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SHORT FORM ORDER

INDEX No. 09-47489
CAL No. 11-01075OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-11-13
ADJ. DATE 10-8-13
Mot. Seq. # 007 - MotD # 010 - MG
008 - MG # 011 - MG
009 - MD

MAREK CHILINSKI, Plaintiff, - against - LMJ CONTRACTING INC., UNITED BAKING CO., INC., d/b/a UNCLE WALLY'S, DUNBAR SYSTEMS, INC., and C&C MILLWRIGHT MAINTENANCE CO., Defendants.	KENNETH A. WILHELM, ESQ. Attorney for Plaintiff 445 Park Avenue, 9th Floor New York, New York 10022 TORINO & BERNSTEIN, P.C. Attorney for LMJ Contracting, Inc. 200 Old Country Road, Suite 220 Mineola, New York 11501 TROMELLO McDONNEL & KEHOE Attorney for United Baking Co., Inc. P.O. Box 9038 Melville, New York 11747
UNITED BAKING CO., INC., Third-Party Plaintiff, - against - C&C MILLWRIGHT MAINTENANCE CO. and DUNBAR SYSTEMS, INC., Third-Party Defendants.	WHITE, FLEISCHNER, FINO Attorney for C&C Millwright Maintenance Co. 61 Broadway, 18th Floor New York, New York 10006 CHRISTOPHER P. DI GIULIO, ESQ. Attorney for United Baking Co., Inc. 111 John Street, Suite 10038 New York, New York 10038 CHURBUCK CALABRIA JONES & MATERAZO Attorney for Dunbar Systems, Inc. 43a East Barclay Street Hicksville, New York 11801

Upon the following papers numbered 1 to 288 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 (007); 46 - 81 (008); 94 - 130 (009); 166 - 199 (010); 240 - 269 (011) ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 19; 24- 25; 26 -31; 35 - 45; 82 - 86; 131 - 147; 148 - 153; 200 - 220; 221 - 226; 227 - 237 270 - 274; 275 - 284; Replying Affidavits and supporting papers 20 - 21; 32-34; 46 - 49; 87 - 93; 154 - 158; 159 - 165; 238 - 239; 285 - 288 ; Other 22 - 23 (United's supplemental affirmation in support of motion) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions by plaintiff, defendant/third-party plaintiff and defendants/third-party defendants for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (007) by defendant/third-party plaintiff United Baking Co., Inc. for an order pursuant to CPLR 3212 (e) granting partial summary judgment dismissing plaintiff's claims sounding in common-law negligence and Labor Law § 200 as against it, and conditional summary judgment on its cross claims and third-party claims for full common-law indemnity as against defendants/third-party defendants C & C Millwright Maintenance Co. and Dunbar Systems, Inc. is determined herein; and it is further

ORDERED that this motion (008) by plaintiff for an order pursuant to CPLR 3212 (e) granting partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) against defendant/third-party plaintiff United Baking Co., Inc. is granted; and it is further

ORDERED that this motion (009) by plaintiff for an order pursuant to CPLR 3212 (e) granting partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) against defendants/third-party defendants Dunbar Systems, Inc. and C & C Millwright Maintenance Co. is denied; and it is further

ORDERED that this motion (010) by defendant/third-party defendant Dunbar Systems, Inc. for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint, cross-claims and third-party complaint as against it is granted; and it is further

ORDERED that this motion (011) by defendant/third-party defendant C & C Millwright Maintenance Co. for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint, cross claims and third-party complaint as against it is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff, a welder, on September 3, 2009 at a commercial bakery plant in a building owned by defendant/third-party plaintiff United Baking Co., Inc. (United) located at 41 Natcon Drive, Shirley, New York. Plaintiff allegedly fell through a purpose-built opening for a mixer in a mezzanine-level platform that was under construction as part of the installation of a new industrial oven and production line (Line 4) for muffins. At the time of the accident, plaintiff was employed by non-party contractor Felber Metal Fabricators (Felber).

United had contracted with defendant/third-party defendant Dunbar Systems, Inc. (Dunbar) for the purchase and installation of the industrial oven and its appurtenances, which included the platform and the aluminum and stainless steel plates to be welded to the surface (decking) of the platform. The stainless steel plates were to be installed on the end of the platform where the mixer was to be located. The contract between United and Dunbar, entitled Revised Confirming Proposal and dated December 5, 2008, contained a section entitled "Project Management Installation Specifications" indicating that the following items were included in the installation: project manager, manufacturer's installations supervisors, and millwright labor for the unloading, rigging and installation of purchased equipment. Paragraph 6 of the portion of the contract entitled "Conditions of Sales" indicated that "Unless specified in writing signed by Seller and Buyer, Seller shall have no obligation or responsibility whatsoever hereunder with respect to installation, start-up or training." Paragraph 12 of that same section provided that "Safety. ... It shall be the Buyer's sole responsibility to determine that all safety devices and controls are in the proper location and in operating

order at all times and in compliance with all federal, state and local government laws, rules and regulations, relating to safety standards and all industry safety standards, unless otherwise agreed to in writing by Seller and Buyer." Paragraph 8 of the rider to the contract, entitled "Installation," indicated as follows: "Seller shall install all Equipment in a workmanlike manner and in compliance with applicable laws and regulations or other technical requirements promulgated by local authorities." In addition, paragraph 6.1 of the portion of contract entitled "AutoBake Oven Functional Specifications" indicated that "Off-loading, inspection and storage of the equipment shall be the responsibility of the vendor's installation supervisor."

Dunbar, in turn, had subcontracted with defendant/third-party defendant C & C Millwright Maintenance Co. (C & C) for the installation work. The purchase order (contract) indicated that C & C was to provide "Millwright labor to install the following equipment: Sigma Thermal Oven Oil System [,] Auto-Bake Muffin Oven System with Support Platform."

During the course of the construction, in or about July 2009, the parties realized that Dunbar would be unable to obtain the stainless steel plates for installation in time for the anticipated end date of the project of December 1, 2009. Dunbar suggested that United obtain a different contractor to fabricate and install the stainless steel plates. The parties orally modified the contract and Dunbar credited United for the original aluminum plates, the stainless steel plate upgrade and the installation costs for the mixing area of the platform. United thereafter contracted with Felber to fabricate, deliver and weld together the stainless steel plates at the end of the platform where the mixer was to be installed.

After Felber employees manufactured the stainless steel plates, some of which were designed with a lip to form the purpose-built opening, they were delivered to the building and C & C employees placed the stainless steel plates into position on the framework of the platform after direction to do so by Dunbar's project manager, Mark S. Wilson. C & C employees constructed a plywood cover to place over the purpose-built opening while they were working on said platform sometime prior to plaintiff's accident.

Plaintiff commenced this action on December 1, 2009[1]. By his second amended complaint, plaintiff alleges a first cause of action for negligence, a second cause of action for violation of Labor Law § 200, a third cause of action for violation of Labor Law 240 (1), and a fourth cause of action for violation of Labor Law § 241 (6). With respect to the fourth cause of action, plaintiff alleges the violation of Industrial Code sections (12 NYCRR §) 23-1.5, 23-1.7 (b), 23-1.16 and 23-1.17. United subsequently commenced a third-party action on May 17, 2010 against C & C and Dunbar for common-law indemnification, contribution, contractual indemnification, and breach of agreement to obtain liability insurance for its benefit.

By its answer, United asserts general denials but admits that work related to the installation of certain equipment was being performed at the subject premises on the date of the accident. United also asserts affirmative defenses as well as cross claims against its co-defendants for common-law indemnity or contribution, contractual indemnity, and breach of contract for failure to name it as an additional insured on an insurance policy. Dunbar, in its answer, asserts general denials, affirmative defenses, including that it lacked actual and constructive notice and that the risks were open and obvious to plaintiff, and cross claims for contribution and indemnification against its co-defendants and a counterclaim against United for

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[1] The parties executed a stipulation of discontinuance without prejudice dated October 21, 2010 discontinuing without prejudice all claims and cross claims against defendant LMJ Contracting Inc.

indemnification. By its answer, C & C asserts general denials, affirmative defenses, cross claims against Dunbar for contribution and contractual indemnification, and counterclaims for contribution and/or indemnification.

The Court initially recalls and vacates its prior order dated September 12, 2013, which denied United's motion (007) for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it and for conditional summary judgment on its claims for common-law indemnity against C & C and Dunbar, and substitutes this order in its stead.

United moves (007) for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims. Dunbar moves (010) for summary judgment dismissing all claims as against it or, in the alternative, for summary judgment on its cross claims. C & C moves (011) for summary judgment dismissing the complaint, cross claims and third-party complaint as against it. Plaintiff moves (008) as against United and moves (009) as against Dunbar and C & C for partial summary judgment on the issue of liability on his Labor Law § 240 (1) and 241(6) claims. The parties' submissions include the pleadings; the deposition transcripts of plaintiff, of C & C employees James Cansler, Roger Hatfield, Bert Cansler, Roy R. Greene, and Kenneth Rednour, of United employees John Avignone, Kevin M. Hopkins and John Oliveri, and of Dunbar employee Mark S. Wilson; the aforementioned contracts; diagrams of the platforms; incident reports; and affidavits of plaintiff, plaintiff's experts, and C & C's expert.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Kevin M. Hopkins, United's director of purchasing who was involved in contracting with Dunbar, as well as in the change of plans concerning the stainless steel plates and finding Felber, testified at his deposition that his understanding of the arrangement was that United would find a company, in this case Felber, to fabricate the plates and that Dunbar was going to "lay those plates down" so that "Felber could come and weld them." Plaintiff's deposition testimony indicates that when the stainless sheets were being prefabricated in the Felber shop he knew that there would be an opening in the platform, and that just prior to his accident he observed a four feet by five feet piece of wood on the platform that he guessed was covering the opening in the platform. James Cansler, a lead man for the C & C foreman, testified at his deposition that there was an opening of 40 inches by 24 inches created by the C & C employees' placement of the stainless steel plates and that one day after the opening was created he decided on his own to cover it to prevent someone from falling through. Mr. Cansler also testified that he put a large piece of exterior

plywood three quarters of an inch thick and weighing 25 to 30 pounds over the opening so that it extended approximately six inches beyond the opening on all sides, and then he got two-by-fours and cut them to length and stacked them around the outside perimeters of the plywood to prevent the plywood from lifting up if someone stepped on it. On the date of plaintiff's accident, the Dunbar and C & C employees had left the platform and gone outside of the building prior to the commencement of the welding work. Plaintiff's testimony also indicates that he began working on the platform at 8:50 a.m. welding the stainless steel sheets together while on his knees then standing up and stepping backwards and that, after repeating this two or three times, he stepped backwards and his right foot stepped on the piece of wood. Plaintiff further testified that the wood did not move, but there was a cracking sound and plaintiff fell to the floor below. He added in his affidavit that while welding and moving backwards toward the opening, he was wearing a welding mask that covered much of his vision and that he did not see nor did he hear the plywood cover being moved. No deposition testimony or affidavit has been provided from any witness to plaintiff's fall. The testimony of all of the deponents who went onto the platform or under the platform in the vicinity of the opening after plaintiff's fall on the day of the accident reveals that none saw any broken wood or pieces of the plywood cover. Only Roger Hatfield, a foreman for C & C, testified that after the accident he saw the plywood cover with the two-by-fours attached to it leaning up against the railing of the platform, and that he threw out said cover one or two days later. According to Mr. Hatfield, the plywood cover would have had to have been removed completely for the welders to weld the seams on the four stainless steel plates that formed the opening.

Here, United designed the purpose-built opening and contracted separately with plaintiff's employer; the materials created by plaintiff's employer formed the purpose-built opening; those materials were placed into position and bolted to the platform frame by C & C employees at the direction of Dunbar; plaintiff's work involved welding the plates that formed said opening; and plaintiff welded while moving backwards towards said opening. At the time of plaintiff's accident, the stainless steel plates had already been "installed" on the platform frame, that is, put into position and bolted into place by C & C employees.

A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from dangerous or defective conditions of the premises, or the manner in which the work is performed (*see* ***Pilato v 866 U.N. Plaza Assoc., LLC***, 77 AD3d 644, 646, 909 NYS2d 80 [2d Dept 2010]; ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). Further, in rare cases, both theories of liability may be implicated (*see* ***Reyes v Wentworth Mgt. Corp.***, 83 AD3d 47, 50-52, 919 NYS2d 44 [2d Dept 2011]; *see also* ***Forssell v Lerner***, 101 AD3d 807, 808, 956 NYS2d 117 [2d Dept 2012]). Inasmuch as plaintiff fell through an employer-created opening while working backwards, the plywood cover either being on or off of said opening at the time, plaintiff's claim arises out of the means, manner and methods of the work, not from a defective or dangerous condition on the premises (*see* ***Sinchi v Aloia***, 25 Misc 3d 1219(A), 901 NYS2d 910 [Sup Ct, Bronx County 2006], *affd* 48 AD3d 373, 853 NYS2d 40 [1st Dept 2008]).

Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Where, as here, a plaintiff's claim arises out of alleged defects or dangers in the methods or materials of the work, to prevail on a Labor Law § 200 cause of action, the plaintiff must show that the defendant "had the authority to supervise or control the performance of the work" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Pilato v 866 U.N. Plaza Assoc., LLC***, 77 AD3d 644, 646, 909 NYS2d 80 [2d Dept 2010]). A defendant has the authority to supervise or control the work for

purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (***Austin v Consolidated Edison, Inc.***, 79 AD3d 682, 684, 913 NYS2d 684 [2d Dept 2010][internal quotation marks omitted]; ***Klimowicz v Powell Cove Assocs., LLC***, 111 AD3d 605, 975 NYS2d 419, 420-422 [2d Dept 2013]).

At his deposition, John Avignone testified that he was a logistics manager and project coordinator for United, that it was his duty "to walk the job," that no one from United was specifically designated as a safety manager, and that he or anyone from United had the authority to tell C & C or Dunbar or Felber to remove the plywood. Mark S. Wilson testified at his deposition that he was the project engineer/project manager for Dunbar, and that his job involved observing the employees of contractors retained by Dunbar, such as C & C, to ensure that they were installing correctly as indicated in the drawings. He also testified that C & C was responsible for its own safety and that if he observed a major safety issue that could be a problem, he would note it to the foreman. Mark S. Wilson added that he did have a right to stop work in progress if he was dissatisfied with it.

United, Dunbar and C & C established their prima facie entitlement to judgment dismissing plaintiff's common-law negligence and violation of Labor Law § 200 claims by demonstrating that they did not supervise or control the performance of the welding work that led to plaintiff's injuries, that plaintiff's work was directed and controlled by his employer Felber, and that they had no authority to exercise supervisory control over plaintiff's work (*see* ***Van Nostrand v Race & Rally Constr. Co., Inc.***, 114 AD3d 664, 979 NYS2d 638, 642 [2d Dept 2014]; ***Koat v Consolidated Edison of New York, Inc.***, 98 AD3d 474, 949 NYS2d 699 [2d Dept 2012]; ***Ferreira v City of New York***, 85 AD3d 1103, 1106, 927 NYS2d 100 [2d Dept 2011]). Both John Avignone and Mark S. Wilson had general supervisory authority for the purpose of overseeing the progress of the work, which is insufficient to impose liability under Labor Law § 200 (*see* ***Van Nostrand v Race & Rally Constr. Co., Inc.***, 114 AD3d 664, 979 NYS2d 638, 642; ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 1125, 912 NYS2d 611 [2d Dept 2010]).

Plaintiff argues in opposition that C & C's defective plywood cover, of which United and Dunbar had actual and constructive notice, caused his fall. A subcontractor may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury, even if it did not possess any authority to supervise or control the plaintiff's work or work area (*see* ***Van Nostrand v Race & Rally Constr. Co., Inc.***, 114 AD3d 664, 979 NYS2d 638, 642; ***Ortiz I.B.K. Enters., Inc.***, 85 AD3d 1139, 1140, 927 NYS2d 114 [2d Dept 2011]; ***Poracki v St. Mary's R.C. Church***, 82 AD3d 1192, 1195, 920 NYS2d 233 [2d Dept 2011]). However, there is no proof that C & C's plywood cover broke or moved when plaintiff stepped on it, just that it emitted a cracking sound, nor is there proof that the cover was in place over the opening as plaintiff moved backwards and at the time that he stepped on it. Without proof, said argument is mere conjecture and insufficient to defeat defendants' requests for summary judgment dismissing plaintiff's common-law negligence and violation of Labor Law § 200 claims. In his affidavit, plaintiff asserts that if the plywood cover was moved before the accident, it must have been moved after he began welding. Plaintiff also argues that United and Dunbar had authority to supervise his work based on the contracts. Notably, nothing in United's contract with Felber expressly grants the authority to supervise the welding work to either United or Dunbar, the stainless steel plates from Felber did not constitute "purchased equipment" by Dunbar that required supervision in its installation pursuant to Dunbar's contract with

United, and there is no evidence that any defective equipment from, or improper installation by, Dunbar caused plaintiff's fall. Therefore, that portion of United motion for partial summary judgment and that portion of the motions for summary judgment by Dunbar and C & C for summary judgment dismissing plaintiff's claims sounding in common-law negligence and Labor Law § 200 are granted and said claims are dismissed in their entirety.

"Labor Law § 240 (1) imposes a nondelegable duty upon owners, contractors, or their agents to provide proper protection to a worker performing certain types of construction work" (***Aversano v JWH Contr., LLC***, 37 AD3d 745, 746, 831 NYS2d 222 [2d Dept 2007]). To hold a subcontractor or statutory agent of the owner or general contractor absolutely liable under Labor Law §§ 240 or 241, "there must be a showing that the subcontractor had the authority to supervise and control the work giving rise to these duties" (***Kehoe v Segal***, 272 AD2d 583, 584, 709 NYS2d 817 [2d Dept 2000]). "The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed" (*id.* at 584, 709 NYS2d 817; *see* ***Temperino v DRA, Inc.***, 75 AD3d 543, 545, 904 NYS2d 767 [2d Dept 2010]; *see also* ***Grochowski v Ben Rubins, LLC***, 81 AD3d 589, 590, 916 NYS2d 171 [2d Dept 2011]).

Here, based on the adduced evidence, C & C was neither a general contractor nor a statutory agent of the owner United or of Dunbar pursuant to Labor Law 240 (1) or Labor Law § 241 (6) inasmuch as C & C did not select or enter into agreements with the other contractors, including Felber, did not have the authority to enforce the provisions of the contracts between United and the other contractors, and did not have the authority to stop the work in the event that an unsafe condition or work practice came to light (*see* ***Borbeck v Hercules Constr. Corp.***, 48 AD3d 498, 852 NYS2d 264 [2d Dept 2008]; ***Aversano v JWH Contr., LLC***, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]; *see also* ***Temperino v DRA, Inc.***, 75 AD3d 543, 904 NYS2d 767). In addition, Dunbar demonstrated that although it was obligated under its contract with United to provide a project manager for the installation of the purchased equipment, it was not contractually responsible for assuring the satisfactory performance of all of the trade contractors, other than its installation millwright subcontractor C & C, and that it did not have the ability to control the post-installation activity by Felber employees of the welding of the stainless steel plates, which were not purchased by Dunbar, such that it is not liable under Labor Law § 240 (1) (*compare* ***Tomyuk v Junefield Assn.***, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]). Dunbar also established that it lacked the authority to supervise and control the post-installation welding of the stainless steel plates giving rise to plaintiff's accident such that it is not liable under Labor Law § 241 (6) (*see* ***White v Village of Port Chester***, 92 AD3d 872, 940 NYS2d 94 [2d Dept 2012]). Inasmuch as no evidence was submitted to demonstrate that Dunbar had any control or supervisory role over plaintiff's welding work, so as to enable it to prevent or correct any unsafe conditions, and that at most its role was that of a general supervisor, there is no triable issue of fact as to Dunbar's liability under Labor Law §§ 240 (1) or 241(6) (*see* ***Damiani v Federated Dept. Stores, Inc.***, 23 AD3d 329, 804 NYS2d 103 [2d Dept 2005]). Therefore, that portion of the motions by Dunbar and C & C for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are granted and plaintiff's motion (009) for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241(6) against Dunbar and C & C is denied in its entirety.

However, plaintiff established, prima facie, that he was not provided with proper protection under Labor Law § 240 (1) for work near the purpose-built opening approximately 14 feet above the floor, that the failure to provide such protection violated a specific and applicable provision of the Industrial Code (*see* 12 NYCRR 23–1.7[b][1][iii]), and that this failure was the proximate cause of his alleged injuries such that the

owner United is liable under Labor Law §§ 240 (1) and 241 (6) (*see generally* ***Norero v 99-105 Third Ave. Realty, LLC***, 96 AD3d 727, 945 NYS2d 720 [2d Dept 2012]; ***Ortiz v 164 Atl. Ave., LLC***, 77 AD3d 807, 808-10, 909 NYS2d 745 [2d Dept 2010]). By his affidavit, plaintiff averred that there was no netting or scaffolding or platform underneath the opening, and that he was not provided with a safety harness or lines nor was he informed that they were available.

12 NYCRR § 23-1.7 (b) entitled "Falling hazards" provides as follows:

> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
>
> (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
>
> (b) An approved life net installed not more than five feet beneath the opening; or
>
> (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

In opposition, United failed to raise a triable issue of fact. United failed to demonstrate in opposition that the Industrial Code provision governing hazardous openings (see 12 NYCRR 23–1.7[b][1]), which was relied on by the plaintiff in his bill of particulars, was either factually inapplicable to this case or was satisfied (*see* ***Ventimiglia v Thatch, Ripley & Co., LLC***, 96 AD3d 1043, 947 NYS2d 566 [2d Dept 2012]). In addition, the "15 feet" limit in 12 NYCRR § 23-1.7 (b) (1)(iii)(a) is not a minimum height requirement for the hazardous opening. Moreover, the statements attributed to an unidentified coworker of plaintiff that plaintiff did not actually fall through the opening down to the floor level constitute inadmissible hearsay (*see* ***Silvas v Bridgeview Investors, LLC***, 79 AD3d 727, 912 NYS2d 618 [2d Dept 2010]). Therefore, plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) and 241(6) claims as against United is granted.

United also seeks conditional summary judgment on its cross claims and third-party claims for common-law indemnity and Dunbar and C & C seek summary judgment dismissing the third-party claims

and cross claims for common-law indemnification, contribution, contractual indemnification, and breach of agreement to obtain liability insurance.

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009]; *see* General Obligations Law § 5–322.1; ***Mikelatos v Theofilaktidis***, 105 AD3d 822, 823, 962 NYS2d 693 [2d Dept 2013]). "Although a clause in a construction contract that purports to indemnify a party for its own negligence is void under General Obligations Law § 5–322.1, such a clause may be enforced where the party to be indemnified is found to be free of any negligence" (***Cabrera v Board of Educ. of City of N.Y.***, 33 AD3d 641, 643, 823 NYS2d 419 [2d Dept 2006]; *see* ***Gonzalez v Magestic Fine Custom Home***, ___ AD3d ___, 2014 NY Slip Op 01713 [2d Dept 2014]). To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (*see* ***Mikelatos v Theofilaktidis***, 105 AD3d 822, 962 NYS2d 693).

Notably, none of the contracts submitted herein contain contractual indemnification provisions or the requirement that liability insurance be obtained naming United as a beneficiary. Therefore, Dunbar and C & C are granted summary judgment dismissing the third-party claims and cross claims for contractual indemnification and breach of agreement to obtain liability insurance (*see* ***Ascencio v Briarcrest at Macy Manor, LLC***, 60 AD3d 606, 874 NYS2d 562 [2d Dept 2009]).

Also, inasmuch as Dunbar and C & C have been found not liable for any of plaintiff's claims and have had the complaint dismissed as against them, United may not recover common-law indemnification or contribution from them (*see* ***Pope v Safety and Quality Plus, Inc.***, 111 AD3d 911, 976 NYS2d 131 [2d Dept 2013]; ***Allan v DHL Exp. (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; ***Fox v H & M Hennes & Mauritz, L.P.***, 83 AD3d 889, 922 NYS2d 139 [2d Dept 2011]; ***Barto v NS Partners, LLC***, 74 AD3d 1717, 906 NYS2d 664 [4th Dept 2010]). It so follows that the third-party complaint and the cross claims and counterclaims of the defendants are dismissed.

Thus, the motions (010, 011) for summary judgment by Dunbar and C & C are granted, plaintiff's motion (008) for partial summary judgment against United is granted, plaintiff's motion (009) for partial summary judgment against Dunbar and C & C is denied, and United's motion (007) for partial summary judgment is granted solely with respect to plaintiff's claims sounding in common-law negligence and violation of Labor Law § 200. The action is severed and continued as against the remaining defendant United for the purposes of a trial on the issue of damages.

Dated: April 14, 2014

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION