[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SEAN NIELSEN AND PATRICIA NIELSEN,
Plaintiffs,

-against-

NEW YORK STATE DORMITORY AUTHORITY, MCKISSACK TURNER CONSTRUCTION/JV,
Defendants.

Index Number: 106040/2008

Motion Seq.: 006

NEW YORK STATE DORMITORY AUTHORITY,
Third-Party Plaintiff,

-against-

METROPOLITAN STEEL INDUSTRIES, INC. AND MIDLANTIC ERECTORS, INC.,
Third-Party Defendants.

METROPOLITAN STEEL INDUSTRIES, INC. AND MIDLANTIC ERECTORS, INC.,
Fourth-Party Plaintiffs,

-against-

THE CROSBY GROUP, INC.
Fourth-Party Defendant.

The following papers were read on the plaintiff's motion for summary judgment, McKissack Turner Construction/JV's cross-motion for summary judgment, and the third-party defendants' cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☒ Yes ☐ No

Plaintiff[1] moves for partial summary judgment on the issue of liability against defendants

[1] The term plaintiff is used in the singular for purposes of consistency, but shall refer to both plaintiffs where appropriate.

on his Labor Law § 240 (1) ("Scaffold Law") claim. New York State Dormitory Authority ("DASNY") cross-moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it, based upon its having no supervisory authority over plaintiff's work, for conditional summary judgment on its contractual indemnity claim as against McKissack Turner Construction/JV ("McKissack") to the extent of unreimbursed defense costs and any damages award in excess of McKissack's insurance coverage, and for summary judgment on its third-party complaint for contractual indemnity as against Metropolitan Steel Industries, Inc. ("Metropolitan") to the extent of unreimbursed defense costs and any damage award in excess of Metropolitan's insurance coverage. Metropolitan and Midlantic Erectors, Inc. ("Midlantic") cross-move for summary judgment dismissing plaintiff's complaint on the ground that plaintiff's conduct was the sole proximate cause of the accident.

Plaintiff does not dispute that DASNY had no supervisory authority over his work and has stated that he does not oppose the portion of DASNY's cross motion that seeks dismissal of his Labor Law § 200 and common-law negligence claims as against it (Mayer affirmation dated October 26, 2010, ¶ 2), and these claims against DASNY are dismissed (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Plaintiff's motion and the cross motions are consolidated for disposition and decided as noted below.

PARTIES

Plaintiff is an ironworker who was working for Midlantic at Medgar Evers College, 1650 Bedford Avenue, Brooklyn, New York (the "Job Site") on January 23, 2008, when he was injured by a falling steel I-beam (bill of particulars, items 4, 5). DASNY was the agent for the City University of New York ("CUNY"), the owner (Dolores EBT, at 7). McKissack was the construction manager pursuant to a contract with DASNY (the "McKissack Contract") for construction of a new building (the "Building") at the Job Site (the "Project") (*id.* at 9), and plaintiff asserts that McKissack is the general contractor. Metropolitan entered into a contract

with DASNY (the "Metropolitan Contract") for fabrication, transportation and erection of the structural steel necessary for the Project (*id.*). Midlantic was the steel erector subcontractor pursuant to a contract with Metropolitan (*id.* at 12). The Crosby Group, Inc. ("Crosby") manufactured the hooks and safety latches that were attached to the chokers used in lifting the steel beams on the Project, including the beam that fell on plaintiff (Hynes EBT, at 43).

PARTIES' ALLEGATIONS

Plaintiff contends that, on January 23, 2008, he was employed as an ironworker by Midlantic for work on the Project (plaintiff EBT, at 12, 18, 25). He states that he was part of a work crew engaged in erecting steel beams and that he was given his equipment by Midlantic and took his instructions as to how to perform his work solely from Steve, the foreman of the bolting gang, and Brian Flynn, the foreman of the raising gang, both of whom were Midlantic employees (*id.* at 35-36, 44). He further states that McKissack was the general contractor on the Project, but that he had no interactions with it (*id.* at 37).

