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

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VINCENT GUIDO and BRETTE GUIDO,

Plaintiffs,

-against-

1114 6th AVENUE CO., LLC, 1114 AVENUE OF THE AMERICAS, LLC, 1114 AVENUE OF THE AMERICAS II, LLC, 1114 TRIZECHAHN-SWIG, LLC, BROOKFIELD OFFICE PROPERTIES, INC., BROOKFIELD PROPERTIES CORPORATION, BROOKFIELD PROPERTIES, LLC, ACC CONSTRUCTION CORPORATION, ACC CONSTRUCTION MANAGEMENT CORP., EAST HILLS METRO, INC., STK MIDTOWN HOLDINGS, LLC, STK MIDTOWN, LLC, THE ONE GROUP, LLC, THE SWIG COMPANY, LLC,

Index No. 154462/12

Motion Sequence No. 002

Defendants.

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JOAN M. KENNEY, J.S.C.:

This action arises out of a construction site accident which occurred on June 29, 2011 at 1114 Sixth Avenue, New York, New York (hereinafter, the premises), also known as the Grace Building. Plaintiffs Vincent Guido and Brette Guido move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1), 241 (6), 200 and under a theory of common-law negligence against defendants 1114 6th Avenue Co., LLC (1114 6th Avenue), STK Midtown, LLC (STK), and ACC Construction Corporation (ACC) and under a theory of common-law negligence against defendant East Hills Metro, Inc. (East Hills).

Defendants 1114 6th Avenue, ACC, STK Midtown Holdings, LLC, STK, The One Group, LLC, and The Swig Company, LLC (collectively, the 1114 6th Avenue defendants) cross-move, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiffs' claims in part or in

their entirety; and (2) summary judgment over and against East Hills.

Defendant East Hills cross-moves, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiffs' claims under Labor Law §§ 200, 240 (1), and 241 (6) as against it.

BACKGROUND

1114 6th Avenue was the fee owner of the premises. 1114 6th Avenue leased a portion of the ground floor and concourse level of the premises to STK. STK was building a restaurant on the premises. STK hired ACC as a construction manager on the project (Grae affirmation in support, exhibit 2). ACC retained ADCO Electrical Corp. (ADCO), plaintiff's employer, to perform electrical work. ACC also hired East Hills as a drywall/ceiling subcontractor.

Plaintiff testified at his deposition[1] that he was working as a foreman for ADCO on the date of the accident (Plaintiff EBT at 8). Plaintiff had been working at the Grace Building for about three to four months prior to his accident (*id.* at 13). ADCO was installing conduit, wires, fixtures, and receptacles for a steakhouse (*id.* at 16, 20). According to plaintiff, his accident occurred on the ground floor (*id.* at 34). Plaintiff was using a 12-foot A-frame ladder to mark measurements of where high hat lights were to be installed (*id.* at 15, 50). The ladder had feet and cross-bracing (*id.* at 50-51). Plaintiff testified that East Hills' employees were also working in the area, and were using a scissor lift to install boards on the ceiling (*id.* at 52, 53). East Hills' employee Larry was "working the lift," meaning that he was on the lift (*id.* at 53). The other East Hills' employees were handing Larry the boards (*id.* at 55). Plaintiff was on the ninth step of the ladder, reaching up to make a marking, when his accident occurred (*id.* at 57). Plaintiff described

[1]Plaintiff was deposed on two occasions: on August 6, 2013 and on November 20, 2013. The court cites to the transcript of plaintiff's August 6, 2013 deposition.

his accident as follows:

> "I was marking out the ceiling. The scissor lift was a couple of feet away from me and he started to move and just ran into the ladder. He tipped it over. I ended up crashing into the railing of the scissor lift with my arms first then my head first and then I flipped backwards into the ladder onto the floor"

(*id.* at 59).

Larry Edwards (Edwards) testified that he was employed by East Hills as a carpenter (Edwards EBT at 6, 10). He was operating the scissor lift on the date of the accident (*id.* at 16). Edwards testified that he was backing up the scissor lift when he heard Mike Atkinson, an East Hills employee who was acting as his ground guide, yell "stop" (*id.* at 24). He testified that he immediately stopped the machine upon hearing the command, but it was too late to avoid the accident (*id.*). When describing the accident, Edwards stated that, "I didn't see it. I didn't feel it. I'm on a big machine, and he's on a wooden ladder. I didn't feel or see it, the actual contact" (*id.*). Edwards was "going forward and back" with the scissor lift "[b]ecause it was tight quarters" (*id.* at 25). Although Edwards did not see the ladder before the accident, "[t]he way that Mike said 'stop'" led him to immediately turn around (*id.* at 36). At that point the scissor lift was "touching" the base of the ladder, and Edwards witnessed plaintiff fall from the ladder (*id.* at 36, 37). Edwards stated that plaintiff first fell into the scissor lift, then bounced backwards off of the scissor lift, hitting the floor (*id.* at 26-27).

