

**Bogdanowicz v New York Univ. Med. Ctr.
Condominium**

2014 NY Slip Op 31707(U)

June 30, 2014

Supreme Court, New York County

Docket Number: 110800/09

Judge: Debra A. James

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

**PRESENT: DEBRA A. JAMES
*Justice***

PART 59

KRZYSZTOF BOGDANOWICZ,
Plaintiff,

Index No.: 110800/09

- v -

Motion Date: 12/03/13

Motion Seq. No.: 03

NEW YORK UNIVERSITY MEDICAL CENTER
CONDOMINIUM and EAST COAST RESTORATION
& CONSULTING CORP.,
Defendant.

NEW YORK UNIVERSITY MEDICAL CENTER
CONDOMINIUM,
Third Party Plaintiff,

Index No.: 590817/10

- v -

PAR ENVIRONMENTAL CORPORATION,
Third Party Defendant,

EAST COAST RESTORATION & CONSULTING CORP.,
Second Third-Party Plaintiff,

Index No.: 590620/11

- v -

PAR ENVIRONMENTAL CORPORATION,
Second Third Party Defendant,

FILED

JUL 03 2014

The following papers, numbered 1 to 7 were read on this motion for summary judgment COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	<u>1</u>
Answering Affidavits - Exhibits	No (s) .	<u>2, 3, 4</u>
Replying Affidavits - Exhibits	No (s) .	<u>5, 6, 7</u>

Cross-Motion: **Yes** **No**

Upon the foregoing papers,

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

- 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**

This is an action to recover damages for personal injuries sustained by an asbestos handler when he fell from a ladder while working at a construction site located at 550 First Avenue, New York, New York (the premises) on July 6, 2009.

In motion sequence number 003, defendant and second third-party plaintiff East Coast Restoration & Consulting Corp. (East Coast) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Krzysztof Bogdanowicz's complaint, as well as all cross claims and counterclaims asserted against it.

Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims.

Defendant and third-party plaintiff New York University Medical Center Condominium (NYU) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims, as well as summary judgment in its favor on the third-party complaint.

Third-party and second third-party defendant Par Environmental Corporation (Par) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party and second third-party complaints against it.

On the date of the accident, defendant and third-party plaintiff NYU owned the premises where the accident took place. NYU hired third-party and second-third party defendant Par,

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pursuant to a purchase order (the NYU/Par purchase order), to perform asbestos abatement work on the windows located on the first floor of the premises (the project). It should be noted that, although defendant and second third-party plaintiff East Coast was hired by NYU to perform building façade work at the premises, this work was not part of the project, nor was this work performed in the area of the alleged accident.

Plaintiff testified that, on the day of the accident, he was employed by Par as an asbestos handler, assigned to remove caulking from the windows on the first floor roof of the premises. In order to perform his work, plaintiff wore safety glasses, gloves, a half mask, work boots and a protective suit, which covered the boots. In addition, plaintiff utilized a six-foot-tall aluminum A-frame ladder, which was provided by Par (the ladder).

Plaintiff explained that, before beginning his work, he opened up the ladder and placed it on a surface consisting of "black tar material". Plaintiff did not notice any defects in the ladder. When asked whether the surface was level, plaintiff replied, "I placed it on the best place".

Plaintiff testified that, at the time of the accident, he was standing and working on the fourth step of the ladder, approximately four feet from the ground. At this time, "[t]he ladder was stable. It didn't move". Plaintiff explained that

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the accident occurred as he "was taking off the molding from the top [of the window] . . . using [a] crowbar". As he was standing with both feet on the ladder step, and while holding a crowbar in both hands as he tried to "unhinge this molding" by pulling it towards him, the "[c]rowbar let it go, and everything fell". Plaintiff further explained that, as the crowbar "slipped from under the molding . . . [he] felt that [he was] losing balance," and then he fell "together with the ladder". At a subsequent deposition, when asked what caused him to fall from the ladder, plaintiff testified that "[t]he ladder moved, and it fell together with me". There were no witnesses to plaintiff's accident.

