

Senlin CAO v 5444 Assoc., L.P.
2011 NY Slip Op 30933(U)
April 5, 2011
Supreme Court, New York County
Docket Number: 113587/2007
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 113587/2007

CAO, SENLIN

VS

5444 ASSOCIATES

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided for
attached

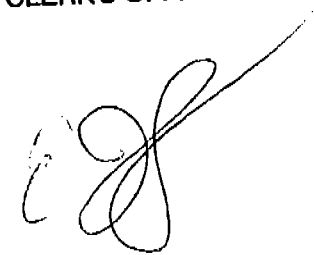
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 13 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/5/11



Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
SENLIN CAO, a/k/a SHENG CAO,

Plaintiff,

-against-

Index No. 113587/07

5444 ASSOCIATES, L.P., METRO FIVE HOTEL LLC,
and MIKESAM CONSTRUCTION CORPORATION,

Defendants.

-----X
MIKESAM CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590002/09

L&L RELIABLE CONSTRUCTION,

Third-Party Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

This is an action to recover damages sustained by a day laborer at 130 Duane Street in Manhattan (the premises) on March 17, 2007. Plaintiff, Senlin Cao, alleges that he fell from an eight-foot A-frame ladder while filling holes in the wall with compound.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants 5444 Associates, L.P. (5444 Associates) and Mikesam Construction Corporation (Mikesam). In motion sequence number 003, third-party defendant L&L Reliable Construction (L&L) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

Defendant/third-party plaintiff Mikesam cross-moves, pursuant to CPLR 3212, for an order: (1)

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**NEW YORK
COUNTY CLERK'S OFFICE**

dismissing the complaint as against it in its entirety; and (2) granting it summary judgment on its third-party claims for indemnification and failure to procure insurance against L&L. Defendant 5444 Associates cross-moves, pursuant to CPLR 3212, for an order: (1) dismissing the complaint as against it in its entirety; and (2) granting it summary judgment on its cross claim for contractual indemnification against Mikesam.

BACKGROUND

5444 Associates is a limited partnership that owned the premises on the date of the accident. On October 22, 2002, 5444 Associates hired Mikesam as the general contractor to construct a six-story hotel on the premises. Pursuant to an agreement dated January 1, 2007, Mikesam retained L&L to perform interior carpentry work within the hotel. Plaintiff was an employee of L&L on the date of his accident.

Plaintiff testified at his deposition that, on the morning of March 17, 2007, Mr. Lin of L&L directed him to go to the fifth floor of the building and seal empty spaces around pipe fittings with a compound (Plaintiff EBT, at 74-75).¹ Plaintiff selected one of L&L's eight-foot metal A-frame ladders and proceeded to his work site where he found a compound provided by L&L (*id.* at 68, 88, 140, 225-226). Plaintiff stated that the ladder was not defective; he stated that "[a]ll the ladders over there were all good" (*id.* at 88). According to plaintiff, he never experienced any difficulty with any of the ladders on the job and never lodged any complaints about the ladders (*id.* at 89). Plaintiff identified the location of his accident as the middle of a hallway with a 90-degree bend (*id.* at 69). However, in the area that he identified as the location of his accident, there is no 90-degree bend (Sabbatino Affirm. in Support, Exh. E). Plaintiff

¹Plaintiff testified through a Mandarin interpreter.

placed the ladder on a flat part of the floor without any holes or breaks in it (*id.* at 77). Plaintiff testified that he opened the ladder and locked the hinges in place (*id.* at 93, 143-144). While standing on the second highest step of the ladder and holding a container with compound in his left hand, the ladder fell to his left as he leaned forward (*id.* at 174-176). Plaintiff landed on top of the ladder (*id.* at 182).

