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

PRESENT: MARCY S. FRIEDMAN PART 57

Justice

Index Number : 115075/2008

SUSKO, ROBERT

VS.

377 GREENWICH

SEQUENCE NUMBER : 006

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for partial summary judgment

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 3/29/12

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

----------X

ROBERT SUSKO and CATHERINE SUSKO,

Plaintiffs,

-against-

377 GREENWICH LLC, 377 GREENWICH OPERATING LLC d/b/a WELLINGTON HOTEL, and MAGNETIC CONSTRUCTION GROUP CORP.,

Defendants.

----------X

MAGNETIC CONSTRUCTION GROUP CORP.,

Third-party Plaintiff,

-against-

ALLEGHENY PLASTER AND STUCCO, INC.,

Third-party Defendant.

----------X

377 GREENWICH LLC and 377 GREENWICH OPERATING LLC d/b/a WELLINGTON HOTEL,

Second Third-party Plaintiffs,

-against-

K&M PLASTER, INC.,

Second Third-party Defendant.

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Index No.: 115075/08
Motion Seq. No. 006

Decision and Order

Third-party Index No..: 590800/09

Second Third-party Index No.: 590884/09

MARCY S. FRIEDMAN, J.S.C.:

In this case involving a scaffold that allegedly collapsed during the construction of the Greenwich Hotel in Manhattan, plaintiffs Robert Susko (Susko or plaintiff) and Catherine Susko move for partial summary judgment against defendant/second third-party plaintiff 377 Greenwich LLC (Greenwich) and defendant/third-party plaintiff Magnetic Construction Group Corp. (Magnetic) as to liability under Labor Law § 240 (1). Greenwich and defendant/second

third-party plaintiff 377 Greenwich Operating LLC (Greenwich Operating LLC) (together, Greenwich) jointly cross-move for summary judgment dismissing the complaint and all cross claims as against them; alternatively, Greenwich seeks summary judgment on its cross claims against Magnetic for contractual indemnification and breach of contract for failure to procure insurance. Magnetic also cross-moves for summary judgment dismissing the complaint and all cross claims as against it; alternatively, Magnetic seeks summary judgment on its cross claim for contractual indemnification against Greenwich. Finally, second third-party defendant K&M Plaster Inc. (K&M) cross-moves for summary judgment dismissing the second-third party complaint and all cross claims as against it.

BACKGROUND

Plaintiff was injured during the construction of the Greenwich Hotel, located at 377 Greenwich Street in lower Manhattan. Greenwich owns the property, and Magnetic served as the general contractor during the excavation and foundation work. The parties dispute whether Magnetic was the general contractor for all or only part of the work during the post-foundation construction of the hotel. In October 2004, Greenwich and Magnetic executed an agreement for excavation and foundation work on the project (Foundation Agreement). Later, the two parties drafted, but did not sign, an agreement for the construction of the hotel.

As discussed more fully below, the Construction Agreement confers a wide range of responsibilities on Magnetic, but reserves the right to Greenwich to hire contractors directly. (See e.g. § 6.1.4.) Initially, Magnetic hired a subcontractor to do the plaster work on the ceilings of the hotel, but Greenwich, unsatisfied with that company's efforts, fired the original plasterers and hired plaintiff's company, third-party defendant Allegheny Plaster and Stucco, Inc. (Allegheny)

to partner with K&M to do plaster work at the hotel. (See Plaintiff's Deposition, at 33-41, 144; Magnetic President Anthony Genovese's Deposition, at 14.)

Plaintiff alleges that on October 6, 2007, while performing plaster work in what would become the hotel's library, he fell through the scaffold on which he was working. Plaintiff pleads claims under Labor Law §§ 200, §§ 240 (1), and 241 (6), and for common-law negligence.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing." (Brandy B. v Eden Cent. School Dist., 15 NY3d 297, 302 [2010], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986].) However, if the moving party fails to make a prima facie showing, the court must deny the motion "regardless of the sufficiency of the opposing papers." (Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008] [internal citation omitted] [emphasis in original].)

