SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 36
Justice

RUBEN ELESCANO,

INDEX NO. 105814/01

Plaintiff(s),

MOTION DATE

-against-

MOTION SEQ. NO. 002

EIGHTH-19TH COMPANY, LLC,

MOTION CAL. NO.

Defendant(s).

.....

EIGHTH-19TH COMPANY, LLC,

Third-party Plaintiff,

-against-

A & T CONSTRUCTION CORP.,

Third-party Defendant.

The following papers, numbered 1 to were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that

The following motion and cross motions are herein addressed: (1) third-party defendant A & T Construction Corp.'s (A&T) motion, pursuant to CPLR 3212, for summary judgment dismissing those

portions of the third-party action sounding in common-law indemnification, and dismissing plaintiff's claims based on Labor Law § 241(6) (mot. seq. no. 002); (2) defendant/third-party plaintiff Eighth-19th Company LLC's (Eighth) cross motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's Labor Law §§ 240, 241(6), 200 and common-law negligence causes of action or, in the alternative, granting Eighth contractual indemnification over and against A&T, as well as summary judgment against A&T for its failure to procure insurance coverage; (3) plaintiff Ruben Elescano's cross motion for partial summary judgment against Eighth on the issue of liability on his Labor Law § 240(1) claim; and (4) A&T's cross motion (to its own motion) for summary judgment dismissing the contractual indemnification and contribution claims brought against it by Eighth.

I. Facts

Eighth was the owner of building located at 259 West 19th Street, in Manhattan. Eighth contracted with A&T, plaintiff's employer, to renovate an apartment located on the fourth floor of the building.

Some weeks prior to December 8, 2000, the date upon which A&T was to start its work, demolition of the apartment had been completed by another company. The demolition included the complete removal of the sub-flooring, leaving the floor beams exposed. The

ceiling of the third-floor apartment below was located approximately one foot below the level of the floor beams.

At the time that plaintiff was injured, he was engaged in removing nails jutting up from the exposed beams, a job that, it is argued, should have been part of the demolition work. While most of the floor beams were exposed, plywood had been nailed down to cover the beams at the entrance to the room in which plaintiff was working, and some plywood was also nailed onto the beams in the center of the room. Extra loose plywood was also on hand which, according to Eighth, workers were to stand on while performing their duties.

Plaintiff was injured at approximately 10:00 a.m., almost immediately upon commencing work at the site, when he caught the toe of his boot on an exposed nail while walking across the beams, and tripped. He was caused to fall between two of the floor beams, and to crash part-way through the ceiling of the apartment below. Plaintiff suffered injuries to his shoulder and neck when he caught himself between two beams. As a result, plaintiff did not fall all of the way through the third-floor ceiling to the floor below.

11. Discussion

A. Labor Law § 240(1)

A review of the facts establishes that plaintiff's accident falls within Labor Law § 240(1). This section

> imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure *(Rocovich v Consolidated Edison* Co. 78 NY2d 509, 513 [1991]; *Bland v Manocherian, 66* NY2d 452, 459 {1985]; *Singh* V *Barrett,* 192 AD2d 378, 379 [lst Dept 1993]).

Carpio V Tishman Construction Corporation of New York, 240 AD2d 234, 234 (1st Dept 1997).

The Court of Appeals in *Rocovich, supra,* defined the covered risks as:

> those related to the effects of'gravity where protective devices are called for either because of *a* difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.

Rocovich v Consolidated Edison Co., *supra,* 78 NY2d 509, at 514; see *also, John v Baharestani,* 281 AD2d 114 (1st Dept 2001); *Carpio v Tishman Construction Corporation of New York, supra.* Labor Law § 240(1) "'is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed' [citations omitted]." *Narducci v Manhasset Bay Associates,* 96 NY2d 259, 267 (2001).

A&T and Eighth argue that the threat to which plaintiff was allegedly exposed was not gravity-related, in that he fell on a "permanent" floor, and that the height to which he was exposed was, at most, only the one-foot drop between the beam and the ceiling of

the room below, a height insufficient to give rise to the protections of Labor Law § 240(1).

