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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Andrzej Konieczny

INDEX NO. 111640/05

MOTION DATE

- v -

MOTION SEQ. NO. 004

MOTION CAL. NO.

MokLam Enterprises, Inc. et al.

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

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 004 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendant Janson Design Group, LLC's (Janson) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it is granted, and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/12/09

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

Andrzej Konieczny,

Index No.: 111640/05

Plaintiff,

DECISION/ORDER

-against-

Moklam Enterprises, Inc., Alcon Building Group, Inc., Rockstar Games, Inc., Take-Two Interactive Software, Inc. and Janson Design Group, LLC,

Defendants.

Alcon Building Group, Inc.,

Index No.: 590300/06

Third-Party Plaintiff,

-against-

Michael Schondorf, Inc. and Michael Schondorf, Inc., d/b/a SCHONDORF ELECTRIC CORP.,

Third-Party Defendants.

Take-Two Interactive Software, Inc.,

Second Third-Party Plaintiff,

Index No.: 590541/06

-against-

Federation Development Corporation,

Second Third-Party Defendant.

Moklam Enterprises, Inc., on its own account and a/a/o Mt. Hawley Insurance Company,

Index No.: 590244/08

Third Third-Party Plaintiff,

-against-

Pacific Indemnity Company, Take-Two Interactive Software, Inc. and Rockstar Games, Inc.,

Third Third-Party Defendants.

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Edmead, J.:

MEMORANDUM DECISION

Motion sequence numbers 003, 004, 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages sustained by an electrician when he fell from a ladder while working at a building located at 622 Broadway, New York, New York on March 30, 2004.

In motion sequence number 003, defendant/third-party plaintiff Alcon Building Group, Inc. (Alcon) moves, pursuant to CPLR 3212, for (a) summary judgment dismissing the complaint as against it in its entirety and for (b) summary judgment in its favor on its third-party action against third-party defendants Michael Schondorf, Inc. and Michael Schondorf, Inc., d/b/a Schondorf Electric Corp. (together, Schondorf).

In motion sequence number 004, defendant Janson Design Group, LLC (Janson) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims asserted as against it.

In motion sequence number 005, plaintiff Andrzej Konieczny moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability under *Labor Law* § 240 (1) against defendants Moklam Enterprises, Inc. (Moklam), Alcon, Rockstar Games, Inc. (Rockstar), Take-Two Interactive Software, Inc. (Take-Two) and Janson.

In motion sequence number 006, second third-party defendant Federation Development Corporation (Federation) moves, pursuant to CPLR 3212, for summary judgment dismissing Take-Two's second third-party complaint, as well as all cross claims against it.

BACKGROUND

On the date of the accident, defendant and third third-party plaintiff Moklam was the owner of the building where the accident took place (the premises). Defendants and third third-party defendants Rockstar and Take-Two were lessees of the sixth floor of the premises. Rockstar is a wholly owned subsidiary of Take-Two. Defendant Janson, an architectural/acoustic design firm, was retained by Rockstar, pursuant to a design service agreement, for the design, construction and implementation of a new audio post-production room (sound studio project) for Take-Two, which would occupy approximately 800 to 1,000 square feet on the corner of the fifth floor of the premises.

Janson hired defendant and third-party plaintiff Alcon to serve as general contractor on the sound studio project. Janson had the power to terminate Alcon's contract for non-performance, as well as to stop the work if it came to its attention that an unsafe method was being used at the work site, until such time as it was corrected. Alcon hired third-party defendant Schondorf to provide the electrical work on the sound studio project. Plaintiff was an electrician employed by Schondorf.

Second third-party defendant Federation, a design and build firm, was hired, pursuant to a construction management agreement, by Take-Two to provide construction management services for a wholly separate renovation project at the premises. This project entailed overseeing the new build of offices for Take-Two on the fourth, fifth and sixth floors of the premises (office build project). Federation was not involved in that part of the fifth floor renovation that was related to the sound studio project.

At the time of plaintiff's accident, plaintiff was assigned the job of connecting air

conditioner compressors on the roof. These compressors were to service the sound studios on the fifth floor. The compressors were approximately 10 feet off the ground and sat on elevated platforms. In order to perform his work, it was necessary for plaintiff to utilize an eight-foot A-frame ladder, which was supplied by his employer, Schondorf. Plaintiff testified that he checked the condition of the ladder before bringing it up to the roof, and that it seemed in good condition, with no defects. Plaintiff also noted that he found the roof surface to be level and dry, with no cracks. After engaging the side braces of the ladder and making sure that the ladder was in a locked position with the legs fully extended, plaintiff climbed approximately five feet up the ladder. Plaintiff's helper did not hold the ladder, but rather was standing approximately 10 feet away from where plaintiff was working. Plaintiff did not request that his helper hold the ladder for him.

Plaintiff testified that, after working on the ladder for approximately five to 10 minutes, at which time he was preparing the wiring to be connected to one of the compressors, he extended his arm upward to the compressor unit. The ladder then shook and swerved, causing plaintiff to lose his balance and fall. Plaintiff specifically stated that "it shook as I flew. I flew and the ladder collapsed" (Federation Notice of Motion, Exhibit K, Konieczny Deposition, at 160-161). As he fell, plaintiff struck the edge of an air conditioning unit on the roof and sustained injuries. Plaintiff maintained that he does not know what caused the ladder to shake and him to fall, but that something must have been wrong with the ladder.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS (motion sequence numbers 003, 004 and 005)

Plaintiff moves for summary judgment in his favor on the issue of liability under Labor Law § 240 (1) as against defendants. Alcon and Janson move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... 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 designed to prevent those types of accidents in which the scaffold ... 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe College*, 12 AD3d 261, 262 [1st Dept 2004]). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed (internal citations omitted)" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Initially, it should be noted that Moklam, as owner of the premises where plaintiff's accident occurred, and Alcon, as general contractor of the sound studio project, fall within the purview of Labor Law § 240 (1) for plaintiff's injuries. However, it must be determined as to whether Rockstar and Take-Two, as lessees of the subject premises, also fall within the purview of the statute. A lessee in possession of property under construction is deemed to be an "owner" for purposes of liability under Article 10 of New York's Labor Laws (*Kane v Coundorous*, 293 AD2d 309, 312 [1st Dept 2002]). For the purposes of the Labor Law, the term "owner" is not limited to the titleholder, but it "encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner by contracting to have work performed for his benefit" (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see Kwang Ho Kim v D & W Shin*

Realty Corporation, 47 AD3d 616, 618 [2d Dept 2008]).

Here, evidence in the record indicates that Rockstar and Take-Two not only had an interest in the property at issue, but that they also contracted to have work performed for their benefit. As such, Rockstar and Take-Two cannot escape liability under Labor Law § 240 (1) merely because they are lessees rather than titleholders of the premises (*see Kane v Coundorous*, 293 AD2d at 311; *see Tate v Clancy-Cullen Storage Company, Inc.*, 171 AD2d 292, 295 [1st Dept 1991]).

As to defendant Janson, in the absence of any contractual right to supervise and control the construction work, as well as site safety, Janson, as the architect, cannot be held liable under the statute (*see Walker v Metro-North Commuter Railroad*, 11 AD3d 339, 341 [1st Dept 2004]; *Davis v Lenox School*, 151 AD2d 230, 231 [1st Dept 1989]). However, Janson may be liable for plaintiff's injuries in the event that it is determined that it was an agent of the owner. When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains "'the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (*Walls v Turner Construction Company*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*id.* at 864; *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d at 293 [defendant lacked the requisite indicia of agency, where, although defendant coordinated home repair work for its borrowers, it did not involve itself with the details of how individual contractors would perform their jobs]).

Here, a review of the record indicates that Janson did not have sufficient authority to supervise and control the injury-producing work at issue, so as to impose liability on it as a statutory agent pursuant to Labor Law § 240 (1) (*see Lazarou v Turner Construction Company*, 18 AD3d 398, 399 [1st Dept 2005] [Labor Law § 240 (1) claim dismissed as against defendant where record established that defendant did not have sufficient supervision or control over the injury-producing work]).

Dennis Janson (Dennis), who testified on behalf of Janson, stated that the services rendered by Janson did not include any work on the roof of the building, where plaintiff's accident took place, and that all of Janson's services were limited to the fifth floor of the building. In addition, Dennis stated that Janson was not responsible for the design and installation of air conditioning at the premises, and that Janson employees have never been present on the roof of the building. Further, Dennis maintained that Janson did not have the authority to direct, supervise or control the construction activities or means and methods of construction at the project, and that it provided no materials or laborers at the work site. To that effect, Janson hired Alcon to serve as general contractor in charge of the actual construction of the sound studios.

Plaintiff argues that, pursuant to the design services agreement with Rockstar, Janson had the authority to direct and supervise the means and methods of the construction of the sound studios. In addition, plaintiff asserts that Janson was under a general contractual obligation to ensure compliance with safety regulations. "'[L]iability may not be imposed upon an engineer, who is engaged to assure compliance with construction plans and specifications, for an injury sustained by a worker, unless the engineer commits an affirmative act of negligence or such

liability is imposed by a clear contractual provision'" (*Prado v Sidney B. Bowne & Sons*, 207 AD2d 875, 875-876 [2d Dept 1994] quoting *Brooks v A. Gatty Service Company*, 127 AD2d 553, 554 [2d Dept 1987]).

Here, although plaintiff and Janson put forth, as evidence in support of their motions, two different allegedly unsigned design services agreements between Rockstar and Janson, under either agreement, the general responsibility assigned to Janson to oversee the means and methods associated with the construction of the sound studios and to ensure compliance with safety regulations for the project does not rise to a level sufficient to support the imposition of liability on an agency theory (*see Smith v McClier Corporation*, 22 AD3d 369, 371 [1st Dept 2005]). Thus, plaintiff is not entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim as against Janson. Accordingly, Janson is entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against it.

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Hernandez v Bethel United Methodist Church of New York*, 49 AD3d 251, 252 [1st Dept 2008], quoting *Montalvo v J. Petrocelli Construction, Inc.*, 8 AD3d 173, 174 [1st Dept 2004]; *see also Rieger v 303 East 37 Owners Corporation*, 49 AD3d 347, 347 [1st Dept 2008] [where it was undisputed that the ladder buckled and tipped over to one side, propelling plaintiff to the concrete floor below, Court granted summary judgment to plaintiff on the issue of liability under Labor Law § 240 (1)]). In addition, "'[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect from falling were

absent'" (*Hernandez v Bethel United Methodist Church of New York*, 49 AD3d at 252-253, quoting *Orellano v 29 East 37th Street Realty Corporation*, 292 AD2d 289, 291 [1st Dept 2002]).

"Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]). "[W]here the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240 (1), and the burden shifts to the defendant" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *see also Kosavick v Tishman Construction Corporation of New York*, 50 AD3d 287, 288 [1st Dept 2008] ["once a plaintiff makes a prima facie showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device," shifting the burden to the defendant to establish that there was no violation of the statute and plaintiff was the sole proximate cause of his accident]).

However, "[w]hen the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d at 1188).

Here, as plaintiff has established the ladder failed to support him while he was performing his work, plaintiff has sufficiently demonstrated prima facie that defendants violated Labor Law § 240 (1) (*see Kosavick v Tishman Construction Corporation*, 50 AD3d at 289 [defendant's failure to properly secure the ladder so as to hold it steady and erect during its use constituted a violation of Labor Law § 240 (1)]). In addition, defendants did not offer sufficient

evidence to refute plaintiff's showing or to raise a bona fide issue as to how the accident occurred (*see Pineda v Kechek Realty Corporation*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corporation*, 118 AD2d 485, 486 [1st Dept 1986]).

It is also of no consequence that plaintiff's accident was not witnessed, as "[t]here is no bar to granting partial summary judgment as to liability, on plaintiff's statement alone, since no bona fide issue as to his credibility exists" (*Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]; *Perrone v Tishman Speyer Properties, L.P.*, 13 AD3d 146, 147 [1st Dept 2004] [the fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment on his behalf]).

In opposition to plaintiff's motion and in support of that part of their motions to dismiss plaintiff's Labor Law § 240 (1) claim against them, defendants assert that plaintiff is the sole proximate cause of his accident, because he did not have a co-worker hold the ladder for him, nor did he utilize any other available safety devices such as a scaffold, safety harness, lifeline or hard hat. Defendants also maintain that plaintiff's accident occurred through no fault of theirs, as plaintiff simply overreached and lost his balance.