Plaintiff submits an affidavit in which he states that when he opened the ladder, the locking rods of the ladder were locked (Plaintiff Aff., ¶ 26). The front legs of the ladder were touching the wall in front of plaintiff, and the right side of the ladder was against the wall plaintiff was patching (*id.*). Plaintiff states that his procedure was to put about five to six pounds of compound on a plate and start patching the holes in the wall (*id.*, ¶ 27). When the compound dish was empty, plaintiff would come down the ladder and fill it (*id.*). Plaintiff repeated this procedure two to three times (*id.*). Plaintiff patched all the holes except the one closest to the emergency light (*id.*, ¶ 28). Plaintiff avers that he was leaning forward, patching the hole, with his right hip slightly pressing against the top of the ladder (*id.*, ¶ 29). He was holding a tool in his right hand to apply compound to the wall (*id.*). As plaintiff was applying the compound, the ladder fell to his left into the three-foot-wide hallway (*id.*). Plaintiff states that he caused the ladder to shift by leaning forward (*id.*). The ladder was fully opened when it fell, with his right buttock pressed against the wall to stabilize himself (*id.*). Plaintiff further states that he may have been wrong as to the location of the accident within the building, but knows exactly how it happened (*id.*, ¶ 31).

David Lee testified that he is employed as a project manager by Mikesam (Lee EBT, at 6-7). Lee's father, Mike Lee, is the owner of Mikesam (*id.* at 7). Mikesam specializes in building

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new hotels (*id.* at 10). Lee's duties as a project manager included ordering materials, checking the quality of the work of subcontractors, and checking for foreseeable issues regarding job safety (*id.* at 10-11). Lee testified that Mikesam was the general contractor on the job, and as such, arranged and coordinated the work (*id.* at 20, 21). Mikesam had a site manager who oversaw the site, and had the authority to stop unsafe conduct by the subcontractors (*id.* at 30). Lee testified that Mikesam's site manager, Michael Lin, told him that an accident occurred over the weekend (*id.* at 47). Lee was told that it occurred in the hallway opposite room number three while a worker was plastering (*id.* at 49). Lin stated that the worker fell off a ladder on the fifth floor (*id.* at 48). Lin gave him a report written in Chinese (*id.* at 51; Rutman Affirm. in Support, Exh. I). Lee translated the report into English (*id.*). According to Lee's translation, at approximately 10 A.M. on March 17, 2007, plaintiff fell from a ladder while plastering and injured his wrist at the jobsite located at 130 Duane Street (Rutman Affirm. in Support, Exh. I). Lee stated that it is difficult to perform plastering work in corners (Lee EBT, at 68). Lee testified that workers also use makeshift platforms made out of planks stacked on top of buckets to reach the corners (*id.*).

Xiang Lin testified that he is the sole owner of L&L (Lin EBT, at 21).² Lin testified that he did not work on March 17, 2007 because he was ill (*id.* at 86-89). According to Lin, Kong Lin was supervising in his absence (*id.* at 87). Kong Lin called him at home and reported the accident (*id.* at 91). Kong Lin told him that a worker fell from a ladder (*id.* at 94). Kong Lin asked Xiang Lin to prepare an accident report (*id.* at 92; Rutman Affirm. in Support, Exh. N).

²Xiang Lin also testified through a Mandarin interpreter.

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Upon reading the accident report³ at his deposition, Xiang Lin stated that plaintiff was “working and fell down from the stairs approximately at 10:00 A.M.” (*id.* at 78). However, Xiang Lin later stated that he was referring to the ladder (*id.* at 94). Xiang Lin testified that L&L workers placed metal posts into the ceilings and then screwed sheet rock onto them (*id.* at 128).

Robert Hazard testified that he is the Vice President of Acquisitions and Development for Hersha Hospitality Trust (Hersha), a publicly-traded real estate investment trust (Hazard EBT, at 7, 8). Hersha acquired the interest of 5444 Associates on January 4, 2008 (*id.* at 11). On the date of the accident, 5444 Associates owned the premises (*id.* at 30).

An ambulance call report indicates that “through translator on street [plaintiff] states he fell down a flight of stairs” (Sabbatino Affirm. in Support, Exh. G, at 3).

Plaintiff commenced the instant action on October 9, 2007, seeking recovery for common-law negligence and for violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff’s amended bill of particulars dated June 23, 2010 asserts violations of 12 NYCRR 23-1.7, 12 NYCRR 23-1.15, 12 NYCRR 23-1.16, 12 NYCRR 23-1.21 (a), (iv), (b) (4) (ii) and 12 NYCRR 23-7.1 (f). In its answer, 5444 Associates asserts a cross claim for contractual indemnification against Mikesam. Defendant Metro Five Hotel LLC has not appeared in this action.

