

**Dwyer v Central Park Studios, Inc.**

2010 NY Slip Op 33672(U)

December 6, 2010

Sup Ct, New York County

Docket Number: 115086-06

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHKE

PART 10

Justice

Index Number : 115086/2006

**DWYER, STEVE**

vs.

**CENTRAL PARK STUDIOS**

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
 DEC 08 2010  
 COUNTY CLERK'S OFFICE  
 NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH  
 THE ACCOMPANYING MEMORANDUM DECISION.

*Status conf 2/3/2011*

Dated: 12/8/10

  
 HON. JUDITH J. GISCHKE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Steve Dwyer,  
Plaintiff (s),

***-against-***

Central Park Studios, Inc., Gerald J. Picaso, Inc.,  
Michael Slosberg and Janet Cohn Slosberg,  
Defendant (s).

-----X  
Central Park Studios, Inc. and Gerard J.  
Picaso, Inc. s/h/a Gerard J. Picaso, Inc.,  
Third-Party Plaintiff (s),

***-against-***

DSA Builders,  
Third-Party Defendant.

-----X  
Michael Slosberg and Janet Cohn Slosberg,  
Second Third-Party Plaintiffs,

***-against-***

DSA Builders,  
Second Third-Party Defendants.  
-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

| PAPERS                                  | NUMBERED |
|---|----------|
| <u>MOTION SEQ #5</u>                    |          |
| AHAC (3212) w/RPM affirm, exhs .....    | 1        |
| CPS/Picaso opp w/AJS affirm, exhs ..... | 2        |

**DECISION/ ORDER**  
Index No.: 115086-06  
Seq. No.: 005, 006

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

T.P. Index No.:  
590503/07  
**FILED**  
**DEC 08 2010**  
COUNTY CLERK'S OFFICE  
NEW YORK

T.P. Index No.:  
590895/07

|  |    |
|--|----|
| DSA opp w/MJV affirm, exhs . . . . .                         | 3  |
| AHAC reply w/RPM affirm, exhs . . . . .                      | 4  |
| <br><u>MOTION SEQ #6</u>                                     |    |
| CPS/Picaso n/m (3212) w/MW affirm, RM affid, exhs . . . . .  | 1  |
| DSA x/m (3212) w/MJV affirm, CS affid, exhs . . . . .        | 2  |
| Dwyer x/m (3212) w/BJI affirm, SD affid, exhs . . . . .      | 3  |
| DSA partial opp w/ MJV affirm, exhs . . . . .                | 4  |
| CPS/Picaso opp & reply w/MW affirm, exhs . . . . .           | 5  |
| DSA reply/further support w/MJV affirm . . . . .             | 6  |
| CP/Picaso opp w/MW affirm, exhs . . . . .                    | 7  |
| Dwyer reply w/BJI affirm, exhs . . . . .                     | 8  |
| CPS/Picaso reply w/MW affirm . . . . .                       | 9  |
| DSA opp to Dwyer motion w/MJV affirm, exhs . . . . .         | 10 |
| Slosberg x/m (3212) w/RJF affirm, exhs . . . . .             | 11 |
| CPS/Picaso opp & reply w/MW affirm, exhs . . . . .           | 12 |
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| DSA partial opp to Slosberg x/m w/MJV affirm, exhs . . . . . | 14 |

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is a personal injury action in which plaintiff Steve Dwyer ("Dwyer" or "plaintiff") alleges defendants violated sections 240 [1], 241 [6] and 200 of the New York State Labor Laws and that such violations were a proximate cause of his injuries. Issue has been joined and the court has before it several motions for summary judgment. Since issue has been joined, summary judgment relief is available (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1<sup>st</sup> Dept 2001]).

**Facts and Arguments Presented**

On October 7, 2005 while working on a construction project, Dwyer was injured when he fell off a ladder. He claims that an unsecured and inadequate ladder upon which he was standing buckled and collapsed, causing him to fall onto the concrete

floor a few feet below. In his Bill of Particulars, Dwyer alleges he suffered a fracture of his right wrist and of the humerus and that he had various surgical procedures which have only been marginally successful. He claims to have residual pain that feels like pins and needles. He also reports a burning sensation in and extremely limited use of his right hand.

Defendants Michael Slosberg and Janet Cohn Slosberg ("Slosbergs") hired third party defendant/second third party defendant DSA Builders ("DSA") to serve as their general contractor in joining two coop apartments that they own at 15 West 67<sup>th</sup> Street, New York, New York ("building"). Central Park Studios, Inc. ("CPS") is the cooperative corporation that owns the building and defendant Gerard J. Piscaso s/h/a Gerald J. Piscaso, Inc. ("Piscaso" or "managing agent") is the building's managing agent.

