[* 1]

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

PRESENT: Hon. Doris Ling-Cohan **PART** 30

Index Number : 111466/2008

WRACLAWEK, TADEUSZ

VS

JNK-GRAND

Sequence Number : 004

PARTIAL 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** Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6

Cross-Motion: ☐ **Yes** ☑ **No**

Upon the foregoing papers, it is ordered that this motion by defendant JNK-Grand LLC for summary judgment is denied in accordance with the attached memorandum decision.

(Consolidated for disposition with motion Sq # 005)

FILED

OCT 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/5/11

JUDGE DORIS LING-COHAN **J.S.C.**

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

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

TADEUSZ WRACLAWEK,

Plaintiff,

-against-

JNK-GRAND LLC and
BREND RENOVATION CORPORATION,

Defendants.

----------X

JNK-GRAND LLC,

Third-Party Plaintiff,

-against-

BREND RENOVATION CORPORATION,

Third-Party Defendant.

----------X

JNK-GRAND LLC,

Second Third-Party Plaintiff,

-against-

FALCON BUILDING SERVICES CORPORATION,

Second Third-Party Defendant.

----------X

BREND RENOVATION CORPORATION,

Third Third-Party Plaintiff,

-against-

FALCON BUILDING SERVICES CORPORATION,

Third Third-Party Defendant.

----------X

Index No.: 111466/08
DECISION/ORDER

Motion Seq. No.: 004 & 005

Index No.: 590472/09

Index No.: 590403/09

Index No.: 590529/10

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, defendant JNK-Grand LLC (JNK-Grand) moves for partial summary judgment to dismiss a portion of the complaint, as well as for summary judgment on its own cross-claims, and plaintiff moves separately for partial summary judgment on another part of the complaint (motion sequence numbers 004, 005). For the following

reasons, JNK-Grand's motion is denied, and plaintiff's motion is granted.

BACKGROUND

On June 20, 2008, plaintiff Tadeusz Wraclawek (Wraclawek) injured his head and right wrist when he fell from a ladder while he was engaged in pointing a hatchway opening in the ceiling of a building (the building) located at 125 Grand Street in the County, City and State of New York. *See* Notice of Motion (motion sequence number 004), Bethmann Affirmation, ¶ 10. JNK-Grand is the owner of the building. *Id.* Defendant Brend Renovation Corporation (Brend) is the general contractor that JNK-Grand had retained to perform renovation work at the building. *Id.* Third-party defendant Falcon Building Services Corporation (Falcon), Wraclawek's employer, was a subcontractor that Brend had subsequently hired to perform a portion of that work. *Id.*, ¶ 7.

At his May 19, 2010 deposition, Wraclawek testified that, at approximately 12:30 P.M. on June 20, 2008, he was by himself on a ladder on the building's second floor preparing to seal what had been a hatchway that was located in the corner of the ceiling and that let out onto the building's roof. *See* Notice of Motion (motion sequence number 004), Exhibit H, at 35-37. Wraclawek stated that he had gotten as far as inserting some pre-cut wooden joists into the former hatchway opening, and was engaged in pointing (i.e., mortaring) those joists into place when he fell. *Id.* at 39-40, 46-47, 62-66. Regarding the ladder, Wraclawek stated that it was free-standing (i.e., not attached to the building's wall), straight (i.e., not A-frame), made of aluminum, without tie-offs or other safety features, and approximately 12 feet tall with rubber feet on its bottom. *Id.* at 43-45, 49-50, 60-61. Wraclawek also stated that the ladder was the only ladder in his work area, that he did not know who had put it there, and that he had observed