Initially, the court grants the branch of Greenwich's cross motion that seeks dismissal of all claims and cross claims as against Greenwich Operating LLC, as the parties agree that Greenwich, rather than Greenwich Operating LLC, owns the property located at 377 Greenwich Street.

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant 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 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 has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury. (Bland v Manocherian, 66 NY2d 452, 459 [1985].) A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential." (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009].)

"[W]here a safety device has been furnished, and it collapses, a prima facie case of liability under Labor Law § 240 (1) is established." (Thompson v St. Charles Condominiums, 303 AD2d 152, 154 [1st Dept], lv dismissed 100 NY2d 556 [2003].) In this circumstance, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment." (In re East 51st Street Crane Collapse Litigation, 89 AD3d 426, 428 [1st Dept 2011] [internal citation omitted].)

Here, plaintiff makes a prima facie showing of entitlement to partial summary judgment as to liability under section 240 (1). At the time of his accident, plaintiff was engaged in a protected activity -- namely, construction. Moreover, plaintiff testified that his accident was caused by the scaffold's collapse:

> "Q: How did you fall?
> A: I fell through the scaffold when I was walking to [measure] a section of the ceiling; the plywood decking act[ed] as a trapdoor and went out from under my feet.
> Q: Did you fall between two pieces of plywood decking or . . . something

else?
A: I fell through a piece of plywood that tipped.
Q: What caused you to fall through a piece of plywood . . . ?
A: There was no scaffold plank underneath . . . .
Q: How did you know there was no scaffold plank under the plywood?
A: When I fell to the ground laying on the ground looking up, I noticed there was no plank under the outside edge of the plywood floor for approximately half the length of that room."

(Plaintiff's Deposition, at 73-74.)

A. Greenwich

Greenwich argues that it is not liable under Labor Law § 240 (1), as the purported removal of the scaffold planks was an unforeseeable and independent intervening act, and this act, rather than any statutory violation, proximately caused plaintiff's accident. More particularly, Greenwich cites the testimony of Naughbert Austin (Austin), the principal of K&M, who was working with plaintiff when he fell through the scaffolding. Austin testified that after the accident, he went looking for the planks that were missing from the scaffold at the time of the accident, and found them leaning against a wall in the basement pool area. (Austin Deposition, at 49-50.)

It is well settled that "[a]n independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them." (Gordon, 82 NY2d at 562; Chacha v Glickenhaus Doynow Sutton Farm Dev., LLC, (69 AD3d 896 [2nd Dept 2010] [gust of wind].) "[T]he intervening criminal act of a third party may constitute an unforeseeable superseding event that relieves an owner . . . of liability. . . ." (Gonzalez v Stern's Dept. Stores, Inc., 211 AD2d 414, 414-415 [1st

Dept 1995].)

On the instant motions, neither Greenwich nor Magnetic acknowledges responsibility to maintain a safe work site. Greenwich takes the position that Magnetic was responsible for general safety at the site, including safety of the scaffold that plaintiff used, while Magnetic claims that Greenwich was responsible for the safety of the scaffold, as Greenwich hired plaintiff. Greenwich's principal testified that he hired Magnetic to act as the general contractor and that Magnetic supervised all of the contractors. (Deposition of Ira Druckier, at 14-16.) He also testified that he was at the job site every day but did not supervise the subcontractors. (Id. at 16-17.) Anthony Genovese, Magnetic's President, testified that Magnetic did not supervise any of the trades that were hired by Greenwich, and that Drukier supervised Greenwich's contractors. (Genovese Deposition, at 15-16.) Under these circumstances, "it cannot be found as a matter of law that defendant's negligence could not have contributed to some extent to plaintiff's injury." (Gonzalez, 211 AD2d at 415.)

Greenwich also argues that there is an issue of fact as to causation of the accident and, in particular, whether plaintiff fell through the scaffold or fell off a truck at the site. Greenwich submits plaintiff's hospital record from the day of the accident, in which plaintiff is quoted as stating: "I twisted my ankle coming off the truck." (October 6, 2007 Medical Chart, at 3). Plaintiff argues that this statement is inadmissible hearsay.

