Guaman v City of New York
2016 NY Slip Op 30718(U)
April 15, 2016
Supreme Court, New York County
Docket Number: 150047/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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MANUEL GUAMAN, as Administrator of the Estate of Decedent ANTONIO GUAMAN, deceased,

Plaintiff,

-against-

THE CITY OF NEW YORK and D'ONORFRIO GENERAL CONTRACTORS CORP.,

Defendants.

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D'ONORFRIO GENERAL CONTRACTORS CORP.,

Third-Party Plaintiff,

-against-

YUKON ENTERPRISES, INC.,

Third-Party Defendant.

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YUKON ENTERPRISES, INC.,

Second Third-Party Plaintiff,

-against-

DIEGO CONSTRUCTION, INC.

Second Third-Party Defendant.

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Index No. 150047/2014

DECISION AND ORDER

Motion Sequence 002

CAROL R. EDMEAD, J.:

MEMORANDUM DECISION

I. Factual Background

This is a Labor Law action brought by Plaintiff Manual Guaman ("Plaintiff") on behalf of his nephew, Decedent Antonio Guaman ("Decedent"). Decedent fell through an exposed skylight

on the roof of a warehouse at Pier 42 (the "Warehouse"), where he was conducting repairs. Defendants City of New York ("the City") own the Warehouse, and hired D'Onofrio General Contractors Corp. ("D'Onofrio") as the general contractor, who in turn hired Diego Construction, Inc. ("Diego") as a subcontractor. Third-Party Defendant Yukon Enterprises, Inc. ("Yukon"), was Decedent's employer, which allegedly provided employees to Diego.

Plaintiff commenced a wrongful death action in Kings County in December 2013 against D'Onofrio, alleging Labor Law violations and negligence. D'Onofrio then commenced a third-party action against Yukon for indemnification and contribution. Yukon filed a second third-party action, impleading Diego. Plaintiff subsequently served an amended Complaint to add Yukon and Diego as direct defendants, which Yukon rejected as untimely and as improper.

Plaintiff also filed an action in New York County against the City, also alleging violations of Labor Law and negligence. The actions were later consolidated in New York County.

Plaintiff now moves for summary judgment on his Labor Law 200, 240(1) and 241(6) claims against the City, D'Onofrio, and Diego.

In response, Diego cross moves for summary judgment dismissing the Complaint as asserted against it and all cross and third-party claims for common law indemnification. Yukon also cross moves for summary judgment dismissing Plaintiff's Complaint (though it is not a direct defendant), and D'Onofrio's third party complaint against it. The City and D'Onofrio cross-move for summary judgment dismissing Plaintiff's Complaint.

A. Plaintiff's motion for summary judgment

Plaintiff argues that the City, D'Onofrio, and Diego violated Labor Law 240(1) as the evidence shows that the City owned the Warehouse; D'Onofrio and Diego were the contractors

who supervised and/or participated in the work; work at the Warehouse included repairing and painting (and were therefore "covered activities"); and Decedent fell through an unprotected skylight. Further, Plaintiff argues, any recalcitrant worker defense or claim that Decedent's own conduct was the sole proximate cause of the accident lacks merit, as said defendants' violation makes it "conceptually impossible" for the Plaintiff's own conduct to be the sole proximate cause of his injury. Even had the Decedent been furnished with a safety harness, and had unhooked the harness prior to his fall, Plaintiff would still be entitled to judgement under 2401(1).

Plaintiff also argues that the City, D'Onofrio, and Diego violated Labor Law 241(6), in that repairing and painting the Warehouse roof was a "covered activity," and that it is undisputed that said defendants failed to furnish a protective cover, railing of certain dimensions, or other safeguard in violation of 12 NYCRR 23-1.7(b)(1)(i) and 23-1.15.

Further, the City, D'Onofrio, and Diego violated Labor Law 200(1), in that they exercised supervisory control over the work in question in accordance with certain contracts concerning the work, and failed to remedy the lack of covers or railings around the skylight of which they had actual and/or constructive notice. Plaintiff argues that the service contract between the City (through Apple Industrial Development Corp. ("Apple")) and D'Onofrio gave the City Comptroller the right to enter and inspect the property, that D'Onofrio's Senior Project Manager Keith Neuscheler ("Neuscheler") was on site the day before and after the accident, and that Diego's roofing supervisor Jorge Alonzo ("Alonzo") was in charge of the roofing crew.

In opposition, Diego and Yukon contend that they were not properly served with Plaintiff's motion as their counsel did not register for the New York State Courts Electronic Filing system ("NYSCEF") e-filing system until after Plaintiff's motion had been filed. Yukon

adds that no service by mail was ever made. Next, Plaintiff cannot rely upon the unsigned deposition transcripts of the D'Onofrio and Diego witnesses (Neuscheler and Alonzo, respectively) to support summary judgment as neither witness was given proper time, pursuant to the CPLR, to review and sign them, and because Diego's deposition remains uncompleted.

As to 240(1), the City and D'Onofrio, Diego and Yukon argue that Decedent was the sole proximate cause of his injuries because, despite proper equipment and instruction, he disconnected his harness and left his designated work area. The City and D'Onofrio assert that the Decedent was provided with adequate fall protection for his work on the roof, that the work areas in which he worked were surrounded by barricades, and that caution tape was placed around the skylights that the workers had not yet placed plywood covers on. 240(1) does not require that multiple, redundant safety devices be provided where the protection given was adequate to prevent to afford proper protection for the job. To require such railings and covers at all times at a construction site would lead to untenable results. Thus, the absence of railings around the subject skylight does not constitute a violation of 240(1).

As to Labor Law 241(6), the City and D'Onofrio, Diego and Yukon argue that the Industrial Code was not violated because the subject skylight was outside the statutorily defined area in which construction work was being performed, in that the designated construction area was cordoned off with caution tape and proper safety railings. Further, OSHA violations are irrelevant, and issues of fact exist with respect to Plaintiff's comparative fault.

And, as to Labor Law 200, the City and D'Onofrio argue that there is no evidence that they supervised or controlled plaintiff's work. There is no evidence that the City was present at the site, and Plaintiff's reliance on the service contract, to which the City was not a party, is

misplaced, as the City's mere right to inspect the Contractor's operations is insufficient to support liability against the City under Labor Law 200(1). Neuscheler, the only D'Onofrio employee to visit the site, was present on-site only briefly to discuss generally progress. Additionally, Decedent's negligence, in whole or in part, precludes summary relief under 200. Yukon maintains that there is no liability under the Labor Law where there is no evidence of a violation and where the Decedent's own negligence was the sole proximate cause of his accident.

Diego, Yukon, The City, and D'Onofrio further add that Plaintiff's motion is premature due to outstanding discovery. According to Diego, a deposition of Decedent's putative employer Yukon is necessary to further support Diego's Workers' Compensation bar defense to Plaintiff's claims. The completion of Diego witness Alonzo and other workers that were working on the roof are also important to the defense of the action.

In reply, Plaintiff asserts that service of the motion through NYSCEF was proper in this "mandatory" e-filing case. Despite having failed to register for e-filing, Diego's and Yukon's counsel noted their representation with the clerk.

Further, the unsigned transcripts may be considered because they were certified by the court reporter, Diego itself relies on the transcripts, and over 60 days have elapsed since Plaintiff tendered the deposition transcripts.

As to the merits, Plaintiff argues that the lack of a temporary safety railing around the subject skylight is a statutory violation under 2401(1), and that therefore it is "conceptually impossible" for Decedent's conduct to be the sole proximate cause of his injury. Defendants have not proven that Decedent refused to use an available safety device so as to render him a "recalcitrant worker." Plaintiff also argues, for the first time, Decedent's harness was defective.

Further, as to 241(6), the skylight through which Decedent fell was not guarded by a substantial cover or railing, in violation of the Industrial Code. Plaintiff contends that evidence showing that Decedent left his work area was false, and in any event, fails to show that Decedent was the "sole proximate cause" of his accident. Plaintiff also claims that D'Onofrio's expert affidavit is conclusory and unsupported by industry standards, and thus, is irrelevant.

As to Labor Law 200, Plaintiff also states that Neuscheler was not the only D'Onofrio employee on the job site, and that Diego's status as a wholly-owned subsidiary of D'Onofrio imputed sufficient exercise and control to D'Onofrio for liability under Labor Law 200.

And, Plaintiff argues that his motion is not premature as he has laid bare his proofs, and any additional evidence is in Defendants' possession, and would be irrelevant or inconsequential.

B. Diego's cross-motion for summary judgment

In support of dismissal of Plaintiff's complaint, Diego argues that Plaintiff's claims against it are barred by the Workers' Compensation Law because the Decedent was a "special employee" of Diego.

Further, in support of dismissal of Yukon's indemnification claims, Diego contends that the Labor Law was not violated because Decedent, who disconnected his safety harness and wandered outside his designated work area, was the sole proximate cause of his accident. Since it cannot be found negligent for Plaintiff's accident, Diego is not obligated to indemnify Yukon.

Plaintiff opposes Diego's cross-motion, based on the arguments made for summary judgment. Yukon opposes dismissal of its indemnification claims against Diego, arguing that a finding in favor of Diego's cross-motion on the ground that Decedent was Diego's special employee, supports Yukon's common law indemnification claims against Diego, without a

showing of negligence on the part of Diego.

In reply, Diego adds that to the extent Plaintiff argues that Decedent's safety harness was defective, summary judgment is premature because further discovery is necessary on that issue.

C. Yukon's cross-motion for summary judgment

Yukon requests dismissal of the Complaint, and third party claims against it, arguing that the record establishes that the Decedent was the sole proximate cause of his accident, and that Defendants complied with the relevant Industrial Code regulations.

In opposition, Plaintiff argues that Yukon's cross-motion is procedurally defective for containing inconsistent return dates and items of relief, and also lacks merit for reasons Plaintiff previously asserted.

Diego also opposes Yukon's cross-motion, arguing that Yukon has not met its burden.

In reply, Yukon states, *inter alia*, that Plaintiff has improperly conflated the "recalcitrant worker" and "sole proximate cause" analyses.

D. City and D'Onofrio's cross-motion for summary judgment

The City and D'Onofrio seek to dismiss the Complaint, likewise arguing that the evidence shows that Decedent's actions were the sole proximate cause of his accident, and Plaintiff cannot demonstrate any Industrial Code violation to support a Labor Law 241(6) claim. The City and D'Onofrio also argue that they did not exercise the requisite level of supervision and control over Decedent's work to support a Labor Law 200 claim.

In opposition, Plaintiff argues that there are no affirmative statements or evidence that proper safety harnesses and safety railings were present. Further, the City and D'Onofrio exercised requisite supervision to justify liability under Labor Law 200 and 241(6), and the

OSHA citation is *prima facie* evidence of a 241(6) violation. Plaintiff also takes issue with the affidavit of John T. Whitty, the City and D'Onofrio's expert.

In reply, the City and D'Onofrio add that the presence of the safety harness is particularly important, because erecting safety barriers around every skylight, even those not in the process of being actively worked on, would have impeded the work of covering the skylights.

II. Discussion

Since plaintiff and defendants seek summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 (Sup Ct New York Cty 2012], *aff'd* 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra, citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184 [1st Dept 2006]).

A. Plaintiff's Motion for Summary Judgment

Contrary to Yukon and Diego's contention, Plaintiff's motion was properly e-filed and served. Yukon's counsel (identified in Yukon's papers as "monitoring counsel") appeared and noted their representation by e-filing such appearance on August 6, 2015 (*NYSCEF 39*), over a month before Plaintiff's motion was e-filed. With respect to Diego, Plaintiff properly e-filed its motion pursuant to the e-filing rules applicable to this action, and thus, any lack of knowledge of

the motion is attributable to counsels' failure to register for e-filing.[1]

When an action is initiated in New York County, initiating documents pursuant to CPLR Article 3 are required to be served with a mandatory e-file notice (22 NYCRR 202.5bb[b][3]). Thereafter, all subsequent papers in a New York County action are required to be e-filed (22 NYCRR 202.5-bb[c] "Except as otherwise provided in this section, filing and service of all documents in an action that has been commenced electronically in accordance with this section shall be by electronic means")). Inasmuch as the New York County action was initiated in accordance with the mandatory e-filing rules, Plaintiff properly e-filed its motion papers.

The additional wrinkle here is that the Kings County action and third party action against Yukon and Diego (where the case was *not* e-filed, and which does not have a mandatory e-filing program) were consolidated with the New York County action (where e-filing is mandatory), and there is apparently no specific procedure in place for these circumstances.

However, new procedural rules and the apparent growing pains of the e-filing system notwithstanding, counsel are responsible for apprising themselves of local rules (*Franklin v McHugh*, 804 F3d 627, 632 [2d Cir 2015] ["...counsel have long been charged with becoming familiar and complying with the various local rules of our courts"]; *United States v Abady*, 03 CIV. 1683(SHS), 2004 WL 444081, at *2 [SDNY Mar. 11, 2004] [attorneys practicing before the court presumed to be familiar with the local district rules]). E-filing has been mandatory in all cases commenced in this Court on and after Feb. 19, 2013 (*see* "Notice to the Bar - Expansion of Mandatory E-Filing" [Feb 19, 2013, Prudenti, J.]), a program which has since been expanded and codified (22 NYCRR 202.5-bb[a][1]) and, as noted by Plaintiff, publicized and documented on

[1] The motion was adjourned at least once, Yukon and Diego had ample time to respond.

the Court's website. Thus, upon transfer of the Kings County action to New York County, counsels should have learned that they were required to promptly register for NYSCEF.

Further, plaintiff's reliance upon transcripts of witnesses whose depositions have yet to be completed by other parties is not fatal to his motion. And, that Plaintiff filed his motion before 60 days had elapsed after the deposition of Diego and D'Onofrio's witnesses, does not render the transcripts are inadmissible or the motion procedurally defective (CPLR 3116[a] ["The deposition shall then be signed by the witness . . . If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed").

Although certain parties have not completed the deposition of Diego's foreman Alonzo, even uncertified transcripts introduced by a moving party are admissible when submitted by another party in support of their cross-motion — this suggests that the accuracy is unchallenged and the transcript is reliable (*see Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]). Here, Diego relies on Alonzo's testimony and even supplements it by affidavit [*see, e.g., Diego affirm* [*Diego MSJ*] ¶¶ 29-33). Similarly, the City and D'Onofrio rely on the depositions of D'Onofrio's project manager Keith Neuscheler and Alonzo in support of their cross-motion (*see, e.g., City/D'Onofrio affirm*, ¶¶ 6-12 [*City/D'Onofrio MSJ*]). Furthermore, Diego filed their opposition on October 28, 2015, over 60 days after the transcript of Alonzo's deposition was transmitted. The City and D'Onofrio filed their cross-motion almost a month later. Therefore, the transcripts of Alonzo and Neuscheler are admissible to support a motion for summary judgment [*see Castano v Wygand*, 122 AD3d 476, 477 [1st Dept 2014]).

1. Labor Law 240(1)

As to the merits of plaintiff's motion, Labor Law 240(1) provides, in relevant part:

> All contractors and owners and their agents . . . in the . . . repairing, altering, painting . . . 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), also known as the "Scaffold Law," imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection from elevation-related risks to a worker who sustains injuries proximately caused by that failure (*Ernish v City of N.Y.*, 2 AD3d 256 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452 [1985]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235, 885 NYS2d 28 [1st Dept 2009]). To establish a cause of action under Labor Law 240(1), a plaintiff must show that the statute was violated, and the violation was a proximate cause of the worker's injury (*Tounkara v Fernicola*, 80 AD3d 470, 914 NYS2d 161 [1st Dept 2011]; *Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). "The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute, and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]). A "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable" (*Ortega v City of New York*, 95 A.D.3d 125, 940 N.Y.S.2d 636 [1st Dept 2012]). In other words, when a worker is performing one of the inherently dangerous activities covered by Labor Law § 240(1), some injury is foreseeable from the failure of a contractor or owner to provide the worker with proper safety devices" (*Ortega,* at 128). Thus, a plaintiff merely has to

demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury (*id.*).

According to the evidence presented by Plaintiff, D'Onofrio was engaged to, *inter alia*, "make watertight the Northeast corner roof . . ." and "board up all of the skylights on the roof," and thus engaged Yukon (from whom the Decedent was paid wages) to perform "Roofing Assistance" related to "Emergency Waterproofing of Skylights." (see D'Onofrio Letter of November 5, 2012). According to D'Onofrio, a "safety report" indicates that the Decedent was employed by Yukon (Neuscheler of D'Onofrio EBT, p. 139)

D'Onofrio and Diego concede that the Decedent "worked on the roof" "at some point" during the subject date (see Responses to Notices to Admit).[2]

As to the Decedent's work at the site, Alonzo testified that the job "was to cover the skylights with plywood and then spray them with spray foam" (EBT, pp. 16, 26, 34 ("cover the skylight and cover it with spray foam"). Pertaining to work regarding the skylights, Alonzo would "gather" the Decedent and the two other workers to begin working on one skylight together, and "put caution tape in order to prevent anyone to go across" to other skylights so as to "concentrate everybody in that area" of the skylight on which they were working; he gathered "all four of us in one skylight because of how dangerous the work was." (EBT, pp. 42-44). Alonzo "placed some safety barriers" called "security rails" consisting of "two-inch pipes," in addition to "caution tape" "around the area" of the skylight on which they were working, in which they were working (EBT, pp. 59, 61) "not to avoid a person to fall because people were . . . attached with

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[2] Alonzo of Diego testified at his deposition that the Decedent was sent to him that day upon his request (to his supervisor Joe DiGregorio) for personnel for work (EBT, pp. 11-13).

the harness," but as "an additional measure of protection" for "them to not leave the area that we were working in" (pp. 65-66).

However, pertaining to the work at the time of the Decedent's fall, approximately 15 minutes before the accident, the Decedent, and other workers, were on the roof, painting over an area to which foam already had been applied; "after you place the foam you also paint it on top of it" (EBT, pp. 70, 74, 77). Alonzo stated, "we were supposed to cover all of them" including "the area that was not going to be covered that day" (as "I would not have enough time to do it that day and I would end up doing the following day") (p. 31)); however, the skylight through which the Decedent fell on Sunday "was not included in the ones that were scheduled to do in the area for that day [Saturday]." (EBT, pp. 29, 31).

On the following day, Alonzo "had a particular portion of the building to work on" (EBT, p. 54), and was "directed to do that particular portion of the building time depending, if I would have time then I would probably go on and do [the remaining skylights] (EBT, pp. 54-55). "We were doing some repairs on the roof and if would have time then we would cover the skylights and . . . put some foam." (EBT, p. 56). "They were still painting an area" for the last 15 minutes remaining for their shift, when, he saw the Decedent fall from the skylight in an area that "was completely separated from the area that they were working on" (EBT, pp. 69-70, 73). When he last was on the roof, before the fall, "all of them had the harness on" and were "properly tied" (EBT, pp. 77, 101). However, when asked if there were barricades that separated the area where Plaintiff was painting from the subject skylight, Alonzo replied, "No," the caution tape was the only thing there. Because at that moment, on that particular day, they were specifically working that that corner of the building"; an area "not even close to that skylight" (EBT, pp. 78-79). The

area in which they were assigned to work "was in the corner" and "the skylights in question were petty much to the middle" (EBT, p. 32).

Based on the above, plaintiff established that the Decedent was engaged in a protected activity at the time of his accident. However, Plaintiff failed to establish that adequate safety devices were not provided to prevent the Decedent from falling through the skylight on the roof on which he working.

Contrary to Plaintiff's contention, "not every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1) (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 288 [2003] (The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party."]). Thus, the mere fact that Decedent fell through an unprotected skylight while assigned to perform repair work on a roof is not, in and of itself, *prima facie* evidence of a Labor Law 240(1) violation.

As the City and D'Onofrio point out, the cases cited by Plaintiff do not support his expansive interpretation because they do not address the circumstance where a safety device testified to as secured and tied off, was provided and adequate for the work assigned (*see, e.g.*, *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [finding a *prima facie* violation where "the plywood cover" on the hole (through which worker fell), was an inadequate safety device because "it was not secured" at the time of the accident); *Timmons v Lynx Contr. Corp.*, 14 Misc 3d 317, 319 [Sup Ct Bronx County 2006] *affd*, 49 AD3d 382 [1st Dept 2008] [where worker performing air conditioning insulation work came down on the other side of the duct he was wrapping and fell through a skylight, as "there was no

planking over the skylight opening and no guards *or other protective devices over or around the opening at the time of his fall* [emphasis added]; *Van Dina v City of New York*, 292 A.D.2d 267, 740 N.Y.S.2d 15 [1st Dept 2002] (concluding that testimony that worker "fell through an inadequately protected opening in the building's roof," sufficient to support summary judgment to plaintiff as to liability under Labor Law § 240 (1)); *Carpio v Tishman Constr. Corp. of N.Y.*, 240 A.D.2d 234, 658 N.Y.S.2d 919 [1st Dept 1997] (finding liability where worker, while extending his paint roller and looking to the ceiling, backed his foot into a hole in floor, causing his leg to fall three feet below surface); *Clark v Fox Meadow Bldrs.*, 214 A.D.2d 882, 624 N.Y.S.2d 685 [3d Dept 1995] (finding liability where worker fell through an opening which had been made in the roof deck to accommodate skylights, as "there was no cover over the opening *and no safety device was in place to protect plaintiff from the uncovered opening*") (emphasis added); *Gandley v Prestige Roofing & Siding Co.*, 148 A.D.2d 666, 539 N.Y.S.2d 416 [2d Dept 1989] (rejecting defendant's claim that "there was no need for any safety device" and finding liability where worker performing roof work fell though a skylight covered with plexiglas bubbles; in addition to the absence of any evidentiary proof that such a plexiglas bubble constituted a safety device, a prior fall by a worker gave notice that the plexiglas bubble covering "could not be relied upon as a safety 'device'" under Labor Law 240(1)); *Jimenez v Hudson 38 Holdings, LLC*, 2013 N.Y. Misc. LEXIS 6663; 2013 NY Slip Op 33724(U) (Sup Ct., Bronx County) (finding liability where worker, who fell through an unprotected skylight to the floor below, alleged "that no one provided him with a safety harness, safety belt, safety rope, lifeline or any other safety device" and "no one placed any netting or any other safety device underneath the glass skylight to protect plaintiff from falling")).

Here, Plaintiff failed to establish that the harness as tied off (couple with the caution tape separating the Decedent's designated work site from the rest of the roof where the subject skylight was located) was an inadequate safety device to prevent the Decedent from falling through the subject skylight. Here, the testimony indicates that the Decedent was provided with a harness which was properly tied 15 minutes before his fall. And, there is testimony indicating that the harness as tied off, would not have created "a possibility that he would have fallen"; the harness was a length that would permit him "to go to the area where was supposed to work and back" (Alonzo EBT, pp. 83-84, 97). Plaintiff presented no caselaw for the support that a functional, properly-anchored safety harness cannot serve as an adequate safety device under Labor Law 240(1) (*cf. Magee v 438 E. 117th St. LLC*, 56 AD3d 376, 376-77 [1st Dept 2008] [summary judgment granted to plaintiff where it was undisputed that "no safety devices, such as harnesses, ropes or nets had been furnished or made available" despite work near garbage chute]; *Aburto v City of New York*, 94 AD3d 640 [1st Dept 2012] [granting summary judgment to plaintiff because "there were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent [plaintiff's] fall"]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [1st Dept 2008] [granting summary judgment to plaintiff because, even if harness had been provided, there was no anchorage point]).

Here, the presence and adequacy of the harness, lanyard, and safety line raises an issue of fact as to whether there was a failure to provide adequate safety devices that proximately caused the Decedent's injuries. To the extent that Plaintiffs base their entire 240(1) summary judgment argument upon the sole fact of Decedent's fall through the skylight, they fail to meet their *prima facie* burden of demonstrating that no adequate safety device, or a demonstrably inadequate one,

was provided.

At the same time, and in relation to plaintiff's Labor Law 240(1) claim, Defendants fail to meet their own burden of demonstrating that the Decedent was the sole proximate cause of his accident so as warrant dismissal of all of his claims.

Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability (*Cahill v. Triborough Bridge and Tunnel Author*, 44 N.Y.3d 358, 23 N.E.2d 439790 N.Y.S.2d 74 [2004]; *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 290 [2003]). If adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under 240(1) does not attach (*Cherry,* 66 AD3d at 236). It "is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" (*Blake*, 1 NY3d at 290) Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it (*id.*; *see also Klapa v O & Y Liberty Plaza Co.*, 218 AD2d 635, 636 [1st Dept 1995] [because plaintiff demonstrated that the failure to provide guardrails was a failure to give "proper protection" under Labor Law 240(1), plaintiff's contributory negligence is irrelevant]).

"Cases upholding the so-called 'recalcitrant worker' defense exemplify this rule" (*Cahill, supra*). The recalcitrant worker defense "is . . . limited to circumstances where a worker is injured as a result of his/her refusal to use available safety devices" (*Landgraff v 1579 Bronx River Ave., LLC*, 15 AD3d 200, 202 [1st Dept 2005]). And, an owner who has provided safety devices is not liable for failing to "insist that a recalcitrant worker use the devices" (*Cahill*, 4 NY3d at 39 [plaintiff received specific instructions to use a safety line while climbing, and chose

to disregard those instructions], *citing Smith v Hooker Chems. & Plastics Corp.* (89 AD2d 361, 365 [4th Dept 1982]).

Nevertheless, "the controlling question" "is not whether plaintiff was 'recalcitrant,' but whether a jury could have found that [the worker's] own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident" (*Cahill*, 4 NY3d at 39-40) (noting that in *Blake*, "[e]ven when a worker is not 'recalcitrant' ... there can be no liability under section 240(1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident" (1 N.Y.3d at 290, 771 N.Y.S.2d 484, 803 N.E.2d 757).)

Here, the cross-movants failed to establish, that the devices provided – the harness, lanyard, and safety line and the caution tape separating the designated work site from the rest of the roof, including the skylight through which Decedent fell – constituted adequate safety devices as a matter of law. While Decedent was instructed in the use of those devices on the day of the accident [*Diego Exh A [Alonzo Aff]* ¶ 2, 4], Alonzo never explicitly testified that the length of Decedent's safety line was "*only*" sufficient to allow access to the designated work area and not beyond it (*Pl Exh 14 [Alonzo Tr]* 84:4-6), and thus his conclusion that Decedent fell because he unhooked his lanyard is insufficient to establish the adequacy of the device as a matter of law (*id.* at 97:11-16). There is also no evidence that the safety devices themselves were later inspected to ensure that they had functioned properly (*id.* at 94:14). To the extent that the City and D'Onofrio's expert affidavit relies on the same testimony (*City/D'Onofrio Exh C [Whitty Aff]* ¶ 5), such affidavit does not alter the Court's analysis.

Furthermore, Defendants also failed to demonstrate that Decedent remove his harness. Alonzo was not present on the roof at the time of Decedent's fall. When Alonzo questioned two

other Yukon employees who were present on the roof and who have not been deposed, they "really did not see anything" (*id.* at 96:14-97:16).

Therefore, the branch of defendants' various cross-motions to dismiss Plaintiff's Labor Law 240(1) claim is likewise denied.

2. Labor Law 241(6)

Labor Law § 241(6) "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Misicki v Caradonna*, 12 NY3d 511, 515, 909 NE2d 1213 [2009]). This section imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]).

In order to recover, a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross,* 81 NY2d at 501-502; *Long v Forest-Fehlhaber,* 55 NY2d 154 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81 NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010] ["A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard"]). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long,* 55 NY2d at 160).

Plaintiff alleges violations of 12 NYCRR 23-1.7(b)(1)(i), which provides that "every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." In turn, 12 NYCRR 23-1.15, requires that the railing be constructed "at a minimum" as follows:

> (a) A two inch by four inch horizontal wooden hand rail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four inch vertical posts at intervals of not more than eight feet.
>
> . . .
>
> (c) A one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.
>
> . . .
>
> (e) Other material or construction may be used for safety railings required by this Part (rule) *provided such assemblies have equivalent strength and assure equivalent safety* (emphasis added.)

Because is undisputed that the skylight through which Decedent fell was not protected by *any* railing, let alone one that complied with the Industrial Code's specifications, Plaintiff established that there was a violation of both Industrial Codes cited above. Contrary to Defendants' arguments that Plaintiff fell through a skylight outside of his designated work area is inconsequential. The Code unambiguously requires that *"every* hazardous opening into which a person may step or fall" be guarded (emphasis added; *Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561, 565 [1st Dept 2011]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]). This construction finds support in express inclusion of such a requirement in the following subparagraph, which discusses the procedure for access into hazardous openings that are the subject of work in progress (Statutes Law § 240 [McKinney]). Any arguments that proper railings were installed on skylights that were undergoing active renovation, or that the

OSHA violation was irrelevant, are red herrings.

However, in light of the testimony that the Decedent was instructed and seen wearing his harness prior to his fall, and that there was "no possibility" that the Decedent would have fallen with the harness attached as instructed, an issue of fact as exists as to whether the Decedent was

Thus, plaintiff is not entitled to summary judgment against the City, D'Onofrio, and Diego under Labor Law 241(6) at this juncture.

In this regard, the branch of the cross-movants' motion to dismiss the Labor Law 241(6) is denied.

3. Labor Law 200/negligence

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Piccicmo & Son*, 54 NY2d 311, 316-317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

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

When an existing defect or dangerous condition caused the injury, liability under Labor Law § 200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [not necessary to prove general contractor's supervision and control "because the injury arose from the condition of the

work place created by or known to contractor, rather than the method of [the] work"]).

In order to find liability for defects or dangers arising from a subcontractor's methods or materials – here, the harness and barriers – it must be shown that the owner or agent exercised sufficient supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no liability without evidence that defendant exercised supervisory control or had any input into the method of moving the beam which injured plaintiff]).

Plaintiff failed to meet its burden of demonstrating, with any admissible evidence, that the City or D'Onofrio exercised anything beyond general supervision, or exercised sufficient supervision or control over the Decedent's work.

And, with respect to Diego, Plaintiff demonstrates, through the extensive testimony of Diego employee Alonzo, that Diego sufficiently exercised control over the work. Indeed, that fact is undisputed by Diego, and the many instances of control arise in the context of Diego's arguments that Diego provided adequate safety devices, instructions on how to use them, and instructions on staying within the appropriate work area.

However, as discussed below, Diego has demonstrated entitlement to summary judgment in its own right because Decedent was Diego's "special employee" and thus, claims against it are barred under the Worker's Compensation Law.[3]

B. Diego's Cross-Motion

As to Diego's request for dismissal based on the Workers' Compensation Law, "a special

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[3] While it is unclear whether the additional discovery cited as necessary would shed light on the issues raised, the parties have failed to meet their respective burdens on summary judgment.

employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment" *(Bellamy v. Columbia University*, 50 A.D.3d 160, 851 N.Y.S.2d 406 [1st Dept 2008]).

A general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [citations omitted]). A special employee is described as one who is transferred for a limited time of whatever duration to the service of another (*id.*). Though not a per se rule, a person's categorization as a special employee is usually a question of fact, and usually involves arrangements under which a general employer performs work and provides services for another business (*id.*). A "significant and weighty" factor is who controls and directs the manner, details and ultimate result of the employee's work (*id.* at 558). In *Thompson (supra)*, the plaintiff was present for the entire year prior to his work-related accident, "was aware of and consented to" his special employee status, reported daily to the defendant's supervisor, worked solely in furtherance of the defendant's business, could not be reassigned, and could only be terminated by the defendant (*id.*).

Here, Diego has introduced sufficient evidence to demonstrate that Decedent was Diego's special employee. Though Decedent was paid by Yukon, Alonzo worked for Diego, and Alonzo's supervisor sent Decedent and the other workers to work on the roof under Alonzo's direction (*Alonzo Tr* 8-9, 12, 21-22). Alonzo, Diego's employee, gave the roof workers all instructions, including safety instructions and warnings (*id. at* 38-40; 67-69). Alonzo also purchased the safety equipment (*id.* at 88-90). In opposition, Plaintiff fails to create a triable issue

of fact. Plaintiff's reliance on the contract between Diego and Yukon, which is not determinative of whether plaintiff was a special employee of Diego, is insufficient (*Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 AD3d 155, 156 [1st Dept 2007]). Accordingly, based on the unrefuted and extensive level of control exercised over Decedent's work by Diego, Diego is entitled to summary judgment based on Decedent's "special employee" status.

As such, the Complaint as asserted against Diego is dismissed.

However, Diego failed to demonstrate that it is not obligated to Yukon for indemnification.

"Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] *citing Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999]; *Espinoza v Federated Dept Stores, Inc.*, 73 AD3d 599, 904 NYS2d 3 [1st Dept 2010] [without a finding of negligence on the part of Macy's, co-defendants are not entitled to common law indemnification for costs and attorney's fees by Macy's]).

The record does not establish Diego's freedom from negligence for the Decedent's accident, so as to support dismissal of Yukon's indemnification claims against is. Thus, the branch of Diego's cross-motion to dismiss Yukon's indemnification claims against is unwarranted.

C. Yukon's Cross-Motion

As to Plaintiff's argument alleging defects in Yukon's notice of cross-motion, any errors are *de minimis* and do not render the cross-motion fatally defective. Such procedural

irregularities may be disregarded by the Court, given that (1) the cross-motion dated November 2, 2015 was ultimately returnable on December 11, 2015 and Plaintiff does not contend that the cross-motion was untimely served; and (2) Plaintiff exercised its opportunity to address Yukon's substantive arguments and therefore, did not suffer any prejudice (*C.V., Inc. v. WNC Tarrytown Co., LLC*, 4 Misc. 3d 1013(A), 791 N.Y.S.2d 868 (Table) [Supreme Court, Westchester County 2004]; *Matter of Estate of Venner*, 235 A.D.2d 805, 653 N.Y.S.2d 150 [3d Dept] *citing* CPLR 2001 [absence of a return date properly disregarded as a procedural irregularity where parties were later informed of the return date]; *Piquette v. City of N.Y.*, 4 AD3d 402, 403, 771 NYS2d 365, 365 [2d Dept 2004] [opposing motion on its merits is a waiver of insufficient notice], *lv den* 3 NY3d 605, 785 NYS2d 21)).

However, inasmuch as Yukon's cross-motion seeks dismissal of D'Onofrio's indemnification claims against it is premised solely upon dismissal of the Plaintiff's claims against D'Onofrio (on the grounds that the Decedent was the sole proximate cause of his accident and that no liability exists under 241(6)), the cross-motion is denied.

D. The City and D'Onofrio's Cross-Motion

The City and D'Onofrio have met their burden for summary judgment by showing the the absence of any material issue of fact that neither exercised sufficient supervision and control so as to be held liable under Labor Law 200. Neuscheler was the only D'Onofrio employee that visited the site prior to Decedent's fall, but did not supervise or control the work. Additionally, the service contract, to which the City is not a direct party, merely gives the City Comptroller "the right on reasonable notice to inspect the operations." The mere right to inspect is insufficient (*Hughes v. Tishman Const. Corp.*, 40 A.D.3d 305, 836 N.Y.S.2d 86 [1st Dept 2007]

citing Haider v. Davis, 35 A.D.3d 363, 827 N.Y.S.2d 179 [2006] ["the owner's general supervision of the project, which consisted mostly of inspections and admonitions to hurry the work, was insufficient to raise a triable issue of fact as to the owner's liability under Labor Law § 200 or based on common-law principles"]).

Thus, dismissal of the Labor Law 200 claims as asserted against the City and D'Onofrio is warranted.

III. Conclusion

Based on the above, it is hereby

ORDERED that plaintiff's motion for summary judgment on his Labor Law 200, 240(1) and 241(6) claims against the City, D'Onofrio, and Diego is denied; and it is further

ORDERED that Diego's cross-motion for summary judgment dismissing the Complaint as asserted against it and all cross and third-party claims for common law indemnification, granted solely to extent that plaintiff's Complaint as asserted against it is dismissed; and it is further

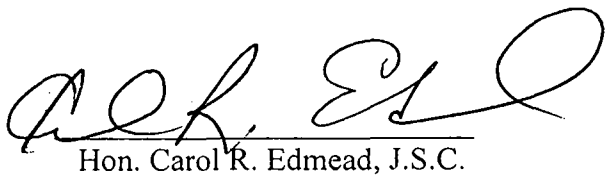
ORDERED that Yukon's cross-motion for summary judgment dismissing Plaintiff's Complaint as asserted against the City, D'Onofrio, and Diego and upon such dismissal, dismissal of the indemnification claims asserted against it, is denied; and it is further

ORDERED that The City and D'Onofrio cross-motion for summary judgment dismissing Plaintiff's Complaint is granted solely to the extent that Plaintiff's Labor Law 200 claim is

severed and dismissed against The City and D'Onofrio; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: April 15, 2016



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.