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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 100356/2010
BUCKLEY, MATTHEW
vs
WEST 44TH STREET HOTEL
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
JUL 29 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 27, 2013

_____, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MATTHEW BUCKLEY and BETH BUCKLEY,

Plaintiffs,

-against-

WEST 44TH STREET HOTEL LLC, TISHMAN CONSTRUCTION CORP. and FIVE STAR ELECTRIC CORPORATION,

Defendants.

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WEST 44TH STREET HOTEL LLC, and TISHMAN CONSTRUCTION CORP.,

Third-party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORPORATION,

Third-party Defendant

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Index №.: 100356/10

DECISION AND ORDER

JOAN A. MADDEN, J.:

In an action involving an ironworker who received two electrical shocks while installing a bolt, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment as to liability on their Labor Law § 240 (1) and Labor Law § 241 (6) claims as against defendants/third-party plaintiffs West 44th Street Hotel, LLC (West 44) and Tishman Construction Corp. (Tishman). West 44 and Tishman cross-move for summary judgment dismissing the complaint as against them, as well as for summary judgment on their cross claims against defendant/third-party defendant Five Star Electric Corporation (Five Star) for contractual and common-law indemnification. Five Star opposes the cross motion and cross-moves for summary judgment dismissing the complaint and the cross claims against it.

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BACKGROUND

On December 28, 2009, plaintiff Matthew Buckley (Buckley or plaintiff), an ironworker employed by non-party Tower Installations (Tower), was working on a project to construct a 600-room hotel, the Intercontinental, Times Square, when he was injured while "bolting up" the roof of the hotel from a scissor lift[1] extended from the floor below. West 44 owns the property, while Tishman was the construction manager on the project. Five Star was the electrical subcontractor retained by Tishman at the project.

At his deposition, Buckley described "bolting up" generally, as well as his specific responsibilities in that process on the day of his accident:

> "You had to take an inch-[and]-an-eighth bolt by 15-inches with a big steel angle, and if I was on the 34th floor, I'd be in a scissor lift, and I'd have to put the bolts up through the floor slab to the guy on the roof, on the 35th floor, and he would put a nut and bolt on it, and then that's how you did it"

(Buckley deposition at 22).

More broadly, the bolting-up work that Buckley was engaged in at the time of his accident was part of a project to erect a screen wall, or curtain wall, as it is sometimes called, on the roof of the building to hide cooling towers from view (*id.* at 87). This project had not been part of the initial construction plan, and was an add-on to Tower's contract with Tishman (*id.*). The bolt that shocked plaintiff was intended to secure the screen wall (*id.* at 84).

The ceiling/floor through which Buckley was to install the bolt had an electrical conduit

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[1] A scissor lift, also referred to as a man lift, is a type of aerial work platform that can only move vertically, and is raised and lowered by linked folding supports.

running through the concrete slab which was not de-energized in preparation for his work (Vincent Colletti affidavit, ¶ 2). Buckley was not told that the area had not been de-energized (Buckley deposition at 85). As he tried to install the bolt and angle, Buckley received an electrical shock that left him momentarily unconscious and knocked him out of the scissor lift (*id.* at 39). A harness prevented Buckley from falling to the ground and he was dangling against the side of the scissor lift when he regained consciousness (*id.* at 39-40). From there, Buckley, who was alone at the time of his accident, climbed back into the scissor lift, where he touched the bolt and angle again because he thought it was going to fall on him, and again it knocked him unconscious momentarily, though he fell this time to the floor of the scissor lift (*id.* at 41). Plaintiffs allege that the accident caused Buckley severe neurological and orthopedic injuries (*see id.* 50-70; 94).

