Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

HENRY PRZYBOROWSKI — Index No. 34563/09

Plaintiff,

- against-

A & M COOK, LLC

Defendant.

Motion Date May 1, 2012

Motion Cal. No. 11 & 12

Motion Seq. No. 3 & 4

A & M COOK, LLC

Third Party Plaintiff,

- against -

PSG CONSTRUCTION COMPANY, INC.

Third Party Defendant.

The following papers numbered 1 to 5 read on this motion by plaintiff for partial summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1), motion by A&M Cook, LLC (A&M), to dismiss the complaint pursuant to CPLR § 3212; and cross motion by PSG Construction Company, Inc. (PSG), to dismiss the third-party action and to dismiss plaintiff's claims pursuant to Labor Law §§ 240 (1) and 241 (6).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1
Notice of Motion - Affirmation - Exhibits.....	2
Notice of Cross Motion - Affirmation - Exhibits.....	3
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In this labor law action, plaintiff seeks damages for personal injuries sustained in a construction accident on June 1, 2009, at 211 Cook Street, New York, NY. At the time of the

accident, plaintiff was employed by PSG as a laborer and was injured when the ladder he was descending slipped out from under him. The building where the accident occurred is owned by A&M. PSG was the general contractor to perform demolition work within the building.

Pursuant to Labor Law § 240 (1), plaintiff moves for partial summary judgment on the ground that the ladder moved thereby causing his fall. A&M moves to dismiss the complaint pursuant to CPLR § 3212 on the grounds that it did not direct, control or supervise any work being performed at the work site; and that plaintiff was the sole proximate cause of his fall. PSG cross-moves to dismiss the third-party action and to dismiss plaintiff's claims pursuant to Labor Law §§ 240 (1) and 241 (6), on the ground that plaintiff was the sole proximate cause of his fall. The motions and cross motion are opposed by the respective parties.

Facts

Plaintiff had been working for third-party PSG as a "helper" at the subject site for only a few days prior to his accident on June 1, 2009. The job entailed bringing an elevated section of a garage down to be level with the lower portion. The difference in elevation was approximately 6 feet.

On the date of the accident, plaintiff observed an eight foot "A-frame" ladder folded up and leaned on the lower elevation up against the wall separating it from the higher elevation. The ladder extended above the higher elevation by about two feet. Plaintiff did not complain about the set up of the ladder. According to plaintiff's affidavit, based on his prior training and experience, an "'A-frame' ladder is properly set up when it is properly on the ground and it won't fall off the support." Plaintiff had previously seen and believed that ladders leaning against an elevated differential that extended above the higher level need to be tied off. In any event, plaintiff used the ladder to descend down to the lower level at the time to clean some dirt and debris that had fallen to the lower level. He attempted to walk down the ladder backwards and, as he stepped onto the ladder, it "fell off with [him]."

Significantly, though plaintiff used the unopened "A-frame" ladder, there was a permanent cement staircase available only three to four meters away from the ladder. The staircase was made of cement and connected to the same two elevations. Plaintiff avers that he did not use the staircase because it was a "further way to use the stairs then [sic] to use the ladder." He was never directed to use the ladder instead of the staircase and chose to use it on his own.

Plaintiff did not lose consciousness following his accident. In fact, he fell on his back, stood up immediately after the accident and did not feel dizzy or sick prior to the arrival of the ambulance. He was taken to Bellevue Hospital where he received stitches for a head laceration. At the hospital, plaintiff complained of "strong headaches" and pain throughout his body.

On behalf of PSG, Kazimierz Ceglarz stated that he had been working with plaintiff for a

week or two before his accident, and was present at the time of the accident. Plaintiff's job entailed demolishing a ramp or elevated portion of the garage and bringing it down to the same level as the lower area. The elevated portion was approximately 3 to 4 feet higher. There was a staircase that led from the lower area to the elevated area which Ceglarz always used. The staircase was generally used by the employees to go from one level to the other, although sometimes the employees may have simply stepped off of the higher elevation as it was not difficult to do so without using the staircase. There was an "A-frame" ladder provided by PSG that was present on the site but he does not recall anyone using it.

Motion by Plaintiff for Partial Summary Judgment

It is the burden of plaintiff to establish that Labor Law § 240 (1) was violated and that the violation was a proximate cause of his injuries (*Kyle v City of New York,* 268 AD2d 192, 196 [2d Dept 2000], *lv denied* 97 NY2d 608 [2002]). Specifically, "Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker" (*Klein v City of New York,* 89 NY2d 833, 834-835 [1996]). Where a "plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]). Instead, the owner or contractor must breach the statutory duty under Labor Law § 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use them or misuses them.

In *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]), the plaintiff and another worker were assigned a task to be performed in an elevator "motor room," which was located four feet above the roof level of a building. Arriving on the roof, they discovered that the stairs from the roof to the motor room had been removed. Ladders were available at the job site, albeit not in the immediate vicinity. Rather than get a ladder, the workers climbed to the motor room by standing on an overturned bucket. The plaintiff exited the motor room by jumping to the roof, and injured his knee when he landed. Citing *Blake*, the court noted that "since ladders were readily available, plaintiff's normal and logical response should have been to go get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law § 240 (1)" (*Montgomery*, 4 NY3d at 806 [internal quotation marks omitted]).

Similarly, in the case at bar, there was a staircase and a ramp available for plaintiff's use three or four steps away from the ladder. Plaintiff chose not to use the staircase or the ramp. Plaintiff chose to use a ladder. Significantly, the "A-frame" ladder which plaintiff chose to use was not even opened for proper usage. Plaintiff merely leaned the closed ladder against the wall and started to walk backwards down the closed ladder. At that point, the ladder started sliding down in a backward position causing plaintiff to fall. Plaintiff testified at his examination before

trial that the ladder did not appear broken or unstable, and he believed the ladder was standing securely. In fact, there were adequate safety devices available: a staircase, a ramp and ladders which when opened, worked properly for plaintiff to use at the job site. As a matter of law, plaintiff's own negligent actions were the sole proximate cause of his injuries. The strict liability benefit of Labor Law § 240 (1) is not available to a worker whose own act in failing to use an otherwise adequate safety device properly is the sole proximate cause of his injury" (*Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 160 [2003]). Accordingly, the motion by plaintiff for partial summary judgment is denied.

Motion by A&M

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Russin v Picciano & Son*, 54 NY2d 311, 316-317 [1981]). However, there is no liability under common-law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed (*see Comes v New York State Elec. & Gas Corp., supra* at 877; *Russin v Picciano & Son, supra* at 317; *Schuler v Kings Plaza Shopping Ctr. & Mar.*, 294 AD2d 556, 558 [2002]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997]).

The instant accident stems not "from a dangerous condition on the premises" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2007]) but "from the manner in which the work was being performed" (*id.*). To be held liable under Labor Law § 200 and for common-law negligence arising from the manner in which work is performed at a work site, a general contractor must have actually exercised supervision and control over the work performed at the site (*see Lombardi v Stout,* 80 NY2d 290, 295 [1992]; *Guerra v Port Auth. of N.Y. & N. J.,* 35 AD3d 810, 811 [2d Dept 2006]; *Parisi v Loewen Dev. of Wappinger Falls,* 5 AD3d 648 [2d Dept 2004]). General supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability (*see Dos Santos v STV Engrs., Inc.,* 8 AD3d 223, 224 [2d Dept 2004]). In order to impose liability, a general contractor must have had the authority to control the activity bringing about the injury so as to enable it to avoid or correct an unsafe condition (*see Russin v Louis N. Picciano & Son,* 54 NY2d 311, 316-317 [1981]; *Dos Santos v STV Engrs., supra* at 224-225).

In contrast, "[w]here . . . a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ., supra* at 708). A&M established its *prima facie* entitlement to summary judgment with evidence that it did not have authority to supervise or control the plaintiff's dismantling of the crane. In opposition, plaintiff failed to raise a triable issue of fact by submitting evidence of the defendant's supervisory control over the activity giving rise to the injury. Contrary to the plaintiff's contention, A&M's liability did not arise from its general

duties to oversee work and to ensure compliance with safety regulations (*see Warnitz v Liro Group,* 254 AD2d 411 [1998]), nor from A&M's authority to stop work for observed safety violations (*see Peay v New York City School Constr. Auth.,* 35 AD3d 566, 567 [2d Dept 2006]).

For reasons noted above, the branch of the motion which is for summary judgment dismissing plaintiff's claim pursuant to Labor Law § 240 (1), is granted.

Labor Law § 241 (6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Comes v New York State Elec. & Gas Corp., supra* at 878; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Dickson v Fantis Foods* 235 AD2d 452 [1997]). To recover on a cause of action alleging a Labor Law § 241 (6) violation, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co., supra* at 503-505). Here, plaintiff's complaint did not identify any specific Industrial Code provisions violated, nor did his bill of particulars. The alleged violations of Occupational Safety and Health Administration (OSHA) standards do not provide a basis for liability under Labor Law § 241 (6) (*see Vernieri v Empire Realty Co.*, 219 AD2d 593, 598 [2d Dept 1995]; *McGrath v Lake Tree Vil. Assoc.*, 216 AD2d 877 [4th Dept 1995]; *McSweeney v Rochester Gas & Elec. Corp.*, 216 AD2d 878 [4th Dept 1995]).

Accordingly, the motion by A&M to dismiss plaintiff's complaint is granted.

Cross Motion by PSG

The cross motion by PSG for summary judgment dismissing the common-law indemnification and contribution causes of action alleged in the third-party complaint, is granted.

Workers' Compensation Law § 11 was amended in 1996 to permit an employer to be held liable for contribution or indemnity only where the third-party plaintiff proves through competent evidence that the injured party sustained a "grave injury." A "grave injury" is defined, in relevant part, as "an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). Although the statute does not define "permanent total disability," the Court of Appeals has determined that "a brain injury results in 'permanent total disability' under [Workers' Compensation Law §] 11 when the evidence establishes that the injured worker is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.,* 3 NY3d 408, 413 [2004] [emphasis omitted]).

PSG established its *prima facie* entitlement to judgment as a matter of law dismissing those causes of action by establishing that the plaintiff's alleged injury was not a "grave injury" as defined in Workers' Compensation Law § 11. In the bill of particulars, plaintiff alleges, *inter alia*, "traumatic brain injury". Plaintiff alleges that he suffered, *inter alia*, a subgaleal hematoma (i.e. bleeding in the space between the skull and the scalp). He also sustained minor

subdural and subarachnoid hematomas, both described as "small" and in a report from a CT performed on June 8, 2009 were noted to be resolving. . . just seven days post-accident. In fact, both brain MRI's (October 22, 2009 and December 16, 2010) were entirely normal. Even plaintiff's treating neurologist reports that plaintiff's memory functions, repetition, reading, writing, copying and "higher integrative functions" are normal. Dr. Braunstein (plaintiff's neurologist) notes inner ear damage but no traumatic brain injury.

Dr. Todd Feinberg, chief neurologist at Beth Israel Medical Center, examined plaintiff and reviewed his treatment records. Dr. Feinberg found plaintiff's speech intact and normal, cognition normal, excellent memory and normal neurological function. He concluded that plaintiff "did not sustain a traumatic brain injury resulting in total incapacity for any employment". In addition, a vocational assessment was performed by Edmond Provder, certified rehabilitation counselor. He found that plaintiff was not disabled from employment "in any capacity" and found plaintiff to be employable in a number of vocational capacities.

In opposition, A&M failed to raise a triable issue of fact by demonstrating that the plaintiff sustained a "grave injury." In the absence of a "grave injury," the causes of action seeking common-law indemnification and contribution should be dismissed (*see* Workers' Compensation Law § 11; *Storms v Dominican Coll. of Blauvelt*, 308 AD2d 575, 576-577 [2003]; *Schuler v Kings Plaza Shopping Ctr. & Mar.*, 294 AD2d 556, 559 [2002]).

Accordingly, the third-party complaint seeking contribution and indemnification are dismissed insofar as asserted against PSG since plaintiff did not sustain a "grave injury" as defined by the statute (*see McCoy v Queens Hydraulic Co.,* 286 AD2d 425 [2d Dept 2001]; *Angwin v SRF Partnership,* 285 AD2d 568 [2d Dept 2001]; *Curran v Auto Lab Serv. Ctr.,* 280 AD2d 636 [2d Dept 2001]; *Ibarra v Equipment Control,* supra).

The motion by plaintiff for partial summary judgment in his favor on his claim pursuant to Labor Law § 240 (1), is denied.

The motion by A&M to dismiss the complaint is granted.

The cross motion by PSG for summary judgment dismissing the common-law indemnification and contribution causes of action alleged in the third-party complaint, is granted.

Dated: July 31, 2012

DARRELL L. GAVRIN, J.S.C.