this construction. Please see *Morris v. City of New York*, [1st Dept., 9/22/11], as a recent example.

Naughton, Jr. v The City of New York
(94 AD3d 1, 940 NYS2d 21 [1st Dept., 2012])
Common Law Indemnity Claim Require (1) Proof that Indemnitee Was Not Negligent and (2) that Indemnitor Was Negligent, or at Least Supervised or Controlled the Work
Lots of good stuff in this lengthy decision from the First Department. The facts of the surrounding incident are relatively straightforward. The City of New York retained Petrocelli to serve as the general contractor for the renovation of the New York County Family Court building. Petrocelli, in turn, entered into a subcontract with W&W Glass, wherein W&W Glass agreed to perform all curtain wall, glass and stonework. W&W Glass then subcontracted the unloading and installation of certain curtain wall panels to Metal Sales. Metal Sales employed the plaintiff at the time of the incident.

Essentially, plaintiff was instructed by Metal Sales supervisors to ascend a stack of panels which where bundled and sitting on a flatbed delivery truck. Although plaintiff was required to stand 15-16 feet above street level, Metal Sales denied his request for a ladder (or any other safety device for that matter). During the course of hoisting a panel bundle from the truck to a nearby sidewalk bridge, plaintiff was struck and knocked from the area where he was standing.

The resulting injuries gave rise to this instant lawsuit. Not surprisingly, plaintiff's Labor Law § 240(1) claim was granted on summary judgment motion. The factual background leads us to a variety of indemnity issues which the Court addressed individually.

The Appellate Division affirmed the Trial Court's dismissal of Petrocelli's (GC) motion for common law indemnity against W&W Glass. While Petrocelli established that it, itself, was not negligent, its motion failed where it could not establish negligence on the part of W&W Glass. On the contrary, the Record established that W&W Glass was not negligent, and likewise did not direct, supervise or control plaintiff's work. Accordingly, there was no basis for a common law indemnity claim

Leone v BJ's Wholesale Club, Inc.
(89 AD3d 406, 931 NYS2d 327 [1st Dept., 2011])
Movant Must Establish Negligence Against the Party From Whom Indemnity is Sought
Plaintiff sustained injury when she slipped and fell on what had leaked from a refrigerated merchandise case at a BJ's Wholesale Club. As a result, the instant action was commenced against both BJ's (on a negligence theory) and against Killon Industries on the basis that the unit in question was improperly designed.

Killon moved for summary judgment, therein demonstrating that there was no design defect, nor was its failure to warn BJ's of potential leaks a proximate cause of the injury. Where, as here, there was no negligence on behalf of Killon, it followed that co-defendant BJ's cross-claims for common law indemnification likewise failed.

D. No Basis for Common Law Indemnity Claim Where there is No Allegation of Vicarious Liability

Great American Insurance Companies v. Bearcat Financial Services, Inc.
(90 AD3d 533, 934 NYS2d 413 [1st Dept., 2011])
No Vicarious Liability Allegation = No Basis for Third Party Common Law Claim
Great American commenced this action, in part, against third-party defendant Hayes as a result of Hayes' own wrongdoing. In response, Hayes commenced a third-party action seeking common law indemnification against another party, Dresdner. Dresdner moved to dismiss the common law claim on the basis that the main-party action filed by Great American only sought to recover for actions committed solely by Hayes. Accordingly, where the only basis for liability against Hayes was his own liability, it was impossible for a claim of common law indemnification to ripen.

Interesting enough standing alone, but the fact that Hayes' counsel was actually sanctioned as a result of bringing the third-party action makes this decision especially noteworthy. In the opinion of the trial court, and affirmed by the First Department, Hayes' third-party action seeking a remedy that was impossible to obtain was patently frivolous.

Torres v 63 Perry Realty, LLC
(123 A.D.3d 9111 N.Y.S.3d 142 [2nd Dept. 2014])

Common Law Indemnification Claim Dismissed Where there is No Vicarious Liability Claim; Common Law Contribution Claim Survives Where Third-Party Defendant may have Contributed to the Cause of the Defective Condition

Plaintiff sustained injury after he slipped on a marble landing at defendant's premises. The marble landing was installed at the premises by third-party defendant Suli approximately 22 months prior to the incident. As part of the third-party action, 63 Perry sought common law and contractual indemnification from Suli, as well as alleging a breach of Suli's obligation to procure insurance.

Suli moved to dismiss the common law indemnification claim by arguing that plaintiff only had direct claims of negligence against 63 Perry. Because 63 Perry could not be vicariously liable to plaintiff, it followed that 63 Perry would never have a viable claim for common law indemnification.

Moreover, the contractual indemnity claim, as well as the failure to procure coverage claim, were both dismissed where, as here, 63 Perry could not produce an agreement containing triggering language. Rather, it only produced a 2005 purchase order which did not contain an insurance procurement clause, or sufficient indemnity language.

Finally, the Appellate Division noted that 63 Perry's claim for contribution survived. The court noted that traditionally a breach of contract will not impose tort liability for damages to a non-contracting party. However, an exception to that general rule is created where the party from whom contribution is sought "launches an instrument of harm or creates or exacerbates a hazardous condition." In the instant case, 63 Perry's expert opined that the marble slab upon which plaintiff fell was defectively installed, thus leading to the condition giving rise to the claim. Based upon that opinion, the Court found a question of fact relative to Suli's potential negligence.