The complaint, filed on January 12, 2010, alleges that defendants are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6). Plaintiff Beth Buckley brings derivative claims for loss of services. On August 17, 2010, West 44 and Tishman filed a third-party complaint against Five Star alleging that it is liable to them for contribution, as well as contractual and common-law and indemnification. Plaintiffs subsequently amended their complaint to add Five Star as a defendant.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

I. Labor Law § 241 (6)

Labor Law § 241 (6) requires that all contractors, owners, and their agents shall comply with the following requirement:

> "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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to "provide reasonable and adequate protection and safety" to construction 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]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 159-160 [1982], *rearg denied* 56 NY2d 805 [1982]). The legislative history underlying section 241 (6) indicates that the statute was meant to place "*ultimate responsibility* for safety practices at building construction jobs where such

responsibility actually belongs, *on the owner and general contractor*" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [internal quotation marks and citations omitted]). While 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]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

Here, plaintiffs claim that they are entitled to summary judgment as to liability under Labor Law § 241 (6) as against West 44 and Tishman based on the violation of two subdivisions of 12 NYCRR 23-1.13,[2] "Electrical hazards," specifically 12 NYCRR 23-1.13 (b) (3) and 12 NYCRR 23-1.13 (b) (4), which provide:

> "(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.
>
> (4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

Plaintiffs argue that 12 NYCRR 23-1.13 (b) (3) was violated, as the record makes clear

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[2]Plaintiffs do not oppose the defendants' summary judgment motion to the extent defendants argue that the Industrial Code provisions other than 12 NYCRR 23-1.13(b)(3) and (b)(4) do not provide a basis for liability under Labor Law § 241 (6).

that no testing was done to discover if an electric power circuit was located such that Buckley, or the bolt he was installing, might come into contact with it. As to 12 NYCRR 23-1.13 (b) (4), plaintiffs argue that this regulation was violated as the record shows that the circuit was not de-energized or guarded with effective insulation. In order to show that defendants failed to inspect the area where Buckley was to install the bolt was not inspected, and that Buckley was not warned of the electrical danger, plaintiffs submit an affidavit from Vincent Colletti (Colletti), an ironworker who who found Buckley after the accident. Colletti states that none of the workers knew that the ceiling/floor was energized:

> "On the date of the accident, no one advised us that the floor was energized. We had no idea that there [were] any sort of electrical hazards when working in that area. Not only did no one tell us of possible electrical hazards that day, there were no warning signs at all stating of an electrical hazard. While we were still at the scene of the accident the electricians tested the hole in which [Buckley] stuffed the bolt and advised that it was live, with 480 volts running through it, which they stated was a 'high level' of voltage. After the accident, the floor was de-energized and our work on that floor was performed off hours. No one told us not to work in that area that morning, but rather we were specifically instructed to work in that area. We were not told of any electrical hazards in that area, nor to wear any safety equipment other than a hard hat and safety harness, which [Buckley] and I were wearing at the time of the accident. I personally core drilled into other areas on that floor on days prior to the accident and was never given or told to wear special safety equipment other than a hard hat and safety harness. Some of the guys wore boots and gloves when core drilling, but only as raingear because when you core drill through concrete you must use water to cool the bit and minimize dust. The water typically splashes everywhere. [Buckley] was not core drilling that day, yet rather just placing a bolt through the floor which should have been an easy duty"

(Colletti affidavit, ¶¶ 2-3).

Plaintiffs also submit the deposition testimony of Peter Hardecker (Hardecker), Tishman's project superintendent, who testified that he was not aware of any testing on the day of the accident for electrical current in the area where Buckley was going to install bolts

(Hardecker deposition at 56).

West 44 and Tishman argue that they are not liable under Labor Law § 241 (6), as plaintiff is the sole proximate cause of his own injuries, based on his failure to wear rubber gloves, double insulated rubber boots and to use a rubber mat when performing the work. Alternatively, they argue that there is, at least, a question of fact as to Buckley's comparative negligence. In support, they submit an affidavit from Peter Schuh (Schuh), Tower's general foreman, in which Schuh states that Tower employees were told to wear protective rubber gear while drilling holes and installing bolts on the curtain-wall project:

> "Prior to beginning work, a meeting was held and all Tower employees were directed to wear double insulated rubber gloves and double insulated rubber boots and were told to stand on rubber mats while core drilling the cement slab and inserting the wall's retention bolts through the drilled holes. This safety equipment was provided to each employee. Rubber mats were also provided for use in the man lift that plaintiff was using at the time of his accident. I was not present at the time of plaintiff's accident. I was on my way up to the level where work was being performed to check on the progress. When I arrived, plaintiff was standing at the location where the work was being performed but he was not working. Plaintiff informed me that he had inserted a bolt into the steel footing when he felt a shock. Plaintiff was not wearing any safety attire at the time. Plaintiff did not make any complaints to me at that time . . . . Plaintiff continued working for the remainder of the day"[3]

(Schuh affidavit, ¶¶ 6-8).

In reply, plaintiffs note that Schuh never states that anyone investigated whether the hole through which Buckley was to install a bolt contained an electrical current, or that anyone warned Buckley of the current. Moreover, as to the issue of protective rubber gear, plaintiff submits an affidavit from Nicholas Bellizzi (Bellizi), a civil engineer and accident

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[3] Schuh's last assertion, that after his accident Buckley worked for remainder of the day, is contradicted by the record, which establishes that Buckley's brother drove him to the hospital after the accident.

reconstructionist, who stated that such gear would have been ineffectual, given the amount electricity found in the hole after the accident: "480 volts is an extremely high amount of voltage and the use of rubber gloves or rubber boots would not prevent someone from [sustaining] electrical shock even if they were using both as the voltage is too high" (Bellizi affidavit, ¶ 14).

As a preliminary matter, both 12 NYCRR 23-1.13 (b) (3) and 12 NYCRR 23-1.13 (b) (4) are sufficiently specific to serve as a predicate to liability under Labor Law § 241 (6) (*Harris v Arnell Constr. Corp.* 47 AD3d 768 [2d Dept 2008];*Crespo v HRH Constr. Corp.* (24 Misc 3d 1246(A), 2009 NY Slip Op 51893U [Sup Ct, NY County 2009]). Next, the record is sufficient to show that 12 NYCRR 23-1.13 (b) (3) and 12 NYCRR 23-1.13 (b) (4) were violated. With respect to 12 NYCRR 23-1.13 (b) (4), the record shows that there was a failure to de-energize the floor, or insulate the power circuit, before plaintiff tried to install the bolt. The part of this regulation that addresses safety gear worn by the worker refers to "work areas where underground power lines are unknown." A building's roof is plainly not underground, and defendants were in control of the electrical source. By failing to do so, or otherwise insulating the current, West 44 and Tishman violated 12 NYCRR 23-1.13 (b) (4).

In addition, the evidence shows that there was a violation of 12 NYCRR 23-1.13 (b) (3) based on the failure to inspect the floor and to warn plaintiff of the electrical danger. The testimony of Hardecker, Tishman's project superintendent, indicates that although the holes were suppose to be tested by Five Star, that such testing was not performed prior to the accident to determine if there was electrical current in the holes Buckley was bolting-up. Moreover, Schuh, Tower's general foreman, omits any reference to an inspection of the holes in his affidavit. The kind of inspection subsequently performed by Five Star would have prevented the accident, had

it been performed before Buckley attempted to install the bolt. Moreover, there is no evidence controverting plaintiff's showing that warning signs regarding the existence of the electrical danger were posted as required by 12 NYCRR 23-1.13 (b) (3).

Next, plaintiffs have demonstrated that these violations were a proximate cause of Buckley's injuries. Moreover, it cannot be said that the Buckley alleged failure to wear rubber gloves and double insulated rubber boots and were told to stand on rubber mats was a sole proximate cause of his injuries or that he was a recalcitrant worker. To defeat summary judgment on this basis, the defendant must establish that plaintiff "'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412 [1st Dept 2008]). Mere "generic statements of the availability of safety devices" are insufficient (*Kosavick*, 50 AD3d at 289)

West 44 and Tishman argue that a question of fact exists as to the sole proximate cause and recalcitrant worker issue based primarily on the affidavit of Schuh, Tower's general foreman, who states that "all Tower employees were directed to wear double insulated rubber gloves and double insulated rubber boots and were told to stand on rubber mats while core drilling cement slab and inserting the wall's retention bolts through the drilled holes" (Schuh affidavit, ¶ 6). However, Schuh never states who told Tower employers to wear protective rubber gear to protect them from electrical risks. Moreover, Buckley testified that the workers who drilled the holes

wore rubber gear, but only as protection for water generated from the drilling (Buckley deposition, at 49). Colletti, another ironworker for Tower, corroborated this testimony by stating in his affidavit that some workers wore rubber gear, but only during drilling, and only to protect against getting wet, which was not an issue during bolt installation (Colletti affidavit, ¶¶ 2-3). Thus, Schuh's affidavit, which does not specifically state that workers were to wear rubber gear as a protection against an electrical risk, does not contradict the testimony of Buckley and Colletti. Additionally, as indicated above, plaintiffs' expert, Bellizi, testified that, given the amount of electricity in the hole, Buckley would have received a shock even if he had been wearing protective rubber gear (Bellizi affidavit, ¶ 14).

In addition, defendants' reliance on the testimony of Hardecker, Tishman's project superintendent and Five Star Project Executive Charles Ranello is misplaced. While Hardecker testified that there were plans for Tower workers to wear rubber gloves, and stand on wood during the core drilling (Hardecker Dep., at 68), he did not testify that the Tower workers, including Buckley, were instructed to use these protective devices. Furthermore, while Ranello testified that "he was told that [Tower workers] were told to use rubber gloves when they were drilling [and] when the used core machines, " he later clarified that he was not told that Tower workers were using the protective gloves but instead that it was recommend by Five Star's general foreman that Tower employees use rubber gloves while drilling.[4] (Ranello Dep., at 54-

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[4]In fact, however, Five Star's general foreman Daniel Fiorella, testified that the only way to assure the safety of those working on the floor was to kill the power and that the only safety precautions he recalls the workers taking was standing on wooden planking. (D. Fiorella Dep., at 43).

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As for comparative negligence, the court likewise finds that the record is insufficient to raise a factual question in this regard as there is no evidence that Buckley was instructed to use rubber gloves or other protective devices to avoid being electrocuted. In these circumstances, West 44 and Tishman have failed to raise an issue of fact as to whether any negligence by Buckley was a proximate cause of his injuries. Accordingly, plaintiffs are entitled to summary judgment as to liability on their Labor Law § 241(6) claim (*see DelRosario v. United Nations Federal Circuit Credit Union,* 104 AD3d 515 (1st Dept 2013)[reversing trial court's denial of summary judgment on Labor Law § 241(6) claim predicted on violations of 12 NYCRR 23-1.13 (b) (3)and (b)(4) where record showed that live circuit in ceiling which hit plaintiff's face while he was working on a ladder was a proximate cause of his injuries];*Valasquez v. 795 Columbus LLC*, 103 AD3d 541, 541-542 [1st Dept 2013][affirming grant of summary judgment on Labor Law § 241(6) claim where testimony established that defendant was vicariously liable for negligence of plaintiff's foreman in directing plaintiff to work on mud covered floor in violation of 12 NYCRR 23-1.7[d] and conclusory affidavit to the contrary was insufficient to raise issue of fact]; *Harris v Arnell Constr. Corp.* 47 AD3d at 768 [trial court properly granted summary judgment on worker's § 241(6) claim where record showed that there was a violation of 12 NYCRR 23-1.13 (b) (3)and (b)(4) which proximately caused the worker's injuries and defendant failed to raise an issue of fact as to worker's comparative negligence).

As such, the branch of plaintiffs' motion that seeks summary judgment against West 44 and Tishman as to liability under Labor Law § 241 (6) is granted, and the branch of West 44 and Tishman's motion that seeks dismissal of plaintiffs' claims under this statute is denied. As

plaintiffs are abandoning their Labor Law § 241 (6) claim against Five Star, their claim under the statute is dismissed as against Five Star.

II. 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]). Where a violation has proximately caused plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Plaintiffs argue that the mobile scissor lift failed to provide adequate protection to Buckley. In their moving papers, plaintiffs do not address the question of whether the harness Buckley wore provided adequate protection from a gravity-related risk. As to whether a fall

caused by an electric shock triggers the protections of this statute, plaintiffs cite to *Vukovich v 1345 Fee, LLC* (61 AD3d 533 [1st Dept 2009] [summary judgment as to defendants' liability under Labor Law § 240 (1) was appropriate where plaintiff received an electric shock and fell from the third or fourth rung of an unsecured A-frame ladder]).

Defendants make the same sole proximate causation argument that the court has already rejected in the Labor Law § 241 (6) context, i.e, that plaintiff should have been wearing protective rubber gear. Defendants also argue that plaintiffs' Labor Law § 240 (1) claim should be dismissed because there was no defect in the harness which Buckley was using at the time of his accident, and it prevented him from falling to the ground.

In reply, plaintiffs cite to *Arnaud v 140 Edgecomb LLC* (83 AD3d 507 [1st Dept 2011]) for the proposition that they have no obligation to prove a defect in the safety equipment to establish a violation under Labor Law § 240 (1). In *Arnaud*, the Appellate Division held that, in a falling object context, "[a] lack of certainty as to exactly what preceded plaintiff's accident does not create an issue of fact as to proximate cause . . . . Nor does the fact that plaintiff did not point to any particular defect in the pulley defeat his entitlement to summary judgment" (*id.* at 508 [internal citation omitted]).

In arguing that the statute has been violated, plaintiffs cite cases where courts have granted partial summary judgment as to liability under the statute where safety harnesses have injured workers while arresting their falls (*Lopez v Boston Props. Inc.*, 41 AD3d 259 [1st Dept 2007]; *Kyle v City of New York*, 268 AD2d 192 [1st Dept 2000]). Plaintiffs also cite to cases that they characterize as analogous to the case at bar, in which courts have likewise granted summary judgment as to liability (*Rich v West 31st St. Assoc., LLC*, 92 AD3d 433 [1st Dept 2012];

Macedo v J.D. Posillico, Inc., 68 AD3d 508 [1st Dept 2009]).

Here, plaintiffs are not entitled to summary judgment as to liability under the statute. In the cases where courts have granted such relief to plaintiffs who were injured by safety harnesses that prevented them from falling further, those plaintiffs were able to show, as a matter of law, that the safety devices provided to them were inadequate to protect them against a gravity risk.

Lopez involved a worker who was hoisting up a bucket from an open beam on the seventh floor of a building under construction. The bucket became stuck on the decking of the seventh floor, and the plaintiff tugged on the tack line to free it, while his co-worker on the ground level let go of the line, believing the bucket had safely reached the seventh floor (*Lopez*, 41 AD3d at 259-260). To prevent the bucket, which was filled with heavy materials, from falling on his co-worker, the plaintiff grabbed it, and it pulled him off the beam, causing him to fall six feet until his safety line abruptly arrested his fall (*id.*). The Court found that "[t]he record establishes that the lack of a brake mechanism on the pulley system used to hoist overloaded buckets constituted a failure to provide proper protection against elevation-related risks, and that such failure was a proximate cause of plaintiff's injuries" (*id.* at 260).

In *Kyle*, which involved a worker's 30-foot fall after a platform being installed to the underside of bridge collapsed, the safety harness itself was defective, as it was not attached to a separate vertical lifeline to prevent falls of more the five feet (268 AD2d at 198). The Court in *Kyle* rejected the defendants argument which equated preventing death with adequate protection under the statute (*id.*). Similarly, in *Rich*, which, instead of a safety harness, involved a hoist attached to a 58-story building that malfunctioned, it did not alter the Court's liability analysis that cushion springs in a sub-basement broke the hoist's fall and prevented the plaintiff from

suffering greater injuries (92 AD3d at 434). In *Macedo,* which involved a fall from a platform, the Court found that the platform malfunctioned, but that, even if it had not, the plaintiff was entitled to summary judgment, as "[w]hether or not the platform failed or bent prior to plaintiff's fall is irrelevant because there is no question that neither plaintiff's safety device nor the platform and associated safety wire prevented his fall and subsequent injury" (68 AD3d at 509).

Here, plaintiffs have not demonstrated as a matter of law that the scissor lift and harness failed to adequately protect him from a gravity-related risk (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 98 AD3d 864 [1st Dept 2012]). Moreover, even if plaintiffs proved a violation, an issue of fact remains as to proximate causation. Accordingly, the trier of fact must decide if Buckley's injuries were caused by the electrical shock itself, or the effect of gravity, which took hold after the shock knocked Buckley out of the scissor lift.

Nor are West 44 and Tishman entitled to summary judgment based on their sole proximate cause argument. A worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post,* 14 NY3d 83, 88 [2010]).

West 44 and Tishman's argument rests on the affidavit of Schuh, Tower's general foreman. For the reasons discussed in connection with the Labor Law § 241 (6), the statements in Schuh's affidavit and the other evidence in the record fail to demonstrate that Buckley own negligence was responsible for his injuries. Thus, the argument that Buckley was a recalcitrant worker or the sole proximate cause of his injuries is without merit. Additionally, as noted in connection with the Labor Law § 241(6) claims, plaintiffs' expert, Bellizi, stated in his

affidavit that, given the amount of electricity in the hole, Buckley would have received a shock even if he had been wearing protective rubber gear (Bellizi affidavit, ¶ 14).

As West 44 and Tishman fail to establish that Buckley was a recalcitrant worker, or the sole proximate cause of his accident, the branch of their motion seeking dismissal of plaintiffs' Labor Law § 240 (1) claim as against them is denied. Accordingly, summary judgment on behalf of either plaintiffs or defendants on the issue of liability under Labor Law § 240 (1) is denied. As plaintiffs have abandoned their claim against Five Star under Labor Law § 240 (1), their claims under the statute are dismissed as against Five Star.

III. Labor Law § 200 and Common-Law Negligence

Five Star is entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims as against it, while West 44 and Tishman are not entitled to the same relief.

A. West 44 and Tishman

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [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 *(Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace 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.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of 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, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] 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]).

Here, West 44 and Tishman argue that Buckley's accident occurred as a result of the method and manner of his work, rather than a dangerous condition on the worksite. Defendants submit Buckley's deposition testimony, in which he testified that he received instruction on his work only from Tower (Buckley deposition, at 47-48). However, plaintiffs argue that the electrical current within the hole was a dangerous condition on the worksite. Thus, plaintiffs argue, supervision is irrelevant.

Here, the accident was caused not by the manner in which Buckley performed his job, but because there was a dangerous condition, i.e., the electrical current in the hole he had been directed to fill with a bolt. Even assuming *arguendo* that West 44 and Tishman did not cause or create the condition resulting in Buckley's injuries, as they have made no showing that they

lacked actual or constructive notice of the condition, they have failed to make a prima facie showing of entitlement to judgment on plaintiffs' Labor Law § 200 and negligence claims ((*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] *Morgan v. Neighborhood Partnership Housing Development Fund Company, Inc.*, 50 AD3d 866 [2d Dept 2008]). Thus, the branch of their motion seeking dismissal of these claims is denied.

B. Five Star

Plaintiffs abandon their Labor Law § 200 claim against Five Star, but nominally maintain that questions of fact remain as to whether Five Star is liable for common-law negligence. In its cross motion, Five Star argues that the negligence claim should be dismissed as it owed no duty to Buckley, as it did not create the defect, and was another subcontractor on the job, rather than a owner or general contractor. In their reply and opposition papers, plaintiffs omit any reference to their claims for common-law negligence against Five Star.

Here, plaintiffs have effectively abandoned their negligence claim against Five Star (*see* (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]). Moreover, plaintiffs fail to rebut Five Star's prima facie showing that it had no duty to Buckley (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Accordingly, the branch of Five Star's motion that seeks dismissal of plaintiffs' common-law negligence claims against Five Star is granted.

IV. Indemnification

Neither Five Star nor West 44 and Tishman is entitled to summary judgement as to either contractual or common-law indemnification.

A. Contractual Indemnification

Five Star's contract with West 44 and Tishman (the Electrical Agreement) provides, in

relevant part:

> "To the fullest extent permitted by law, [Five Star] shall indemnify, defend, and hold harmless [West 44 and Tishman] . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), arising out of or resulting from the acts or omissions of [Five Star], or anyone that [Five Star] may be liable [sic.], in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations, including the performance of the obligations set forth in this clause. To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether caused in part by the active or passive negligence or other fault of any one the Indemnitees, provided, however, that [Five Star's] duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee"

(Electrical Agreement, § 7).

West 44 and Tishman argue that Buckley's accident arose out of Five Star's failure to test the hole for an electrical current after drilling was performed in the slab. In support, they submit the deposition testimony of Tishman's project superintendent, Hardecker, who testified that Five Star was responsible for testing the holes for electrical current (Hardecker deposition at 32-33, 50-53).

Five Star argues that the indemnification provision quoted above does not apply because the work was pursuant to "Extra Work Order Authorizations" rather than the Electrical Agreement itself. In support, Five Star submits an affidavit from Dan Fiorello (Fiorello), its project foreman, who states:

> "Prior to the day of Mr. Buckley's alleged accident . . . [Five Star] completed its work of installing electrical conduits and conductors on the roof area pursuant to the terms of its contract entered into with [West 44 and Tishman]. Sometime subsequent to the completion of the work under the above contract, Tishman requested that [Five Star] perform electrical change order work that was related to the work being performed by plaintiff's employer . . . . Specifically, at the time of plaintiff's accident, [Tower] was engaged in the installation of a screen wall on the roof level. Upon information and belief, the work being performed by

> plaintiff and [Tower] was an 'add-on' to the project work at the building. The electrical change order work that was being performed by [Five Star] concerned the repair of conduit that had been drilled through at the roof level . . . . At the time of plaintiff's accident . . . [Five Star] was working on the roof level solely pursuant to these additional work orders and had completed all affected work on the roof under the prime contract with Tishman"

(Fiorello affidavit, ¶¶ 5-9).

Five Star also submits an affidavit from Jennifer Gallo (Gallo), its risk manager, who stated that, on the date of the accident, it had "completed its work of installing electrical conduits and conductors on the roof area pursuant to the terms of its contract" and was working pursuant to extra work order authorizations (Gallo affidavit, ¶ 5-6).

The Electrical Agreement contains a clause entitled "Changes and Extras" that incorporates its terms to any add-on work on the project; the clause provides, in relevant part, that:

> "[West 44] or [Tishman], without invalidating this Agreement, may order extra Work or make changes by altering, adding to or deducting from the Work, the Contract Price to be adjusted accordingly to the extent applicable. The Contractor shall not make any alterations or omit anything, or perform additional or extra Work, except upon written order signed by the Owner. [West 44] or [Tishman] shall at any time have the right to order extra Work to be performed on (a) Lump Sum Proposal, (b) Unit Prices, or (c) Time and Material Basis. No request for payment for extra Work will be honored unless accompanied by such written order. All such Work shall be executed under the provisions of this Agreement"

(Electrical Agreement, § 39).

Five Star argues that this clause, or at least its incorporation of the Electrical Agreement's indemnification provision, is invalid, as courts in New York have consistently rejected attempts to incorporate indemnification provisions by reference. However, the three cases that Five Star cites to support this principle, *Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.* (73 AD3d 511 [1st Dept 2010]), *Waitkus v Metropolitan Hous. Partners* (50 AD3d 260 [1st Dept

2008]), and *Bussanich v 310 E. 55th St. Tenants* (282 AD2d 243 [1st Dept 2001]), each involve an attempt to incorporate a provision of a prime contract against a subcontractor who was not a signatory to that contract. Here, as Five Star was a signatory to the contractual provisions that West 44 and Tishman seek to enforce, the reasoning of these cases does not apply. Accordingly, the Electrical Agreement's indemnification provision applies to add-on work that Five Star was performing at the time of Buckley's accident.

The only question left, then, is whether Buckley's accident arose out of Five Star's work. In order for a claim to "arise out" of a party's work, there must be a showing that "a particular act or omission in the performance of such work was causally related to the accident" (*Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 [1st Dept 2007] [internal quotation marks and citation omitted]). Five Star contends that it had no obligation to test the subject hole for electrical current. Fiorello, Five Star's foreman, testified that the add-on work was unrelated to inspecting holes drilled in preparation for installing the curtain wall on the roof:

"Q: Did those work orders in any way represent the inspection of the 400 separate core drill holes required to do the curtain wall?

A: No.

Q: Was Five Star ever hired to inspect the core drill holes?

A: No.

Q: These work orders would reflect the inspection of broken conduit, correct?

A: Correct.

Q: You would be informed of the broken conduit after the core drill hole, correct?

A: Yes.

Q: It would be illogical to think you would inspect a hole where [the] conduit wasn't impacted?

A: Absolutely"

(Fiorello deposition, at 70).

Five Star also submits work orders for the add-on work, none of which refer to the testing that Hardecker claimed was Five Star's obligation. Moreover, Fiorello also testified that he was present at work meetings where the core drilling was discussed, and that he suggested that the power should be turned off prior to conducting core drilling and bolt installation:

"Q: While you were at the construction meetings, were any discussions being held regarding safety precautions that were taken during core drilling the slab?

A: Yes.

Q: What were those discussions?

A: When the installations [were] first discussed, as far as the screen wall, and it was brought to my attention that they were going to be core drilling through these slabs, I suggested that there's some live electricity in these slabs, which is above the normal power . . . My first suggestion was to have Five Star Electric drill these holes.

Q: What response did you receive?

A: There was a couple of responses. Someone within the room – it may have been Peter from Tower – suggested it's iron workers' work as opposed to electrician's work. So they sort of felt that I was looking to do their work, when in fact, I was applying the knowledge that – you know, we are electricians and the slab does

have live electricity in there. Maybe it would be better if we were the guys to core drill through the slab.

***

Q: Other than suggesting that Five Star core drill the holes, did you make any other suggestions?

A: Yes. I suggested that if Five Star was not going to be the ones doing the core drilling through the holes – the question was asked to me was if it would be safe for anyone else to drill through the slabs, and I had said the only way I can give you any suggestion as far as safety for the slabs would be to shut off the main switches to the service gear down below in the cellar, which would then kill all power to the building.

Q: Did you receive a response to that suggestion?

A: Yes, many responses. A lot of snickering, laughing . . . . Due to the weather and the progression of the job, the job would be greatly affected. Had the power gone out, the painting, tilting, concrete – every wet trade would be affected by the weather and the lighting and the power"

(*id.* at 44-46).

Five Star also submits the deposition testimony of Charles Ranello (Ranello), Five Star's project manager, who testified that Five Star had not, to his knowledge, been instructed to inspect the holes drilled for the curtain-wall project (Ranello deposition, at 63, 67).

Here, through the testimony of Fiorello and Ranello, as well as the add-on work orders, Five Star has raised a question of fact as to whether it had any obligation to test the holes for electricity. If Five Star had no obligation to inspect, then the fact that they did not test the hole

before Buckley's accident is not an omission at all, and thus it could not be an omission which gave rise to the accident. If the jury were to so find, then the indemnification provision would not be implicated. As such, West 44 and Tishman are not entitled to summary judgment on their claim for contractual indemnification. Meanwhile, Hardecker's testimony raises a question of fact as to whether it was Five Star's obligation to inspect the holes, in which case Five Star's failure to do so would be an omission that gave rise to Buckley's accident. Accordingly, Five Star is not entitled to dismissal of West 44 and Tishman's claim for contractual indemnification.

B. Common-law Indemnification

Generally, common-law indemnification requires one party that is "actively at fault in bringing about the injury" to indemnify another party that "is held responsible solely by operation of law because of [its] relation to the actual wrongdoer" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [internal quotation marks and citation omitted]). Here, West 44 and Tishman have failed to show that they were not negligent in Buckley's accident. As such, they are not entitled to summary judgment as to common-law negligence. However, if a jury credits Hardecker's testimony over that of Fiorello and Ranello, then Five Star could be liable to West 44 and Tishman for common-law indemnification. Accordingly, the branch of Five Star's motion seeking dismissal of West 44 and Tishman's common-law indemnification claims against it is also denied.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment as to liability against defendants/third-party plaintiffs West 44th Street Hotel, LLC and Tishman Construction Corp. is granted as to the Labor Law § 241 (6) claim based on violations of 12 NYCRR 23-1.13(b)(3) and (b)(4), and denied as to the Labor Law § 240 (1) claim; and it is further

ORDERED that defendants/third-party plaintiffs West 44th Street Hotel, LLC and Tishman Construction Corp.'s joint cross motion for summary judgment is denied; and it is further

ORDERED that defendant/third-party defendant Five Star Electric Corporation's cross motion for summary judgment is granted only to the extent that plaintiffs' complaint is dismissed as against it.

Dated: July 22 2013

J.S.C.

FILED

JUL 29 2013

COUNTY CLERK'S OFFICE
NEW YORK