Bush v CNY Bldrs. LLC
2014 NY Slip Op 33627(U)
September 8, 2014
Supreme Court, New York County
Docket Number: 100750/12
Judge: Joan M. Kenney

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

FA 9/11/14 E

PRESENT: JOAN M. KENNEY J.S.C. PART 8
Justice

Index Number : 100750/2012
BUSH, CONNOR
vs.
CNY BUILDERS
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 100750/12
MOTION DATE 5/27/14
MOTION SEQ. NO. 005

The following papers, numbered 1 to 29, were read on this motion to/for sj motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1-26
Answering Affidavits — Exhibits ____ | No(s). 27-28
Replying Affidavits ____ | No(s). 29

Upon the foregoing papers, it is ordered that this motion is

FILED
SEP 11 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

RECEIVED
SEP 11 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: September 9, 2014

JOAN M. KENNEY, J.S.C.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK-PART 8

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CONNOR BUSH,

Plaintiff,

-against-

CNY BUILDERS LLC and GRANITE BROADWAY DEVELOPMENT LLC,

Defendants.

----------x

CNY BUILDERS LLC and GRANITE BROADWAY DEVELOPMENT LLC,

Third-Party Plaintiffs,

-against-

NAVILLUS TILE, INC. d/b/a NAVILLUS CONTRACTING,

Third-Party Defendant.

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DECISION & ORDER
Index No.: 100750/12

Third-Party Index No.: 590912/12

Kenney, J.:

Motion sequence numbers 003, 004 and 005 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a carpenter when he was hit on the head by a wooden beam while working at a construction site located at 1717 Broadway, New York, New York (the premises) on December 14, 2011.

In motion sequence number 003, plaintiff Connor Bush moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants/third-party plaintiffs CNY Builders LLC (CNY Builders) and Granite Broadway Development LLC (Granite) (together, defendants).

In motion sequence number 004, third-party defendant Navillus Tile, Inc. d/b/a Navillus Contracting (Navillus) moves, pursuant to CPLR 3212, for summary judgment dismissing defendants' third-party contribution and common-law indemnification claims against it.

In motion sequence number 005, defendants move, pursuant to CPLR 3212, for summary

judgment dismissing the complaint against them in its entirety, as well as granting summary judgment in their favor on the third-party claims for contractual and common-law indemnification against third-party defendant Navillus.

BACKGROUND

On the day of the accident, defendant/third-party plaintiff Granite was the owner of the premises where the accident occurred. Granite hired nonparty CNY Builders 1717, LLC (CNY Builders 1717) to serve as construction manager on a project at the premises which entailed the construction of a new building (the project). CNY Builders 1717 hired third-party defendant Navillus to serve as the sole superstructure contractor on the project. Plaintiff was employed by Navillus as a carpenter on the day of the accident. Defendant/third-party plaintiff CNY Builders was responsible for hiring the union laborers for the project.

Plaintiff's Deposition Testimony

Plaintiff testified that he was working at the premises as an employee of Navillus on the day of the accident. Plaintiff testified that his duties on the project included "setting up scaffolding, stripping the forms, setting up forms" (plaintiff's notice of motion, exhibit K, plaintiff's tr at 30). Plaintiff asserted that his work was supervised by either his Navillus supervisor, JP Sullivan, or his Navillus partner on the project. When asked if anyone else ever instructed him as to how to perform his work, plaintiff replied, "No" (*id.* at 49).

At the time of the accident, plaintiff, who was wearing a hard hat, was stripping forms on "the fourth floor, north wall" of the premises while in the proximity of about four or five other Navillus workers (*id.* at 67). Plaintiff described the forms as large boards with metal on the outside of them. He explained that these forms, used during the construction of the walls that

would eventually support the ceiling above, were used to hold the concrete in place after being poured.

Plaintiff testified that he has no personal recollection of how the accident occurred. He last recalls stripping the forms from the north wall, and then someone pouring water onto his head. However, after the incident, his supervisor, the shop steward and the site safety manager all told him that the accident occurred when a 3 by 4 foot piece of wood (the beam) fell from above and hit him on the head.

Plaintiff also testified that, prior to the time of the accident, he observed workers directly above him through "a gap, an opening" in the floor above him (the gap) (*id.* at 97). However, he did not observe them performing any work or throwing anything down through the gap. Plaintiff could not describe the dimensions of the gap.

Deposition Testimony of Jan Grimsland (Vice President of Risk Management for G-CNY Group)

Jan Grimsland testified that he is vice president of risk management and corporate safety for nonparty G-CNY Group. He explained that G-CNY Group is the parent company of CNY Builders. Grimsland's duties on the project included overseeing site safety for the company, which included monitoring fall protection, as well as worker safety around floor openings.

It should be noted that, during his deposition, Grimsland was, at first, confused as to whether he was being questioned about CNY Builders or CNY Builders 1717. Eventually, Grimsland stated affirmatively that CNY Builders 1717 served as construction manager and agent of the owner on the project, and that CNY Builders, which was not an agent of the owner, merely hired the union laborers on the project. Grimsland explained that CNY Builders 1717

entered into all the contracts between the owner and the trades on the project. In addition, CNY Builders 1717 hired an outside safety consultant, nonparty Certified Site Safety, to serve as a site safety manager for the project.

Grimsland testified that openings existed between the floors, "which would eventually become elevator shafts . . . to access the floor above" (plaintiff's notice of motion, exhibit L, Grimsland tr at 54). These elevator shaft openings were barricaded off with guardrails and mesh to prevent objects from falling through. Other than the elevator shafts, Grimsland did not believe that there were any other gaps or spaces between the floors.

Grimsland also testified that there was no form installation work or stripping of forms going on in the areas near the elevator shafts. He noted that the accident occurred near the north wall, which was approximately 20 feet away from the nearest elevator shaft. Grimsland also maintained that it was Navillus's responsibility to assure that the installation of shoring at the project was properly performed.

Deposition Testimony of John Kuefner (Navillus' Project Manager)

John Kuefner testified that he served as Navillus's project manager on the day of the accident. Navillus was hired as concrete, masonry and tile work subcontractor. During his deposition, Kuefner testified as to the process by which the building's floors were created. To that effect, Kuefner explained that each of the building's floors had a completely closed plywood deck with two openings for stairways. Guardrails were installed around these stairway openings. In addition, openings were made to accommodate elevator shafts. The elevator shaft openings were boarded over with the exception of a hole remaining to run up a ladder. Kuefner noted that, as the deck was whole and solid, with the exception of the aforementioned openings, it was not

possible for anything to fall from one floor to the other.

Kuefner further explained that the original shoring material, which was used to support the deck at the time of the initial concrete pour, involved 16-foot-long wood ribs (the long ribs) located under sheets of plywood. Twenty-four to 48 hours after the concrete was poured, the long ribs and the plywood were stripped away. After this original shoring material was stripped away, reshoring was installed, which remained in place for nearly a month until the concrete floor was completely cured.

Kuefner testified that the installation of the reshoring consisted of placing smaller 3 by 4 foot pieces of wood (the 3 by 4s) on top of the shoring frames and then pinching them up tight to the concrete deck between two U plates. The 3 by 4s were then tightened up with screw jacks until snug to support the concrete deck while it cured. After the concrete deck was completely cured, the 3 by 4s, which were solely used for reshoring purposes, were eventually removed by loosening the screw jacks below them, grabbing them on one end, sliding them out and then dropping them to the floor. The 3 by 4s were then bundled together and eventually lifted to the next floor for use there.

Kuefner further testified that, at the time of the accident, plaintiff was working on the third floor of the building near the north wall, stripping the wall forms that were supporting the fourth floor. The ceiling above plaintiff had already been poured and the long ribs and the plywood had been removed. However, the reshoring was still in place. Importantly, Kuefner testified that no stripping work would have been ongoing on the actual fourth floor, because the concrete walls on that floor were still being poured. These concrete walls would eventually support the fifth floor ceiling.

Kuefner testified that there was one witness to the accident, Wentworth Manners, who told him that plaintiff was struck by the beam. However, Manners could not state as to where the beam originated. Kuefner also spoke to the Navillus site safety manager, Ed Curtis, who advised him that perhaps Manners dropped the beam, but he could not prove it.

Kuefner explained that protection from falling objects "comes down to a couple of things; one, there is personal protective equipment which [Navillus] provide[s]; his helmet, his glasses, et cetera . . . [and] if there's someone working going over your head, you shouldn't be within ten feet of that" (plaintiff's notice of motion, exhibit M, Kuefner tr at 21-22). When asked whether or not the Navillus workers were specifically told that they were not supposed to be within ten feet of someone working above them, Kuefner replied, "that would be in our handbook that they all sign" (*id.* at 22). Kuefner could not confirm whether or not said instruction was ever conveyed verbally to the Navillus workers.

The Affidavit of Wentworth Manners (Witness to the Accident)

In his affidavit, Wentworth Manners stated that, on the day of the accident, he was "working, at the same time, very close to" plaintiff (plaintiff's notice of motion, exhibit O, Wentworth aff). In addition, Wentworth stated:

> "While we were performing [the] work I saw Connor Bush get struck on the hard hat that he was wearing on his head by a wood rib of the approximate size of 3 feet by 4 feet (approximately four feet long). The wood rib that struck Connor Bush came from above his head. Connor Bush did not cause the wood to fall onto his hard hat. The wood rib that struck Connor Bush was not the same type of material or size of material that Connor Bush and I were stripping off the North Wall at the time of the accident" (*id.*).

The Accident Reports

In one of the Navillus incident reports, Wentworth Manners described the accident as

occurring when "a piece of lumber [approximately] 4' long" struck plaintiff's hard hat while plaintiff was stripping forms from the north wall (plaintiff's notice of motion, exhibit P, Navillus incident report). In another Navillus incident report, Ed Curtis, the site safety coordinator, described that accident as having occurred when "something from above struck [plaintiff] on his head . . .. When [plaintiff was] asked what it was he was not sure and it was unclear what hit him" (plaintiff's notice of motion, exhibit R, Navillus incident report).

In Certified Site Safety's accident investigation report, it is stated that the accident occurred when "[a] 3'x4' x4' wood rib fell from above" (plaintiff's notice of motion, exhibit Q, Certified Site Safety accident report).

In CNY Builders 1717's incident investigation report, the accident is described as having happened when plaintiff was struck in the head by a 3 by 4 foot wood rib while he was stripping forms from the north wall. The report also notes that the accident was witnessed by Manners.

Finally, in the Workers' Compensation Board's C-2 report, plaintiff's accident is alleged to have occurred when a 3 by 4 foot piece of wood struck plaintiff on top of his hard hat.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York 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], citing *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 (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiffs' Labor Law § 240 (1) Claim Against Defendants (motions 003 and 005)

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:

> "[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 [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, as the undisputed owner of the premises where the accident took place, defendant Granite may be held liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6). However, it must be determined as to whether defendant CNY Builders may also be liable under the Labor Law as a statutory agent of the owner.

"'When the work giving rise to [the duty to conform to the requirements of Labor Law § 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

A review of the evidence in this case reveals that CNY Builders did not have any authority to supervise and control the injury-producing work at issue, i.e., the installation of the beam, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law § 240 (1). As argued by defendants, CNY Builders was neither a general contractor or a construction manager on the project on the day of the accident. CNY Builders' only connection with the project was its responsibility for hiring the union laborers. In fact, the record is clear that Navillus workers were responsible for the performance of said work. Thus,

CNY Builders is entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. Therefore, the remainder of the decision will only address plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against defendant Granite.

As argued by plaintiff, liability under a falling object theory is not limited to objects in the process of being hoisted or secured at the time of the accident. Labor Law § 240 (1) also applies to objects which "'required securing for the purposes of the undertaking'" (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and not in the process of being hoisted or secured, at the time that it fell on the plaintiff (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008] [Labor Law § 240 (1) applicable where "[the plaintiff] was struck by falling planks that had been placed over open doors as a makeshift shelf"]; *Vargas v City of New York*, 59 AD3d 261, 261 [1st Dept 2009]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 421 [2d Dept 2006] [Labor Law § 240 (1) liability imposed where the steel beam that fell on plaintiff needed to be secured for the purposes of the undertaking]; *Orner v Port Auth. of N.Y. & N.Y.*, 293 AD2d 517, 518 [2d Dept 2002] [Labor Law § 240 (1) applicable where the plaintiff was injured when he was struck in the head by unsecured roofing material]).

The case of *Boyle v 42nd Street Dev. Project, Inc.* (38 AD3d 404, 405 [1st Dept 2007]) has further explained the law in this area. Citing *Outar*, the Court held that plaintiff's accident clearly fell within the purview of the statute inasmuch as plaintiff was struck by a falling object that had been inadequately secured. In that case, threaded rods, which were not in the process of being hoisted or secured at the time of the accident, fell from a height and injured plaintiff.

Similarly, in the instant case, it is of no import that the beam did not fall during the course of being hoisted or secured, because it should have been secured, like the rods in *Boyle*.

In addition, contrary to defendants' contention, plaintiff has properly shown that "the object fell '*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute'" (*Moncayo v Curtis Partition Corp.*, 106 AD3d at 964, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268). As explained by Kuefner, the installation of reshoring requires placing 3 by 4s on top of the shoring frames and then pinching them up tight to the concrete deck between two U plates. These 3 by 4s are then tightened up with screw jacks until snug to support the concrete deck while it cures. Therefore, the combination of U plates and screw jacks are intended to serve as safety devices to hold the 3 by 4s in place while the concrete cured. As these safety devices failed to keep the beam from falling and striking plaintiff, Labor Law § 240 (1) applies to the facts of this case. As noted by the Court in the case of *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 603 [2009]), "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

Further, although defendants argue that plaintiff is not entitled to judgment in his favor because plaintiff has not put forth direct evidence explaining how the beam fell, whether it was dropped or exactly where it came from, "[a] lack of certainty as to exactly what preceded plaintiff's [accident] does not create a material issue of fact here as to proximate cause" (*Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005] [where either defective or inadequate protective devices constituted the proximate cause of the plaintiff's accident, it did not matter whether the plaintiff's fall was the result of the scaffold tipping over or whether it was the result

of plaintiff misstepping off its side]; *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [where a wooden plank from an improvised scaffold fell and hit the plaintiff in the head, "the fact that plaintiff failed to point to a specific defect in the scaffold [did] not require denial of the motion]).

In a similar First Department case, *Mercado v Caithness Long Is. LLC* (104 AD3d 576, 577 [1st Dept 2013]), the evidence revealed that the plaintiff, a welder, was struck on the head by a pipe that fell through a gap in a toeboard, which had been installed near the top of a power plant's generator. In finding that Labor Law § 240 (1) applied to the facts of the case on a falling objects theory, the Court noted that it was "undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries" (*see also Humphrey v Park View Fifth Ave. Assocs. LLC*, 113 AD3d 558, 559 [1st Dept 2014] [where a worker was injured when an aluminum beam fell from above, struck a stringer that he was carrying and then knocked him to the ground, the worker did not have to establish where the beam fell from in order to recover under Labor Law § 240 (1)]).

Here, it is enough that plaintiff has adequately established, through circumstantial evidence, that while he was working at the site, the beam fell from an elevated height and struck him, causing him injury (*Rios v 474431 Assoc.*, 278 AD2d 399, 399 [2d Dept 2000] ["plaintiff established, through the use of circumstantial evidence, that . . . a piece of pipe fell from an elevated height, where a co-worker had been cutting pipes, and struck him in the face"]; *Cosgriff v Manshul Constr. Corp.*, 239 AD2d 312, 312 [2d Dept 1997] [recovery under Labor Law § 240

(1) where circumstantial evidence indicated that the plaintiff was struck in the head by an object which came from the roof of a building at the location where he was working, and that no safety devices were provided]).

Moreover, while defendants argue that plaintiff failed to meet his summary judgment burden, in that he failed to put forth an expert affidavit to demonstrate how the accident occurred, expert testimony is required only when the subject matter is "beyond the ken of the typical juror," or when the issues involved are of "such scientific or technical complexity as to require the explanation of an expert in order for the jury to comprehend them" (*Hendricks v Baksh*, 46 AD3d 259, 260 [1st Dept 2007]). Here, defendants have not sufficiently established that the subject matter and issues involved in the case are such that expert testimony is necessary.

Defendants also argue that Labor Law § 240 (1) does not apply here, because it is possible that the beam that struck plaintiff was deliberately dropped or thrown from above. Labor Law § 240 (1) is not applicable where the falling object is not of the type that should be secured, such as when the falling object is deliberately dropped or thrown, or falls as part of or incidental to the method of the work (*see Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002] [no Labor Law § 240 (1) protection where the plaintiff, an employee of an asbestos removal company, was injured when a piece of asbestos, which had been cut and deliberately dropped from above him, fell on him]; *Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14*, 286 AD2d 744, 745 [2d Dept 2011] [piece of wood that allegedly struck the plaintiff in the head was not a material in need of securing where it was allegedly thrown from the roof]; *Fried v Always Green, LLC*, 77 AD2d 788, 789 [2d Dept 2010] [no Labor Law § 240 (1) liability where the plaintiff was injured when a laborer tossed a bag of construction debris from the roof of the

building onto the plaintiff's head]; *Solano v City of New York*, 77 AD3d 571, 572 [1st Dept 2010]; *Harinarain v Walker*, 73 AD3d 701, 702 [2d Dept 2010] [no Labor Law § 240 (1) liability where the plaintiff was struck with a piece of plywood which was either thrown, or fell from, the hole in the roof]).

However, 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 fact, Kuefner testified that no stripping was even being done on the actual fourth floor on the day of the accident, as the workers were still pouring the concrete walls on the fourth floor which were to support the fifth floor. In addition, plaintiff testified that he did not observe any workers throwing anything above him. Therefore, there is no support for defendants' argument that the beam might have been deliberately dropped or thrown from above.

Defendants further argue that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because a question of fact exists as to whether 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]; *DeCoursey v Seven Hanover Assoc., LLC*, 39 AD3d 342, 343 [1st Dept 2007]).

Here, defendants argue that plaintiff caused the accident by improperly working underneath a work area. However, as noted previously, Kuefner testified that no stripping work

was being done on the floor above plaintiff's head on the day of the accident. He also testified that the concrete which comprised the floor above plaintiff's head had already been poured and the reshoring was already in place. As such, there was no particular reason for plaintiff to avoid the area. Thus, defendants are not entitled to dismissal of the Labor Law § 240 (1) claim on the theory that plaintiff was the sole proximate cause of his injuries.

In any event, plaintiff's alleged conduct in working beneath the subject area 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 [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 citation 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 other 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]).

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 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]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . 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 defendant Granite. Accordingly, Granite is not entitled to dismissal of the Labor Law § 240 (1) claim against it.

Plaintiff's Labor Law § 241 (6) Claim Against Defendant Granite (motion sequence numbers 003 and 005)

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.*).

In support of his motion, and in opposition to defendants' motion, plaintiff asserts generally that he is entitled to judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.7 (a) and 23-2.2 (a), (b) and (c) (1) and (3). However, plaintiff only puts forth arguments that defendants violated sections 23-1.7 (a) and 23-2.2 (a). As such, that part of plaintiff's Labor Law § 241 (6) claim predicated on alleged violations of sections 23-2.2 (b) and (c) (1) and (2) are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of

defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). Thus, plaintiff is not entitled to judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of these Industrial Code sections, and defendant Granite is entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-1.7 (a)

The provisions of 12 NYCRR 23-1.7 (a) (1) state, in pertinent part, as follows:

> (a) Overhead Hazards.
>
> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection.

Initially, the provisions of 12 NYCRR 23-1.7 (a) contain concrete specifications enough to satisfy Labor Law § 241 (6) (*Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]; *Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997]).

Here, the area near the north wall where plaintiff was working was located at least 20 feet from the nearest elevator shaft opening. In addition, testimony in the record demonstrates that no shoring, reshoring or stripping work was being performed on the floor above plaintiff's head at the time of the accident. Therefore, the area where plaintiff was working at the time of the accident was not of the kind that is normally exposed to the risk of falling material or objects for the purposes of Industrial Code section 23-1.7 (a) (*see Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2d Dept 2009] [the fact that two brackets had fallen from the building prior to the plaintiff's accident did not provide a basis for a finding that the accident site was "normally exposed" to falling objects]; *Buckley v Columbia Grammar and Preparatory*, 44

AD3d at 271] [section 23-1.7 (a) (1) did not apply where the elevator shaft worker was not normally exposed to the hazard of dislodged falling counterweights]).

Thus, plaintiff is not entitled to partial summary judgment in his favor as to liability on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (a) (1). In addition, Granite is entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-2.2 (a)

The provisions of 12 NYCRR 23- 2.2 (a) states, in pertinent part, as follows:

> 23-2.2 Concrete work
>
> (a) *General requirements.* Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.

Initially, that part of section 23-2.2 (a) that requires that "[f]orms, shores and reshores" must be "properly braced or tied together so as to maintain position and shape," is sufficiently specific to support a Labor Law § 241 (6) claim (*see Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2d Dept 2013]; *Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]).

Defendants argue that section 23-2.2 (a) does not apply to the facts of this case, because the concrete located above plaintiff's head had already been poured and partially dried, and, as such, all form work had been completed. However, contrary to defendants' contention, section 23-2.2 (a) applies to competed forms, as well as the uncompleted forms (*see Morris v Pavarini Constr.*, 98 AD3d 841, 843 [1st Dept 2012] *affd* 22 NY3d 668 [2014]; *Giordano v Forest City Ratner Cos.*, 43 AD3d 1106, 1108 [2d Dept 2007]).

Defendants also argue that section 23-2.2 (a) does not apply to the facts of this case, because there is no evidence to suggest that the beam was not properly installed. However, the

fact that the beam fell indicates that it was not "properly braced."

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-2.2 (a), and Granite is not entitled to dismissal of the same.

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims Against Defendants

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a

Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

It is well-settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, the accident was caused when the beam, which was only temporarily in place to supporting the concrete pour above it, and which was not adequately secured, fell and hit plaintiff

on the head. Thus, plaintiff was injured, not because of any inherently dangerous condition of the property itself, but rather, because of "'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; *see also Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 146 ["Since defendants could not control the activity that continuously produced the water, namely, the operation of the wet saw, they lacked any ability to correct the unsafe condition and thus were not liable under section 200 or for negligence (citation omitted)"]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010] [tripping hazard created by pin, which was stored on a wooden form and was to be inserted into a form to hold it together during a concrete pour, was created by the manner in which plaintiff's employer performed its work, rather than an unsafe premises condition]; *Dalanna v City of New York* (308 AD2d 400, 400 [1st Dept 2003] [protruding bolt was not a defect inherent in the property, but instead, its presence was the result of the manner in which the plaintiff's employer performed its work]). Therefore, in order to find defendants Granite and CNY Builders liable under Labor Law § 200, it must be shown that it exercised some supervisory control over the way that the beam was installed.

As explained previously, Navillus supervised, directed and controlled the injury-producing work, i.e., the installation of the beam. There is absolutely no evidence in the record to suggest that either Granite or CNY Builders had anything to do with this work. Thus, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

The Third-Party Claim for Contribution and Common-Law Indemnification Against Navillus (motion sequence numbers 004 and 005)

Third-party defendant Navillus moves for summary judgment dismissing defendants' third-party claims for contribution and common-law negligence against it. Defendants move for summary judgment in their favor on these claims against Navillus.

"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 quotation marks 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).

On the day of the accident, plaintiff was an employee of third-party defendant Navillus, acting within the scope of his employment. As such, section 11 of the Workers' Compensation Law is relevant to this case. 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."

Therefore, "[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]).

In plaintiff's bill of particulars, he alleges that, as a result of the accident, he sustained the following injuries, in pertinent part:

> Closed head trauma with traumatic brain injury and postconcussion syndrome;
> Neuropsychological impairment secondary to cerebral dysfunction;
> Right temporal lobe dysfunction;
> Diffuse Axonal Injury;
> Impaired learning, memory, attention, concentration, information processing and executive functions;
> Headaches;
> Dizziness;
> Nausea;
> Sensitivity to bright lights;
> Difficulty walking;
> Balance problems;
> Sleep disturbance;
> * * *
> Pain, swelling, discomfort and tenderness of the head

(plaintiff's notice of motion, exhibit A, bill of particulars). Plaintiff also alleges that, as a result of the accident, he "has been totally incapacitated from employment from the date of the subject

accident, December 14, 2011, to the present, and such is continuing" (*id.*).

Here, the only purported injury put forth by plaintiff, which could possibly be considered "grave" for the purposes of the workers' compensation law, is plaintiff's claim of traumatic brain injury. That said, a review of the evidence in this case reveals that plaintiff did not sustain a grave injury as required by workers' compensation law.

Initially, plaintiff testified that he intends to go back to work in the future, and that, since the time of the accident, he has been able to vacation overseas, as well as to attend weddings in Michigan and California. In addition, on July 18, 2013, plaintiff appeared before Dr. David M. Erlanger, a board certified clinical neuro-psychologist, retained by defendants, for an independent medical and neuro-psychological examination. Based upon his examination of plaintiff, as well as his review of plaintiff's medical records and reports, Dr. Erlanger opined that:

> "Within a reasonable degree of neuropsychological certainty, there is no valid and reliable evidence of cognitive impairment due to concussion, brain injury or post-concussion syndrome and there is valid and reliable evidence that Mr. Bush manufactured and exaggerated such symptoms"

(Navillus' notice of motion, exhibit W, Dr. Erlanger Report at 10). He also maintained that plaintiff is independent in daily living activities, and that there is "no basis to conclude that he is incapable of a return to full-time employment" (*id.* at 11).

On August 27, 2013, plaintiff appeared before Dr. William B. Head for an examination. Dr. Head reported that a CT of plaintiff's head, which was performed on December 14, 2011, revealed normal findings and no evidence of any brain injury. Dr. Head concluded that "there is no objective evidence of brain injury on neurological or psychiatric examination . . . [plaintiff's] neurological and psychiatric examinations are objectively normal" (Navillus's notice of motion,

exhibit S, Report of Dr. Head). Dr. Head also reported that plaintiff "should be able to carry on with his usual and customary duties for work, as a carpenter, or in any other capacity for which he is trained without difficulty, from a neurological and psychiatric perspective" (*id.*).

On August 6, 2012, plaintiff appeared before psychiatrist Dr. Solomon Miskin for a workers' compensation examination. Dr. Miskin found that plaintiff required no work restrictions, with the exception of him not being a good candidate for safety-sensitive tasks due to evidence of "a mild partial temporary psychiatric disabiltiy" (Navillus' notice of motion, exhibit Y, Dr. Miskin's report).

Thus, third-party defendant Navillus is entitled to summary judgment dismissing the third-party claims for contribution and common-law indemnification against it. Accordingly, defendants are not entitled to summary judgment in their favor on these third-party claims.

The Third-Party Claim for Contractual Indemnification Against Navillus (motion sequence number 005)

Defendants move for summary judgment in their favor on the third-party claim for contractual indemnification against third-party defendant Navillus. "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 [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 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]; *Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). 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]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]). As such, with respect to defendants' third-party claims against Navillus, it must be determined as to whether a clear and unambiguous written agreement exists between the parties which requires Navillus to indemnify defendants and to 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]).

Additional Facts Relevant To The Issue of Whether Navillus Owes Defendants Contractual Indemnification

On April 4, 2011, CNY Builders 1717 entered into a standard trade contract with Navillus (the contract). According to the contract, Navillus was to serve as the trade contractor for the

performance of the superstructure concrete work on the project. The contract contains an indemnity provision that states, in pertinent part, as follows:

> 16.02 To the fullest extent permitted by law . . . [Navillus] shall defend . . . indemnify and hold harmless Construction Manager and Owner along with their officers, directors, shareholders . . . agents . . . from and against all claims, demands, causes of action, damages, penalties, costs, expenses, attorney's fees . . . arising out of, or in any way connected with or incidental to, the damage, loss and/or Injury to the Work and/or materials contemplated in Article 4.17

(plaintiff's notice of motion, exhibit H, CNY Builders 1717/Navillus contract at 33).

Here, the language of the contract's indemnification provision clearly states that Navillus must defend and indemnify defendants for claims arising out of their work. As such, proof of negligence on the part of Navillus need not be shown in order to trigger the provision. As the injury at issue in this case arose from the work of Navillus, defendants are entitled to contractual indemnification from Navillus.

The Third-Party Claim Against Navillus For Failure to Procure Insurance (motion sequence numbers 005)

Defendants also move for summary judgment in their favor on the third-party claim for breach of contract against Navillus for failure to procure insurance. Initially, it should be noted that exhibit C to the contract contains an insurance procurement provision requiring that Navillus name defendants CNY Builders and Granite as additional insureds on their commercial general liability insurance policy on a primary non-contributory basis, with a limit of at least $1,000,000 each occurrence/$2,000,000 aggregate per project for bodily injury. In addition, the contract requires that Navillus provide umbrella coverage with limits of at least $50,000,000 each occurrence/$50,000,000 aggregate. Defendants argue that, to date, Navillus's excess carrier has failed to acknowledge the same. As such, they maintain that Navillus is in breach of the

contract's requirement that Navillus obtain excess insurance for the benefit of CNY Builders and Granite as additional insureds.

Here, as the contractual terms are clear and binding, Navillus is obligated to obtain excess insurance for the benefit of defendants. However, a review of the record reveals that a question of fact exists as to whether Navillus acquired said excess insurance, but the carrier failed to acknowledge coverage, or whether Navillus ever obtained such insurance in the first place. Thus, defendants are not entitled to judgment in their favor on the third-party breach of contract cause of action for failure to procure insurance claim against Navillus.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff Connor Bush's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-2.2 (a), against defendant/third-party plaintiff Granite Broadway Development LLC (Granite) is granted, and the motion is otherwise denied; and it is further

ORDERED that the motion of third-party defendant Navillus Tile, Inc. d/b/a Navillus Contracting (Navillus) (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing defendants' third-party contribution and common-law indemnification claims against it is granted, and these claims are severed and dismissed as against this third-party defendant; and it is further

ORDERED that the part of defendants/third-party plaintiffs CNY BUILDERS LLC

(CNY Builders) and Granite's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety as against CNY Builders is granted, and the action is dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the part of defendants/third-party plaintiff's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as the Labor Law § 241 (6) claim, with the exception of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-2.2 (a), as against Granite is granted, and these claims are severed and dismissed as against this defendant/third-party plaintiff; and it is further

ORDERED that the part of defendants/third-party plaintiff's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment in their favor on the third-party contractual indemnification claim as against third-party defendant Navillus is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue and the parties shall proceed to mediation/trial forthwith.

DATED: September 8, 2014

ENTER:

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