Plaintiff asserts that, as part of the construction process, the five-man raising crew was moving steel I-beams from the roof of the Building to another work crew to connect them to the Building (*id.* at 53). He states that this was done by attaching a steel cable with loops on each end, known as a choker, to the beam and attaching the choker to a hook with a safety latch, so that a crane could lift the beam and the beam could be placed in the proper position (*id.* at 45-46, 53). He further asserts that he and Flynn were operating to connect the choker to the center of the I-beam, so that it would be properly centered and stable (*id.* at 50-51).

Plaintiff also contends that the I-beam had a lintel, since it was to be placed on the Building's perimeter and facade work was to be done there, and that it was therefore necessary to roll or rotate the beam to put it in a proper direction (*id.* at 53). He further states that, after being rolled once, the beam was lowered and then lifted again between three and a half and four feet, when it became unbalanced (*id.* at 61-62, 54). He asserts that, after he adjusted it, he

took a couple of steps back and then heard a loud pop and the beam fell on him (*id.* at 67, 69; Flynn affidavit; Gregory affidavit).

Plaintiff further states that his legs were numb, and that as a result of the accident, he suffered right knee injuries requiring surgery, back injuries requiring surgery and a torn rotator cuff (plaintiff EBT, at 100, 107) and that he has been unable to work since the accident.

Plaintiff also asserts that Flynn told him to adjust the choker (*id.* at 65), that a new hook had been installed that day by Midlantic due to problems with the old hook on the previous day (*id.* at 183), and that, after the accident, the new hook was broken and in pieces (Gregory affidavit). He contends that DASNY and McKissack breached their obligations under the Scaffold Law, under Labor Law § 241 (6) and various regulations, and that McKissack was negligent under Labor Law § 200 and the common law.

DASNY asserts that it was the agent for the owner, CUNY, and that it hired McKissack as construction manager, pursuant to the McKissack Contract, for the construction of a new building at the Job Site (Dolores EBT, at 7-8). It also states that it never instructed plaintiff on how to perform his work (*id.* at 20-21). It further states that McKissack coordinated subcontractors, but did not hire them (*id.* at 9). The McKissack Contract includes a provision (the "McKissack Indemnity Provision") under which McKissack agreed "to indemnify and hold harmless (DASNY) against all claims arising out of the negligent acts, alleged negligent acts, or failure to act by (McKissack) and shall pay any judgment or expense ... (except that covered by McKissack's insurance)."

DASNY also asserts that it entered into a contract with Metropolitan for steel fabrication and erection on the Project and that the Metropolitan Contract includes a provision (the Metropolitan Indemnity Provision) that states that Metropolitan "assumes entire responsibility and liability for any and all damage or injury ... caused by, resulting from, arising out of, or occurring in connection with (its work)."

DASNY contends that, since it has established that there was no negligence on its part and its liability is due solely to its status under the Labor Law, it is entitled to conditional summary judgment against McKissack pursuant to the McKissack Indemnity Provision, and to summary judgment against Metropolitan on contractual indemnity pursuant to the Metropolitan Indemnity Provision.

McKissack contends that it oversaw the prime contractors that had contracts with it (Bordonaro EBT, at 8) and that it had daily walk-throughs on the Project, but that it never instructed plaintiff or any other Midlantic employees on how to perform their steel erection work (*id.* at 17, 20), or the crane operator on how to perform that task (*id.* at 51-52). It further states that it believes that the choker was not tightened correctly and that Metropolitan was responsible for inspection of the safety latches on the hook (*id.* at 29, 46).

Metropolitan and Midlantic contend that Metropolitan was responsible for fabrication and erection of the structural steel for the Project and that it subcontracted the erection work to Midlantic (Hynes EBT, at 9, 11-14). They further state that Midlantic rented a crane to raise and lower steel beams, whose operator took signals from the raising crew that plaintiff was on (*id.* at 26, 32, 39). They also assert that the hooks and safety latches came from Crosby, but were checked daily by Midlantic (*id.* at 43, 50-51).