It has long been held that a medical record containing a plaintiff's statement about how an accident occurred, which is inconsistent with the plaintiff's testimony, is admissible as a business record only if the manner in which the accident occurred was germane to diagnosis and treatment. (Williams v Alexander, 309 NY 283, 287-288 [1955]; see also People v Ortega, 15

NY3d 610, 617 [2010].) The weight of recent authority holds that a plaintiff's statement in a hospital record about the cause of an accident will be admissible as an admission, even if it was not relevant to diagnosis and treatment and therefore does not qualify as a business record, provided that the evidence establishes that the plaintiff was the source of the statement. (See e.g. Preldakaj v Alps Realty of NY Corp., 69 AD3d 455, 456 [1st Dept 2010]; Quispe v Lemle & Wolff, Inc., 266 AD2d 95 [1st Dept 1999]; Coker v Bakkal Foods, Inc., 52 AD3d 765 [2nd Dept 2008], lv denied 11 NY3d 708 [2008].) Notably, even the Courts which reason that the entry itself is inadmissible where the statement about causation is not germane to diagnosis and treatment, recognize that the doctor or medical provider who made the entry is competent to testify to the plaintiff's alleged admission against interest. (Williams, 309 NY at 286, n 1; Schroeder v Consolidated Edison Co. of NY, 249 AD2d 69 [1st Dept 1998].)

The court finds that the deposition testimony of Arti Sukhwani, the physician's assistant who took plaintiff's statement while he was in the emergency room, is sufficient to identify plaintiff as the source of a statement in the hospital record about a cause of the accident – namely, a fall from a truck. Nevertheless, the court holds that this statement is insufficient to bar summary judgment in plaintiff's favor. Plaintiff's accident was witnessed by his partner, Naughbert Austin, who testified, as did plaintiff, that plaintiff fell through the scaffold. (Austin Deposition, at 46-47.) Austin, who acknowledged that he installed the scaffold (id. at 35), is clearly an interested witness. However, Van Davis, a security guard at the premises, testified without contradiction that he heard a bang, went to the nearby room where plaintiff was working, and helped pick him up from between the scaffold. (See Davis Deposition, at 12.) Significantly also, defendants do not dispute plaintiff's testimony that there were planks missing from the

scaffold at the time of the accident.

Thus, the court finds that there is no factual dispute that plaintiff fell through the scaffold, although the hospital record raises a triable issue of fact as to whether another fall from a truck may also have been a contributing cause of plaintiff's injury - an issue that can be determined by a jury at trial in fixing plaintiff's damages.

Plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim will accordingly be granted as to Greenwich.

B. Magnetic

Magnetic argues that it was not the general contractor, or an agent of the owner, with respect to the plaster work performed by plaintiff at the time of his accident. Plaintiff contends that Magnetic was the general contractor on the project, and responsible for the general safety of the entire site.

General contractors have no liability under Labor Law §§ 240 (1) and 241 (6) where the work being performed at the time of the accident was not within the scope of the contract between the general contractor and the owner. (See e.g. Balthazar v Full Circle Constr. Corp., 268 AD2d 96 [1st Dept 2000]; Root v County of Onondaga, 174 AD2d 1014 [4th Dept], lv denied 78 NY2d 858 [1991].) As explained by the Appellate Division of this Department:

> "[T]his defense inures only to the benefit of the parties who lacked the authority to supervise or control the work. The rule has its genesis in the concept that Labor Law liability under section 240 (1) and section 241 (6) is premised on an owner's or general contractor's right to control the work, irrespective of whether such control is exercised, and that if the work leading to the accident is outside of the scope of what is contracted for, there is no right of control on the part of the contractor and thus no liability under those statutes."

(Butt v Bovis Lend Lease LMB, Inc., 47 AD3d 338, 341 [1st Dept 2007]; see also Moracho v

Open Door Family Med. Ctr., Inc., 74 AD3d 657, 658 [1st Dept 2010].)

