

**Melito v ABS Partners Real Estate, LLC**

2014 NY Slip Op 32965(U)

November 19, 2014

Supreme Court, New York County

Docket Number: 152150/12

Judge: Joan M. Kenney

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8**

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NANCY J. MELITO, as administratrix of the Estate of  
ROBERT MELITO, deceased,

Index No: 152150/12

Plaintiff,

-against-

ABS PARTNERS REAL ESTATE, LLC, JLJ LLC,  
3738 WEST LLC, 3738 WEST COMPANY LIMITED  
PARTNERSHIP and 3738 LLC,

Defendants.

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ABS PARTNERS REAL ESTATE, LLC, JLJ LLC and  
3738 WEST LLC,

Third-Party Index  
No.: 590660/12

Third-Party Plaintiffs,

-against-

TRANSEL ELEVATOR AND ELECTRIC, INC.,  
Third-Party Defendant.

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**Kenney, J.:**

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

Plaintiff Nancy J. Melito brings this action to recover for the wrongful death of her husband, Robert Melito (decedent), an apprentice elevator mechanic, who was fatally injured on September 23, 2011, when he fell to the bottom of an elevator shaft while working at 230 West 38<sup>th</sup> Street, New York, New York (the premises).

In motion sequence number 002, defendants/third-party plaintiffs ABS Partners Real Estate, LLC (ABS Partners), JLJ LLC (JLJ), 3738 West LLC (3738 West) and 3738 West Company Limited Partnership (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1), 241 (6) and 241-a claims against them, as well as for summary judgment in their favor on the third-party claims for contractual and common-law indemnification against third-party defendant

Transel Elevator and Electric, Inc. (Transel).<sup>1</sup>

In motion sequence number 003, third-party defendant Transel moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it.

### **BACKGROUND**

On the day of the accident, defendants owned and managed the premises where the accident took place. Defendant ABS Partners was the managing agent, defendant JJJ was the fee owner and defendant 3738 West was the owner of the premises. A couple of days before the accident, decedent's employer, Transel, an elevator maintenance company, was called to the premises to investigate the cause of some burnt wires which had put the building's elevator 2 (the elevator) out of service. Over the next two days, decedent and his supervisor worked to identify the malfunction and repair the elevator, replacing wiring and engaging the elevator's controller, or computer, which was housed in the motor room located on the 18th floor of the premises. During their second day of work, it became necessary for decedent to go down to the 10<sup>th</sup> floor of the premises to manually move the elevator's car up and down for testing purposes, once his supervisor brought the car down to him. Decedent was later found dead in the elevator pit below the 10<sup>th</sup> floor.

#### *Deposition Testimony of Efrain Cardona (Decedent's Supervisor)*

Efrain Cardona testified that he was employed by Transel as a mechanic on the day of the accident, and that decedent was his apprentice. On the day before the accident, the two men were dispatched to the premises to work on the elevator. They were told by the building's superintendent that "[the elevator] was shut down, because the controller burnt down" (plaintiff's

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<sup>1</sup>Defendant 3738 LLC has not yet made an appearance in this action.

notice of motion, exhibit G, Cardona tr at 43). The two men proceeded to “[r]eplace most of the burnt wires, if not all; look throughout the controller and make sure there wasn’t anything else that [they] might have missed . . . [power] up the main line and [look] at the controller to see if anything would happen, like smoke” (*id.* at 50).

The next day, upon arriving at the premises, Cardona and decedent proceeded to the 10<sup>th</sup> floor of the building, where they reduced the opening of the elevator to less than one foot. At this time, the elevator door was held open by a spike located inside the elevator, and which was inserted into the saddle of the car. The two men then returned to the 18<sup>th</sup> floor to continue their repair work on the elevator’s controller.

Cardona explained that, as the elevator's brake lift was not working as it should, it became necessary to “bump [the elevator’s] car up or down” about a foot, in order to get the brake to lift (*id.* at 70). Eventually, it became necessary for Cardona “to see the brake engage and disengage in more than just a transitory fashion” (*id.* at 88). Cardona testified, “[Decedent] turned to me . . . and asked me why don’t I just run the car for you manually, instead of using the relays, and I felt it was safe enough to do that” (*id.* at 87-88). Cardona then instructed decedent to leave the motor room and go back down to the 10<sup>th</sup> floor where the men believed the elevator's car was located. After determining the location of the car, decedent was to radio the car location to Cardona, so that Cardona could maneuver the car until it was level with the 10<sup>th</sup> floor, “so [that decedent] could step right in [to it]” (*id.* at 88). Then, decedent and Cardona planned to test the elevator system by manually operating the car up and down.

Cardona testified that the only way to get down to the 10<sup>th</sup> floor from the 18<sup>th</sup> floor was by freight elevator. When Cardona did not immediately hear from decedent, he called the building’s

freight elevator operator looking for him. The elevator operator confirmed that he had, in fact, dropped decedent off on the vacant and unoccupied 10th floor. When Cardona went down to the 10<sup>th</sup> floor to continue looking for decedent, he noticed that the elevator door was open “no more than a foot” (*id.* at 99). Cardona did not see any elevator cables when he peered inside the elevator shaft, which meant that the car was above him. Eventually, he found decedent dead at the bottom of the elevator shaft, approximately 120 feet below the 10<sup>th</sup> floor.

Cardona maintained that there was no reason why decedent would have needed to access the elevator shaft in order to locate the car, as he simply could have observed whether the elevator’s cables were visible. Visible cables would have indicated that the car was located below the 10<sup>th</sup> floor. If they were not visible, the car was located above the 10<sup>th</sup> floor.

Cardona testified that, according to the Elevator Industry Field Employee’s Safety Handbook, which was issued to all new employees, fall protection was required when working at heights of six feet or more, and when working near openings greater than 12 inches. In that case, the worker was required to “call” for a safety line (*id.* at 21). Cardona also testified that he never instructed decedent to use a harness or any other fall protection in connection with the elevator repair work. Cardona further testified that, while Transel typically provides short and tall barricades for set up in front of open elevator shafts, to prevent Transel employees from falling into them, no barricades were in place at the accident location on the day of the accident.

*Deposition Testimony of Robert Hauth (Building Superintendent)*

Robert Hauth, the building superintendent on the day of the accident, described the premises as a 17-story commercial building with three passenger and two freight elevators. He explained that, pursuant to a maintenance contract, Transel employees were automatically

dispatched to the premises twice a month to perform elevator maintenance. However, if an elevator broke down, he would call Transel to come and fix it. Hauth was not aware of any problems associated with the elevator before the date of the accident.

Just a few days before the accident, Hauth called Transel to report some burnt wiring, which resulted in taking the elevator out of service. Transel then sent out two employees to perform the repair. Hauth found out about the accident when a call came over the building's radio system. When he arrived at the accident location, Hauth learned that decedent had fallen, landing in the elevator pit.

#### *ABS Partners' Incident Report*

In ABS Partners' incident report, dated September 26, 2011, Hauth reported that the accident occurred when

“[decedent] and an additional Transel employee (Irfan) were troubleshooting electrical wires that appeared to have a short circuit. As per Mr. Irfan, prior to the accident, the two employees were in radio/phone communication - with one employee located in the elevator motor room and the other employee on the presently vacant 10<sup>th</sup> floor”

(plaintiff's opposition, exhibit E, ABS Partners' incident report).

#### *Affidavit of Deborah Brooks (Transel's Accounts Receivable Specialist)*

In her affidavit, Deborah Brooks stated that she served as Transel's accounts receivable specialist on the day of the accident. As such, she was responsible for “reviewing Transel records, including accounting records, such as invoices and account ledgers” (Transel's notice of motion, exhibit N, Deborah Brooks affidavit). Citing to the account ledger (attached to her affidavit), she stated, “Based upon my review of the account ledger for the [premises], Transel issued an invoice on September 30, 2011 for the ‘repair [of] the burnt controller wires and troubleshoot on car #2,’

which occurred on or about September 22, 2011 and September 23, 2011, constituting ‘time and materials’ work that falls outside of the [Transel/ABS Partners elevator maintenance agreement]” (*id.*).

*Occupational Safety and Health Administration (OSHA) Report*

The OSHA report, issued to Transel on March 22, 2012, states, in pertinent part, as follows:

“The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to multi-story falls:

a) 10<sup>th</sup> floor Freight Elevator # 2:

On or about September 23, 2011

An employee fell thru shaft-way doors when preparing to enter and operate the elevator. Freight elevator doors were propped open while employees were performing maintenance on elevator”

(plaintiff’s opposition, exhibit H, OSHA report).

### DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). “If there is any doubt as to the existence of a triable fact,” the

motion for summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

***The Common-Law Negligence and Labor Law §§ 200, 241 (6) and 241-a Claims Against Defendants (motion sequence number 002)***

In her opposition papers, plaintiff does not oppose that part of defendants' motion seeking to dismiss the common-law negligence and Labor Law §§ 200, 241 (6) and 241-a claims against them. Thus, defendants are entitled to dismissal of said claims against them.

***Plaintiff's Labor Law § 240 (1) Claim Against Defendants (motion sequence number 002)***

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1<sup>st</sup> Dept 1983]), provides, in relevant part:

“[a]ll 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2004]).

Initially, the crux of this case involves the issue of whether the work that decedent was performing at the time of the accident was a repair, which is covered by Labor Law § 240 (1), or routine maintenance, which is not. Defendants argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because decedent was performing maintenance work on the elevator at the time of the accident.

To fall within the special protections afforded by Labor Law § 240 (1), a worker must have been engaged in one of the statute’s enumerated activities at the time of the accident (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880-881 [2003]). Labor Law § 240 (1) expressly applies not only to “construction,” but also to “repairing.” “Although repairing is among the enumerated activities, [courts] have distinguished this from ‘routine maintenance,’” which falls outside the purview of the statute (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003] [citation omitted]; *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]; *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d at 882). The focus of the inquiry is on the

“type of work the plaintiff was performing at the time of injury” (*Panek v County of Albany*, 99 NY2d 452, 457 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]).

As set forth in a recent First Department case, *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.* (118 AD3d 524, 526-527 [1<sup>st</sup> Dept 2014]):

“In distinguishing between what constitutes repair as opposed to routine maintenance, courts will consider such factors as ‘whether the work in question was occasioned by an isolated event as opposed to a recurring condition’ (*Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1<sup>st</sup> Dept 2013]; whether the object being replaced was ‘a worn-out component’ in something that was otherwise ‘operable’ (*Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 697 [2d Dept 2012]; and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement (*Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511, 512 [1<sup>st</sup> Dept 2012]).”

Initially, a review of the testimonial evidence in this case indicates that the work in question was caused by an isolated event, and not a recurring condition (*see Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d at 607-608 [where the plaintiff was called upon to address a flooding condition that was causing vaporous conditions, the Court held that the plaintiff’s work was “far from routine,” and thus, was repair work for the purposes of the statute]). Here, Cardona specifically testified that “[the elevator] was shut down, because the controller burnt down” (plaintiff’s notice of motion, exhibit G, Cardona tr at 43). As such, the men were not replacing a worn out or loose component part, but rather, they were repairing fire damage to the elevator controller’s wiring (*see Piccione v 1165 Park Ave., Inc.*, 258 AD2d 357, 358 [1<sup>st</sup> Dept 1999] [replacing the ballast and sockets of a fluorescent light fixture and disconnecting, stripping, and reconnecting the wires constitutes “repairing” within the meaning of the statute]; *Benfanti v Tri-Main Dev.*, 231 AD2d 855, 855 [4<sup>th</sup> Dept 1996] [removal of a part of a drain pipe for the

purpose of unclogging and repairing it constituted repair work]; *compare Esposito v New York Indus. Dev. Agency*, 1 NY3d at 528 [work constituted routine maintenance, rather than repair work, where the work “involved replacing components that require replacement in the course of normal wear and tear”]).

Moreover, the courts have held that, “[w]here a person is investigating a malfunction . . . , efforts in furtherance of that investigation are protected activities” (*Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728-1729 [4<sup>th</sup> Dept 2010], quoting *Short v Durez Div.-Hooker Chems. & Plastic Corp.*, 280 AD2d 972, 973 [4<sup>th</sup> Dept 2001]; *Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 202 [1<sup>st</sup> Dept 2002] [where the plaintiff’s work involved climbing a water tank in response to an alarm indicating something wrong with a repair, the Court held that “(i)nspection of an integral part of a building in furtherance of repairing an apparent malfunction (was) . . . within the scope of . . . (Labor Law § 240 [1])”). At the time of the accident, decedent and his supervisor were “troubleshooting” the cause of the elevator’s malfunction, as they worked to repair it (plaintiff’s opposition, exhibit E, ABS Partners’ incident report).

Finally, this is not a situation where the device or component that was being fixed or replaced was intended to have a limited life span or required periodic adjustment or replacement (*see Soriano v St. Mary’s Indian Orthodox Church of Rockland, Inc.*, (118 AD3d at 525, 527 [replacement of glass panels of a skylight in a church steeple constituted repair work for the purposes of Labor Law § 240 (1), because the panels were not expected to be regularly replaced due to normal wear and tear]). Thus, as the work that decedent was performing at the time of the accident constituted repair work, his work falls within the purview of Labor Law § 240 (1).

Defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) cause

of action, because decedent was the sole proximate cause of his accident. In support of this argument, defendants put forth Cardona's testimony, wherein he alleges that there was no reason for decedent to enter the shaft in order to locate the position of the elevator's car. "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21<sup>st</sup> St.*, 201 AD2d 353, 354 [1<sup>st</sup> Dept 1994]). "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, as there are no witnesses to the accident, it is unclear as to whether any negligence on the part of decedent proximately caused the accident. In any event, however, defendants' argument goes 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 [1<sup>st</sup> Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]; *Klein v City of New York*, 222 AD2d at 352).

“[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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2002]; see *Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1<sup>st</sup> 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 [1<sup>st</sup> 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]; *Velasco v Green-Wood Cemetery*, 8 AD3d at 89 [“(p)laintiff’s use of the ladder without his coworker present amounted, at most, to comparative negligence”]).

In addition, 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 [1<sup>st</sup> Dept 2008]; *Olszewski v Park*

*Terrace Gardens*, 306 AD2d 128, 128-129 [1<sup>st</sup> Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 87 [1<sup>st</sup> Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1<sup>st</sup> Dept 2002]; *Sanango v 200 E. 16<sup>th</sup> St. Hous. Corp.*, 290 AD2d 228, 228-229 [1<sup>st</sup> Dept 2002]). Here, there is no evidence in the record to indicate that decedent was given any specific instruction to use a harness or a safety line, nor was he ever offered any other safety devices which he refused to utilize.

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).

Having found defendants’ remaining arguments in support of their motion to be without merit, we find that defendants are not entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action against them.

***Defendants’ Third-Party Claims For Common-Law and Contractual Indemnification Against Transel (motion sequence numbers 002 and 003)***

Defendants move for summary judgment in their favor on the third-party common-law and contractual indemnification claims against Transel. Transel moves for dismissal of the same. On the day of the accident, decedent was employed by Transel. Therefore, Workers’ Compensation Law section 11 is relevant to the issue of whether Transel, as decedent’s employer, owes

common-law and contractual indemnification to defendants. Section 11 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 . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

#### *The Common-Law Indemnification Claim*

“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 [1<sup>st</sup> Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1<sup>st</sup> 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)).

In addition, “[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, as decedent died as a result of the accident, decedent suffered a grave injury as defined in the statute. Accordingly, defendants may be entitled to common-law indemnification from Transel if they can establish that no negligence on their part proximately cause decedent’s death. That said, defendants were negligent in not placing a barrier or barricade in front of the elevator shaft, and in not providing decedent with proper fall protection, so as to protect him from falling down the shaft as he investigated the location of the elevator car. In addition, said negligence proximately caused the accident to occur.

Thus, defendants are not entitled to summary judgment in their favor on the third-party common-law negligence claim against Transel. Accordingly, Transel is entitled to dismissal of this third-party claim against it.

#### *The Contractual Indemnification Claim*

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied 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 *Tonking v Port Auth. of N.J. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1<sup>st</sup> Dept 2002]).

*Transel’s Elevator Maintenance Agreement With ABS Partners*

In the elevator maintenance agreement between Transel and ABS Partners, dated June 26, 2007 (the elevator maintenance agreement), Transel agreed to “regularly and systematically adjust and lubricate as required, components including the following: Machine . . . Motor . . . Brake . . . Controller . . . Selector . . . Wiring . . . Hoistway . . . Car . . . Signals . . .” (plaintiff’s opposition, exhibit C, the elevator maintenance agreement, at 2-3).

In addition, the elevator maintenance agreement contains an indemnification provision which states, in pertinent part, as follows:

“nothing in [the elevator maintenance agreement] shall be construed to mean that [Transel] assumes any liability because of accidents to persons or property, except those directly due to negligence by [Transel] or its employees . . . [Transel] shall not be responsible or liable for any loss . . . caused by strikes . . . fire explosion . . . act of God, or by any cause beyond its reasonable control . . . [Transel] will be responsible only for the work, service and liability specifically mentioned in this proposal” (*id.* at 3).

*The Indemnification Provision Contained in the Transel/ABS Partners Insurance Agreement*

Subsequent to executing the elevator maintenance agreement, Transel and ABS Partners executed a separate two-page agreement, dated April 11, 2008, entitled “Contractors Insurance Requirements” (the insurance agreement) (Transel’s notice of motion, exhibit M, the insurance agreement). The insurance agreement set forth that “[Transel] and its subcontractors shall not commence work until it has obtained all insurance referred to herein . . . and has been approved by 3738 West LLC” (*id.*). Notably, the insurance agreement also contains an indemnification

provision which states, in pertinent part, as follows:

“[Transel] shall, to the fullest extent permitted by law . . . indemnify and hold Owner harmless from . . . all claims . . . resulting from injury and/or death . . . arising out of any negligent . . . act or omission . . . in connection with the operations of [Transel] or its subcontractors. The foregoing shall indemnify and include injury or death of any employee of [Transel] . . . and shall not be limited in any way by an amount or type of damages . . . payable under . . . Workers’ Compensation, Disability Benefits or other similar employee benefits” (*id.*)

Transel argues that it is entitled to dismissal of the third-party claim for contractual indemnification against it, because the “repair” work that decedent was performing at the time of the accident fell outside the scope of the elevator maintenance agreement, which does not include the repair of burnt controller wires. As such, no valid indemnification agreement was in effect at the time of the accident with respect to the work that decedent was performing. In support of this notion, Transel puts forth the affidavit of Brooks, Transel’s accounts receivable specialist, wherein she maintains that, based upon what is recorded in the account ledger for the premises, Transel issued a separate invoice for the subject repair work, and that the repair work fell outside the scope of the elevator maintenance agreement.

However, while it is true that decedent’s work may have fallen outside the scope of the elevator maintenance agreement (and its indemnification provision), a question of fact exists as to whether decedent’s work also fell outside the scope of the insurance agreement between the parties (and its indemnification provision). To that effect, the insurance agreement does not refer to the elevator maintenance agreement, nor does it contain a definition of the term “work.” It is possible that the insurance agreement covered all work performed by Transel for defendants, i.e., both maintenance work and repair work.

Further, in the event that the indemnification provision contained in the insurance

agreement is intended to cover Transel's repair work, as well as Transel's maintenance work, at least a question of fact exists as to whether any negligence on the part of decedent proximately caused the accident. As there were no witnesses to the accident, the events leading up to the causation of the accident are murky. In addition, Cardona testified that there was no reason for decedent to enter the shaft in order to locate the position of the elevator's car.

Thus, defendants are not entitled to summary judgment in their favor on the third-party contractual indemnification claim against Transel, and Transel is not entitled to dismissal of this third-party claim against it. We have considered defendants' remaining contentions in opposition and find them to be without merit. For the foregoing reasons, it is hereby


**ORDERED** that defendants/third-party plaintiffs ABS Partners Real Estate, LLC, JJJ LLC, 3738 West LLC and 3738 West Company Limited Partnership's (collectively, defendants) motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 241 (6) and 241-a claims against them is granted, and these claims are severed and dismissed as against these defendants, and the motion is otherwise denied; and it is further

**ORDERED** that the part of third-party defendant Transel's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the third-party claim for common-law indemnification is granted, and this third-party claim is severed and dismissed as to this third-party defendant, and the motion is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue.

DATED: November 19, 2014

ENTER:

  
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J.S.C.  
**JOAN M. KENNEY**  
J.S.C.