Metropolitan and Midlantic further assert that McKissack had access to the Job Site, the authority to stop unsafe work and that it would observe how Midlantic was performing its work (*id.* at 53-54). They also contend that the proper procedure for realigning the choker was to replace the I-beam on the surface and then move the choker, and that the shortcut of adjusting the choker in the air was an unsafe practice (*id.* at 61, 67-68, 70). They also state that there were no prior complaints from McKissack about lifting the beams or any prior problems with the safety latches or chokers (*id.* at 90-91).

Metropolitan and Midlantic claim that the accident occurred solely as a result of plaintiff's

alleged misconduct in adjusting the choker and that his complaint should therefore be dismissed. Metropolitan asserts that DASNY delayed in bringing its cross motion and that its attorneys' fees in defending this action might be excessive, and that DASNY should, therefore, not be entitled to contractual indemnity. McKissack also asserts that DASNY's attorneys' fees might have been unnecessary and that, therefore, DASNY should not be entitled to conditional summary judgment on contractual indemnity.

LABOR LAW § 240 (1)

Labor Law § 240 (1) provides that:

> "All contractors and owners and their agents ... in the erection ... of a building ... shall furnish or erect, or cause to be furnished or erected for the performance of such labor ... hoists, ... slings, ... braces, ... ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The purpose of the Scaffold Law is to protect workers who are engaged in construction work and face elevation-related risks by placing responsibility for safety equipment and practices on owners and general contractors who are deemed to be best situated to bear that responsibility (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

The I-beam weighed about 4,000 pounds and was about six feet long (plaintiff EBT, at 170, 49). Plaintiff contends that the Scaffold Law was violated since the I-beam was not properly secured in the hoisting and, due to this failure, it fell on him. Hoisting steel beams is the type of extraordinary elevation- related risk that the Scaffold Law aims to guard against (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]).

CONSTRUCTION MANAGER VERSUS GENERAL CONTRACTOR

McKissack argues that it is not liable under the Scaffold Law because it was not the general contractor for the Project. It contends that, because it did not supervise or direct the hoisting operation performed by Midlantic (Bordanaro EBT, at 17, 20), its scope of responsibility

was too limited to impose statutory liability against it as the owner's statutory agent.

McKissack's role is significant since the Scaffold Law places "'ultimate responsibility for safety practices at building construction jobs ... on the owner and general contractors'" who are considered to be in the best position by their status to ensure that proper safety practices are observed and proper safety devices are used (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981] [citation omitted]). The Scaffold Law statute also extends liability to agents of the owner and general contractor (Labor Law § 240[1]; *Russin*, 54 NY2d at 318). McKissack contends that a prime contractor that lacks supervisory authority over plaintiff's work is not considered to be a general contractor or owner's statutory agent. In support, McKissack cites *Russin* (54 NY2d at 318), *Decotes v Merritt Meridian Corp.* (245 AD2d 864, 866 [3d Dept 1997]), and *Nowak v Smith & Mahoney* (110 AD2d 288, 290 [3d Dept 1985]). However, McKissack fails to cite *Walls v Turner Constr. Co.* (4 NY3d 861 [2005]), the authoritative case on this issue, which supercedes the older case law cited by McKissack. Notably, the *Walls* defendant, Turner Construction Company ("Turner"), is a partner in the McKissack / Turner joint venture that is a defendant herein, and was also represented by the same counsel that represents McKissack in this case.

In *Walls*, Turner argued, as McKissack does here, that it had no liability under the Scaffold Law, because it was a construction manager rather than a general contractor, and did not have supervisory control sufficient to establish statutory agent status. The Court of Appeals rejected Turner's position, finding that the requisite supervisory authority existed because "Turner functioned as the eyes, ears, and voice of the owner. Turner's broad responsibility was both that of coordinator and overall supervisor for all the work being performed on the job site" (*Walls*, 4 NY3d at 864). The majority held that,

> given (1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) Turner's duty to oversee the construction site

> and the trade contractors, and (4) the Turner representative's acknowledgment that Turner had authority to control activities at the work site and to stop any unsafe work practices, we agree that the Appellate Division was correct in holding Turner liable as a statutory agent of the [owner] under Labor Law § 240(1).