it in his work area a week before his injury. *Id.* at 44-45. Wraclawek further stated that, when he was injured, the ladder was not resting directly on the building's concrete floor, but on an unsecured eight-foot long by four-foot wide plywood platform, part of which rested on the floor, and part of which rested on the top of a "pipe scaffold" that had been erected on the floor below, and that extended through a two-foot by eight-foot hole in the floor of the building's second floor (where Wraclawek was working). *Id.* at 52-60. Wraclawek estimated that there was approximately a four inch height differential between the level of the floor and the protruding top of the scaffold. *Id.* at 55-56. Wraclawek also stated that the hole in the floor was surrounded by a 40-inch-high railing made of wooden posts. *Id.* at 69-71. Regarding his accident, Wraclawek stated that the top of the ladder was resting against the building's wall, and that its rubber-footed bottom was resting on the approximately two-foot portion of the platform that extended over the building's concrete floor. *Id.* at 59-60. Wraclawek also stated that he had climbed the ladder, had rested his bucket full of mortar on a rung of the ladder, and had been engaged in mortaring the afore-mentioned wooden joists into the ceiling with a trowel, for approximately half an hour when he fell. *Id.* at 60-65. Wraclawek specifically stated that the bottom of the ladder slid backwards out from under him and across the plywood platform. *Id.* at 65-68, 73-74. Wraclawek also stated that the ladder then fell into the space between the plywood platform and the scaffold and then to the first floor below. *Id.* at 72-73, 108.

JNK-Grand was deposed via a managing member, Nathan Korn (Korn), who confirmed that JNK-Grand had retained Brend as its general contractor, but testified that neither he, nor anyone else at JNK-Grand, had ever given anyone employed by Brend any instructions about how to perform the work at the building. *See* Notice of Motion (motion sequence number 004),

Exhibit I, at 21-22, 28-30. Korn stated that, at one time, he had observed a metal ladder attached to the hatch in the building's ceiling that Wraclawek was engaged in closing off, but stated that he believed that it may have been removed before that work was commenced in 2008. *Id.* at 38-42, 52-55. Korn also stated that he himself inspected the progress of the work at the building every one to three months, but that JNK-Grand did not employ any other representative, construction manager, project manager or safety manager to inspect the progress of the work at the building. *Id.* at 26, 30-31. Korn's testimony does not include any reference to complaints about the work site where Wraclawek was injured.

Brend was first deposed via its president, Witold Brend, who confirmed Brend's contract with JNK-Grand. *See* Notice of Motion (motion sequence number 004), Exhibit J, at 20-24, 30-37. Witold Brend stated that he himself inspected the progress of the work at the building less than once per week. *Id.* at 26. Witold Brend also stated, however, that his company was responsible for "site safety" at the building, and testified that Brend had the authority to stop subcontractors from working if any Brend employee observed a subcontractor engaging in unsafe conduct. *Id.* at 30-37. Finally, Witold Brend stated that JNK-Grand employed an architect named John Nakrosis (Nakrosis) who had some authority to direct Brend's and Falcon's employees on-site regarding "how the work was supposed to be done." *Id.* at 56-59. Witold Brend's testimony also does not include any reference to complaints about the work site where Wraclawek was injured.

Brend was also deposed a second time on June 21, 2010 via its executive vice-president Matthew Jaworski (Jaworski), who opined that the ladder that Wraclawek fell from might have been the same steel ladder with rounded metal rungs that he had once observed (in approximately

2001) affixed to the building's hatch, but that had been detached at some point prior to Brend's commencing work at the building. *See* Notice of Motion (motion sequence number 004), Exhibit K, at 13-16. Jaworski stated several times, however, that he was not certain which ladder had been involved in Wraclawek's accident. *Id.* at 29, 31, 56, 63. Jaworski stated that he was often present at the building several times a week to inspect the progress of the work, and that he acted as the de facto site safety manager of the work at the building. *Id.* at 10, 60-61. Jaworski specifically stated that he was present at the site of Wraclawek's injury several days before his accident, that he had observed that similar wooden joists had been placed and mortared to seal a skylight in the building's second floor ceiling that was located near to the hatchway that was also due to be sealed. *Id.* at 32-34. Jaworski also stated that it was normally Brend's practice to furnish its subcontractors with ladders and other equipment, but that he did not recall having furnished the ladder that Wraclawek was injured on, and that he was sure that JNK-Grand had not furnished any equipment or materials. *Id.* at 55-59. Jaworski finally stated that he, Korn and Nakrosis had all used the ladder in question to ascend to the hatchway before it had been closed off, and that he himself had never received any complaints about the ladder. *Id.* at 61-62.