Magnetic and Greenwich both rely on the Construction Agreement. Although unsigned, this Agreement is enforceable, as the conduct of Greenwich and Magnetic establishes that both sides intended to be bound. (See Kowalchuk v Stroup, 61 AD3d 118, 125 [1st Dept 2009] [internal quotation marks and citation omitted].) The parties, however, cite differing sections of the Construction Agreement in support of their positions on whether Magnetic had authority to supervise and control plaintiff's work.

Section 10.2.1 of the Construction Agreement, entitled "Safety of Persons and Property," on which Greenwich places emphasis, provides in relevant part:

> "The Owner [Greenwich] assumes no responsibility or liability for the physical condition or safety of the Project Site or any improvements located on the Project Site. The Contractor [Magnetic] shall be solely responsible for providing a safe place for the performance of the Work. The Contractor shall provide for the safety and protection of all Subcontractors and Contractor personnel, and other persons who may come in contact with the Work within or adjacent to the Project Site or such other locations where any Work is performed."

Section 1.1.3 of the Construction Agreement defines "the Work" as:

> "the construction and services required by and/or reasonably inferable from and consistent with the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the contractor's obligations. The Work may constitute the whole or a part of the Project."

Section 1.1.4 defines "the Project" as:

> "the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors."

Section 3.3.1, entitled "Supervision and Construction Procedures," provides:

> "The Contractor shall supervise and direct the Work . . . . 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. . . . If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect and Owner. . . ."

Section 5.1.1, on which Magnetic places emphasis, provides in pertinent part:

> "A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work or to supply labor, materials, services and/or equipment for the Project. . . . The term "Subcontractor" is referred to throughout the Contract Documents . . . and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor."

Section 6.1.4, entitled "Construction by Owner or By Separate Contractors," provides, consistent with section 5.1.1:

> "Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12."

Construction of the contract is for the court in the first instance. "In determining the scope of contractual obligations, the reasonable expectation of the parties is a factor to be considered," and "courts must interpret a contract so as to give meaning to all its terms." (Greater New York Mut. Ins. Co. v Mutual Mar. Off., 3 AD3d 44 [1st Dept 2003].)

The provisions of the Construction Agreement, read as a whole, require Magnetic to provide for the safety of its own employees and subcontractors – i.e., those with which it has a direct contract. In contrast, where the Owner enters into its own subcontracts, the Owner's

subcontractors are not considered subcontractors of Magnetic. While the Construction Agreement delegates responsibility to Magnetic for site safety, it limits this responsibility for safety to Magnetic's personnel and Subcontractors which, in turn, are defined as contractors who have a direct contract with Magnetic. The court accordingly holds that the Construction Agreement does not, by its terms, delegate responsibility to Magnetic for the safety of the work of plaintiff with whom Greenwich had its own contract.

An independent issue exists, however, as to whether Magnetic was delegated responsibility for the safety of all workers at the project, as evidenced by Greenwich and Magnetic's course of conduct. As explained by the Court of Appeals, a third party such as a construction manager

> "may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. When the work giving rise to [the duty to conform to the requirements of the Labor Law] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law."

(Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005] [internal quotation marks and citations omitted] [decided under Labor Law § 240 [1]]; see Barrios v City of NY, 75 AD3d 517, 519 [2nd Dept 2010] [finding prime contractor liable as statutory agent where it had been "delegated supervisory control and authority over the work being done when the plaintiff was injured . . . particularly with respect to safety issues."])

Magnetic's own construction superintendent, Joe LoMonico, testified that plaintiff was a

subcontractor of Greenwich but that Magnetic supervised his work and was in charge of the whole work site. (LoMonico Deposition, at 11.) He also testified that it was his responsibility "to provide the job is ran [sic] in a safe manner" (id. at 12); that it was his responsibility, as manager of the work site, to point out to plaintiff if he was doing something unsafe (id. at 13-14); and that he had the power to stop plaintiff's work. (Id. at 18.)[1] In fact, LoMonico claimed to have told plaintiff that a scaffold in the middle of the library area on which plaintiff worked was not properly erected. (Id. at 39.) While he testified that Magnetic did not direct any aspect of plaintiff's work other than where the work was going to be done, and that his direction " was all scheduling" (id. at 65), his testimony contained numerous acknowledgments that he was responsible for safety on the site as a whole. Greenwich's principal, Ira Druckier, testified similarly that Magnetic's responsibilities included supervision of plaintiff's work and site safety. (Drukier Deposition, at 58, 85.)

