[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

EDMUNDO ARCOS, SR. and LOURDES ARCOS,

Plaintiffs,

- against-

ROCKEFELLER CENTER NORTH, INC., ROCKEFELLER CENTER INC. and HACHETTE BOOK GROUP USA, INC.,

Defendants.

INDEX NO. 103548/2007

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

ROCKEFELLER CENTER NORTH, INC. and ROCKEFELLER CENTER INC.,

Third-Party Plaintiffs,

- against-

PRESTIGE RESTORATION AND MAINTENANCE, LLC,

Third-Party Defendant.

The following papers, numbered 1 to 5, were read on this motion by defendants/third-party plaintiffs Rockefeller Center North, Inc. and Rockefeller Center Inc. for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ☒ No

This is a personal injury action by plaintiff Edmundo Arcos, Sr. ("plaintiff") and his wife Lourdes Arcos (collectively "plaintiffs") to recover damages for injuries allegedly sustained when plaintiff fell from an elevated platform while painting a cooling tower at the Time Life Building ("the Building") on December 14, 2005. At the time of the accident, plaintiff was performing his

job duties as an employee of Prestige Restoration and Maintenance, LLC ("Prestige"). Plaintiff brings claims under Labor Law §§ 200, 240(1) and 241(6), and for common-law negligence, against defendants/third-party plaintiffs Rockefeller Center North, Inc. ("Rockefeller North") and Rockefeller Center Inc. ("Rockefeller Center") (collectively "Rockefeller defendants"), whom he claims are the Building's owners and/or managers.[1] His wife brings a derivative claim for loss of services. The Rockefeller defendants have brought a third-party action against Prestige seeking a declaration that Prestige is contractually obligated to defend, indemnify and hold harmless the Rockefeller defendants for plaintiffs' claims. Discovery is complete and the Note of Issue was filed on October 26, 2009.

Before the Court is the Rockefeller defendants' motion for summary judgment, pursuant to CPLR 3212, seeking: (1) dismissal of the complaint in its entirety; (2) judgment on the third-party claim declaring that Prestige is contractually obligated to defend and indemnify Rockefeller North for plaintiffs' claims; and (3) an inquest to determine the amount of damages allegedly owed to Rockefeller North by Prestige. Plaintiffs have responded in opposition to the motion, and Prestige has submitted an affirmation in partial support and in opposition.

BACKGROUND

In support of their summary judgment motion, the Rockefeller defendants submit, *inter alia*, depositions of plaintiff, Luis Reyes, Wilton Reyes, Blaise Cresciullo ("Cresciullo"), and Michael A. Kulp ("Kulp"); an affidavit of Gerald W. Blume ("Blume"); and the Purchase Order between Rockefeller North and Prestige ("Purchase Order"). In opposition, plaintiffs submit, *inter alia*, depositions of plaintiff and Wilton Reyes; and affidavits of plaintiff and Andrew R. Yarmus ("Yarmus"). Prestige relies upon the Rockefeller defendants' evidence. The following facts are undisputed.

---

[1]Plaintiffs also named Hachette Book Group USA, Inc. ("Hachette") as a defendant. The complaint as against Hachette has been withdrawn by stipulation.

A. The Parties

The Building is a multi-story office building located at 1271 Sixth Avenue, New York, New York. Plaintiffs allege that the Building was owned by Rockefeller Center "and/or" Rockefeller North at the times relevant to this action. The Rockefeller defendants maintain that the Building was not owned, controlled or managed by Rockefeller Center, but they do not dispute Rockefeller North's ownership and involvement with the Building at the pertinent times.

Prestige is a company involved in the business of metal restoration that was retained by Rockefeller North to perform restoration work on a cooling tower at the Building in late 2005. Plaintiff is a painter who was employed by Prestige.

B. The Purchase Order

A cooling tower made up of nine cells containing 21 cooling fans is located on the roof of the Building on the 47th and 48th floors. By Purchase Order dated November 14, 2005, Rockefeller North hired Prestige to perform restoration painting services on cell #4, and work on the dunnage steel in cell #3. Paragraph 5 of the Purchase Order contained an indemnification provision, which provided in pertinent part:

> "5. Supplier will indemnify and save harmless Owner, its agents, its and their respective officers, directors and employees . . . from and against any and all liability (including, but not limited to, statutory liability), loss, damages, interest, judgments and liens growing out of, and any and all costs and expenses (including, but not limited to, counsel fees and disbursements) arising out of or incurred in connection with, any and all claims, demands, suits, actions and/or proceedings which shall be made or brought against any of the indemnities for or in relation to: (a) any (or any alleged) injury to . . . any person or persons (including, but not limited to, officers, directors and employees of any of the indemnities or of Supplier) . . . arising out of or in connection with the . . . performance of any work or services hereunder to be performed or furnished by Supplier and which shall be (or shall be alleged to be) in whole or in part due to or the result of any act, omission, negligence, carelessness or unlawful conduct on the part of Supplier, its agents or subcontractors, or anyone directly or indirectly employed by any of them. . . ." (Not. of Motion, Ex. K).

Kulp, Prestige's President, acknowledged at his deposition that it was his understanding that the work would be done in accordance with the indemnification provision.

C. The Incident

Plaintiff was assigned to the crew that was responsible for scraping and repainting cell #4 pursuant to the Purchase Order. He worked in a team with Luis Reyes, while two other painters made up a second team. Wilton Reyes was the foreman. Prestige supplied the workers with various tools and safety devices to perform the job, including two 8 foot A-frame ladders, a scaffold, safety harnesses and belts, and assorted wooden planks. The workers were not provided with safety nets.

Each of the nine cells at the cooling tower was about 20 x 30 feet in diameter and 40 feet high. A grid of crossing steel beams, with polyester mesh fill covering rectangular openings, formed floors at three levels within the cells. The lowest grid was about 9 feet above the cooling tower floor. The scaffold supplied by Prestige had a maximum height of 6 to 8 feet and only allowed the workers to reach the lowest level of overhead beams in the cells. The mesh fill inside cell #4 was removed before the job was started, leaving three floors of open grids which formed rectangular openings that were about 5 x 4 feet in size.

On December 13, 2005, plaintiff and Luis Reyes finished painting all of the areas of the beams in cell #4 that could be reached from the floor or the scaffold. Due to the configuration of the beams in cell #4, the scaffold could not be raised to the next level and using a ladder or placing planks on the first level of the grids as a temporary floor would not allow them to be high enough or was unsafe. To gain a few extra feet of height, they placed some loose metal bars above the lowest overhead grid, and, with the help of the other painters, placed two empty 50 gallon plastic barrels on top of the metal bars spanning the beams. They then placed a wooden plank across the top of the barrels to form a "makeshift platform" to stand on.

The next day, plaintiff reported to work and put on his safety harness and belt and

climbed to the top of the makeshift platform with Luis Reyes. He alleges that he could not find a secure place to connect his safety belt at this higher level. He claims that there was no rope to hook onto and no smaller metal pipes, outcroppings or beams to wrap the belt around; and that it would have been impossible to perform his work if the belts were wrapped around the nearest structural steel beam since the belts were only a few feet long. Therefore, according to plaintiff, the men removed their belts and placed them on the floor of the cooling tower below them. Wilton Reyes was purportedly aware that safety belts could not be used in some situations and just told the men to be extra careful when they could not use the belts.

Plaintiff and Luis Reyes began painting while standing at either end of the platform with the paint bucket located in the middle. After about 2 hours of work, plaintiff slipped and fell as he was walking back to his end of the platform after wetting his paint brush. He tried to grab a beam above or in front of him as he went over, but he fell straight down about 12 or 13 feet to the floor below through one of the rectangular openings. There was nothing to stop his fall, as the openings in the beams just below were not planked over and no safety nets were installed under the area where he was working. Plaintiff was allegedly injured as a result of the fall.

Cresciullo, Rockefeller North's then property manager, testified at his deposition that Rockefeller North did not have any of its employees go to the Building to check on the progress of the work prior to the date of the accident. Cresciullo also testified, however, that the Building's engineers visited the roof three times daily to conduct inspections of equipment. In addition, Wilton Reyes testified that Building employees would enter the cells each morning and sometimes in the afternoons and walk around and check the work. Such employees did not give instructions to the workers, or come into the area where plaintiff was working.

Yarmus, a professional engineer hired by plaintiff's counsel, inspected the accident site on February 25, 2009, and inspected two scaffolds and a safety harness and safety belt

supplied by Prestige on July 29, 2009.[2] In his affidavit, Yarmus opines that there was a failure to provide a proper work platform or scaffold for plaintiff to work on, as required by Labor Law § 240(1), which was a substantial factor in allowing plaintiff to fall a distance of 10 to 12 feet. Yarmus also opines that Labor Law § 241(6) was violated by failures to provide suitable tail lines upon which to secure the safety harness (12 NYCRR 23-1.16); complete and secure temporary flooring immediately above the lowest steel beam grid (12 NYCRR 23-1.7 [b]); safety nets immediately below the elevated worksite (12 NYCRR 23-1.17); safety railings (12 NYCRR 23-1.15); and a dry and non-slip work platform (12 NYCRR 23-1.7 [d]). Yarmus additionally asserts that the safety harness had a lanyard that was not long enough to permit the workers to paint efficiently if it were to have been tied around the overhead steel beams. He concludes that plaintiff would have fallen a shorter distance had proper temporary flooring, safety nets or anchor points for the safety belt and harness been provided. The Rockefeller defendants have not submitted an expert's affidavit in support of their motion.

DISCUSSION

The Rockefeller defendants move for summary judgment dismissing the complaint in its entirety as a matter of law. They argue that plaintiff's claims under Labor Law §§ 240(1) and 241(6) should be dismissed because plaintiff's own actions in using a makeshift scaffold and failing to use the safety harness provided to him was the "sole proximate cause" of his accident. They further argue that the Labor Law § 200 and common-law negligence claims should be dismissed because Rockefeller North did not direct, supervise or control plaintiff's work. They additionally seek a declaration that Prestige is contractually obligated to defend and indemnify

[2]The Rockefeller defendants challenge the admissibility of Yarmus' affidavit on the basis that it improperly relies upon hearsay since Yarmus mentions facts reported to him but does not identify the source of such facts. Even if Yarmus' affidavit contains hearsay, as alleged, "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

Rockefeller North for plaintiffs' claims.[3] Finally, they argue that plaintiffs' claims as against Rockefeller Center should be dismissed since this defendant did not own, operate, manage, maintain or control the accident site.

Plaintiffs argue that summary judgment should be denied because the Rockefeller defendants have not established, prima facie, that plaintiff was the sole proximate cause of his injuries, or that Rockefeller North did not direct, supervise or control plaintiff's work. They claim that there are material questions of fact regarding exactly how the accident occurred, what safety devices were provided, and who was responsible for the conditions at the worksite. They also argue that the claims as against Rockefeller Center should not be dismissed because there are questions of fact regarding the Building's ownership.

Prestige opposes the motion only insofar as the Rockefeller defendants seek contractual indemnification for plaintiffs' claims. Prestige argues that such relief is inappropriate if the Rockefeller defendants were themselves negligent, and that there are questions of fact regarding their responsibility for the supervision and safety of the worksite.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of

[3]The Rockefeller defendants' motion also seeks summary judgment declaring that Prestige breached its contract with Rockefeller North by failing to procure necessary insurance coverage naming Rockefeller North as an additional insured on a primary basis. Prestige has submitted a copy of a Certificate of Insurance naming Rockefeller North as an additional insured under Prestige's general liability policy, which Rockefeller North does not dispute, thus rending this issue moot.

the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Labor Law §§ 240(1) and 241(6)

The Rockefeller defendants argue that they cannot be held liable under Labor Law §§ 240(1) and 241(6) because plaintiff cannot establish that a violation of section 240(1) or the Industrial Code was the proximate cause of his injuries. Rather, they maintain that the "sole proximate cause" of plaintiff's accident was his own decision to forgo the use of the safety harness provided to him and to instead use a makeshift scaffold with no safety harness.

Labor Law § 240(1) imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).[4] To establish liability, the injured plaintiff must

---

[4]Labor Law § 240(1) provides in pertinent part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be

demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the worksite (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). If, however, a plaintiff's own actions were the "sole proximate cause" of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). Liability may be imposed even where the owner or contractor did not supervise or control the worksite. To establish liability, a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of the Industrial Code that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principals (*see Ross*, 81 NY2d at 502-04). Once it has been alleged that a concrete specification of the Industrial Code has been violated, "it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury" (*Rizzuto*, 91 NY2d at 350). If proven, the owner or

---

> furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

contractor is vicariously liable without regard to his or her fault. The owner or contractor "may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*id.*).

Here, the Rockefeller defendants argue that plaintiff cannot establish that his alleged injuries were "proximately caused" by a violation of either section 240(1) or the Industrial Code because adequate safety devices were provided, *i.e.*, the safety harness, and plaintiff's own decision to work on a makeshift scaffold without using the safety harness was the "sole proximate cause" of his accident. They also dispute plaintiff's assertion that he was unable to attach his harness at the higher level. They contend that the harness could have been affixed to the beams above plaintiff since he was close enough to the beams to be able to paint them with a brush, and that the workers were in fact provided with safety lines for use with the safety harness.

Plaintiff argues that he *had* to use a makeshift platform since the scaffolds and ladders could not be used to reach the areas to be painted in cell #4, and that the safety belts became useless when he was finally in a position to perform his job. He claims that he was injured because there was "nowhere to attach them; the steel beam grid floor just a few feet below the barrel and board platform remained almost entirely open and uncovered because only one piece of plywood was provided by Prestige to use as a base; [there was] no temporary complete plywood or planking flooring, no safety lines, tail lines or anchoring points for the safety harness belt; and no hand rails or nets were provided" (Affirmation in Opposition at 26).

The Court finds that the Rockefeller defendants have failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims on the grounds that plaintiff's own conduct was the sole proximate cause of his accident (*see Silvas v Bridgeview Inv., LLC*, 79 AD3d 727 [2d Dept 2010]). Beyond mere speculation, the Rockefeller defendants have presented no competent evidence, such as an

affidavit from an expert witness, establishing that plaintiff's use of the safety harness would have prevented his fall and that the accident was not caused by a violation of section 240(1) or the Industrial Code (*see id.*; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008] ["In the absence of some proof that a harness, if provided, would have actually furnished adequate protection, defendants failed to raise an issue of fact whether plaintiff's actions were the sole proximate cause of his injuries."]; *cf. Yedynak v Citnalta Const. Corp.*, 22 AD3d 840, 841 [2d Dept 2005] [defendant demonstrated, prima facie, that sole proximate cause of fall was plaintiff's own failure to use safety harness, not violations of Labor Law §§ 240(1) and 241(6), where plaintiff was instructed in proper use of harness and directed to use it at all times and "defendant presented testimony that a safety line was available near where the plaintiff fell, and that the harness would have prevented his fall to the floor below"]; *Leniar v Metro. Tr. Auth.*, 37 AD3d 425, 426 [2d Dept 2007] [the parties did "not dispute that the plaintiff would not have fallen to the ground and sustained injuries if his harness had been hooked to the scissor lift"]).

The Rockefeller defendants also fail to dispute plaintiff's evidence that his injuries may have been caused, at least in part, by the absence of safety nets or proper temporary flooring which might have blocked the distance of his fall (*see Merante v IBM*, 169 AD2d 710, 711 [2d Dept 1991]). Moreover, plaintiff's improvisational use of a "makeshift platform" is not material since a worker's contributory negligence does not bar recovery under section 240(1) (*see Mata v Park Here Garage Corp.*, 71 AD3d 423, 424 [1st Dept 2010]; *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592-93 [1st Dept 2010]; *Alexander v Hart*, 64 AD3d 940, 944 [3d Dept 2009]).

To the extent that the Rockefeller defendants' motion is based on a claim that plaintiff was a "recalcitrant worker" since he did not use the safety harness, there is no evidence that the defense applies. Plaintiff testified that he was unable to use the safety harness because there was no place to attach it, and there has been no showing that plaintiff ignored specific

instructions regarding his use of the harness *(see Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403, 404 [1st Dept 2005] ["The recalcitrant worker defense, predicated on the injured plaintiff's alleged failure to use a safety harness and other protective devices, is unavailaing, since there is no evidence that he deliberately refused to use safety devices provided."]; *Harris v Rodriguez*, 281 AD2d 158, 158 [1st Dept 2001]).

The Court further finds summary judgment may not be granted since there are questions of material fact regarding whether there were adequate safety lines, tail lines or other anchor points for the safety harness. Plaintiff testified that there was nothing to attach the safety harness to at the higher level. The Rockefeller defendants maintain that the harness could have been attached to the overhead beams, and, further, that safety lines were in fact present. Given this factual dispute, summary judgment is inappropriate (*see Cherry*, 66 AD3d at 238 ["To the extent that the statements and testimony of the plaintiff and the defendants conflict as to where the scaffolds with guardrails were located that day, they raise a triable issue of fact, and so preclude summary judgment."]; *Latchuk v Port Authority*, 71 AD3d 560, 560 [1st Dept 2010]; *Welsch v Maimonides Med. Ctr.*, 915 NYS2d 163, 164 [2d Dept 2011]).

Therefore, the Rockefeller defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims is denied.

C. Labor Law § 200 and Common-Law Negligence

The Rockefeller defendants also seek to dismiss plaintiff's Labor Law § 200 and common-law negligence claims on the basis that Rockefeller North did not direct, supervise or control the work being performed by plaintiff. They assert that plaintiff was injured while performing his job duties as Prestige's employee, and that Prestige supervised plaintiff and provided the materials for him to perform his work. They argue that general oversight of the progress of the work, or a contractual duty to oversee the performance of the work, does not constitute the supervision and control required by the statute.

Plaintiff argues that the Rockefeller defendants have failed to demonstrate that they exercised no supervisory control over the work being performed by Prestige, or that they were unaware of any unsafe conditions. Plaintiff points to the testimony indicating that Building engineers and employees frequently inspected the worksite, and he asserts that there is no evidence that the Rockefeller defendants were not entitled to order modifications to Prestige's work if they found it unsatisfactory.

Labor Law § 200 is essentially a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). Liability is limited to parties who exercise supervision or control over the work out of which the injury arises, or who create or have actual or constructive notice of an unsafe condition which causes the injury when a premises condition is at issue (*see Mendoza v Highpoint Assoc., IX, LLC*, --NYS2d--, 2011 WL 782164, at *4 [1st Dept 2011]; *Bruce v 182 Main St. Realty Corp.*, --NYS2d--, 2011 WL 1312308, at *4 [1st Dept 2011]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

The Rockefeller defendants have established their entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 200 and common-law negligence claims. They have made a prima facie showing that Rockefeller North did not supervise or control plaintiff's work, nor create or have notice of an unsafe condition that caused the accident (*see Matter of New York City Asbestos Litig.*, 25 AD3d 374, 374 [1st Dept 2006]). In opposition, plaintiff has failed to raise a triable issue of fact. Although there is evidence of daily inspections conducted by Building engineers and employees, it is well-settled that the "mere presence of [Building] personnel at the worksite, while perhaps indicative of a general right of inspection, does not suffice to create an inference of supervisory control" (*id.; see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [deposition testimony established that no issues of negligence existed as to building's owner "whose employees inspected the work and had the

authority to stop it in the event they observed dangerous conditions or procedures but did not otherwise exercise supervisory control over the work"]; *Rivera v Ambassador Fuel & Oil Burner Corp.*, 45 AD3d 275, 276 [1st Dept 2007]; *Haider v Davis*, 35 AD3d 363, 364 [2d Dept 2006]). Nor is there any evidence that the Rockefeller defendants created the makeshift platform from which plaintiff fell, or had actual or constructive notice of its existence (*see Bruce*, 2011 WL 1312308, at *4; *New York City Asbestos Litig.*, 25 AD3d at 374).

Accordingly, summary judgment dismissing the Labor Law § 200 and common-law negligence claims is granted.

D. Indemnification

The Rockefeller defendants further argue that under the terms of the Purchase Order, Prestige is contractually obligated to defend and indemnify Rockefeller North for plaintiffs' claims. They also assert that Prestige is obligated to reimburse Rockefeller North for its costs and expenses, including attorney's fees and disbursements, incurred in the defense of plaintiffs' claims.

Prestige opposes the Rockefeller defendants' motion only to the extent that it seeks contractual indemnification. Prestige argues that the Rockefeller defendants must establish that Rockefeller North was itself free from negligence and was held liable solely by virtue of statutory liability. Here, Prestige argues, there remain issues of fact regarding the responsibility for the supervision and safety of the worksite since there is testimony that the Building's engineers inspected the roof area daily.

It is well established that 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] [quotations omitted]). The party seeking contractual indemnification has to establish that it is free from any negligence and that its liability is solely vicarious arising from the non-delegable duty imposed by the Labor Law (*see DiFilippo v*

Parkchester North Condominium, 65 AD3d 899, 899 [1st Dept 2009]; *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 871 [2d Dept 2008]). Moreover, in the absence of any showing of negligence on the part of the indemnitee, General Obligations Law § 5-322.1 does not bar enforcement of contractual indemnification for vicarious liability imposed under the Labor Law (*see Auriemma v Biltmore Theatre, LLC*, --NYS2d--, 2011 WL 240404, at *6-7 [1st Dept 2011]).

Here, the Court has found that dismissal of the Labor Law § 200 and common-law negligence causes of action is warranted (*see Bruce*, 2011 WL 1312308, at *4; *New York City Asbestos Litig.*, 25 AD3d at 374). Therefore, Rockefeller North's liability, if any, would only be vicarious and statutory, and Rockefeller North is entitled to enforce the indemnification provision in its agreement with Prestige (*see Smith v Broadway 110 Developers, LLC*, 80 AD3d 490 [1st Dept 2011]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510-11 [1st Dept 2009]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]; *Colozzo v National Ctr. Found., Inc.*, 30 AD3d 251, 252 [1st Dept 2006]).

Accordingly, the Rockefeller defendants' motion for summary judgment, to the extent that it seeks judgment against Prestige declaring that Prestige is contractually obligated to defend and indemnify Rockefeller North for plaintiffs' claims and an inquest for a determination of damages, is granted.

E. Rockefeller Center

Lastly, the Rockefeller defendants argue that the action as against Rockefeller Center must be dismissed because this defendant had no involvement with the Building or the work being performed. They submit an affidavit of Blume, Vice President and Assistant Secretary of Rockefeller Center, stating that Rockefeller Center did not own, operate, maintain, control or lease the premises where the accident occurred on the date in question.

Plaintiffs submit in opposition a 1958 deed between Rock-Time, Inc. and "Rockefeller Center, Inc. (successor by merger to Westprop, Inc.)", and a 1997 management contract

between Rockefeller North and "Rockefeller Center Management Corporation," which they claim raise questions of fact regarding the Building's ownership. In reply, the Rockefeller defendants submit a 1982 certificate of incorporation of Rock-Prop, Inc. and a 1984 certificate of amendment changing the corporate name to "Rockefeller Center, Inc.", which they claim establish that Rockefeller Center is not the entity named in the 1958 deed because Rockefeller Center did not exist until its incorporation under the name Rock-Prop, Inc. in 1982.

The Court grants the Rockefeller defendants' motion to the extent that it seeks to dismiss the complaint as against Rockefeller Center. The Rockefeller defendants have demonstrated, prima facie, that Rockefeller Center was not an "owner" of the Building for purposes of the Labor Law because it did not have an interest in the property at the relevant times (*see Cortez v Northeast Realty Holdings*, LLC, 78 AD3d 754, 757 [2d Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact (*see id.*).

For these reasons and upon the foregoing papers, it is,

ORDERED that the Rockefeller defendants' motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1) and 241(6) is denied; and it is further,

ORDERED that the Rockefeller defendants' motion for summary judgment dismissing plaintiff's claims under Labor Law § 200 and for common-law negligence is granted; and it is further,

ORDERED that the Rockefeller defendants' motion for summary judgment granting judgment against Prestige declaring that Prestige is contractually obligated to defend and indemnify Rockefeller North for plaintiffs' claims is granted; and it is further,

ORDERED that the Rockefeller defendants' motion for summary judgment ordering an inquest to determine the amount of damages allegedly owed to Rockefeller North by Prestige is granted; and it is further,

ORDERED that the Rockefeller defendants' motion for summary judgment dismissing the

complaint as against Rockefeller Center is granted; and it is further,

ORDERED that the remainder of this action shall continue; and it is further,

ORDERED that plaintiffs shall serve a copy of this Order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: February 27, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**