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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL
Justice

IA Part 19

MIGUEL RAMOS, et al.

-against-

VORNADO NEW YORK RR ONE LLC, et al.

BAUHAUS CONSTRUCTION INC.

-against-

TRI-BUILT CONSTRUCTION, INC.

VORNADO NEW YORK RR ONE LLC

-against-

H&M HENNES & MAURITZ L.P.

VORNADO NEW YORK RR ONE LLC

-against-

TRI-BUILT CONSTRUCTION, INC.

Index Number 3125 2004

Motion Date October 6 2010

Motion Cal. Numbers 15, 16, 20-24

Motion Seq. Nos. 6, 8, 9-11, 13-14

The following papers numbered 1 to 100 read on this order to show cause by Tri-Built Construction, Inc. (Tri-Built), to compel the testimony of Jeffrey Bogo; motion by Bauhaus Construction, Inc. (Bauhaus), to strike the answer and cross claims of Tri-Built or preclude Tri-Built from producing a witness at trial to testify, on the ground that Tri-Built has never produced a witness; motion by Vornado New York RR One LLC (Vornado), to dismiss plaintiff's Labor Law § 200 and common-law negligence claims and for contractual and common-law indemnification as against all co-defendants and third-party defendants; motion by Tri-Built for summary judgment in its favor dismissing the third-party complaint;

cross motion by Tri-Built to compel Bauhaus to provide discovery previously ordered and also items made known at the depositions of various nonparties; motion by Pavarini for summary judgment in its favor dismissing the complaint insofar as asserted against it; motion by H&M Hennes & Mauritz L.P. (H&M), for summary judgment in its favor on its claim for contractual indemnification against Bauhaus; motion by Bauhaus for summary judgment in its favor dismissing the complaint insofar as asserted against it and for summary judgment against Tri-Built; and cross motion by plaintiff for summary judgment in his favor on his claims pursuant to Labor Law §§ 200, 240(1) and 241(6).

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Upon the foregoing papers it is ordered that the motions and cross motions are decided as follows:

The order to show cause by Tri-Built to compel the testimony of Bogo, is denied as moot.

The motion by Bauhaus to strike the answer and cross claims of Tri-Built or preclude Tri-Built from producing a witness at trial to testify, on the ground that Tri-Built has never produced a witness is denied as moot.

The motion by Vornado to dismiss plaintiff's Labor Law § 200 and common-law negligence claims and for contractual and common-law indemnification as against all co-defendants and third-party defendants, is granted.

The motion by Tri-Built for summary judgment in its favor dismissing the third-party complaint is denied. The cross motion by Tri-Built is denied as moot.

The branches of the motion by Pavarini which is for summary judgment in its favor dismissing plaintiff's Labor Law §§ 200 and 241 claims against it is granted. The branch of the motion by Pavarini which seeks to dismiss plaintiff's Labor Law §240 (1) claim is denied.

The motion by H&M for summary judgment in its favor on its claim for contractual indemnification against Bauhaus is granted.

The branch of the motion by Bauhaus for summary judgment in its favor dismissing plaintiff's Labor Law §§ 200 and 241(6) claims is granted, insofar as asserted against Bauhaus. The branch of the motion by Bauhaus which is for summary judgment on its claims for contractual indemnification against Tri-Built, is granted. Upon a search of the record (CPLR 3212[b]), summary judgment in plaintiff's favor on his claim pursuant to Labor Law § 240(1), is granted. The branch of Bauhaus' motion which seeks to dismiss plaintiff's claims under Labor Law § 240(1), is denied.

Finally, the cross motion by plaintiff is denied as untimely.

Facts

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained while working as a taper for Tri-Built. Pavarini was the construction manager for the core and shell work at the premises. The premises were owned by Vornado which hired Pavarini as construction manager/general contractor. Vornado also hired Bauhaus as a general contractor. The building was a multi-story, mixed-use property that was undergoing major renovations. Numerous different trades were working on the project. Plaintiff's job duties included measuring, cutting, and installing tape. Pavarini had a contract with Vornado for demolition of buildings and erection of new buildings. H&M hired Bauhaus to build the interior space, and Bauhaus contracted with Tri-Built for the installation of drywall, among other things.

The action was commenced against Vornado, Pavarini and Bauhaus by filing of a supplemental summons and amended complaint on or about February 10, 2004. Issue was joined by service of Vornado's verified answer on or about October 17, 2005. Within its answer, Vornado cross-claimed for contractual and common-law indemnification against Pavarini and Bauhaus.

Bauhaus subsequently impleaded Tri-Built on November 15, 2005. Thereafter, Vornado separately impleaded H&M and Tri-Built on October 19, 2006, seeking judgment over these parties for contribution, contractual and common-law indemnification. H&M and Tri-Built answered these third-party complaints on or about May 8, 2007.

Plaintiff testified that he received all of his work assignments from his foreman at Tri-Built and that he was directed by a gentleman to finish a particular taping job. This man was identified as a carpenter foreman, who told plaintiff to use the ladder involved in the accident. The carpenter who gave plaintiff the ladder worked for Tri-Built and for Chelsea.

Plaintiff was caused to fall from a ladder that had been placed on top of a scaffold while plaintiff was performing taping work during the course of his employment with Tri-Built. At the time of the accident, plaintiff was reaching up to sand the wall in order to

prepare the surface for sheet rock installation. Plaintiff had been directed by his foreman to place a 16-foot high, A-frame ladder on top of a 22-foot high mobile scaffold in order to reach the location on the wall (located approximately 40 feet above the floor), where he had to perform his work because the scaffold was not high enough by itself for plaintiff to reach the ceiling.

At the time of the accident, plaintiff was standing on the last step of the ladder that had been placed on top of the scaffold. No one was holding the ladder and the ladder was not secured to the scaffold or otherwise secured against movement. While performing his directed task, plaintiff was caused to fall off the ladder and to the floor. Notably, both the scaffold and the ladder tipped over to the left and collapsed to the floor. The ladder was not properly secured against movement and no other safety devices were available, or were provided to prevent or break plaintiff's fall. The safety devices that were provided to plaintiff were inadequate and failed to protect him.

Order to Show Cause by Tri-Built

The order to show cause by Tri-Built to compel the examination before trial of Jeffrey Bogo, is denied as moot as the record reveals that Mr. Bogo has since appeared for examination before trial.

Motion by Bauhaus

The motion by Bauhaus to strike the answer of Tri-Built on the ground that it did not produce a witness for examination before trial is denied as moot.

Motion by Vornado

Vornado moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims and for summary judgment in its favor on its claims for contractual and common-law indemnification as against all co-defendants and third-party defendants.

Briefly, at the time of the accident, plaintiff was an employee of third-party defendant Tri-Built, which was performing work at the location pursuant to a subcontract with general contractor, Bauhaus. Bauhaus was on site to build the interior of a store via a general contract with H&M. At the time of the incident, H&M was a retail store tenant of Vornado, an absentee landowner.

Allegedly, plaintiff had been directed by a Tri-Built foreman named "Bogo" to work on the scaffold and to use the ladder involved in the accident. He did not recall receiving any

instructions from Vornado, and he did not know if anyone from Vornado was present on the date of the accident.

Eli Zamek, Vornado's senior vice-president for design and construction, testified as follows: in the two months prior to the accident, Vornado had hired Pavarini as the construction manager and general contractor to construct "core and shell work" around the building. During the period of July and August 2002, months prior to the accident, Zamek oversaw Pavarini's construction of the core and shell of the building. At that time, H&M's contractors - Bauhaus or Tri-Built - were not yet on the site. Vornado's oversight of Pavarini ended in August 2002, prior to plaintiff's accident. Once the work by Pavarini was completed, the tenant, H&M, brought in their own contractors from Bauhaus for the interior work. Over a year prior to the subject accident, Vornado leased the entire building for retail store space solely to H&M. With regard to the interior of the building, H&M hired their own architects. Zamek explained that once the premises are turned over to the tenant for their own construction, "it's up to the tenant to complete their own space."

James Hennessy, H&M's construction manager, testified as follows: his job, along with four H&M project managers, is to oversee, by coordinating architects and contractors, the building of H&M's new clothing apparel store. H&M project managers routinely met with their contractors to check on the status of the job and to troubleshoot. In addition to these duties, Hennessy was to review H&M's store leases. According to the lease with Vornado, H&M retained their own general contractor, Bauhaus, for build-out of their interior leased space at the subject location. Bauhaus was responsible for overall site safety of the interior "build-out"; at no time did he learn of any complaints regarding the scaffolding or equipment used during the construction project at the subject location.

Mao Sarkissian, a Bauhaus office manager/bookkeeper, was deposed and testified as follows that: for the subject location, Bauhaus contracted with drywall subcontractor Tri-Built. Ms. Sarkissian recognized Jeffrey Bogo's signature on the Bauhaus accident report prepared after plaintiff's fall; Bogo was on site daily at the subject location and investigated the incident. Bogo monitored and coordinated with all of the subcontractors of the various trades at the subject locations. When questioned about Vornado's involvement in this case, Ms. Sarkissian had "never heard of" Vornado.

Paul Demeio, Pavarini's safety director, testified as follows: his duties included conducting safety inspections at projects, working with insurance companies on safety issues. He recognized Pavarini's contract with Vornado for the alleged incident location. He testified that back in September 2002, Pavarini had two superintendents on site daily for the "core and shell" of the H&M store. Demeio reviewed these Pavarini superintendents' accident reports for the subject accident and conducted an investigation himself but never reported to Vornado about the accident; he never dealt with anyone from Vornado about the

subject accident. As a result of conducting the investigation, Demeio concluded that plaintiff's accident occurred "in an area that was part of Pavarini's project."

Pursuant to section 35 of the lease between Vornado and H&M, dated August 23, 2001, H&M was to indemnify Vornado "(a) except to the extent caused by Vornado's negligence, for all claims arising from any act, omission or negligence of the tenant or its contractors . . . (b) except to the extent caused by Vornado, for claims arising from any accident in or about the premises during the tenancy . . ." The record indicates that the accident occurred during H&M's tenancy and that the accident was caused by the negligence of one of H&M's contractors insofar as Tri-Built instructed plaintiff to place a ladder on top of a scaffold and failed to provide plaintiff with any additional safety equipment. The indemnification agreement is enforceable under these circumstances, in which there has been no finding of negligence on the part of Vornado (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1977]), and no evidence that Vornado exercised supervision or control over plaintiff's work (*see Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14*, 286 AD2d 744 [2001]). Accordingly, Vornado is entitled to summary judgment on its claim for contractual indemnification from H&M.

Pursuant to section 3.18 of Bauhaus' general contractor agreement with H&M, Bauhaus is to indemnify Vornado for alleged or actual improper acts or omissions of the contractor in the performance of the work. Inasmuch as Bauhaus retained Tri-Built as one of their subcontractors and plaintiff was injured in the scope of his employment with Tri-Built, Vornado is entitled to indemnification from Bauhaus.

Similarly, Pavarini's contract with Vornado also serves as a basis for indemnification to Vornado.

A landowner will be liable for violation of Labor Law § 200 and common-law negligence when the injuries complained of are caused by a dangerous condition at a work site only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the dangerous condition (*see Giambalvo v Chemical Bank*, 260 AD2d 432 [1999]; *Rosemin v Oved*, 254 AD2d 343 [1998]; *Akins v Baker*, 247 AD2d 562 [1998]). Additionally, for liability to be imposed, the owner must direct and control the manner in which the work is performed, not merely possess general supervisory authority (*see Haghighi v Bailer*, 240 AD2d 368 [1997]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311 [1997]; *Merkle v Weibrecht*, 234 AD2d 696 [1996]). A general power to supervise and inspect the premises by an owner and/or general contractor alone does not constitute control sufficient to impose liability under Labor Law § 200 (*Allen v Cloutier*, 44 NY2d 290 [1978]; *Brezinski v Olympia, New York*, 218 AD2d 633 [1995]). Here, there is no evidence in the record that Vornado exercised supervision or control over the work site. Therefore, the branch of the motion which is to dismiss the Labor Law § 200 claims against Vornado is granted.

Motion by Tri-Built

Tri-Built seeks summary dismissal of the third-party complaint commenced by Bauhaus, which contains three causes of action: common-law indemnity and contribution; contractual indemnity and breach of contract.

Tri-Built first argues that since plaintiff's injuries are not "grave," the third-party claims sounding in common-law indemnification and contribution must be dismissed. Employers such as Tri-Built who provide workers' compensation coverage are immune from tort liability except in a narrow class of cases in which the plaintiff has sustained a "grave injury" (*see* Workers' Compensation Law § 11; *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415-416 [2004]). By statute, "grave injury" is "both narrowly and completely described" (*see Rubeis v Aqua Club, Inc.*, *supra* at 416) as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11).

The burden of demonstrating the absence of a grave injury lies with the movant (*see Way v Grantling*, 289 AD2d 790 [2001]). In support of its motion, Tri-Built submitted the reports of Drs. Lillian Bobelian, D.C., and Michael Miller. The affirmation from Dr. Bobelian is insufficient to sustain Tri-Built's burden. Submissions from a chiropractor must be by affidavit because a chiropractor is not considered a medical doctor who can affirm pursuant to CPLR 2106 (*see Shinn v Catanzaro*, 1 AD3d 195 [2003]). As to the Miller report, an affidavit or affirmation is necessary in order to make a prima facie showing of entitlement to summary judgment (*see Pagano v Kingsbury*, 182 AD2d 268 [1992]). The Miller report is not sworn to under the penalty of perjury. Based upon these submissions, Tri-Built has not met its burden of establishing the absence of a grave injury (*Way v Grantling*, *supra*). Therefore, the branches of the motion which seek to dismiss the common-law indemnity and contribution claims asserted by Bauhaus, is denied.

The branch of Tri-Built's motion which seeks summary judgment in its favor dismissing the claim for contractual indemnification by Bauhaus, is denied for reasons noted herein.

Cross Motion by Tri-Built

The cross motion by Tri-Built to compel Bauhaus to provide discovery previously ordered is denied as moot. In a court-ordered stipulation dated April 28, 2010, Bauhaus was ordered to provide to Tri-Built, the following items: blueprints for the job; last known address of Drew Robinson; progress photos; the Site Safety Book; and the project schedule

and any site meeting minutes. In opposition to the cross motion, Bauhaus submits that the said discovery has either been provided to Tri-Built, does not exist or is not relevant. Specifically, Bauhaus submits that it provided Robinson's last known address in a letter to counsel dated June 3, 2010. Bauhaus provided the daily construction report at the deposition of Jeffrey Bogo on August 4, 2010; Bogo identified the report as his daily field report for the date in question. Bauhaus submits that there is no proof that any construction photos exist; and that the blueprints, project schedule and site meeting minutes are not relevant to the issues herein.

Cross Motion by Plaintiff

The cross motion by plaintiff is denied as untimely. By court order dated November 15, 2008, all dispositive motions were to be filed by March 31, 2009. The instant cross motion, filed approximately three months later is untimely. Inasmuch as plaintiff correctly concedes that his cross motion for summary judgment was made approximately three months beyond the March 31 date, it is incumbent upon plaintiff to make a good cause showing for his failure to timely file his motion in order for the court to entertain the motion (*see* CPLR 3212[a]; *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]).

Plaintiff contends that good cause exists for the court to entertain the belated motion on the ground that various items of discovery are outstanding; the delay is minimal and that defendants cannot show any demonstrable prejudice. Specifically, plaintiff contends that the deposition of a Mr. Bogo, an alleged eyewitness, has not taken place and that the deposition of a treating physician has not taken place. Since plaintiff did not demonstrate how the said missing discovery was essential to the making of his cross motion, "good cause" for plaintiff's delay in making the instant cross motion is not shown (*Tower Ins. Co. of New York v Razy Assoc.*, 37 AD3d 702 [2007]). It is not clear that the missing discovery is relevant to the merits of the instant cross motion (*id.*). A late motion for summary judgment is not excusable where the movant's contentions in support of the summary judgment motion are based upon previously known facts and not based upon information revealed in belated discovery provided by an opponent (*Caiola v Allcity Ins. Co.*, 277 AD2d 273 [2000]).

