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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Raymond Smith

INDEX NO. 107091/06

MOTION DATE

- v -

MOTION SEQ. NO. 2

MOTION CAL. NO.

Broadway 110 Developers

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 this motion**

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendants/third-party plaintiffs BDS, Zedek Ventures SPE LLC and Pavarini pursuant to CPLR 3211 and/or 3212 to dismiss plaintiff's common law, Labor Law §§200 and 241(a) is granted; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs pursuant to CPLR 3211 and/or 3212 to dismiss plaintiff's 240 and 241(6) claims is denied; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs for summary judgment on defendants' defense and indemnification claims against A&B is granted; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs for summary judgment on their third-party claims for failure to procure insurance is denied; and it is further

ORDERED that plaintiffs' application for partial summary judgment under Labor Law §240 is denied.

This constitutes the decision and order of the Court.

Dated: 4/3/09

HON. CAROL EDMEAD J.S.C.

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

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

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RAYMOND SMITH and CELESTE SMITH,

Plaintiff,

-against-

BROADWAY 110 DEVELOPERS, LLC, ZEDEK VENTURES SPE LLC and PAVARINI MCGOVERN, LLC,

Defendants.

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BDS DEVELOPERS, LLC S/H/A BROADWAY 110 DEVELOPERS, LLC, ZEDEK VENTURES SPE LLC and PAVARINI MCGOVERN, LLC,

Third-Party Plaintiff,

-against-

A&B CAULKING CO., INC.,

Third-Party Defendant.

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Index No. 107091-2006

DECISION/ORDER

Third-Party Index No. 590837-2006



HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this labor law action, Raymond ("plaintiff") and Celeste Smith (collectively "plaintiffs") seek damages for injuries plaintiff sustained while performing work with a scaffold. It is alleged that plaintiff was engaged in the construction of a new building located at 543 West 110th Street in Manhattan. The construction site was owned by defendant BDS Developers, LLC, s/h/a Broadway 110 Developers, LLC, ("BDS"), which engaged defendant Pavarini McGovern, LLC, ("Pavarini") as its construction manager. Pavarini, in turn, hired plaintiffs employer, A&B Caulking ("A&B"), as its caulking trade contractor.

Defendants/third-party plaintiffs BDS, Zedek Ventures SPE LLC ("Zedek") and Pavarini

(collectively, the "defendants") now move pursuant to CPLR 3211 and/or 3212 to dismiss plaintiff's common law, Labor Law §§200, 240, 241(a) and 241(6) claims, and for summary judgment on defendants' defense, indemnification and insurance procurement third-party claims against plaintiff's employer, A&B.

Motion

As to plaintiff's Labor Law §200 allegation, defendants argue that they did not have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Plaintiff testified that he received all of his instructions from his A&B supervisor, and never spoke with defendants at the job site. BDS, Zedek and Pavarini did not provide any instructions, directions, tools or materials to A&B employees and that only A&B provided instructions to plaintiff. Accordingly, since defendants did not have the necessary level of control to be held liable under Labor Law §200 or the common law, and that the Labor Law §200 claims should be dismissed in their entirety. And, as Labor Law §200 is a codification of the common law, this Court should dismiss the common law claims as plaintiff has not established any negligence on behalf of defendants.

Defendants also argue that the Labor Law §240 claim should be dismissed as plaintiff clearly did not have the type of accident contemplated by the statute. The foundation for the establishment of a §240 claim requires an injury resulting from a fall from a height without adequate safety equipment or that an object fell while "being hoisted or secured" due to the inadequacy of the safety device enumerated in the statute. Plaintiff did not fall from a height, fall through an unsecured opening or have a hoisted item fall on him. Labor Law §240(1) is clearly inapplicable as plaintiff was not working in a situation where he needed fall protection and there

were no hoisted objects that could fall on him.

Defendants also argue that assuming plaintiff alleged a violation of Labor Law §241-a (Protection of Workmen in or at Elevator Shaftways, Hatchways and Stairwells), it is clear that the statute does not apply.

Defendants also maintain that the Labor Law §241(6) claim should be dismissed. The industrial code regulations which plaintiff cites in support are insufficient because they are either (1) general and fail to impose a specific duty, or (2) inapplicable to the facts of this case based on how the accident occurred. Plaintiff was in the process of moving a scaffold across the building's face at the time of the accident. Plaintiff's partner was holding a rope attached to the scaffold to keep the scaffold away from the building during the move. As plaintiff was straddling the right side of the scaffold, his partner dropped the rope, causing plaintiff's injuries.

