

Delgado v 313-315 W. 125th St. LLC
2015 NY Slip Op 32181(U)
October 1, 2015
Supreme Court, Bronx County
Docket Number: 311561/2011
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Briganti

MIGUEL DELGADO, JR., as Guardian of the Person
and Property of Miguel Delgado, Sr., IP, and ROSA
DELGADO, individually and as husband and wife,

X

Plaintiffs,

DECISION/ORDER

-against-

Index No.: 311561/2011

313-315 W. 125th STREET LLC., PLAZA CIRCLE
ENTERPRISE, LLC., SOLIL MANAGEMENT, LLC.,
SOL GOLDMAN INVESTMENTS LLC., ESTATE OF
LILLIAN GOLDMAN and LILLIAN GOLDMAN
2002 LLC.,

Defendants.

X

313-315 W. 125th STREET LLC., PLAZA CIRCLE
ENTERPRISE, LLC., SOLIL MANAGEMENT, LLC.,
SOL GOLDMAN INVESTMENTS LLC., ESTATE OF
LILLIAN GOLDMAN and LILLIAN GOLDMAN
2002 LLC,

Third-Party Plaintiffs,

Index No.: 83821/2012

-against-

KATSELNİK & KATSELNİK GROUP, INC.,

Third-Party Defendant.

X

The following papers numbered 1 to 15 read on the below motions noticed on March 12, 2015
and June 23, 2015 and duly submitted on the Part IA15 Motion calendar of May 1, 2015, and
July 7, 2015:

<u>Papers Submitted</u>	<u>Numbered</u>
Pls.' MSJ, Exhibits	1,2
313-315 West's Cross-Motion, Opp., Exhibits	3,4,5
K&K's Aff. In Opp., Exhibits	6,7
Pls.' Reply Aff., Exh.	8,9

Pls.' Reply, Opp. to Cross-Motion, Exh.	10,11
313-315 West's Reply Aff., Exhibits	12
K&K's MSJ, Exhibits	13
313-315 West's Aff. In Opp., Exhibits	14
K&K's Reply Aff.	15

Upon the foregoing papers, the plaintiff Miguel Delgado, Jr., as guardian of the person and property of Miguel Delgado, Sr., IP, and Rosa Delgado, individually and as husband and wife (collectively, "Plaintiffs"), move for summary judgment against all defendants and the third-party defendant on the grounds that they violated Labor Law §240(1) and 241(6).

Defendants/third party plaintiffs 313-315 West 125th Street, LLC ("313-315 West"), Plaza Circle Enterprises, LLC. ("Plaza Circle"), Solil Management, LLC ("Solil Management"), Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC., oppose Plaintiffs' motion, and cross-move for an Order (1) granting summary judgment to defendants Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC., dismissing Plaintiffs' complaint as against them; (2) granting summary judgment to 313-315 West, Plaza Circle, and Solil Management, dismissing Plaintiffs' claims under Labor Law §200 and common law negligence; (3) reforming the contract between 313-315 West's agent, Solil Management, LLC., and third-party defendant Katselnik & Katselnik Group, Inc. ("K&K"), to correctly name 313-315 West as the "Owner" of the subject premises; (4) granting summary judgment in favor of 313-315 West, Solil Management, and Plaza Circle, on their claims for contractual indemnification against K&K; and (5) granting summary judgment in favor of 313-315 West, Solil Management, and Plaza Circle, on their claims for common law indemnification against K&K. Plaintiffs oppose that branch of the cross-motion seeking summary judgment in favor of defendants Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC. K&K opposes those branches of the cross-motion seeking summary judgment on claims of common law and contractual indemnification, and that branch of the cross-motion seeking reformation of the contract. K&K also opposes Plaintiffs' motion for summary judgment.

Separately, K&K moves for summary judgement, dismissing the contractual indemnity claims asserted by defendants 313-315 West, Plaza Circle, Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC. 313-315 West, Plaza Circle, Solil Management, Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman

2002 LLC. oppose K&K's motion insofar as it seeks dismissal of 313-315 West and Plaza Circle's contractual indemnity claims.

The above motions are consolidated and disposed of in the following Decision and Order.

I. Background

This matter arises out of an alleged construction site accident that occurred on September 9, 2011, at the premises located at 313 West 125th Street in New York, New York. On that date, plaintiff Miguel Delgado, Sr. (individually, "Plaintiff") was working as a laborer for third-party defendant K&K when he allegedly fell from an elevated scaffold and down an exposed stairwell during a construction project. At the time of the alleged accident, the premises was owned by 313-315 West, and managed by co-defendants Solil and Plaza Circle. As a result of this accident, Plaintiff allegedly sustained a closed head injury resulting in permanent total disability, and rendering him unable to engage in daily life without assistance and unable to testify on his own behalf.

Miguel Delgado, Jr., son of the injured Plaintiff, was deposed on March 26, 2014. He testified, in pertinent part, that he had spoken to Plaintiff's co-worker, Oscar, to try and find out how this accident occurred. Oscar told him that Plaintiff had fallen from a "stepladder" while painting, and he had witnessed the fall. Three months later, Oscar allegedly approached Mr. Delgado, Jr. and asked to speak with him privately. Oscar then told Mr. Delgado, Jr. that he had photographs and videotapes that could support Plaintiffs' case. Oscar advised that he wanted \$40,000 in exchange for his evidence and testimony, and \$200,000 in total. Oscar allegedly told him that "his testimony could go one way if he was paid, and another way if he wasn't." Mr. Delgado, Jr., testified that at this private encounter, he did not speak with Mr. Escalante about the events of the accident. The deponent testified that he later spoke to a man named Radames who was allegedly working with Plaintiff at the time of the accident. "Radames" alleged that there were unsafe working conditions at the site, but admitted that he could not prove it. Other than Oscar and Radames, Mr. Delgado, Jr., did not speak with anyone else who was working at the job site about this accident.

Nicola Crecco of K&K appeared for deposition, and testified that at relevant times he was employed by K&K as a project manager. His duties included overseeing the construction work, project coordination, filing papers, and scheduling. With respect to this particular project, Mr.

Crecco testified that he was on site daily to supervise K&K's foreman, as well as the foreman for the subcontractors. Mr. Crecco ensures that K&K employees have proper materials and equipment, and generally acted as a superintendent or "top person" at the work site. If he observed an unsafe condition, it was his responsibility to remedy it immediately.

As for the accident itself, Mr. Crecco testified that he arrived on the scene and observed Plaintiff lying on the floor. The only person who had witnessed the accident was Oscar Escalante, Plaintiff's co-worker. Mr. Escalante told him that he and Plaintiff had been working on a four-foot high "mini scaffold" securing metal studs. The scaffold itself was approximately 4-5 feet wide, with two planks placed on top to use the scaffold at a height of either two feet or four feet. The scaffold had a rail around its perimeter that sits 12-15 inches above the planks when they are set to the four-foot level, as they were on the date of this accident. Mr. Escalante and Plaintiff had been working on building an enclosure for a staircase. Mr. Escalante told Mr. Crecco that Plaintiff was on top of the mini scaffold when he fell from the outside partition of the staircase, through the metal studs, and onto the stairs below. The stairwell was approximately nine feet lower than the first floor. Mr. Crecco testified that the night before the accident, he personally observed a worker place a cover over the opening of the staircase so as to completely cover it. However, it would have been necessary to remove the cover at the time of this accident to allow workers to perform their work framing out the wall adjacent to the staircase.

Mr. Crecco testified that Plaintiff was wearing a safety harness when he observed him lying on the staircase. Mr. Crecco had given Plaintiff the harness the day before, when he began his employment with K&K. At the time of the accident, there was an overhead structural steel that the harness could have been hooked onto. Plaintiff also had access to a lifeline in a gang box that he could have used to clip into the scaffold, that would have offered him proper protection. Mr. Crecco noted that Mr. Escalante was aware that a lifeline was available. Mr. Crecco testified that, in addition to the harness Plaintiff was wearing, he observed a safety cable draped over the scaffold cable to which Plaintiff could have fastened himself. Plaintiff was also working near a structural brick column, to which his safety harness could have been attached. K&K owned the scaffold and safety equipment. No one else would have given safety instructions to K&K employees.

Oscar Escalante appeared for deposition on January 13, 2012. The deposition was conducted by Plaintiff's prior counsel, without notice to any of the defendants in this action. On

that date, he testified that at the time of this accident, Plaintiff was assisting him in carpentry work that entailed the installation of metal framing studs. Mr. Escalante testified that K&K's supervisor, Nick, told employees that if they were working on a scaffold over six feet, they had to wear a harness and a hard hat at all times. The day prior to this accident, Nick instructed Mr. Escalante and Plaintiff to wear harnesses and a hard hat every day on the job. Mr. Escalante testified that both himself and Nick were responsible for giving safety instructions and checking on the workers. Mr. Escalante witnessed this accident, and testified that Plaintiff was wearing a harness and a hard hat at the time. Plaintiff's harness had a "big clip" at the waist, and was attached to a six-foot clip that would run from the harness to an anchor, or if a longer distance was involved, a rope. Prior to this accident, Mr. Escalante had instructed Plaintiff to secure the anchor on his harness to a metal stud supporting a wall. He testified, however, that Plaintiff "forgot" to secure the anchor to the stud, and therefore fell off of the scaffold. He noted that the height of the scaffold was approximately 5 feet, and it was equipped with aluminum planks that lay flat at the top. The scaffold had no safety railing because it was less than six feet in height, and moreover, railings were not required because the workers were wearing hardhats and harnesses for safety. Mr. Escalante testified that the day before, he had discussed the work with Plaintiff and instructed him as to which metal stud to attach the anchor on his safety harness. After the fall, Mr. Escalante inspected the scaffold, and found that it had no defects.

Mr. Escalante appeared for another deposition on September 26, 2014. This time, he testified, *inter alia*, that he did not know if Mr. Crecco had given Plaintiff any safety briefing prior to this accident taking place. At the time of the accident, Plaintiff was working on top of the scaffold, screwing in metal framing studs, while Mr. Escalante was working below to properly level the studs as they were being installed. This particular job required the scaffold due to the height at which the work was being performed. Mr. Escalante testified that Plaintiff was wearing a hardhat, but no harness. There was no plywood covering the open staircase, and he had never seen any covering in the two days he had been working in the area. There was no netting in place as it was not needed, because the walls around the opening had already been framed out. During the course of the leveling work, while checking the level of the studs, Mr. Escalante saw something fall, and realized that Plaintiff had fallen down into an opening for the staircase.

In addition to the contradictory testimony offered at the second deposition, Mr. Escalante

had signed a two-page written statement about this accident, wherein he confirmed that Plaintiff was wearing a harness at the time. In that statement, Mr. Escalante wrote that he believed Plaintiff had "passed out" prior to falling. At his deposition, Mr. Escalante conceded to providing a phone interview to an investigator hired by Plaintiff's counsel, where he stated that Plaintiff had been wearing a safety harness. When asked why his prior deposition testimony and sworn statements were now being contradicted, Mr. Escalante stated that he had given the prior statements that Plaintiff was wearing a safety harness because he had feared of being laid off. Mr. Crecco had allegedly told him to lie and say that Plaintiff had been wearing a harness. Mr. Escalante, further, denied ever demanding money from Mr. Delgado, Jr., in exchange for giving favorable testimony in this case.

The defendants/third party plaintiffs also offer certain evidence and testimony regarding the ownership of the building, and the contract between Solil Management and K&K. Claims Risk Manager Kathleen Weeks testified on behalf of Solil Management, the property manager for the premises. She testified that 313-315 West has owned the property for the past 8-9 years, when ownership was turned over from the Estate of Lillian Goldman. The Estate had no involvement with the property since it was turned over. Lilian Goldman 2002 LLC, and Sol Goldman Investments, also had no involvement with the property. She testified that Solil Management's project manager, Joe Grabowski, signed a contract with K&K for work to be performed at the property. The defendants/third party plaintiffs submit a deed demonstrating that the ownership of the premises had transferred from Lilian Goldman to 313-315 West in April of 1999.

Mr. Grabowski appeared for a deposition, and testified that he was last employed by Solil Management in 2013 as Director of Property Management, charged with overseeing commercial properties for Solil, including construction projects. He confirmed that some time in 2009 or 2010, K&K was retained as a general contractor for work on the property. This particular project involved a gut renovation of the building. As part of the contract, subcontractors would be hired to complete the work. Solil Management, however, did not play a role in hiring subcontractors. Mr. Grabowski was shown a copy of the contract, and identified the document as the contract between Solil Management and K&K, which he had signed as the agent for 313-315 West, the owner of the premises. At some point, Mr. Grabowski was informed that a worker had fallen on the job site, and had to be transported away via ambulance. He was told that the worker had been

working on installing a platform for a new set of stairs leading from the first floor to the second floor when he fell. Crecco of K&K told him that the worker had removed a barricade that was on the platform, and slipped and fell. Mr. Grabowski confirmed that he would visit the job site about once a week to discuss the progress of work, change orders, and schedule. He did not offer any instruction as to how to perform the work. Site safety had been the responsibility of K&K. Neither the owner, 313-315 West, or property manager, Solil, provided any safety equipment, or were responsible for monitoring the work to ensure it complied with OSHA standards. If Mr. Grabowski observed unsafe conditions on the site, he did have the authority to stop the work.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

Labor Law 240(1)

Plaintiff now moves for summary judgment against “all defendants, including the third party defendant,” on the issue of their liability under Labor Law §240(1). In reply papers,

however, Plaintiff concedes that it has no direct claims against K&K, Plaintiff's employer.

Labor Law §240(1) imposes a duty of protection of employees upon owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The duty consists in providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." The foregoing devices are to be furnished in a manner sufficient to give "proper protection" to the workers. Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 [1993]). Specifically, the statute imposes liability in situations where a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 [1991]). The two elements of a 240(1) cause of action are that the statute was violated and that the violation was a proximate cause of the injury (*Blake, supra*; *Bland v. Manocherian*, 66 N.Y.2d 452 [1985]), *Chacha v. Glickenhauz Doynow Sutton Farm Development, LLC*, 69 A.D.3d 896).

To prevail on a motion for partial summary judgment on a cause of action under Labor Law §240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries. (*Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1 [1st Dept. 2011][internal citations omitted]). A statutory violation, and thus a prima facie entitlement to summary judgment, is established where the safety device collapses, slips, or otherwise fails to perform its function of supporting the worker and his materials (*Ortega v. City of New York*, 95 A.D.3d 125, 128 [1st Dept. 2012], citing *Morin v. Machnick Bldrs.*, 4 A.D.3d 668 [3rd Dept. 2004]).

In this matter, Plaintiffs established entitlement to summary judgment as a matter of law on his Labor Law §240(1) claims, as it is not disputed or contradicted under either "version" of the accident that the Plaintiff became injured when he fell from an elevated scaffold, through an open stairwell, and landed on a staircase several feet below. Plaintiff has thus made a prima facie showing that the safety device he was using at the time of the accident - the scaffold - proved inadequate to shield him from the harm which flowed directly from the application of the force of gravity to his person (*Kyle v. City of New York*, 268 A.D.2d 192 [1st Dept. 2000]).

In opposition, the defendants/third party plaintiffs and K&K claim that the conflicting testimony of Mr. Escalante, as well as the testimony of Mr. Crecco, raise credibility issues that must be assessed by a trier of fact, and moreover, raise issues of fact as to whether Plaintiff was a recalcitrant worker and whether his conduct was the sole proximate cause of this accident.

Where, as here, there is a single eyewitness account of an accident, a triable question of fact may be presented if the witnesses' version of the accident is inconsistent with either her own previous account, or that of another witness (*see Rodriguez v. New York City Housing Authority*, 194 A.D.2d 460 [1st Dept. 1993]). However, where the sole eyewitness' testimony is not refuted or materially inconsistent, summary judgment will not be barred (*see Strojek v. 33 East 70th Street Corp.*, 128 A.D.3d 490 [1st Dept. 2015]; *see also Klein v. City of New York*, 222 A.D.2d 351 [1st Dept. 1995], *aff'd*, 89 N.Y.2d 833 [1996]). In other words, summary judgment will not be denied to the plaintiff in this scenario unless the defendants present a conflicting theory with supporting evidence, or raise a "bona fide credibility issue" with respect to the plaintiff's account of the accident (*see Weber v. Baccarat, Inc.*, 70 A.D.3d 487 [1st Dept. 2010]).

In this matter, the sole eyewitness to this accident, Mr. Escalante, originally testified that the scaffold at issue required no railings because it was raised no more than six feet, and because he and plaintiff were provided with a harness and life line as safety equipment. Mr. Escalante stated that both himself and the foreman were in charge of giving safety instructions to employees. Mr. Escalante also testified that Plaintiff was wearing a harness just before the accident, and that he told Plaintiff to hook his life line to a metal stud supporting the wall. Plaintiff, however, did not do so. Mr. Escalante believed Plaintiff "forgot to clip it." Mr. Escalante also admitted to signing a statement shortly after the accident where he indicated that Plaintiff had indeed been wearing a harness. Mr. Escalante further conceded that he gave a telephone interview with an investigator hired by Plaintiffs' counsel where, again, he alleged that Plaintiff was wearing a harness at the time of the fall. At his subsequent deposition, however, Mr. Escalante stated that his earlier testimony was not true, and he had lied because his supervisor told him to, and he feared losing his job. This time, he testified that Plaintiff was not wearing a harness at all at the time of his fall.

The conflicting testimony of Mr. Escalante does not necessarily preclude entry of summary judgment in favor of the plaintiff on his labor law §240(1). The issue now becomes whether, under either version of events, the Plaintiff has established a violation of Labor Law

§240(1), as a matter of law (*see, e.g., John v. Baharestani*, 281 A.D.2d 114 [1st Dept. 2001]).

The opponents to the motion contend that Mr. Escalante's initial testimony, and the testimony of Mr. Crecco, raise an issue of fact as to whether the Plaintiff was provided with proper safety equipment – a harness – and was directed to use it, but for no good reason failed to do so. In order for a defendant to avail itself to the “recalcitrant worker” defense, there must be evidence that the worker disregarded an “immediate instruction” to use a safety device (*Vacca v. Landau Industries, Ltd.*, 5 A.D.3d 119 [1st Dept. 2004]). Further, in order to raise an issue of fact as to whether the plaintiff was the sole proximate cause of his accident due to his failure to use a harness, a defendant needs to show that the harness, if indeed provided, would have actually furnished adequate protection (*see Miglionico v. Bovis Lend Leasing*, 47 A.D.3d 561 [1st Dept. 2008]).

Here, Mr. Escalante indeed initially testified that Plaintiff disregarded his immediate instruction to clip his harness to a metal stud affixed to the wall. Plaintiff's expert engineer, however, opined after his review of the pertinent testimony and photographs of the accident site that those metal studs were improper anchorage points, as they would not have supported adequate weight. The expert further noted that the scaffold had no railing and was positioned adjacent to a 9-foot deep open stairwell, which is consistent with Mr. Escalante's initial deposition testimony. The defendants cite testimony from Mr. Crecco, who alleged that Plaintiff could have “hooked into” and overhead steel beam that was “probably” overhead. Upon further questioning, however, Mr. Crecco conceded that a worker would have to drill into the beam to accomplish this. He was not aware if anything was actually drilled into the beam at the time, and did not recall if he ever saw anyone hooking into this steel beam during the project.

In light of the foregoing, even crediting Mr. Escalante's initial testimony, and deeming Plaintiff recalcitrant, Plaintiffs have established that the harness would not have provided adequate protection because there were no suitable anchorage points, and the failure of the scaffold to protect him from this fall was a *more proximate* cause of this accident (*see Berrios v. 735 Ave. of Americas, LLC.*, 82 A.D.3d 552 [1st Dept. 2011]; *see also Milewski v. Caiola*, 236 A.D.2d 320 [1st Dept. 1997] [“neither plaintiff's disregard of a co-worker's advice that the plank plaintiff was lying across the elevator shaft was unsafe, nor the conflicting testimony concerning whether plaintiff was wearing a safety harness at the time of the accident, creates an issue of fact sufficient to support the recalcitrant worker defense”]). The defendants have offered no evidence

to competently refute Plaintiff's expert's contentions that there were no suitable anchorage points available at the accident site (*Miglionicio v. Bovis Lend Lease, Inc.*, 47 A.D.3d 561, 564-565 [defendants' witnesses did not state whether the suggested anchorage points would have provided proper protection]; *Tzic v. Kasampas*, 93 A.D.3d 438 [1st Dept. 2012][defendants did not contest plaintiff's expert assertion that securing a harness to a nearby fire escape was improper]). Defendants have therefore failed to raise an issue of fact as to whether Plaintiff's conduct, even if recalcitrant, was the sole proximate cause of this accident. It is true that "[w]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability." (*Cahill v. Triborough Bridge and Tunnel Auth.*, 4 N.Y.3d 35, 39 [2004].) But "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." (*Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d at 290, 771 N.Y.S.2d 484, 803 N.E.2d 757.) "[R]egardless of the precise manner in which the accident occurred, a defendant is not absolved from liability where ... a plaintiff's injuries are at least partially attributable to the defendant's failure to provide proper protection as mandated by the statute." (*Cammon v. City of New York*, 21 A.D.3d 196, 201, 799 N.Y.S.2d 455 [1st Dept. 2005].)

Plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law §240(1) is granted to the extent of Plaintiffs' claims asserted against 313-315 West, Plaza Circle, and Solil Management. Plaintiffs conceded in reply that they asserted no direct claims against Plaintiff's employer, K&K. As will be discussed *infra*, defendants Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC are entitled to dismissal of this action as a matter of law.

Labor Law 241(6)

To the extent that a plaintiff asserts a viable claim under this section, the plaintiff must demonstrate that his injuries were proximately caused by a violation of an applicable Industrial Code regulation. (*Penta v. Related Cos., L.P.*, 286 A.D.2d 674 [2nd Dept 2001]). The regulation(s) relied on must be "concrete specifications" as opposed to general safety standards. (*Ross v. Curtis-Palmer Hydro Electric, et. al.*, 81 N.Y. 2d 494 [1993]). "Violation of an administrative regulation promulgated pursuant to statute is simply some evidence of negligence. The owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241(6), including contributory and comparative negligence (*Catarino v. State*, 55

A.D.3d 467 [1st Dept. 2008]; citing *Rizzuto v. LA Wenger Constr. Co.*, 91 N.Y.2d 343, 350 [1998]).

Here, however, since Plaintiff is entitled to summary judgment on his Labor Law §240(1) claim, this court need not address his entitlement to summary judgment under Labor Law §241(6). “Plaintiff’s damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic” (*Auriemma v. Biltmore Theatre, LLC.*, 82 A.D.3d 1 [1st Dept. 2011], citing *Torino v. KLM Constr.*, 257 A.D.2d 541 [1st Dept. 1999]; see also *Jerez v. Tishman Constr. Corp. of New York*, 118 A.D.3d 617 [1st Dept. 2014]).

While the defendants did not move for summary judgment dismissing Plaintiff’s Labor Law §241(6) claims, upon search of the record (see *Miranda v. NYC Partnership Housing Dev. Fund Co., Inc.*, Plaintiff’s claims predicated upon alleged violations of Occupational Safety and Health Rules and Regulations (“OSHA”) must be dismissed, since violation of OSHA standards do not provide a basis for liability under §241(6) (*Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247 [1st Dept. 1999]).

Goldman Estate, Goldman 2002, and Sol Goldman Investments, LLC

Goldman Estate, Goldman 2002, LLC, and Sol Goldman Investments argue that they are entitled to summary judgment, because it is undisputed that Lillian Goldman, who is succeeded by the Estate of Lillian Goldman, transferred her ownership in the property to 313-315 West in 1999. Those defendants submit a copy of the relevant deed as well as deposition testimony establishing that Estate of Lillian Goldman, Goldman 2002, and Goldman, had no connection with the property at the time of this incident. Plaintiff opposes and argues that these entities are not entitled to dismissal because defendants’ corporate registration records and the deed for 313-315 West point to the Goldman family’s ownership and management of the defendant companies, who are “alter-egos” of each other, and whose ownership structure and insurance information have not been provided by defendants despite multiple requests. Moreover, the Estate of Sol Goldman Investments, LLC, is listed as an additional insured in the certificate of liability insurance for K&K. Plaintiffs contend that defendants have not provided adequate responses to discovery demands regarding the interrelationship between the various entities. The testimony of Ms. Weeks did not clarify the issue, as she testified that the Goldman family runs defendant Solil Management, which, together with Plaza Circle, collectively manages 313-315

West. The Goldman family was therefore involved with all defendants, although Solil Management is the only defendant that had employees.

This Court finds that since it is undisputed that ownership of the premises at issue was transferred to 313-315 West prior to the date of this accident, the Estate of Lilian Goldman, The Lilian Goldman 2002 LLC, and Sol Goldman Investments, LLC, are entitled to dismissal of the complaint and all cross-claims. Even if, as alleged by Plaintiffs, these entities are involved with the ownership and management of all the defendant companies, “corporations have a legal existence separate from that of their officers and shareholders, even when the corporation has a single shareholder who of necessity dominates the corporation” (*see Kok Choy Yeen v. NWE Corp.*, 37 A.D.3d 547 [2nd Dept. 2007]). Plaintiff alleges that the sale to 313-315 West was a “sham” to insulate the Goldman family from liability judgments, however, “a business can lawfully be incorporated for the very purpose of enabling its proprietor to avoid personal liability” (*Seuter v. Liberman*, 229 A.D.2d 386 [2nd Dept. 1996]). Plaintiff also alleges that they “may seek to pierce the corporate veil and expose the Goldman entities and/or family members to liability.” Piercing the corporate veil, however, generally requires a showing that (1) the owners exercised complete dominion of the corporation in respect to the transaction attacked, and (2) such dominion and control was used to commit a fraud or wrong against a plaintiff which resulted in that plaintiff's injury (*see, Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135 [1993]). Here, even if Plaintiffs can establish the first element, they fail to allege any facts or submit admissible evidence to raise a genuine issue of fact as to the second element. Accordingly, the complaint and any cross-claims asserted against Estate of Lilian Goldman, The Lilian Goldman 2002 LLC, and Sol Goldman Investments, LLC .must be dismissed.

Labor Law 200 / Common Law Negligence as to 313-315 West, Plaza Circle, Solil Mgmt.

No opposition has been filed to that branch of 313-315 West, Plaza Circle, and Solil Management's motion seeking dismissal of Plaintiff's Labor Law §200 and common-law negligence claims asserted against them. Labor Law §200 is a codification of common-law negligence principles concerning the duty imposed upon an owner or general contractor to provide workers with a safe work environment. (*See, Comes v. New York State Elec. & Gas Corp.*, 82 NY.2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Electric Company et al.*, 81

N.Y.2d 494, 505 [1993]; *Dunham v. Hilco Construction Co.*, et al., 89 N.Y.2d 425, 429 (1996). It is well settled that an implicit precondition to this duty is that the party 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 (See *Rizzuto v. LA. Wenger Contracting Co., Inc.*, 91 NY.2d 343, 352 [1998]). Liability does not attach “solely because the owner had notice of the allegedly unsafe manner in which the work was performed.” (*Comes*, 82 N.Y.2d at 878, 609 N.Y.S.2d 168, 631 N.E.2d 110; see also *Ortega v. Puccia*, 57 A.D.3d 54, 61 [2nd Dept. 2008]). In this matter, the defendants 313-315 West, Solil Management, and Plaza Circle have established *prima facie* entitlement to dismissal of Plaintiff’s Labor Law §200 and common law negligence claims, as it is not disputed that those defendants exercised no control or supervisory authority over the injury-producing work. Accordingly, those claims as asserted against the moving defendants are dismissed.

Reformation of the Contract

313-315 West, Solil, and Plaza Circle move to reform the contract between 313-315 West and K&K, to reflect that “313-315 West,” and not Solil, is the owner of the premises. The defendants/third party plaintiffs allege that the identification of Solil as the “owner” in the contract is the result of a scrivener’s error. Solil’s project manager, Mr. Grabowski, signed the contract with Katselnik for the work being performed at the time of Plaintiff’s accident. Mr. Grabowski testified that he signed the contract on behalf of Solil, as an agent for 313-315 West, who was the owner of the premises.

As noted by K&K, the defendants 313-315 West and Plaza Circle brought a declaratory judgment action in Supreme Court, New York County, against K&K and their insurer, Arch Specialty Insurance Group. The action contained causes of action seeking, *inter alia*, a declaration of coverage from Arch in favor of the declaratory judgment plaintiffs, as well as reformation of the contract between Solil and K&K to deem the “owner” to be 313-315 West. On March 27, 2015, Justice Carol Edmead of the Supreme Court, New York County issued a decision and order denying the declaratory judgment-plaintiffs’ motion for summary judgment, and granting the declaratory judgment-defendant’s cross-motion for summary judgment, dismissing the action in its entirety. In so ruling, the Court determined that the declaratory judgment plaintiffs were owed no coverage under Arch’s insurance policy, that the declaratory

judgment plaintiffs are precluded from reforming the contract, and further, that the declaratory judgment plaintiffs are not beneficiaries under the contract.

Despite the issuance of that Order, the defendants/third party plaintiffs again, in this action seek reformation of the contract. The movants argue, contrary to K&K's contention, that this issue is not barred by *res judicata* or collateral estoppel, because the instant matter involves issues of indemnification and not insurance coverage, and even if it were identical, Justice Edmead's Order was not a "final judgment on the merits," and is on appeal to the First Department.

This court declines to grant 313-315's motion to the extent it seeks reformation of the contract. When presented with the same evidence, Justice Edmead found that 313-315 had not submitted sufficient evidence that the naming of Solil as "Owner" was unintentional or the result of a scrivener's error. The issue was squarely litigated in the declaratory judgment action, and thus the claim for reformation is barred by the doctrine of *res judicata*. 313-315 alleges that there was no "valid final judgment" in the declaratory judgment action, however, K&K has presented a copy of entered decision and order resolving the summary judgment motions in the declaratory judgment action, and disposing of the matter. "[T]here is no question that the granting of summary judgment ... was an adjudication on the merits and therefore entitled to *res judicata* effect" (*see Murray v. National Broadcasting Co.*, 178 A.D.2d 157 [1st Dept. 1996][internal citations omitted]). Moreover, the case *Guzman v. 170 West End Avenue Association* concerned issues of non-signatories' entitlement to contractual indemnification, and did not address issues of contract reformation (115 A.D.3d 462 [1st Dept. 2014]).

Contractual Indemnification in favor of 313-315 West, Solil, and Plaza

313 West, Solil, and Plaza all move for summary judgment on the issue of their claims against K&K on the issue of contractual indemnification.

The operative contractual indemnification provision found in the Solil Management - K&K AIA construction contract reads:

"To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses ... arising out of or resulting from performance of the work, provided that such claim ... is attributable to bodily injury ... but only to the extent

caused by the negligent acts or omissions of the Contractor ..." (Par. 3.18).

K&K contends that the defendants/third party plaintiffs cannot prevail on their claim for contractual indemnity because the contract only identifies Solil as the "Owner" of the premises. Further, K&K argues that the decision issued in the related New York County declaratory judgment action explicitly determined this precise issue, when the Court found that neither 313-315 nor Plaza were third-party beneficiaries under the contract. On those grounds, K&K has filed a separate motion for summary judgment, seeking dismissal of 313-315 West and Plaza Circle's cross-claims for contractual indemnification.

First, there is no dispute that defendant/third party plaintiff Solil Management is identified as "Owner" in the subject contract. Where an entity is held strictly liable based solely on its status as owner or general contractor pursuant to Labor Law §240(1), as is the case here with respect to Solil Management, the entity is entitled to contractual indemnification where such has been agreed to between the parties (*see Velez v. Tishman Foley Partners*, 245 A.D.2d 155 [1st Dept. 1997]). In this matter, therefore, Solil Management is entitled to conditional summary judgment on its contractual indemnification claims against K&K, as its liability is purely statutory. The summary judgment will be conditional upon a finding of K&K's negligence, as the provision at issue obligated K&K to indemnify Solil Management to the extent bodily injuries arose out of K&K's "negligent acts or omissions" (*see Crimi v. Neves Assoc.*, 306 A.D.2d 152 [1st Dept. 2003]).

313-315 West and Plaza Circle, however, are not entitled to summary judgment on their contractual indemnification against K&K, since those entities do not appear on the contract. At the outset, this Court finds that the issue of whether K&K is contractually obligated to indemnify 313-315 West and Plaza Circle is separate and distinct from the issue resolved in the declaratory judgment action – whether 313-315 West and Plaza Circle were additional insureds under the policy of insurance issued to K&K by its insurance carrier, Arch Specialty Insurance Company. The prior decision from New York County Supreme Court, accordingly, has no preclusive effect on this issue.

The contractual provision at issue obligates K&K, as contractor, to indemnify the "owner" and its agents and employees for claims arising out of K&K's negligent acts or omissions. Despite the fact that 313-315 West is indeed the owner of the premises, it was not the "owner" identified in the contract and it therefore has no claims under the contract (*see Crimi v.*

Neves Assoc., 306 A.D.2d at 153). Similarly, the contract affords no rights to defendant/third party plaintiff Plaza Circle. The provision cannot be construed or altered to state that either 313-315 West or Plaza Circle was an “agent” of Solil Management, as urged by the defendants/third party plaintiffs. As in *Tonking v. Port Authority of N.Y. and N.J.*, 3 N.Y.3d 486 (2004), “[the court is] unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out. If the parties intended to cover [313-315 West and/or Plaza Circle] as ... potential indemnitee[s], they had only to say so unambiguously.” Because the contract provision at issue is unambiguous, the parol evidence proffered by the defendants/third party plaintiffs seeking to explain the parties’ intent is inadmissible (*see generally W.W.W. Assoc., Inc. v. Giancontieri*, 77 N.Y.2d 157 [1990]).

313-315 West and Plaza Circles allege that *Guzman v. 170 West End Avenue Association* is directly analogous to the case at hand. That matter, however, distinguishable because the indemnification provision in *Guzman* more broadly obligated the contractor to indemnify “the Owner parties and their respective officers, board members, agents and employees” (115 A.D.3d 462). The Appellate Division therefore found that the actual premises owner (170 West End Avenue Owners Corp) and managing agent (170 West End Avenue Associates) were entitled to indemnification notwithstanding the fact that only “170 West End Avenue Condominium” was actually identified as the “Owner” in the contract. The provision at issue, however, is not as broad as the provision in *Guzman*, as it limits indemnity to the “owner,” “architect,” or their “agents” or “employees.” As noted *supra*, this Court cannot presume that the actual owner of the premises, or the owner’s managing agent, should be deemed “agents” or “employees” of Solil Management (*Tonking v. Port Authority of N.Y. and N.J.*, *supra*).

Accordingly, 313-315 West and Plaza Circle’s motion for summary judgment on their cross-claims for contractual indemnification must be denied, and K&K’s motion seeking dismissal of those cross-claims is granted¹.

¹K&K also sought dismissal of the contractual indemnification claims asserted by Sol Goldman Investments, LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC. Since Plaintiff’s complaint and any cross-claims have been dismissed as to those defendants, any cross-claims for contractual indemnification from those defendants are dismissed as moot.

Common Law indemnification in favor of 313-315 West, Plaza Circle, and Solil

Notwithstanding the foregoing, however, 313-315 West, Plaza Circle, and Solil Management are entitled to conditional summary judgment on their cross-claims against K&K seeking common law indemnification. The moving defendants/third party plaintiffs have demonstrated that they did not control or supervise Plaintiff's work, and that K&K exercised exclusive authority to supervise the Plaintiff's work, and implement safety features (*see Bermejo v. New York City Health and Hospitals Corp.*, 119 A.D.3d 500, 504 [2nd Dept. 2014]; *citing, inter alia, McCarthy v. Turner Constr. Inc.*, 17 N.Y.3d 369 [2011] *see also Serowik v. Leardon Boiler Works, Inc.*, 129 A.D.3d 471 [1st Dept. 2015]). A conditional order is appropriate here, where the indemnitee's lack of negligence has been established, and there is no issue of fact as to whether the indemnitor, K&K, exercised actual, exclusive, supervisory authority over the Plaintiff (*McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d at 377-378). The Court also notes that the defendants/third party plaintiffs have established, and K&K has not disputed, that Plaintiff has sustained a "grave injury" as a result of this accident, within the meaning of Workers' Compensation Law §11.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability on his Labor Law §240(1) claims is granted, to the extent those claims have been asserted against defendants 313-315 West, Plaza Circle, and Solil Management, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability on his Labor Law §241(6) claims is denied as academic, except that any claim predicated upon a violation of OSHA standards are dismissed, and it is further,

ORDERED, that defendants/third party plaintiffs Sol Goldman Investments LLC, Estate of Lillian Goldman, and Lillian Goldman 2002 LLC's motion for summary judgment is granted, and all claims asserted against those defendants are dismissed with prejudice, and it is further,

ORDERED, that defendants/third party plaintiffs 313-315 West, Plaza Circle, and Solil Management's motion for summary judgment, dismissing Plaintiff's Labor Law §200 and common law negligence claims, is granted, and those claims are dismissed with prejudice, and it is further,

ORDERED, that defendants/third party plaintiffs' motion seeking reformation of the subject contract is denied, and it is further,

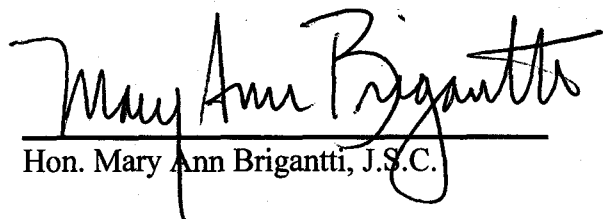
ORDERED, that defendants/third party plaintiff Solil Management's motion for summary judgment against K&K on its cross-claims for contractual indemnification is granted conditionally, only to the extent that there is a finding that the Plaintiff's damages arose out of K&K's negligent acts or omissions, and it is further,

ORDERED, that defendants/ third party plaintiffs 313-315 West and Plaza Circle's motion for summary judgment against K&K on their cross-claims for contractual indemnification, is denied, and K&K's motion for summary judgment, dismissing 313-315 West, Plaza Circle, Sol Goldman Investments LLC., Estate of Lillian Goldman, and Lillian Goldman 2002 LLC's cross-claims for contractual indemnification, is granted, and those claims asserted against K&K are dismissed with prejudice, and it is further,

ORDERED, that defendants/third party plaintiffs 313-315 West, Plaza Circle, and Solil Management's motion for summary judgment against K&K on their cross-claims for common law indemnification is granted conditionally, only to the extent that there is a finding that Plaintiff's damages arose out of K&K's negligent acts or omissions.

This constitutes the Decision and Order of this Court.

Dated: 10/1/15


Hon. Mary Ann Brigantti, J.S.C.