It has been held that an accident in which a construction worker's foot crashes through a permanent floor is not the result of an elevation-related risk. *See, Avelino v 26 Railroad Avenue, Inc.*, 252 AD2d 912 (3d Dept 1998). In fact, a fall from any permanent structure, such as a staircase, is likely not to involve Labor Law § 240(1). *See, Williams v City of Albany*, 245 AD2d 916 (3d Dept 1997). Similarly, a fall into a small hole in a permanent floor will not be seen as an elevation-related accident, but merely the result an "ordinary and usual" peril to which workers are exposed at construction sites. *See, Alvia v Teman Electrical Contracting, Inc.*, 287 AD2d 421, 422 (2d Dept 2001). Lastly, a height differential of "a mere foot or so" is "not one of the 'exceptionally dangerous conditions posed by elevation differentials at work sites.'" *Galloway v Tenth City Associates*, 228 AD2d 254, 255 (1st Dept 1996).

These precedents do not take plaintiff's accident out of Labor Law § 240(1). A thoughtful look at the facts reveals that plaintiff was not being asked to work on a permanent floor only one foot above safe footing, but was, instead, instructed to walk from beam to beam across a floor from which the permanent flooring had been removed, over gaps measuring at least 16 inches across. Since

the ceiling of the floor below plaintiff's work site was *not* a surface intended for walking on, and, in fact, showed itself incapable of bearing the weight of a man, it is specious to state that plaintiff's work site was located one foot above the ground; it was located, at minimum, one foot plus the entire height of the third floor apartment below him, a height significant enough to raise a gravity-related claim under Labor Law I 240(1).

While plaintiff's fall was precipitated by a trip, it differs little from other cases where *a* worker falls through a temporary floor, and ends up stuck between floors. *See, e.g., Robertti v Chang,* 227 AD2d 542 (2d Dept 1996). This court does not accept Eighth's argument that falling through a ceiling located below the floor beams of a room stripped of its subfloor is but a 'general hazzard of the work place." DeMatteo Aff., ¶ 13. In light of the elevation-related risks which existed at plaintiff's work site, plaintiff was entitled to such "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). Plaintiff has established, prima facie, his right to summary judgment on this claim.

A&T and Eighth cannot rely on a recalcitrant worker defense. There is a factual question as to whether Mr. Vasiliu, vice-

president of plaintiff's employer, A&T, directed plaintiff to use the loose plywood, which allegedly was available at the work site, as a platform from which to stand while pulling out the nails from the beams, and not to step on the beams themselves. Plaintiff denies receiving any such instructions. However, "[t]he recalcitrant worker defense requires a showing of the 'injured worker's *deliberate refusal* to use available and visible safety devices in place at the work station' [citations omitted] [emphasis in original]." *Harris* v *Rodriguez*, 281 AD2d 158, 158 (1st Dept 2001). "[T]his defense is not established merely by showing that the worker failed to comply with an employer's instruction ... to use a particular safety device [citations omitted]." Powers v *Lino Del Zotto and Son Builders, Inc.*, 266 AD2d 668, 669 (3d Dept 1999). A plaintiff's mere failure to comply with instructions to use a particular device "is not equivalent to a refusal" to use the device, and does not create a factual question to support the recalcitrant worker defense. Id

In the present case, there is no evidence of any "deliberate refusal" on plaintiff's part to use the plywood as a safety device, and so, no recalcitrant worker defense can be raised.[1]

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[1]In light of ***Robertti*** v *Chang* (227 AD2d 542, *supra*), there is a question as to whether loose plywood spread over the floor beams would constitute an adequate safety device in any event.

Consequently, as A&T and Eighth have failed to raise any factual issues that would require a trial as to plaintiff's Labor Law § 240(1) claim , plaintiff's cross motion for partial summary judgment on the issue of liability under the statute is granted, and Eighth's cross motion to dismiss the claim is denied.

B. Labor Law § 200 and Common-Law Negligence

Eighth cross-moves for dismissal of plaintiff's Labor Law § 200 and common-law negligence causes of action as well. Labor Law § 200 is but a codification of an owner's common-law duty to provide workers with a reasonably safe workplace. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *Higgins v 1790 Broadway Associates*, 261 AD2d 223 (1st Dept 1999). "[L]iability for an injury resulting from a dangerous condition at the work site may be imposed on the owner where the owner either exercised supervision and control over the work or had actual or constructive notice of the unsafe condition [citations omitted]." *Higgins v 1790 Broadway Associates, supra,* at 225. An owner or general contractor's retention of "general supervisory control, presence at the work site or authority to enforce general safety standards is insufficient to establish the necessary control [citations omitted]." *Soshinsky v Cornell University*, 268 AD2d 947, 947 (3d Dept 2000).

Eighth insists that it exercised no supervisory control over the work site at all, since that role belonged solely to A&T. Both plaintiff and A&T assert that there is a factual question as to whether Eighth's own negligence contributed to the incident.

Apparently, Eighth acted as its own general contractor for the renovation work, and, prior to the renovation of the apartment, had hired a company, A. Baten Construction (Baten), to do the demolition work. Baten was the party which removed the apartment's subfloooring, exposed the beams, and, allegedly, left the nails protruding from the beams. Mr. Vasiliu testified at his deposition that he had expected the demolition contractor to have placed plywood on the floors in such a manner so as to allow workers to get tools and materials into the apartment (Vasiliu Dep. at 34, Ex. C to Eighth's Notice of Cross Motion), and that the removal of the nails was not within the expected scope of A&T's work, i.e., was part of the demolition work. Id. at 40. Mr. Vasiliu claims to have complained to Eighth's superintendent that the beams had not been "cleaned" as part of the demolition (id. at 42), but instructed his own men to clean up the nails anyway. Apparently, the demolition crew did return to remove debris left between the beams, but was not asked to, and did not, remove the nails. Id. at 41-43.

Plaintiff describes the "dangerous condition" which caused his accident as the "many nails protruding from the floor beams, combined with the lack of plywood planking ... ." Altman Aff. at 16. Plaintiff argues that there is evidence that Eighth actually created this dangerous condition, or had actual or constructive notice it, because both Eighth's building manager and its superintendent visited the work site prior to A&T's arrival, and because Eighth's building manager instructed the superintendent to put down some of the plywood.

There is, firstly, no evidence at all as to the scope of the work which was to be completed by Baten. There is also no evidence that it was Eighth's responsibility to see to the removal of the nails prior to A&T's arrival, and no evidence that Eighth's representatives intended the plywood that they did put down to be protection fromprotruding nails, as opposed to providing cover for the gaps between the beams in some limited areas. There is, in fact, no evidence that they were aware of protruding nails, or where aware that the nails constituted a 'dangerous condition." While A&T's Mr. Vasiliu felt that the nails should have been removed as part of the demolition, there is no evidence that he passed on the opinion to Eighth that the nails constituted a 'dangerous" condition. Rather, he informed Eighth that the demolition company would have to return to remove the debris which

it had left between the beams, without mentioning the nails. Thus, there is no evidence that Eighth created, or had notice of the existence of protruding nails as a "dangerous condition."

To the extent that plaintiff may be trying to say that the gaps between the beams constituted a dangerous condition, the argument must be discounted, since A&T was hired to, among other things, level and cover the floors to the apartment, requiring access to the beams. In fact, since plaintiff had been instructed to remove the nails from the beams, he cannot maintain a claim under Labor Law § 200 for injuries received in doing the very work he was assigned to do. *See, Skinner* v *G & T Realty Corp.* of *New York,* 232 AD2d 627 (2d Dept 1996).

There is also no factual question raised as to whether Eighth is responsible for allegedly inadequate lighting in the vicinity of plaintiff's accident, since plaintiff has not attributed his accident to "inadequate lighting," and there is no real evidence that the lighting was "inadequate."

Since plaintiff has failed to show that Eighth had actual or constructive knowledge of any dangerous condition, and has not alleged that Eighth exercised any supervisory control over plaintiff's work, he has failed to raise a factual issue so as to retain his Labor Law § 200, and common-law negligence claims.

C. Labor Law § 241(6)

A&T and Eighth have conceded that plaintiff has stated claims under Labor Law § 241(6), and so, the portions of their respective motion and cross motion which seek dismissal of the Labor Law § 241(6) claims have been withdrawn by stipulation.

D. Common-Law Indemnification

The part of A&T's motion seeking dismissal of those portions of the third-party action sounding in common-law indemnification is granted. Under Workers Compensation Law § 11, employers cannot be liable to a third party for contribution or indemnification based on injuries sustained by the employee acting within the scope of his or her employ unless it is proven that the employee sustained a "grave injury" as defined in the statute. *Id.*; see, *also*, *Castro v United Container Machinery Group, Inc.*, 96 NY2d 398 (2001). Eighth has now conceded that plaintiff's injuries do not meet the strict criterion for Worker's Compensation Law § 11, and so, this portion of A&T's motion is granted.

E. Contractual Indemnification

In its cross motion, Eighth has asked for, among other things, summary judgment on its claim against A&T for contractual indemnification. A&T has cross-moved for summary judgment dismissing Eighth's contractual indemnification and contribution claims.

The contract between Eighth and A&T is dated December 8, 2000, and contains a clause stating that A&T is to indemnify Eighth, and hold it harmless, for any claims arising from A&T's work "to the fullest extent permitted by law." Ex A. to Eighth's Notice of Cross Motion, ¶ 9.12.

It is well-settled that "'[a] party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances"' [citation omitted]." Kennelty *v Darlind* Construction, Inc., 260 AD2d 443, 446 (2d Dept 1999).

This court has already found Eighth to be free of negligence with regard to plaintiff's accident, taking into consideration A&T's arguments as well as plaintiff's. Consequently, A&T cannot avoid the reach of its contractual indemnification clause based on a theory that Eighth was negligent, so as to deny Eighth recovery under General Obligations Law § 5-322.1. *See*, Correia *v* Professional Data Management, Inc., 259 AD2d 60, 65 (1st Dept 1999)("[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability").

Worker's Compensation Law § 11 contains language which permits contractual (as opposed to common-law) indemnification, under certain circumstances, to wit:

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

Thus, Eighth may only succeed on its claim for contractual indemnification if it is established that the contract between it and A&T was "entered into" prior *to* plaintiff's accident. *Ferri v 63 Madison Associates, L.P.*, 280 AD2d 419 (1st Dept 2001).

A&T insists that this cannot have been the case. The contract is dated December 8, 2000, the date of plaintiff's accident. Plaintiff was injured at approximately 10:00 a.m. in the morning. It is undisputed that A&T prepared the contract, with the contract date of December 8, 2000. The contract was then forwarded to Eighth for signature. According to A&T, "[i]t therefore stands to reason that [Eighth] did not execute or enter into [the contract] 'prior to the accident or occurrence.' Moreover, said contract was clearly not 'written' prior to the accident.'' Zotos Aff., at 15.

The case is not so clear. A&T has produced no evidence as to when it wrote the contract, when the contract was forwarded to Eighth, or as to when Eighth signed the contract. It is all speculation at this point to assume that the contract had not yet been signed by 10:00 a.m. on December 8, 2000, merely because A&T had provided on the document that it was to be effective as of that date. A&T will have to make a better showing if it is to prove

that there was no valid contractual indemnification provision in effect at the time of plaintiff's accident.

F. Failure to Obtain Insurance

Eighth seeks partial summary judgment against A&T for A&T's failure to procure insurance which would have covered Eighth for the claims brought against it in the instant action.

The contract between A&T and Eighth required A&T to procure general liability insurance on behalf of Eighth. A&T provided Eighth with a Certificate of Insurance from Pennsylvania Insurance Company (Pennsylvania), listing Eighth as an additional insured, under, inter alia, a general liability policy numbered OJR591363. Ex. D, Aff. of DeMatteo. However, despite discovery demands, A&T has thus far failed to produce a copy of the policy itself.

By letter dated April 27, 2001, Eighth wrote to Pennsylvania requesting that it defend and indemnify Eighth in the present suit. Eighth does not say whether it ever received a response to this letter, but claims that A&T's refusal to provide a copy of the policy has somehow curtailed its ability to pursue Pennsylvania as a potential insurer under the policy listed on the Certificate of Insurance. If A&T breached its obligation to procure the required coverage, it will be liable to Eighth for all of Eighth's out-of-pocket expenses incurred as a result of the breach, including premiums, deductibles, co-payments and increased future premiums.

Inchaustegui v 666 5th Avenue Limited Partnership, 96 NY2d 111 (2001); see also, *Wong* v New *York* Times Co., 297 AD2d 544 (1st Dept 2002).

A&T argues that Eighth cannot win on its claim for breach of contract to procure insurance for the same reason that it cannot win on its claim for contractual indemnification: because there was no valid contract entered into prior to plaintiff's accident which would require the procurement of insurance.

It has previously been established that there is an issue of fact as to when the contract was actually executed, although, by its terms, the contract was to be effective as of December 8, 2000. A&T would not have been required to procure, and could not have procured, insurance which would have covered plaintiff's accident, if the actual contract was not executed until after the accident. Therefore, there is a question of fact as to whether there was a contract to procure insurance as of the date of plaintiff's accident, and Eighth's cross motion must be denied.

However, based on the evidence produced thus far, it appears that A&T failed to procure insurance naming Eighth as an additional insured, whenever the contract was actually signed. As of this date, A&T has only produced the Certificate of Insurance which, on its face, declares that it is issued "as a matter of information only, and confers no rights upon the certificate holder." Ex. D,

Aff. of DeMatteo. Despite many opportunities to do so, A&T has failed to produce a copy of the insurance policy. It is well established that "[a] certificate of insurance is evidence of a contract for insurance, but is not conclusive proof that the contract exists and not, in and of itself, a contract to insure [citations omitted]." *Penske Truck Leasing Co., L.P. v Home Insurance Company*, 251 AD2d 478, 479 (2d Dept 1998); *see also, St. George v W.J. Barney Corporation*, 270 AD2d 171 (1st Dept 2000). Under these circumstances, if A&T fails to provide proof of the existence of the contract of insurance, Eighth will be entitled to partial summary judgment on its breach of contract claim, should it be established that a duty to procure insurance which would have covered plaintiff's accident existed. *See, Buccini V 1568 Broadway Associates*, 250 Ad2d 466 (1st Dept 1998).

111. Conclusion

Accordingly, it is

ORDERED that the remaining portion of third-party defendant A&T's motion[2] (mot. seq. no. 002), for summary judgment dismissing those portions of the third-party action sounding in common-law indemnification is granted, and these claims are dismissed;

and it is further

[2]The portion of A&T's motion to dismiss plaintiff's claims under Labor Law § 241(6) has been withdrawn by stipulation.

ORDERED that defendant/third-party plaintiff Eighth's cross motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 200[3], and common-law negligence claims, granting Eighth contractual indemnification over and against A&T, and granting partial summary judgment on Eighth's breach of contract claim against A&T for failure to procure insurance, is granted solely as to the dismissal of the claims under Labor Law § 200 and common-law negligence, and the cross motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim is granted; and it is further

ORDERED that A&T's cross motion for summary judgment dismissing the contractual indemnification and contribution claims brought against it by Eighth is denied; and it is further

ORDERED that A&T is to produce a copy of the policy of insurance issued by Pennsylvania Insurance Company, or a statement to the effect that no such policy exists, within 20 days of service of this order with notice of entry.

Dated: 2/28/07

MARILYN SHAFER J.S.C.

J.S.C.

Check one: [1 **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

[3]The portion of Eight's cross motion to dismiss plaintiff's claims under Labor Law § 241(6) has been withdrawn by stipulation.