Finally, defendants are entitled to defense and indemnification, and summary judgment on their claim for failure to procure insurance. According to paragraph 8 of the Trade Contract between A&B and Pavarini, A&B agreed to defend and indemnify BDS, Zedek and Pavarini for accidents. Where an indemnification clause is clear and unambiguous, summary judgment should be granted in favor of the indemnitees. A&B has also acted in a manner to be bound by the terms of the Trade Contract by procuring insurance as mandated by the documents. The Certificate of Insurance names Pavarini, BDS and Zedek as additional insureds as required in the contract documents. Therefore, A&B owes defense and indemnification to Pavarini, BDS and Zedek as their conduct clearly indicates acceptance of the terms of the Trade Contract. Furthermore, as the Trade Agreement allows indemnification only "to the fullest extent permitted by law," conditional or partial indemnification is an available remedy. Caselaw makes clear that

Pavarini, BDS and Zedek are entitled to, at a minimum, partial indemnification, if not total indemnification due to A&B's actions at the job site.

Further, A&B has not offered any evidence that it procured the requisite insurance for defendants as required. Since A&B agreed to procure insurance, Pavarini's failure to procure such insurance gives rise to liability for all resulting damages, including the costs of defending a lawsuit. Upon the granting of summary judgment on such claim, an inquest to determine the amount of defense costs incurred by defendants should be held.

And, although a claim for indemnification does not generally accrue until payment is made by the party seeking indemnification, a conditional judgment may be entered when indemnification is based upon an express contract to indemnity against loss. Since A&B cannot raise any factual issues pertaining to defendants' alleged negligence, defendants' claim for defense costs survive the extinction of the primary claim, and entitles defendants to a recovery in excess of its liability on the plaintiff's claim. Thus, if A&B provides evidence that it procured insurance covering defendants as required, defendants are still entitled to summary judgment against A&B on the third-party claim based on the indemnity provisions contained in the contract, including the costs of defending this matter. In such event, an inquest is necessary to determine the defense costs incurred by defendants.

Plaintiffs' Opposition

Plaintiffs argue that the facts establish clear violations of Labor Law §§240 and 241(6), and that, accordingly, upon a search of the record, partial summary judgment should be granted to plaintiff. At the very least, there are questions of fact which preclude summary judgment for the defendants.

At his deposition, plaintiff explained that he and his partner, Alex Martinez, had been caulking the building using a motorized scaffold, suspended by hooks from the building's roof (Smith deposition, 21-25). After the caulking work was completed, plaintiff and Martinez lowered the scaffolding to the roof of an adjacent building so that it could be dismantled (33-34, 39). The scaffolding had been lowered to a height of approximately four feet above the adjacent building, but it could not be lowered further because air conditioners and duct work were in the way (33-34). Thus, plaintiff had positioned himself astride the railing of the scaffolding so that he could kick the scaffolding away from the wall (39-40). With his right hand he was able to operate the button that lowered the scaffolding (37, 40). Martinez stood on the roof of the adjacent building, holding a rope which he used to pull the scaffolding away from the building (36-40). Suddenly, Martinez began vomiting, and let go of the rope, causing the scaffold to fall back to the wall, crushing the plaintiff's chest (40-43). Plaintiff explained that when obstructions of this type prevent the scaffolding from being lowered, a wooden bridge is normally constructed, but no such bridge had been built at the accident site (34).

Plaintiffs argue that the accident arose from the improper operation of the hoist. Specifically, the scaffold was lowered in a dangerous fashion with plaintiff's co-worker Martinez, manually pulling plaintiff away from the wall. As the language of Labor Law § 240(1) specifies, and the caselaw holds, such improper operation gives rise to liability under Labor Law § 240(1). Plaintiff's accident resulted from the improper operation of a device, *i.e.*, a scaffold, as enumerated in Labor Law § 240(1). Moreover, it is evident that the equipment provided to plaintiff was inadequate for the task. In this regard, as plaintiff testified that the moving scaffold was blocked by obstructions, the proper procedure required the construction of a "bridge" to

bypass the construction. It is undisputed that, in the present case, this was not done. Defendants are not exculpated from liability by the fact that plaintiff did not actually fall from the scaffolding. As a result of the force of gravity on the scaffolding, plaintiff's scaffold was propelled into the wall, causing him to sustain serious injuries. Labor Law § 240(1) is applicable even though plaintiff was able to prevent himself from falling completely off the scaffold, onto the roof some four feet below him. Based on the undisputed facts relating to the defendants' Labor Law § 240(1), the Court should grant plaintiff summary judgment under said statute.

As to Labor Law §241(6), defendants have acknowledged that Industrial Code §§ 23-5.8 and 23-5.9 are "arguably applicable to the case." Plaintiff's accident was a direct consequence of the excessive "horizontal displacement" of the suspended scaffold on which plaintiff was working, in violation of section 23-5.8(c)(2). At the very least, there is a question of fact as to whether sections 23-5.8 and 23-5.9 and, consequently, Labor Law § 241(6) were violated.