As previously indicated, on January 29, 2007, JNK-Grand and Brend executed an "abbreviated form of agreement between owner and contractor" (the Brend contract), pursuant to whose terms, Brend was to perform renovation work at the building. *See* Notice of Motion (motion sequence number 004), Exhibit G. The relevant portions of the Brend contract provide as follows:

Article 9 - Contractor ...

> 9.1 The Contractor [i.e., Brend] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for

and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract ... .

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner [i.e., JNK-Grand]... 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 Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... but only to the extent [that it was] caused in whole or in part by negligent acts or omissions of the Contractor, [or] a Subcontractor [i.e., Falcon] ... whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. ...

Article 17 - Insurance ...

17.1 The Contractor shall purchase ... and maintain ... insurance for protection from claims under workers' or workmen's compensation acts and other employee benefits acts which are applicable, claims for damages because of bodily injury, including death ... . This insurance shall be written for not less than the limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates of such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required under the Contract Documents.

Id.

Wraclawek initially commenced this action against JNK-Grand only. *See* Notice of Motion (motion sequence number 004), Exhibit A. Thereafter, JNK-Grand impleaded and commenced the first third-party action herein against Brend by serving a third-party complaint that sets forth causes of action for: 1) contractual indemnification; 2) common-law indemnification; 3) attorney's fees and court costs; and 4) breach of contract. *See* Notice of Motion (motion sequence number 004), Exhibit B. Wraclawek filed an amended complaint in the main action that sets forth causes of

action for: 1) common-law negligence; 2) violation of Labor Law § 200; 3) violation of Labor Law § 240 (1); and 4) violation of Labor Law § 241 (6). *Id.*; Exhibit C. JNK-Grand filed an answer to the amended complaint that included cross claims against Brend for: 1) contractual indemnification; 2) common-law indemnification; 3) attorney's fees and court costs; and 4) breach of contract. *Id.* Brend filed its own answer to Wraclawek's amended complaint that included one cross claim against JNK-Grand for "apportionment ..., contribution, common-law indemnification and/or contractual indemnification." *Id.* Thereafter, JNK-Grand impleaded and commenced the second third-party action herein against Falcon by filing a complaint that sets forth causes of action for: 1) contractual indemnification; 2) common-law indemnification; 3) attorney's fees and court costs; and 4) breach of contract. *See* Notice of Motion (motion sequence number 004), Exhibit D. Brend similarly commenced the third third-party action herein against Falcon, by filing a complaint that sets forth causes of action for: 1) contractual indemnification; 2) common-law indemnification; 3) attorney's fees and court costs; and 4) breach of contract. *Id.*; Exhibit E. It is alleged that Falcon did not file timely answers to either of these third-party complaints and that motions for default judgments are now being prepared, however those motions are not part of this decision. *See* Notice of Motion (motion sequence number 004), Bethmann Affirmation, ¶ 8.

Now before the court are JNK-Grand's motion for partial summary judgment to dismiss Wraclawek's first and second causes of action, and summary judgment on its cross claims against Brend (motion sequence number 004); and Wraclawek's motion for partial summary judgment on the issue of liability only on his third cause of action (motion sequence number 005).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, for the following reasons, JNK-Grand has failed to meet its burden of proof and thus, its motion for summary judgment is denied; however, Wraclawek's motion for summary judgment is granted, as he established an entitlement to judgment as a matter of law and no material factual issues have been raised.

JNK-Grand's Motion

In the first branch of its motion, JNK-Grand requests partial summary judgment to dismiss Wraclawek's first and second causes of action, which plead common-law negligence and violation of Labor Law § 200, respectively. It is well settled that Labor Law § 200 is the statutory codification of the common-law duty that is imposed on owners and/or general contractors to provide construction workers with a safe work site. *See e.g. Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 (1st Dept 2008), citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). In *Ortega v Puccia* (57 AD3d 54, 61 [2d Dept 2008]), the Appellate Division, Second Department, cogently summarized the governing law as follows:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...

> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, JNK-Grand argues that Wraclawek's claims must fail because there is no evidence either that "[JNK-Grand] exercised any supervision or control over the work being performed," or that JNK-Grand had "any notice of any allegedly defective condition." *See* Notice of Motion (motion sequence number 004), Bethmann Affirmation, ¶¶ 28-29. Wraclawek argues that the former assertion is irrelevant because his claims are based on "premises condition" and not "means and manner" of the work performed. *See* Rigelhaupt Affirmation in Opposition, ¶ 8. Both parties' arguments, however, improperly mix the theories of liability enunciated in the holding in *Ortega v Puccia* (57 AD3d 54, *supra*). It is, thus, necessary to review each theory separately.

Pursuant to a "hazardous condition" analysis, Wraclawek is obligated to demonstrate that JNK-Grand either created the dangerous condition that caused his accident or that had actual or constructive notice of that condition. JNK-Grand does not address any of these points squarely in its motion. However, Wraclawek argues that there is an issue of fact presented by Jaworski's deposition testimony that "someone had removed the fixed steel ladder that had been attached to

the wall," and, therefore, that "the possibility exists that [JNK-Grand] created a dangerous condition by removing the fixed ladder, which ... resulted in plaintiff having to use a different ladder that was not fixed to the wall or otherwise braced or secured." *See* Rigelhaupt Affirmation in Opposition, ¶¶ 5-6. JNK-Grand replies that Wraclawek's "conclusions are unsubstantiated." *See* Bethmann Reply Affirmation, ¶ 15. The court notes that Korn acknowledged that a fixed-wall ladder had been detached from the area of the building where Wraclawek was injured at some point prior to the start of work there, and that he himself had inspected the progress of the work, every one to three months. *See* Notice of Motion (motion sequence number 004), Exhibit K, at 13-16. The court also notes that Jaworski stated that he had observed Korn ascend the unsecured ladder to the hatchway at the site where Wraclawek was injured, although he did not give a time frame for this observation. *See* Notice of Motion (motion sequence number 004), Exhibit K, at 61-62. Under these facts, the court cannot find that the foregoing deposition testimony justifies the conclusion that JNK-Grand either "created" or had "actual knowledge" of the allegedly hazardous condition that Wraclawek complains of.

With respect to "constructive notice," the Court of Appeals holds that "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). The Court also ruled that "neither a general awareness that ... some ... dangerous condition may be present nor the fact that plaintiff observed [such a condition shortly] before his fall is legally sufficient to charge defendant with constructive notice." *Id.* at 838. Further, the Appellate Division, First Department, held in *Santiago v New York City Health and Hospitals Corp.* (66 AD3d 435, 435 [1st Dept 2009]) that constructive notice may be found to

exist where the allegedly dangerous condition is of a type that a "[defendant] is presumed to have seen it, or to have been negligent in failing to see it." Here, as previously discussed, Jaworski's deposition testimony indicates that Korn himself had used the ladder that Wraclawek fell from. Assuming this to be true, it can be reasonably inferred that Korn would have had to notice the necessity of placing the bottom of that straight, non-A-frame-type ladder on top of the unsecured plywood platform and leaning the top of the ladder into the hatchway entrance in the ceiling in order to ascend it. Pursuant to the legal standards discussed above, this inference gives rise to the presumption that Korn may have seen the purportedly hazardous condition that Wraclawek complains of, or may have been negligent in failing to see it. Thus, there is sufficient evidence to raise a factual issue as to whether JNK-Grand - through Korn - had "constructive notice" of the allegedly hazardous condition. That does not end the present inquiry, however.