Where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006] [plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; *Montgomery v Federal Express Corporation*, 4 NY3d 805, 806 [2005]; *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices

and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d at 290).

However, where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]). In such a case, comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dos Santos v State of New York*, 300 AD2d 434, 434 [2d Dept 2002]; *Jamison v GSL Enterprises, Inc.*, 274 AD2d 356, 361 [1st Dept 2000] [Labor Law § 240 (1) applied although plaintiff's injuries were caused in part by his fateful decision to abandon a tilting scaffold in order to escape to the roof]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of New York*, 49 AD3d at 253, quoting *Blake v Neighborhood Housing Services of New York City*, 1 NY3d at 290).

Here, the fact that defendants' actions or omissions were a proximate cause of plaintiff's injuries is established as a matter of law by the undisputed fact that, while subjected to an elevation-related risk, plaintiff fell as a result of an unsecured ladder. In addition, plaintiff was not supplied with any safety devices which may have prevented the ladder from tipping over (*see*

Ranieri v Holt Construction Corporation, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Peralta v American Telephone and Telegraph Company*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240 (1), notwithstanding claims of comparative negligence or unsupported claims that plaintiff's conduct was the sole proximate cause of her injuries]). Moreover, plaintiff's co-worker "is not a safety device contemplated by the statute" (*McCarthy v Turner Construction, Inc.*, 52 AD3d 333, 334 [1st Dept 2008]). Nor, even if plaintiff had "disobeyed an instruction" to have his co-worker hold the ladder for him, would the "liability for failing to provide adequate safety devices be reduced" (*id.*).

Finally, contrary to defendants' assertion, this is also not a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 87 [1st Dept 2003]; *DePalma v Metropolitan Transportation Authority*, 304 AD2d 461, 461 [1st Dept 2003] [Court rejected a recalcitrant worker defense where there was no evidence that plaintiff's decedent had refused to use a safety harness, and the fact that safety harnesses may have been available at the work site was insufficient to allow defendants to escape Labor Law § 240 (1) liability]).

Here, there is no evidence in the record to indicate that plaintiff was given any specific

instruction to ask his co-worker to hold the ladder, nor was he ever offered any safety devices which he refused to utilize. Thus, plaintiff is entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim against defendants Moklam, Alcon, Rockstar and Take-Two. Accordingly, Alcon is not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against it.

ALCON AND JANSON'S MOTIONS FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW §§ 200 AND 241 (6) CLAIMS AS AGAINST THEM

Initially, it should be noted that plaintiff appears to have abandoned his common-law negligence and Labor Law §§ 200 and 241 (6) claims as against Alcon and Janson, as he does not put forth any argument or evidence whatsoever in his opposition papers to refute Alcon and Janson's assertions that they are entitled to summary judgment dismissing these claims as against them (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

When a claim arises out of defects or dangers in the methods or materials of the work, as in the instant case, recovery under Labor Law § 200 requires that "it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]). Mere "'general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for

common-law negligence and under Labor Law § 200 [citations omitted]'" (*Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]). "'[T]he duty to provide a safe place to work [under Labor Law § 200] is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Ortega v Puccia*, 57 AD3d at 62, quoting *Persichilli v Triborough Bridge & Tunnel Authority*, 16 NY2d 136, 145 [1965]).

Here, the allegedly defective ladder should be viewed as a device involving the methods and means of work, and thus, Labor Law § 200 imposes no liability absent evidence of Alcon and Janson's authority to supervise and control the work (*id.*). As put forth by Alcon and Janson, testimonial evidence in the record indicates that all of plaintiff's equipment, including the subject ladder, was provided by his employer, Schondorf. In addition, neither Alcon or Janson supervised or directed plaintiff in the manner that he performed his electrical work on the project. Thus, Alcon and Janson are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against them.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIM

Defendants Alcon and Janson are persuasive in their argument that no alleged Industrial Code violation proximately caused plaintiff's accident in this case. To this effect, these defendants argue that plaintiff testified that he checked the condition of the ladder, and that it seemed in good condition, with no defects, and that he found the roof surface to be dry and level. Defendants also maintain that there were additional safety devices available for plaintiff's use. In addition, as to the OSHA violations asserted by plaintiff in his bill of particulars, "it has been held that violations of OSHA standards do not provide a basis for liability under Labor Law §

241 (6)" (*Vernieri v Empire Realty Company*, 219 AD2d 593, 598 [2d Dept 1995]). Thus, Alcon and Janson are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against them.

It should be noted that Janson also moves for summary judgment dismissing all cross claims against it. However, as Janson has not identified these cross claims, nor has it put forth any evidence or argument to sustain its burden, Janson is not entitled to summary judgment dismissing all cross claims against it.

ALCON'S THIRD-PARTY CLAIMS AGAINST SCHONDORF (motion sequence number 003)

Defendant and third-party plaintiff Alcon moves for summary judgment in its favor on its third-party claims against third-party defendant Schondorf for common-law and contractual indemnification and failure to procure insurance.

ALCON'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST SCHONDORF

Schondorf, an electrical subcontractor, was working at the premises pursuant to a purchase order, dated December 3, 2003, placed with it by Alcon (the purchase order). The purchase order states, in pertinent part, that:

> [Schondorf] shall be responsible for and hereby indemnify and hold Alcon harmless from and against all claims, losses, costs, damages or expenses (including without limitation reasonable attorney's fees), made on account of any actual or alleged violation or infringment ... arising out of the Work or methods, materials or other things used by [Schondorf] in the Work

(Alcon Notice of Motion, Exhibit D, Schondorf Purchase Order, at 2). The purchase order also required that Schondorf maintain a commercial liability insurance policy naming Alcon as an additional insured on the policy.

To the extent that Alcon was not protected from and against claims and damages by the

terms and conditions of the purchase order, Alcon was also covered by a separate indemnification agreement with Schondorf for the period of January 1, 2003 through December 31, 2004 (the indemnification agreement). The indemnification agreement set forth, in pertinent part, that:

> [Schondorf] shall indemnify and hold harmless Alcon Builder's Group Inc. and/or their agents and employees including but not limited to the names listed above as additional insureds from and against all claims, damages, losses and the work, provided that any such claim, damage, loss or expense is (A) attributable to bodily injury ... and is (B) caused in whole or in part by any neglect, act or omission by the subcontractor, any sub-tier subcontractor or any one directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by the party indemnified hereunder

(Alcon's Notice of Motion, Exhibit E, Schondorf/Alcon Indemnification Agreement).

Schondorf purchased an insurance policy which named Alcon as an additional insured for the project (Alcon's Notice of Motion, Exhibit F, Certificate of Insurance). This underlying insurance policy, which was issued on June 17, 2003, had a policy period of August 1, 2003 through April 7, 2004 (the Schondorf policy). The Schondorf policy contained a blanket endorsement, which was titled Blanket Additional Insured (Contractors), which provided for coverage for Alcon with respect to liability arising out of Schondorf's work, with any coverage provided by the endorsement to be "excess over any other valid and collectible insurance available to the additional insured" (Alcon's Notice of Motion, Exhibit F, Blanket Additional Insured [Contractors] Endorsement).

Michael testified that Schondorf performed work at the premises pursuant to the purchase order with Alcon. In addition, Robert Schondorf (Robert), vice president and office manager of Schondorf, testified that the indemnification agreement was "for this particular job" (Alcon's

Notice of Motion, Exhibit J, Robert Schondorf Deposition, at 41). Robert also stated that, after discussing it with Michael, Michael authorized him to sign the purchase order on Michael's behalf.

While owners and general contractors owe non-delegable duties under the Labor Law to plaintiffs who are employed at their work sites, these defendants can obtain indemnity contractually and at common law from those responsible for the accident (*see Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 178 [1990]). "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'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 402 [1st Dept 2005]). It is well settled that with respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability under Labor Law § 240 (1) (*De La Rosa v Philip Morris Management Corporation*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82 [1st Dept 2002]).

As there has been no showing to establish that plaintiff's injuries were caused as a result of Alcon's negligence, such that it would be held liable for plaintiff's injuries solely by virtue of its vicarious liability under Labor Law § 240 (1), Alcon may seek contractual indemnification from Schondorf.

Although the purchase order requires a showing of a violation or infringement arising out of Schondorf's work or methods before indemnification is owed by Schondorf to Alcon, which

has not been established herein, pursuant to the indemnification agreement, Schondorf is required to indemnify and hold harmless Alcon from any claims and/or damages attributable in whole or in part by any "act" of Schondorf. Thus, as plaintiff's fall while working from the ladder is to be considered such an "act," Alcon is entitled to summary judgment in its favor on that part of its third-party action seeking contractual indemnification from Schondorf.

ALCON'S COMMON-LAW INDEMNIFICATION AND BREACH OF CONTRACT CLAIMS AGAINST SCHONDORF

As Alcon has not demonstrated that plaintiff sustained a "grave injury," Alcon is not entitled to summary judgment in its favor on its common-law indemnification claim against Schondorf, plaintiff's employer, pursuant to section 11 of the Workers' Compensation Law.

Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

> For 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.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death ... resulting in [conditions net relevant herein].

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

In addition, as evidence in the record indicates that Schondorf obtained the required

insurance on behalf of Alcon, as required under the purchase order, Alcon is not entitled to summary judgment in its favor on that part of its third-party action against Schondorf for failure to procure insurance.

FEDERATION'S MOTION FOR SUMMARY JUDGMENT DISMISSING TAKE-TWO'S SECOND THIRD-PARTY COMPLAINT, AS WELL AS ALL CROSS CLAIMS AGAINST IT (motion sequence number 006)

Federation moves for summary judgment dismissing Take-Two's second third-party complaint, wherein Take-Two asserts causes of action against Federation for common-law indemnification, contribution and contractual indemnification and breach of contract for failure to procure insurance. Plaintiff and Alcon oppose Federation's motion for summary judgment dismissing Take-Two's second third-party action on the grounds that it is untimely. CPLR 3212 (a) provides:

> Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

"In the absence of a court order or rule to the contrary, CPLR 3212 (a) requires summary judgment motions to 'be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown'" (*Filannino v Triborough Bridge and Tunnel Authority*, 34 AD3d 280, 281 [1st Dept 2006]; *Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726 [2004]). Under the standard announced in *Brill v City of New York* (2 NY3d 648, 652 [2004]), leave to file a late motion for summary judgment under CPLR 3212 (a) requires a showing of "good cause" for the delay in filing the motion. "In the

absence of such a showing, a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary" (*Dettmann v Page*, 18 AD3d 422, 422 [2d Dept 2005]).

This court's preliminary conference order, dated July 11, 2006, called for all motions for summary judgment to be made within 60 days from the filing of the Note of Issue (the preliminary conference order). The Note of Issue in this case was filed on April 17, 2008, and 60 days thereafter expired on June 16, 2008. Federation filed its motion for summary judgment on the 111th day from the filing of the Note of Issue.

In support of its argument that good cause existed for the untimeliness of its motion, Federation puts forth that, as the second third-party defendant in this case, it only interposed its answer to the second third-party complaint on September 12, 2006. Federation did not participate in the conference that led to the preliminary conference order. Moreover, although in its answer to the second third-party complaint, Federation annexed a Notice for Discovery and Inspection, which demanded that all discovery motions and orders to be provided to it, Federation was never provided a copy of the subject preliminary conference order.

In addition, none of the compliance conferences that Federation did participate in since entering the case made reference to the subject preliminary conference order. Thus, Federation asserts that it was never made aware of the 60-day requirement within which to file its motion. As a result, Federation proceeded under the New York Supreme Court rules, which dictate that, unless there is a court order in place to the contrary, a party's time to move for summary judgment is 120 days from the filing of the Note of Issue.

While, in fact, Federation's motion for summary judgment is untimely, this court is

persuaded by Federation's argument that good cause existed for the untimeliness of its motion for summary judgment. Thus, this court will consider Federation's motion for summary judgment dismissing Take-Two's second third-party action against it.