A&B's Opposition

A&B opposes the branch of defendants' motion for defense, indemnification and breach of contract damages. A&B contends that the real party in interest in the third-party action is not Pavarini, but its insurer, American Home Assurance Company ("American Home"). Defendants' motion is disingenuous because the same issues are being litigated by American Home in a companion declaratory judgment action before this Court, *American Home Assurance Co. v Burlington Insurance Co. & A&B Caulking Co.* (the "declaratory judgment action"). Burlington Insurance Company, the insurer for A&B has refused demands to defend and indemnify Pavarini, American Home's insured. Thus, this relief should not be granted, and the issue of defense, indemnification and attorneys fees should be decided in the declaratory judgment action.

Further, in the declaratory judgment action, it is alleged that American Home is subrogated to the rights of BDS, Zedek and Pavarini with respect to the defense costs incurred in plaintiffs' action. While it is alleged in that action that plaintiff, American Home "has no adequate remedy at law," its subrogee attempts to obtain judgment within the context of the Smith personal injury action. Thus, on this basis alone, Pavarini's motion against A&B should be denied.

The motion against A&B should also be denied due to the possibility of inconsistent verdicts. Should this Court grant defendants' motion against A&B on the grounds of failure to obtain insurance and then there is a holding that A&B's insurer Burlington does provide coverage, then there would be inconsistent verdicts. This can be avoided if the Court determines that the indemnification and insurance issues belong in the declaratory judgment action. The Court has not yet made a determination whether coverage is provided by Burlington and whether A&B procured the coverage.

The third reason for denying defendants' motion is that plaintiff raises various questions of fact which render a decision on the indemnification issue premature. There are issues of whether the alleged contract is violative of General Obligations Law which provides that a construction contract which purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury caused by the negligence of the promisee is against public policy, void and unenforceable. There is also an issue of ambiguity as to the wording of the purported agreement. The language appears overly broad and violative of the General Obligations Law because the Trade Contract can be interpreted as attempting to shift full liability to A&B despite any negligence on the part of Pavarini. The Trade Contract can be interpreted as

requiring indemnification against A&B for movant's own negligence.

Further, there was no gravity-related injury. If there is any inference to be drawn that defendants were negligent, the motion for summary judgment on the issue of indemnification should be denied. One cannot be indemnified for its own negligence.

There is also a further issue as to whether there was even an accident. Defendants' motion notes that "plaintiff's accident was not reported to Pavarini." There was no actual fall from the scaffold but a complaint later that the plaintiff had some issue with his heart and blamed it on the scaffold hitting him. Thus, there is even an issue whether there was an incident and for what exactly third-party plaintiff wants to be indemnified.

Further, since insurance was procured by A&B, the motion for summary judgment for breach of contract damages should be denied as moot. In its answer to the amended complaint, A&B admits that it also insured Pavarini.

Although the certificate of insurance cannot confer, extend or amend coverage, the certificate may clarify the intent of the parties, coming to an agreement. The ambiguity of the terms of the Trade Contract also creates questions of fact and law to defeat summary judgment. Defendants' papers are insufficient because they show no clear intent is requiring A&B to indemnify Pavarini. Furthermore, any ambiguity must be resolved against the party who drafted the agreement, and here the contract was drafted by Pavarini. Defendants' motion against A&B is based upon an attorney's bare assertion, which is insufficient unless it is accompanied by documentary evidence in admissible form. Defendants made no *prima facie* showing by an admission of A&B or other documentation from A&B as to what the intent of the parties. Further, in defendants' discovery response in this action, they admit that they are insured by New

Hampshire Insurance Company which, upon information and belief, is an affiliate of American Home, in the amount of $2,000,000. Therefore, any alleged damages to which defendants could be entitled are limited to the out of pocket expenses caused by the alleged breach such as the cost of obtaining and maintaining such substitute coverage. Damages are therefore limited to the premiums for the replacement policy. The alleged failure of A&B to procure insurance, and defendants' own procurement of insurance coverage create questions of fact and limit its alleged damages, if any, to the cost of such insurance.

Defendants's Reply

Defendants oppose plaintiff's application for summary judgment, arguing that the cases on which plaintiffs rely are distinguishable: plaintiff did not fall from a height or through any opening; there was no vertical movement of the scaffold; the scaffold merely swung into the wall; there is no evidence that the scaffold fell apart; and the scaffold remained intact. The alleged accident did not involve a falling item that was being "hoisted or secured." Thus, as the present action does not rise to a viable Labor Law §240 claim, plaintiff's application should be denied, plaintiff's Labor Law §240 claim should be dismissed.

Defendants also point out that plaintiff did not oppose dismissal of the Labor Law 200, common law, or Labor Law §241(a) claims.

Further, by failing to rely on any of the other code sections cited in the Bill of Particulars, plaintiff concedes that the rest are inapplicable to the case. The only code section discussed by plaintiff is 12 NYCRR 23-5.8(c)(2). However, plaintiff does not explain how this code section was allegedly violated or provide any expert testimony in support of their opposition. This section states that the proportion between the height and the distance must not exceed one tenth.

There is no evidence about the height of the building or the distance plaintiff's partner moved the scaffold away from the building. Plaintiff does not even establish the height of the building to provide a baseline for the one tenth calculation. Finally, plaintiff was only four feet above the roof level. The explicit code section requires a safety harness only where the employee is more than ten feet above the ground. Based on the foregoing, plaintiff cannot establish the relevance of the 23-5.8(c)(2). As such, the Labor Law 241(6) claim must be dismissed.

With respect to the A&B, defendants argue that there is no basis for denial of the motion due to a separate declaratory judgment action. Defendants' counsel herein is not involved in the other case as evidenced by the Complaint. There is no likelihood of a double recovery as defendants can collect only once when there is a determination of the summary judgment motion. Furthermore, there is no likelihood of inconsistent verdicts as this case will be decided first. Summary judgment has not even been filed in other case and the Note of Issue has not been served.

In support of their breach of contract claim, defendants point out that paragraph 6 of the Trade Contract attached to their moving papers requires A&B "at its own expense" to purchase insurance. Paragraph 2 of the Trade Contract mandates that A&B procure Commercial General Liability Insurance including personal injury protection at an amount certain and the coverage must include: "Blanket Written Contractual Liability covering all Indemnity Agreements." Pavarini, McGovern, BDS and Zedek are to be named additional insured under A&B's insurance policy. And, counsel for A&B acknowledges that the certificate of insurance is evidence of intent to be bound at paragraph 19. Based on counsel's admission it is clear that A&B agreed to be bound by the terms of the Trade Contract requiring A&B to defend, indemnify and procure

insurance in favor of defendants.

Also, the indemnification provision at issue is enforceable by the Court due to the saving language "to the full extent permitted by law." In the present action the clear intent of the parties to be bound by the contract is evident by the signed Trade Contract between Pavarini and A&B. A&B signed the contract which was identified at their deposition. Moreover, A&B evidenced its intent to be bound by the terms of the contractual indemnification terms by purchasing the requisite insurance. Counsel acknowledges that the certificate of insurance is evidence of intent to be bound at paragraph 19. The contract requires A&B to procure comprehensive general liability insurance in the amount of $5,000,000.00 per occurrence based upon the Trade Contract. The certificate of insurance notes that coverage was purchased on a general liability basis. Moreover, A&B has not established that there is any negligence by defendants at the premises. Therefore, at a minimum, A&B owes defendants full defense and indemnification. As A&B has not served admissible evidence to oppose defendants' motion for defense and indemnification against A&B and said motion should be granted on this basis alone.

The contract requires A&B to provide all necessary materials to perform their work. A&B is to control how the pointing work is completed. A&B accepted the terms of the contract by performing the work pursuant to the Trade Contract. A&B must abide by the "terms of the purchase order." Additionally, the contract clearly requires A&B to defend and indemnify defendants for any claims arising out of A&B's work. Plaintiff's alleged accident clearly arose out of his work for A&B at the job site. The only admissible evidence establishes that A&B was at fault for the happening of the accident. Accordingly, the Court should enforce the defense, indemnity and insurance provisions of the Trade Contract.

Finally, A&B breached the Trade Contract by failing to properly insure defendants. Therefore, defendants are entitled to the loss they actually suffered by such breach. Unless A&B provides evidence that it procured insurance covering defendants as required by the Trade Contract, defendants are entitled to summary judgment on its third-party claim against A&B.

Analysis

In determining a motion to dismiss pursuant to CPLR 3211, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]).

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §

3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). The movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" such as an affidavit, the pleadings, and depositions to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; CPLR § 3212[b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, the party opposing the motion bears the burden of demonstrating by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

Labor Law §200 and Negligence

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Nevins v Essex Owners Corp.*, 276 AD2d 315, 714 NYS2d 38 [1st Dept 2000] *citing Blessinger v The Estee Lauder Co.*, 271 AD2d 343, 707 NYS2d 78). In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had

"authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son,* 54 NY2d 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.,* 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (*see LaRose v Resinick Eighth Ave. Assoc., LLC,* 26 AD3d 470, 810 NYS2d 493 [2006]; *Gatto v Turano,* 6 AD3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.,* 2 AD3d 548 [2003]).

It is uncontested that plaintiff denied receiving instructions from anyone other than A&B and that he did not have any dealings with anyone from BDS, Zedek or Pavarini. Pavarini's project superintendent at the jobsite, Brent Wetherell ("Wetherell"), did not recall ever speaking to plaintiff during the course of plaintiff's work. Wetherell also denied ever instructing or telling anyone from A&B how to perform their work or "move the swing stage." James Tirelli, A&B's project manager at the job site, testified that Pavarini did not provide tools or materials to any of the employees at A&B. Tirelli admitted that he was the person at A&B who directed A&B employees where to perform their work and to see that A&B employees were performing their work. Further, plaintiffs' opposition does not address defendants' arguments regarding Labor Law §200 or common law negligence. Therefore, as defendants established that they had no authority or control over plaintiff's work at the time of his accident, plaintiff's Labor Law 200 and negligence claims are dismissed.

Labor Law §240(1)

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

All contractors and owners and their agents, . . . in the erection, demolition, repairing,

> altering, painting, cleaning or pointing 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) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514, 577 NYS2d 219 [1991]), the Court of Appeals defined the scope of Labor Law § 240 (1) as encompassing special hazards inherent in elevation-related tasks (*Gill v Samuel Kosoff & Sons*, 229 AD2d 824 [3d Dept 1996]). The Court again addressed the scope of Labor Law §240 (1) in *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993]), wherein it stated that the section "was designed 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*" (*supra*, at 501 [emphasis in original]). Thus, pursuant to Labor Law § 240 (1), owners and contractors have the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the work site (*Drew v Correct Manufacturing Corp.*, 149 AD2d 893 [3d Dept 1989]).

At the time of the accident, plaintiff was "wrapped around the corner" of the scaffold, holding "the motor in the back with [his] left hand and . . . pressing the button with [his] right hand" as "we were going down." (37). Martinez was standing on the roof of the three-story building, holding the rope attached to the scaffold (38-39). When the scaffold started lowering,

Martinez "let go of the rope, and the rig started swinging" (40). Plaintiff grabbed onto the scaffold to prevent himself from falling, and "hit the wall" (40). The scaffold, which was approximately 10 feet from the building facade (43) hit plaintiff's chest and crushed him (40).

According to plaintiff, "they usually have a bridge there normally, with wood. They didn't, they didn't have anything there." (24). Plaintiff told his boss and "they were supposed to take care of it." (24).

Labor Law § 240(1) applies to a situation where the scaffolding "prove[s] 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 at 501). Here, plaintiff claims that he was injured when the scaffold being lowered shifted, because the scaffold and the rope that were being used were not "so constructed, placed and operated as to give proper protection" and a bridge had not been built at the accident site (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 760 NYS2d 478 [1st Dept 2003] [plaintiff was injured because the elevator he was hoisting to the ground fell, and the elevator fell because the hoist he was using, once removed, was not, as the statute requires, "so constructed, placed and operated as to give proper protection." although the load being hoisted was at the same level as the injured worker, it remains that plaintiff's injuries were the immediate result of 'the effects of gravity' and the ultimate result of the lack of a hoist properly placed and operated so as to afford the protection required by the statute]; *Lanza v Cohen*, 236 AD2d 287, 653 NYS2d 583 [1st Dept 1997] [scaffold was secured to plaintiff's body, which was used to keep the scaffold and plaintiff from "plummeting down" to the ground below; in the course of using his body in this way and in an attempt to brace his fall, plaintiff's knee "popped;" the "'risk' or 'special hazard' of being pulled

off the roof and being injured in the absence of 'proper protection' is among the 'risks related to elevation differentials' to which Labor Law § 240(1) applies"]).

Further, an injured plaintiff is not required to show that he fell completely off an elevation device to the floor (*Stephens v Triborough Bridge & Tunnel Auth.*, 55 AD3d 410, 866 NYS2d 48 [1st Dept 2008] [where stairway moved away from the anchorage, causing plaintiff to fall partially into the gap created between the anchorage and the stairway]; *Pesca v City of New York*, 298 AD2d 292, 749 NYS2d 26 [1st Dept 2002] ["Although plaintiff did not fall from the ramp, the injuries he allegedly sustained in preventing himself from falling may be compensable under Labor Law § 240(1) if shown to have resulted from a failure to provide a proper safety device in accordance with the requirements of that statute"]). Further, in *Skow v Jones, Lang & Wooton Corp.* (240 AD2d 194, 195, 657 NYS2d 709), the First Department stated: "That plaintiff neither fell from a height nor was struck by a falling object does not require dismissal of his section 240(1) claim. . . ." Thus, contrary to defendants' contention, that plaintiff did not fall is not fatal to his claim, since his injuries he allegedly sustained in preventing himself from falling may have resulted from the failure to provide proper safety devices pursuant to the statute (*Sharp v Scandic Wall Ltd. Partnership*, *id.*; *Pesca v City of New York*, 298 AD2d 292, 749 NYS2d 26 [1st Dept 2002] ["Although plaintiff did not fall from the ramp, the injuries he allegedly sustained in preventing himself from falling may be compensable under Labor Law §240(1) if shown to have resulted from a failure to provide a proper safety device in accordance with the requirements of that statute"]).

The cases cited by defendants are factually distinguishable. Therefore, defendants' motion to dismiss plaintiffs' Labor Law §240(1) claim is denied.

Plaintiff's application for the Court to search the record and find liability in favor of plaintiffs and against defendants under Labor Law §240(1) is denied. Although defendants' threshold argument that Labor Law §240(1) does not apply to the accident is unavailing, the applicability of this statute to plaintiff's accident, and the fact that A&B were responsible for erecting and dismantling the scaffold, do not establish that the statute was violated as a matter of law and that such violation was the proximate cause of plaintiff's injuries. Therefore, plaintiff's application for summary judgment is denied.

Labor Law §241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross,* 81 NY2d at 501-502). In order to recover a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross,* 81 NY2d at 501-502; *Long v Forest-Fehlhaber,* 55 NY2d 154 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81 N.Y.2d at 502-504). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long,* 55 NY2d at 160).

In terms of the obligations statutorily imposed by Labor Law § 241(6), it has been recognized that the statute is "a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor

Commissioner's rule-making authority . . . " (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503, 601 NYS2d 49). In *Ross,* the Court of Appeals, in adherence with prior determinations, held that a plaintiff may not rely solely upon the "broad, nonspecific regulatory standard . . ." contained in section 241(6) (*id.* at 504, 601 NYS2d 49), but instead, must rely upon the violation of a specific administrative rule, i.e., a corresponding Industrial Code violation which mandates compliance with "concrete specifications," and not one which merely establishes "general safety standards" (*id.* at 505, 601 NYS2d 49).

Given that plaintiffs' opposition papers rely solely upon Industrial Code §§ 23-5.8 and 23-5.9 to support their Labor Law §241(6) claim, the remaining sections cited in their Complaint are stricken.

Defendants' sole claim, that there is no violation of these provisions based on plaintiff's testimony on how the alleged accident occurred, lacks merit.

Section 23-5.8, All Suspended Scaffolds,[1] requires, *inter alia*, that certain distances be

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[1] (a) Inspection before installation. All load-carrying parts or components and means of suspension including adequacy of anchorage or support of every suspended scaffold shall be inspected before such scaffold is installed.
(b) Suspension from roof hooks or irons. No parapet, curtain wall or similar portion of a building or other structure shall be used to support the roof hooks or irons of any suspended scaffold unless a professional engineer licensed to practice in the State of New York certifies that such parapet, curtain wall or similar portion of a building or other structure is adequate to support the loads intended to be imposed thereon. Such certification shall be kept on the job site available for examination by the commissioner.
(c) Installation and use.
(1) The installation or horizontal change in position of every suspended scaffold shall be in charge of and under the direct supervision of a designated person.
(2) The horizontal displacement of any suspended scaffold platform in a direction perpendicular to the face of a building or other structure by means of an applied horizontal force shall not exceed one-tenth of the vertical distance from the elevation of the scaffold platform to its point of suspension. Any person who applies such horizontal force to a scaffold platform while he is located on any portion of the building or other structure at a point more than 10 feet above the ground, grade or equivalent surface shall be provided with and shall use an approved safety belt with a lifeline in compliance with this Part (rule).
(d) Hoisting machines.
(1) Any manual or power-operated hoisting machine used for suspended scaffolds shall be approved.
(2) A block and tackle shall not be construed to be a hoisting machine and is not required to be approved.

maintained for suspended scaffold platforms.

Section 23-5.9, Two-Point Suspension Scaffolds,[2] provides, *inter alia*, :

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footnote 1, contd.

(3) At least four turns of the suspension wire rope shall at all times remain on the drum. The end of such rope shall be properly secured to the drum. The foregoing requirement does not apply to traction type hoists.
(e) Fibre rope. Fibre ropes used with suspended scaffolds shall be first grade manila hemp or its equivalent in strength. Blocks shall be of a size to fit the ropes.
(f) Limited use of fibre rope.
(1) Fibre rope shall not be used for or near any work involving the use of corrosive substances or chemicals.
(2) Fibre rope shall not be used as a means of suspension in lengths exceeding 100 feet between blocks.
(3) Fibre rope shall not be used on hoisting drums.
(g) Tie-ins. Every suspended scaffold shall be tied in to the building or other structure at every working level. Window cleaners' anchors shall not be used for such tie-ins and other means shall be provided.
(h) Scaffold platform. The planking of every suspended scaffold platform shall overlap its support in compliance with this Part (rule). Such planking shall be either nailed in place or otherwise secured against displacement. Where such planks rest directly upon stirrups without any intermediate supporting frames, they shall be secured together by means of cleats nailed to the undersides at intervals not exceeding four feet. Cleats or other equivalent means shall be provided on each side of the supporting stirrups under the planks to prevent sliding or any movement of the planks.

[2] (a) Width and fastening. Two-point suspension scaffold platforms shall be not less than 20 inches nor more than 32 inches in width. Every such platform shall be of sufficient width to properly fit the hangers and shall be securely fastened thereto by U-bolts which pass around the hangers or by other equivalent means.
(b) Hangers. The platforms of two-point suspension scaffolds shall rest on hangers fabricated of mild steel or wrought iron, each having a cross-sectional area capable of sustaining four times the maximum rated load. Such hangers shall be designed with supports for guard rails, intermediate rails and toeboards.
(c) Roof irons. Roof irons or hooks used in connection with two-point suspension scaffolds shall be constructed of mild steel or wrought iron and shall be securely anchored. They shall be provided with tie-backs of at least three-quarters inch manila rope so installed that the tension is at right angles to the face of the building or other structure. Where the upper block hook does not directly engage the roof iron, the connection shall be made by improved plow steel wire rope not less than one-half inch in diameter.
(d) Safety railings and screening. The open sides of two-point suspension scaffolds shall be provided with safety railings constructed and installed in compliance with this Part (rule). In addition, such safety railings shall be provided with wire mesh installed from the toeboards to the top railings. Such wire mesh shall be not less than No. 18 U.S. gage steel with openings that will reject a one-inch diameter ball.
(e) Use of two-point suspension scaffolds.
(1) Two or more such scaffolds shall not be combined into one by bridging the distance between them. Persons shall not pass from one two-point suspension scaffold to another. Not more than two persons shall be permitted to work on any two-point suspension scaffold at one time unless such scaffold is specially approved and such use is stated in such approval.
(2) Every person located on any two-point suspension scaffold shall be provided with and shall be required to use an approved safety belt or harness together with a separate hanging lifeline in compliance with this Part (rule).
(f) Suspension ropes.
(1) When hoisting machines are used for any two-point suspension scaffold, the wire rope shall be at least

Defendants conceded that these sections "arguably" apply, but as the movant, fail to establish that they complied with any of the numerous requirements thereunder. Simply stating that the manner in which the accident occurred establishes that they did not violate this section is plainly insufficient. Further, as pointed out by plaintiff, there is no indication as to whether the horizontal displacement of the scaffold platform did "not exceed one-tenth of the vertical

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Footnote 2, contd.

five-sixteenths inch in diameter and capable of supporting at least six times the intended load.
(2) All fibre rope used for two-point suspension scaffolds shall be at least equivalent in strength to three-quarter inch first grade manila rope.
(g) Platform requirements. Wood platforms of two-point suspension scaffolds shall comply with one of the following requirements. Metal platforms or other platforms not in compliance with this Part (rule) shall be approved.
(1) Ladder type platforms.
(i) The side stringers of the horizontal supporting ladder shall be constructed of clear spruce or other material of equivalent strength and durability. The rungs shall be constructed of straight-grained oak, ash or hickory not less than one and one-eighth inches in diameter with seven-eighths inch tenons mortised into the side stringers at least seven-eighths of an inch. The stringers shall be tied together with metal tie rods not less than one-quarter inch in diameter. Such tie rods shall pass through the stringers and shall be riveted tight against washers at both ends. Hangers shall be securely fastened to the platforms not less than six inches nor more than 18 inches from either end by means of U-bolts at the bottom supporting member. Such U-bolts shall pass over the side rails of the platforms. (See Tables XII and XIII of this Subpart.)
(ii) The flooring strips of ladder type platforms shall be spaced so that any opening in the platform floors will reject a three-quarter inch diameter ball. Ladder type platforms shall be constructed in accordance with the schedules listed in Tables XII and XIII of this Subpart.
(2) Plank type platforms. Plank type platforms shall be constructed of planks not less than two inches in thickness and eight inches in width, full size. Such planks shall extend not less than six inches nor more than 18 inches beyond the supporting hangers. A bar shall be nailed across the platform on the underside at each end to prevent the platform from slipping off the hangers. Where two or more planks are used, they shall be fastened together by cleats not less than one inch by six inches in size. Such cleats shall be nailed on the underside at intervals of not more than four feet. Planks used for such platforms shall not be spliced. Any span between supports shall not exceed 10 feet.
(3) Beam platforms. Beam platforms shall have stringers constructed of straight-grained lumber not less than two inches by six inches full size set on edge. The stringers shall be supported on the hangers and the clear spans between hangers shall not exceed 16 feet. The ends of the stringers shall extend beyond the hangers not less than six inches nor more than 18 inches. The stringers shall be bolted to the hangers by means of U-bolts which pass around the hangers and through the stringers. The platforms shall be supported on cross-beams not less than two inches by six inches full size which are laid flat and let into the upper edges of the stringers at intervals of not more than four feet. Such cross-beams shall fit snugly and shall be securely nailed in place with screw-type nails. The platforms shall be constructed of lumber not less than one inch by six inches in size, nailed tight together and extended to the outside faces of the stringers. The ends of all platform boards shall rest on the cross-beams and shall be securely nailed thereto.

distance from the elevation of the scaffold platform to its point of suspension" or that an "approved safety belt with a lifeline" was provided, pursuant to 23-5.8 (c)(2).

Therefore, dismissal of plaintiff's Labor Law 240(1) claim is unwarranted, and defendants' motion in this regard is denied.

Indemnification and Defense

It is undisputed that the Trade Contract provides as follows:

> To the fullest extent permitted by law, [A&B] shall indemnify and hold harmless [Pavarini, BDS and Zedek] ... from and against any and all claims, damages, losses and expenses, including, but not limited to, attorneys fees, including those claims caused in whole or in part by the acts or omissions of [A&B] ... or anyone directly or indirectly employed by them.

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [2004]). "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank,* 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.,* 215 AD2d 191, 193 [1995]).

In the case of *Itri Brick & Concrete Corp v. Aetna Cas & Sur Co.* (89 NY2d 786, 658 NYS2d 903 [1997]), the Court of Appeals held that an indemnification agreement which contemplates full indemnification of the general contractor by the subcontractor, even where the general contractor has been found partially negligent violates both General Obligations Law §

5-322.1 and public policy. However, contrary to A&B's contention, the indemnification clause found in the Trade Contract between defendants and A&B does not violate General Obligations Law § 5-322.1, in that the obligation was "[t]o the fullest extent permitted by law" (*Murphy v Columbia Univ.*, 4 AD3d 200, 773 NYS2d 10 [1st Dept 2004]).

It is well settled that "[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. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*De La Rosa v Philip Morris Management Corp.*, 303 AD2d 190, 757 NYS2d 527 [1st Dept 2003]). Thus, defendants must establish that they were free from any negligence regarding plaintiff's accident.

Although A&B acknowledges that any inference that defendants were negligent would preclude summary judgment on the issue of indemnification, A&B points to no evidence from which a jury may infer that defendants were negligent. A&B's claim that an issue exists as to whether there was even an accident, since plaintiff's accident was not reported to Pavarini, is insufficient. Plaintiff's testimony, as well as the testimony of Pavarini and A&B clearly establish that A&B was solely responsible for the erection, dismantling and supervision of the scaffold and plaintiff's work at the site. Thus, having failed to raise an issue of fact as to defendants' negligence, any liability on their part would be vicarious, entitling defendants to contractual indemnification and defenses conditioned upon a finding of vicarious liability against them.

The companion action for declaratory judgment does not preclude this Court from ruling on the instant motion; the companion action involves different parties, and no summary judgment motion was file in that action.

Therefore, as defendants established their freedom from negligence, the branch of defendants' motion which seeks summary judgment on their claim for contractual indemnification is granted.

As to defendants' failure to procure insurance claim, paragraph 6 of the Trade Contract provides that:

> The Trade Contractor [A&B], at its own expense, shall obtain and submit to the Construction Manager before undertaking part of the Work, policies and certificates . . . in amounts and on such other terms as provided for hereinafter and in the "Insurance Requirements" attached to this Trade Contract as Exhibit C. . . . All such insurance shall be maintained by Trade Contractor, at its expense, until the Work has been completed and all obligations of Trade Contractor under the Contract Documents have been satisfied. (Trade Contract, Exhibit C)

Under the plain terms of the above provision, A&B was required to procure insurance with Commercial General Liability of at least $5,000,000 per occurrence and aggregate, which may be provided through a combination of primary and umbrella/excess liability policies.

Although, as A&B points out, its Answer to the amended complaint admits that its insured, Burlington, also insured BDS, Zedek, and Pavarini, Burlington's answer "denies any and all obligations to defend and indemnify" BDS, Zedek, and Pavarini in the underlying/instant action. Therefore, issues exist as to whether A&B obtained insurance pursuant to the requirements of the Trade Contract.

Thus, the branch of defendants' motion for summary judgment on its failure to procure insurance claim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants/third-party plaintiffs BDS, Zedek

Ventures SPE LLC and Pavarini pursuant to CPLR 3211 and/or 3212 to dismiss plaintiff's common law, Labor Law §§200, 241(a) is granted; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs pursuant to CPLR 3211 and/or 3212 to dismiss plaintiff's 240, and 241(6) claims is denied; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs for summary judgment on defendants' defense and indemnification claims against A&B is granted; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs for summary judgment on their third-party claims for failure to procure insurance is denied; and it is further

ORDERED that plaintiffs' application for partial summary judgment under Labor Law §240 is denied.

This constitutes the decision and order of the Court.

Dated: April 3, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

APR 07 2009

COUNTY CLERK'S OFFICE
NEW YORK