Pompa v Broadway & 67th St. Corp.

2014 NY Slip Op 33647(U)

October 21, 2014

Supreme Court, New York County

Docket Number: 107581/09

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 107581/2009

POMPA, PETER

vs

BROADWAY

Sequence Number : 004

SUMMARY JUDGMENT

PART 10

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: OCT 21 2014

____, J.S.C.
GEORGE J. SILVER

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 10

---X

PETER POMPA,

Plaintiff,

Index No. 107581/09

-against-

DECISION/ORDER

BROADWAY & 67TH STREET CORPORATION, SHAWMUT DESIGN AND CONSTRUCTION and INTERSTATE INDUSTRIAL CORP.,

Defendants.

---X

BROADWAY & 67th STREET CORPORATION and SHAWMUT DESIGN AND CONSTRUCTION,

Third-Party Plaintiffs,

T.P. Index No. 590360/10

-against-

BEAUCE-ATLAS, INC., INTERSTATE INDUSTRIAL CORP. and STONEBRIDGE STEEL ERECTION,

Third-Party Defendants.

FILED
OCT 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

BEAUCE-ATLAS, INC.,

Second Third-Party Plaintiff,

Second T.P Index No. 590863/10

-against-

STONEBRIDGE ERECTOR COMPANY,

Second Third-Party Defendant.

---X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmation, Affidavits & Exhibits Annexed	1, 2, 3
Answering Affirmation, Affidavit(s) & Exhibits	4, 5
Replying Affirmation, Affidavit(s) & Exhibits	6
Notice of Cross-Motion Affirmation, Affidavits & Exhibits Annexed	7, 8
Answering Affirmation, Affidavit(s) & Exhibits	9
Replying Affirmation, Affidavit(s) & Exhibits	10
Notice of Cross-Motion Affirmation, Affidavits & Exhibits Annexed, Memorandum of Law	11, 12, 13
Answering Affirmations & Exhibits Annexed	14, 15, 16
Replying Affirmation & Exhibits	17
Notice of Cross-Motion Affirmation, Affidavits & Exhibits Annexed, Memorandum of Law	18, 19, 20, 21, 22
Answering Affirmations	23, 24, 25, 26
Replying Affirmation	27

By Notice of Motion dated October 14, 2013 third-party/second third-party defendant Stonebridge Erector Company (Stonebridge) moves pursuant to CPLR § 3212 for an order granting it summary judgment dismissing the third-party complaint and cross-claims of defendants/ third-party plaintiffs Broadway & 67th Street Corporation (Broadway & 67th) and Shawmut Design and Construction (Shawmut) and the second third-party claim and all cross-claims of third-party defendant/second third-party plaintiff Beauce-Atlas, Inc. (Beauce-Atlas) and all cross-claims by defendant/third-party defendant Interstate Industrial Corp. (Interstate). By Notice of Cross-Motion dated December 16, 2013 Beauce-Atlas cross-moves pursuant to CPLR § 3212 for an order granting it summary judgment dismissing Broadway & 67th's and Shawmut's third-party complaint and all cross-claims and counterclaims against it, granting it summary judgment on its second third-party complaint against Stonebridge. By Notice of Cross-Motion dated December 20, 20103 plaintiff Peter Pompa (Plaintiff) cross-moves pursuant to CPLR § 3212 for an order granting him summary judgment against Broadway & 67th, Shawmut and Interstate on his Labor Law §§ 240 [1] and 241 [6] causes of action. By Notice of Cross-Motion dated December 20, 2013 Broadway & 67th and Shawmut cross-move pursuant to CPLR § 3212 for an order granting them summary judgment and dismissing plaintiff's verified complaint, dismissing all cross-claims, granting them summary judgment on their third-party complaint against Beauce-Atlas, Interstate and Stonebridge and dismissing all counterclaims against them.

Plaintiff testified at his examination before trial that he was employed by Stonebridge on March 10, 2009 as a journeyman iron worker. March 10, 2009 was the first date plaintiff was on the Apple Store job site. Plaintiff was given his instructions for the day on the morning of March 10, 2009 by Russell Huber (Huber), Stonebridge's general foreman. Plaintiff testified that on March 10, 2009 he did not speak with anyone associated with Shawmut, who plaintiff described as the general contractor at the job site, or the owner of the property, Broadway & 67th Street.

Plaintiff was working as a signal man and was responsible for sending signals to a crane operator through a cable phone. At approximately 9:30 a.m., after throwing the cable phone into the foundation pit, plaintiff climbed down an extension ladder into the foundation pit where steel was to be sent down. Plaintiff did not know who provided the ladder and no one directed him the use the ladder. The ladder was the only ladder coming out of the pit. Plaintiff did not place the ladder and did not witness anyone place it. Plaintiff testified that he felt the ladder shift while he was descending the ladder between the third or second rung from the bottom of the ladder. The ladder shifted to the right causing plaintiff let go of the ladder and lost his balance. Plaintiff's left knee came into contact with a mound of rocks located below the ladder. According to plaintiff, the ladder was tied off a rebar with a tie wire. Plaintiff's accident occurred the first time plaintiff used the ladder on March 10, 2009. Plaintiff was the first Stonebridge employee to use the ladder on the date of the accident. Plaintiff did not observe the mound of rocks or any other debris below the ladder prior to descending the ladder and did not notice or observe anything wrong with the ladder or the tie off. Plaintiff estimated the height of the mound of rocks to be approximately four-to- five feet. Plaintiff remained on the job following his accident and exited the pit by climbing up the same ladder. Plaintiff testified that he was not given tools, materials or equipment to use on the job site by anyone other than Stonebridge.

Jeffrey Wheeler (Wheeler), Shawmut's superintendent, testified that he was assigned to the Apple Store job site in March 2009 where Shawmut was acting as construction manager. According to Wheeler, Interstate, which was subcontracted by Shawmut as the excavation and foundation contractor, provided a ladder as the means of access into the foundation at the job site in March 2009. Interstate set up the ladder and laborers from Interstate were responsible for maintaining it in good working condition. Wheeler testified that the ladder was a fiberglass extension ladder and that the ladder was used throughout February and March 2009. The ladder was secured by a tie wire. A two-by-four was nailed into the concrete at the bottom of the ladder to prevent the ladder from slipping away from the foundation wall. The ladder did not change position from the first day Wheeler came onto the job site until the job site was turned over to Apple. Interstate was still in the process of removing rock, dirt and other material from the foundation in March 2009. Stonebridge workers were never instructed not to use the ladder to access the foundation. As part of Interstate's excavation process, rock piles were created at the job site. Wheeler did not make any complaints to Interstate about rock piles being stored near the access ladder to the foundation. Wheeler further testified that Beauce-Atlas was hired by Shawmut as the steel fabricator and Beauce-Atlas' subcontracted the steel installation work to Stonebridge. Beauce-Atlas delivered steel but did not perform any physical construction work at the job site.

Wheeler testified that Shawmut had overall site safety responsibility. Wheeler also testified that he had the authority to stop a subcontractor's work at the job site if it was being performed unsafely and if he had observed an unsafe condition with respect to the ladder he would have brought it to Interstate's attention. Shawmut issued a safety manual for the Apple Store project, a copy of which was kept on the job site. All of Shawmut's superintendents on the job site were responsible for job safety prior to and on the date of plaintiff's accident. Wheeler testified that if he observed a pile of rubble at the bottom of the subject ladder on March 10, 2009

he would have considered that a dangerous condition and would have noted the condition in a daily log and requested that it be corrected.

Wheeler did not witness plaintiff's accident but had a conversation with plaintiff on April 22, 2009 wherein plaintiff informed Wheeler that he had injured his one of his knees. Wheeler also testified that during the April 22, 2009 conversation plaintiff mentioned that the accident involved a ladder but Wheeler did not recall any specific details from plaintiff as to how the accident occurred. Wheeler testified that he did not instruct plaintiff how to perform his work.

Leonid Klevitsky (Klevitsky), Interstate's director of project management, testified that he was only on the Apple Store job site on one day several months after plaintiff's accident and was not the project manager for that job site, had no specific knowledge of Interstate providing access ladders to the foundation of the job site in March 2009. Klevitsky testified that, in general, Interstate provided access ladders for its trades from street level to the foundation of job sites where it was doing excavation and foundation work. Interstate was also responsible for inspecting and maintaining those ladders. Klevitsky further testified that as the excavation subcontractor, Interstate would be responsible for the removal of any rock that was generated at the Apple Store job site.

Brian Kellett (Kellett) testified on behalf of Stonebridge. Kellett was Stonebridge's general superintendent for the Apple Store project in 2009. Stonebridge was responsible for offloading and staging the steel at the job site pursuant to its subcontract with Beauce-Atlas and Stonebridge directed the work of its employees at the job site. Kellett testified that the ladder used by plaintiff on the date of his accident was provided and owned by Interstate. The ladder was the only means of accessing the foundation pit. According to Kellett, the extension ladder was physically in place at the job site when Stonebridge arrived and it was used by all employees, including plaintiff, on the job site. Stonebridge never moved the ladder in connection with the work its employees were performing.

Kellett further testified that he spoke with plaintiff regarding the accident after Kellett reviewed the accident report. According to Kellett, plaintiff stated that he was descending a ladder and when he stepped to the ground he twisted his knee on large, loose gravel. Plaintiff did not tell Kellett that the ladder became unstable or shifted in any way prior to his accident but did tell Kellett that the accident occurred when plaintiff was stepping off the ladder. Kellett recalled seeing loose rock or gravel in the vicinity of the bottom of the ladder and testified that on the date of plaintiff's accident he believed the bottom of the ladder was resting on the ground without a concrete block underneath it. No one from Stonebridge made any complaints to Kellett about the ladder.

Russell Huber (Huber) also testified on behalf of Stonebridge. Huber was a foreman for Stonebridge in March 2009 and acted in that capacity at the Apple Store project. As a foreman, Huber was plaintiff's supervisor. Plaintiff served as Stonebridge's steward at the Apple Store project. Huber testified plaintiff was injured during Stonebridge's walk-through of the job site on the first day Stonebridge was present there. According to Huber, Kellett descended the extension ladder into the foundation first. Huber then descended the ladder. Huber did not recall if the ladder was tied off in any way and did not recall seeing any markings on the ladder. Huber testified that he did not know who owned the ladder or who placed the ladder. Huber further testified that the ladder had been placed by another contractor working in the area and that he

recalled Interstate being the only contractor working at the job site during Stonebridge's walk-through. Huber could not recall if the ladder moved or shook while he was descending it. Huber also testified that the ground underneath the ladder was not level and that there were rocks and debris in the area. Huber did not recall Kellett warning him regarding the condition of the ground below the ladder and did not recall if he warned plaintiff. Huber testified both that he saw plaintiff step off the ladder and that he did not recall seeing plaintiff step off the ladder. Huber further testified he did not witness plaintiff's accident but heard plaintiff groaning and assisted plaintiff to his feet and back up the ladder. According to Huber, plaintiff had been in the foundation pit for approximately five to fifteen minutes when the accident occurred. Huber could not recall what distance away from the ladder plaintiff was when Huber heard plaintiff groan but testified that plaintiff was not far away from the ladder. Huber testified that he could not recall if plaintiff was attempting to ascend the ladder when the accident happened but testified "personally, I think he stumbled on something right before we got to the ladder, but I can't be definite."

Huber also testified that the requirements regarding ladders contained in Stonebridge's safety manual applied only to Stonebridge's ladders and equipment installed by Stonebridge, not to other contractors' equipment.

Dale Fajen (Fajen), Beauce-Atlas's field representative in the United States, testified on Beauce-Atlas' behalf. Fajen testified that as a field representative his general duties included the drafting of daily reports to Beauce-Atlas detailing the progress of steel erection at various job sites as well as whether there were any errors in the fabrication or delivery of the steel and any pro0belsm that arose with steel erectors. Fajen further testified that he was responsible for safety violations at job sites and had the authority to stop erectors' work in the event of a safety violation. With respect to the Apple Store project, Fajen testified that he was Beauce-Atlas's site supervisor. Beauce-Atlas was responsible for supplying fabricated steel for the project pursuant to the subcontract with Shawmut. Stonebridge was Beauce-Atlas's subcontractor and was responsible for the erection of the fabricated steel. Beauce-Atlas was responsible for delivering the fabricated steel and Stonebridge responsible for offloading. Fajen had no involvement in determining how the steel would be offloaded. Beauce-Atlas did not have a safety supervisor at the job site and Fajen did not attend any safety meetings at the job site. Beauce-Atlas did not provide any equipment or tools to Stonebridge and did not have a shanty at the job site. Fajen testified that of Stonebridge failed t comply with any safety practices at the Apple Store job site he had the authority to stop the job. Stonebridge was not required to inform Fajen if any of its workers were injured on the job but was required to inform Beauce-Atlas's project manager, Marc Generon. Fajen was not aware of plaintiff's accident and did not recall what role, if any, Interstate played at the Apple Store project. Fajen further testified that he was never made aware of any unsafe conditions at the job site regarding access into and out of the foundation pit.

Summary Judgment Standard

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to

judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Stonebridge's Motion for Summary Judgment

In support of its motion for summary judgment dismissing all claims and cross-claims for contractual indemnification Stonebridge argues that no party can establish an act or omission on Stonebridge's part caused or contributed to plaintiff's alleged accident. Specifically, Stonebridge contends that it that did not own, repair install or maintain the subject ladder, did not place or have notice that the subject ladder was placed in a dangerous position and did not have a duty with respect to the subject ladder.

"A party is entitled to full contractual indemnification provided the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances'" (*Torres v Morse Diesel Int'l, Inc.*, 14 AD3d 401 [1st Dept 2005] [internal citations omitted]). In the indemnification clause in its subcontract with Beauce-Atlas, Stonebridge agreed to defend, indemnify and hold harmless "Beauce-Atlas, the Owner, the General Contractor and/or the Construction Manager, and the Architect/ from and against all claims "arising out of, relative to, or resulting from the performance of the Work and/or

Subcontractor's [Stonebridge's] operations under this Agreement including but not limited to any claim, damage, loss or expense (1) attributable to bodily injury, sickness, disease or death or injury to or destruction of tangible property . . . (2) caused in whole or in part by any act or omission of the Subcontractor, any of its Trade Subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable . . . ." The subcontract does not require as a condition for indemnification that the act or omission by Stonebridge be negligent or wrongful. Thus, whether Stonebridge was negligent is irrelevant on the question of its liability for contractual indemnification (*Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019 [2d Dept 2011]; *Flynn v 835 6th Ave,. Master L.P.*, 107 AD3d 614 [1st Dept 2013]). Regardless whether plaintiff's accident occurred while plaintiff was descending the extension ladder to work in the foundation pit as a signal man or while plaintiff was walking in the foundation pit during Stonebridge's initial walk-through of the job site, it is apparent that plaintiff's accident arose out of Stonebridge's performance of the work called for in its sub-subcontract with Beauce-Atlas (*Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374 [1st Dept 2008]). However, the fact that plaintiff's accident arose out of Stonebridge's work is insufficient, by itself, to trigger the indemnification clause. In order for the indemnification clause to be triggered, plaintiff's accident must also have been "caused in whole or in part by any act or omission" of Stonebridge. It is undisputed that the ladder from which plaintiff allegedly fell was owned by Interstate, not Stonebridge. The ladder was placed in the location where plaintiff's accident occurred by Interstate, not Stonebridge, as a means of entering and exiting the foundation pit. Interstate's laborers were responsible for maintenance of the ladder (*cf. Keena v Gucci Shops*, 300 AD2d 82 [1st Dept 2002] [holding summary judgment was appropriate on an owner's cross-claim for contractual indemnification where a worker's injury occurred while he was walking on a plank supplied by a subcontractor]). Moreover, there is no evidence that Stonebridge had notice of any defective or unsafe condition associated with the ladder. Since plaintiff's accident did not arise out of the failure of Stonebridge or a party in its employ to provide plaintiff with an adequate safety device in conformance with the Labor Law, the indemnification clause in Stonebridge's subcontract with Beauce-Atlas is not triggered (*cf. Britez v Madison Park Owner, LLC*, 106 Ad3d 531 [1st Dept 2013]).