This testimony raises a triable issue of fact as to whether, apart from the Construction Agreement, Greenwich delegated supervisory control and authority to Magnetic over the work being done when plaintiff was injured. (See Barrios, 75 AD3d at 519.) As there is an issue of fact as to whether Magnetic had the authority to supervise plaintiff's work, the branches of both plaintiff's motion and Magnetic's cross motion that seek summary judgment regarding Magnetic's liability under Labor Law § 240 (1) must be denied.

II. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or

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[1]It is noted that Magnetic's president, Anthony Genovese, testified that LoMonico did not have authority to stop the work of the trades if he thought it was unsafe. (Genovese Deposition, at 15.)

contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993].) Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed. (Ortega v Puccia, 57 AD3d 54, 61 [2nd Dept 2008]; see also Urban v No. 5 Times Sq. Dev., LLC, 62 AD3d 553, 556 [1st Dept 2009].)

Where the alleged failure to provide a safe work place arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work." (Hughes v Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007].) "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or contractor] controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed." (Id. [emphasis in original].)

In contrast, where the defect arises from a dangerous condition on the work site, instead of from the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice." (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also Minorczyk v Dormitory Auth. of the State of N.Y., 74 AD3d 675 [1st Dept 2010].) In this circumstance, "whether [it] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims. . . ." (Seda v Epstein, 72 AD3d 455, 455 [1st Dept 2010].)

A. Greenwich

Greenwich argues that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed, as it did not have notice of the dangerous condition involving the missing planks on the scaffold plaintiff was using at the time of his accident. However, plaintiff's accident falls in the method-and-manner category, as the accident was caused by a material of his work, a scaffold, and not a defect on the work site. (See Castellon v Reinsberg, 82 AD3d 635, 636 [1st Dept 2011].) Thus, Greenwich is required to make a showing that it did not exercise supervisory control over plaintiff's work in order to warrant summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. As it did not attempt to do so, and argues, instead, merely that it did not have notice of the condition of the scaffold (i.e., that planks were allegedly missing), Greenwich fails to make a prima facie showing of entitlement to judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims.

B. Magnetic

While, as discussed above, there is an issue of fact as to whether Magnetic had the authority to supervise plaintiff's work, its submissions make clear that it did not exercise supervisory control over plaintiff's work. Specifically, plaintiff testified that, while Magnetic gave him general directions on "what areas would be ready, where they wanted us, what areas they didn't want us in," Magnetic did not tell him how to do his work. (Plaintiff's Deposition, at 42-43). Even if Magnetic had authority over site safety issues, the absence of actual control over the manner in which plaintiff performed his work bars liability under section 200 or for common-law negligence. (See Hughes, 40 AD3d at 309.) The branch of Magnetic's cross motion that seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claims will therefore

be granted.

III. Labor Law § 241 (6)

Labor Law § 241 provides, in relevant part:

> "All contractors and owners and their agents . . . shall comply with the following requirements: . . .
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241[6].) This duty is nondelegable and exists even in the absence of control or supervision of the worksite. (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348-349 [1998].)

In order to maintain a viable claim under Labor Law § 241 (6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Ross, 81 NY2d at 505.) The former gives rise to a nondelegable duty, while the latter does not. (Id.; see also Misicki v Caradonna, 12 NY3d 511, 515 [2009].)

Plaintiff alleges that defendants violated sections 23-5.1 (c) (1) and 23-5.1 (e) (1) of the Industrial Code. 12 NYCRR 23-5.1 (c) (1) provides, in relevant part, that "all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependant therefrom or placed thereon when in use." 12 NYCRR 23-5.1 (e) (1), entitled "Scaffold planking," provides:

> "Except on needle beam and pole scaffolds, scaffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place."

The subdivisions of 12 NYCRR 23-5.1 contain "specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6)." (Tomyuk v Junefield Assoc., 57 AD3d 518, 521 [2nd Dept 2008). Greenwich contends that these regulations are inapplicable, as plaintiff contends that his accident was the result of the removal of planks from the scaffold, and was not related to the scaffold's ability to bear weight or the placement of planks. While Greenwich submits testimony from Austin to the effect that the scaffold was safe when initially constructed (Austin Deposition, at 81), it provides no evidence that the specific requirements of 12 NYCRR 23-5.1 (c) (1) and 12 NYCRR 23-5.1 (e) (1) were met. Nor does it submit any authority that these Industrial Code provisions do not continue to apply to a scaffold that is altered after its installation. Greenwich therefore fails to make a prima facie showing that it is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. (See generally Treu v Cappelletti, 71 AD3d 994, 998 [2nd Dept 2010].)

Magnetic makes no argument with respect to 12 NYCRR 23-5.1 (c) (1) or 12 NYCRR 23-5.1 (e) (1) and therefore also fails to make a prima facie showing as to liability under section 241 (6). The branches of Greenwich and Magnetic's cross motions that seek dismissal of plaintiff's Labor Law § 241 (6) claim will accordingly be denied.

IV. K&M's Cross Motion

K&M seeks dismissal of Greenwich's second third-party complaint, as well as all cross claims asserted as against it. Greenwich, which brings cross claims against K&M for contractual

and common-law indemnification, and for breach of contract for failure to procure insurance, argues initially that K&M's cross motion should be denied on the ground that it was untimely. K&M does not contest the untimeliness of its submission, but argues that Greenwich's cross motion and its own motion raise some of the same issues.

K&M's cross motion was filed on July 27, 2011, more than 120 days after February 4, 2011, the date of filing of the note of issue. It was therefore untimely. (See CPLR 3212 [a].) An untimely cross motion for summary judgment "may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion." (Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006] [internal quotation marks and citations omitted].)

Here, the relief sought by K&M is not "nearly identical" to the relief sought by any of the other parties on their motions. Plaintiff seeks summary judgment against Greenwich and Magnetic as to liability under Labor Law § 240 (1). Greenwich seeks dismissal of plaintiff's complaint and cross claims against it or, alternatively, summary judgment on its cross claims against Magnetic. Magnetic seeks dismissal of the complaint and cross claims against it, and judgment on its contractual indemnification claim against Greenwich. None of the other moving parties seeks summary judgment against K&M. On its cross-motion, K&M seeks dismissal of Greenwich's indemnification and breach of contract claims, as well as dismissal of Magnetic's cross claim for indemnification. While there are some overlapping issues on the motions – e.g., whether the removal of planks from the scaffold constitutes an intervening act that would relieve Greenwich of liability -- K&M's ultimate liability is not at issue under any of the other parties' motions. Moreover, K&M does not provide any evidence to show and, indeed, does not even

argue that it has good cause for its late summary judgment motion. The court accordingly declines to consider K&M's cross-motion on the merits.

V. Cross Claims Between Greenwich and Magnetic

Greenwich seeks partial summary judgment as to liability on its cross claims against Magnetic for contractual indemnification and breach of contract for failure to procure insurance. Magnetic seeks partial summary judgment against Greenwich on its cross claim for contractual indemnification. Neither party is entitled to summary judgment on its cross claims against the other.

A. Contractual Indemnification

The Foundation Agreement, which governs the excavation and foundation work, provides that Greenwich will indemnify Magnetic for actions arising out of Greenwich's negligence, and that Magnetic will indemnify Greenwich for actions arising out of Magnetic's negligence, or the negligence of those working under Magnetic's authority. (Foundation Agreement, § 17.)

The Construction Agreement also contains an indemnification clause, from which the word "negligence" was crossed out. This clause provides:

> "To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless the Owner . . . from and against all liability, claims, damages, losses, suits, judgments, liens, encumbrances and expense, including but not limited to attorney's fees, arising out of or resulting from performance of the Work . . . only to the extent caused by the acts or omissions of the Contractor, a Subcontractor, Sub-subcontractor, or any person or entity directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether such liability claim, damage, loss or expense is caused in part by a party indemnified hereunder . . . . "

(Construction Agreement, § 3.18.1.)