DSA was Dwyer's employer on the day of the accident. At that time, DSA had a "1B" Workers' Compensation Policy with American Home Assurance Company ("AHAC"). AHAC brought a motion to intervene in the second-third party action which was granted by the court, without opposition (Order, Gische J., 11/13/08). AHAC now moves for summary judgment (motion sequence no. 5), dismissing the Slosbergs' third party action against DSA for common law indemnification. AHAC contends that Dwyer did not sustain a "grave injury," as defined under the Workers' Compensation Law (section 11) and, therefore, DSA, as his employer, cannot be sued by the Slosbergs for common law indemnification. This motion is opposed by DSA, the Slosbergs, CPS and Piscaso, who each contend this issue is premature to decide without further discovery (CPLR 3212 [f]) and, in any event, AHAC has not met its burden of proving the absence of a grave injury.

CPS and Picaso ("CPS/Picaso") have jointly moved (sequence no. 6) to dismiss Dwyer's complaint on the basis that: 1) he was the sole proximate cause of his accident because he chose a ladder that was too short to do his job, although a taller one was available, 2) there was no dangerous condition because the ladder Dwyer used was not defective and 3) Picaso is not a statutory agent within the meaning of the labor laws. CPS/Picaso also seek summary judgment on their third party complaint against DSA for contractual indemnification.

DSA has cross moved for summary judgment dismissing CPS/Picaso's third party complaint against them for contractual indemnification and contribution.

The Slosbergs have cross moved to dismiss Dwyer's complaint on the basis that they are exempt from the requirements of Labor Law §§ 240 [1] and 241 [6] because, as proprietary lessees of two coop apartments, they are not an "owner" within the meaning of those statutes.

Dwyer has cross moved for summary judgment against defendants CPS and Picaso on his Labor Law §§ 240 [1] and 241 [6] claims on the issue of liability.

There are two contracts that of particular importance in this action and the subject of the motions by the defendants<sup>1</sup>. One contract, dated April 2005, is the AIA printed construction contract for the project joining the two coop apartments ("construction contract"). The construction contract identifies the Slosbergs as the "owners" and DSA as the "contractor." The contract is, however, unsigned. Section

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<sup>1</sup>As a general matter, reference to "defendants" means any party in this action other than Dwyer, unless the court otherwise makes a distinction. Although a party may not have moved for certain relief, they join in the motion or support the arguments presented by the defendant that brought the (cross)motion.

3.12 pertains to indemnification. It provides as follows:

“To the fullest extent provided by law, the Contractor shall indemnify and hold harmless the Owner...from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injuries, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them . . .”

The other contract is an alteration agreement that was required required under the terms of the Slosbergs’ proprietary lease (“alteration agreement”). The alteration agreement, printed on Picaso letterhead, is signed by the Slosbergs, the managing agent and Carrie Salter (“Salter”) on behalf of DSA.

In relevant part the alteration agreement provides that “You have asked Central Park Studios Inc. (The “Corporation”) for its written contract to the making of certain alterations...” It also provides that “Before commencing any work, the contractor will provide us with Certificates of Insurance against liability for injury to person, damage to property and Workman’s Compensations insurance coverage, the liability and property to name the Fifth Avenue Lofts Corp and the Managing Agent as insured parties.” “You shall furnish to the Corporation a letter from the licensed workers indicating their names, license number and insurance coverage.”

Paragraph 7 of the alteration agreement sets forth language pivotal to the issues among the Slosbergs, CPS/Picaso and DSA. That provision is as follows:

“By executing this Agreement you undertake to indemnify and hold harmless the Corporation, the Managing Agent

and the tenants and occupants in the Building, against any claims for damage to persons or property suffered as [a] result of the alterations whether or not caused by negligence, and any expenses (including without limitation, attorneys fees and disbursements) incurred by the Corporation in connection therewith. If requested, you shall procure a bond or agreement from an insurance company, acceptable to the Corporation, insuring performance by you of the provisions of this paragraph."

The Slosbergs seek summary judgment against DSA, arguing that although the construction contract is unsigned, DSA accepted its terms and conditions by acting in accordance with its terms. This was manifested by DSA, among other things, by providing all the labor and equipment for the project, accepting payment in the agreed to amount by applying for payment based upon that amount, acting on work change orders and acting in all respects as if the parties were contractually bound. Thus, the Slosbergs seek summary judgment on their contractual indemnification claims against DSA based upon the alteration agreement. DSA does not raise issues of fact about the enforceability of the unsigned document. Its sole opposition to that branch of the Slosbergs' motion is that it is premature because plaintiff has not established liability against the the Slosbergs and, therefore, they have not yet sustained a loss for which they have to be indemnified. DSA also claims its discovery with respect to the Slosbergs is not completed, as only Mr. Slosberg has been deposed (CPLR 3212 [f]). DSA believes that Mrs. Slosberg was frequently present while the work was being performed on the apartments and DSA wants to inquire whether she directed or supervised the work being done which, if proved, would demonstrate the Slosbergs are not entitled to contractual indemnity for their own negligent acts.

The Slosbergs have cross moved to dismiss the cross claims against them by CPS and Picaso on the basis that the alteration agreement was not an arm's length agreement, not mutual and, therefore, its sole purpose was to indemnify CPS for its own negligence. Thus, the Slosbergs argue the alteration agreement was an attempt to circumvent the GOL § 5-321 by placing the burden on them to obtain insurance. CPS/Picaso have brought their own motion for summary judgment against the Slosbergs for contractual indemnification pursuant to their proprietary lease and the alteration agreement. CPS/Picaso argues that pursuant to Great Northern Ins. Co. v. Interior Const. Corp., 7 NY3d 412 [2006], such clauses are enforceable despite the General Obligation Law's prohibition against exempting or exculpating a lessor from its own liability for damages or injuries caused by lessor's own negligence.

CPS/Picaso has also cross moved for contractual indemnification against DSA based upon the terms of the alteration agreement and DSA has cross moved to dismiss those claims. DSA adopts the arguments raised by the Slosbergs as to why CPS/Picaso is not entitled to contractual indemnification. Separately, however, DSA argues there is no evidence that it agreed to be bound by the alteration agreement even though Salter signed it on behalf of DSA. Salter, who provides her sworn affidavit, states she was a former employee of DSA, in charge of pricing projects and ordering materials. She states that she "cannot recall why I signed the agreement and cannot recall whether someone asked me to execute the same. I had no involvement in negotiating the agreement." In response to those claims, CPS/Picaso provides correspondence showing that another DSA employee, Shannon Linden, sent the signed alteration agreement back with a cover letter on DSA stationery, from Salter

"requesting that we be allowed to begin demolition" and stating "[E]nclosed with this is the last page of the alteration agreement with my signature."

DSA also claims that the language of the alteration agreement and repeated references to "You" and "your" mean the Slossbergs, not the contractor, and therefore, even if DSA is a signatory thereto, it is the Slossbergs, not DSA who has to provide indemnification to CPS/Picaso. Thus, according to DSA, there is no "unmistakable intent" by DSA to indemnify CPS/Picaso and the agreement should be construed against the drafter - CPS/Picaso.

AHAC, DSA's worker's compensation insurance carrier, has brought a motion for summary judgment (sequence no. 5) seeking the dismissal of the common law indemnification claims against DSA, its insured. AHAC argues that Dwyer did not suffer a grave injury because he can still use his arm and therefore, no action for common law negligence and/or indemnity can be maintained against DSA, plaintiff's employer. DSA, CPS/Picaso and the Slossbergs oppose the motion. They contend that it is for the jury to decide whether Dwyer's condition meets the statutory threshold of a "grave injury" and Dwyer is still being treated for a condition that may not improve.

CPS/Picaso and the Slosbergs seek summary judgment against Dwyer, dismissing his Labor Law § 200, 240 [1] and 241 [6] claims against them. The moving defendants adopt each other's arguments and present some arguments unique to their particular situation. Although DSA is not a direct defendant, the employer joins in the cross motions brought by CPS/Picaso and the Slosbergs against Dwyer.

Defendants contend that Dwyer insisted on using a ladder that was too short to do his job (installing sheet rock) and that although a taller, 10 foot ladder was available

in the same room he was working in, he chose not to use it, but selected a 6 foot ladder instead. The defendants further argue that there is conflicting evidence about whether the ladder Dwyer was using was sturdy or wobbly. At his deposition, Dwyer testified the legs of the ladder buckled, but immediately after the accident he reported to his boss, Mitchell Dennis of DSA ("Dennis"), that he had lost his balance and fallen. Dennis, who was also deposed, testified that he examined the ladder after the accident and observed it was intact and had plastic "feet" on all four legs. He also observed the safety brackets were engaged.

Also, according to Dennis, there were no other contractors using ladders in the Slosbergs' apartment and it was obvious the taller ladder belonged to DSA and Dwyer could use it. Thus, defendants argue Dwyer's Labor Law 240 [1] claim should be dismissed because not only was a proper safety device provided, Dwyer was the sole proximate cause of his accident.

The defendants claim to be entitled to summary judgment on Dwyer's Labor Law § 241 [6] claim because it is without a predicate basis. They contend none of the Industrial Code provisions plaintiff relies upon (12 NYCRR § 23-1.21 [b] [4]) apply.

The moving defendants argue that his Labor Law § 200 should be dismissed as well because he was supervised, directed and otherwise controlled only by DSA, not the other defendants. CPS, Picaso and the Slosbergs deny they created a dangerous condition or had notice of one.

The Slosbergs separately argue that, as proprietary lessees of the coop apartments, they are not "owners" under either the scaffold law or Labor Law § 241 [6] because, although they contracted for the work, they neither controlled nor supervised

it.

Dwyer has cross moved for summary judgment on his Labor Law §§ 240 [1] and 241 [6] claims. He denies either having access to a taller ladder or knowing he could use it. He also claims that a taller ladder would not have been an adequate safety device anyway and would have been even more dangerous for him to use because it would not have fit into the cramped area he had to work in.

Dwyer testified at his deposition that the ladder he was using was in poor condition. The feet and "stoppers" were missing and the legs were bent. Furthermore, Dwyer contends the ladder that was produced during discovery was not the same ladder he was on when his accident happened. For this claim he relies on his recollections as well as the sworn affidavit of Dale King, an engineer employed by the manufacturer of the ladder, who states that he reviewed the photographs of the ladder that defendants produced. He contends that the ladder has a date code on it: "110744M." According to King, this code means the ladder was manufactured in the Merced, California factory in November 2007, thus it could not have been the same ladder involved in Dwyer's accident in October 2005.

#### **Law Applicable to Motions for Summary Judgment**

A movant seeking summary judgment in its favor 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 " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate

the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (See: Hindes v. Weisz, 303 A.D.2d 459 [2<sup>nd</sup> Dept 2003]).

### Discussion

*Are the Slosbergs "owners"?*

Labor Law § 240 [1] imposes a non-delegable duty upon owners, contractors and their agents to supply necessary security devices for workers at an elevation, to protect them from falling (Bland v. Manocherian, 66 N.Y.2d 452, 458-459 [1985]). An owner, contractor or agent who breaches that duty may be held liable in damages, regardless of whether it has actually exercised supervision or control over the work (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]). Therefore, a violation of this duty results in absolute liability where the violation was the proximate cause of the accident (Meade v. Rock-McGraw, Inc., 307 A.D.2d 156 [1<sup>st</sup> Dept. 2003]).

Similarly, Labor Law § 241 [6] also imposes a non-delegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Comes v. New York State Electric & Gas Co., 82 NY2d 876 [1993]; Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]).

The "owners of one and two-family dwellings who contract for, but do not direct or control the work" are, however, exempted from the requirements of having to provide safety devices for the protection of workers.

There is overwhelming proof in this record, and the Slosbergs have established, that they had a contract with DSA to perform the work necessary for the two apartments to be joined. The Slosbergs have established that they themselves did not direct or control the work DSA's employees (including Dwyer) did on the project.

Although DSA claims it still needs to depose Mrs. Slosberg before addressing this issue (CPLR 3212 [f]), DSA already deposed Mr. Slosberg, the plaintiff, and other persons familiar with the project. DSA has no testimony by any of these witnesses tending to show that Mrs. Slosberg supervised, controlled or directed the work being performed. When Dwyer was asked whether Mrs. Slosberg ever got involved in instructing him how to do his work he responded "No." He gave the same response when asked about Mr. Slosberg.

Even crediting DSA's observation that Mrs. Slosberg "frequently" visited the premises, these weekly visits were generally to observe the progress of the work being done in the apartment next door to the one she and Mr. Slosberg were living in. She may have discussed general matters with the contractor and even attended meetings with the architect, but there is no proof offered by DSA (or any other defendant) that she (or either of the Slosbergs) instructed or gave directions to DSA's employees or controlled the means and methods they used to do their job (Uribe v. Fairfax, LLC, 48 AD3d 336 [1<sup>st</sup> Dept 2008]). In order for a worker to be "directed" within the meaning of the Labor Laws, there must be supervision of the manner and method of the work to be performed (Duda v. John W. Rouse Const. Corp., 32 N.Y.2d 405 [1973]).

The Slosbergs have, therefore, established that they are exempt from liability under Labor Law §§ 240 [1] and 241 [6] because they are not statutory "owners" within

the meaning of these section of the Labor Law, but fall within the exception contained in that statute for the "owners of one and two-family dwellings who contract for but do not direct or control the work" (Maciejewski v. 975 Park Ave. Corp., 37 A.D.3d 773 [2<sup>nd</sup> Dept 2007] *lv den* 8 N.Y.3d 815 [2007]; Xirakis v. 1115 Fifth Ave. Corp., 226 A.D.2d 452 [2<sup>nd</sup> Dept 2006]; DeSabato v. 674 Carroll Street Corp., 24 Misc.3d 1236 [A] [Sup Ct Kings Co. 2005]; DeNota v. 45 East 85<sup>th</sup> Street Corp., 163 Misc.2d 734 [Sup Ct NY Co. 1995]; *see also*, Brown v. Christopher Street Owners Corp., 87 N.Y.2d 938, 939 [2006])

Therefore the Slosbergs' motion for summary judgment dismissing the Labor Law §§ 240 and 241 [6] claims against them is granted.

*Is any other movant entitled to summary judgment on Dwyer's Labor Law § 240 [1] claim?*

Labor Law § 240 [1], commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1<sup>st</sup> Dept 2007] *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 [1995]). Labor Law § 240 [1] requires property owners and contractors to furnish or cause to be furnished safety devices, such as ladders and scaffolds, which are "so constructed, placed and operated as to give proper protection" to workers. The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed (Panek v. County of Albany, 99 N.Y.2d 452 [2003]). In order to prevail on a Labor Law § 240 [1] cause of

action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]; Camlica v Hansson, 40 AD3d 796 [2007]).

There are some discrepant facts about the circumstances surrounding Dwyer's accident. According to Dennis, Dwyer's supervisor, testified at his deposition that Dwyer came to him immediately after the accident happened. Dwyer reportedly told him that while up on the ladder he had "lost his balance and fell." Dennis testified at his EBT that after he heard what happened, he examined the ladder which was laying on the floor. Dennis did not observe any wrong with the ladder, such broken or missing pieces, and the ladder had its feet. Dennis testified DSA owns between 10 and 30 ladders of different sizes and that workers can use any ladder they need. Dennis stated he took the ladder involved in the accident "out of service" but it was inadvertently put back into use at his and other jobs, without any reports of there being a problem with it.

Dwyer, however, claims he complained "at least once" about the condition of the ladders he had to use. He claims the ladder he was using was defective, had no rubber feet and was bent. According to Dwyer the top piece or platform (where a paint can is usually rested) was missing. Although a 10 foot ladder was available in the same room where he had to work, Dwyer chose the shorter ladder to reach the 11 foot ceiling because he did not know he could use the taller one. Now, however, he states in his sworn affidavit that the taller ladder was too wide to use when opened and that there was debris on the floor. Dwyer acknowledged that he used the ladder although he saw it was unstable because all four legs were bent. The taller ladder was not bent.

A fall from a ladder by itself is insufficient to impose liability under Labor Law § 240 [1] (Artoglou v. Gene Scappy Realty Corp., 57 A.D.3d 460 [2<sup>nd</sup> Dept 2008]). In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240(1), he must establish that there was a violation of the statute, which was the proximate cause of the worker's injuries (see Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 [2003] ). To be statutorily liable, the owner or contractor must breach its statutory duty to provide the worker with adequate safety devices and this breach must proximately cause the worker's injuries. If adequate safety devices are available at the job site, but the worker does not use them or misuses them, "these prerequisites do not exist" (Robinson v. East Medical Center, L.P., 6 NY3d at 554). Consequently, where a plaintiff's actions are the sole proximate cause of his accident, liability under Labor Law § 240 [1] does not attach (Robinson v. East Medical Center, L.P., 6 NY3d 552 [2006]).

There is a triable issue of fact whether plaintiff should have used a taller ladder to do his job. There was an available 10 foot ladder in the same room which Dwyer decided not to use. His deposition testimony was that he thought it belonged to a different contractor, but there is testimony by others that there were no other contractors in the same room that day and that the taller ladder was not marked in any way tending to show it belonged to any contractor other than DSA. Dwyer did not ask for a taller or better ladder to do his job that day, but claims he had complained about the ladders he was provided with on prior occasions and had never been provided with a stable one. Thus, there is a triable issue of fact whether plaintiff's own actions were the sole proximate cause of his injuries (Robinson v. East Medical Center, L.P., supra;

Miro v Plaza Constr. Corp., 38 AD3d 454 [1<sup>st</sup> Dept 2007]). There are also issues of credibility; issues of credibility are for the trier of fact to decide. Therefore, Dwyer's cross motion for summary judgment on his Labor Law 240 [1] claim is denied. The motion by CPS and Picaso for summary judgment dismissing Dwyer's Labor Law 240 [1] claim is also denied for the same reason Dwyer is not entitled to summary judgment.

*Is any other movant entitled to summary judgment on Dwyer's Labor Law § 241 [6] claim?*

Plaintiff's Labor Law § 241 [6] claim is based upon Industrial Code provisions 12 NYCRR §§ 23-1.21 [b] [4]. The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court (Messina v. City of New York, 300 A.D.2d 121 [1<sup>st</sup> Dept 2002]).

Section 23-1.21 (b) (4) (i) requires *inter alia* that a ladder be fastened securely (Kinsler v. Lu-Four Associates, 215 AD2d 631 [2<sup>nd</sup> Dept 1995]). Section 23-1.21 (b) (4) (ii) requires that all ladder footings be firm (Sprague v. Peckham Materials Corp., 240 A.D.2d 392 [2<sup>nd</sup> Dept 1997]). Section 23-1.21 (b) (4) (iii) requires that a leaning ladder be rigid enough to prevent excessive sag under maximum loads. Section 23-1.21 (b) (4) (iv) requires that when work is being performed from ladder rungs between 6 and 10 feet above the ladder footing, a leaning ladder has to be held in place by another person. Section 23-1.21 (b) (4) (v) requires that the upper end of any ladder "which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder" (Kwang Ho Kim v. D & W Shin Realty Corp., 47 A.D.3d 616 [2<sup>nd</sup> Dept 2008]).

The court finds that sections 23-1.21 (b) (4) (i) and (ii) are applicable to the facts of this case and serve as predicate bases for plaintiff's Labor Law § 241 (6) claim.

Sections 23-1.21 (b) (4) (iii), (iv) and (v), however, are not predicate bases, based upon the facts of this case as presented. Therefore, the motions for summary judgment, dismissing the Labor Law § 241 [6] claims are granted only to the extent that the claim is predicated on Sections 23-1.21 (b) (4) (iii), (iv) and (v); the Labor Law § 241 [6] claim otherwise survives (except as the Slossbergs, against whom it has already been dismissed, *supra*).

*Did Dwyer Suffer a Grave Injury?*

Pursuant to Worker's Compensation Law §11, an employer may only be held liable for contribution or common law indemnification to a third party if the employee sustained a "grave injury." Grave injury is a statutorily defined threshold for catastrophic injuries and includes only those injuries that are permanent, including the "permanent and total loss of use or amputation of an arm . . ." The statutory list is exhaustive and finite, not illustrative; absent further legislative action, the list is not to be expanded (Castro v. United Container Machinery Group, Inc., 96 NY2d 398, 736 NYS2d 287 [2001]). Furthermore, injuries qualifying as "grave" are narrowly defined and the words in the statute are to be given their plain meaning without resorting to forced or unnatural interpretations (Meis v. ELO Organization, LLC., 97 N.Y.2d 714 [2002] *internal citations omitted*).

The burden falls on the third-party seeking contribution or indemnification from the employer to prove, through competent medical evidence, that an employee sustained a grave injury (Coque v. Wildflower Estates Developers, Inc., 31 A.D.3d 484

[2<sup>nd</sup> Dept 2006]). However, on this motion, it is AHAC (the insurance carrier) who has the burden of proving Dwyer did not sustain a "grave injury."

Dwyer claims to have sustained a life altering, permanent injury which causes him intense pain, even when showering. He describes a burning sensation down his neck and shoulder. His arm gets stiff and cold almost daily and he has lost sensation on parts of his skin. At times his arm deadens, causing him to drop whatever is in his hand Dwyer has undergone surgeries, including a bone graft.

Importantly, it is not the plaintiff who is placing his physical condition at issue on this motion, but an intervenor. AHAC has not provided any medical records to prove that Dwyer has not suffered a grave injury. The defendants have not yet had the opportunity to conduct a physical examination of the plaintiff, which they have a right to do. Therefore, this motion by AHAC for a threshold determination is premature (3212 [f]) and it is denied for that reason.

*The third party complaint: is either side entitled to summary judgment?*

An individual who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of the other contracting party, is conclusively presumed to know its contents and to assent to them (Metzger v. Aetna Ins. Co., 227 N.Y. 411 [1920]; Imero Fiorentino Associates, Inc. v. Green, 85 A.D.2d 419 [1<sup>st</sup> Dept 1982]). Furthermore, a contract of indemnity is binding on the indemnitor where there is no fraudulent concealment or where the indemnitor has knowledge of the facts (Vasiliades v. Lehrer McGovern & Bovis, Inc., 3 A.D.3d 400 [1<sup>st</sup> Dept 2004]). Salter admits she signed the alteration agreement on behalf of her employer. Whether she recalls having signed the agreement or not, her signature is on it; there is no claim of fraud. Thus,

any argument by DSA that it may not have intended to be bound by the alteration agreement fails. DSA is clearly a party to that agreement.

In general, an alteration agreement that fails to make any exception for the party benefitting from the indemnification provision (i.e. indemnitee's) own negligence is unenforceable pursuant to General Obligations Law § 5-321. This is because GOL § 5-321 prohibits a lessor from exempting or exculpating itself for its own liability for damages or injuries caused by lessor's own negligence (Hadzihasanovic v. 155 East 72nd Street Corp., 70 A.D.3d 637 [2<sup>nd</sup> Dept. 2010]). Where, however, such an indemnification agreement is coupled with an insurance procurement requirement, that agreement to indemnify is enforceable. This is tantamount to an agreement to use insurance as a way of allocating the risk of liability to third parties (Great Northern Ins. Co. v. Interior Const. Corp., 7 NY3d 412 [2006]); Otero ex rel. Vasquez v. L & M Hub Associates, LLC, 68 A.D.3d 444 [1<sup>st</sup> Dept 2009]).

Here, the Slosbergs were required, pursuant to the terms of their proprietary lease, to not only obtain insurance for the benefit of the lessor (CPS), but also to complete an alteration agreement. Thus, the indemnification provision of the alteration agreement, when coupled with the insurance requirement in the proprietary lease, require the use of insurance to allocate risk of liability to third parties between lessor and lessee. That agreement is enforceable against the Slosbergs, who agreed to indemnify CPS for "any claims for damage to persons or property suffered as [a] result of the alterations whether or not caused by negligence." Thus, although Dwyer's claims against the Slosbergs have been dismissed, the indemnification provision of the alteration agreement is enforceable. Therefore, CPS's motion for summary judgment

for indemnification by the Slosbergs is granted.

The Schlosbergs' argument that the alteration agreement is an unenforceable contract of adhesion is rejected. Love'M Sheltering Inc. v. County of Suffolk, 33 AD3d 923 (2<sup>nd</sup> dept. 2006).

While the lessee and lessor are bound by the terms of the alteration agreement, which was required under the proprietary lease, DSA is not a party to the proprietary lease. There is, however, an insurance provision in the alteration agreement which may avoid the consequences of GOL 5-321, assuming the indemnification applies to DSA. DSA has raised issues of fact that there is an ambiguity in the alteration agreement. Some provisions of the agreement unmistakably apply and refer to the "contractor." Other sections however, including the indemnification provision, refers to "you" or "your" without any definition of who that is. For example, the first provision in the agreement states that:

"You have asked Central Park Studios, Inc. ("The Corporation") for its written consent to the making of certain alterations (the "Alteration") to Apartment \_\_\_\_\_. You have submitted to the Corporation, for its approval, in substantially final form, the plans and specifications annexed hereto ("the Plan") for the alterations."

Paragraph 2 provides:

"You agree to assume all responsibility for the weather-tightness of any installation ... and other equipment installed, or altered, by you during the balance of your lease term."

Paragraph 6 provides:

"The entire cost of the Alterations, including the costs of the Plans and the procurement of all required approvals

shall be paid in full by you within thirty days after the completion of the Alterations. If ... one or more mechanic's liens are filed ... you shall at your sole expense cause such mechanic's liens to be discharged. If you fail to discharge said mechanic's lien or liens, the Corporation may exercise all rights and remedies reserved to it under your Proprietary Lease."

These provisions highlight the ambiguity about who the "you" is in the indemnification paragraph stating that "you undertake to indemnify and hold harmless the Corporation, the Managing Agent..."

An agreement to indemnify must be strictly construed so as to avoid reading into it a duty to indemnify which the parties did not intend would be assumed (Great Northern Ins. Co. v. Interior Const. Corp., supra). Thus, CPS/Picaso's motion and DSA's cross motion for summary judgment on the third party complaint are each denied. The alteration agreement is ambiguous and neither side has proved it is entitlement to a judgment in its favor, as a matter of law.

*Is Picaso an "agent" within the meaning of the Labor Law?*

Picaso, CPS's managing agent, argues that it is not the owner's statutory "agent," within the meaning of the Labor Law. The term agent applies to someone who acts for the owner or general contractor by standing in their shoes and performing their duties and obligations. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under Labor Law §§ 240 and 241 (Russin v. Picciano & Son, 54 N.Y.2d 311, 318 [1981]).

Although Picaso was in charge of the making sure the necessary paperwork was

completed before the alteration work could proceed, Picaso has proved that it did not actually have, nor did it exercise, any control over the work being done in the Slosbergs' apartments (Griffin v. MWF Development Corp., 273 A.D.2d 907, 901 [4<sup>th</sup> Dept 2000] *internal citations omitted*). Dwyer took his instructions from his supervisor who was also employed by DSA. No triable issue of fact has been raised that Picaso is the owner's statutory agent, which would be the basis for imposition of liability under the Labor Laws. Therefore, Picaso's motion to dismiss Dwyer's claims against it based upon alleged violations of Labor Law § 240 [1] and 241 [6] is granted. Those claims against Picaso are hereby severed and dismissed.

*Are the Slosbergs, CPS and/or Picaso entitled to Summary Judgment dismissing the Labor Law § 200 (common law negligence) claim?*

Plaintiff has not moved with respect to his Labor Law § 200 (common law negligence claims. The elements of a prima facie Labor Law § 200 claim are that the defendants: 1) exercised supervision and control over the work performed or 2) had actual or constructive notice of the dangerous condition alleged, or 3) created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1<sup>st</sup> Dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1<sup>st</sup> Dept. 1998]).

The Slossbergs, CPS and Picaso has established that they did not control the injury producing work nor did they have notice of or create the dangerous condition alleged. Therefore, the Slosbergs, CPS and Picaso have proved their defenses. Plaintiff has not come forward with any triable issues of fact. Therefore, Dwyer's Labor Law § 200 (common law negligence) is severed and dismissed.

*Recapitulation and Summary*

Dwyer has only moved with respect to his Labor Law §§ 240 [1] and 241 [6] claims. He has not, however, proved that he is entitled to summary judgment on either of those claims. The Slosbergs are entitled to summary judgment on Dwyer's claims against them (Labor Law §§ 240 [1], 241 [6] and 200 (common law negligence) and Dwyer's claims against the Slosbergs are hereby severed and dismissed.

Picaso has proved it is entitled to summary judgment dismissing all of Dwyer's claims (Labor Law §§ 240 [1], 241 [6] and 200) against the managing agent, therefore Picaso's cross motion is granted.

The Labor Law § 200 claims are dismissed as to CPS as well, and CPS's motion for summary judgment is granted to that extent.

CPS has also proved it is entitled to summary judgment on its contractual indemnification claim against the Slosbergs for the reasons stated. Therefore, CPS's motion for summary judgment is granted to that extent as well. The Slosberg's cross motion for summary judgment dismissing the cross claim by CPS based upon contractual indemnification is, therefore, denied.

CPS has not proved it is entitled to summary judgment against Dwyer on his Labor Law §§ 240 [1] and 241 [6] claims; their cross motion for that relief is denied.

Neither moving party has proved nor disproved that DSA is required to indemnify CPS/Picaso and therefore, the motion by CPS/Picaso and cross motion by DSA are each denied; there are triable issues of fact before the court can apply the law.

AHAC's motion to dismiss the third party complaints against the employer (DSA), based upon Dwyer not having sustained a "grave injury" is denied as premature.


This case was previously adjourned without a date pending the court's decision on these motions. A status conference is hereby scheduled for **February 3, 2011 in Part 10** and the Note of Issue is extended to February 4, 2011. The defendants' medical examination of Dwyer shall take place no later than Thirty (30) days after the date of entry of this decision and order.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of this court.

Dated:           New York, New York  
                  December 6, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
DEC 08 2010  
COUNTY CLERK'S OFFICE  
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