At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of April, 2024.

P R E S E N T:

HON. INGRID JOSEPH
Justice.

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JONATHAN PAULINO,

Plaintiff,

-against-

Index No.: 517750/16

KOLA HOUSE, LLC and
408 WEST 15TH STREET OWNER, LLC,

Defendants.

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408 WEST 15TH STREET OWNER, LLC,

Third-Party Plaintiff,

DECISION & ORDER

-against-

408 W15 ASSOCIATES, LLC and
DUPRAT CONSTRUCTION CORP.,

Third-Party Defendants,

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408 WEST 15TH STREET OWNER, LLC,

Second Third-Party Plaintiff

-against-

408 W15 MEMBERS, LLC.

Second Third-Party Defendant

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	214-219,220-248,249-267,269-285
Opposing Affidavits (Affirmations)	268,287,290,292-293,294
Affidavits/ Affirmations in Reply	291, 295
Other Papers:	

Upon the foregoing papers, plaintiff Jonathan Paulino ("plaintiff") moves for an order, pursuant to CPLR 3212, granting him summary judgment under his Labor Law §§ 240 (1) and 241 (6) causes of action against defendant/third-party plaintiff/second third-party plaintiff 408 West 15th Street Owner, LLC's ("408 Owner") and defendant/third-party defendant 408 W15 Associates, LLC ("408 Associates") (Mot. Seq No. 12). Third-party defendant Duprat Construction Corp. ("Duprat") moves for an order granting it summary judgment dismissing 408 Owner's third-party claims against it (Mot. Seq. No. 13). Duprat moves also for an order, pursuant to CPLR 3216, striking the answer and cross-claims of 408 Associates for failure to prosecute cross-claims, failure to retain counsel, and failure to comply with discovery (Mot. Seq. No. 14). 408 Owner cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint against it and granting it summary judgment under its contractual indemnification and breach of contract claims against Duprat (Mot. Seq. No. 15).

The instant action arises out of a September 4, 2016 construction/renovation site accident in which plaintiff sustained various injures after falling from a scaffold. The accident occurred at the premises located at 408 West 15th Street in Manhattan (the "premises" or the "building"). Prior to the accident, 408 Associates leased the lower level, ground floor, and second level of the building from its former owner, non-party 405 West 14th Street, LLC. Thereafter, 408 Owner purchased the building and was assigned the lease agreement. Under the terms of the lease agreement, the tenant was prohibited from making any structural changes to the premises without obtaining the landlord's prior written consent.

On March 24, 2016, Duprat, 408 Owner and 408 Associates entered into an agreement whereby 408 Owner granted its consent to allow alterations to the premises (the "Consent Agreement"). Among other things, the Consent Agreement contained a clause whereby Duprat agreed to defend and indemnify 408 Owner from and against any and all claims "arising from or out of, or in connection with, or relating to, directly or indirectly, in whole or in part ... the Work, or any other work in or

around the Premises and the Building except to the extent caused by the negligence [of 408 Owner]." The Consent Agreement also contained a provision stating that Duprat "agrees to name [408 Owner] as additional insureds under its/their policies of Insurance ... with respect to Work done in the Building." On April 1, 2016, Duprat and second third-party defendant 408 W15 Members, LLC ("Members") entered into a written construction management agreement (the "Construction Agreement") whereby Duprat agreed to serve as the construction manager on a renovation project involving the construction of a new restaurant on the first floor of the premises.[1] Under the terms of the Construction Agreement, Duprat agreed to obtain general liability insurance coverage with $2,000,000/$4,000,000 coverage limits which listed 408 Owner, 408 Associates, and Members as additional insureds. The Construction Agreement also contained a provision whereby Duprat agreed to indemnify Members from and against any claims arising out of the work to the extent such claims were caused by the acts or omissions of Duprat, its agents, and employees.

Approximately one month prior to the accident, plaintiff was hired by Duprat to work on the underlying project as a carpenter. While working on the project, plaintiff performed a variety of jobs including framing, tiling, and installing sheetrock. When performing this work, plaintiff was supervised by, Anthony Capice, a manager employed by Duprat and another Duprat supervisor named Carlos. On the day of the accident, plaintiff and a co-worker named Felipe were instructed by Mr. Capice to install certain decorative bronze planking near the first-floor ceiling of the building. In order to access this area, plaintiff used a scaffold that consisted of two separate six-foot Baker scaffolds stacked on top of each other. In this regard, plaintiff testified that Felipe and another Duprat employee stacked the scaffolds. Immediately prior to the accident, plaintiff climbed to the top of the scaffold in order to take certain measurements while Felipe held the apparatus to ensure that it remained stable. The accident occurred after plaintiff took the needed measurements and began to climb down from the scaffold. In particular, after receiving confirmation from Felipe that he was holding the scaffold, plaintiff stepped onto the top rung of the scaffold ladder. However, when he did so, the scaffold began to tilt. Plaintiff then threw himself off the scaffold in an attempt to prevent the apparatus from collapsing onto him and fell some 12 feet to the ground. The scaffold ultimately did collapse. At his deposition, plaintiff testified that he learned after the accident that Felipe was not holding the scaffold at the time it collapsed.

[1] Both Duprat and 408 Owner's deposition witnesses testified that Members and 408 Associates were affiliated with each other. However, neither Members nor 408 Associates has produced a deposition witness and the exact nature of the affiliation between these entities is unclear.

By summons and complaint dated September 30, 2016, plaintiff commenced the instant action against 408 Owner and Kola House LLC ("Kola") alleging that his injuries were caused by their negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Thereafter, plaintiff commenced a second action against 408 Associates under Kings County Index No. 509737/17 which alleged the same causes of action as the initial complaint. In an order dated November 29, 2017, Hon. David B. Vaughn of this court consolidated the two actions under Kings County Index No. 517750/16. On April 10, 2017, 408 Owner commenced a third-party action against 408 Associates and Duprat seeking common-law indemnification, contractual indemnification, and damages for breach of contract for failure to procure liability insurance. Thereafter, 408 Associates interposed an answer which asserted numerous affirmative defenses as well as two cross-claims against Duprat.

After the accident, 408 Owners sought coverage as an additional insured under a Sompo International Companies ("Sompo") policy which listed Duprat as the named insured. However, although 408 Owners was listed as an additional insured under the policy, Sompo disclaimed coverage as the policy contained an exclusion for claims arising out of bodily injuries sustained by Duprat employees during the course of their employment. In this regard, it is undisputed that plaintiff was injured during the course of his employment with Duprat.

On or about May 8, 2017, the parties entered into a stipulation discontinuing all claims against Kola without prejudice to renewal. On September 20, 2018, 408 Owner commenced a second third-party action against Members seeking common-law indemnification, contractual indemnification, and damages for breach of contract to procure liability insurance. In an order dated September 25, 2018, Justice Vaughn granted 408 Associates' counsel's unopposed motion to withdraw from representing 408 Associates. Since that time, 408 Associates has not appeared in this action or participated in discovery. The instant motions are now before the court.

Plaintiff moves for summary judgment against 408 Owner and 408 Associates under his Labor Law § 240 (1) cause of action. At the same time, 408 Owner cross-moves for summary judgment dismissing this claim against it. In support of his motion, plaintiff points to his own deposition testimony, which indicates that he was injured during the course of a construction/renovation project when the unsecured scaffold that he was descending tilted and collapsed. According to plaintiff, this constitutes prima facie evidence of a Labor Law § 240 (1) violation. Plaintiff further maintains that, as the respective owner and tenant of the premises, 408 Owner and 408 Associates are liable for this violation as a matter of law.

In opposition to this branch of plaintiff's motion, and in support of its own motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against it, 408 Owner argues that the work

plaintiff was performing at the time of the accident is not covered under the statute. 408 Owner points to plaintiff's deposition testimony, wherein he stated that at the time of the accident, he was taking measurements in preparation for the installation of decorative brass planking. According to 408 Owner, this work is not covered under the statute as it did not constitute a significant physical change to the structure. Alternatively, 408 Owner argues that plaintiff's own actions were the sole proximate cause of the accident. In particular, 408 Owner notes that plaintiff was using two stacked six-foot Baker scaffolds at the time of the accident. 408 Owner maintains that this was an unsafe, makeshift device and that photographs of the accident site show that 12-foot A-frame ladders were available at the jobsite. Thus, 408 Owner maintains that plaintiff's failure to use these ladders was the sole proximate cause of the accident.

Labor Law § 240(1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, "[t]he duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at

501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In falling worker cases, "[w]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his or her materials" (*Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). Thus, the fact that a scaffold or ladder collapses constitutes prima facie evidence of a Labor Law § 240 (1) violation (*Exley v Cassel Vacation Homes, Inc.*, 209 AD3d 839, 841 [2d Dept 2022]; *Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]).

As a final matter, "[a]lthough comparative fault is not a defense to the strict liability of the statute, where the plaintiff is the sole proximate cause of his or her injuries [or otherwise recalcitrant], there can be no liability under Labor Law § 240 (1)" (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2d Dept 2020]). The sole proximate cause defense applies "when plaintiffs: '(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice'" (*Biaco-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Here, plaintiff has submitted uncontroverted evidence in the form of his deposition testimony demonstrating that he was injured during the course of a construction/renovation project pursuant to his employment with the construction manager/general contractor on the project when the unsecured scaffold that he was climbing down tilted and collapsed. This constitutes prima facie evidence of a Labor Law § 240 (1) violation. Thus, as the respective owner and tenant of the premises, the burden shifts to 408 Owner and 408 Associates to submit evidence sufficient to raise a triable issue of fact regarding their liability under the statute.

The defendants have failed to meet this burden. In particular, 408 Associates has not submitted any opposition to plaintiff's motion. Moreover, the arguments raised by 408 Owner lack merit. In particular, it is undisputed that the work plaintiff was performing at the time of the accident took place in the context of his employment as a carpenter for the construction manager/general contractor on a gut renovation project involving the construction of a new concept restaurant in the building Thus, plaintiff's work was clearly covered under Labor Law § 240 (1). Furthermore, 408 Owner has failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident. In particular, there is no evidence that plaintiff was expected to use an A-frame ladder to perform his work instead of the stacked Baker scaffold. Nor is there any evidence that plaintiff could perform his work using an A-frame ladder or that an A-frame ladder would have been any safer than the scaffold had it been properly secured by his coworker. Given the uncontroverted evidence that the scaffold collapsed as a result of plaintiff's coworker's failure to hold the device, plaintiff's failure to use an A-

frame ladder could not be the *sole* proximate cause of the accident (*Smith v State*, 180 AD3d 1270, 1271 [3d Dept 2020]).

Accordingly, that branch of plaintiff's motion which seeks summary judgment under his Labor Law § 240 (1) claim against 408 Owner and 408 Associates is granted. That branch of 408 Owner's cross motion which seeks summary judgment dismissing this claim is denied.

Plaintiff also moves for summary judgment against 408 Owner and 408 Associates under his Labor Law § 241 (6) cause of action. At the same time, 408 Owner cross-moves for summary judgment dismissing this claim against it. In support of this branch of his motion, plaintiff initially notes that, as the owner and tenant of the premises, both 408 Owner and 408 Associates are subject to liability under the statute. In addition, plaintiff contends that the work he was performing is covered under Labor Law § 241 (6) since it took place in the context of a gut renovation project. Finally, plaintiff maintains that, to the extent that he relies upon a violation of 12 NYCRR § 23-5.3 (g) (1), he is entitled to summary judgment.

In opposition, 408 Owner argues that plaintiff's accident is not covered under Labor Law § 241 (6) since he was not engaged in construction, excavation, or demolition work at the time. Further, 408 Owner reiterates its argument that plaintiff was the sole proximate cause of the accident. In addition, 408 Owner maintains that the scaffold used by plaintiff was in compliance with 12 NYCRR § 23-5.3 (g). Finally, 409 Owner contends that the remaining Industrial Code violations alleged by plaintiff are either too general to support a Labor Law § 241 (6) claim, or inapplicable given the circumstances of the accident.

As an initial matter, there is no merit to 408 Owner's argument that plaintiff's work at the time of the accident is not covered under Labor Law § 241 (6) as it is undisputed that he was performing his duties as a carpenter for the construction manager/general contractor on a gut renovation project at the time the scaffold collapsed. Thus, this work clearly qualified as construction work under the statute. Further, the court has already determined that plaintiff's own actions were not the sole proximate cause of the accident.

Turning to the Industrial Code regulation in question, 12 NYCRR § 23-5.3 (g) (1) requires, among other things, that the footing of metal scaffolds "shall be secure against movement in any direction and shall have sufficient area to properly transfer the vertical post or end frame loads of the scaffolds to the ground." While this regulation is sufficiently specific to support a Labor Law § 241 (6) claim (*Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010]), it is not applicable in this case. In particular, 23-5.3 (a) provides that "[t]his section applies to all scaffolds constructed of metal except mobile types." Here, plaintiff testified that the Baker scaffold that he was using had

lockable metal wheels on each footing and that the apparatus could be moved around the construction site. Thus, the apparatus was a mobile scaffold, which is not covered under section 23-5.3 (a). Accordingly, that branch of plaintiff's motion which seeks summary judgment against 408 Owner and 408 Associates under his Labor Law § 241 (6) cause of action is denied. That branch of 408 Owner's motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted only to the extent that plaintiff relies upon a violation of section 23-5.3 (g) (1). Inasmuch as 408 Owner's cross motion papers do not address any of the other Industrial Code violations alleged in plaintiff's pleadings, its cross motion to dismiss plaintiff's Labor Law § 241 (6) claim is otherwise denied.

408 Owner moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it. In so moving, 408 Owner initially notes that the underlying accident arose out of the means and methods Duprat used in carrying out its work. 408 Owner further maintains that the uncontroverted evidence before the court, including plaintiff's own deposition testimony, demonstrates that 408 Owner did not play any role in directing, supervising, or controlling plaintiff's work. In this regard, 408 Owner points out that plaintiff testified that he was supervised solely by Mr. Capice and another individual named Carlos, both of whom were employed by Duprat. Plaintiff has not submitted any opposition to this branch of 408 Owner's motion.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2d Dept 2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2d Dept 2004]; *Akins v Baker*, 247 AD2d 562, 563 [2d Dept 1998]). Specifically, "[w]here a premises condition is at issue, property owners [and contractors] may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). On the other hand, "[w]here a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor

exercisers no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2d Dept 2011]).

Here, the underlying accident arose out of the means and methods employed by plaintiff and his Duprat co-workers at the time of the accident. Furthermore, 408 Owner has made a prima facie showing that it did not exercise any control or supervision over this work by pointing to plaintiff's own sworn deposition testimony in which he stated that he was supervised solely by Durprat employees. Accordingly, inasmuch as plaintiff has not submitted any opposition to this branch of 408 Owner's motion, its motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it is granted.

Duprat moves to strike 408 Associates' answer and cross claims. In support of this motion, Duprat notes that, since its original counsel withdrew from representing it, 408 Associates has not appeared in this action or retained new counsel. In this regard, Duprat points out that, pursuant to CPLR 321 (a), a corporation, such as 408 Associates, cannot prosecute or defend a civil action unless it is represented by counsel. In further support of its motion, Duprat notes that 408 Associates has not participated in discovery and failed to comply with four separate court orders directing that it appear for a deposition. According to Duprat, this amounts to willful and contumacious conduct which justifies the remedy of striking 408 Associates' answer and cross claims. No opposition has been submitted to Duprat's motion to strike.

"A court may impose sanctions where a party 'refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed'" (*C.K. v City of New York*, 216 AD3d 753, 756 [2d Dept 2023], quoting CPLR 3126). "Although public policy strongly favors that actions be resolved on the merits when possible, a court may resort to the drastic remedies of striking a pleading or precluding evidence upon a clear showing that a party's failure to comply with a disclosure order was the result of willful and contumacious conduct" (*L.K. v City of New York*, 210 AD3d 753, 753 [2d Dept 2023] [internal quotation marks omitted]). "The willful and contumacious character of a party's conduct can be inferred from either the repeated failure to respond to demands or comply with discovery orders, without demonstrating a reasonable excuse for these failures, or the failure to comply with court-ordered discovery over an extended period of time" (*id.* at 754).

Here, 408 Associates failed to comply with four separate court orders which were issued between December 2018 and September of 2019 directing that it appear for a deposition. Further, 408 Associates has not offered any excuse for this failure and has not submitted any opposition to Duprat's motion. Under the circumstances, it is clear that 408 Associate's failure to comply with discovery

demands was the result of willful and contumacious conduct. Accordingly, Duprat's motion to strike 408 Associates' answer and cross claims in the third-party action is granted.

Duprat moves for summary judgment dismissing 408 Owner's common-law indemnification and contribution claims against it. In so-moving, Duprat maintains that these claims are barred under Workers' Compensation Law § 11 inasmuch as it was plaintiff's employer at the time of the accident and plaintiff did not sustain a "grave injury" as that term is defined under the statute. In support of this argument, Duprat points to plaintiff's bill of particulars, which allege injuries consisting of a fractured right wrist, a fractured left finger, left wrist derangement, lower back pain and derangement which required fusion surgery, neck derangement and pain, and a right shoulder tear. According to Duprat, none of these injuries are among the list of grave injuries set forth in Workers' Compensation Law § 11. 408 Owners has not submitted any opposition to this branch of Duprat's motion.[2]

"An employer's liability for an on-the-job injury is generally limited to worker's compensation benefits, but when an employee suffers a 'grave injury' the employer may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). Here, Duprat "established its prima facie entitlement to judgment as a matter of law dismissing [408 Owner's claims] for contribution and common-law indemnification by submitting the plaintiff's bill of particulars specifying the nature of his physical injuries, none of which constituted a grave injury within the meaning of the statute" (*Stock v Grand Loft Corp.*, 218 AD3d 702, 705 [2d Dept 2023], citing *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]). Accordingly, inasmuch as 408 Owners has failed to submit any opposition, that branch of Duprat's motion which seeks summary judgment dismissing 408 Owner's common-law indemnification and contribution claims against it is granted.

Duprat further moves for summary judgment dismissing 408 Owner's breach of contract claim against it. At the same time, 408 Owner cross-moves for summary judgment against Duprat under this cause of action in the third-party complaint. In support of its cross motion, 408 Owner points out that under the terms of the Consent Agreement, Duprat agreed to name 408 Owner as an additional insured under its liability policy "with the required amounts of coverage with respect to Work Done in the Building." 408 Owner also notes that under the Construction Agreement, Duprat was required to obtain liability insurance with $2,000,000/$4,000,000 coverage limits that listed 408 Owner as an

[2] Plaintiff submitted an affidavit "concerning" this branch of Duprat's motion which sets forth a list of his alleged injuries (NYSCEF Doc No. 268). However, this submission does not constitute opposition papers and, in any event, whether or not plaintiff sustained a grave injury as defined in Workers' Compensation Law § 11 has no bearing on the validity of plaintiff's claims or any damages award which he might ultimately recover.

additional insured. According to 408 Owner, Duprat breached both of these agreements since the policy Duprat obtained listing 408 Owner as an additional insured excluded coverage for Duprat employees injured while performing the underlying work in the building.

In opposition to this branch of 408 Owner's cross motion, and in support of its own motion to dismiss 408 Owner's breach of contract claim against it, Duprat argues that an enforceable contract does not exist between 408 Owner and Duprat. In particular, Duprat notes that it is not a party to the Construction Agreement. Furthermore, Duprat maintains that 408 Owner is not a third-party beneficiary of the Construction Agreement since there is no language stating this in the agreement and there is no provision in the document that allows 408 Owner to enforce the insurance requirement provision. Alternatively, Duprat contends that it complied with the insurance procurement provisions in the Construction Agreement since 408 Owner was in fact listed as an additional insured under its policy. Moreover, to the extent that the Consent Agreement required Duprat to list 408 Owner as an additional insured under its liability policy, Duprat argues that the Consent Agreement is not an enforceable contract between it and 408 Owner as no consideration or exchange of promises exists benefitting Duprat. Specifically, Duprat avers that the only promise made by 408 Owner in the Consent Agreement is to allow the proposed alterations. According to Duprat, this allowance solely benefited the tenant, 408 Associates.

"'A party seeking summary judgment based on an alleged failure to procure liability insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with'" (*Dibuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011], quoting *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]). Here, both the Consent Agreement and Construction Agreement contained a provision requiring that Duprat obtain liability insurance that listed 408 Owner as an additional insured. Furthermore, there is no merit to Duprat's argument that 408 Owner was not an intended beneficiary under the Construction Agreement. A third-party is deemed to be an intended third-party beneficiary to a contract "when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was 'an intent to permit enforcement by the third party'" (*Dormitory Auth. of the State of N.Y. v Sampson Constr. Co.*, 30 NY3d 704, 710 [2018], quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]). Here, the insurance requirement section of the Construction Agreement provided that "[Duprat] shall obtain or cause to be obtained the policies of insurance required by Exhibit C annexed hereto. [Members] (and such other parties as may be required by [Members]) shall be an additional insureds on all such insurance." Furthermore, Exhibit C to the Construction

Agreement specifically identifies 408 Owner as one of the parties to be listed as an additional insured under Duprat's general liability policy. Thus, it is clear from the language of the contract that there was an intent to permit 408 Owner to enforce the insurance procurement requirement in the Construction Agreement as 408 Owner is specifically named and identified as one of the parties which was to be named as an additional insured under the policy obtained by Duprat.