JNK-Grand asserts that there was no actual "hazardous condition" present upon which to base a common-law negligence/Labor Law § 200 claim, because Wraclawek had "testified that the ladder ... had rubber footings and [that] ... he had ascended and descended it several times on that day with no movement." *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 5. JNK-Grand also argues that "no complaints were ever made by plaintiff, " and that "witnesses for the defendants all testified that they were not aware of any complaints about any ladders at the site." *Id.* Wraclawek responds that "a dangerous condition was created by the removal of the fixed ladder." *See* Rigelhaupt Affirmation in Opposition, ¶ 8. JNK-Grand responds that "this conclusory assertion is not substantiated in any manner." *See* Bethmann Reply Affirmation, ¶ 15. The court disagrees. There is no strict legal definition of what constitutes a "hazardous condition" - a truth that the parties both implicitly acknowledge by their failure to cite

any case law to support their respective arguments. That inquiry is, by its nature, a factual one. Here, Wraclawek's deposition testimony indicates that, given the dimensions of the space that he was working in, the only possible way to place a free-standing ladder so as to reach the hatchway in the ceiling that he was closing off was to stand that ladder on top of the unsecured plywood platform on the floor. Although this may or may not be true, JNK-Grand has not presented any evidence to refute it. Under these circumstances, there is indeed a question of fact as to whether the use of a free-standing ladder that had to be placed on an unsecured plywood platform (which may be prone to sliding) constituted an inherently "hazardous condition"; such a question of fact is appropriately committed to a jury for resolution. As a result, Wraclawek's common-law negligence and Labor Law § 200 claims may be sustained under "hazardous condition" analysis.

Even if the condition that Wraclawek complains of is ultimately not found to be "hazardous," his claims may still survive pursuant to the "means and manner" analysis, under which Wraclawek is obligated to demonstrate only that JNK-Grand had the authority to supervise or control the performance of his work. *Ortega v Puccia*, 57 AD3d at 61. JNK-Grand argues that "the record...is totally devoid of any evidence" that it had such authority. *See* Memorandum of Law in Support of Motion, at 3. The court, however, notes that Witold Brend testified that JNK-Grand's architect, Nakrosis, had the authority to oversee and direct the work of Brend's and Falcon's employees at the building. *See* Notice of Motion (motion sequence number 004), Exhibit J, at 56-59. Thus, there is an issue of fact as to whether JNK-Grand did "supervise or control" Wraclawek in the performance of his work. As a result, Wraclawek's common-law negligence and Labor Law § 200 claims may also be sustained under a "means and manner" analysis. Accordingly, JNK-Grand has failed to meet its burden of proving that it is entitled to summary

judgment dismissing those claims, and concludes that the first branch of JNK-Grand's motion is denied.

In the second branch of its motion, JNK-Grand requests summary judgment on its cross claims against Brend for, inter alia, contractual indemnification, common-law indemnification, attorneys' fees and court costs and breach of contract. With respect to its first cross claim for contractual indemnification, JNK-Grand refers to the indemnity provision set forth in paragraph 9.12 of the Brend contract, and argues that it is entitled to summary judgment because "there is no evidence that ... [JNK-Grand] was in any way responsible for the alleged accident." *See* Notice of Motion (motion sequence number 004), Bethmann Affirmation, ¶¶ 31-34. Brend raises two arguments in response.

Brend first notes the general rule that a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. *See e.g. Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 (2d Dept 2009). Brend also argues that there are factual issues as to JNK-Grand's liability, negligence and involvement with plaintiff's alleged accident." *See* Romano Affirmation in Opposition, ¶¶ 20-30. Brend specifically argues that there are questions of fact as to: 1) who supplied the ladder that Wraclawek fell from; 2) whether JNK-Grand was free from negligence; or 3) whether Nakrosis actually controlled and supervised Wraclawek's work. *Id.*, ¶¶ 25-28. JNK-Grand replies that the deposition testimony does not support these alleged questions of fact. *See* Bethmann Reply Affirmation, ¶¶ 16-17. JNK-Grand particularly objects that Brend had mischaracterized Witold Brend's deposition testimony regarding Nakrosis's role at the work site. *Id.*, at 12 ¶ 31-21. However, the court has already determined that there is a question of fact as to

whether Nakrosis exercised supervision and control over Wraclawek's work so as to render JNK-Grand liable to him for negligence. The court further discounts JNK-Grand's argument regarding Witold Brend's deposition testimony because it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Industries, Inc.*, 295 AD2d 218 (1st Dept 2002). Thus, because JNK-Grand has not demonstrated that it is free from negligence as a matter of law, it would be improper to grant JNK-Grand's request for summary judgment on its cross claim for contractual indemnification.

The court also notes that Brend raised the additional argument that the indemnity provision of the Brend contract violates General Obligations Law § 5-322.1, and is therefore void as against public policy. *See* Romano Affirmation in Opposition, ¶¶ 31-35. Brend particularly objects that the clause purports to indemnify JNK-Grand against the results of its own negligence. *Id.*, ¶ 34. JNK-Grand replies that the instant indemnity clause cannot be read that way, because it contains the legally required disclaimer language that precludes it from being so read. *See* Bethmann Reply Affirmation, ¶¶ 29-34. JNK-Grand is correct. In *Brooks v Judlau Contracting, Inc.* (11 NY3d 204, 210 [2008]) the Court of Appeals held that indemnification clauses that contain the language "to the fullest extent permitted by law" "contemplates partial indemnification and is intended to limit [a defendant's] contractual indemnity obligation solely to [the defendant's] own negligence." The instant indemnity clause unquestionably contains the required "saving language." Therefore, the court rejects Brend's argument. However, since there is a question of fact as to the extent, if any, of JNK-Grand's negligence herein, JNK-Grand's motion is denied with respect to its first cross claim.

With respect to its second cross claim for common-law indemnification, JNK-Grand again

argues that it was free from any negligence toward Wraclawek. *See* Notice of Motion (motion sequence number 004), Bethmann Affirmation, ¶ 43. However, as discussed above, there is an open question of fact that precludes making such a determination at this juncture. Therefore, the court rejects JNK-Grand's argument, and JNK-Grand's motion is denied with respect to its second cross-claim.

JNK-Grand's moving papers do not include any argument to support its request for summary judgment on its cross claims against Brend for attorney's fees and court costs or breach of contract. Thus, JNK-Grand's motion is denied with respect to its third and fourth cross claims.

Plaintiff's Motion

In his motion, Wraclawek seeks partial summary judgment, on the issue of liability only, on his third cause of action for violation of Labor Law § 240 (1). That statute provides that:

> 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 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.

The Court of Appeals holds that the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991). The Court also notes that this statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." *Sanatass v*

Consolidated Investing Co., Inc., 10 NY3d 333, 342 (2008). Finally, the Court requires a "plaintiff to show that the statute was violated and that the violation proximately caused his injury." *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 (2004).

Here, Wraclawek cites a quantity of Appellate Division, First Department, precedent to support his argument that the unsecured condition of the ladder that he fell from constitutes a violation of Labor Law § 240 (1). *See* Notice of Motion (motion sequence number 005), Rigelhaupt Affirmation, ¶¶ 24-31. Wraclawek particularly relies on the First Department's decision in *Montalvo v J. Petrocelli Constr., Inc.* (8 AD3d 173, 174-175 [1st Dept 2004]), in which the Court reiterated the following principles of statutory interpretation:

> Labor Law § 240 (1) mandates that owners and contractors provide "devices which shall be so constructed, placed and operated as to give proper protection to" persons performing work covered by the statute. "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 remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)." ...
>
> In the instant case, plaintiff[] ... alleged that [defendant]'s failure to properly secure the ladder by having someone hold it or by the provision of some other safety device led to its unsteadiness, and ultimately, to his injury. Contrary to the suggestion of the motion court, plaintiffs were not required to show that the ladder on which he was standing was defective, or that plaintiff fell completely off the ladder to the floor.
>
> ***
>
> "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." As the uncontradicted evidence establishes that [plaintiff] was injured, at least in part, due to the failure of [defendant] to provide adequate safety devices to secure the ladder on which he was working, and since the risk created by such failure is one that it is covered by the statute (i.e., falling), plaintiff[] ha[s] established a violation of section 240 (1) as a matter of law [internal citations omitted].

Wraclawek also cites the more recent First Department decision in *Harris v 170 East End Ave., LLC* (71 AD3d 408, 409-410 [1st Dept 2010]), in which the Court noted that:

> Even assuming, without deciding, that defendants established that the [safety device] was secured in accordance with industry practice, summary judgment was properly granted to plaintiff on his claim pursuant to Labor Law § 240 (1). That section "evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured.'" The statute is one of strict liability. Therefore, it is irrelevant that a safety device was provided if an accident that the device was intended to prevent still befalls the plaintiff. Here, the [safety device] fell as a result of a foreseeable construction-related accident, not an act of God or other calamity which defendants could not have anticipated. Thus, section 240 (1) was violated, notwithstanding that the [safety device] may have been [utilized] in accordance with industry protocol [internal citations omitted].

Wraclawek concludes, from the foregoing facts and law, that "there is no doubt that [he] was engaged in the type of activity covered by [Labor Law § 240 (1)], and that [the statute] was violated since the ladder he was working on was unsecured and failed to provide him with proper protection." *See* Notice of Motion (motion sequence number 005), Rigelhaupt Affirmation, ¶ 32. The court agrees. The statute required Wraclawek's employers to provide him with a "ladder[] ... 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). The evidence clearly shows that Wraclawek was given a straight ladder upon which he had to balance himself along with a quantity of tools and a bucket of mortar for an extended period of time to seal an opening in the building's ceiling. It also indicates that the layout of the work area may have been such that Wraclawek was obliged to place that ladder on top of an unsecured plywood platform in order to lean that ladder at such an angle that he was able to reach that opening. In any case, the evidence is unequivocal that, after a certain period of time, the ladder slid out from under Wraclawek and precipitated him to the floor before itself sliding between the plywood platform and the scaffold that it sat upon on and eventually coming to rest on the floor below. Clearly, then, the ladder was not "so constructed, placed and

operated" as to give Wraclawek proper protection. Labor Law §240(1). It is also clear that Wraclawek did not have "any other devices" that might have prevented the ladder from slipping and himself from being injured. Thus, plaintiff has established a violation of Labor Law § 240 (1) and that such violation is the sole proximate cause of Wraclawek's injuries, as a matter of law. *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d at 174-175; *Harris v 170 East End Ave., LLC*, 71 AD3d at 409-410.

Nevertheless, defendants raise several unpersuasive arguments in opposition. JNK-Grand first argues that there was no statutory violation because "progress photographs depict numerous other ladders at the site." *See* Bethmann Affirmation in Opposition, ¶ 21. Wraclawek responds by citing the Court of Appeals holding in *Zimmer v Chemung County Performing Arts, Inc.* (65 NY2d 513, 524 [1985]) that "[t]he mere presence of ladders or safety belts somewhere at the worksite does not establish 'proper protection.'" Therefore, the court rejects JNK-Grand's first argument.

JNK-Grand next argues that, with respect to proximate causation, "there is ... a question of fact as to why the alleged ladder failed," because it was equipped with rubber feet. *See* Bethmann Affirmation in Opposition, ¶ 22. Wraclawek responds by citing the Appellate Division, First Department's, holding in *Schultze v 585 West 214th Street Owners Corp.* (228 AD2d 381, 381 [1st Dept 1996]) that, in the absence of any evidence suggesting an intervening cause, "[w]hether the ladder slipped on its own, or the platform against which it leaned, or may have even been secured, slipped or gave way, makes no difference with respect to defendants' liability." Here, JNK-Grand does not offer any evidence that there was such an "intervening cause" (i.e., something else at the work site that struck or fell on the ladder, thus causing it to fall). Therefore, the court finds that JNK-Grand's second argument constitutes an improper attempt to shift the burden of proof to

Wraclawek, and rejects it.

Finally, JNK-Grand argues that, because Wraclawek was the only witness to his accident, and because there are "inconsistencies" regarding his statements about the accident, "his credibility is at issue," and creates a triable issue of fact that precludes summary judgment. *See* Bethmann Affirmation in Opposition, ¶¶ 32-33. JNK-Grand derives these "inconsistencies" from: 1) statements from "several doctors ... that plaintiff fell from a scaffold or slipped and fell at a construction site"; 2) the accident reports prepared by Falcon that "indicate that the ladder collapsed rather than slid out from the wall"; and 3) and the deposition testimony of Jaworski and Korn that "there were ... other ladders available." *Id.* Wraclawek responds by citing the Appellate Division, First Department's, holding in *Vergara v SS 133 West 21, LLC* (21 AD3d 279, 280 [1st Dept 2005]) that:

> A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff misstepping off its side. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident.

Wraclawek argues that the same situation obtains here; i.e., that "where there are differing versions of an accident, either of which would result in liability under [Labor Law] § 240 (1), the plaintiff will be entitled to summary judgment." *See* Rigelhaupt Reply Affirmation, ¶ 10. The court agrees. None of the purported "inconsistencies" that JNK-Grand identifies affords any credible evidence that Wraclawek's injuries resulted from anything other than an elevation-related hazard proscribed by Labor Law § 240 (1) and defendants' failure to provide his with adequate protection against such a hazard. Therefore, the court rejects JNK-Grand's third and final argument.

Also in opposition, Brend argues that there is a question of fact as to the proximate

causation element of Wraclawek's claim because "there is no evidence that there were any prior accidents involving the subject ladder," or of "any prior complaints," so "it is apparent that the ladder ... was safe and in proper working condition." *See* Romano Affirmation in Opposition, ¶ 44. Wraclawek repeats his reply that "the sole proximate cause defense is not applicable" here. *See* Rigelhaupt Reply Affirmation, ¶¶ 24-39. The court agrees with Wraclawek.

Significantly, "plaintiff[] [is] not required to show that the ladder on which he was standing was defective." *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d at 174. He need only demonstrate a violation of Labor Law § 240 (1) by his exposure to an elevation-related hazard and a lack of safety devices to protect his therefrom. Here, Wraclawek has done so. Moreover, as the Court of Appeals held in *Blake v Neighborhood Housing Services of New York City, Inc.* (1 NY3d 280, 290 [2003]), "it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury." Thus, defendants are, indeed, foreclosed from raising the "sole proximate cause defense" herein. Therefore, the court rejects Brend's first argument.

Brend also argues that "questions of fact exist as to whether there were other ladders available for plaintiff's use." *See* Romano Affirmation in Opposition, ¶¶ 48-54. Wraclawek again repeats his reply that this is both unsupported by the evidence, and irrelevant to whether or not defendants violated Labor Law § 240 (1). *See* Rigelhaupt Reply Affirmation, ¶¶ 7-8; this court agrees. "The mere presence of ladders or safety belts somewhere at the work site does not establish 'proper protection'" pursuant to the statute. *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d at 524, *supra*. Therefore, the court rejects Brend's second and final argument.

In conclusion, because Wraclawek has demonstrated that he was exposed to an elevation-

related hazard, and that defendants' failed to furnish him with an adequate ladder and/or additional safety devices to protect against such hazard,Wraclawek has established both that defendants violated Labor Law § 240 (1) and that said violation was the proximate cause of his accident. Accordingly, Wraclawek is entitled to partial summary judgment on the issue of liability on his cause of action for violation of Labor Law § 240 (1), and that his motion for such relief is granted, with the issue of damages, reserved for trial.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant JNK-Grand LLC (motion sequence number 004) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Tadeusz Wraclawek (motion sequence number 005) is granted to the extent of awarding plaintiff partial summary judgment on the issue of liability only on the third cause of action set forth in the amended complaint [Labor Law §240(1)], with the issue of damages to await trial; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: New York, New York
October 5, 2011

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\wraclawekvjnk.dlc.lane.wpd