John Conway testified that he served as NYU's project manager on the day of the accident. He explained that Par was hired to do asbestos abatement work around the windows in an office suite on the first floor of the premises, pursuant to a purchase order with NYU.

Notably, Conway testified that defendant and second third-party plaintiff East Coast did "[n]othing" on the asbestos abatement project. In addition, East Coast was not involved in Par's work or the contracting of Par's work. In fact, no other contractors were assigned to work in the accident area, as the asbestos abatement area was completely blocked off from workers. Conway further explained that NYU hired East Coast to work on a

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different project, which entailed inspecting the outside of the building for loose or cracked bricks which might cause water leakage.

Par's senior project manager on the day of the accident testified that his duties as senior project manager included "estimat[ing] the jobs and oversee[ing] the running". He explained that Par was doing asbestos abatement on the flat roof of the first floor of the premises on day of the accident. Par's senior project manager also testified that East Coast was not involved in the asbestos abatement project in any capacity, and that there were no other subcontractors hired for that particular job.

Par's senior project manager stated that the project entailed removing the caulking from the windows, and that a Par supervisor chose the tools to be used for each job and inspected the work areas. He explained that a six-foot A-frame ladder is typically used for the kind of work that plaintiff, a Par asbestos handler, was doing at the time of the accident. He asserted that, "except the gravel, there was no holes or anything in the roof" where plaintiff was working. He testified that plaintiff was responsible for setting up his own ladder. When asked if Par had any regulations regarding setting up ladders on uneven surfaces, he maintained that it was his "understanding" that the gravel under the ladder would be removed prior to

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setting up the ladder. He further stated that "[y]ou're not supposed to set up a ladder, in my opinion, on an uneven surface". Notably, he asserted that it is not necessarily unsafe to set up a ladder on gravel surface, because "[e]very worker who knows how to put up the ladder knows he has to spread the ladder in order to put up the ladder". In addition, it is not necessary to direct the foreman on the job to remove the gravel, because "[t]hat is standard [OSHA] operating procedure". He could not state whether anyone from Par made sure that the gravel was removed from the accident area on the day of the accident.

Finally, Par's senior project manager testified that both the foreman and the supervisor told him that plaintiff was injured when he lost his balance and fell from the ladder, and that another Par supervisor prepared the accident report. He acknowledged that the accident report stated that plaintiff's accident occurred when plaintiff lost his balance and jumped to the ground, landing on an "uneven surface". Par's senior project manager explained that the words, "uneven surface," referred to the gravel.

In plaintiff's bill of particulars, plaintiff alleges that, as a result of his accident, he sustained a rupture of the right achilles tendon, cervical post traumatic myofascial pain, cervical post-traumatic myofascial pain and lumbar post traumatic myofascial pain. In addition, plaintiff claims that all of his

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injuries "are permanent and were accompanied by severe pain, swelling and ecchymosis with damage to surrounding soft tissues, nerves, tendons, muscles, ligaments and blood vessels, with permanent loss of use, function and motion".

The accident report, dated July 6, 2009, states that plaintiff, an asbestos handler, suffered injury when he "lost balance on the ladder" while removing "window caulking using a ladder and hand tools". The report also notes that plaintiff "lost balance" while "standing on the 4th step of the 6 [foot] ladder," and "jump[ed] down to the ground when landing on uneven surface he sprain right foot".

"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 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]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). 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]; Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

Initially, defendant and second third-party plaintiff East Coast is entitled to dismissal of the complaint, as well as all cross claims and counterclaims asserted against it (motion sequence number 003), on the ground that the testimony and documentary evidence in this case clearly establishes that East Coast had absolutely nothing to do with the asbestos abatement project going on at the premises on the day of the accident.

In fact, in his opposition papers, plaintiff concedes that the evidence in this case supports East Coast's motion, as witnesses from NYU, East Coast and Par all testified that East Coast was not involved in any way with the asbestos removal work, which was exclusively performed by Par. In addition, NYU's project manager, Conway, testified that East Coast did "[n]othing" on the asbestos abatement project. Rather, NYU hired East Coast to work on a different project, which entailed inspecting the façade of the building. Kochanoski of Par also testified that East Coast had nothing to do with the asbestos abatement project.

Thus, East Coast is entitled to dismissal of the complaint and any cross claims or counterclaims asserted against it. Accordingly, plaintiff is not entitled to summary judgment in his

favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against East Coast.

Plaintiff cross-moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant NYU. NYU cross-moves for dismissal of the Labor Law § 240 (1) claim against it. Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), 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."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure

to use, or the inadequacy of, a safety device of the kind enumerated therein"

(Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]; Makarius v Port Auth. of N.Y. & N.J., 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; Hill v Stahl, 49 AD3d 438, 442 [1st Dept 2008]; Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe Coll., 12 AD3d 261, 262 [1st Dept 2004]).

Initially, NYU argues that, as plaintiff testified that the ladder has not been shown by plaintiff to be defective, plaintiff is not entitled to judgment in his favor. However, plaintiff is not required to demonstrate that the ladder was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (Orellano v 29 E. 37th St. Realty Corp., 292 AD2d 289, 291 [1st Dept 2002]; McCarthy v Turner Constr., Inc., 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained

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injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]; Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173, 174 [1st Dept 2004]).

Importantly, plaintiff was caused to lose his balance and fall, not because the ladder was defective, but because the ladder was not the proper safety device for the job at hand. As such, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against NYU. "[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (Nimirovski v Vornado Realty Trust Co., 29 AD3d 762, 762 [2d Dept 2006], quoting Conway v New York State Teachers' Retirement Sys., 141 AD2d 957, 958-959 [3d Dept 1988]; Lightfoot v State of New York, 245 AD2d 488, 489 [2d Dept 1997]; Pritchard v Murray Walter, Inc., 157 AD2d 1012, 1013 [3d Dept 1990]).

Under the facts of this case, it was foreseeable that plaintiff, an asbestos handler in the process of pulling at molding, while using both hands and a crow bar, might lose his balance and fall during the performance of his work, as he was

totally reliant on the steadiness of his feet while on the ladder. As such, additional safety devices, such as a device with rails, such as a Baker scaffold, would have been more suitable for the job at hand to prevent him from falling (see Ortega v City of New York, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; Nimirovski v Vornado Realty Trust Co., 29 AD3d at 762-763 [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]; Bush v Goodyear Tire & Rubber Co., 9 AD3d 252, 253 [1st Dept 2004]; Kollbeck v 417 FS Realty, 4 AD3d 314, 314 [1st Dept 2004])).

In addition, plaintiff testified that "[t]he ladder moved, and it fell together with me". "'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (Montalvo v J. Petrocelli Constr., Inc., 8 AD3d at 174 [1st Dept

2004] [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting Kijak v 330 Madison Ave. Corp., 251 AD2d 152, 153 [1st Dept 1998]; Klein v City of New York, 89 NY2d 833, 835 [1996]; Hart v Turner Constr. Co., 30 AD3d 213, 214 [1st Dept 2006] [plaintiff met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (Quattrocchi v F.J. Sciame Constr. Corp., 44 AD3d 377, 381 [1st Dept 2007], quoting Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 289). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (Nelson v Ciba-Geigy, 268 AD2d 570, 572 [2d Dept 2000]; Peralta v American Tel. and Tel. Co., 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable

under Labor Law § 240 (1)]; Chlap v 43rd St.-Second Ave. Corp., 18 AD3d 598, 598 [2d Dept 2005]).

NYU asserts that it is not liable for plaintiff's injuries under Labor Law § 240 (1), because, as plaintiff was the one that set up his ladder on gravel, an uneven surface, plaintiff was the sole proximate cause of his injuries. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (Ball v Cascade Tissue Group-N.Y., Inc., 36 AD3d 1187, 1188 [3d Dept 2007]; Robinson v East Med. Ctr., LP, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]; Montgomery v Federal Express Corp., 4 NY3d 805, 806 [2005]; Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 290).