ACC's incident (occurrence) report dated June 29, 2011, completed by Harvey Ulmer, ACC's project superintendent, states that:

> "Vincent Guido was working off of a 12-foot ladder doing layout for light fixtures in the Bistro Dining room ceiling on jobsite. Lawrence Edwards was operating a s[c]issor lift owned by East Hills Metro. Both men involved were working in close proximity to one another. Lawrence was backing up the lift to position it to his work.

> Mike Atkins was on the floor acting as ground guide, yelled for Lawrence to stop the lift. Lawrence released the control to stop the machine, but the machine hit the base of the ladder, causing it to topple. Vincent fell from the ladder and struck upon the lift before falling to the floor, receiving the injuries listed below"

(Grae affirmation in support, exhibit 8).

Harvey Ulmer (Ulmer), ACC's project superintendent, testified that the report was based upon what he personally observed and his conversations with Mike and Larry (Ulmer EBT at 61, 62). Ulmer testified that he saw a ladder falling, plaintiff reaching out to grab the safety rails of the scissor lift and plaintiff falling to the ground (*id.* at 45). He did not witness the scissor lift come into contact with the ladder, but learned after the accident that the scissor lift came into contact with the ladder (*id.* at 47).

Plaintiffs commenced this action on July 11, 2012, seeking recovery for common-law negligence and for violations of Labor Law §§ 200, 240, and 241. Plaintiff Brette Guido asserts a derivative claim for loss of services, society, companionship, affection, and consortium. STK Midtown Holdings, LLC, STK, The One Group, LLC, ACC, and ACC Construction Management Corp. assert a cross claim for contractual and common-law indemnification against, among other parties, East Hills.

By stipulation dated May 22, 2013, plaintiffs discontinued the action against defendants 1114 Avenue of the Americas, LLC, 1114 Avenue of the Americas II, LLC, 1114 Trizechahn-Swig, LLC, Brookfield Properties Corporation, Brookfield Properties, LLC, and ACC Construction Management Corp. (hereinafter, the Discontinued Entities) (Van Etten affirmation in support, exhibit D).

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Labor Law § 240 (1)

Plaintiffs move for summary judgment under Labor Law § 240 (1) against 1114 6th Avenue, STK, and ACC. Plaintiffs contend that plaintiff is entitled to judgment because the ladder he was standing on was struck by a scissor lift, which caused him to fall, and defendants did not provide any safety devices to prevent his injury.

The 1114 6th Avenue defendants also move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim in their favor, arguing that: (1) there were no defects in the ladder or problems with the placement of the ladder on the floor where the accident occurred; and (2) the ladder did not move, shake or in any other way cause plaintiff to fall. The 1114 6th Avenue defendants argue that East Hills' employee's actions in driving the scissor lift into plaintiff's ladder was a superseding and intervening cause of the accident. Alternatively, the 1114 6th

Avenue defendants contend that ACC cannot be held liable as a construction manager.

For its part, East Hills moves for summary judgment dismissing plaintiff's Labor Law claims against it, arguing that it cannot be held liable under these statutes as a subcontractor.

Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners, general contractors, and their agents for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). "[T]he 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). To establish liability on a Labor Law § 240 (1) cause of action, the plaintiff must show: (1) a violation of the statute; and (2) that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices" on owners and general contractors, rather than on workers, who are "scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and

citation omitted]). Thus, the negligence of the injured worker is not a defense to liability under section 240 (1) (*Rocovich*, 78 NY2d at 513).

1. Proper Defendants

1114 6th Avenue and STK

At the outset, the court notes that it is undisputed that 1114 6th Avenue is the fee owner of the premises. There is also no dispute that STK was the lessee of the ground floor of the premises (Grae affirmation in support, exhibit 1), and hired ACC to perform the construction work (*id.*, exhibit 2). In light of this evidence, STK may also be found liable pursuant to Labor Law § 240 (1) (*see Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002] ["A lessee of property under construction is deemed to be an 'owner' for purposes of liability under article 10 of New York's Labor Law"]; *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] ["owner" encompasses "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit"]).

ACC

Plaintiffs argue that ACC was the general contractor on the project according to ACC's witnesses and ACC's subcontracts with ADCO and East Hills. The 1114 6th Avenue defendants argue that ACC was hired as a construction manager, and that it did not direct, control or supervise the means and methods of the work and did not have any responsibility for safety other than general oversight.

> "When the work giving rise to [the nondelegable duties under Labor Law §§ 240 (1) and 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 and general contractor"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

> "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity that brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

In *Walls*, *supra*, the Court of Appeals held that a construction manager which contracted with a school district for capital improvement projects, had supervisory control and authority over a work site (*id.* at 864). The Court noted that the construction manager "functioned as the eyes, ears and voice of the owner" and its "broad responsibility was both that of coordinator and overall supervisor for all the work being performed on the job site" (*id.*). The Court held that the construction manager was a statutory agent of the school district given:

> "(1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) [the construction manager]'s duty to oversee the construction site and the trade contractors, and (4) [the construction manager]'s representative's acknowledgment that [it] had the authority to control activities at the work site and to stop any unsafe work practices"

(*id.*).

In moving for summary judgment against ACC, plaintiffs argue that ACC was a general contractor according to the testimony of its representatives and ACC's subcontracts with East Hills and ADCO. However, ACC's contract with STK identifies it as a construction manager (Grae affirmation in support, exhibit 2). Moreover, in their moving papers, plaintiffs have not pointed to any specific testimony of ACC's representatives that establishes that it had the authority to control activities on the job site. Therefore, plaintiffs have failed to make a prima facie showing that ACC may be held liable under Labor Law § 240 (1) as a construction manager

(*see Ostrov*, 91 AD3d at 152). Plaintiffs cannot meet their prima facie burden in reply, because "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief" (*Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]).

Nevertheless, in response to the 1114 6th Avenue defendants' cross motion,[2] plaintiffs point out that: (1) there was no general contractor on the job site; (2) ACC's contract required it, among other things, to "[s]chedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling and status of the Work," and to have a superintendent or foreman on site at all times (Grae affirmation in support, exhibit 2, § 2.3.2.5, Exhibit C [5] [C] [i]); and (3) ACC's project superintendent testified that he coordinated the work and had the ability to stop work if he saw that it was not being done properly, and that ACC was responsible for the safe operation of the job site (Ulmer EBT at 15, 19, 25). "The label of construction manager versus general contractor is not necessarily determinative" (*Walls*, 4 NY3d at 864). Based on the above evidence, there are issues of fact as to the scope of ACC's oversight and control over the work, and whether ACC was the functional equivalent of a general contractor (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 531 [1st Dept 2013] [issue of fact as to whether construction manager was the functional equivalent of a general contractor where it was responsible for planning and coordinating construction activity throughout the

[2]In particular, the 1114 6th Avenue defendants do not point to any terms of ACC's contract with STK, but rely on the following evidence: (1) plaintiff's testimony that ACC did give him instructions as to how to the installation work (Plaintiff EBT at 16-17); (2) ACC's superintendent's testimony that he did not direct the trades how to do the work (Ulmer EBT at 65-66); and (3) ACC's representative's testimony that it did not provide any safety equipment on the job site (Medaglia EBT at 32-33).

project, provided safety supervision of all contractors and subcontractors on the project, and conducted daily safety walkthroughs]; *Paljevic v 998 Fifth Ave. Corp.*, 65 AD3d 896, 897-898 [1st Dept 2009] [triable issue of fact as to contractor's statutory liability were raised by the absence of a general contractor, contractor's assumption of responsibility for site safety, and contractor's coordination of the trades at the project]; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2d Dept 2007] [construction manager was liable under the statute where it assumed the school district's authority, and responsibility, to demand compliance with safety regulations and to stop the work upon detecting any unsafe practice or condition]).

Therefore, the branch of plaintiffs' motion as to ACC's liability under Labor Law § 240 (1), and the branch of the 1114 6th Avenue defendants' cross motion seeking dismissal of plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims on the ground that it cannot be held liable as a construction manager, are denied.

East Hills

East Hills, the drywall subcontractor, moves for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240 (1), and 241 (6) claims against it (*see Russin*, 54 NY2d at 318). Plaintiffs did not oppose dismissal of these claims. Accordingly, East Hills' cross motion for partial summary judgment is granted, and plaintiffs' Labor Law §§ 200, 240 (1), and 241 (6) claims against East Hills are dismissed.

2. Statutory Violation and Proximate Cause

Labor Law § 240 (1) requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "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]; *see also McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334 [1st Dept 2008]).

Here, plaintiff testified at his deposition that when he was marking out the ceiling, the scissor lift ran into his ladder, which caused him to crash into the scissor lift and onto the floor (Plaintiff EBT at 59). Plaintiff further testified that he did not have anywhere to tie off with a safety harness while he was on the ladder (*id.* at 148). Edwards similarly testified that he was backing up the scissor lift when he heard Mike Atkinson yell, "stop," struck plaintiff's ladder, and saw plaintiff fall from the ladder (Edwards EBT at 24, 37). According to Edwards, there was no fall arrest protection on the site (*id.* at 28). ACC's superintendent testified that there was no safety equipment on the job for ladder safety (Ulmer EBT at 33). Therefore, plaintiffs have shown that defendants failed to provide adequate safety devices to prevent plaintiff from falling (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 175 [1st Dept 2004]).

The 1114 6th Avenue defendants have failed to raise an issue of fact. Contrary to the 1114 6th Avenue defendants' contention, plaintiffs are not required to show that the ladder was defective (*see Orellano*, 292 AD2d at 290). Further, East Hills' actions were not a superseding cause of the accident. "An independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them" (*Gordon Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). Here, the conduct of East Hills' employee in striking the ladder was not such an extraordinary event as to

constitute a superseding cause of the accident (*see Morocho v Plainview-Old Bethpage Cent. Sch. Dist.*, 116 AD3d 935, 936 [2d Dept 2014] [although coworker pulled a piece of plastic which became entangled in the ladder, such actions were not extraordinary or attenuated enough to constitute superseding cause sufficient to relieve school of liability]; *Montalvo*, 8 AD3d at 175 [striking of ladder by a falling object was not such an extraordinary event as to constitute a superseding cause of the accident]; *cf. Hajderlli v Wiljohn 59 LLC*, 71 AD3d 416, 416 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010] [worker's supervisor's act of pulling ladder away while worker was using it as a ramp to reach the floor was a superseding act as a matter of law that broke the chain of causation]).

Accordingly, plaintiffs are entitled to partial summary judgment under Labor Law § 240 (1) as against 1114 6th Avenue and STK. The branch of plaintiffs' motion for summary judgment against ACC is denied. The portion of the 1114 6th Avenue defendants' cross motion seeking dismissal of plaintiffs' Labor Law § 240 (1) claim is denied. The branch of East Hills' cross motion seeking dismissal of plaintiffs' Labor Law § 240 (1) claim is granted.

B. Labor Law § 241 (6)

Labor Law § 241 states that:

> "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:
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> ***
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> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and

> contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. This statute is a "hybrid" provision "since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]). To recover under Labor Law § 241 (6), the plaintiff must prove the violation of a concrete specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision reiterating common-law safety standards (*id.* at 503-504). In *Ross*, the Court held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not"

(*id.* at 505). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Owens v Commercial Sites*, 284 AD2d 315, 315 [2d Dept 2001]).

Plaintiffs' bills of particulars allege violations of 12 NYCRR 23-1.2, 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.15, 12 NYCRR 23-5.1, 12 NYCRR 23-1.21, and 12

NYCRR 23-2.1 (Verified bill of particulars, ¶ 11). Plaintiffs move for summary judgment under Labor Law § 241 (6) based on violations of 12 NYCRR 23-6.1 (c), 12 NYCRR 23-6.1 (e), and 12 NYCRR 23-9.2 (b). Defendants move for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim, arguing that plaintiffs have failed to identify any specific or applicable Industrial Code violation. Plaintiffs did not oppose dismissal of the remaining Industrial Code regulations. Therefore, the court shall only consider the disputed sections 23-6.1 (c), 23- 6.1 (e), and 23-9.2 (b).

1. 12 NYCRR 23-6.1 (c) (1) and (e) (1)

Subpart 23-6 of the Industrial Code governs "Material hoisting." Section 23-6.1 provides as follows:

> "(c) Operation.
>
> > (1) Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times.
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> ***
>
> "(e) Signal system required.
>
> > (1) Operators and signalmen. Material hoists shall be operated only in response to a signal system and all operators and signalmen shall be able to comprehend the signals readily and to execute them properly"

(12 NYCRR 23-6.1).

Section 23-6.1 (c) (1) has been held to be insufficiently specific to support a Labor Law § 241 (6) claim (*Sharrow v Dick Corp.*, 233 AD2d 858, 861 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997], *rearg denied* 89 NY2d 1087 [1997]). Moreover, neither section 23-6.1 (c) (1) nor 23-6.1 (e) (1) applies because materials were not being hoisted at the time of the accident (*see*

Miles v Buffalo State Alumni Assn., Inc., 121 AD3d 1573, 1575 [4th Dept 2014] [section 23-6.1 was inapplicable in an action where the plaintiff was struck by a wheeled cart]; *Georgakopoulos v Shifrin*, 83 AD3d 659, 660 [2d Dept 2011] [section 23-6.1 (d) did not apply where plaintiff was injured while he was lifting a stone, rather than using hoisting equipment]).

2. 12 NYCRR 23-9.2 (b) (1)

Subpart 23-9 governs "Power-Operated Equipment" (*see generally Misicki v Caradonna*, 12 NY3d 511, 518 [2009] ["subpart 23-9 applies to 'power-operated *heavy equipment or machinery* (12 NYCRR 23-9.1 [emphases added]) such as excavating machines, pile drivers and motor trucks"]). Section 23-9.2 (b) (1) states that "[a]ll power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times" (12 NYCRR 23-9.2 [b] [1]). Courts have held section 23-9.2 (b) (1) to be a "mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under [Labor Law § 241 (6)]" (*Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]; *see also Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2d Dept 2009]; *Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1285 [3d Dept 2007], *affd* 10 NY3d 902 [2008]).

Therefore, since plaintiffs have failed to identify a specific or applicable violation of the Industrial Code, plaintiffs' Labor Law § 241 (6) claim must be dismissed (*see Owens*, 284 AD2d at 315).

C. Labor Law § 200 and Common-Law Negligence

1. The 1114 6th Avenue Defendants

Plaintiffs move for summary judgment under Labor Law § 200 and under principles of

common-law negligence against 1114 6th Avenue, STK, and ACC. Plaintiffs contend that ACC[3] was responsible for coordinating the work of the various subcontractors and ensuring that all of the subcontractors complied with relevant safety standards and regulations. However, according to plaintiffs, ACC provided no training, direction or safety equipment to account for subcontractors working in close proximity to one another.

The 1114 6th Avenue defendants move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims in their favor, arguing that: (1) plaintiff's employer was responsible for the means and methods of his work and for ensuring that plaintiff used necessary safety equipment; and (2) 1114 6th Avenue, STK, and ACC did not exercise any supervisory control over the work that East Hills was engaged in at the time of the accident.

Labor Law § 200, a codification of the common-law duty imposed upon owners, general contractors, and their agents to provide workers with a reasonably safe place to work (*Lombardi v Stout*, 80 NY2d 290, 294 [1992]), provides that:

> "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. The board may make rules to carry into effect the provisions of this section."

"[A]n implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition'" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998], quoting *Russin*, 54 NY2d at 317). "Cases involving Labor Law § 200 fall into two broad

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[3]Plaintiffs make no argument as to 1114 6th Avenue or STK.

categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "These two categories should be viewed in the disjunctive" (*id.*).

Where a plaintiff's injury arises out of a dangerous premises condition, the plaintiff must show that the owner or contractor created or had actual or constructive notice of the condition (*see Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]). Where a plaintiff's accident arises out of the means and methods of the work, "liability for common-law negligence or under Labor Law § 200 may be imposed against an owner or general contractor if it 'actually exercised supervisory control over the injury-producing work'" (*Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508 [1st Dept 2014], quoting *Cappabianca*, 99 AD3d at 144; *see also Ross*, 81 NY2d at 505).

Here, plaintiff's accident arose out of the means and methods of the work, not a dangerous premises condition. The 1114 6th Avenue defendants have met their burden of establishing that they did not exercise any supervisory control over either ADCO's or East Hills' work. Plaintiff testified that he did not receive any instructions from ACC as to how to do the installation (Plaintiff EBT at 16). He further testified that 1114 6th Avenue's chief engineer did not instruct him as to how to do the installation work (*id.* at 40-41). Moreover, ACC did not supervise the means and methods of East Hill (Ulmer EBT at 114).

Plaintiffs argue that ACC was responsible for coordinating the work of the various subcontractors, and was responsible for ensuring that all of the various subcontractors complied

with relevant safety standards and regulations.[4] ACC's representative testified that ACC's superintendent coordinated the work of the trades, and had the authority to schedule where the various trades would work based upon space limitations "so that everybody wasn't working on top of each other" (Medaglia EBT at 30-31, 85-86). ACC's superintendent also testified that he coordinated the installation of the HVAC systems, electrical systems, and all of the other systems to make the building a finished product (Ulmer EBT at 15). On the day of the accident, ACC's superintendent saw East Hills' employees working in conjunction with ADCO's employees for more than an hour (*id.* at 36-37). In light of this evidence, plaintiffs have raised an issue of fact as to whether ACC had "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto*, 91 NY2d at 352; *see also Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dept 2013] [trial court erred in dismissing the plaintiff's Labor Law § 200 and common-law negligence claims against construction manager, where construction manager managed day-to-day activities on the job site, and exercised at least some control over coordination of subcontractors' work that arose when subcontractors were working in the same elevator shaft]).

Thus, the 1114 6th Avenue defendants' motion seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is granted to the extent of dismissing these claims against 1114 6th Avenue, STK Midtown Holdings, LLC, STK, The One Group, LLC and The Swig Company, LLC, and is denied as to ACC. Plaintiffs' motion against 1114 6th Avenue, STK, and ACC under Labor Law § 200 and under a theory of common-law negligence is denied.

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[4]As movants, plaintiffs have failed to eliminate all triable issues of fact on their Labor Law § 200 and common-law negligence claims (*see Ostrov*, 91 AD3d at 152).

2. *East Hills*

As noted above, plaintiffs' Labor Law § 200 claim has been dismissed against East Hills.

Plaintiffs move for summary judgment under a theory of negligence against East Hills, arguing that East Hills' employee operated the scissor lift in a negligent manner, and that there is no evidence that plaintiff was comparatively negligent in the happening of the accident.

In opposition, East Hills contends that: (1) plaintiffs fail to establish that East Hills owed him a duty of care; (2) plaintiffs fail to establish that East Hills breached a duty of care owed to plaintiff; and (3) there are issues of fact as to whether East Hills was negligent under the circumstances.

The court rejects East Hills' contention that it did not owe plaintiff a duty of care. All persons have a common-law duty to exercise ordinary care and skill to refrain from injuring others (*see Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]). In addition, "[t]he doctrine of respondeat superior renders a master vicariously liable for a tort committed by his [or her] servant while acting within the scope of employment" (*Schiffer v Sunrise Removal, Inc.*, 62 AD3d 776, 778 [2d Dept 2009] [internal quotation marks and citation omitted]).

> "[W]hen the suit is founded on a claim of negligence, the plaintiff will generally be entitled to summary judgment only in cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's conduct either was really not involved (such as with a passenger) or was clearly of exemplary prudence in the circumstances"

(*Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979] [internal quotation marks and citation omitted]).

Here, plaintiffs have not established as a matter of law that East Hills' employee's conduct in striking the ladder "fell far below any permissible standard of due care" (*id.*). In any

case, East Hills has raised triable issues of fact as to whether its employee was negligent under the circumstances. Plaintiff testified that he saw the scissor lift being driven by Larry nearby, and stated that Larry was carefully maneuvering the scissor lift within the confined space (Plaintiff EBT at 54, 119). Edwards testified that he was operating the scissor lift with the guidance of East Hills employees Steve Smith and Mike Atkinson (Edwards EBT at 21). Edwards stated that he immediately stopped the scissor lift when he heard his "ground guide" yell "stop" (*id.* at 24). Edwards was maneuvering the lift in the lowered position because it was the safer way to do it (*id.* at 33). While the scissor lift was moving, there was a beeping noise loud enough to hear above the noise of the motor of the lift (*id.* at 41). Plaintiff also testified that no one from ACC or any other entity ever told him how to do his work in an area where another trade was working (Plaintiff EBT at 131). According to plaintiff, no one was holding the ladder (*id.* at 122).

Accordingly, the branch of plaintiffs' motion for summary judgment against East Hills is denied.

D. The 1114 6th Avenue Defendants' Request for Contractual Indemnification Over and Against East Hills

The 1114 6th Avenue defendants move for contractual defense and indemnification in their favor over and against East Hills pursuant to the indemnification provision in the subcontract between ACC and East Hills, which provides as follows:

> "**INDEMNIFICATION**
> Addendum to Contract A401-1997
> It is hereby agreed that Article 4.6.1 is amended to read:
>
> 4.6.1 To the fullest extent permitted by law, *Subcontractor [East Hills] shall defend, indemnify and hold harmless Owner [The One Group], Contractor [ACC], Architect [ICrave Design Studio], and consultants, agents and employees of any of them* (individually or collectively, 'Indemnity') from and

against all claims, damages, liabilities, losses and expenses, *including but not limited to attorneys' fees, arising out of or in any way connected with the performance or lack of performance of the work under the agreement* and any change orders or additions to the work included in the agreement, *provided that any such claim, damage, liability, loss or expense is attributable to bodily injury*, sickness, disease or death, or physical injury to tangible property including loss of use of that property, or loss of tangible property that is not physically injured, *and caused in whole or in part by any actual or alleged*:

- *Act or omission of the Subcontractor [East Hills]* or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or
- Violation of any statutory duty, regulation, ordinance, rule or obligation by an Indemnitee provided that the violation arises out of or is in any way connected with the Subcontractor's [East Hills'] performance or lack of performance of the work under the agreement.

The Subcontractor's [East Hills'] obligations under this Article shall apply regardless of whether or not any such claim, damage, liability, loss or expense is or may be attributable to the fault or negligence of the Subcontractor [East Hills].

In the event that an Indemnitee is determined to be any percent negligent pursuant to any verdict or judgment, then, in addition to the foregoing, Subcontractor's [East Hills'] obligation to indemnify the Indemnitee for any amount, payment, judgment, settlement, mediation or arbitration award shall extend only to the percentage of negligence of the Subcontractor [East Hills] and anyone directly or indirectly engaged or retained by it and anyone else for whose acts the Subcontractor [East Hills] is liable.

The indemnity agreement obligation under this Article shall not be construed to negate, abridge or reduce any other right or obligation of indemnity that would otherwise exist as to any person or entity described in this Article"

(Van Etten affirmation in support, exhibit O, Rider B [emphasis supplied]).

In moving for contractual indemnification, the 1114 6th Avenue defendants argue that East Hills is required to indemnify the "Owner, Contractor, Architect, and consultants, agents and employees of any of them" (*id.*). As support, the 1114 6th Avenue defendants submit an affidavit from Sam Goldfinger, the chief financial officer of The One Group, LLC, as to the

ownership of STK, STK Midtown Holdings, LLC, and The One Group, LLC. The 1114 6th Avenue defendants contend that they are entitled to full contractual indemnification from East Hills, since there is no dispute that plaintiff's accident arose when his ladder was struck by East Hills' scissor lift, and there is no evidence that the 1114 6th Avenue defendants were negligent. Additionally, the 1114 6th Avenue defendants argue that the prime contract between STK and ACC contains additional indemnification provisions running to the owners' benefit.

In opposition to the 1114 6th Avenue defendants' request for indemnification, East Hills contends that the Discontinued Entities are no longer in the case, and therefore, they are not entitled to contractual indemnification against East Hills. In addition, East Hills argues that there are issues of fact as to whether East Hills owes contractual indemnification to 1114 6th Avenue, STK, STK Midtown Holdings, LLC or The One Group, LLC. In support of this argument, East Hills points out that its subcontract identifies the "Owner" as "The One Group"; the "Contractor" as "ACC Construction Corporation"; and the "Architect" as "ICrave Design Studio." Further, with respect to ACC, East Hills argues that contractual indemnification is premature because: (1) East Hills' indemnification obligation is limited only to the percentage of negligence attributable to East Hills; (2) there are issues of fact as to whether ACC was negligent and whether it properly coordinated the work; and (3) there are issues of fact as to whether ACC is barred from seeking contractual indemnification from East Hills pursuant to the anti-subrogation rule, since East Hills' insurer agreed to share in the defense of ACC, but the extent of the defense is in dispute.

In reply, the 1114 6th Avenue defendants respond that 1114 6th Avenue, STK, STK Midtown Holdings, LLC, The One Group, LLC, and ACC are entitled to full contractual indemnification from East Hills. According to the 1114 6th Avenue defendants, East Hills must

indemnify 1114 6th Avenue, STK, STK Midtown Holdings, LLC, and The One Group, LLC because the prime contract and ACC's subcontract clearly identify the owners of the premises, the lease between 1114 6th Avenue and STK clearly defined their roles, and Goldfinger's affidavit further amplifies the roles of these defendants. As for ACC, the 1114 6th Avenue defendants contend that: (1) there are no issues of fact as to ACC's negligence; and (2) ACC's contractual indemnification claim is not barred by the anti-subrogation rule because the court ruled in the declaratory judgment action that no defense was owed by East Hills' insurer to ACC, and even if East Hills' argument was meritorious, the rule would not apply to any claims above the primary policy.

"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]). "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" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). To establish entitlement to full contractual indemnification, the one seeking indemnity "'need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability'" (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

The 1114 6th Avenue defendants have failed to establish that East Hills is bound by the indemnification provision in the prime contract between STK and ACC. Although paragraph 1.1

of East Hills' subcontract with ACC incorporated the prime contract by reference, "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontract only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]).

In addition, the 1114 6th Avenue defendants have failed to demonstrate that STK Midtown Holdings, LLC or The Swig Company, LLC are an "Owner, Contractor, Architect, and consultants, agents and employees of any of them" (Van Etten affirmation in support, exhibit O). As noted above, the 1114 6th Avenue defendants offer an affidavit from Sam Goldfinger, the chief financial officer of The One Group, LLC, indicating the relationship among STK, STK Midtown Holdings, LLC, and The One Group, LLC. Nevertheless, the affidavit is unsigned and unnotarized and, therefore, does not constitute proof in admissible form (*see Buonaiuto v Shulberg*, 254 AD2d 384, 385 [2d Dept 1998] [unsworn and unsigned affidavits do not constitute proof in admissible form]). In addition, The One Group, LLC's representative testified, when asked about the relationship between The One Group, LLC and STK, that "[t]he technical relation, I don't know specifically" and that "Legal, I don't know the term they use" (Contini EBT at 6). The 1114 6th Avenue defendants do not provide any evidence as to The Swig Company, LLC.

The court concludes that there are issues of fact as to whether the parties intended that East Hills would indemnify 1114 6th Avenue, STK or The One Group, LLC. Although East Hills' subcontract identifies the "Owner" as "The One Group," the prime contract between ACC and STK identifies the "Owner" as "STK Midtown, LLC [i.e., STK] c/o The One Group" (Van

Etten affirmation in support, exhibits N, O).[5] The "Owner's Designated Representative" is listed as "Mr. Fred Contini- Director of Construction of the One Group" in the prime contract (*id.*, exhibit O).

However, ACC is identified as the "Contractor" in East Hills' subcontract (Van Etten affirmation in support, exhibit O). Moreover, the language of the indemnification provision is triggered since plaintiffs' claims "[arise] out of . . . the performance . . . of the work under the agreement . . . and was caused in whole or in part by any actual or alleged . . . Act or omission of [East Hills]" (*id.*), inasmuch as they allege that his accident occurred when East Hills' employee struck plaintiff's ladder (*see Britez v Madison Park Owner, LLC*, 106 AD3d 531, 532 [1st Dept 2013] [drywall subcontractor was obligated to indemnify general contractor and owner against "claims . . . arising out of or resulting from the performance of the Work . . . provided such claim . . . is caused in whole or in part by any act or omission of (Subcontractor)," since the accident arose out of the performance of the subcontractor's work and its failure to provide an adequate safety device]; *Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1019 [2d Dept 2011] [subcontractor was required to indemnify contractor in action that arose out of the performance of its work and the persons or entities directly and indirectly employed by subcontractor]). Since ACC has not established its freedom from negligence, ACC's request for full contractual indemnification against East Hills is premature (*see Hurley v Best Buy Stores, L.P.*, 57 AD3d

[5]As pointed out by the 1114 6th Avenue defendants, an amendment to the prime contract states that "Construction Manager shall cause the company issuing its insurance policies to name Owner, 1114 6th Avenue Co. LLC, having an address at c/o Brookfield Properties Management LLC, Three World Financial Center, 200 Vesey Street, 2nd Floor, New York, New York, 10014 (the landlord under Owner's lease) and any mortgagee holding a mortgage affecting the property, as additional insured parties to said insurance policies" (Van Etten affirmation in support, exhibit N).

239, 240 [1st Dept 2008] [grant of summary judgment on indemnification claim was premature where defendants never moved to dismiss the common-law negligence and Labor Law § 200 claims, or otherwise established their freedom from negligence as a matter of law, and there was a possibility that the plaintiff could prevail on a theory of negligent coordination of demolition and electrical projects]).

E. The 1114 6th Avenue Defendants' Request for Common-Law Indemnification Against East Hills

The 1114 6th Avenue defendants also move for common-law indemnification against East Hills. The 1114 6th Avenue defendants argue that: (1) plaintiff's accident arose when his ladder was knocked over by the scissor lift; and (2) there is no evidence of any active negligence on their part.

In response, East Hills contends that common-law indemnification is premature because there are issues of fact as to ACC's negligence and East Hills' negligence.

Common-law indemnification is predicated on "'vicarious liability without actual fault on the part of the proposed indemnitee'" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept 2013], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]). "To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). Common-law indemnification

includes the right to attorneys' fees, costs, and disbursements in defending the main action (*Perez v Spring Cr. Assoc.*, 283 AD2d 626, 627 [2d Dept 2001]).

Although 1114 6th Avenue and STK have been found vicariously liable pursuant to Labor Law § 240 (1), the 1114 6th Avenue defendants have failed to demonstrate that East Hills was negligent or exclusively supervised the injury-producing work or plaintiff's work site (*see Reilly v DiGiacomo & Son*, 261 AD2d 318, 318 [1st Dept 1999] [owners' motion for common-law indemnification was properly denied because their evidence did not establish, as matter of law, that the general contractor was "either negligent or exclusively supervised and controlled plaintiff's work site"]). Therefore, the request for common-law indemnification is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of plaintiffs for partial summary judgment is granted under Labor Law § 240 (1) against defendants 1114 6th Avenue Co., LLC and STK Midtown, LLC, and is otherwise denied; and it is further

ORDERED that the cross motion of 1114 6th Avenue Co., LLC, ACC Construction Corporation, STK Midtown Holdings, LLC, STK Midtown, LLC, The One Group, LLC, and The Swig Company, LLC is granted to the extent of dismissing: (1) plaintiffs' Labor Law § 200/common-law negligence claims as against defendants 1114 6th Avenue Co., LLC, STK Midtown Holdings, LLC, STK Midtown, LLC, The One Group, LLC and The Swig Company, LLC; and (2) plaintiffs' Labor Law § 241 (6) claim, and is otherwise denied; and it is further

ORDERED that the cross motion of defendant East Hills Metro, Inc. for partial summary judgment is granted, and plaintiffs' Labor Law §§ 200, 240 (1), and 241 (6) claims against it are

dismissed.

Dated: 3/10/15

ENTER:

J.S.C. JOAN M. KENNEY