In *Jackson v Jamaica First Parking, LLC* (49 AD3d 501 [2008]), the court affirmed a Supreme Court, Queens County order which denied summary judgment as untimely for failure to demonstrate "good cause" for delay after the 120-day deadline imposed by CPLR Rule 3212(a). The court held that "[t]he record contains no proof that outstanding discovery prevented the appellant from making a timely motion for summary judgment (*see Espejo v Hiro Real Estate Co.*, 19 AD3d 360 [2005])." Subsequently, the Appellate Division, Second Department, instructed in *Anderson v Kantares* (51 AD3d 954 [2008]), that: "The Supreme Court erred in entertaining the motion of the defendant . . . for summary judgment, which was made returnable 29 days beyond the deadline fixed by the

Supreme Court in the so-ordered stipulation, where she failed to demonstrate good cause for the delay" (*see* CPLR 3212[a]; *Brill v City of New York*, *supra*; *DiBenedetto v Lowe's Home Ctrs., Inc.*, 43 AD3d 853 [2007]). The testimony of the nonparty witness, whose deposition transcript the defendant was reportedly awaiting, was not relevant to the defendant's motion (*see Jackson v Jamaica First Parking, LLC*, 49 AD3d 501, *supra*; *Tower Ins. Co. of New York v Razy Assoc.*, *supra*; *Espejo v Hiro Real Estate Co.*, *supra*). Accordingly, the court will not herein reach the merits of the motion (*see Brill v City of New York*, *supra*).

Motion by Pavarini

The branches of the motion by Pavarini which is for summary judgment in its favor dismissing plaintiff's Labor Law §§ 200 and 241 claims against it is granted. The branch of the motion by Pavarini which seeks to dismiss plaintiff's Labor Law § 240(1) claim is denied.

Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work (*Allen v Cloutier Constr. Corp.*, *supra*). An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Reynolds v Brady & Co.*, 38 AD2d 746 [1972]). The record indicates that Pavarini had no authority to control either plaintiff or the setting up of the ladder on the scaffold which eventuated in his injury. Without this authority to control the activity producing the injury, this defendant is not liable to plaintiff under § 200 for failure to provide a safe place to work (*id.*).

Similarly, § 241 imposes no liability on Pavarini for plaintiff's injury. Labor Law § 241(6) is a general site safety statute applicable to "contractors" under which plaintiffs must demonstrate negligence and a violation of the specific regulation of the New York State Industrial Board (*see* Labor Law § 241[6]; *Betemit v Spring*, 306 AD2d 177 [2003]). Just as with Labor Law §§ 200 and 240, a plaintiff claiming a violation of § 241(6), must establish that the defendant had the authority to supervise or control the activity giving rise to the plaintiff's harm (*see Filchuk v Lehrer McGovern Bovis Construction, Inc.*, 232 AD2d 329 [1996]).

To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Accordingly, the motion by Pavarini for summary judgment in its favor dismissing the Labor Law and common-law negligence claims against it is granted.

The branch of the motion which seeks to dismiss plaintiff's Labor Law § 240(1) claim, is denied. "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" (*Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2007]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]). Labor Law § 240(1) "creates a liability that is strict, or absolute, in two senses: the duty it imposes is nondelegable, and, thus, contractors and owners are liable under the statute whether or not they supervise or control the work; and where an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge & Tunnel Auth.*, *supra*). There is, however, no liability "where a plaintiff's own actions are the sole proximate cause of the accident (*id.*).

Motion by H&M

The motion by H&M for contractual indemnification from Bauhaus is granted. Pursuant to the contract between the parties, Bauhaus agreed to defend and indemnify H&M and H&M did not supervise or control plaintiff's work. Since there is no evidence that H&M was negligent, i.e., that it directed, supervised or controlled plaintiff's work, it is entitled to summary judgment as against the contractor based upon the contractual agreement (*Brown v Two Exchanges Plaza Partners*, 76 NY2d 172 [1990]; *Lazzaro v NJM Industries Inc.*, 288 AD2d 440 [2001]).

Motion by Bauhaus

Bauhaus moves for summary judgment dismissing the complaint and for summary judgment in its favor on its claims for contractual indemnification from Tri-Built.

The branch of the motion which seeks to dismiss plaintiff's Labor Law § 200 claims against Bauhaus is granted. Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury" (*Russin v Louis N. Picciano & Son, supra*). Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (*Lombardi v Stout*, 80 NY2d 290 [1992]). Here, plaintiff testified that he took all of his direction from his employer and Chelsea, who also supervised and controlled plaintiff's work.

The branch of the motion which seeks summary judgment dismissing plaintiff's claim pursuant to Labor Law § 240(1) is denied. Once again, "[i]n 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" (*Rudnik v Brogor Realty Corp.*, *supra*; *see Cahill v Triborough Bridge & Tunnel Auth.*, *supra*; *Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra*). Liability under this statute is strict, or absolute. The duty imposed under the statute is nondelegable; contractors and owners are liable under the statute whether or not they supervise or control the work. Also, "where an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge & Tunnel Auth.*, *supra*).

Here, the evidence in the record indicates that the failure by Pavarini and Bauhaus as the contractors, and Vornado, as the owner of the building, to provide adequate safety devices to prevent the ladder from slipping, the scaffold from collapsing, or plaintiff from falling constituted a violation of Labor Law § 240(1) (*see Dasilva v A.J. Contr. Co.*, 262 AD2d 214 [1999]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1999]; *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1996]). Such violation makes Pavarini, Bauhaus and Vornado liable for plaintiff's injuries under Labor Law § 240(1), as a matter of law, regardless of whether they exercised any control or supervision over the work (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Guillory v Nautilus Real Estate*, 208 AD2d 336 [1995], *appeal* dismissed *and lv denied* 86 NY2d 881 [1995]).

There was testimony that plaintiff lost his balance and fell from the ladder. Based upon this, defendants contend that plaintiff was the sole proximate cause of the accident. Any negligence on plaintiff's part could not have been the sole proximate cause of his accident, since the accident was caused, at least in part, by defendants' failure to satisfy their statutory duty to provide an adequate safety device to protect plaintiff from the risk of falling (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Hart v Turner Constr. Co.*, 30 AD3d 213 [2006]; *Ben Gui Zhu v Great Riv. Holding, LLC*, 16 AD3d 185 [2005]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [2004]). Where, as here, the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the "[n]egligence, if any, of the injured worker is of no consequence" (*Rocovich v Consolidated Edison Co.*, *supra*; *see also Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]).

Bauhaus' contention that they did not supervise or control plaintiff's work is irrelevant, since absolute liability follows upon proof that a defendant's breach of its statutory duty proximately caused the accident (*see Zimmer v Chemung County Performing Arts*, *supra*). Accordingly, upon a search of the record (CPLR 3212[b]), summary judgment in plaintiff's favor on his claim pursuant to Labor Law § 240(1), is granted. The branch of Bauhaus' motion which seeks to dismiss plaintiff's claims under Labor Law § 240(1), is denied.

The branch of the motion which seeks to dismiss plaintiff's claims against it based upon a violation of Labor Law § 241(6), is granted. Bauhaus had no authority to supervise and control the plaintiff's work. Therefore, it bears no liability under Labor Law § 241(6) (*see Russin v Louis N. Picciano & Son*, *supra*; *Morris v Pepe*, 283 AD2d 558 [2001]; *cf. Kehoe v Segal*, 272 AD2d 583 [2000]).

The branch of the motion which seeks summary judgment on Bauhaus' claim for contractual indemnification from Tri-Built is granted. The contract between Bauhaus and Tri-Built contains an indemnity provision as follows:

> "To the fullest extent permitted by law, the subcontractor shall indemnify and hold harmless Bauhaus Construction Corporation, the Owner, and all entities listed under Rider 'A' harmless from claims, damages, losses and expenses, including without limitation consultants' and attorneys' fees and disbursements, arising out of or relating to the performance of their SC, providing the same is caused in whole or in part by the Subcontractor, its subcontractor, supplier, agent, employee or someone for whose acts or omissions any of them might be liable. . ."

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). The contract between Bauhaus and Tri-Built plainly requires Tri-Built to indemnify Bauhaus for all personal injury claims "caused by, resulting from, arising out of, or occurring in connection with the execution of the [contract] Work." Since the work plaintiff was performing on behalf of his employer Tri-Built at the time he was injured plainly constituted "Work" required under the Bauhaus-Tri-Built contract, the contractual indemnity provision was triggered by plaintiff's personal injury claim (*see Cunningham v Alexanders Kings Plaza, LLC*, 22 AD3d 703 [2005]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401 [2005]).

Contrary to Tri-Built's assertion, this provision does not violate General Obligations Law § 5-322.1 as it does not require Tri-Built to indemnify Bauhaus for its own negligence. The provision is clear, obligating Tri-Built to indemnify Bauhaus only when it is shown that damages were caused by Tri-Built's own negligence (*see Brooks v Judlau Construction Contracting Corp.*, 11 NY3d 204 [2008]). Significantly, the statutory prohibition of General Obligations Law § 5-322.1 against indemnifying a party for its own negligence does not apply where, as here, the party seeking indemnification is found to be free of any negligence (*Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747 [2007]; *Davis v All State Assoc.*, 23 AD3d 607 [2005]; *Damiani v Federated Department Stores, Inc.*, 23 AD3d 329 [2005]). Indeed, there has been no finding of negligence on the part of Bauhaus. Although

a clause in a construction contract that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such a clause may be enforced where the party to be indemnified is found to be free of any negligence (*see Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508 [2005]). Here, Tri-Built failed to raise a triable issue of fact as to whether Bauhaus was negligent, as Bauhaus' "general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that [Bauhaus] would be liable for the negligence of the contractor who performs the day-to-day operations" (*Warnitz v Liro Group*, 254 AD2d 411, 411 [1998]). Moreover, because the indemnification provision authorized indemnification " 'to the fullest extent permitted by law,' " it did not violate General Obligations Law § 5-322.1 (*Bink v F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409 [2006], quoting *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]; *Dutton v Pankow Bldrs.*, 296 AD2d 321 [2002]).

Conclusion

The order to show cause by Tri-Built to compel the testimony of Bogo, is denied as moot.

The motion by Bauhaus to strike the answer and cross claims of Tri-Built or preclude Tri-Built from producing a witness at trial to testify, on the ground that Tri-Built has never produced a witness is denied as moot.

The motion by Vornado to dismiss plaintiff's Labor Law § 200 and common-law negligence claims and for contractual and common-law indemnification as against all co-defendants and third-party defendants, is granted.

The motion by Tri-Built for summary judgment in its favor dismissing the third-party complaint is denied. The cross motion by Tri-Built is denied as moot.

The branches of the motion by Pavarini which is for summary judgment in its favor dismissing plaintiff's Labor Law §§ 200 and 241 claims against it is granted. The branch of the motion by Pavarini which seeks to dismiss plaintiff's Labor Law § 240(1) claim is denied.

The motion by H&M for summary judgment in its favor on its claim for contractual indemnification against Bauhaus is granted.

The branch of the motion by Bauhaus for summary judgment in its favor dismissing plaintiff's Labor Law §§ 200 and 241(6) claims is granted, insofar as asserted against Bauhaus. The branch of the motion by Bauhaus which is for summary judgment on its claims for contractual indemnification against Tri-Built, is granted. Upon a search of the

record (CPLR 3212[b]), summary judgment in plaintiff's favor on his claim pursuant to Labor Law § 240(1), is granted. The branch of Bauhaus' motion which seeks to dismiss plaintiff's claims under Labor Law § 240(1), is denied.

Finally, the cross motion by plaintiff is denied as untimely.

Dated: March 1, 2011

J.S.C.