Here, it has not been sufficiently demonstrated that plaintiff's placement of the ladder on gravel was a cause of the accident. Rather, the evidence in the record indicates that

plaintiff's accident was caused as a result of him losing his balance when he pulled the molding off the window with a crowbar. At approximately the same time, the ladder moved. In fact, plaintiff never attributes his fall to the placement of the ladder on an uneven surface. For example, when asked whether the surface where he set up the ladder was level, plaintiff replied, "I placed it on the best place". Plaintiff also testified that, while working on the ladder prior to losing his balance, the ladder felt stable. Moreover, Kochanowski testified that setting up an A-frame ladder on gravel is not necessarily unsafe, because "[e]very worker who knows how to put up the ladder knows he has to spread the ladder in order to put up the ladder".

In any event, as plaintiff was not provided with a proper device for the job at hand in the first place, plaintiff's placement of the ladder on gravel would go to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Velasco v Green-Wood Cemetery, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a

statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (Hernandez v Bethel United Methodist Church of N.Y., 49 AD3d 251, 253 [1st Dept 2008], quoting Blake v Neighborhood Hous. Servs. of N.Y., 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]; see Ranieri v Holt Constr. Corp., 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; Lopez v Melidis, 31 AD3d 351, 351 [1st Dept 2006]; Torres v Monroe Coll., 12 AD3d at 262 [Court noted that even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]).

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Further, defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (see Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288 [1st Dept 2008]; Olszewski v Park Terrace Gardens, 306 AD2d 128, 128-129 [1st Dept 2003]; Morrison v City of New York, 306 AD2d 86, 87 [1st Dept 2003]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]; Sanango v 200 E. 16th St. Hous. Corp., 290 AD2d 228, 228-229 [1st Dept 2002]).

In addition, defendants did not offer any evidence, other than mere speculation, to refute plaintiff's showing or to raise a bona fide issue as to how the accident occurred (see Pineda v Kechek Realty Corp., 285 AD2d 496, 497 [2d Dept 2001]; Hauff v CLXXXII Via Magna Corp., 118 AD2d 485, 486 [1st Dept 1986]). In any event, "[a] lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause" (Vergara v SS 133 West 21, LLC, 21 AD3d 279, 280 [1st Dept 2005] [where either defective or inadequate protective devices constituted the proximate cause of plaintiff's accident, it did not matter whether plaintiff's fall was the result of the scaffold tipping over or was whether it was the result of plaintiff misstepping off its side]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a

height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006]).

"As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (John v Baharestani, 281 AD2d at 117, quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against NYU. Accordingly, NYU is not entitled to dismissal of the Labor Law § 240 (1) claim against it.

Plaintiff cross-moves for partial summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendant NYU. NYU cross-moves for dismissal of the Labor Law § 241 (6) claim against it. Labor Law § 241 (6) provides, in pertinent part, as follows:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed,

shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.21 (b) (4) (ii) and (e) (3), plaintiff does not address these alleged Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (see Genovese v Gambino, 309 AD2d at 833; Musillo v Marist College, 306 AD2d 782, 784 n [3d Dept 2003]). As such, NYU is entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those provisions.

Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) requires that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." Initially, it should be noted that Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) is sufficiently specific to support a Labor Law § 241 (6) claim (see Sprague v Peckham Materials Corp., 240 AD2d 392, 394 [2d Dept 1997]).

While plaintiff makes the argument that a violation of section 23-1.21 (b) (4) (ii) occurred because the surface that the ladder was set up on was uneven due to the presence of gravel, plaintiff puts forth no argument or evidence whatsoever to establish that the placement of the ladder was the proximate cause of the accident. In fact, as noted previously, plaintiff testified that the accident was actually caused when he was lost his balance while pulling the molding from the window with a crowbar. In addition, although plaintiff testified that he felt the ladder move just prior to the fall, plaintiff's testimony offered no indication that the ladder moved because of its placement on gravel.

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-1.21 (b) (4) (ii). Accordingly, NYU is entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-1.21 (e) (3), which applies to "[s]tepladder footing," is also sufficiently specific to support a Labor Law § 241 (6) claim (see Schroeder v Kalenak Painting & Paperhanging, Inc., 27 AD3d 1097, 1099 [4th Dept 2006], *affd* 7 NY3d 797 [2006]). Section 23-1.21 (e) (3) requires:

"Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means."

As previously discussed, while plaintiff asserts that the ladder was set up on gravel, which he alleges is not a firm, level footing, he fails to offer any argument or evidence to establish that this surface condition was a proximate cause of the accident. In addition, while plaintiff argues that this section applies to the facts of this case, because plaintiff was working at a height of between six and 10 feet, in fact, plaintiff clearly testified that his accident occurred while he was working on the fourth step of the ladder, and only approximately four feet from the ground.

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-1.21 (e) (3). Accordingly, NYU is entitled to dismissal of the same.

NYU cross-moves for summary judgment in its favor on the third-party claims for contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance as against Par. Par cross-moves for summary judgment dismissing NYU's third-party complaint and East Coast's second third-party complaint against it, pursuant to Workers' Compensation Law § 11.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotations and citations omitted]" (Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 61 [2d Dept 2003]).

"To establish a claim for common-law indemnification, 'the one 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 causation of the accident'" (Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; Priestly v Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (Chapel v Mitchell, 84 NY2d 345, 347 [1994]).

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Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

"For purposes of this section, the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall 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."

To that effect, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (Rubeis v Aqua Club, Inc., 3 NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (Way v Grantling, 289 AD2d 790, 793 [3d Dept 2001]).

Initially, it should be noted that, as the complaint, as well as all cross claims and/or counterclaims against East Coast have been dismissed, East Coast's second third-party claims against Par are now moot. Thus, Par is entitled to dismissal of East Coast's second third-party complaint against it.¹

As to NYU's third-party claims against Par for contribution and common-law indemnification, it is undisputed that plaintiff was Par's employee on the date of the accident, and there have been no allegations to the effect that plaintiff sustained a "grave injury," as defined by Workers' Compensation Law § 11. Thus, pursuant to Workers' Compensation Law § 11, Par is entitled to dismissal of NYU's third-party claims against it sounding in contribution and common-law indemnification. Accordingly, NYU is not entitled to summary judgment in its favor on its third-party claims against Par to that extent.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied

¹ A review of plaintiff's bill of particulars reveals that plaintiff did not sustain a grave injury. As, in addition, no relevant contract existed between East Coast and Par that required Par to indemnify or procure insurance for East Coast, pursuant to Workers' Compensation Law § 11, Par is entitled to dismissal of East Coast's second third-party complaint against it, in any event (see *Guijarro v V.R.H. Constr. Corp.*, 290 AD2d 485, 486 [2d Dept 2002] [summary judgment dismissing the third party complaint granted, pursuant to Workers' Compensation Law § 11, where there was no evidence that plaintiff sustained a grave injury, and where there was no written contract between the parties for indemnification]).

from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]; see Torres v Morse Diesel Intl., Inc., 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" [citation omitted]" (De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 [1st Dept 2003]; Keena v Gucci Shops, 300 AD2d 82, 82 [1st Dept 2002])).

"Even in the absence of a grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (Mentesana v Bernard Janowitz Constr. Corp., 36 AD3d 769, 771 [2d Dept 2007]). Therefore, with respect to NYU's third-party claim for contractual indemnification and breach of contract for failure to procure insurance against Par, it must be determined as to whether the parties entered into a written agreement with each other which required Par to indemnify and procure insurance (Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427, 431-432 [2005]; Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 365 [2005]).

NYU hired Par to perform the asbestos abatement work at the premises, pursuant to the NYU/Par purchase order, dated June 17, 2009 (purchase order). While no indemnification provision or requirement to procure insurance appears on its face, the NYU/Par purchase order does contain the following language, "This order is governed by the terms and conditions on our website". The NYU/Par purchase order also notes the terms and conditions referred to on the purchase order can be found at "www.nyu.edu/purchasing services/register".

According to the affidavit of NYU's risk manager, the terms and conditions which appeared on NYU's website at the time of the execution of the NYU/Par purchase order (the terms and conditions) contained an insurance procurement provision requiring Par to provide additional insured coverage to NYU for its work in connection with the asbestos abatement project. Attached to his affidavit were such terms and conditions that also contained an indemnification provision, stating in pertinent part, as follows:

"[Par] shall assume entire responsibility and liability for any and all losses, damages or injuries of any kind or nature whatever . . . to all persons . . . caused by, resulting from, arising out of, or occurring in connection with the products purchased from [Par], the work and services provided by [Par]".

Initially, in opposition, Par argues that the subject indemnification provision is unenforceable, because it violates General Obligation Law § 5-322.1, in that it purports to

indemnify NYU for its own negligence and does not contain a "savings clause" (see Cabrera v Board of Educ. of City of N.Y., 33 AD3d 641, 643 [2d Dept 2006] [an indemnification clause that purports to indemnify a party for its own negligence is not void under General Obligations Law § 5-322.1 if it authorizes indemnification "to the fullest extent permitted by law"]).

However, as in the instant case, where there is no negligence on the part of the proposed indemnitee, that statute does not apply (see Brown v Two Exch. Plaza Partners, 76 NY2d 172, 177 [1990]). General Obligations Law § 5-322.1 "only prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, or had the authority to supervise, direct, or control the work that caused the injury" (Naranjo v Star Corrugated Box Co., Inc., 11 AD3d 436, 438 [2d Dept 2004] [citations omitted]).

In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d at 433; Tullino v Pyramid Cos., 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks

and citation omitted]" (Meabon v Town of Poland, 108 AD3d 1183, 1185 [4th Dept 2013]).

Par argues that as the purchase order itself does not contain an express agreement obligating Par to indemnify NYU and procure insurance on NYU's behalf, or does not explicitly refer to the indemnification and insurance procurement provisions contained in the terms and conditions, Par is not contractually obligated to indemnify NYU or obtain insurance on its behalf. It also argues that the presence of the terms and conditions on the NYU website does not constitute a written agreement and that the hard copy of the terms and conditions provided by NYU at the deposition of its vice president are dated two years after the date of the Purchase Order. Par urges that therefore there is no evidence that Par assented to such terms and conditions.

NYU counters that a review and consideration of all of the documents, including but not limited to Par's proposal dated April 28, 2009, which Par delivered to NYU, in addition to the purchase order, establish an agreement between it and Par under which Par agreed to provide indemnification and to procure insurance to cover such promise pursuant to the terms and conditions on NYU's website. NYU argues that, likewise, the course of conduct between the parties establishes the indemnification obligation on the part of Par.

This court agrees with NYU. As stated by the Court of Appeals in Flores v Lower East Side Service Center, 4 NY3d 363, 369-370 (2005)

...nothing in the language of [Workers' Compensation Law § 11] provides a basis for us to conclude that, in addition to requiring a written indemnification clause, the Legislature intended to deviate from the common-law rule that written documents can be enforced even if they are not signed.

the common-law rule- which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract- governs the validity of a written indemnification agreement.

The agreement between NYU and Par arose from a series of writings (see Crabtree v Elizabeth Arden Sales Corporation, 305 NY 48 [1953]) that establish the offer, acceptance of the offer, consideration and performance.

In addition, the course of conduct between the parties, i.e. the extrinsic evidence in the form of the practical construction which the parties themselves gave the agreement, establish that there was a meeting of the minds sufficient to give rise to an enforceable contract (see Land-Site Contracting Corp v Marine Midland Bank, N.A., 177 AD2d 413, 415 [1st Dept 1991]). Such course of conduct showed the intent of Par to abide by the terms and conditions that included the indemnification provision.

With respect to the series of writings, the e-mail communication dated April 28, 2009 from Par asking NYU about details of the project establishes that Par's proposal was in

response to and in compliance with the bid documents and bid form attached to the specifications supplied by NYU. NYU's e-mail response to Par's query established that such specifications, which included the terms and conditions, were discussed during the "walk through" by the prospective bidders of the project, including Par. Moreover, NYU's acceptance of Par's proposal specifically stated that it was subject to "Par Environmental Corporation executing a written contract containing our standard terms and conditions."

With respect to the ongoing course of dealing between NYU and Par during which Par performed the asbestos abatement project for NYU, by Notice dated June 17, 2009, sent to Par, NYU wrote "IT HAS COME TO OUR ATTENTION THAT YOUR INSURANCE COVERAGE HAS EXPIRED OR IS NON-COMPLIANT WITH NYU'S GENERAL TERMS AND CONDITIONS. PLEASE CONTACT THE NYU INSURANCE & RISK MGT OFFICE IMMEDIATELY". The Notice further stated "THIS ORDER IS GOVERNED BY THE TERMS AND CONDITIONS ON OUR WEBSITE" and "PURCHASE ORDER TERMS & CONDITIONS AT www.nyu.edu/purchasin.services/register.htm." As part of its post project submittal package dated August 14, 2009, Par delivered to NYU a copy of the certificate of insurance naming NYU as a additional insured. There is no dispute that Par purchased comprehensive general and umbrella liability insurance, with endorsements that name NYU as an additional insured for the

project at bar. As in Flores v Lower East Side Service Center, Inc, supra (4 NY3d 363, at 371), Par admitted that it was the asbestos abatement contractor on the project and the record at bar shows that Par acted in conformity with the terms and conditions set forth in NYU's website. Par submits no evidence that tends to refute the statement of NYU's risk manager that the terms and conditions that appeared on NYU's website at the time of the purchase order contained the indemnification provision in question.

Therefore, as the purchase order states that it is governed by the terms and conditions found on NYU's website, as the terms and conditions contain provisions regarding indemnification and insurance procurement in favor of NYU, and as Par performed the project in accordance with such terms and conditions, such indemnification provision is enforceable under Workers' Compensation Law § 11. Thus, Par is not entitled to dismissal of that part of NYU's third-party complaint which seeks contractual indemnification but NYU is entitled to summary judgment in its favor on that part of its cross motion that seeks contractual indemnification.

For the foregoing reasons, it is hereby

ORDERED that the cross motion of defendant/second third-party plaintiff East Coast Restoration & Consulting Corp. to dismiss the complaint is granted and the complaint is dismissed

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in its entirety as against such defendant/third-party plaintiff, and the cross motion of second third party defendant Par Environmental Corporation to the extent that it seeks to dismiss the second third-party complaint of East Coast Restoration & Consulting Corp. is granted as a matter of law and the second third party complaint is dismissed in its entirety as against such second third-party defendant, with costs and disbursements to such defendant/second third-party plaintiff and with costs and disbursements to such second third party defendant, respectively, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant/second third party plaintiff and in favor of such second third party defendant; and it is further

ORDERED that the cross motion of third party defendant Par Environmental Corporation to the extent that it seeks to dismiss the third party complaint of third party plaintiff New York University Medical Center Condominium is denied; and it is further

ORDERED that the defendant/third-party plaintiff New York University Medical Center Condominium's cross motion, pursuant to CPLR 3212, to the extent that it seeks summary judgment dismissing the Labor Law §241 (6) claim against it is granted, and this claim is dismissed against such defendant/third-party plaintiff; and it is further

ORDERED that the part of defendant/third-party plaintiff New York University Medical Center Condominium's cross motion, pursuant to CPLR 3212, for summary judgment in its favor on its complaint for indemnification against third party defendant Par Environmental Corporation is granted, and it is further

ORDERED that the part of the defendant/third-party plaintiff New York University Medical Center Condominium's cross motion to for an order to compel third party defendant Par Environmental Corporation to produce discovery and for an order to vacate the Note of Issue is denied as moot; and it is further

ORDERED that the part of plaintiff Krzysztof Bogdanowicz's cross motion for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant New York University Medical Center Condominium is granted, and the motion is otherwise denied; and it is further

ORDERED that the main action against the remaining defendant/third party plaintiff New York University Medical Center Condominium and the third party action against the third party defendant Par Environmental Corporation is severed and shall continue.

This is the decision and order of the court.

Dated: June 30, 2014

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

FILED

JUL 03 2014

COUNTY CLERK'S OFFICE
NEW YORK