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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 : 600455/2008
VESELI, FIDAN
vs.
420 WEST INVESTORS
SEQUENCE NUMBER : 002
PARTIAL 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 and cross motion are decided in accordance with the annexed Memorandum Decision/Order

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

Dated: January 15, 2014

_____, **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: IAS PART 11

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FIDAN VESELI,

Plaintiff,

-against- Index No. 600445/2008

420 WEST INVESTORS LLC, 420 W. BUILDERS LLC, and NEWMARK CONSTRUCTION SERVICES, LLC,

Defendants.

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420 WEST INVESTORS LLC and 420 W. BUILDERS LLC,

Third-Party Plaintiffs,

-against- TP Index No. 590351/2009

SPECTRUM PAINTING CONTRACTORS CORP.,

Third-Party Defendant.

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JOAN A. MADDEN, J.:

In this action arising out of injuries sustained by a worker at a construction site, plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendants 420 West Investors LLC (Investors), 420 W. Builders LLC (Builders), and Newmark Construction Services, LLC (Newmark), solely on the issue of liability with respect to his Labor Law § 240 (1) claim. Third-party defendant Spectrum Painting Contractors Corp. (Spectrum) cross-moves for summary judgment dismissing all of the third-party claims asserted against it by defendants and third-party plaintiffs Investors and Builders.[1]

BACKGROUND

Plaintiff seeks to recover damages for personal injuries that he sustained on October 29, 2007, when he fell from a scaffold while working as a painter at a construction site located at 420

[1] A cross motion for summary judgment, that was asserted against Spectrum by third-party plaintiffs Investors and Builders, has since been withdrawn.

West 25th Street in Manhattan (the premises). On the date of the occurrence, the premises were undergoing construction as part of a project to convert the premises into residential apartments for a condominium development. Investors was the owner of the premises. Builders was the general contractor on the project. Newark was the construction manager on the project. Builders had subcontracted with Spectrum to perform painting and wall covering at the premises. Plaintiff was employed by Spectrum to spray paint primer on the walls and ceilings of the apartments.

According to his deposition testimony, on the day of the accident, plaintiff had been spraying primer on the walls and ceilings of various apartments at the premises. Plaintiff testified that he was working alone that day (Plaintiff's 10/27/2008 Deposition [EBT I] at 11; Plaintiff's 3/25/2011 Deposition [EBT II] at 19-20). At the time of his injury, plaintiff had just begun spray painting an apartment that had high ceilings, which measured between 16 to 22 feet from the ground (EBT I at 15; EBT II at 34-36). In order to reach the high ceilings, plaintiff testified that he made use of a Baker's scaffold that had been assembled and placed in the apartment for workers at the premises to use (EBT I at 17-18; EBT II at 12-14, 28). The scaffold had a flat plywood platform, which was located between six and eight feet from the ground (EBT I at 25; EBT II at 34, 35). The scaffold did not have any guardrails (EBT I at 51-53).

Plaintiff testified that, after checking over the scaffold, he had moved it into place about three feet from the wall, and had locked the wheels in place (EBT I at 18, 51, 53; EBT II at 30, 33). Plaintiff then had climbed onto the scaffold and started to spray paint the ceiling (EBT I at 18-19; EBT II at 31-32). To accomplish this task, plaintiff used a large spray machine with a wand and sprayer (EBT I at 14; EBT II at 11). Plaintiff testified that he was wearing painter's clothes and a respirator with goggles at the time (EBT II at 36-37).

Plaintiff testified that he initially encountered no problems while spray painting; however, as he continued to spray paint, the scaffold became shaky and started moving back and forth (EBT I at 19; EBT II at 38-39). Plaintiff tried to catch his balance while still holding the heavy wand and sprayer, but the scaffold kept moving (EBT I at 19). Plaintiff then felt the scaffold tilt, which caused him to fall backwards off of the scaffold and onto the floor below (EBT II at 37-39). Plaintiff testified that he landed on and broke his left wrist (EBT I at 19; EBT II at 39). According to plaintiff, the scaffold did not break, fall, or collapse (EBT I at 19). Apparently, no one but plaintiff witnessed the accident.