Also without merit is Duprat's argument that the Consent Agreement does not constitute an enforceable contract due to lack of consideration. The Consent Agreement, which was executed by 408 Owner, 408 Associates, and Duprat on March 24, 2016, was clearly entered into in anticipation of the Construction Agreement (which was entered into eight days later) inasmuch as the lease agreement between 408 Owner and 408 Associates required 408 Owner's prior written consent before any structural changes were made to the leased premises. Duprat was in the construction management/general contracting business, and it entered into the Construction Agreement and ultimately performed and was paid for the construction/renovation work on the premises. However, none of this would have been possible without 408 Owner's prior consent. Thus, 408 Owner's consent was the consideration Duprat received for entering into the Consent Agreement and this contract, including the insurance procurement requirement, is fully enforceable against Duprat (*see Dunkin' Donuts of America, Inc., v Liberatore*, 138 AD2d 559, 560-561 [2d Dept 1988]).

As a final matter, there is no merit to Duprat's argument that it complied with the insurance procurement provisions in the contracts. While it is true that 408 Owner was listed as an additional insured under Duprat's liability policy, the policy contained an exclusion for injuries sustained by Duprat's employees in the course of their employment. There is no language in either contract which allows for such a major exclusion. To the contrary, the Consent Agreement required "coverage with respect to Work done in the Building" and made no exception for the work performed by Duprat's own employees.

Accordingly, that branch of Duprat's motion which seeks summary judgment dismissing 408 Owner's third-party breach of contract claim is denied. That branch of 408 Owner's cross motion which seeks summary judgment against Duprat under its breach of contract claim is granted. However, 408 Owner's damages are limited to out-of-pocket damages caused by the breach (*see Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 935 [2d Dept 2015]; *Antinello v Young Men's Christian Assoc.*, 42 AD3d 851, 851-852 [3d Dept 2007]).

Duprat also moves for summary judgment dismissing 408 Owner's third-party contractual indemnification claim against it, and 408 Owner cross-moves for summary judgment against Duprat under this cause of action. In support of its cross motion, 408 Owner points to the aforementioned

provision in the Consent Agreement stating that Duprat agreed to defend and indemnify 408 Owner against any claims arising out of the work except to the extent caused by 408 Owner's negligence. 408 Owner further notes that the accident clearly arose out of Duprat's work since plaintiff was a Duprat employee performing work on the renovation/construction project at the time he was injured. Finally, 408 Owner maintains that it is clear from plaintiff's own deposition testimony that it did not exercise any control over Duprat's work and was not otherwise negligent.

In opposition to this branch of 408 Owner's cross motion, and in support of its own motion to dismiss the contractual indemnification claim against it, Duprat notes that the Construction Agreement did not contain a clause requiring that it indemnify 408 Owner. Further, Duprat reiterates its argument that the Consent Agreement (which did contain a clause requiring that it indemnify 408 Owner) is not an enforceable contract.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dept 2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). Finally, a party seeking contractual indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; General Obligations Law § 5-322.1).

Here, the language in the Consent Agreement specifically required that Duprat indemnify 408 Owner for claims arising out of the alteration work. Further, it is undisputed that plaintiff was performing this work at the time of the accident. Moreover, the evidence before the court demonstrates that the accident was not caused by any negligence on 408 Owner's part as plaintiff testified that he was supervised solely by Duprat employees and that he had never heard of 408 Owner before. Finally, the court has already determined that the Consent Agreement is an enforceable contract as against Duprat. Accordingly, that branch of Duprat's motion which seeks summary judgment dismissing 408 Owner's contractual indemnification claim is denied. That branch of 408 Owner's cross motion which seeks summary judgment against Duprat under its contractual indemnification cause of action is granted.

Accordingly, it is hereby

ORDERED, that plaintiff's motion (Mot. Seq. No. 12) is decided as follows: that branch seeking summary judgment against 408 Owner and 408 Associates under his Labor Law § 240 (1) cause of action is granted and that branch seeking summary judgment against 408 Owner and 408 Associates under his Labor Law § 241 (6) cause of action is denied; and it is

ORDERED, that Duprat's motion (Mot. Seq. No. 13) which seeks summary judgment dismissing 408 Owner's third-party claims against it is granted with respect to 408 Owner's common law indemnity/contribution claim and denied with respect to its contractual indemnity and breach of contract claims; and it is

ORDERED, that Duprat's motion (Mot. Seq. No. 14) for an order, pursuant to CPLR 3216, striking 408 Associates' answer and cross claims in the third-party action is granted; and it is further

ORDERED, that the 408 Owner's cross motion (Mot. Seq. No. 15) is decided as follows: that branch seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied; that branch seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted to the extent that plaintiff relies upon a violation of 12 NYCRR § 23-5.3 (g) (1) and otherwise denied; that branch seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it is granted; and that branch seeking summary judgment against Duprat under its third-party contractual indemnity and breach of contract claims is granted.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice