SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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ROBERT CLARKE and MARY ALISON CLARKE,

Plaintiffs,

-against-

Index No. 152822/12

42ND STREET DEVELOPMENT PROJECT, INC., TIMES SQUARE TOWER ASSOCIATES, LLC, PRITCHARD INDUSTRIES, INC., and BOSTON PROPERTIES LIMITED PARTNERSHIP,

Motion Sequence Nos. 004, 005 & 006

Defendants.

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42ND STREET DEVELOPMENT PROJECT, INC., and TIMES SQUARE TOWER ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590781/12

SHULDINER GLASS, INC.,

Third-Party Defendant.

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42ND STREET DEVELOPMENT PROJECT, INC., and TIMES SQUARE TOWER ASSOCIATES, LLC,

Second Third-Party Plaintiffs,

-against-

Second Third-Party Index No. 590010/13

DAVID SHULDINER, INC. and R&R SCAFFOLDING LTD.,

Second Third-Party Defendants.

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42ND STREET DEVELOPMENT PROJECT, INC., and TIMES SQUARE TOWER ASSOCIATES, LLC,

Third Third-Party Plaintiffs,

-against-

Third Third-Party

PRITCHARD INDUSTRIES, INC., Index No. 590674/13

Third Third-Party Defendant.

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ELLEN M. COIN, J:

Motion sequence numbers 004, 005, and 006 are consolidated for disposition.

In this Labor Law action, plaintiff Robert Clarke (hereinafter, plaintiff or Clarke) alleges that on February 2, 2012, he was injured while standing on a permanent, exterior motorized scaffold at 7 Times Square, New York, New York (hereinafter, the building). Plaintiff allegedly sustained injuries while replacing a large glass panel on the 36th floor with his foreman, when his foreman was unable to control his side of the glass panel, causing the full weight of the glass panel to come under plaintiff's control.

Defendant/third third-party defendant Pritchard Industries, Inc. (Pritchard) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, the third third-party complaint, and all cross claims against it (motion sequence no. 004).

Third-party defendant/second third-party defendant David Shuldiner Inc. s/h/a Shuldiner Glass Inc. (Shuldiner) cross-moves pursuant to CPLR 3212 for summary judgment dismissing: (1) the claims of third-party plaintiffs 42nd Street Development Project, Inc., Times Square Tower Associates, LLC, and of defendant Boston Properties Limited Partnership (collectively, the Owner defendants); (2) the claims of second third-party defendant R&R Scaffolding, Ltd. (R&R) as against it; and (3) the claims of Pritchard as against it.[1]

The Owner defendants move pursuant to CPLR 3212 for: (1) summary judgment dismissing the complaint and all cross claims against them; and (2) summary judgment on their

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[1]Shuldiner made three identical cross motions for summary judgment.

claim for contractual indemnification against Shuldiner (motion sequence no. 005).

Plaintiffs cross-move pursuant to CPLR 3212 for partial summary judgment on the issue of liability under Labor Law § 240 (1) against the Owner defendants.

Shuldiner cross-moves pursuant to CPLR 3212 for summary judgment dismissing: (1) the claims of the Owner defendants as against it; (2) the claims of R&R as against it; and (3) the claims of Pritchard as against it.

R&R moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the second third-party complaint and all cross claims and counterclaims against it (motion sequence no. 006).

Shuldiner cross-moves pursuant to CPLR 3212 for summary judgment dismissing: (1) the claims of the Owner defendants as against it; (2) the claims of R&R as against it; and (3) the claims of Pritchard as against it.

BACKGROUND

The Owner defendants each have an ownership interest in the premises. Boston Properties Limited Partnership is also the managing agent of the building. R&R was hired to maintain, repair and inspect the permanently-installed scaffolds at the building, including the subject scaffold. Pritchard was hired as a janitorial service contractor that used the scaffold to wash the building's windows. Shuldiner was contracted to perform reglazing work at the building. Shuldiner employed plaintiff as a glazier on the date of his accident.

Plaintiff testified at his deposition that on February 2, 2012, he arrived at the building at 6:30 a.m. (Plaintiff tr at 47). It was plaintiff's first day working on the reglazing project at the building (*id.* at 48). Plaintiff checked in with the security desk at the loading dock and was

escorted by a building employee on the freight elevator up to where Shuldiner stored its supplies at the building (*id.* at 52-53, 56-57). According to plaintiff, he and other Shuldiner employees then carried the pieces of glass that needed to be installed on the exterior of the building up to the roof (*id.* at 65). Plaintiff's foreman, Sean Church (Church), then moved the scaffold into position (*id.* at 74, 82). After placing their tools in the scaffold, plaintiff and Church took the scaffold over the side of the building and connected the scaffold to the mullion guide or "fins" that ran along the façade of the building (*id.* at 100-104). Plaintiff testified that the purpose of the mullion guide is to hold the scaffold in place and prevent the scaffold from swaying (*id.* at 103, 105).

Church brought the scaffold down to the 36th floor, using the fixed remote controls on the scaffold (*id.* at 105-106). Church then showed plaintiff the piece of glass that needed to be replaced (*id.* at 108). According to plaintiff, he and Church then released the scaffold from the mullion guide in order to bring the scaffold closer to the building (*id.* at 108-109). Plaintiff and Church cut the old piece of glass out of the frame and lifted it onto the scaffold (*id.* at 114-118). Plaintiff and Church then cleaned the frame, reconnected the scaffold to the mullion guide, and brought the old piece of glass up to the roof (*id.* at 118-120).

Once on the roof, plaintiff got out of the scaffold and removed the old piece of glass (*id.* at 124-125). The new piece of glass was then loaded into the scaffold and plaintiff got back on the scaffold (*id.* at 129-130, 132). Church brought the scaffold back over the side of the building and the scaffold was again locked into the mullion guide (*id.* at 134). Church then brought the scaffold down to the 36th floor (*id.* at 139). When the scaffold reached the 36th floor, plaintiff and Church released the scaffold from the mullion guide (*id.*). Plaintiff and Church caulked the

frame where the new piece of glass was to be installed (*id.* at 140-141). After the caulking was completed, Church moved the scaffold down slightly in preparation for lifting the new piece of glass into place (*id.* at 142, 144). Plaintiff and Church untied the glass from the scaffold and moved the glass to the center of the opening (*id.* at 146-147). Plaintiff testified that as he and Church started to lift the glass, Church told him to put the glass back down because he had an idea (*id.* at 149). Church then put a bucket in the middle of the scaffold and told plaintiff to lift the glass onto the bucket first and then lift it into place in the frame (*id.* at 149-151). Plaintiff and Church lifted the glass and placed it on the bucket (*id.* at 155). Plaintiff and Church then lifted the glass over the side of the scaffold and attempted to place the glass into the bottom of the frame (*id.* at 162-163). As Church attempted to set his side of the glass into the frame, a rubber block that had been set by plaintiff and Church to assist with the installation "flipped up" behind the glass (*id.* at 163, 165, 173). Plaintiff testified that Church then "jerked [the glass] up and down" as he attempted to set it into place, which caused "[t]he scaffold [to] move[] back and forth, sideways" (*id.* at 163, 165). Plaintiff stated that he felt "all the weight of that glass on [him]," "all the weight went to [his] side," and that he "actually felt like [he] was holding the whole glass" (*id.* at 520, 537). Plaintiff felt a shooting pain through his whole body as he was holding the glass (*id.* at 169).

However, Church, Shuldiner's foreman, testified that while he and plaintiff were in the process of setting the glass, the "fins" were locked into the vertical tracks on the scaffold on the date of the accident (Church tr at 97-98).

PROCEDURAL HISTORY

On May 15, 2012, plaintiffs commenced the instant action, seeking recovery under Labor

Law §§ 240, 241, 200 and under principles of common-law negligence against 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC. In the complaint, Mrs. Clarke asserts a claim for loss of society, support, services, and consortium.

42nd Street Development Project, Inc. and Times Square Tower Associates, LLC commenced a third-party action against Shuldiner Glass, Inc., alleging causes of action for contribution, common-law indemnification, contractual indemnification, and failure to procure insurance. Shuldiner asserted counterclaims for contribution and common-law indemnification against 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC.

42nd Street Development Project, Inc. and Times Square Tower Associates, LLC commenced a second third-party action against David Shuldiner, Inc. and R&R, alleging causes of action for contribution, common-law indemnification, contractual indemnification, and failure to procure insurance. David Shuldiner, Inc. asserted counterclaims for contribution and common-law indemnification against 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC. R&R asserted counterclaims for contribution, common-law indemnification, and contractual indemnification against 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC.

On August 27, 2013, 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC commenced a third third-party action against Pritchard, alleging causes of action for contribution, common-law indemnification, contractual indemnification, and failure to procure insurance. Pritchard asserted counterclaims for contribution, common-law indemnification, and contractual indemnification against 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC.

Plaintiffs subsequently brought an action against Boston Properties Limited Partnership under Index No. 158284/13, alleging causes of action under Labor Law §§ 240, 241, 200 and in common-law negligence. In the complaint, Mrs. Clarke asserts a claim for loss of society, support, services, and consortium.

On December 16, 2013, the court consolidated the two actions under this index number.

By stipulations filed on March 12 and March 23, 2015, the parties agreed that Boston Properties Limited Partnership asserted the third-party claims previously asserted by 42nd Street Development Project, Inc. and Times Square Tower Associates, LLC against Shuldiner, Pritchard, and R&R (Pludwin affirmation in support, exhibit O).

On September 18, 2015, plaintiffs discontinued any and all claims concerning: (1) negligent maintenance, repair and/or inspection of the scaffold claimed to be involved in plaintiff's accident; and (2) any claim that R&R failed to train, certify or supervise plaintiff with respect to the scaffold at issue (Glass affirmation in support, exhibit M).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v*

Citibank Corp., 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Timeliness of Plaintiffs' and Shuldiner's Cross Motions for Summary Judgment

The Owner defendants move for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim. Plaintiffs cross-move for partial summary judgment on their Labor Law § 240 (1) claim against the Owner defendants. In response, the Owner defendants contend that plaintiffs' cross motion is untimely.

In response to the Owner defendants' motion for summary judgment, Pritchard's motion for summary judgment, and R&R's motion for summary judgment, Shuldiner cross-moves for summary judgment, contending that Church's testimony establishes that the actions and methods of Shuldiner were not in any way negligent and did not cause plaintiff's accident, precluding any party from establishing third-party or cross claims against Shuldiner (Potter affirmation in support, ¶ 69). In opposing Shuldiner's cross motion, the Owner defendants, R&R, and Pritchard contend that Shuldiner's cross motion is untimely.

"An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). "Although a

court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion" (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], quoting *Filannino*, 34 AD3d at 281; *see also Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 337 [1st Dept 2008]).

In this case, the court may consider plaintiffs' cross motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) against the Owner defendants. Plaintiffs' cross motion for summary judgment addresses the same cause of action, i.e., Labor Law § 240 (1), as the Owner defendants' timely motion for summary judgment dismissing this claim (*see Guallpa*, 121 AD3d at 419-420 [defendants' untimely cross motion for summary judgment as to plaintiff's Labor Law § 200 and common-law negligence claims did not raise issues sufficiently related to plaintiff's Labor Law §§ 240 and 241 (6) claims raised by plaintiff's timely motion; therefore consideration unwarranted]; *Filannino*, 34 AD3d at 281 [trial court properly denied plaintiff's cross motion for summary judgment on Labor Law § 240 (1) claim as untimely where defendants' timely motion only addressed Labor Law §§ 200 and 241 (6)]).

In addition, Shuldiner's cross motion for summary judgment may also be considered, since it raises issues that are "nearly identical" to the Owner defendants' motion (*see Lapin*, 48 AD3d at 337 ["owner's marginally untimely cross motion for summary judgment was properly considered by the court because it raised nearly identical issues, inter alia, of lack of proof of defect and notice, as asserted in Century's timely motion"]). Shuldiner seeks summary judgment on the ground that it was not negligent. The Owner defendants move for summary judgment on their contractual indemnification claim against Shuldiner, in part, on the basis that Shuldiner,

plaintiff's employer, was negligent in failing to provide proper training to him in the use of the scaffold.

Plaintiffs' Labor Law § 240 (1) Claim

The Owner defendants argue that Labor Law § 240 (1) does not apply because: (1) plaintiff's accident did not involve a fall from a height, since plaintiff did not fall from the scaffold; and (2) neither the glass nor any other object fell onto plaintiff. In addition, according to the Owner defendants, even if the glass did fall, section 240 (1) is inapplicable because plaintiff's injuries were not the direct result of a risk arising from a "physically significant elevation differential." Additionally, the Owner defendants argue that plaintiff's misuse of the scaffold by unlocking it from the mullion guide was the sole proximate cause of his accident and injuries.

In support of their cross motion for summary judgment against the Owner defendants, plaintiffs contend that the statute applies because the force of gravity operated on the glass. Plaintiffs further argue that the Owner defendants violated section 240 (1) (and caused plaintiff's accident) in light of: (1) the dimensions of the glass (59 inches by 69 inches), and the height of the railing (42 inches high); (2) the windows were set back in frames, forcing the workers to work with outstretched arms; (3) the workers were not provided with a cup and crane or chain fall or winching device to move the glass; (4) plaintiff removed the tie-in guides at the direction of his foreman, which allowed vertical and lateral movement of the scaffold; and (5) neither plaintiff nor Church was trained in the use of the suspended scaffold.

For its part, Prichard argues that it cannot be held liable under the statute because it is not an owner, general contractor or statutory agent of either an owner or general contractor.

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

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

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Bland v Manocherian*, 66 NY2d 452, 459 [1985]). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather than on workers, who "are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Thus, "[n]egligence, if any, of the injured worker is of no consequence" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Owner Defendants

It is undisputed that the Owner defendants have ownership interests in the building (Pludwin affirmation in support, ¶ 9). Therefore, the Owner defendants are subject to liability under Labor Law § 240 (1) (*see Spagnuolo v Port Auth. of N.Y. & N.J.*, 8 AD3d 64, 64 [1st Dept 2004] ["Liability under § 240 (1) rests on the fact of ownership, and whether the owner has contracted for the work or benefitted from it are legally irrelevant"]).

Pritchard

Here, it is undisputed that Pritchard, the janitorial services contractor, was not an owner or a general contractor. Thus, Pritchard may only be held liable under Labor Law §§ 240 (1) and 241 (6) as an agent of an owner or general contractor.

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [citations omitted]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]; *Blake*, 1 NY3d at 293 ["Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under [section 240 (1)]"]).

In this case, Pritchard has demonstrated that it did not have the authority to supervise or

control plaintiff's or Shuldiner's work. Plaintiff testified that he and the rest of the Shuldiner crew took directions from Shuldiner's foreman, Sean Church, only (Plaintiff tr at 68, 71, 285). According to plaintiff, the man who brought Shuldiner's crew up to the roof (who may have been Pritchard's employee, John Lewis) had nothing to do with handling glass or moving a scaffold; he was just there to open doors for Shuldiner's crew (*id.* at 99).

Moreover, given that plaintiffs did not oppose dismissal of their Labor Law §§ 240 and 241 claims against Pritchard, plaintiffs have failed to raise an issue of fact as to whether Pritchard had the authority to supervise and control plaintiff's or Shuldiner's work (*see Giuffrida*, 100 NY2d at 81). Therefore, Pritchard is entitled to dismissal of plaintiffs' Labor Law §§ 240 and 241 claims as against it.

Statutory Violation and Proximate Cause

The Owner defendants assert that section 240 (1) does not apply because plaintiff did not fall and an object did not strike plaintiff. However, in *Runner*, the Court of Appeals held that:

> "the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, *the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential*"

(13 NY3d at 603 [emphasis added]). In *Runner*, the plaintiff was injured while serving as a counterweight on a makeshift pulley to move an 800-pound reel of wire down a set of stairs (*id.* at 602). The plaintiff was dragged into the pulley mechanism after the reel rapidly descended the stairs (*id.*). Even though the plaintiff did not fall and was not struck by a falling object, the Court held that section 240 (1) applied, since "the harm to plaintiff was the direct consequence of the

application of the force of gravity to the reel" (*id.* at 604). The Court continued, stating that "[t]he elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 605).

Here, plaintiff testified that when "[they] were lifting, reaching over the basket, over the bucket," Church was "jerking the glass up and down" and that "the scaffolding [was] moving because the fins weren't connected" (Plaintiff tr at 520). Plaintiff stated that then "all the weight went to [his] side" and that he "felt like [he] was holding the whole glass" (Plaintiff tr at 537; *see also* Affidavit of Robert Clarke, sworn to November 12, 2015, ¶¶ 71-73; Ex 2 to the Affirmation of Bradley Sacks dated November 19, 2015). Plaintiff then felt a shooting pain through his body (Plaintiff tr at 169, 537; Plaintiff aff, ¶ 73). Thus, plaintiff has shown that the harm flowed from the application of the force of gravity to the glass (*see Runner*, 13 NY3d at 604; *Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011]), and, therefore, Labor Law § 240 (1) applies.[2] Moreover, it cannot be said that the elevation differential was de minimis, considering the weight of the glass and the amount of force it was capable of generating over the course of its descent (*see id.*). Plaintiff states that the glass unit was a large unit that weighed about 200 pounds

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[2]The Owner defendants rely on cases in which the plaintiff tripped or slipped at ground level, causing an object to strike the plaintiff (*see Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 585 [1st Dept 2014] [section 240 (1) held inapplicable where plaintiff's injuries were not "direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential," where plaintiff slipped on muddy surface and tripped on rock while he and two coworkers were carrying metal pipe on their shoulders, causing coworkers to drop the pipe, which then "jumped" and hit him on left ear, neck and shoulder]; *Ghany v BC Tile Contrs., Inc.*, 95 AD3d 768, 769 [1st Dept 2012] ["The record establishes that the impetus for the heavy stone's fall was plaintiff's tripping on ground level, rather than the direct consequences of gravity"]). However, plaintiff did not trip or slip at ground level in this case.

(Plaintiff aff, ¶ 28).

Plaintiffs' expert, Dennis R. Andrews, PhD (Andrews), a safety engineer, states that a cup and crane or chain fall or crab winch or similar device should have been set up on the roof or through an available window above the set (which would have required removal of that glass unit first) (Andrews aff, sworn to November 12, 2015, ¶ 33; Ex 1 to the Sacks Aff.). Andrews further indicates that no safety device was provided to lift the glass (*id.*).

The Owner defendants rely on an affidavit from Preston R. Quick, P.E. (Quick), which states that "there is no evidence that [p]laintiff's alleged incident was causally related to a fallen or falling object" (Quick Affidavit sworn to September 18, 2015, ¶ 24; Ex A to the Affirmation of Amy L. Pludwin dated September 24, 2015). However, Quick has not refuted Andrews's assertion that safety devices such as a cup and crane, chain fall or crab winch were required to lift the weight of the glass unit.

The court rejects the Owner defendants' contention that plaintiff was the sole proximate cause of his accident because he removed the mullion guides from the tracks when the scaffold descended to the 36th floor. "The Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence" (*Somereve v Plaza Constr. Corp.*, 136 AD3d 537, 540 [1st Dept 2016] [internal quotation marks and citation omitted]). Moreover, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

In this case, plaintiff claims that Church instructed him to remove the guides because the glass unit could not be safely installed due to the distance between the scaffold and the window frame (Plaintiff tr at 186, 524; Plaintiff aff, ¶¶ 42, 56). Thus, plaintiff cannot be found to be the

sole proximate cause of his accident (*see Harris,* 83 AD3d at 110 [plaintiff not sole proximate cause of accident where his foreman directed him to stand on top of piece of wood to keep it in place]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 749 [2d Dept 2009] [plaintiff not sole proximate cause of his injuries where he was following example of coworkers and acting with tacit approval of his supervisor]; *Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008] [worker who died after falling through tempered glass skylight not sole proximate cause of his injuries where he was following directions of his foreman and could not use safety rope system]). Even if plaintiff was negligent in removing the mullion guides, his negligence is not a defense to liability under section 240 (1) (*see Rocovich*, 78 NY2d at 513).

In light of the above, plaintiffs are entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against the Owner defendants. The branch of the Owner defendants' cross motion for summary judgment seeking dismissal of plaintiffs' Labor Law § 240 (1) claim is denied.

Plaintiffs' Labor Law § 240 (2) Claim

The Owner defendants argue that Labor Law § 240 (2) was not violated because the scaffold had a safety railing extending along the entire length of the outside of the scaffold. The Owner defendants also point out that the scaffold had a mullion guide that prevented the scaffold from swaying.

In opposition to the Owner defendants' motion, plaintiffs contend that if Clarke's version of the accident is accepted as true, the Owner defendants could be found liable under Labor Law § 240 (2) because the scaffold was allowed to move away from the face of the building.

Labor Law § 240 (2) provides as follows:

> "Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure."

"Labor Law § 240 (2) is implicated when a worker is injured due to an elevation-related hazard" (*Pietrowski v ARE-East Riv. Science Park, LLC*, 86 AD3d 467, 468 [1st Dept 2011], citing *Bryant v General Elec. Co.*, 221 AD2d 687, 689 [3d Dept 1995] ["subdivision (1) of Labor Law § 240 states when and by whom devices must be provided and then details in subdivisions (2) and (3) more specific requirements when working at an elevated height"]). "Moreover, liability under Labor Law § 240 (2) is predicated upon the failure to provide safety rails on a scaffold more than twenty feet off the ground, when such violation is the proximate cause of plaintiff's accident" (*Pietrowski*, 86 AD3d at 468 [citations omitted]; *see also Viera v WFJ Realty Corp.*, – AD3d – , 2016 NY Slip Op 04202, *2, 2016 WL 3064521 [2d Dept 2016] ["(t)o establish liability pursuant to Labor Law § 240 (2), there must be proof that 'the subject scaffolding was more than 20 feet above the ground and lacked properly secured safety rails, and that the failure to provide such protection was a proximate cause of plaintiff's injuries'"] [citation omitted]).

In this case, Clarke testified that the scaffold had a safety railing that went around the entire scaffold basket, and he also stated that he did not fall off the scaffold (Plaintiff tr at 133-134, 523). Therefore, the Owner defendants have demonstrated that the scaffold complied with Labor Law § 240 (2), and that Clarke's accident was not proximately caused by any violation of

the statute, i.e., failure to provide safety rails on the scaffold. Plaintiffs have failed to raise an issue of fact. As a result, plaintiffs' Labor Law § 240 (2) claim is dismissed.

Plaintiffs' Labor Law § 241 (6) Claim

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

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241 (6), a plaintiff must: (1) plead and prove the violation of a concrete provision of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standards (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]); and (2) show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). Comparative negligence is a defense to liability pursuant to section 241 (6) (*Once v Service Ctr. of N.Y.*, 96 AD3d 483, 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]). "[T]he plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241(6)" (*Owen v Commercial Sites*, 284 AD2d 315, 315 [2d Dept 2001]).

Plaintiffs' bills of particulars allege violations of 10 NYCRR 23-5.1 (c) (2), 10 NYCRR 23-5.6 (g),[3] and 29 CFR 1910.66 (Plaintiffs' verified bill of particulars in response to Owner defendants' demand, ¶ 7; Plaintiffs' verified bill of particulars in response to Shuldiner's demand, ¶ 4). In opposition to the Owner defendants' motion, plaintiffs only rely, for the first time, on 12 NYCRR 23-5.2. Therefore, the court shall only consider the alleged violation of 12 NYCRR 23-5.2 (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013] ["Plaintiff abandoned the Labor Law § 241 (6) claims that are predicated on violations of other Industrial Code provisions and OSHA regulations cited in his bill of particulars, since he failed to address them in his motion papers or on appeal"]).[4]

Section 23-5.2 provides that "[t]he use of any scaffold of a type not named, specified or described in this Part (rule) is prohibited unless such scaffold has been granted a special approval" (12 NYCRR 23-5.2).

In opposing the Owner defendants' motion, plaintiffs argue that the Owner defendants violated section 23-5.2 in that: (1) the subject scaffold was formally approved for use by window washers (Sacks affirmation in opposition, exhibit 12); (2) the Owner defendants were, therefore, required to comply with all stipulations in that approval, including stipulation (o), which provides that "persons designated to use this equipment shall be thoroughly trained for the proper and correct operation of the equipment" (*id.*); and (3) the Owner defendants failed to enforce the

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[3]Part 10 of the Codes, Rules, and Regulations of New York contains the Department of Health's regulations.

[4]In any event, it is well settled that OSHA regulations cannot serve as a predicate for a Labor Law § 241 (6) claim (*Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept 2006], *lv dismissed* 7 NY3d 864 [2006]).

training and certification requirement, since plaintiff was not trained to use the scaffold.

In response, the Owner defendants argue that plaintiffs' reliance on this Industrial Code provision should be rejected because it raises a new theory of liability for the first time in opposition to their motion for summary judgment. In addition, the Owner defendants maintain that section 23-5.2 is insufficiently specific. Further, the Owner defendants point out that plaintiffs concede that the Owner defendants complied with this provision, since they were granted special approval from the Department of Labor.

> "A plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241 (6) claim for the first time in opposition to a motion for summary judgment if the allegation 'involves no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants'"

(*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011], quoting *Kelleir v Supreme Indus. Park, LLC*, 293 AD2d 513, 514 [2d Dept 2002]).

Contrary to the Owner defendants' contention, the court finds that section 23-5.2 is a specific provision of the Industrial Code (*see Zhai v Jump Tech Constr. Co., Inc.*, 2010 WL 10805371 [Sup Ct, NY County 2010] ["section 23-5.2 is sufficiently specific by prohibiting the use of any scaffold not designated in the Industrial Code as an approved scaffold unless special approval is granted"]). However, even if plaintiffs' belated allegation of section 23-5.2 may be considered, section 23-5.2 was not violated in this case, as plaintiffs have provided Department of Labor Resolution of Special Approval No. 9803, which indicates that the scaffold was granted a special approval by the Department of Labor (Sacks affirmation in opposition, exhibit 12).

Consequently, since plaintiffs have failed to identify a violation of a specific and applicable Industrial Code provision, plaintiffs' Labor Law § 241 (6) claim is dismissed (*see*

Owens, 284 AD2d at 315).

Plaintiffs' Labor Law § 200 and Common-Law Negligence Claims

Labor Law § 200 (1) states:

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

Pritchard

As noted above, Pritchard has shown that it cannot be held liable under Labor Law § 200 because it is not an owner, general contractor, or statutory agent (*see Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001] [Labor Law § 200 "applies to owners, contractors, or their agents"]). Plaintiffs did not oppose dismissal of the Labor Law § 200 claim against Pritchard.

In addition, Pritchard contends that as an independent contractor, it did not owe a duty of care to plaintiff (*see Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept], *lv dismissed* 4 NY3d 739 [2004]). Plaintiffs also did not oppose dismissal of their common-law negligence claim, by arguing that any of the exceptions to the general rule apply in this case (*see Church*, 99 NY2d at 111-112 [contractor may owe duty of care to noncontracting third party "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk"; (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation"; and (3) "where the contracting party has entirely

displaced the other party's duty to maintain the premises safely"] [internal quotation marks and citations omitted]). Accordingly, plaintiffs' Labor Law § 200 and common-law negligence claims as against Pritchard are dismissed.

Owner Defendants

Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where the worker is injured as a result of the manner in which the work is performed, liability for common-law negligence or under Labor Law § 200 may be imposed against an owner "if it actually exercised supervisory control over the injury-producing work" (*Cappabianca,* 99 AD3d at 144; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). However, where the worker's injury stems from a dangerous or defective premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011][citation and internal quotation marks omitted]; *see also Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

R&R's director of operations and safety testified that the scaffold's components were inspected on January 6, 2012 and were found to be satisfactory and in good working order

(Hogne tr at 53-64, 74-77). In particular, the "mullion grabbers" were inspected on that date and found to be in good working order (*id.* at 76-77). Additionally, Church stated that he inspected the scaffold on February 2, 2012 and found that everything was working properly; he stated that "[e]verything was functioning properly or we wouldn't have worked that day" (Church tr at 128-129). Plaintiff also testified that there was nothing wrong with the scaffold on the date of his accident (Plaintiff tr at 275-276). Therefore, the Owner defendants have established that plaintiff's injury did not arise out of a dangerous or defective premises condition. Thus, the relevant inquiry is whether the Owner defendants exercised supervisory control over the means and methods of the injury-producing work (*see Cappabianca*, 99 AD3d at 143).

Plaintiff testified that no one other than Church gave him directions as to how to perform the work on the date of the accident (Plaintiff tr at 285). Plaintiff further stated that he had never heard of Times Square Tower Associates, and never spoke to anyone from Boston Properties Limited Partnership or Times Square Tower Associates (*id.* at 545-546, 588). In addition, Shuldiner provided all of the tools needed to complete his job (*id.* at 63).

Although plaintiffs argue that Clarke was not trained or certified in the use of the scaffold, and that the Owner defendants were obligated to ensure that any worker was so trained, plaintiffs have failed to raise an issue of fact as to whether the Owner defendants actually exercised supervisory control over Clarke's or Shuldiner's work or excluded untrained workers from using the scaffold (*see Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008] ["(w)here an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200"]).

Therefore, plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed.

Shuldiner's Cross Motions for Summary Judgment

Shuldiner argues that all claims asserted by the Owner defendants, R&R, and Pritchard against it should be dismissed, because Church's testimony establishes that Shuldiner's methods were not negligent and did not cause plaintiff's accident.[5] However, plaintiff testified to a different version of the events – he stated that Church directed him to remove the mullion guides (Plaintiff tr at 186, 524). Pursuant to paragraph 4.2 of Shuldiner's contract, Shuldiner was required to supervise and train its employees (Sacks affirmation in support, exhibit 20). Thus, there are questions of fact as to whether Shuldiner was negligent and caused or contributed to plaintiff's accident. Accordingly, Shuldiner's cross motions for summary judgment are denied.

Cross Claims and Counterclaims Against the Owner Defendants

The Owner defendants move for summary judgment dismissing the cross claims and counterclaims for contribution and common-law indemnification against them, arguing that there is no evidence of their negligence.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 714 [2003] [internal quotation marks and citation omitted]). Common-law indemnification is predicated on "vicarious liability without actual fault" on the part of the indemnitee (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept], *lv dismissed* 7 NY3d 864 [2006] [internal quotation

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[5]Shuldiner does not argue that plaintiff did not suffer a "grave injury" (*see* Workers' Compensation Law § 11).

marks and citation omitted]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]). "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 Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

As noted above, the Owner defendants have shown that they were not negligent, i.e., they did not exercise supervision over the means and methods of plaintiff's work. Accordingly, the Owner defendants are entitled to dismissal of the claims for contribution and common-law indemnification as against them.

The Owner defendants also seek summary judgment on the contractual indemnification and breach of contract claims against them. None of the parties has come forward with any evidence that the Owner defendants were required to indemnify any other party. Moreover, none of the parties has argued that the Owner defendants breached any contract. Therefore, the contractual indemnification and breach of contract claims against the Owner defendants are dismissed.

Owner Defendants' Request for Contractual Indemnification Against Shuldiner

The Owner defendants move for conditional summary judgment on their contractual indemnification claim against Shuldiner, pursuant to paragraph 8.4 in Shuldiner's contract, entitled "Indemnity," which provides as follows:

> "**8.4 <u>Indemnity</u>**. CONTRACTOR [Shuldiner] shall indemnify, defend and hold harmless the Owner Entities from any claims, demands, debts, suits, losses, damages, fines, penalties, liabilities, costs and expenses, including attorney's fees, expenses, court costs, or causes of action whatsoever of every name and nature, both in law and equity (I) arising from or claimed to have arisen from the omission, fault, act,

> negligence, or misconduct of CONTRACTOR or CONTRACTOR's subcontractors of any tier, licensees, invitees, agents, servants or employees, or (ii) resulting from the failure of CONTRACTOR to perform and discharge its covenants and obligations under this Agreement. CONTRACTOR agrees that the obligations assumed herein shall survive the expiration of this Agreement. CONTRACTOR shall require all subcontractors of any tier to provide a similar indemnity to the Owner Entities"

(Pludwin affirmation in support, exhibit E).

The Owner defendants argue that if a jury accepts Clarke's account of the accident for purposes of imposing liability against the Owner defendants, such liability would clearly arise out of the acts, negligence and misconduct of Shuldiner's employees, as well as failure to perform and discharge its covenants and obligations under Shuldiner's contract. The Owner defendants point out that plaintiff has alleged that the accident occurred after he and Church unlocked the mullion guide, which allowed the scaffold to sway as they were performing their reglazing work. In addition, according to the Owner defendants, Shuldiner was responsible for training and supervising its own employees.

Shuldiner contends in opposition that: (1) the subject indemnification provision violates General Obligations Law § 5-322.1; (2) the indemnification provision is ambiguous; and (3) there is evidence that the Owner defendants were negligent in providing a defective scaffold, precluding indemnification at this juncture.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). To establish entitlement to full contractual indemnification, the Owner defendants "'need only establish that [they were] free

from any negligence and [were] held liable solely by virtue of the statutory liability'" (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

General Obligations Law § 5-322.1 (1) provides:

> "A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable . . . ."

Thus, an indemnification agreement is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210-211 [2008] [indemnification "to the fullest extent permitted by law" contemplated partial indemnification, permissible under the statute]). Even if the clause does not contain the savings language "to the fullest extent permitted by law," it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]; *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 193 [1st Dept 2004]).

"[A] written agreement that is complete, clear and unambiguous on its face must be

enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether or not an agreement is ambiguous is an issue of law for the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The proper inquiry in determining whether an agreement is ambiguous is whether the agreement is reasonably susceptible to more than one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Chiusano v Chiusano*, 55 AD3d 425, 425 [1st Dept 2008]).

In this case, the indemnification clause at issue unambiguously requires Shuldiner to defend and indemnify the Owner defendants for claims "arising from or *claimed to have arisen* from the omission, fault, act, negligence, or misconduct" of Shuldiner or resulting from Shuldiner's "failure . . . to perform and discharge its covenants and obligations under [the] Agreement" (Pludwin affirmation in support, exhibit E [emphasis added]). Additionally, plaintiff, a Shuldiner employee, alleges that his accident occurred when he unlocked the mullion guide from the scaffold when directed to do so by his Shuldiner foreman (Plaintiff tr at 139, 163, 165, 173). Thus, plaintiffs' claims are *claimed to arise* out of Shuldiner's acts, negligence, and misconduct of its employees. In addition, the indemnification clause is enforceable, even though it does not contain the "savings language." As noted above, the Owner defendants have established their freedom from negligence.[6] Accordingly, the Owner defendants are entitled to

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[6]While Shuldiner asserts that the scaffold was defective, the record does not support this claim. The Owner defendants' expert does not state that the scaffold was defective; he states that "[t]o the extent that [p]laintiff alleges a defect in the design of the [scaffold] was causally related to his alleged incident, the manufacturer and/or designer was responsible for such a condition, not the Building Owners" (Quick aff, ¶¶ 22, 23). R&R's witness also stated that the mullion guides could be disengaged from the building (Lewis tr at 59-60, 92-93, 156). In any event, Shuldiner has not submitted any evidence that the Owner defendants had actual or constructive notice of the defective condition.

full contractual defense and indemnification from Shuldiner (*see Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013] ["(t)he owner being without fault and therefore unconditionally entitled to indemnification, Sage's express contractual duty to defend the owner also imposes upon it a present obligation to pay the costs of the owner's defense"]).

Third-Party Claims And Cross Claims Against R&R

Contractual Indemnification

R&R moves for summary judgment dismissing the Owner defendants' contractual indemnification claim against it.

Paragraph 8.4 in R&R's contract provides:

> "8.4. Indemnity. CONTRACTOR [R&R] shall indemnify, defend, and hold harmless the Owner Entities from any claims, demands, debts, suits, losses, damages, fines, penalties, liabilities, costs and expenses, including attorney's fees, expenses, court costs, or causes of action whatsoever of every name and nature, both in law and in equity, (I) arising from or claimed to have arisen from the omission, fault, act, negligence, or misconduct of CONTRACTOR [R&R] or CONTRACTOR's [R&R's] subcontractors of any tier, licensees, invitees, agents, servants, or employees, or (ii) resulting from the failure of CONTRACTOR [R&R] to perform and discharge its covenants and obligations under this Agreement"

(Pludwin affirmation in opposition, exhibit R).

R&R asserts that plaintiffs' claims do not arise out of any omission, fault, act, negligence or misconduct of R&R. R&R, however, does not dispute that it had a contractual duty to provide training to workers using the scaffold. Rather, R&R asserts that "[t]here has been no proof . . . that R&R was contacted to provide training" (R&R's memorandum of law in support at 13).

In opposition, the Owner defendants argue that R&R failed to make a prima facie showing that the Owner defendants never contacted R&R to provide training to plaintiff.

Here, R&R is required to indemnify the Owner defendants against any claim "arising

from or claimed to have arisen from the omission, fault, act, negligence, or misconduct of [R&R] . . ." (Pludwin affirmation in opposition, exhibit R, § 8.4). As argued by the Owner defendants, R&R has failed to establish that plaintiffs' claims do not arise out of R&R's omissions, fault, acts, negligence or misconduct. R&R has not submitted any evidence to show that the Owner defendants did not contact R&R to train plaintiff. R&R "cannot meet this burden merely by pointing to gaps in [the Owner defendants'] proof" (*McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]). Christopher Hogne, R&R's director of operations and safety, stated that requests for training would come into R&R by telephone and were recorded in a logbook (Hogne tr at 124-125). However, Hogne testified that the logbook may have been lost (*id.* at 126). Therefore, R&R is not entitled to dismissal of the Owner defendants' contractual indemnification claim against it.

Common-Law Indemnification and Contribution

R&R moves for summary judgment dismissing the common-law indemnification and contribution claims, arguing that there is no evidence that it was negligent. In support, R&R contends that it appropriately maintained and inspected the scaffold, and that there is no evidence that its work caused the accident.

The Owner defendants do not oppose dismissal of their common-law indemnification and contribution claims against R&R. Accordingly, the Owner defendants' claims for common-law indemnification and contribution against R&R are dismissed.

Shuldiner argues, in opposition, that there are issues of fact as to whether R&R properly serviced and maintained the scaffold. Specifically, Shuldiner argues that only a defect in the lateral bracing system would have allowed it to be unlocked from the side of the building when it

was in use.

Lewis, Pritchard's senior window washer at the premises, testified that he assisted Shuldiner's crew while it performed the window replacement job by manning the two-way radio, giving it access to the rig, and making sure that it did not damage any electrical cords on the roof while moving the scaffold (Lewis tr at 33-34). Lewis stated that the "torpedoes" or "fins" are "the parts that are attached to the basket of the scaffold that enables you to lock in to the side of the building to prevent the scaffold from moving" (*id.* at 46). He stated that "the purpose of the torpedoes is to guide you down the side of the building without going all over the place, without letting the wind take you and blow you to 42nd Street" (*id.* at 47). Lewis further stated that there is a pin that locks the handle in place that controls the rollers (*id.* at 58, 59). "It's put in once you're over the side to lock in and then it's removed when you want to disengage the torpedo from the building" (*id.* at 59-60). When asked whether he ever disengaged the torpedoes from the building, he stated that "it's not necessary. It's not the proper way to work the scaffold" (*id.* at 92-93). Lewis further stated that, at the end of the day, the torpedo could be removed from the channel at 10, 15 or 20 feet below the roof (*id.* at 156). Therefore, Lewis's testimony indicates that the mullion guides could be disengaged from the building.

In addition, to the extent that Shuldiner points out that four new wire ropes were installed in January 2012, R&R's witness stated that it was considered routine maintenance "because we are not replacing anything that's broken or reengineering or redesigning anything" (Hogne tr at 232).

Although Shuldiner also relies on Quick's affidavit to show that the scaffold was defective, the paragraph of Quick's affidavit relied on by Shuldiner states that "[t]o the extent

that plaintiff alleges a defect in the design of the BMU was causally related to his alleged incident, the manufacturer and/or designer was responsible for such a condition, not the Building Owners" (Quick aff, ¶ 22). Thus, Quick does not state that the scaffold was defective. Moreover, plaintiffs' expert states that the mullion guides are "designed to be engaged and disengaged at any point along the track" (Andrews aff, ¶ 16).

In view of the above, there is no evidence that the scaffold was improperly maintained or defective at the time of the accident. Accordingly, Shuldiner's claims for common-law indemnification and contribution against R&R are dismissed.

Failure to Procure Insurance

R&R submits primary and excess policies indicating that it procured the required insurance (Glass affirmation in support, exhibit K). In response, the Owner defendants do not oppose dismissal of their breach of contract claim against R&R. Therefore, the Owner defendants' breach of contract claim against R&R is dismissed.

Third-Party Claims and Cross Claims Against Pritchard

Contractual Indemnification and Breach of Contract

Pritchard contends that the Owner defendants' contractual indemnification claim must be dismissed, since there is no evidence that it was negligent or failed to perform its duties under its contract. Pritchard also maintains that it did not breach its contract because its employee, John Lewis, was performing a task mandated by the Department of Labor, not the janitorial contract. Pritchard also submits an insurance policy indicating that the Owner defendants were covered under an additional insured endorsement (Castronuovo affirmation in support, exhibit N). The Owner defendants did not oppose dismissal of these claims. Therefore, the Owner defendants'

contractual indemnification and breach of contract claims against Pritchard are dismissed.

Common-Law Indemnification and Contribution

Pritchard argues that the claims for common-law indemnification and contribution against it must be dismissed because it was not negligent.

The Owner defendants did not oppose dismissal of their common-law indemnification or contribution claims against Pritchard. Therefore, these claims are dismissed.

In opposition to Pritchard's motion, Shuldiner asserts that Pritchard was negligent by failing to perform "third man" duties on the roof on the date of the accident, in violation of Department of Labor regulations.

Initially, the court notes that Shuldiner does not point to any Department of Labor regulations.

In any case, the Advisory Standards for Construction, Operation, and Maintenance of Suspended Scaffolds, AS 101-3 Design Components, state as follows in section (6) (k):

> "**Communication requirements**. Adequate means of communication between the scaffold platform and personnel within the building or structure should be provided for use by the scaffold operator. A telephone or two-way voice radio located on the scaffold platform in contact with a continuously manned switchboard phone or base stations will be considered adequate"

(Castronuouvo reply affirmation, exhibit A).

Contrary to Shuldiner's contention, there is no requirement that the radio needs to be operated from the roof. In addition, Clarke's foreman, Church, testified that Pritchard's employee, John Lewis, brought them up to the roof, and that "[h]e had no role other than to make sure the scaffold was functioning properly" (Church tr at 42). According to Church, "[John Lewis] was not designated to be with [them] at all times. Once [they] knew the scope of work,

[they] performed [their] duties. [Church] had a radio and [Lewis] had a radio, and [they] would contact each other if there were any issues" (*id.* at 61-62). Church contacted Lewis *after* the accident to let him know that plaintiff was injured (*id.* at 102). Thus, the evidence indicates that Pritchard had no control over whatever occurred on the scaffold. In other words, Pritchard's job of manning the radio did not cause or contribute to plaintiff's accident. Therefore, Pritchard is entitled to summary judgment dismissing Shuldiner's claims for common-law indemnification and contribution against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of defendant/third third-party defendant Pritchard Industries, Inc. for summary judgment is granted and the complaint, the third third-party complaint, and all cross claims are dismissed with costs and disbursements to said defendant/third third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion of third-party defendant/second third-party defendant David Shuldiner Inc. s/h/a Shuldiner Glass Inc. for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 005) of defendants/third-party plaintiffs/second third-party plaintiffs 42nd Street Development Project, Inc., Times Square Tower Associates, LLC, and Boston Properties Limited Partnership is granted to the extent of (1) dismissing plaintiffs' Labor Law §§ 240 (2), 241 (6), 200 and common-law negligence claims, (2) dismissing the common-law indemnification, contribution, contractual indemnification and

breach of contract claims against said defendants; and (3) granting said defendants contractual defense and indemnification over and against third-party defendant/second third-party defendant David Shuldiner Inc. s/h/a Shuldiner Glass Inc., and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants 42nd Street Development Project, Inc., Times Square Tower Associates, LLC, and Boston Properties Limited Partnership is granted, with the issue of plaintiffs' damages to await the trial of this action; and it is further

ORDERED that the cross motion of third-party defendant/second third-party defendant David Shuldiner Inc. s/h/a Shuldiner Glass Inc. is denied; and it is further

ORDERED that the motion (sequence number 006) of second third-party defendant R&R Scaffolding, Ltd. for summary judgment dismissing the second third-party complaint and all cross-claims and counterclaims against it is granted except as to the contractual indemnification claim of defendants 42nd Street Development Project, Inc., Times Square Tower Associates, LLC, and Boston Properties Limited Partnership; and it is further

ORDERED that the cross motion of third-party defendant/second third-party defendant David Shuldiner Inc. s/h/a Shuldiner Glass is denied.

Dated: July 13, 2016

ENTER:

A.J.S.C.

HON. ELLEN M. COIN