TAKE-TWO'S CLAIMS FOR COMMON-LAW INDEMNIFICATION AND CONTRIBUTION AGAINST FEDERATION

A review of the evidence in this case establishes that there were two separate and distinct construction projects going on at the premises throughout the fourth, fifth and sixth floors. With regard to the sound studio project, Rockstar hired Janson to serve as the architect, and Janson hired Alcon as the general contractor. With regard to the office build project, Take-Two hired Federation to serve as construction manager. Plaintiff testified that Schondorf's work was limited to sound studio project, and that, on the date of his accident, he was installing compressors on the roof that were to service the sound studios on the fifth floor.

Jules Davis, Chairman of the Board for Federation, testified that on March 20, 2004, Federation was hired by Take-Two to provide construction management services for a renovation project that entailed building new offices for Take-Two on the fourth, fifth and sixth floors. Davis maintained that Federation's work was separate and distinct from the renovation of the sound studios, which comprised one-third of the fifth floor. Davis explained that, although Federation "balanced" the air conditioning as part of its duties, Federation's work did not involve any work on the roof of the building (Federation's Notice of Motion, Exhibit N, Davis Deposition, at 21, 50).

Eli Weissman, who was hired by Rockstar to supervise the integration of the sound studio at the premises, testified that Schondorf was hired in connection with work on the sound studios,

which were located in a corner of the fifth floor of the premises. Weissman also explained that Federation was responsible for the rest of the construction which was occurring on the rest of the fifth floor, as well as the fourth floor of the premises. Dennis also testified that the sound studio project, which comprised 25% of the fifth floor, was separate and distinct from the office build project for which Federation was serving as a construction manager. Patrick Boland, who appeared for a deposition on behalf of Alcon, testified that there was no connection between the two projects going on at the premises. In addition, he noted that Federation did not instruct or supervise Alcon's workers.

Thus, as it has not been established that Federation was guilty of some negligence that contributed to the causation of plaintiff's accident, Federation is entitled to summary judgment dismissing Take-Two's claim for common-law indemnification against it.

TAKE-TWO'S CONTRACTUAL INDEMNIFICATION CLAIMS AGAINST FEDERATION

The indemnification agreement in the construction management agreement between Take-Two and Federation set forth, in pertinent part:

> **3.18 Indemnification**
> **3.18.1** To the fullest extent permitted by law ... the Contractor shall indemnify and hold harmless the Owner, Architect, and agents and employees of any of them from and against claims, damages ... arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury

(Federation's Notice of Motion, Exhibit R, Take-Two/Federation General Conditions of the Contract for Construction, at 17).

Here, as Federation's work at the premises was not related in any way to plaintiff's accident, plaintiff's accident did not arise out of or result from the performance of Federation's

work under the construction management agreement between Take-Two and Federation. Thus, Federation is entitled to summary judgment dismissing Take-Two's contractual indemnification claim against it. In addition, for the same reasons, Federation is also entitled to summary judgment dismissing Take-Two's breach of contract claim, as well as all cross claims against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant/third-party plaintiff Alcon Building Group, Inc.'s (Alcon) motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in its favor on that part of its third-party claim seeking contractual indemnification against third-party defendant Michael Schondorf, Inc. and Michael Schondorf, Inc., d/b/a Schondorf Electric Corp., as well as for summary judgment dismissing plaintiff Andrzej Konieczny's common-law negligence and Labor Law §§ 200 and 241 (6) claims against it, is granted, and these claims are severed and dismissed as to this defendant, and the motion is otherwise denied; and it is further

ORDERED that defendant Janson Design Group, LLC's (Janson) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it is granted, and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 005), pursuant to CPLR 3212, for partial summary judgment in its favor on the issue of liability under Labor Law § 240 (1) claim against defendants Moklam Enterprises, Inc., Alcon Building Group, Inc., Rockstar Games, Inc. and Take-Two Interactive Software, Inc. (Take-Two) is granted; and it is further

ORDERED that second third-party defendant Federation Development Corporation's (Federation) motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing Take-Two's second third-party complaint, as well as all cross claims against it, is granted, and the second third-party complaint and all cross claims are severed and dismissed as to this second third-party defendant, and the Clerk is directed to enter judgment in favor of this second third-party defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

DATED: January 12, 2009

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD