Anderson v City of New York
2015 NY Slip Op 32078(U)
January 13, 2015
Supreme Court, New York County
Docket Number: 109183/11
Judge: Kathryn E. Freed

[*1]

FA 1/16/15 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Carl Anderson

-v-

The City of New York and Lend Lease (US) Construction Inc.

INDEX NO. 109183/11

MOTION DATE

MOTION SEQ. NO. 03

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 is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JAN 16 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JAN 16 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 1-13-15
JAN 13 2015

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

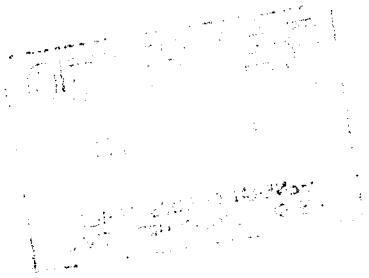
1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

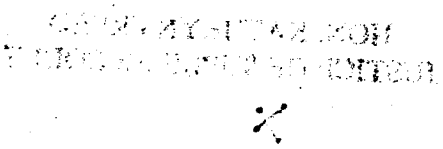
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

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: IAS PART 2
----------X
CARL ANDERSON,

Plaintiff,

-against-

THE CITY OF NEW YORK and LEND LEASE (US) CONSTRUCTION INC.,

Defendants.
----------X

DECISION AND ORDER
Index No. 109183/11
Mot. Seq. Nos. 003 and 004

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

SEQ. 003 PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs.A-N)
ANSWERING AFFIDAVITS	3,4
REPLY AFFIDAVIT	5

SEQ. 004 PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs. A-H)
ANSWERING AFFIDAVIT	3
ANSWERING AFFIDAVIT	4.(Exs.1-5)
REPLY AFFIDAVITS	5,6

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In this action for personal injuries, defendant Lend Lease (US) Construction Inc. ("Lend Lease") moves, pursuant to CPLR 3212, for summary judgment dismissing the claims asserted against it in their entirety (motion sequence no. 003). Defendant City of New York ("the City") moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims and all cross claims against it, and for summary judgment on its cross claim for indemnification against Lend Lease (motion sequence no. 004).

FACTUAL AND PROCEDURAL BACKGROUND:

On February 14, 2011, plaintiff Carl Anderson was injured while working as a carpenter for nonparty Tully Construction ("Tully") at the Department of Sanitation ("DOS") garage located at 620 West 57th Street, New York, New York. The project consisted of the demolition and construction of the DOS facility. The City was the owner of the premises. The City, acting through DOS, hired Lend Lease to provide construction managerial services on the project. The City entered into separate prime contracts with four different contractors, including Tully, to provide general construction services on the site.

Plaintiff testified at his deposition[1] that he had been working at the DOS garage job site for approximately 18 months prior to his accident. His accident occurred in the elevator lobby area of the third floor. Plaintiff testified that he was installing a door return on the date of his accident. To perform his work, he had to get up above the door on a ladder and use a drill to screw in self-tapping screws to the door. His work was supervised by Tully's foremen on the job site and he did not directly deal with any Lend Lease or City employees. The floor was covered with eight-foot by four-foot overlapping masonite sheets that were secured with duct tape. There were broken pieces of masonite on the floor. However, plaintiff avoided putting the ladder on the broken pieces of masonite. According to plaintiff, he had to kick garbage out of the way in order to set up the ladder. There was also thick, black dust on the masonite tiles where he was setting up the ladder, which he attempted to sweep away with his foot. Plaintiff stated that he asked for a laborer to hold the ladder

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[1]Plaintiff was deposed on two occasions: on April 17, 2012 and on May 15, 2013. This Court cites to the transcript of plaintiff's April 17, 2012 deposition.

before his accident, but his foreman told him that it was not possible because the budget did not allow for it.

Plaintiff described the ladder that he was using as a shaky, 12-foot A-frame ladder that he had used the day before his accident. There were no rubber shoes on the bottom of the ladder. Plaintiff testified that he was working about four or five feet off the ground. Plaintiff stated that, while he was above the door, and standing on the ladder and holding the door, he "slipped with the drill," when "one of [the screws] didn't bite. [He] lost control, you know, because [he is] holding the door. [He] fell back. The door hit the ladder and we all went down. The ladder and [plaintiff] all at the same time" (Plaintiff tr., at 40-41, 50). As plaintiff fell, he twisted his body to break his fall, causing the right side of his forehead to strike a tool cart before his knees hit the ground.

Delano Walsh, DOS's chief engineer, testified that Lend Lease oversaw the construction work; monitored the progress of the work; processed payment requisitions for contractors; negotiated change orders; maintained daily personnel logs; and provided periodic progress reports of the work being performed. According to Walsh, Lend Lease had the authority to stop the work on the project.

Calvin Gerson, a senior project manager employed by nonparty Bovis Lend Lease, testified that he did not have the power to direct the contractors to do anything, and that only DOS had the authority to direct the contractors. Gerson testified that Lend Lease's superintendent met with the contractors to review the work programs. Gerson stated that the minutes from weekly coordination meetings held for the project were submitted to Lend Lease. Lend Lease had inspectors on the job site to observe the work conditions.

Tully's accident report dated February 14, 2011 indicates that:

> On the above date and time, [Tully's] carpenter [plaintiff] reportedly sustained a cut above the eye, as well as an injury to his left arm while removing an overhead door stop while using a 6 ft. ladder. [Plaintiff] was removing the stop when it snapped, causing it to hit him above the eye, and thus falling from the ladder. He went to the St. Lukes Roosevelt Hospital emergency room and received (5) stitches on the date of the accident. A follow-up doctor checkup is recommended.

(Ex. N to Sperry affirmation in support).

On or about August 9, 2011, plaintiff commenced this action against the City and Lend Lease, asserting violations of Labor Law §§ 200, 240 (1), and 241 (6), and seeking recovery for common-law negligence. In its answer, the City asserted a cross claim for contractual indemnification against Lend Lease.

On May 7, 2014, this Court (York, J.) denied plaintiff's motion for partial summary judgment under Labor Law § 240 (1) against the City. The court stated that there were issues of fact as to whether the ladder was defective, and whether plaintiff was provided with an adequate protective device.

LEGAL CONCLUSIONS:

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 (1st Dept 2012) (internal quotation marks and citation omitted). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment." *Id.* "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v*

Citibank Corp., 100 NY2d 72, 81 (2003). On a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012).

A. Whether Lend Lease May Be Liable Pursuant to Labor Law §§ 240 (1) and 241 (6) As a Construction Manager

Lend Lease argues that Labor Law §§ 200, 240 (1), and 241 (6) do not apply to it because it is a construction manager. Lend Lease contends that, since the project was conducted pursuant to the Wicks Law, it cannot be held liable because it was neither a general contractor nor an agent for the purposes of Labor Law liability. More specifically, Lend Lease asserts that: (1) it did not supervise the means and methods utilized by plaintiff or plaintiff's employer; (2) it did not hire any of the prime contractors or subcontractors; rather, the City hired all prime contractors; (3) it did not provide any tools or equipment to plaintiff; (4) it did not provide any directions or instructions to plaintiff; and (5) it did not perform any of the construction work at the site.

Plaintiff contends, in opposition, that there are issues of fact as to whether Lend Lease was delegated the authority to supervise and control plaintiff's work. The City argues that it delegated the oversight of the construction scheduling, quality control, and safety to Lend Lease, thereby rendering it the City's statutory agent.

"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 or 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 which 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. 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 authority to control activities at the work site and to stop unsafe work practices.

Id.

Here, Lend Lease's contract with DOS required it to provide, inter alia, "[s]upport to the [DOS] during construction by providing resident engineering service, with day to day on site field supervision" and to provide "[r]eview and analysis to assess the adequacy of the Construction contractor's proposed health and safety plan(s)." Ex. L to Sperry affirmation in support. In addition, DOS's chief engineer testified that Lend Lease oversaw the work, had the authority to stop work on the project, and was required, pursuant to its contract, to review the work from a safety and health perspective. Lend Lease's senior project manager testified that, although he was unable to direct prime contractors, if he pointed out a safety issue to a foreman or safety person, he or she would

comply quickly. Lend Lease's superintendent met with contractors to review work programs from a safety perspective. While Lend Lease argues that it cannot be liable as a construction manager, "[t]he label of construction manager versus general contractor is not necessarily determinative." *Walls*, 4 NY3d, *supra* at 864. In light of the above evidence, there are issues of fact as to whether Lend Lease served as 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 existed as to whether construction manager was the functional equivalent of a general contractor so as to hold it liable under Labor Law § 241 (6), where it was responsible for planning and coordinating construction activity throughout the project, provided safety supervision of all contractors and subcontractors on the project, and conducted daily safety walkthroughs on the site); *Barrios v City of New York*, 75 AD3d 517, 519 (2d Dept 2010) (construction manager was responsible party under Labor Law § 240 (1) where it was delegated the authority to oversee and control the work of the various on-site contractors, particularly with respect to safety issues); *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 (2d Dept 2007) (construction manager's responsibility was both that of coordinator and overall supervisor for all work being performed on the job site where it assumed the school district's authority, and responsibility, to "demand compliance with applicable safety requirements and to stop the work upon detecting any unsafe practice or condition").

Accordingly, the branch of Lend Lease's motion seeking dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims on the ground that it is a construction manager is denied.

B. Labor Law § 200 and Common-Law Negligence

Lend Lease also moves for summary judgment dismissing plaintiff's Labor Law § 200 and

common-law negligence claims, arguing that there is no evidence that it supervised or controlled plaintiff's work, furnished materials or tools to be used by plaintiff at the site, or had any knowledge of any defect at the site.

The City also contends that these claims should be dismissed, since there is no evidence that it supervised, directed or controlled plaintiff's work or had any actual or constructive notice of any dangerous condition. According to the City, any liability imposed upon it would be vicarious due to its statutory role as owner of the premises.

In opposition to the motions, plaintiff argues that there are issues of fact as to whether: (1) plaintiff's injuries were caused by a dangerous condition on the premises, given that there was dust and debris on the floor where his accident occurred; and (2) the City and Lend Lease exercised control over staffing and cleaning operations.

Labor Law § 200 (1) 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.

It is well established that Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to provide workers with a reasonably safe place to work. *See Lombardi v Stout*, 80 NY2d 290, 294 (1992). Labor Law § 200 is "tantamount to a common-law negligence claim in a workplace context." *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 (1st Dept 2011). "Cases involving Labor Law § 200 fall into two broad 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 accident arises from the means and methods of plaintiff's 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 v Skanska USA Bldg., Inc.*, 99 AD3d 139, 144 (1st Dept 2012). However, where a plaintiff's injury arises from a dangerous condition at the premises, the plaintiff must show that the owner or contractor created or had actual or constructive notice of the condition. *See Marcano v Hailey Dev. Group, LLC*, 117 AD3d 518, 518-519 (1st Dept 2014); *Mitchell v New York Univ.*, 12 AD3d 200, 202 (1st Dept 2004).

Here, plaintiff testified that, as he was installing a screw into a door, he lost control of the drill and the door then hit the ladder, causing both the ladder and plaintiff to fall. Plaintiff also testified that there was a thick, black dust on the masonite floor where he set up the ladder, which he attempted to sweep away with his foot. Plaintiff believed that the dust contributed to the fall of the ladder.

To the extent that plaintiff alleges that his accident was caused by the means and methods of his work, there is no evidence that the City or Lend Lease exercised supervisory control over his work. Plaintiff conceded that he was directed and instructed solely by Tully. Plaintiff further stated that Tully owned the drill and he believed that Tully owned the ladder. He never dealt with anyone from Lend Lease or the City. Although plaintiff contends that Lend Lease and the City controlled staffing on the job site and had the authority to stop the work, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor

controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed." *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007). Moreover, the authority to stop the work for safety reasons is insufficient to impose liability under Labor Law § 200 or in common-law negligence. *Paz v City of New York*, 85 AD3d 519, 520 (1st Dept 2011); *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003).

However, to the extent that plaintiff alleges that his accident was caused by a dangerous condition on the work site, i.e., construction dust on the slippery masonite floor, the City and Lend Lease have failed to meet their burden of demonstrating that they did not create or have notice of the condition. On a motion for summary judgment, the defendant bears the initial burden of establishing that it lacked notice of the allegedly dangerous condition. *See Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008) (a defendant who moves for summary judgment bears the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of it); *Manning v Americold Logistics, LLC*, 33 AD3d 427 (1st Dept 2006) (on a motion for summary judgment, "defendant met its burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it"). Although Lend Lease contends that plaintiff did not complain to it about any working conditions (Plaintiff tr. at 130), Lend Lease's project manager testified that he toured the building quite often, often saw dirty areas, and directed contractors to clean up their work areas. In addition, the City's chief engineer testified that he observed construction dust on the floor during his walkthroughs, but did not recall whether it was before February 14, 2011.

In light of the foregoing, the branches of the motions by the City and Lend Lease seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims are denied.

C. Labor Law § 240 (1)

Lend Lease moves for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. This Court (York, J.) previously denied plaintiff's motion for partial summary judgment under Labor Law § 240 (1) as against the City. In its May 7, 2014 decision and order, this Court found that there were issues of fact as to whether the ladder was defective and whether plaintiff was provided with an adequate protective device. Accordingly, the portion of Lend Lease's motion for summary judgment seeking dismissal of plaintiff's Labor Law § 240 (1) claim is denied.

D. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, 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 . . . , shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide 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), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code containing "specific, positive commands," rather than a provision reiterating common-law general safety standards. *Id.*, at 503-504. 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*, 99 AD3d, *supra* at 146. The plaintiff "need not show that the defendants exercised supervision or control over his worksite in order to establish his right to recovery." *Ross*, 81 NY2d, supra at 502.

As noted by the Court of Appeals, "once it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project, caused plaintiff's injury." *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

Plaintiff's bills of particulars allege violations of 12 NYCRR 23-1.21 (a); 23-1.21 (b); 23-1.21 (e); and 23-1.21 (f). Ex. E to Sperry affirmation in support. Lend Lease moves for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, arguing that none of the cited Industrial Code provisions is specific or applicable to the accident.[2] In opposition to Lend Lease's motion, plaintiff relies on sections 23-1.7 (d), 23-1.21 (b) (3) (iv), 23-1.21 (b) (4) (ii), 23-1.21 (b) (9), and 23-1.21 (e) (3).

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[2]Specifically, Lend Lease's motion addresses sections 23-1.21 (b) (3) (i) through (iv); 23-1.21 (b) (4); 23-1.21 (b) (5); 23-1.21 (b) (6), (7), and (10); 23-1.21 (b) (8) and (9); 23-1.21 (e); and 23-1.21 (f).

12 NYCRR 23-1.7 (d)

Section 23-1.7 (d) states that:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

12 NYCRR 23-1.7 (d).

In *Kelleir v Supreme Indus. Park* (293 AD2d 513, 513-514 [2d Dept 2002]), the Court held that:

> [a]lthough a plaintiff asserting a Labor Law § 241 (6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code, a failure to identify the Code provision in the complaint or bill of particulars is not fatal to such a claim. Thus, the plaintiffs' belated allegation of a violation of 12 NYCRR 23-1.8 (a) involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants. The plaintiffs' failure to seek leave of court to supplement their bill of particulars is not fatal to their Labor Law § 241 (6) claim (citations omitted).

Although plaintiff did not cite section 23-1.7 (d) in his bills of particulars, Lend Lease does not address this regulation at all in its reply. Lend Lease does not argue that this section raises new factual allegations, new theories of liability, or causes any prejudice. Thus, this Court shall consider this regulation in opposition to Lend Lease's motion. Plaintiff testified that he placed the ladder on slippery masonite tiles coated with thick dust, which he attempted to sweep away with his foot. Consequently, this section is applicable, and there are questions of fact as to whether there was a violation which caused plaintiff's accident.

12 NYCRR 23-1.21 (b) (3)

Section 23-1.21 (b) (3) provides that:

> Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
>
> (i) If it has a broken member or part.
>
> (ii) If it has any insecure joints between members or parts.
>
> * * *
>
> (iv) If it has any flaw or defect of material that may cause ladder failure.

12 NYCRR 23-1.21 (b) (3).

Section 23-1.21 (b) (3) (iv) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim. *See De Oliveira v Little John's Moving*, 289 AD2d 108, 109 (1st Dept 2001). Moreover, in light of plaintiff's testimony that the ladder was "shaky" and lacked rubber feet (Plaintiff tr. at 22, 33), section 23-1.21 (b) (3) (iv) is applicable to plaintiff's accident, and there are issues of fact as to whether a violation of this section caused plaintiff's accident. *See Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 (2d Dept 2006) (triable issues of fact as to whether there was a violation of section 23-1.21 (b) (3) (iv); plaintiff established that the absence of rubber feet caused a ladder to move on a slippery floor); *De Oliveira*, 289 AD2d, *supra* at 109 (Industrial Code section 23-1.21 (b) (3) (iv) applied to plaintiff injured when he fell from a ladder which allegedly lacked rubber feet).

12 NYCRR 23-1.21 (b) (4)

Section 23-1.21 (b) (4) (ii) provides that "[a]ll ladder footings shall be firm" and that "[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used for ladder footings." This section, too, has been held to be sufficiently specific to impose liability pursuant to Labor Law § 241 (6). *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 (1st Dept 2006). "12 NYCRR 23-1.21 (b) (4) (ii) requires all ladders to have firm footings, and is not limited to ladders that are at least 10-feet tall." *Estrella v GIT Indus., Inc.*, 105 AD3d 555, 555 (1st Dept 2013). Although Lend Lease argues that section 23-1.21 (b) (4) (ii) is inapplicable, plaintiff testified that the ladder was "shaky," lacked rubber feet, and that he placed the ladder on a slippery masonite floor which had construction dust on it. Plaintiff tr. at 22, 26, 33, 136-137. Therefore, this Court finds that this subsection applies to plaintiff's accident, and that there are issues of fact as to whether any violation of section 23-1.21 (b) (4) (ii) was a proximate cause of his accident. *See Soodin v Fragakis*, 91 AD3d 535, 535-536 (1st Dept 2012) (plaintiff was entitled to summary judgment under Labor Law § 241 (6) based upon Industrial Code section 23-1.21 (b) (4) (ii), where he was supplied with an old, weak, shaky ladder that lacked rubber footings and was placed on a slippery polyurethane-coated floor).

12 NYCRR 23-1.21 (b) (9)

Section 23-1.21 (b) (9) requires that "[l]adders shall not be placed in door openings unless the doors are securely fastened open, closed and locked or otherwise effectively guarded against swinging." Here, as Lend Lease points out, this provision is applicable because plaintiff was using the ladder in a door opening. However, Lend Lease has failed to establish that this provision was not violated, or that a violation of that provision was not a proximate cause of plaintiff's injuries.

See Whalen v ExxonMobil Oil Corp., 50 AD3d 1553, 1554 (4th Dept 2008), *lv denied* 53 AD3d 1124 (4th Dept 2008).

As discussed above, there are issues of fact as to whether Lend Lease may be liable under Labor Law § 241 (6) as a construction manager. Although Lend Lease argues that plaintiff failed to ensure that the door was securely fastened or guarded against swinging, any such failure on plaintiff's part would be an issue of comparative negligence to be evaluated by the jury. *See generally, Kozlowski v Ripin*, 60 AD3d 638 (2d Dept 2009).

12 NYCRR 23-1.21 (e) (3)

Section 23-1.21 (e) (3), governing "Stepladder footing," provides that "[s]tanding stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means." Plaintiff testified that he did not place the ladder on broken pieces of masonite and that the ladder felt solid on the ground. Plaintiff tr. at 131, 133. Plaintiff was about four or five feet off the ground. *Id.*, at 35. Thus, section 23-1.21 (e) (3) does not apply in this case. *Cf. Losurdo v Skyline Assoc., L.P.*, 24 AD3d 1235, 1237 (4th Dept 2005) (section 23-1.21 (e) (3) applied where plaintiff established that stepladder was placed on uneven surface).

Therefore, the portion of Lend Lease's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim is granted to the extent that it is predicated on 23-1.21(e)(3) and is denied insofar as it is predicated on 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.21 (b) (3), 12 NYCRR 23-1.21 (b) (4), and 12 NYCRR 23-1.21 (b) (9).

E. The City's Request for Indemnification Against Lend Lease

The City moves for conditional indemnification against Lend Lease pursuant to article XX of Lend Lease's contract, which provides as follows:

> The Consultant shall be liable to and hereby agrees to indemnify and hold harmless the Commissioner and the City and each officer, agent and employee of the City from any and all claims and judgements against any of them, for damages and from costs and expenses to which the City and its respective officers, agents, and employees may be subjected, or which they may suffer or incur by reason of any loss, property damage, bodily injury, or wrongful death, *to the extent resulting from the negligence of the Consultant, his agents or employees in the performance of this Contract, or from the failure to comply with any provisions of this Contract or of law.*"

Ex. H. To Lugo affirmation in support (emphasis added).

The City relies on article II of the contract, entitled "Specific Requirements," which provides that "[t]he consultant services shall include, but not be limited to the following:

> B. Constructability review and analysis necessary to identify all potential design and/or construction problems associated with the project.
>
> M. Support to the [DOS] during construction by providing resident engineering service, with day to day on site field supervision."

Id.

In moving for contractual indemnification against Lend Lease, the City argues that the record is devoid of any proof of its negligence and that any liability on its part would be purely vicarious. In addition, according to the City, Lend Lease had the authority to supervise, direct and control plaintiff's work. The City maintains that, pursuant to the contract, Lend Lease was charged with providing resident engineering services with day-to-day on site field supervision.

In opposition, Lend Lease contends that there is no evidence of its negligence since it was

not required to direct or supervise plaintiff's work pursuant to its contract, and plaintiff's accident was not the result of a design defect or engineering issues.[3]

"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) (internal quotation marks and citation omitted). To establish entitlement to full contractual indemnification, the City "'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 First Department has held that, even where there are issues of fact regarding an indemnitee's active negligence, a conditional award of indemnification is warranted where the indemnification provision does not violate General Obligations Law § 5-322.1. *See Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 (1st Dept 2012); *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 (1st Dept 2010). Nonetheless, in *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 (1st Dept 2012), the Court held that conditional indemnification was premature where:

> the contractual indemnification provision on which [defendants] rely contains no language limiting indemnification to damages arising from accidents caused by [plaintiff's employer's] negligence, or precluding indemnification for damages caused by their own negligence. Thus, if it is found that plaintiff's injures are attributable to any negligence on their part, enforcement of the indemnification provision will be barred by General Obligations Law § 5-322.1, and the conditional grant of summary judgment to defendants on their contractual indemnification claim

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[3]Although Lend Lease seeks summary judgment dismissing "all claims asserted against it," it has not addressed the City's cross claim for indemnification, and thus has failed to meet its burden on summary judgment to dismiss this claim (*see Ryan*, 96 AD3d, *supra* at 553).

against [plaintiff's employer] is premature" (citations omitted).

Here, the indemnification provision may require Lend Lease to indemnify the City for its own negligence. The indemnification provision does not state that Lend Lease will indemnify the City "to the fullest extent permitted by law" or contain similar savings language. *See Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 209 (2008). Moreover, the provision is not limited to damages for accidents arising out of Lend Lease's negligence; rather the contract provides that Lend Lease shall indemnify the City "from any and all claims . . . to the extent resulting from the negligence of [] [Lend Lease] . . . in the performance of this Contract, *or* from the failure to comply with any of the provisions of this Contract or of law." Ex. H to Lugo affirmation in support (emphasis added). Thus, given that there are issues of fact as to the City's negligence, the City's motion for conditional indemnification is premature. *See Bell v City of New York*, 104 AD3d 484, 486 (1st Dept 2013); *Picaso*, 101 AD3d, *supra* at 512). Accordingly, the branch of the City's motion for conditional contractual indemnification against Lend Lease is denied.

Therefore, in accordance with the foreoing, it is hereby:

ORDERED that the motion (sequence number 004) by defendant City of New York for summary judgment is denied; and it is further,

ORDERED that the motion (sequence number 003) by defendant Lend Lease (US) Construction, Inc. for summary judgment dismissing the complaint is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) insofar as it is predicated on a violation of 12 NYCRR

23-1.21(e)(3), and is otherwise denied; and it is further,

ORDERED that this constitutes the decision and order of the court; and it is further,

ORDERED that the parties are to appear for a settlement conference on March 4, 2015 at 80 Centre Street, Room 280, at 2:30 p.m.

Dated: January 13, 2015

ENTER:

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT