At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of May, 2009.

P R E S E N T:

HON. LAWRENCE S. KNIPEL,
Justice.

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RYSARD LASKI, ,
Plaintiffs,

- against - Index No. 11196/06

AM&G WATERPROOFING, LLC, et ano.,
Defendants.

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AM&G WATERPROOFING, LLC, et ano.,
Third-Party Plaintiffs,

- against - Third-Party Index No. 75451/07

D&M MAINTENANCE, INC.
Third-Party Defendant.

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The following papers numbered 1 to 12 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4 5-6
Opposing Affidavits (Affirmations)	7 8, 9 8
Reply Affidavits (Affirmations)	10, 11
Supporting Affidavit (Affirmation)	8 12
Other Papers	

Upon the foregoing papers, plaintiffs Rysard Laski (Laski) and Zenobia Laski (collectively, plaintiffs) move for an order, pursuant to CPLR 3212, granting them partial summary judgment under Labor Law § 240 (1) against Erma Realty, LLC (Erma) in this action to recover damages for direct and derivative injuries allegedly sustained as a result of a fall from a scaffold. Defendants AM&G Waterproofing, LLC (AM&G) and Erma (collectively, defendants) cross-move for an order, pursuant to CPLR 3212, granting them summary judgment (1) dismissing all plaintiffs' claims against AM&G; (2) dismissing Laski's claims under Labor Law §§ 200, 240, and 241 against Erma; and (3) granting Erma judgment against third-party defendant D&M Maintenance, Inc. (D&M). In addition, D&M cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Laski, an experienced scaffold mechanic, fell about six to seven feet from a construction scaffold on December 5, 2005. The accident occurred on premises in Brooklyn, New York where the parties were constructing a warehouse. AM&G had leased the premises from Erma, who contracted with D&M to build the new warehouse for AM&G and Park Avenue Building & Roofing Supply. D&M, in turn, hired Laski and others to perform masonry block work on the warehouse. AM&G was also present on the construction site, purportedly only to monitor progress and answer building layout questions.

Laski was standing on the first level and erecting the second level of the scaffold when he fell. He was attempting to fit the second level frame on top of the first level frame and had difficulty fitting the pipe of the second level frame onto the coupler because the frame was "half an inch off." While using his foot to nudge one "leg" of the frame onto the coupler, a common practice in the

trade according to testimony by various witnesses, the other "leg" popped out of the other coupler, dragging Laski down and causing him to fall.

Plaintiffs commenced this action to recover damages for personal and derivative injuries against Erma and AM&G on or about August 28, 2006. Defendants filed an answer to the complaint and commenced a third-party action against Laski's employer, D&M, on or about April 2, 2007.

DISCUSSION

Claims Under Labor Law § 240 (1)

(a) The Parties' Positions

Plaintiffs argue in their summary judgment motion that Labor Law § 240 (1) imposes upon Erma, as premises owner, the responsibility of protecting workers from the "special hazards" of working on an elevated construction site including falling from such elevation. They further argue that the statute requires constructing scaffolding with proper protection, that Laski's scaffold lacked protective guardrails and was also constructed with fewer than usual planks. Finally, they assert that neither Laski's alleged negligence nor his erecting a scaffold (rather than constructing a building) would negate Erma's liability.

Defendants argue in opposition to plaintiffs' motion that material questions of fact remain regarding the proximate cause of the accident and whether Laski's conduct was negligent. They also argue that the scaffold's alleged failure cannot serve as a basis for a statutory violation because the lower level where Laski was standing did not break, collapse or shift and thus did not fail to provide proper protection. They maintain that the statute does not mandate them to provide guardrails nor harnesses for the scaffold while erecting it. They add in their own cross motion for summary judgment that the Labor Law § 240 (1) claim against Erma should be dismissed because Laski fell

from the scaffold due only to the ordinary dangers of a construction site, which cannot by itself give rise to an owner's liability. They further allege that Laksi's conduct was the sole proximate cause of the accident and that the scaffold was not defective and did not fail to provide proper protection to plaintiff. Defendants also argue that Laski's Labor Law § 240 (1) claim against AM&G should be dismissed because AM&G was neither the owner of the premises nor general contractor on the project and did not exercise supervisory control over operations.

D&M argues, in opposition to defendants' cross motion and in support of its own cross motion for summary judgment, that Labor Law § 240 (1) is inapplicable because D&M in fact provided adequate safety devices to Laski. It further contends that Laski's recalcitrance and negligence in failing to use the available safety devices or a safe method to erect the scaffold were the sole proximate cause of his accident.

(b) Relevant Law

The moving party on a motion for summary judgment has the burden of making "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion, who must produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1), commonly called the "Scaffolding Law," provides in pertinent part that:

> "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 . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes a non-delegable duty upon owners, contractors, and their agents to provide adequate safety measures at the work site and is liberally construed to accomplish its purpose of placing the ultimate responsibility for safety practices on the owner and general contractor rather than on individual workers who are "scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County for Performing Arts*, 65 NY2d 513, 520 [1985] [internal citation and internal quotation marks omitted], *rearg denied* 65 NY2d 1054 [1985]). This duty is "nondelegable and . . . an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control" (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993] [internal citation and internal quotation marks omitted]).

Building owners and contractors under this provision are absolutely liable when a violation of Section 240 (1) proximately causes a worker's injuries attributable to falls from ladders, scaffolding, or other elevation devices that do not provide proper protection against such "*harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [internal citation and internal quotation marks omitted]). Liability under Section 240 (1) requires risks to the plaintiff not from ordinary construction hazards but from "the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). A plaintiff thus must prove that the statute was violated and that the violation was a proximate cause of the injuries sustained (*see Zimmer*, 65 NY2d at 519).

"[T]he general standard of section 240 (1) . . . requires that scaffolding be so constructed and erected as 'to give proper protection' to the worker, without regard to height" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]). Labor Law § 240 (1) specifically requires guardrails only on scaffolds exceeding twenty feet in height, but owners and contractors are still obligated to follow other safety precautions necessary to maintain proper protection for workers (*id.*). The plaintiff need not specifically show that a safety device broke, collapsed or was defective to warrant a finding that the defendant violated the statute (*see Mingo v Lebedowicz*, 57 AD3d 491 [2008]).

It is well-settled that a plaintiff cannot prevail on a summary judgment motion for liability under Labor Law § 240 (1) if a jury could find that defendant's violation was not a proximate cause of plaintiff's accident (*see Zimmer*, 65 NY2d at 524). Summary judgment must also be denied when there are factual questions whether a plaintiff's own actions were the sole proximate cause of the accident (*see Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998], *rearg denied* 92 NY2d 875 [1998]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Proximate cause is established only where a "defendant's act or failure to act as the statute requires" was a substantial cause of the events which produced the plaintiff's injuries (*Gordon*, 82 NY2d at 561-562; *Ekere v Airmont Indus. Park*, 249 AD2d 104, 105 [1998]; *Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69 [1996]). In addition, although a plaintiff's alleged contributory or comparative negligence is not a defense to a cause of action under Labor Law § 240 (1) (*see Zimmer*, 65 NY2d at 521), such a cause of action will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (*see Blake*, 1 NY3d at 289-290; *see also Tweedy v Roman Catholic Church of Our Lady of Victory*, 232 AD2d 630, 630 [1996], *lv denied* 90 NY2d 810 [1997]).

(c) Resolution

Plaintiffs successfully demonstrate in their summary judgment motion a prima facie case that Erma failed to provide proper protection on the scaffold six to seven feet above the ground. Laski testified that the scaffold did not have guardrails, nor was he given or told to wear a safety harness or any other safety device. The record indicates that it was without protective guardrails, harness, net, line or other safety device when he fell from the partially constructed scaffold. Erma had a duty to provide adequate and proper protection even though building guardrails on partially erected scaffolds is "not practiced," as Laski testified (*see Bland*, 66 NY2d at 461-462).

In opposition, defendants have failed to show a question of fact as to whether the prima facie violation of Labor Law § 240(1) was not a proximate cause of plaintiff's injuries, or whether plaintiff's actions were the sole proximate cause. Assuming arugendo that plaintiff acted negligently, such negligence is at best comparative, which is not a defense to a claim asserted under Labor Law § 240 (1). Accordingly, plaintiffs' motion for summary judgment on his Labor Law § 240(1) claim is granted insofar as asserted against Erma. The branch of Erma's cross motion for summary judgment dismissing the Labor Law § 240(1) claim asserted against it is denied.

The branch of the cross motion dismissing the Labor Law § 240(1) insofar as asserted against AM&G, is granted. AM&G was neither the owner of the premises nor general contractor on the project and did not exercise supervisory control over operations. Owners and general contractors are specifically named in the statute. However, prime contractors (i.e., those entering contracts directly with the owner of the premises) not in privity with the general contractor of a construction project may not be held liable under Labor Law § 240 (1) for personal injuries arising out of work not specifically delegated to them (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 315

[1981]). Liability attaches only if they are statutory agents of the owner or general contractor with the authority to supervise and control (*Sabato v New York Life Ins. Co.*, 259 AD2d 535, 536-537 [1999]).

A contractor cannot be liable to a plaintiff under Labor Law § 240 (nor Section 241) where a contractor has no contractual agreement with the general contractor and was therefore not in a position to control any of the activity which generated plaintiff's injury (*Russin*, 54 NY2d at 316-318). "The determinative factor on the issue of control is . . . whether he has control of the work being done and the authority to insist that proper safety practices be followed" (*see Kehoe v Segal*, 272 AD2d 583, 584 [2000]; *Serpe v Eyris Prods.*, 243 AD2d 375, 380 [1997]).

AM&G indisputably was not the owner of the premises. Nor is there any evidence that AM&G functioned as a general contractor. D&M, Laski's employer, was the only other contractor working on the site at the time of the accident and was hired directly by Erma, the owner of the premises, to perform work independently. AM&G had an employee on site to monitor progress, but contends that he did not supervise Laski's work. Laski in fact testified that his foreman was "Kowalski," a D&M employee, as confirmed by witnesses for both D&M and AM&G. Defendants insist there was no evidence that AM&G had any input into how the work at the site was to be performed.

Consequently, AM&G cannot qualify as an agent of the owner, Erma, considering that it did not exercise the requisite supervisory control over Laski's work on the scaffold (*see e.g. Russin*, 54 NY2d at 317-318; *Sabato*, 259 AD2d at 537; *D'Amico v New York Racing Assn.*, 203 AD2d 509, 510-511 [1994]). Plaintiffs offered no opposition to defendants' allegations about AM&G. Hence, defendants have satisfied their burden of demonstrating that AM&G is not liable to plaintiffs under

Labor Law § 240 (1) as a matter of law. Accordingly, the part of defendants' cross motion for summary judgment dismissing the Labor Law § 240 (1) claim against AM&G is granted.

The branch of D&M's cross motion for summary judgment dismissing the Labor Law § 240(1) claim is denied. Although D&M asserts that safety devices were in fact provided, and D&M's witness testified that spare harnesses and other safety devices were available on site for any worker who did not have his own, an owner or contractor will not escape absolute liability because safety devices which the injured worker might have used are available or exist on the premises (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2006]; *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [1988]; *Heath v Soloff Constr.*, 107 AD2d 507, 512 [1985]; *Krieger v PAT Constr.*, 112 AD2d 10, 10 [1985]).

Claims Under Labor Law § 241 (6)

(a) The Parties' Positions

Erma and AM&G argue in their cross motion for summary judgment that the Labor Law § 241 (6) claim should be dismissed because the New York State Industrial Code regulations (12 NYCRR § 23 *et seq*), which plaintiffs allege were violated, are either inapplicable to the facts of the case or too general to support a Labor Law § 241 (6) claim. They also argue that plaintiffs' Labor Law § 241 (6) claim against AM&G should be dismissed because it was not an owner or general contractor, as discussed above.

D&M cross-moves and argues that a Labor Law § 241 (6) violation does not give rise to absolute liability. It asserts that the statute's broad mandate of adequate protection and safety takes Laski's negligence into account and a finding of no liability under the more stringent Labor Law § 240 (1) is likely to result in a finding of no liability under Labor Law § 241 (6).

Plaintiffs maintain in opposition to these branches of defendants' and third-party defendant's motions that their allegations of violations of 12 NYCRR §§ 23-1.7, 1.15-17, 5.1, and 5.3-5 are sufficient to support the Labor Law § 241 (6) claim.[1] They offer no opposition to defendants' arguments that claims against AM&G should be dismissed.

(b) Relevant Law

Labor Law § 241 (6) provides in pertinent part that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

The statute, enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a non-delegable duty upon owners and contractors to comply with the specific safety regulations set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Thus, a plaintiff supports a Labor Law § 241 (6) cause of action by demonstrating that his or her injuries were proximately caused by a violation of an Industrial Code rule applicable to the circumstances of the accident and setting forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

(c) Industrial Code Section 23-1.7 (b) (1)

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[1]Plaintiffs' bill of particulars also alleged violations of 12 NYCRR §§ 23-1.5, 1.30, 1.33, and 2.1, but plaintiffs have since withdrawn claims that those sections of the Industrial Code were violated.

Industrial Code Section 23-1.7 (b) (1) refers to falling hazards and hazardous openings. This regulation is sufficiently specific to support a Labor Law § 241 (6) claim (*Davidson v E.Q.K. Green Acres*, 298 AD2d 546, 547 [2002]; *Luckern v Lyonsdale Energy Ltd. Partnership*, 281 AD2d 884, 886-887 [2001]), but courts have consistently declined to find Industrial Code Sections 23-1.7 (b) (1) (i) and (iii) applicable to alleged falls from stairway landings, concrete walls, loading docks, ladders, and other edges that are not adjacent to "holes" (*see e.g. Rookwood v Hyde Park Owners Corp.*, 48 AD3d 779, 781 [2008]; *Dooley v Peerless Importers*, Inc., 42 AD3d 199, 206 [2007]; *Godoy v Baisley Lumber Corp.*, 40 AD3d 920, 923-924 [2007]; *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 714 [2007]; *Riccio v NHT Owners, LLC*, 13 Misc 3d 1209(A), *11 [Sup Ct, Kings County 2006]; *cf. Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2005] [excavation cavity]; *Davidson*, 298 AD2d at 547 [elevator shaft]). Plaintiffs thus unsuccessfully contend that Sections 23-1.7 (b) (1) (i) and (iii) are applicable to this accident, given that a fall from a scaffold does not constitute a fall into a hazardous opening. Accordingly, the parts of defendants' and third-party defendant's summary judgment cross motions seeking dismissal of Laski's Labor Law § 241 (6) claim predicated on a violation of 12 NYCRR §§ 23-1.7 are granted.

(d) Industrial Code Sections 23-23-1.15, 1.16 and 1.17

Sections 23-1.15, 1.16, and 1.17, concerning safety railings, safety belts, harnesses, tail lines or lifelines, are inapplicable as well because there was no safety railing and Laski was not provided any such devices (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337-338 [2006]; *Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 870-871 [1998]; *Maternik v Edgemere By-The-Sea Corp.*, 19 Misc 3d 1118(A), *7 [Sup Ct, Kings County 2008]). Accordingly, the parts of defendants' and third-party defendant's

summary judgment motions seeking dismissal of plaintiffs' Labor Law § 241 (6) claim predicated on violations of 12 NYCRR §§ 23-1.15 through 1.17 are granted.

(e) Industrial Code Sections 23-5.1, 5.3, 5.4 and 5.5

Sections 23-5.1, 5.3, 5.4, and 5.5 refer to scaffolds and, contrary to defendants' contentions, are all sufficiently specific to support a Labor Law § 241 (6) claim (*Tomyuk v Junefield Assn.*, 57 AD3d 518, 521 [2008]; *O'Connor v Spencer (1997) Inv. Ltd. Partnership*, 2 AD3d 513, 515 [2003]). Here, the accident involved a scaffold and defendants have failed to meet their burden of showing that Sections 23-5.3, 5.4, and 5.5 are inapplicable.[2] Accordingly, the parts of defendants' and third-party defendant's summary judgment cross motions seeking dismissal of plaintiffs' Labor Law § 241 (6) claim as against Erma and predicated on violations of 12 NYCRR §§ 23-5.1 and 5.3 through 5.5 are denied. However, it is dismissed as against AM&G because Labor Law § 241 (6) does not apply to an entity that was not an owner or general contractor and did not exercise supervisory control over operations, as discussed above.

Claims Under Labor Law § 200 and Common-Law Negligence

(a) The Parties' Positions

Defendants also move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims. Defendants argue that Erma did not supervise or control the activity that brought about the injury and was not in a position to prevent or correct the alleged unsafe

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[2] An initial jury question also exists regarding the type of scaffold involved in the accident and thus, which particular section applies. Such question arises from witness testimony identifying Laski's scaffold as "pipe scaffolding" (Laski Transcript at 86-88; Vogler Transcript at 41-44). Resolving that question will enable determining whether Section 23-5.4 (governing tubular welded frame scaffolds) or Section 23-5.5 (governing tube and coupler metal scaffolds) applies to Laski's scaffold.

condition. They assert that Erma bears no liability in the absence of evidence that it had any input into how to perform work at the site or that it actually directed Laski in the course of his work at the time of the accident. Defendants rely on witness testimony that "Kowalski," a D&M employee, was Laski's foreman to support this branch of their motion. They also argue that Laski's Labor Law § 200 and common-law negligence claims against AM&G merit dismissal because it was not an owner or general contractor with supervisory control, as discussed above.

D&M argues in its cross motion that the conduct that caused Laski's accident resulted from his own decision rather than any supervision. It also argues, perhaps more importantly, that the duties in Labor Law § 200 are delegable, and plaintiffs may not recover against the owner and construction manager because they did not have supervisory control over the project.

Plaintiffs argue in opposition to these branches of defendants' and third-party defendant's cross motions that D&M had direct supervision and control over Laski's conduct at the work site and that no contrary evidence was presented. However, they offer no opposition to defendants' allegations about the absence of Erma's or AM&G's supervision and control.

(b) Relevant Law and Application

Labor Law § 200 codifies a common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Imposing liability on an owner or contractor under a Labor Law § 200 / common-law negligence cause of action requires some evidence that the owner or contractor controlled and supervised the manner in which the underlying work was performed, or that the owner or contractor created or had actual or constructive notice of the alleged dangerous condition which caused the accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park E.*

Constr., 4 AD3d 315, 316 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). No liability attaches to the owner where the defect or dangerous condition arises from the worker's own actions and the owner exerts no supervisory control over the work (*see Ruccolo v City of New York*, 278 AD2d 472, 474 [2000]).

Here, it is undisputed that Erma did not exercise any supervisory control over Laski's work. Plaintiffs offered no opposition to this branch of defendants' cross motion. Accordingly, the part of defendants' summary judgment cross motion seeking dismissal of the Labor Law § 200 claim against Erma is granted.

It is also undisputed that AM&G was not an owner or general contractor and did not exercise any supervisory control over Laski's work, as discussed above. Plaintiffs offered no opposition to this branch of defendants' cross motion. Accordingly, the part of defendants' summary judgment cross motion seeking dismissal of the Labor Law § 200 claim against AM&G is also granted.

Third-party defendant D&M presents no testimony or other admissible proof that it did not exercise supervisory control over Laski's work. However, D&M is still entitled to summary judgment as a matter of law regarding the part of its summary judgment cross motion seeking dismissal of plaintiffs' Labor Law § 200 claim against Erma and AM&G.

Indemnification Claim by Erma against D&M

(a) The Parties' Positions

Defendants argue in their cross motion for summary judgment that D&M is required to indemnify Erma pursuant to Erma's contract with D&M, and that Erma is entitled to judgment as a matter of law on claims against D&M for contractual indemnification. Defendants assert that assert that D&M failed to provide the proper tools, instructions, guidance, and safety devices to

Laski. Their attorney argues that "The record is littered with instances of negligence on behalf of D&M" and that "It is clear from the record evidence that D&M failed to provide the proper tools, equipment, instructions and proper guidance to the plaintiff. In addition, they failed to provide him with a safety harness or a line to tie off with." Defendants support their cross motion by submitting a copy of Erma's contract with D&M, including Section 3.18.1, entitled "Indemnification," which reads:

> "[D&M] shall indemnify and hold harmless [Erma] from and against all claims . . . including but not limited to attorneys' fees, arising out of or resulting from performance of the Work . . . but only to the extent caused in whole or in part by negligent acts or omissions of [D&M] . . . regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder."

D&M argues in opposition that summary judgment concerning the contractual indemnification issue should be denied because material issues of fact exist regarding whether Laski, at the time of the accident, was either a direct or indirect employee of D&M who would be covered by the indemnification clause of the contract. D&M asserts that any alleged employment of Laski by D&M was designed solely for AM&G's principals to cheat Laski's union of fees for his work. D&M also contends that it was not negligent at the site and that the accident was solely the result of Laski's own negligence.

(b) Relevant Law and Application

The contractual indemnification provision at issue requires D& M to indemnify Erma for all claims arising from the negligent acts or omissions of D& M. It is clear that Erma was not actively negligent, that the injuries arose out of the work for which D&M was responsible, and that the plaintiff's damages were "caused" by D&M. Erma has thus established prima facie entitlement to

judgment as a matter of law on this issue, and D&M has failed to raise a triable issue of fact in response. Notwithstanding the motivation behind Laski's "transfer" from AM&G to D&M, witness testimony confirms that Laski was on D&M's payroll and that he took instructions from and referred to D&M employee Teddy Kowalski as his foreman. Consequently, D&M was the only entity in position to supervise Laski's work and control the conditions on the work site.

Accordingly, the branch of the motion for contractual indemnification from D&M is granted (*see Argueta v Pomona Panorama Estates, Ltd.*, 39 AD3d 785 [2007]; *Tkach v City of New York*, 278 AD2d 227 [2000]).

SUMMARY

Plaintiffs' motion for partial summary judgment against Erma under Labor Law § 240 (1) is granted. So much of the cross motions of defendants and third-party defendant seeking the dismissal of the claims asserted under Labor Law § 241 (6) predicated on a violation of Industrial Code Sections 23-1.7 and 1.15 through 1.17, claims under Labor Law § 200, are granted, as is the branch of the cross motion seeking the dismissal of claims against AM&G. The branch of the cross motion seeking summary judgment regarding contractual indemnification of Erma by D&M is granted.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.