Magnetic argues that Greenwich owes it contractual indemnification based on section 6.1.4 of the Construction Agreement, which provides:

> "Unless otherwise provided in the contract documents, when the Owner performs construction or operations related to the Project with Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which applies [sic] to the Contractor under the conditions of the contract, including, without excluding others, those stated in Article 3, Article 6 and Articles 10, 11, and 12."

This provision assigns Magnetic's rights and responsibilities to Greenwich, in the event that, as with plaintiff's plaster work, Greenwich directly hires its own contractors to perform work. It does not expressly provide to Magnetic a right to be indemnified for accidents arising from work done by Greenwich's contractors. Rather, Magnetic claims a right to indemnification based on the reference in section 6.1.4 to Article 3 of the Construction Agreement.

Under settled principles of contract interpretation, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (Hooper Assoc. v AGS Computers, Inc., 74 NY2d 487, 491-492 [1989] [internal citations omitted].) Article 3 of the Construction Agreement contains an indemnification provision (§ 3.18). However, the vast majority of its provisions govern diverse aspects of the Contractor's performance of work, including "supervision and construction procedures" (§ 3.3.1), provision and payment for labor and materials (§ 3.4), obtaining of permits (§ 3.7), and employment of a superintendent (§3.9). While the applicability of the construction provisions is apparent where Greenwich exercises its right to hire its own contractors to perform

work, the court cannot find that the general reference to Article 3 unambiguously evidences a clear intent to impose an indemnification obligation upon Greenwich in the event it elects to perform work.

Even assuming arguendo that the indemnification clause obligates Greenwich to provide indemnification, Magnetic fails to demonstrate as a matter of law that Greenwich was responsible for the safety of the scaffold and, thus, that an act or omission of Greenwich caused plaintiff's accident. (See Urbina v 26 Ct. St. Assoc., LLC, 46 AD3d 268, 271-273 [1st Dept 2007].) Conversely, as to Greenwich's claim for indemnification against Magnetic, Greenwich fails to demonstrate that Magnetic was responsible for the safety of the scaffold and that its act or omission was a cause of the accident.

The court notes that even if the indemnification provision in the Foundation Contract were applicable, neither party would be entitled to indemnification under it, as that provision requires a showing of negligence which neither party makes against the other.

The branches of the motions of Magnetic and Greenwich for indemnification will therefore be denied.

B. Failure to Procure Insurance

Greenwich is not entitled to summary judgment as to liability on its cross claim against Magnetic for failure to procure insurance.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (DiBuono v Abbey, LLC, 83 AD3d 650, 652 [2nd Dept 2011] [internal quotation marks and citation omitted].)

Here, Greenwich does not specify the provisions in the contract documents based on which it claims that Magnetic was required to name Greenwich as an additional insured on its liability insurance policy. Thus, Greenwich fails to make a prima facie showing of entitlement to relief on this claim. Although Magnetic fails to address the claim, the burden did not shift to it to do so.

ORDER

It is hereby ORDERED that plaintiffs' motion for partial summary judgment as to liability under Labor Law § 240 (1) is granted as to defendant/second third-party plaintiff 377 Greenwich LLC, and denied as to defendant/third-party plaintiff Magnetic Construction Group Corp.; and it is further

ORDERED that defendants/second third-party plaintiffs 377 Greenwich LLC and 377 Greenwich Operating LLC's joint cross motion is granted only to the extent of dismissing the complaint and all cross claims against Greenwich Operating LLC; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the cross motion of defendant/third-party plaintiff Magnetic Construction Group Corp. is granted to the extent of dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against said defendant/third-party plaintiff; and it is further

ORDERED that second third-party defendant K&M Plaster, Inc.'s cross motion for summary judgment dismissing the second third-party complaint and all cross claims as against it is denied.

Dated: New York, New York
March 29, 2012

MARCY FRIEDMAN, J.S.C.