All claims and cross-claims for common-law indemnification and contribution against Stonebridge are also dismissed. Workers' Compensation Law § 11 bars third persons from seeking common-law contribution or indemnity from an injured worker's employer where the injuries claimed by the employee do not meet the statutory definition of "grave injury" (*see Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012]; *Acosta v Green Mgt. Corp.*, 267 AD2d 67, 68 [1st Dept 1999]). The statute defines a "grave injury" as one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by external physical force resulting in permanent total disability" (Workers Compensation Law § 11). Although Stonebridge has not presented medical evidence establishing the absence of a grave injury, because plaintiff does not allege, nor does his verified bill of particulars evince, that he sustained "permanent and total loss of use" (Workers' Compensation Law § 11) of his knees, Stonebridge may not be held liable to

any party for common-law indemnification or contribution (*see Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]; *Vargas v New York City Tr, Auth.*, 60 AD3d 438 [1st Dept 2009]).

Finally, the claims and cross-claims against Stonebridge for breach of contract for failing to procure insurance are dismissed. A party which breaches its obligation to procure insurance naming such party as an additional insured "is liable for the resulting damages, including the amount of damages awarded to or paid to the injured party in the main action, within the limits of the policy that was to have been procured, as well as the costs incurred in defense of the main action" (*Encarnacion v Manhattan Powell L.P.*, 258 AD2d 339 [1st Dept. 1999] *citing Kinney v G.W. Lisk Co.*, 76 NY2d 215, 219, 557 NYS2d 283, 556 NE2d 1090) [1990]). Pursuant to paragraph 13 of the subcontract between Beauce-Atlas and Stonebridge, Stonebridge, prior to commencing its work, was required submit certificates of insurance made out to Beauce -Atlas and to name Beauce-Atlas as an additional insured on all required insurance policies. Stonebridge's submission establishes that it purchased a commercial general liability policy, issued by Axis Surplus Insurance Company, effective from August 6, 2008 through August 6, 2009. This policy, which has an each occurrence limit of $1,000,000 and a products/completed operations aggregate limit of $2,000,000, contains a blanket endorsement for contractually designated additional insureds. Based upon this endorsement, the claims and cross-claims that Stonebridge breached its contractual obligation to procure insurance are untenable and must be dismissed (*Perez v Morse Diesel Int'l, Inc.* 10 AD3d 497 [1st Dept 2004]; *see also Garcia v A&P*, 231 AD2d 401 [1st Dept 1996] [Defendant satisfied its contractual obligation to procure insurance for a co-defendant by obtaining a policy with an automatic addition insured endorsement]).

In accordance with the foregoing, Stonebridge's motion for summary judgment is granted and the third-party complaint and second third-party complaint against Stonebridge, as well as all cross-claims against Stonebridge, are dismissed.

Beauce-Atlas' Cross-Motion for Summary Judgment

Beauce-Atlas's cross-motion for summary judgment on its contractual indemnification claim against Stonebridge is denied. As discussed above, there is no evidence that plaintiff's accident was caused in whole or in part by an act or omission by Stonebridge in failing to provide plaintiff with an adequate safety device as required by the Labor Law. In the absence of such proof, the indemnification clause between Beauce-Atlas and Stonebridge is not triggered (*see Mikelatos v Theofilaktidis*, 105 AD3d 822 [2d Dept 2013]). The branches of Beauce-Atlas' cross-motion seeking summary judgment on its common-law indemnification claim and breach of contract for failure to procure insurance claim against Stonebridge are also denied for the reasons set forth above.

However, Beauce-Atlas's cross-motion for summary judgment dismissing Broadway & 67th's and Shawmut's third-party complaint is granted. Shawmut's subcontract with Beauce-Atlas contains an indemnification clause in which Beauce-Atlas agreed "to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contractor, . . . from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work and caused in whole or in part by any negligent act or omission of Subcontractor or those employed

by it, or working under those employed by it at any level, regardless of whether or not caused in whole or in part by a party indemnified hereunder." The record herein is devoid of any proof that plaintiff's accident resulted from a negligent act or omission by Beauce-Atlas as required by the defense and indemnification clause (*see Fernandez v Stockbridge Homes, LLC*, 99 AD3d 550 [1st Dept 2012]). Rather, as discussed above, it is undisputed that the subject ladder was owned by Interstate, placed by Interstate and that Interstate's workers were responsible for it. Plaintiff's accident, therefore, did not arise out of a negligent act or omission by Beauce-Atlas (*Mikelatos v Theofilaktidis*, 105 AD3d 822 [2d Dept 2013]). Moreover, to the extent Beauce-Atlas's indemnification clause includes claims caused by the negligence of its sub-subcontractor, Stonebridge (*Lipari v AT Spring, LLC*, 92 AD3d 502 [1st Dept 2012]), there is no evidence that a negligent act or omission by Stonebridge, working in Beauce-Atlas's employ, caused plaintiff's accident.

In the absence of any evidence that a negligent act or omission by Beauce-Atlas caused plaintiff's accident, Shawmut and Broadway & 67th are also not entitled to common-law indemnification or contribution from Beauce-Atlas.

The branch of Beauce-Atlas's cross-motion seeking dismissal of Interstate's cross-claims against for contractual indemnification and common law indemnification is also granted. Interstate and Beauce-Atlas are not in contractual privity with each other (*see Vargas v New York City Tr. Auth.*, 60 AD3d 438, 440 [1st Dept 2009]) and there is no proof that Beauce-Atlas, as the proposed indemnitor, was negligent or exercised actual supervision or control over the injury-producing work (*Naughton v City of New York*, 94 AD3d 1 [1st Dept 2012]).

Plaintiff's Cross-Motion for Summary Judgment

Labor Law § 240 (1) states that: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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) imposes a nondelegable duty upon the owner and contractor to provide proper and adequate safety devices to protect workers at an elevation from falling (*Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [1st Dept 2005]). To establish a cause of action under section 240 [1], a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 803 NE2d 757, 771 NYS2d 484 [2003]). The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one (*Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]).

"Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. "It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). Thus, "where the

owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence'" (*Orellano*, 292 AD2d at 291, *quoting Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513, 583 NE2d 932, 577 NYS2d 219 [1991]; and *citing Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, 482 NE2d 898, 493 NYS2d 102 [1985]). Plaintiff established his prima facie entitlement to summary judgment on his Labor Law § 240 [1] by establishing that he was using the ladder in the course of his employment, that the ladder shifted as he was descending it, that the ladder was the only means available for accessing the foundation pit and that the bottom of the ladder was resting on a resting on a pile of rocks (*see Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251 [1st Dept 2008]).

Defendants' argument that Labor Law § 240 is inapplicable to the facts of this case because plaintiff's fall was from a de minimus height is also unavailing. There is no bright-line minimum height differential that determines whether an elevation hazard exists (*Auriemma v Biltmore Theatre, LLC* 82 AD3d 1 [1st Dept 2011]). "Rather, the relevant inquiry is whether the hazard is one 'directly flowing from the application of the force of gravity to an object or person'" (*id. quoting Prekulaj v Terano Realty*, 235 AD2d 201, 202 [1st Dept 1997]). Assuming that plaintiff was injured when he fell from the ladder, the fact that plaintiff allegedly fell from only the third or second lowest rung of the ladder does not relieve defendants of liability under Labor Law § 240 [1] since plaintiff was exposed to a gravity-related hazard (*see Lelek v Verizon N.Y., Inc.*, 54 AD3d 583 [1st Dept 2008]; *Megna v Tisman Constr. Corp. of Manhattan*, 306 AD2d 163 [1st Dept 2003]; *McGarry v CVP 1 LLC*, 55 Ad3d 441 [1st Dept 2008]). Moreover, contrary to defendants' argument, plaintiff's accident, if it occurred in the manner plaintiff claims it did, was not one involving risks ordinarily faced by workers in a construction area. In *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 712 NE2d 1219, 690 NYS2d 852 [1999], the Court of Appeals held that a plaintiff who stepped from the bottom rung of a ladder onto a drop cloth covered carpeted floor and, with one foot still on the ladder, tripped on a concealed portable light, was not entitled to the extraordinary protections of Labor Law § 240 [1]. In so holding, the Court of Appeals noted that the ladder provided to plaintiff was effective in preventing plaintiff from falling while he was installing a ceiling sprinkler and that the core objective of Labor Law § 240 [1] was met because the plaintiff successfully descended the ladder. Here, however, plaintiff testified that while both of his feet were still on the ladder the ladder shifted to the right, plaintiff let go of the ladder, lost his balance, fell and his left knee came into contact with a mound of rocks located below the ladder. Thus, the core objective of Labor Law § 240 [1] was not met and it cannot be said based upon the record before the court that plaintiff's injury "resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance . . ." (*id.*).

The record does, however, raise questions of fact as to whether the ladder from which plaintiff allegedly was properly secured. It is well settled that the failure to properly secure a ladder, to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 [1]" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). Plaintiff testified that the bottom of the ladder was resting on a mound of rubble and debris. Relying on this testimony plaintiff's expert contends the ladder did not provide plaintiff with proper protection because it was not properly secured on all four sides *and* because it was placed

on rock or other loose excavation. However, in support of defendants' cross-motion, Wheeler avers that the bottom of the ladder was secured by a two-by-four piece of wood that was attached to a concrete slab and that there was no rubble, loose rock or debris present at or near the base of the ladder on March 10, 2009. This testimony, coupled with plaintiff's admission that the top of the ladder was tied off, raises triable issues of fact as to how plaintiff's accident occurred and it cannot be concluded as a matter of law that the alleged failure to provide plaintiff with proper protection proximately caused his injuries (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593 [1st Dept 2014]). Since defendants would not be liable if plaintiff simply lost his footing while descending a properly secured, non-defective ladder that did not malfunction, summary judgment is inappropriate (*see Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441 [1st Dept 2012]). A fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-89, 803 NE2d 757, 771 NYS2d 484 [2003]).

Moreover, the accident reports submitted by defendants in opposition to the motion, while hearsay (*see Taylor v One Bryant Park, LLC* 94 AD3d 415 [1st Dept 2012]; *cf. Bradley v IBEx Constr., LLC*, 54 AD3d 626 [1st Dept 2008]; *Petrocelli v Tishman Constr. Co.*,19 AD3d 145 [1st Dept 2005]), are admissible to defeat plaintiff's cross-motion for summary judgment as they are not the only evidence offered by defendants (*Stankowski v Kim*, 286 AD2d 282 [1st Dept 2001]). These reports raise a question of fact as to whether plaintiff's accident occurred as a result of a fall while plaintiff was descending the ladder or occurred after plaintiff had completely descended the ladder and was walking in the foundation pit. Accordingly, plaintiff's cross-motion for summary judgment on his Labor Law § 240 [1] claim is denied.

Labor Law § 241 [6], which imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350, 693 NE2d 1068, 670 NYS2d 816 [1998]), is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263 [1st Dept 2007]). The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence (*id.*). The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury. Moreover, to be entitled to the protection of Labor Law § 241 [6], a worker must establish that the injury occurred in an area "in which construction, excavation or demolition work is being performed" (Labor Law § 240 [6]).

Plaintiff cross-moves for summary judgment on his Labor Law § 241 [6] claim pursuant to Industrial Code § 23-1.7 [f], which states "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Although this provision is sufficiently specific to support a claim under Labor Law § 241 [6] (*Baker v City of Buffalo*, 90 AD3d 1684 [4th Dept 2011]), plaintiff has failed to establish that the nature or progress of the Apple Store project was such that the installation of stairways, ramps or runways was possible. Plaintiff's expert's contention that there was no reason stairways could not have been built at the job site is conclusory and not

supported by any evidence in the record. Moreover, since there is a question of fact as to whether the ladder was properly secured, plaintiff has not established that the ladder was not a "safe means of access" to the foundation pit (Industrial Code § 23-1.7 [f]). Thus, plaintiff has failed to establish his prima facie entitlement to summary judgment on his Labor Law § 241 [6] claim and his cross-motion for summary judgment is denied in its entirety.

Broadway & 67th's and Shawmut's Cross-Motion for Summary Judgment

The triable issues of fact necessitating denial of plaintiff's cross-motion for summary judgment on his Labor Law § 240 [1] claim also mandate denial of defendants' cross-motion for summary judgment dismissing that claim. Further, since there are questions of fact as to whether the ladder was properly secured, defendants are also not entitled to summary dismissal of plaintiff's Labor Law § 241 [6] claim as predicated on a violation of Industrial Code § 23-1.7 [f]. However, because plaintiff does not oppose the branch of Broadway & 67th's and Shawmut's cross-motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence causes of action those claims are dismissed.

The branches of Broadway & 67th and Shawmut's cross-motion for summary judgment on its claims for contractual indemnification against Beauce-Atlas and Stonebridge are denied as moot, as is the branch of the cross-motion seeking common-law indemnification from Beauce-Atlas, for the reasons set forth by the court in the portion of this decision resolving Stonebridge's motion and Beauce-Atlas's cross-motion for summary judgment.

Shawmut and Broadway & 67th are entitled to conditional summary judgment on their third-party claim for contractual indemnification against Interstate for any judgment plaintiff may recover. In contractual indemnification, the one seeking indemnification need only establish that it was free from any negligence and was held liable solely by virtue of statutory liability (*Brown v two Exch. Plaza Partners*, 76 NY2d 172, 556 NE2d 430, 556 NYS2d 991 [1990]). In light of the dismissal of the common law negligence and Labor Law § 200 causes of action, any liability that may be imposed on Shawmut and Broadway & 67th will be vicarious pursuant to Labor Law § 241 [6] and/or 240 [1] and will not run afoul of General Obligations Law § 5-322.1 (*Best v Tishman Constr. Corp. of N.Y.*, 2014 NY Slip Op 06240 [1st Dept]; *Velez v Tishman Foley Partners*, 245 AD2d 155 [1st Dept 1997]). Shawmut and Broadway & 67th, however, are not entitled to summary judgment against Interstate on their common law indemnification claims. "[I]n the case of common law indemnification, the one seeking indemnity must prove not only 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 for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240 [1]" (*Correia v Professional Dtata Mgmt., Inc.*, 259 AD2d 60 [1st Dept 1999]). Because there are questions of fact as to whether the ladder from which plaintiff allegedly fell was properly secured, it cannot be said at this juncture that Interstate, as the proposed common law indemnitor, was guilty of negligence that contributed to the causation of plaintiff's accident. Therefore, Broadway & 67th and Shawmut are not entitled to summary judgment on their common law indemnification claim against Interstate (*Velez*, 245 AD2d at 156).

Accordingly, it is hereby

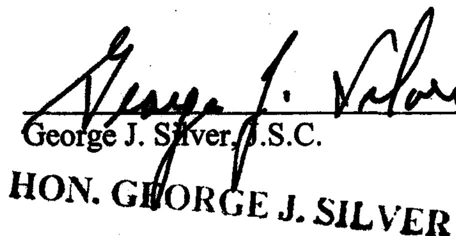
ORDERED that the motion and cross-motions for summary judgment are resolved in accordance with the foregoing; and it is further

ORDERED that the third-party complaint and second third-party complaint against Stonebridge Erector Company are dismissed and the Clerk is directed to enter judgment accordingly and it is further

ORDERED that the third-party complaint against Beauce-Atlas, Inc. is dismissed and the Clerk is directed to enter judgment accordingly;

ORDERED that counsel for the remaining parties to the action are to appear for a pre-trial conference on December 9, 2014 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that movant Stonebridge Steel Erection is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.



George J. Silver, J.S.C.

HON. GEORGE J. SILVER

Dated: OCT 21 2014
New York County

FILED
OCT 22 2014
NEW YORK
COUNTY CLERK'S OFFICE