(*Walls*, 4 NY3d at 864). In other words, there was no general contractor on site, but, for Scaffold Law purposes, Turner was the general contractor in all but name. Being that Turner, as Construction Manager, was responsible for the coordination of all trades and overall supervision of the site, it was not relevant whether Turner actually supervised the plaintiff's work (*see also*, *Moracho v Open Door Family Med. Ctr., Inc.*, 74 AD3d 657, 658 [1st Dept 2010] [where plaintiff's employer, an asbestos removal company, was prime contractor directly hired by owner, and general contractor was restricted from area where plaintiff was working at time of accident, general contractor could still be held liable under Scaffold Law because general contractor "was contractually responsible for preventing accidents at the site and for taking reasonable precautions to prevent injury to employees on the job"]).

Here, as noted by both plaintiff (Plaintiff's Affirmation in Support at ¶ 4) and DASNY (DASNY's Affirmation in Support at ¶¶ 17, 24-27, 31-32, 54), the record establishes that McKissack was the coordinator and overall supervisor for all work performed on the site, including site safety, and had authority to stop work on the Project. The Project did not involve a general contractor, and McKissak, as construction manager, contracted to take on essentially all on-site responsibilities of a general contractor. The Court therefore rejects McKissack's argument that it should be exempt from liability under the Scaffold Law because of its status as a prime contractor without supervisory control.

SOLE PROXIMATE CAUSE

Under the Scaffold Law, a plaintiff must show a statutory violation and that this violation was a proximate cause of the accident and, therefore, if plaintiff was "solely to blame" for the accident, there is no liability (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290

[2003]). If plaintiff is the sole proximate cause of the accident, this bars recovery under the Scaffold Law, Labor Law § 241 (6), Labor Law § 200 and common-law negligence. Sole proximate cause can take the form of the failure to use an available safety device (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Similarly, a plaintiff who fails to use a ladder available at the job site and who jumps off an inverted bucket elevated four feet is "the sole cause of his injury" (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]).

Metropolitan and Midlantic contend that plaintiff's action in adjusting the choker make him solely responsible for the accident. However, they have sued Crosby, alleging product liability for the purportedly defective hook and safety latch. There is evidence that the hook was broken and bent after the accident, raising a factual issue as to whether it failed (Gregory affidavit), and that Flynn, plaintiff's foreman, instructed him in performing his work (Flynn affidavit, plaintiff EBT, at 36, 70). Since Midlantic was responsible for inspecting the hook, the adequacy of its inspection is also a potential cause of the accident. Metropolitan and Midlantic have the burden of showing that plaintiff's actions were the sole proximate cause of the accident (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288-289 [1st Dept 2008]). The evidence presented includes additional possible causes of the accident, including the possibly defective hook and Flynn's instruction to plaintiff to proceed. Therefore, Metropolitan and Midlantic have not established as a matter of law that plaintiff's actions were the sole proximate cause of the accident (*Blake*, 1 NY3d at 290; *Mercado v New York Univ.*, 29 AD3d 496 [1st Dept 2006]) and, accordingly, their cross motion to dismiss plaintiff's complaint is denied.

Plaintiff has made a prima facie case under the Scaffold Law against DASNY and McKissack by showing a statutory violation of an inadequately secured object falling on him and that the failure to properly secure it was a cause of the accident (*Blake*, 1 NY3d at 289; *Kosavick*, 50 AD3d at 288). Plaintiff need not establish that the statutory violation is the sole cause of his accident, merely that it was *a* proximate cause of his accident (*Blake*, 1 NY3d at 289;

Campuzano v Board of Educ. of City of N.Y., 54 AD3d 268 [1st Dept 2008] [emphasis added]). In opposition, McKissack raises a triable issue of fact by referencing deposition testimony of a third party defendant; an examination of the third-party defendant deposition of Steven Hynes reveals that Hynes opined that plaintiff acted negligently, causing the subject accident. DASNY, by contrast, has not presented any basis to oppose liability against it under the Scaffold Law. However, strict liability under the Scaffold Law is identical for owners, general contractors, and their statutory agents (*see* Labor Law 240[1]), regardless of negligence, and the sole proximate cause defense of McKissack and third party defendants, to the extent it is factually viable, would apply equally to DASNY. Therefore, for the sake of judicial consistency, it is appropriate for the Court to search the record and apply the sole proximate cause defenses presented by McKissack and the third-party defendants for the benefit of DASNY (*see also Rodriguez v Freight Masters, Inc.*, 80 AD3d 452 [1 Dept 2011] [order granting summary judgment modified to grant summary judgment to non-movant, where summary judgment motion resolved all factual issues for non-movant]).

CONTRACTUAL INDEMNITY

In contractual indemnity, a party seeking to impose indemnity must show that it is free from negligence, but need not show that the proposed indemnitor is negligent, and must show that the indemnification provision applies (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]).

McKissack states that DASNY "has not demonstrated that plaintiffs' claim arises out of (its) negligent acts or omissions" (Mahoney affirmation dated October 26, 2010, ¶ 10). Plaintiff's complaint against McKissack includes claims under Labor Law § 200 and common-law negligence. Under the McKissack Indemnity Provision, McKissack is obligated to indemnify DASNY for McKissack's "negligent acts, alleged negligent acts, or failure to act" and DASNY has established that it had no supervisory authority over plaintiff's work and that therefore it was not

negligent. Consequently, it is entitled to summary judgment on its claim for contractual indemnity against McKissack, conditioned upon a finding at trial that McKissack is liable to plaintiff under Labor Law § 200 and/or common-law negligence (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401 [1st Dept 2005]).

Metropolitan asserts that DASNY's cross motion must be denied as untimely since it was made on September 17, 2010, more than 120 days after the note of issue was filed on May 13, 2010. However, the court's order dated September 29, 2010 struck the note of issue based upon the need for additional discovery and DASNY's cross motion is therefore timely. Metropolitan also states that its insurer agreed to provide coverage to DASNY, but DASNY nevertheless incurred attorneys' fees unnecessarily. The Metropolitan Indemnity Provision requires Metropolitan to indemnify DASNY from "all damage ... caused by, resulting from, arising out of, or occurring in connection with (its work)." Metropolitan was responsible for fabrication and erection of the steel on the Project and it subcontracted the erection work to Midlantic. Plaintiff was an employee of Midlantic who was engaged in the erection work and his work falls within the scope of the Metropolitan Indemnity Provision.

The amount of DASNY's attorneys' fees will be determined at a hearing at trial and, to the extent that they are found to be unnecessary or excessive, they will not be awarded. However, DASNY has established its right to summary judgment on its claim for contractual indemnity as against Metropolitan.

CONCLUSION, ORDER AND JUDGMENT

It is, therefore,

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability on his claim under Labor Law § 240 (1) is denied in its entirety; and it is further

ORDERED that Metropolitan Steel Industries, Inc.'s and Midlantic Erectors, Inc.'s cross motion to dismiss plaintiff's complaint is denied; and it is further

ORDERED that the portion of New York State Dormitory Authority's cross motion to dismiss plaintiffs' Labor Law § 200 and common-law negligence claims as against it is granted without opposition; and it is further

ORDERED that the portion of New York State Dormitory Authority's cross motion for summary judgment against McKissack Turner Construction/JV on its cross claim for contractual indemnity only to the extent of unreimbursed defense costs and to the extent that a verdict on damages exceeds said party's insurance coverage is granted; and it is further

ORDERED that the portion of New York State Dormitory Authority's cross motion for summary judgment against Metropolitan Steel Industries, Inc. on its third-party complaint for contractual indemnity only to the extent of unreimbursed defense costs and to the extent that a verdict on damages exceeds said party's insurance coverage is granted; and it is further

ORDERED that a hearing on the amount of unreimbursed defense costs shall be held at the time of trial.

This constitutes the Decision and Order of the Court.

Dated: 5/24/11

Enter:

PAUL WOOTEN J.S.C.

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

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