On January 5, 2009, Mikesam impleaded L&L, asserting causes of action for contractual indemnification, common-law indemnification, contribution, and breach of contract for failure to procure insurance.

³The report is written in Chinese (Rutman Affirm. in Support, Exh. N).

DISCUSSION

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the prima facie showing has been made, the burden shifts to the party opposing the motion to “produc[e] evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory and irrelevant allegations will suffice to defeat summary judgment” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 228 [1st Dept 2002]).

Labor Law § 240 (1)

Plaintiff moves for summary judgment as to liability under Labor Law § 240 (1) against 5444 Associates, the owner, and Mikesam, the general contractor on the job site. Plaintiff submits his affidavit, and argues that defendants failed to provide an adequate safety device for working in the corners of the hallway. According to plaintiff, his work required him to stand on a ladder and reach forward, causing his weight to shift and the ladder to tip.

In opposing plaintiff’s motion, and in cross-moving to dismiss plaintiff’s section 240 (1) claim, defendants submit plaintiff’s deposition testimony, asserting that plaintiff has failed to show any violation of the statute or that any statutory violation was a proximate cause of his accident. Defendants contend that, at most, plaintiff’s proof shows that he was the sole

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proximate cause of his accident. To support this argument, defendants makes a borderline frivolous argument, that defendants are entitled to summary judgment because plaintiff has not identified any defect in the ladder, and that plaintiff erected the ladder himself on a flat, clean, and well-lit surface. Defendants also maintain that, in light of plaintiff's conflicting accounts as to the location of the accident, it is impossible to determine that the device was inadequate. Furthermore, defendants argue that plaintiff is not entitled to summary judgment where his accident was unwitnessed and there are questions regarding how the accident occurred.

Labor Law § 240 (1) imposes a duty upon all “contractors and owners and their agents [engaged] in the erection, demolition, repairing . . . or pointing of a building or structure” to “furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” “Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). To impose liability under Labor Law § 240 (1), the plaintiff need only prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation of the statute was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290 [2003]).

“Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it

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remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]). In *McCarthy v Turner Constr., Inc.* (52 AD3d 333, 333-334 [1st Dept 2008]), the First Department wrote that:

“Plaintiff was injured when the unsecured ladder he was standing on to drill holes in a ceiling tipped over and he fell to the floor. Plaintiff was not required to show that the ladder was defective in some way as part of his prima facie case for summary judgment. It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (citations and quotation marks omitted).

Under the circumstances of this case, plaintiff has made a prima facie case for recovery under the statute. Plaintiff submits an affidavit indicating that while he was applying compound to the ceiling, the ladder fell to his left into the three-foot-wide hallway, causing him to fall to the floor (Plaintiff Aff., ¶ 29). The collapse of the ladder is prima facie evidence of a violation of the statute. Plaintiff is not required to show that the ladder is somehow defective (*see Demaj v Pelham Realty, LLC*, – AD3d –, 2011 NY Slip Op 01891, *1 [1st Dept 2011] [plaintiff injured because of a collapsing ladder established entitlement to summary judgment on the issue of defendant’s liability under section 240 (1)]; *Roman v Hudson Tel. Assoc.*, 11 AD3d 346 [1st Dept 2004] [“(t)he ladder used by plaintiff, which was owned by his employer, failed in its ‘core objective’ of preventing him from falling to the cement floor below”]).

The burden thus shifts to defendants to raise an issue of fact as to whether plaintiff is entitled to recover. Defendants submit an uncertified ambulance call report, which states that “through translator on street [plaintiff] states that he fell down a flight of stairs” (Sabbatino Affirm. in Support, Exh. G, at 3). Where there are differing accounts as to the manner of how the accident occurred, summary judgment should be denied (*Jones v West 56th St. Assoc.*, 33

AD3d 551, 552 [1st Dept 2006]). A translated statement contained within an ambulance call report may be potentially admissible in evidence as a business record or as an admission against interest, but only upon a showing that the plaintiff was the source of the statement, and that its translation was accurate (*see Martinez v New York City Tr. Auth.*, 41 AD3d 174, 175 [1st Dept 2007]; *Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96 [1st Dept 1999]). To qualify as a business record, the statement must be relevant to the plaintiff's diagnosis or treatment (*see CPLR 4518; Williams v Alexander*, 309 NY 283, 288 [1955]; *Matter of Progressive Northeastern Ins. Co. v Randazzo*, 24 AD3d 560 [2d Dept 2005]).

Here, defendants have failed to establish that the translation in the ambulance call report was accurate. Furthermore, the statement regarding the cause of the accident, i.e., whether plaintiff fell from a ladder or fell down stairs, is not germane to plaintiff's diagnosis or treatment, and is thus not admissible under the business records exception to hearsay (*see Quispe*, 266 AD2d at 96 ["since the disputed cause of plaintiff's injury, i.e., whether she fell from a height of eight feet or jumped from that height, is not germane to plaintiff's diagnosis or treatment, the history portion of the hospital record is not admissible under the business records exception to the hearsay rule"]). Moreover, although plaintiff testified through a translator that he worked at 90th Street "before [he] fell down from the stairs" (Plaintiff EBT, at 37), he clearly testified later that his accident occurred when he set up a ladder and was compounding holes in the wall (*id.* at 174-179). Xiang Lin also testified through a translator that plaintiff fell down stairs (Lin EBT, at 77-78), but later stated that he was referring to the ladder the entire time (*id.* at 94).

Defendants' assertion that plaintiff was the sole proximate cause of his accident is without merit and borderline frivolous. To defeat summary judgment on this basis, defendants

must establish that plaintiff ““had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured”” (*Auremma v Biltmore Theatre, LLC*, – AD3d –, 2011 NY Slip Op 00439, *7 [1st Dept 2011], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). There is no evidence that plaintiff misused an adequate ladder or failed to use a readily available safety device which would have protected him from a fall (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010] [ironworker was not the sole proximate cause of his injuries where nothing indicated that he knew where to find safety devices or that he was told to use them]; *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [worker was not the sole proximate cause of his injuries for failing to test electrical panel prior to applying force to the panel]; *cf. Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009] [where defendant’s store manager testified “that he saw plaintiff lean a closed ladder against the wall, unsecured, that he warned plaintiff that this was not safe, and that plaintiff replied that he knew what he was doing,” such testimony raised “the factual issue of whether plaintiff misused an otherwise adequate ladder by leaning it, unsecured, against the wall, after which the ladder slipped as he was moving on top of it”]). While a project manager employed by Mikesam testified that makeshift platforms are used while working in corners (*Lee EBT*, at 68), there is no evidence that this device could even qualify as a safety device, or, that plaintiff knew to use it or that he unreasonably chose not to use it. Additionally, “[p]laintiff’s conduct [in leaning forward], at most, constituted comparative negligence, which is not a defense under Labor Law § 240 (1)” (*Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 593 [1st Dept 2010]).

Finally, although plaintiff's accident was unwitnessed, defendants have failed to produce any evidence in admissible form sufficient to raise an issue of fact as to plaintiff's credibility or as to whether he fell off a ladder (*see Klein v City of New York*, 89 NY2d 833, 835 [1996] ["Since neither the defendant nor third-party defendant has presented any evidence of a triable issue of fact relating to the prima facie case or to plaintiff's credibility, summary judgment was properly awarded to the plaintiff"]; *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001] [unwitnessed fall from ladder did not bar summary judgment where there was no substantiated challenge to the plaintiff's credibility]). For the same reasons, any inconsistencies as to the location of the accident do not preclude summary judgment to plaintiff.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted against 5444 Associates, the owner, and Mikesam, the general contractor. The court denies the branches of the cross motions seeking dismissal of this cause of action.

Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To make out a cause of action under Labor Law 241 (6), a plaintiff must: (1) plead and prove the violation of a concrete and applicable specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision reiterating common-law safety standards (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 349 [1998] [internal quotation marks and citation omitted]); and (2)

establish that any breach of the statute was a proximate cause of the injuries sustained (*Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]). A “plaintiff’s failure to identify a specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)” (*Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

In his amended bill of particulars dated June 23, 2010, plaintiff alleges violations of the following sections of the Industrial Code: sections 23-1.7, 23-1.15 (a-e), 23-1.16 (a-e), 23-1.21 (a), (iv), (b) (4) (ii), 23-1.17, and 23-7.1 (f) (Amended Verified Bill of Particulars, ¶ 17).

However, in opposition to defendants’ cross motions, plaintiff only relies upon section 23-1.7 (f), and has thus abandoned reliance on the remaining cited regulations (*see Cardenas*, 68 AD3d at 438 [“Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . .”]).

Section 23-1.7 (f), entitled “Vertical passage,” states that “[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided” (12 NYCRR 23-1.7 [f]). This section sets forth a specific standard of conduct sufficient to support a Labor Law § 241 (6) cause of action (*Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]; *O’Hare v City of New York*, 280 AD2d 458 [2d Dept 2001]; *Akins v Baker*, 247 AD2d 562 [2d Dept 1998]). It is settled that section 23-1.7 (f) “does not apply [where the] plaintiff was not injured while attempting to access working levels above or below ground” (*Gielow v Coplion Home*, 251 AD2d 970, 972 [4th Dept 1998], *lv dismissed and denied in part* 92 NY2d 1042, *rearg denied* 93 NY2d 889 [1999]).

Here, plaintiff was standing on an A-frame ladder and applying compound near the

ceiling (Plaintiff EBT, at 174-176; Plaintiff Aff., ¶ 29). Thus, plaintiff does not allege that his activities required him to access another working level within the meaning of the regulation (*compare Lynch v 99 Washington, LLC*, 80 AD3d 977, 978 [3d Dept 2011] [temporary job site trailer was not a “working level” within the meaning of the regulation], *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009] [regulation held inapplicable where plaintiff was injured on ramp, which bridged the height differential between a sidewalk and adjacent road surface], and *Lavore Kir Munsey Park 020, LLC*, 40 AD3d 711, 713 [2d Dept 2007], *lv denied* 10 NY3d 701 [2008] [utility bin on the side of plaintiff’s truck was not working level above ground requiring a stairway, ramp or runway], with *Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [1st Dept 2008] [issue of fact where plaintiff was instructed to descend from overpass’s roadway onto deck approximately three feet below], and *Gonzalez v Pon Lin Realty Corp.*, 34 AD3d 638, 639 [2d Dept 2006] [trial court erred in dismissing section 241 (6) claim where plaintiff fell through staircase between fourth and fifth floors of a building]).

The court finds plaintiff’s reliance on *Conklin v Triborough Bridge & Tunnel Auth.* (49 AD3d 320 [1st Dept 2008]) and *McGarry v CVP 1 LLC* (55 AD3d 441 [1st Dept 2008]) to be unpersuasive. In both of these cases, the plaintiffs were injured while attempting to access working areas above or below ground. In *Conklin* (49 AD3d at 321, *supra*), the plaintiff was injured when he slipped on a “chicken ladder” which was the sole means of access to his employer’s shanty. The First Department thus held that “[p]laintiff’s Labor Law § 241 (6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7 (f) was properly sustained, because the ramp, which is alleged to have been unsafe, provided a means of access to different working levels” (*id.*). In *McGarry* (55 AD3d at 441, *supra*), the plaintiff was injured when a block of an

unsecured cinder block staircase skidded from under his foot. The staircase led from a platform supporting a material hoist to the concrete slab floor of the work site three feet below (*id.*).

Therefore, plaintiff's Labor Law § 241 (6) cause of action is dismissed.

Labor Law § 200/Common-Law Negligence

5444 Associates and Mikesam move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, asserting that they did not supervise, direct or control plaintiff's work and had no notice of any defective condition.

In opposition, plaintiff withdraws his section 200 and common-law negligence claims against 5444 Associates (Rutman Affirm. in Opposition, ¶ 38). Plaintiff, however, points out that Mikesam had the authority to oversee job site safety and to stop unsafe work practices.

It is well established that Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*Rizzuto*, 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Section 200 claims fall into broad categories: those involving allegedly defective or dangerous premises conditions and those involving injuries from the manner in which the work is performed (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Where the plaintiff's injury stems from the manner in which the work is performed, the owner or general contractor may be liable only if it exercised supervision and control over the work (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 219-221 [1st Dept], *lv denied* 100 NY2d 508 [2003]).

General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled how the injury-producing work was performed (*Hughes*, 40 AD3d at 306).

In this case, plaintiff's accident arose out of the means and methods of his work, not a dangerous or defective condition on the premises. Plaintiff testified that he received his instructions from a person he identified as "Mr. Lin," who worked for L&L (Plaintiff EBT, at 54-55, 74). Plaintiff received all materials, tools, and equipment, including ladders, from his employer, Mr. Lin (*id.* at 64). Although plaintiff points to Mikesam's project manager's testimony that Mikesam had the authority to oversee job site safety and stop unsafe work practices (*Lee EBT*, at 28-29), this amounts to general supervisory control. "[M]onitoring and oversight of the timing and quality of the work [are] not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons" (*Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [citations omitted]; *see also Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]; *Reilly*, 303 AD2d at 221).

Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed.

Third-Party Claims for Common-Law Indemnification and Contribution

L&L moves for dismissal of the third-party claims for common-law indemnification and contribution, contending that plaintiff did not suffer a "grave injury" within the meaning of

Workers' Compensation Law § 11.⁴

In response to L&L's motion, Mikesam argues that L&L has failed to submit evidentiary proof in admissible form. Specifically, Mikesam contends that L&L has failed to submit an affidavit by a person with personal knowledge of the facts, as required by CPLR 3212 (b), and instead relies upon an unexecuted copy of the deposition of its principal.

Here, L&L did not submit an affidavit from a person with personal knowledge of the facts. However, the affirmation from defendants' counsel may properly "serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts" (*Zuckerman*, 49 NY2d at 563). The transcript of Lin's deposition is in fact unsigned, but is certified by the court reporter as accurate, and Mikesam does not challenge the accuracy of the transcript. Under these circumstances, the First Department has determined that unsigned deposition transcripts may be considered on a motion for summary judgment (CPLR 3116 [a]; *White Knight Ltd. v Shea*, 10 AD3d 567 [1st Dept 2004]; *Bennett v Berger*, 283 AD2d 374, 375 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 17 [1st Dept 1998]). In any event, Mikesam relies upon Lin's deposition in moving for summary judgment.

Workers' Compensation Law § 11 provides that:

"An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which

⁴Mikesam initially moved for summary judgment on its third-party claim for common-law indemnification against L&L. However, in its reply, Mikesam acknowledged that that part of its motion was made in error and was withdrawn (*Sabbatino Affirm. in Opposition and Reply*, ¶ 29).

shall mean only one or more of the following: *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*" (emphasis added).

"The grave injuries listed are deliberately both *narrowly and completely described*. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action" (*Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001] [internal quotation marks and citation omitted]).

Here, plaintiff alleges that he suffered the following injuries:

"traumatic bulge at C5-C6;
 traumatic bulge at C6-C7;
 C6-C7 cervical radiculopathy;
 cervical sprain/strain;
 cervical herniated discs at L4-L5 creating pressure effect in the thecal sac;
 concussion;
 post[-]concussion syndrome;
 fracture left tenth rib;
 fracture eleventh rib;
 left shoulder rotator cuff strain;
 contusion of the chest wall;
 lumbosacral sprain/strain;
 aggravation of asymptomatic cervical and lumbosacral degenerative disc disease;
 bilateral shoulder sprain/strain;
 left shoulder joint effusion;
 swelling involving the acromioclavicular joint associated with inferior bulging of the joint capsule, causing pressure effect on the supraspinatus muscle;
 biceps tendonitis;
 aggravation of degenerative changes of the left acromioclavicular joint;
 mental anguish"

(Amended Verified Bill of Particulars, ¶¶ 9-10). L&L provides a copy of a narrative report dated January 14, 2009 from Dr. Chandra M. Sharma, M.D., a Board-certified neurologist who examined plaintiff and reviewed plaintiff's medical records (Egan Affirm. in Support, Exh. K, at

2-6). Dr. Sharma states that “[t]here is no objective neurological disability. There are no neurological limitations with regard to continuation of usual work and normal activities of daily living” (*id.*, Exh. K, at 6). L&L also submits a report dated December 3, 2009 from Dr. Alain D. Hyman, M.D., a radiologist who examined plaintiff, which indicates that plaintiff has “[m]ild degenerative changes of the acromioclavicular joint” (*id.*, Exh. L, at 4). Mikesam has failed to demonstrate that plaintiff suffered a “grave injury” within the meaning of the statute, and therefore, Mikesam’s third-party claims for common-law indemnification and contribution are dismissed.

Third-Party Claim for Contractual Indemnification

Mikesam, the general contractor, moves for contractual indemnification from L&L, the subcontractor, pursuant to paragraph 4.6.1 of the subcontract, which provides that:

“To the fullest extent permitted by law, the Subcontractor [L&L] shall indemnify and hold harmless the Owner [5444 Associates], Contractor [Mikesam], Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney’s fees, *arising out of or resulting from performance of the Subcontractor’s [L&L’s] Work under this Subcontract*, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Subcontractor [L&L], the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them* or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6” (emphases added).

(Sabbatino Affirm. in Support, Exh. B).

Mikesam argues that the work was exclusively supervised and directed by L&L, and that

there is no evidence that it was negligent.

In opposing this portion of Mikesam's motion, and in cross-moving for dismissal of Mikesam's contractual indemnification claim, L&L argues that the indemnification agreement is unenforceable as a matter of law under General Obligations Law § 5-322.1.

Pursuant to General Obligations Law § 5-322.1 (1),

“A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable”

Thus, an agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008] [indemnification “to the fullest extent permitted by law” contemplated partial indemnification and was permissible under statute]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [permitting indemnification “to the fullest extent permitted by applicable law”]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003] [indemnification “to the fullest extent permitted by applicable law” called for partial, not full, indemnification and was enforceable]). Even if the clause does not contain the savings language,

it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]). Here, the indemnification clause does not violate the General Obligations Law because it contains the savings language “to the fullest extent permitted by law.” Additionally, as noted above, Mikesam has shown that it was not negligent.

“The right to contractual indemnification depends upon the specific language of the contract” (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). The intent to indemnify must be clearly implied from the language and purposes of the entire agreement (*see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]).

The subject indemnification clause requires L&L to “indemnify and hold harmless [Mikesam] . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of [L&L’s] Work under this Subcontract, . . . *but only to the extent caused by the negligent acts or omissions of [L&L], [L&L’s] Sub-subcontractors, [or] anyone directly or indirectly employed by them or anyone for whose acts they may be liable*” (Sabbatino Affirm. in Support, Exh. B [emphasis supplied]). It has not yet been established that plaintiff’s accident was the result of a negligent act or omission by L&L. Therefore, Mikesam’s motion for contractual indemnification against L&L is premature at this time and is denied (*see Mohammed v Silverstein Props., Inc.*, 74 AD3d 453, 454 [1st Dept 2010] [contractual indemnification correctly denied where contract required indemnitor to indemnify indemnitee for its negligent performance under contract, and there was no finding that indemnitor was negligent]; *D’Angelo v*

Builders Group, 45 AD3d 522, 525 [2d Dept 2007] [since it had not been determined that plaintiff's accident was caused by an act or omission by the subcontractor, contractual indemnification was premature]).

Third-Party Claim for Failure to Procure Insurance

L&L moves for summary judgment dismissing Mikesam's third-party claim for failure to procure insurance, asserting that it purchased a general liability insurance policy naming Mikesam as an additional insured. In support, L&L points to the deposition testimony of Xiang Lin, who testified that L&L purchased three insurance policies: one for personal injuries, one for workers' compensation, and one for the job site (Lin EBT, at 53). L&L also provides a certificate of insurance indicating that "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below" (Egan Affirm. in Support, Exh. O). L&L further asserts that it provided all parties with authorizations allowing them to obtain the contents of the file maintained by its insurance broker with respect to the 130 Duane Street construction job (*id.*, Exh. P).

Mikesam also moves for summary judgment on its failure to procure insurance claim, and submits copies of the disclaimer letters issued by L&L's insurer, Utica First Insurance Company which disclaimed coverage primarily on the basis that, given various exclusions, the policy did not "provide any form of coverage for damages arising out of the accident" (Sabbatino Affirm. in Support, Exhs. I, J, K).

It is well established that an agreement to procure insurance is distinct from an agreement

to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Where there is a breach of an agreement to procure insurance, the breaching party is responsible for all “resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff” (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]).

In *Crespo v Triad, Inc.* (294 AD2d 145, 148 [1st Dept 2002]), the First Department held that “[t]he Owners were properly granted partial summary judgment on their cross claim against Bozell for breach of contract for failure to procure insurance where the lease between them required each to procure insurance naming the other as an additional insured, and, in response to the motion, Bozell failed to tender an insurance policy” (*see also Chaehee Jung v Kum Gang, Inc.*, 22 AD3d 441, 443 [2d Dept 2005], *lv denied* 7 NY3d 703 [2006] [summary judgment on breach of contract claim for failure to procure insurance properly granted where company failed to produce any evidence of its compliance with insurance procurement clause]; *Taylor v Gannett Co.*, 303 AD2d 397, 399 [2d Dept 2003] [same]).

Article 13.1 of the subcontract required L&L to purchase and maintain comprehensive general liability insurance with a limit of \$1,000,000, and name Mikesam and 5444 Associates as additional insureds (Sabbatino Affirm. in Support, Exh. B). L&L has failed to tender an insurance policy in response to Mikesam’s motion. Although L&L submits a certificate of liability insurance, indicating that “[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder” and that “[t]his certificate does not amend, extend or alter the coverage afforded by the policies below” (Egan Affirm. in Support, Exh. O), it is well established that “[a] certificate of insurance is only evidence of a carrier’s intent to provide

coverage, but is not a contract to insure the designated party, nor is it conclusive proof, standing alone, that such a contract exists” (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]; *see also Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]). Lin testified at his deposition that L&L purchased three insurance policies, but did not state that Mikesam was named as an additional insured on those policies (Lin EBT, at 53).

Therefore, Mikesam is entitled to partial summary judgment on its breach of contract claim against L&L.

Cross Claim for Contractual Indemnification

5444 Associates moves for summary judgment on its contractual indemnification claim against Mikesam, pursuant to paragraph 3.18.1 of the contract between them, which states that:

“To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor [Mikesam] . . . the Contractor [Mikesam] shall indemnify and hold harmless the Owner [5444 Associates] . . . 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 injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Contractor [Mikesam], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18” (emphasis added).

(Halbardier Affirm. in Support, Exh. A).

5444 Associates is not entitled to contractual indemnification from Mikesam at this

junction. There has been no finding that plaintiff's accident was the result of Mikesam or L&L's negligent acts or omissions (*see Zeigler-Bonds v Structure Tone*, 245 AD2d 80, 81 [1st Dept 1997]). Therefore, that part of its motion must be denied.

CONCLUSION

Accordingly, based upon the foregoing, it is

ORDERED that the motion (sequence number 002) of plaintiff Senlin Cao a/k/a Sheng Cao for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants 5444 Associates, L.P. and Mikesam Construction Corporation is granted, with the issue of plaintiff's damages to await the trial in this matter; and it is further

ORDERED that the motion (sequence number 003) of third-party defendant L&L Reliable Construction for summary judgment is granted to the extent of dismissing the third-party claims for common-law indemnification and contribution, and is otherwise denied; and it is further

ORDERED that the cross motion of defendant/third-party plaintiff Mikesam Construction Corporation for summary judgment is granted to the extent of (1) dismissing plaintiff's Labor Law §§ 241 (6) and 200/common-law negligence causes of action as against it; and (2) granting it judgment on the issue of liability on its third-party claim for failure to procure insurance against third-party defendant L&L Reliable Construction, with the issue of damages to await the trial in this matter, and is otherwise denied; and it is further

ORDERED that the cross motion of defendant 5444 Associates, L.P. for summary judgment is granted to the extent of dismissing plaintiff's Labor Law §§ 241 (6) and 200/common-law negligence causes of action as against it, and is otherwise denied; and it is

further

ORDERED that the parties appear on June 20, 2011 to pick a jury, with the trial commencing immediately thereafter.

This Constitutes the Decision and Order of the Court.

Dated: April 5, 2011

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

APR 13 2011

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COUNTY CLERK'S OFFICE