At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of June 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,
Justice.

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SANG HWAN OH,

Plaintiff,

Index No. 21668/04

- against -

358-74 VERNON AVENUE HOUSING DEVELOPMENT FUND CORPORATION, et al.,

Defendants.

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R & J BRICK MASONRY INC., et ano.,

Third-Party Plaintiffs,

Index No. 75138/05

- against -

PETRA B CORPORATION,

Third-Party Defendant.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5
_____Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant 358-74 Vernon Avenue Housing Development Fund Corporation (Vernon) and defendants/third-party plaintiffs R & J Brick Masonry Inc. (R&J) and J & R Brick Masonry Inc. (J&R) move for an order, pursuant to CPLR 3212, granting summary judgment to R&J and Vernon on their claims for contractual indemnity and failure to procure insurance against third-party defendant Petra B Corporation (Petra), and awarding them defense costs against Petra. In the alternative, movants seek an order granting summary judgment dismissing plaintiff's complaint and all claims and cross-claims against them.

Background

This case arises from an accident which occurred on July 20, 2001 at a construction site in Brooklyn, New York. At the time of the accident, plaintiff Sang Hwan Oh was employed by Elite Construction, a.k.a. Joe Hop Contracting Inc., ("Elite"), constructing senior citizen housing at 358-74 Vernon Avenue (the premises). Defendant Vernon, the owner of the premises, hired defendant/third-party plaintiff R&J as the general contractor. Third-party defendant Petra was hired by R&J, pursuant to a written contract, as a sub-contractor on the project.

On plaintiff's first day at the site, plaintiff was repairing gaps in installed sheetrock, using an electric drill, when the accident occurred. Plaintiff arrived at work at approximately 7:30 A.M. and met the foreman, who directed him to "mend the broken sheetrocks." Plaintiff states that he looked around for a ladder or foot step to reach the upper

parts of the walls, which were approximately eight feet high. Plaintiff did not find one. According to the plaintiff, he may have asked the foreman where he could find a ladder, and was told to look for "whatever [he] could use for that purpose on [his] own." Accordingly, plaintiff stacked together two partially filled five-gallon paint cans which he found in the room. As plaintiff was standing on the stacked cans attaching a piece of sheetrock to the wall, the upper can fell causing plaintiff to fall. Plaintiff fell on the lower can, which remained in place on the floor, striking it with his back and sustaining injuries.

Plaintiff testified that there was nothing else in the room in which he was working which could have been used to stand on, and that he did not check outside of that apartment for a ladder. When he was brought to the construction site that day there were no ladders in the vehicle. Plaintiff stated that while he was unsure whether Elite had ladders at the site, he did observe other workers using a ladder in a different room of the same apartment. The workers in the other room were not Elite employees. Plaintiff indicated that he did not ask them to allow him to use the ladder "because [he] could see they were using them." In a sworn affidavit, submitted in opposition to defendant's application, plaintiff avers: "About three of the painters were working on ladders. I did not ask any of the painters for their ladders, because it was obvious to me that the ladders were being used, and I knew that the ladders did not belong to my employer. None of the ladders were available to me."

On July 9, 2004, plaintiff commenced this action against Vernon, R&J and J&R, alleging violations of Labor Law §§ 200, 240 (1) and 241 (6). On or about February 8, 2005,

R&J and J&R commenced a third-party action against Petra for contractual indemnification and failure to procure insurance. On July 26, 2006 plaintiff filed a note of issue. Thereafter, or about October 12, 2006, Vernon, R&J and J&R filed the instant motion.[1]

Discussion

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 the 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]). 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]). "The duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or

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[1]By Order of September 7, 2006 (Ruditzky, J.), the deadline for the parties to file summary judgment motions was extended to October 26, 2006.

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). Furthermore, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]). However, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). Rather, only those accidents proximately caused by a Labor Law § 240 (1) violation will result in the imposition of liability under the statute (*Blake v Neighborhood Hous. Services of New York City*, 1 NY3d 280, 287 [2003]).

To establish a violation of Section 240 (1), a plaintiff must show that he was subject to particular risk because of "the relative elevation at which the task [had to] be performed or at which materials or loads [had to] be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

Movants argue that plaintiff's Labor Law § 240 (1) claim must be dismissed on the ground that plaintiff was the sole proximate cause of his accident (*see e.g. Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 291-292 [2003]). Defendants argue that plaintiff caused the accident by "[choosing to stand] on two cans when ladders were readily available" (*see e.g. Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005] [plaintiff's use of a bucket, instead of "readily available" ladders, was sole proximate cause of accident]; *Misirlakis v East Coast Entertainment Props.*, 297 AD2d 312, 313 [2002]

[plaintiff's "unnecessary and unforeseeable act of climbing onto the dumpster and ascending the fire escape" was sole proximate cause of accident], *lv denied in part and dismissed in part* 100 NY2d 637 [2003]).

On a motion for summary judgment, every inference must be drawn in favor of the non-moving party (*see e.g. Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2003]; *Akseizer v Kramer*, 265 AD2d 356, 356 [1999]). In this case, plaintiff has raised a genuine question of fact as to whether there were any ladders readily available on the site and whether plaintiff's employer failed to provide him with adequate safety equipment in violation of Labor Law § 240 (1) (*see e.g. Makaj v Metropolitan Transp. Auth.*, 18 AD3d 625, 626-627 [2005]; *Juncal v W 12/14 Wall Acquisition Assocs., LLC*, 15 AD3d 447, 449 [2005]). Contrary to defendants' assertion, plaintiff did not testify that he knew "very well" that ladders were available. Instead, plaintiff testified that he was not aware of any available ladders, as he believed the ladders at the site were all in use. Moreover, plaintiff indicated that he believed that any ladders on site did not belong to his employer, Elite. Finally, plaintiff recalls that his foreman told him to use "whatever" he could find to perform the sheetrock work. Accordingly, if the plaintiff had no other option than to use the paint cans, then he could not have been the sole proximate cause of this accident (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554[2006]; *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY2d 35, 39-40 [2004]).

Therefore, that part of defendants' motion seeking summary judgment dismissal of plaintiff's Labor Law § 240 (1) claim is denied.

Common Law Negligence/Labor Law § 200

Labor Law § 200 codifies common law negligence rules and, thus, only applies to a defendant who exercised actual supervisory control over the work in question, or who created or had actual or constructive notice of the dangerous condition (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Linares v United Mgt. Corp.*, 16 AD3d 382, 384 [2005]).[2] "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under Labor Law § 200" (*id.*).

Movants argue that plaintiff's Labor Law § 200 claim must be dismissed as the uncontroverted evidence shows that defendants did not exercise supervisory control over plaintiff's work, and did not create or have notice of the dangerous condition. Plaintiff does not oppose that portion of defendants' motion. Moreover, plaintiff testified that he received instructions only from his supervisor, an Elite employee. In addition, a representative of R&J denied any knowledge of Elite's distribution of equipment to its employees and was unaware

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[2]Labor Law § 200 provides, in relevant part:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

if any complaints were made about the job site while Elite was working at the premises. That portion of defendants' motion as seeks summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims is granted.

Labor Law § 241 (6)

Labor Law § 241 (6) was enacted to provide construction workers with reasonable and adequate safety protections, and places a nondelegable duty upon owners and general contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502).[3] "In order to recover on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards" (*Handlovic v Bedford Park Dev., Inc.*, 25 AD3d 653, 654 [2006] [citing *Ross*, 81 NY2d at 503-505], *lv denied* 7 NY3d 701 [2006]). Defendants argue that plaintiff has failed to allege the requisite specific, concrete and applicable regulation. Plaintiff does not oppose this portion of the motion.

In his bill of particulars plaintiff alleges violations of the following Industrial Code sections: 12 New York Code of Rules and Regulations ("NYCRR") §§ 23-1.7, 23-1.7 (b),

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[3]Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

23-1.7 (d), 23-1.16, 23-1.21. None of these regulations gives rise to liability in this case. 12 NYCRR § 23-1.7 (b) relates to hazardous openings or bridge and overpass construction. 12 NYCRR § 23-1.7 (d) addresses slippery conditions. 12 NYCRR §§ 23-1.16 (safety belts, harnesses, tail lines and lifelines) and 23-1.21 (ladders) regulate the use of devices which are not at issue here (*see e.g. D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 108 [2002]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531, 532 [1999]). Accordingly, that portion of the motion as seeks dismissal of plaintiff's Labor Law § 241 (6) claim is granted.

Indemnification

R&J and Vernon argue that they are entitled to indemnification from Petra based upon common law and contractual indemnification. They contend that it is "undisputed that Petra required that Elite provide ladders in connection with its work." They argue that if plaintiff's accident was caused by Elite's failure to provide him with a ladder, then Petra, the entity who hired Elite, would be responsible. Alternatively, they ask for an order of conditional contractual indemnification against Petra. In opposition, Petra argues that summary judgment on indemnification should be denied as premature.

To establish a claim for common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident or . . . had the authority to direct, supervise, and control the

work giving rise to the injury" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2005] [internal quotation marks and citations omitted]). With respect to contractual indemnification, the parties' agreement reads, in pertinent part:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor . . . and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but *only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . ."

Summary judgment on indemnification is generally premature where "there has been no determination as to the proximate cause of injury or who was liable for the accident" (*see e.g. Iurato v City of New York*, 18 AD3d 247, 248 [2005], *lv dismissed* 6 NY3d 806 [2006]). In this case Petra does not deny that it hired plaintiff's employer, Elite. However, it has not yet been determined whether Elite failed to provide adequate safety devices for its employees. Accordingly, there is a question as to whether the accident was caused by any negligence by Elite. Moreover, a representative of Petra testified that Petra had no authority to direct or control the work in question, or to stop the work based upon any unsafe condition. In addition, there is no evidence that Petra had sufficient control over plaintiff's work to give rise to a common law duty to indemnify in the absence of negligence.

Accordingly, the request for summary judgment on the contractual and common law indemnification claims is denied as premature.

Nonetheless, in opposition, Petra does not deny the validity of the contractual provision requiring it to indemnify R&J and Vernon in the event that negligence by Petra or one of its subcontractors is found to have caused plaintiff's injuries.[4] Accordingly, movants' request for conditional contractual indemnification is granted.

Insurance

The contract between Petra and R&J required Petra to obtain a "Broad Form Comprehensive General Liability Insurance" policy naming R&J and Vernon as additional insureds. Movants argue that Petra breached the contract by failing to procure the required insurance. In support of their contention, they submit a letter, dated September 6, 2005, from Petra's insurance company disclaiming coverage for plaintiff's accident, based upon a provision excluding coverage for "bodily injury to any employee of any insured" arising during the course of employment. Movants also submit a letter from R&J and Vernon to Petra, dated April 10, 2006, tendering their defenses and demanding indemnification.

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[4]Petra does not contend that this contractual provision violates General Obligations Law § 5-322.1, which prohibits indemnification agreements that require a subcontractor to indemnify the general contractor for its own negligence (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]; *Carriere v Whiting Turner Contr.*, 299 AD2d 509, 511 [2002]). Even if the provision could be read to require Petra to indemnify Vernon or R&J for their own negligence, the clause nonetheless limits Petra's obligation to that "permitted by law" (*see McGuinness v Hertz Corp.*, 15 AD3d 160, 161-162 [2005]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [2002], *lv denied* 99 NY2d 511 [2003]).

An agreement to procure insurance coverage "is clearly distinct from and treated differently from the agreement to indemnify" (*McGill v Polytechnic Univ.*, 235 AD2d 400, 401-402 [1997]; *see also Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]; *Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [1999]; *Mathew v Crow Constr. Co.*, 220 AD2d 490, 491 [1995]; *Roblee v Corning Community College*, 134 AD2d 803, 804 [1987], *lv denied* 72 NY2d 803 [1988]). A determination of a party's liability for failure to procure insurance as required by a contract "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*McGill*, 235 AD2d at 402; *see also Kennelty*, 260 AD2d at 445; *Mathew*, 220 AD2d at 491).

In its opposition, Petra does not address movants' contention that it failed to obtain the broad form comprehensive general liability insurance required by their contract, and offers no proof that it obtained the insurance coverage required (*cf. e.g. Kennelty*, 260 AD2d at 445 [submission of certificate of insurance not sufficient to show that party purchased the required insurance]; *McGill*, 235 AD2d at 402 [same]). Accordingly, that part of R&J and Vernon's motion seeking summary judgment on its breach of contract claim is granted. Movants, however, do not address whether they are covered by any other insurance policy, which would limit their damages to their out of pocket costs (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 116 [2001]). Therefore, no determination as to damages can be made at this time. It, therefore, is

ORDERED, that the motion for summary judgment by Vernon, R&J and J&R is granted to the extent that: (1) plaintiff's common law negligence, Labor Law §§ 200 and 241 (6) claims are dismissed; (2) R&J and Vernon shall have a conditional judgment for contractual indemnification against Petra; and (3) R&J and Vernon's shall have judgment as to liability against Petra on their breach of contract claim, with damages to be determined, and the motion is otherwise denied; and it is further

ORDERED, that the case be over-ridden to the Jury Co-ordinating Part in due course.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. GLORIA DABIRI