Plaintiff testified that he had not been tethered or secured to the scaffold, as there was no place to hook any such equipment (EBT I at 25, 53). Plaintiff further testified that he had not been provided with any safety belts, ropes or harnesses (EBT I at 53).

On February 14, 2008, plaintiff commenced the instant action against Investors and Builders, asserting causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). On April 21, 2009, Investors and Builders commenced a third-party action against plaintiff's employer, Spectrum, asserting claims for contractual indemnification, common-law indemnification, and contribution.

Thereafter, on May 27, 2010, plaintiff filed an amended complaint adding Newmark as a defendant in his personal injury action. Defendants Investors and Builders then cross-claimed against defendant Newmark for common-law indemnification and/or contribution. Newmark, in turn, cross-claimed against Investors and Builders for common-law indemnification, contribution, and contractual indemnification. Plaintiff filed the note of issue on May 4, 2012.

Plaintiff now moves for summary judgment against Investors, Builders, and Newmark with respect to liability solely on his Labor Law § 240 (1) claim. Spectrum cross-moves for

summary judgment dismissing the third-party claims asserted against it by Investors and Builders.

DISCUSSION

It is well settled that "[t]he 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" (*Winegrad v New York Univ. Med. Ctr.*, 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]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's role is solely to determine whether any triable issues of fact exist, and not to determine the merits of any such issues (*Sheehan v Gong*, 2 AD3d 166 [1st Dept 2003]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Labor Law § 240 (1) Claim

Labor Law § 240 (1) imposes absolute liability upon owners and general contractors who fail to fulfill their statutory obligation to furnish or erect safety devices adequate to give proper protection to a worker who sustains gravity-related injuries proximately caused by such failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Bland v Manocherian*, 66 NY2d 452 [1985]). Specifically, Labor Law § 240 (1), also known as the Scaffold Law, 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"

(*id.*). In order to accomplish its goal, the statute places responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility" (*Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 [1993]). The statute is to be liberally construed to achieve this purpose (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross,* 81 NY2d at 501). For liability to attach under this statute, "'the owner or contractor must breach the statutory duty . . . to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries'" (*Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 471 [1st Dept 2013], quoting *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Thus, to prevail on his claim, plaintiff must show (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks); and (2) that the statutory violation was a contributing or proximate cause of his injuries (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]).

Once plaintiff has made the requisite showing, the burden shifts to defendants to establish that "'there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept

2008], quoting *Blake*, 1 NY3d at 289 n 8). Defendants may also defeat plaintiff's motion for summary judgment by raising "bona fide credibility issues with respect to [plaintiff's] testimony" as to how the accident occurred *(Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]; *see also Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996]).

Here, plaintiff has made a prima facie showing that the statute was violated through his deposition testimony that he was injured when he fell from a six- to eight-foot-high baker's scaffold that lacked guardrails, after the scaffold began to shake and tilt, and despite the fact that the wheels were locked. In factually similar circumstances, such evidence had been found sufficient to establish "that plaintiff's injuries were proximately caused by defendants' failure to provide proper protection against the elevation-related risk" (*Vail v 1333 Broadway Assoc., L.L.C.*, 105 AD3d 636, 636-637 [1st Dept 2013] [plaintiff established that statute was violated and violation was proximate cause of plaintiff's injuries, where plaintiff fell after the six-foot baker's scaffold upon which he was working shifted despite the fact that he had locked the wheels, and where it was undisputed that the scaffold lacked guardrails]; *see also Zengotita v JFK Intl. Air Term.*, LLC, 67 AD3d 426 [1st Dept 2009] [statute was violated and violation was a proximate cause of plaintiff's injuries, where plaintiff fell from a scaffold because the scaffold moved, and no other safety device was provided to prevent the scaffold from moving or to prevent plaintiff from falling]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005] [plaintiff made a prima facie showing that adequate protection was not provided, where there was "no dispute that the six-foot-high, manually propelled scaffold, which plaintiff was directed to use in order to plaster a 15-foot-high ceiling, had no side rails, and no other protective device was provided to protect him from falling off the sides"]).

In opposition, defendants argue that plaintiff failed to make a prima facie showing that

the statute was violated, as there is no evidence that the scaffold tipped, broke, collapsed, or was otherwise defective. Defendants point to case law holding that the mere occurrence of a fall does not establish a violation of Labor Law § 240 (1) (citing *Blake*, 1 NY3d at 289; *Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011]). Defendants argue that, absent evidence of a malfunction or defect in the scaffold, a jury could find that it was plaintiff's actions that were the sole proximate cause of his accident, as it was plaintiff that chose to use and how to position the scaffold.

The courts have held, however, that "a Labor Law § 240 (1) inquiry cannot focus simply on whether the provided safety devices malfunctioned, but must also examine whether the safety devices that were provided 'operated [so] as to give *proper* protection'" (*Harris*, 83 AD3d at 111, quoting Labor Law § 240 [1] [emphasis added]). Defendants have not disputed that the scaffold lacked guardrails that might have prevented plaintiff's fall. Thus, given that the scaffold was inadequate in the first instance, it follows that any negligence on the part of plaintiff in choosing to use and placing the scaffold would only have been contributory, and not the sole proximate cause of his injuries *(see Vail*, 105 AD3d at 627). It is well settled that contributory or comparative negligence is not a defense to absolute liability under Labor Law § 240 (1) (*Jamison v GSL Enters.*, 274 AD2d 356 [1st Dept 2000]; *Johnson v Riggio Realty Corp.*, 153 AD2d 485 [1st Dept 1989]).

Alternatively, defendants argue that summary judgment is inappropriate since plaintiff was the sole witness to the accident, and has provided differing accounts as to how the accident occurred, raising a triable issue of fact as to plaintiff's credibility. Specifically, defendants note that plaintiff's testimony, regarding how the accident occurred, differs from a written statement describing the accident, which is contained in an "Employer's Report of Work-Related

Accident/Occupational Disease" (Form C-2). In that Form C-2, which defendants attach to their opposition papers, the cause of plaintiff's accident is described, as follows: "I was spraying paint in apt and got blind from spray and fell off the scaffle [sic]" (*see* Rubinstein Affirm. in Opposition, Ex. A; Acholonu Affirm. in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, Ex. N).

Defendants contend that the Form C-2 was prepared by plaintiff; therefore, the written statement describing the accident constitutes an inconsistent statement by plaintiff that is sufficient to raise a triable issue of fact as to whether the accident took place as described, and as to plaintiff's credibility. Defendants base their contention, that it was plaintiff who prepared the form, solely on the fact that when plaintiff was shown the Form C-2 at his deposition, plaintiff admitted that certain identifying information contained therein, i.e., plaintiff's name, address, date of birth, social security number, the date of the accident, and the name of plaintiff's treating physician, was accurate (EBT II at 47-49).

Plaintiff objects to defendants' submission of the Form C-2, arguing that any inconsistent statement contained therein is inadmissible hearsay. Plaintiff notes that, while he did testify that certain identifying information in the form was accurate, plaintiff also testified that he had not prepared the Form C-2 or supplied the statement regarding the cause of the accident (*see* EBT II at 43-46). Specifically, plaintiff testified that he had never seen the Form C-2 before it was presented to him at the deposition, that he had not prepared or assisted in preparing the document, that the handwriting on the document was not his, that he had not written the description as to the cause of the accident and that no one had written it at his direction, and that he did not know who prepared the document (EBT II at 43-46). Plaintiff further testified that the statement as to the cause of the accident was false and could not have been accurate, because he

was wearing a respirator with eye protection at the time of his injury, and thus could not have been blinded (EBT II: 44-46). Plaintiff notes that defendants have offered no evidence to controvert plaintiff's disavowal of the document, to support their contention that the document was prepared by plaintiff, or to establish that the statement contained therein is attributable to plaintiff. Plaintiff argues that, absent any evidence connecting plaintiff to the statement contained in the Form C-2, the hearsay statement is insufficient to defeat his summary judgment motion.

Where, as here, plaintiff has established his prima facie case, it is defendants' burden to offer "evidence, other than mere speculation, to undermine the plaintiff's showing of entitlement to judgment as a matter of law, or present a bona fide issue regarding the plaintiff's credibility as to a material fact" (*Melchor v Singh*, 90 AD3d 866, 869 [2nd Dept 2011]; *see also Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 891 [2nd Dept 2011]). Although summary judgment should be denied "where credible evidence reveals differing versions of the accident," here, "it is not conclusively clear" who created the Form C-2 or where that person acquired the information (*Taylor v One Bryant Park, LLC*, 94 AD3d 415, 415 [1st Dept 2012] [internal quotation marks and citations omitted). Defendants have produced no evidence to establish who prepared or submitted the Form C-2 to the Workers' Compensation Board, as the form itself is neither signed[2] or authenticated, and, indeed, the entire section of the form titled "Preparation" was left completely blank. Other than establishing the accuracy of plaintiff's personal and employment

[2]Defendants' exhibit A to their affirmation in opposition includes the unsigned Form C-2, and two workers compensation forms-- a notice of retainer and appearance form and an authorization to disclose workers' compensation records–which appear to be completed and signed by plaintiff and/or his attorney and dated February 5, 2010. To the extent defendants claimed at oral argument that plaintiff effectively signed and/or authenticated the Form C-2 based on his signature on unrelated workers' compensation forms, the court rejects this argument.

information, defendants have identified nothing in the Form C-2 that might establish when or by whom the form was prepared. Nor have defendants proffered any other evidence with regard to its preparation. Instead, defendants rely wholly on conjecture to support their contention that the document was prepared by plaintiff.

While an inconsistent account of the accident by plaintiff can be considered a statement against interest, and thus admissible as an exception to the hearsay rule, there must be clear evidence connecting plaintiff to the statement (*see Preldakaj v Alps Realty of NY Corp.*, 69 AD3d 455, 456-457 [1st Dept 2010] [hearsay statement admissible as inconsistent statement only if there is clear evidence connecting party to the statement]). Based on the record before this court, as there is no clear evidence connecting plaintiff to the inconsistent statement contained in the Form C-2, it is not sufficient to establish a bona fide issue of fact as to plaintiff's credibility. In any event, even if admissible, under the facts here, such version of the accident would not provide a basis for denying summary judgment since, as stated above, the scaffold lacked guardrails and was inadequate in the first instance. Thus, any negligence by plaintiff while spraying would only be contributory negligence and not the sole proximate cause of the accident *(see Vail*, 105 AD3d at 627).

Additionally, the fact that plaintiff was the sole witness to the accident does not, by itself, preclude an award of summary judgment in his favor (*see Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [1st Dept 2004]).

As plaintiff has met his burden of establishing prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim, and defendants have failed to offer legally competent evidence to undermine the plaintiff's showing, or present a bona fide issue regarding plaintiff's credibility, plaintiff's motion for summary judgment on the issue of liability on so

much of his complaint as alleged a violation of Labor Law § 240 (1), is granted.

Third-Party Plaintiffs' Claims

Spectrum cross-moves to dismiss the third-party indemnification and contribution claims asserted against it by Investors and Builders on the grounds that (1) the contractual indemnification provision contained in its contract with Builders is void and unenforceable under General Obligations Law§ 5–322.1 (1), and (2) New York's Workers' Compensation Law § 11 precludes defendants from seeking common-law indemnification and/or contribution from Spectrum, absent a showing that plaintiff sustained a "grave" injury as defined by that statute.

That portion of Spectrum's motion that seeks summary judgment dismissing Investors' and Builders' third-party claim for contractual indemnification is denied, as premature. General Obligations Law § 5–322.1 (1) provides that:

> "A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable"

(*id.*). Under this provision, an indemnification agreement that purports to indemnify a party for its own negligence is void and unenforceable.

Nevertheless, the courts have held that such an agreement does not violate the General Obligations Law if (1) the indemnity provision limits the obligation to indemnify "to the fullest extent permitted by law," which phrase serves to create only a partial indemnification obligation on behalf of the indemnitor *(see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]), or (2) the indemnitee is found to have been free of any active negligence *(see Haynes v Estate of*

Goldman, 62 AD3d 519 [1st Dept 2009]; *Crouse v Hellman Constr. Co., Inc.*, 38 AD3d 477 [1st Dept 2007]). Accordingly, General Obligations Law § 5–322.1 (1) will not bar enforcement of even a broad contractual indemnification provision where the indemnitee's liability to plaintiff is purely vicarious under Labor Law § 240 (1), and not based on its own negligence *(Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]).

The indemnification provision contained in of the subcontract between Builders and Spectrum provides, in pertinent part, as follows:

> "The Subcontractor [i.e. Spectrum] will defend, protect, indemnify and save the Indemnitees harmless from and against any and all Loss-and-Expense, resulting from or in any manner arising out of, in connection with or on account of: (I) the performance of the Work, (ii) any act, omission, fault or neglect of Subcontractor, or any sub-subcontractor or anyone employed by any of them in connection with the Work, or anyone for whose acts any of them may be liable, (iii) claims of injury to or disease, sickness or death of persons or damage to property (including, without limitation, loss of use resulting therefrom) occurring or resulting directly or indirectly from the Work or the activities of Subcontractor, or any sub-subcontractor or anyone employed by any of them in connection with the Work, or any of their respective agents, contractors, subcontractors, employees, invitees or licensees in connection with the Work, or anyone for whose acts any of them may be liable, (iv) any breach by Subcontractor of its obligations under this Contract, (v) any defects, faulty materials or improper workmanship supplied to or incorporated in the Work by or on behalf of Subcontractor, (vi) any violations of any Legal Requirements, and/or (vii) any mechanics' or materialmen's or other liens or claims (and all costs or expenses associated therewith) asserted, filed or arising out of the Work. The provisions of this Article shall survive the expiration or earlier termination of this Contract"

(Rubinstein Affirm. in Support, Exh. M: Trade Contract, Article 9 [a]). Because this indemnification provision contains no language limiting Spectrum's obligation to partial indemnification, it will be void and unenforceable under General Obligations Law § 5–322.1 (1) in the event that Investors and Builders are determined to be even partially negligent.

Here, Investors and Builders have been found only to be strictly liable under Labor Law § 240 (1), there is no basis at this juncture for dismissing the contractual indemnification claims as

void and unenforceable under General Obligations Law § 5–322.1 (1) (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172).

However, that portion of Spectrum's motion that seeks summary judgment dismissing Builders' and Investors' third-party claims for common-law indemnification and/or contribution is granted.

Section 11 of the Workers' Compensation Law bars any third party from seeking common-law indemnification or contribution from an injured plaintiff's employer absent a showing that the employee sustained a "grave" injury as defined by the statute *(see Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012]). The statute defines a "grave injury" to mean

> "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

(Workers Compensation Law § 11). "Injuries qualifying as grave are narrowly defined . . . . [T]he only determination to be made is whether the injury falls within the statute's objective requirements . . . without resort to forced or unnatural interpretations" (*Castro v United Container Mach. Group*, 96 NY2d 398, 401 [2001]).

Here, Spectrum has met its burden of demonstrating that the plaintiff's injuries to his left wrist/arm did not constitute a "grave injury" within the meaning of Workers' Compensation Law § 11, through submission of the following: plaintiff's bill of particulars; plaintiff's deposition testimony; and, a report prepared by plaintiff's hand surgeon indicating that, while plaintiff may only have limited use of his left hand/arm, he has not suffered a total loss of use of the hand or arm. The record in this case also establishes that plaintiff has received workers' compensation

benefits for the injuries he allegedly sustained in the accident. Therefore, as Spectrum has made a prima facie showing of entitlement to summary judgment as a matter of law, and, as neither plaintiff nor the third-party plaintiffs, Investors and Builders, oppose this portion of Spectrum's motion, Spectrum's motion, insofar as it seeks summary judgment dismissing the contribution and common-law indemnification claims and cross claims asserted against it, is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendants 420 West Investors LLC, 420 W. Builders LLC, and Newmark Construction Services, LLC on the issue of liability with respect to his Labor Law § 240 (1) claim, is granted, with the amount of damages to be determined at trial; and it is further

ORDERED that third-party defendant Spectrum Painting Contractors Corp.'s cross motion for summary judgment dismissing all of the third-party claims asserted against it by third-party plaintiffs 420 West Investors LLC and 420 W. Builders LLC, is granted to the extent of dismissing the third-party claims for common-law indemnification and contribution, and the motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by 420 West Investors LLC and 420 W. Builders LLC on their third-party claim for contractual indemnification against Spectrum Painting Contractors Corp. is withdrawn; and it is further

ORDERED that this action shall continue as to the remaining causes of action; and it is further

ORDERED that the parties shall proceed to mediation.

Dated: January 15, 2014

J.S.C.