SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CHRISTOPHER GALGAN,

Index No.: 151205/14

Plaintiff,

-against-

BROOKFIELD PROPERTIES ONE WFC CO. LLC, WFP TOWER B CO. L.P., WFP TOWER D CO. L.P., BFP TOWER C CO. LLC, AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS CREDIT CORPORATION and JOHN GALLIN & SON, INC.,

Defendants.

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BROOKFIELD PROPERTIES ONE WFC CO. LLC, WFP TOWER B CO. L.P., WFP TOWER D CO. L.P., BFP TOWER C CO. LLC, AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS CREDIT CORPORATION and JOHN GALLIN & SON, INC.,

Third-Party Index No.:

Third-Party Plaintiffs,

-against-

GODSELL CONSTRUCTION CORP.,

Third-Party Defendant.

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Edmead, J.:

This is an action to recover damages for personal injuries allegedly sustained by a carpenter on February 3, 2014, when he fell from a ladder while working at a construction site on the 26th floor of a building located at 200 Vesey Street, New York, New York (the Premises).

Plaintiff Christopher Galgan moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs Brookfield Properties One WFC Co. LLC, WFP Tower B Co. L.P., WFP Tower D Co. L.P., BFP Tower C Co. LLC (collectively, the Brookfield defendants), American Express Travel Related Services Company, Inc. (American Express Travel), American Express Company (together, the Amex defendants), American Express Credit Corporation and John Gallin & Son, Inc. (Gallin) (all together, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment (1) dismissing the complaint and any and all claims asserted against them; and (2) summary judgment in their favor on the third-party contractual indemnification claim against third-party defendant Godsell Construction Corp. (Godsell).

BACKGROUND

On the day of the accident, nonparty Battery Park City Authority was the fee owner of the Premises where the accident occurred. The Amex defendants leased the 26th floor of the Premises as tenants in common. While BFP Tower C Co. LLC also had a leasehold interest in the Premises, it had no leasehold interest in the 26th floor where the accident occurred. The Amex defendants hired Gallin to serve as general contractor for a renovation project underway on the 26th floor of the Premises (the Project). Gallin hired plaintiff's employer, Godsell, a carpentry company, to install soffits in the ceiling of various conference rooms there.

It should be noted that a review of the record reveals that Brookfield Properties One WFC Co. LLC, WFP Tower B Co., L.P. and WFP Tower D Co. L.P. had no connection to the

circumstances and allegations contained in this action.[1] In addition, American Express Credit Corporation was not a party to the ground lease, nor did it contract with Gallin for its services.[2]

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was working for Galgan as a carpenter on the Project. Plaintiff's duties that day included constructing a soffit in the ceiling of a conference room that was to be used to house a pull-down projection screen. Plaintiff received his daily assignments and work direction from his Godsell foreman, John Murphy.

To reach the approximately nine-foot high ceiling, Godsell provided plaintiff with a baker scaffold and an A-frame ladder. Plaintiff described the scaffold as consisting of a platform that stood approximately five feet above the ground. The only way to access the platform of the scaffold was by the use of a six-foot A-frame ladder. Plaintiff and Murphy set up the scaffold, and plaintiff set up the ladder. Before using the ladder, plaintiff checked it to make sure that its locking device was "in place" (plaintiff's tr at 197). Plaintiff did so by "tak[ing] out [his] hammer and hit[ting] both of them and lock[ing] [the locking devices]" (*id.*). Plaintiff also personally locked the scaffold's wheels. Plaintiff described the ladder as "pretty new" and as having rubber on its feet. Plaintiff never made any complaints about the safety of the ladder.

Plaintiff testified that, just prior to the accident, he was standing on the platform of the scaffold taking measurements for a piece of the soffit known as a "track" that he planned to install in the ceiling (*id.* at 48). When plaintiff needed to disembark the scaffold in order to

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[1]See affidavit of Kathleen G. Kane, executive vice president and general counsel of Brookfield Financial Properties, L.P. (defendants' notice of cross motion, exhibit A).

[2]See affidavit of Moriah Candotti, project manager, Global Real Estate & Workplace Enablement for American Express Company (defendants' notice of cross motion, exhibit E).

retrieve the track, he stepped off the platform and onto the ladder. As his right foot stepped onto the third rung of the ladder and while his left foot was still on the platform, the ladder kicked out from underneath him, causing him to fall to the ground and become injured. Specifically, plaintiff described the accident, as follows:

> "I put one hand on top of the baker, put one hand on top of the ladder, stepped down to the ladder on the third rung, the ladder kicked out. I went straight to the floor"

(*id.* at 57). Plaintiff maintained that, when the ladder's bottom kicked out, "the ladder tipped over on top of [him] and [he] went straight down" (*id.* at 60). Plaintiff was not aware of what caused the ladder to tip over. As a result of his fall, plaintiff suffered torn ligaments in his right elbow and right foot.

Deposition Testimony of Gregg Boita (Gallin's Superintendent)

Gregg Boita testified that he was a superintendent for Gallin on the day of the accident. He explained that Gallin served as general contractor on the Project, which entailed "redoing a series of conference rooms and reception" on the 26th floor of the Premises (Boita tr at 9). As general contractor, Gallin coordinated the trades, hired subcontractors, oversaw the work of the contractors and stopped work in the event an unsafe condition was observed. As Gallin's superintendent, Boita's job was "[r]unning the job site" (*id.* at 8).

Gallin hired plaintiff's employer, Godsell, to perform certain carpentry work for the Project, including "working on ceilings, soffits, drywall" (*id.* at 23). Notably, Gallin did not supply any tools or equipment to Godsell, nor did it supervise Godsell's workers "beyond the foreman" (*id.* at 93-94).

On the day of the accident, Godsell was installing soffits in the ceilings of multiple

conference rooms located on the 26th floor. In order to reach the ceilings, it was necessary for the Godsell workers to utilize a baker scaffold, which Godsell supplied and which Godsell workers set up. Boita was notified of the accident by a foreman who told him that plaintiff fell off a ladder. Shortly after the accident, Boita went to the accident area where he found plaintiff still lying on the floor.

Deposition Testimony of Sean Cassidy (Godsell's General Foreman)

Sean Cassidy testified that he was Godsell's general foreman on the day of the accident, and that Godsell was in the business of "office renovation, general carpentry/construction (Cassidy tr at 9). Godsell was hired to construct soffits in the ceiling of the Premises. As general foreman, Cassidy checked on the progress of the job. Gallin also had an additional foreman, Murphy, who was more directly in charge of the Godsell workers and was also "responsible for safety" at the site (*id.* at 55). In addition to Godsell "providing supervision to their workers," it provided all of the equipment that they needed to perform their work (*id.* at 56). Said equipment included safety equipment, as well as tools and devices.

Cassidy testified that, at the time of the accident, plaintiff was performing ceiling work from the platform of a baker scaffold. After the accident, plaintiff told him that he fell as he was stepping off of the scaffold and onto a ladder. When Cassidy checked the ladder and the scaffold following the accident, he did not notice any problems or issues with them. He further observed that someone had returned the ladder to an upright position. He testified that the ladder appeared to be new, and that its rungs were in good shape. In addition, the ladder had rubber feet. No one ever indicated to him that the scaffold or the ladder were not properly set up, and, as far as he was aware, plaintiff followed proper procedure while disembarking the scaffold.

DISCUSSION

"'The proponent of a summary judgment motion must make 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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for 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]).

Initially, it is important to note that plaintiff does not oppose that part of defendants' motion seeking dismissal of the common-law negligence and Labor Law § 200 claims against them. Thus, defendants are entitled to dismissal of these claims.

The Labor Law § 240 (1) Claim Against Defendants

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants move for dismissal of said claim. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant 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) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, plaintiff makes no opposition to defendants' contention that the Labor Law §§ 240 (1) and 241 (6) claims must be dismissed as against the Brookfield defendants and American Express Credit Corporation, as a matter of law, because these defendants are neither contractors, owners or agents of the owners and/or they had nothing to do with the Premises or the Project. Thus, these defendants are entitled to dismissal of the complaint, as well as any and all cross

claims asserted against them. Accordingly, the remainder of the decision will focus on whether or not the Amex defendants and Gallin are proper Labor Law defendants and whether they are liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6).

As to the Amex defendants, it should be noted that "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has not been limited to titleholders but has 'been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008]; *Lacey v Long Is. Light. Co.*, 293 AD2d 718, 718-719 [2d Dept 2002]).

Here, the Amex defendants were parties to a tenancy agreement in regard to the subject property, and they hired Gallin to serve as general contractor for the Project. Therefore, as the Amex defendants had an interest in the property and fulfilled the role of owner by contracting for work for their benefit, they are to be considered owners for the purposes of Labor Law § 240 (1). In addition, as general contractor, Gallin may also be liable for plaintiff's injuries under the Labor Law.

Plaintiff asserts that Labor Law § 240 (1) applies to the facts of this case, because, while he was stepping from the scaffold onto the ladder, the ladder, which was not secured to anything to keep it from tipping over, kicked out from under him, causing him to fall to the ground and become injured. "'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'"

(*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of unsteady ladder, the plaintiff did not need to show that the ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]).

Important to the facts of this case, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason' [citation omitted]" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d at 618 [defendant not entitled to dismissal of Labor Law § 240 (1) claim where it failed to establish that the ladder, which had slipped out from underneath the plaintiff, provided proper protection]).

Here, defendants are liable for plaintiff's injuries under Labor Law § 240 (1), because, although plaintiff was provided with a ladder, the ladder was not properly secured so as to prevent it from tipping over and plaintiff from falling (*see Casasola v State of New York*, 129 AD3d 758, 759 [2d Dept 2015] [Labor Law § 240 (1) liability where the A-frame ladder that the plaintiff was working on "tipped over," causing him to become injured]; *Seferovic v Atlantic Real Estate*

Holdings, LLC, 127 AD3d 1058, 1059 [2d Dept 2015] [Labor Law § 240 (1) liability where the plaintiff was injured when the A-frame ladder he was working on "twisted out from under him while he was lifting materials"]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 639 [1st Dept 2014]). "The lack of a secure ladder is a violation of Labor Law § 240 (1)" (*Nazario v 222 Broadway, LLC*, 135 AD3d 506, 508 [1st Dept 2016], *affd as mod* _ NY3d _, 2016 NY Slip Op 07823 [2016] [Labor Law § 240 (1) liability where the plaintiff "was injured . . . because [the ladder] was not secured to something stable," causing him to fall to the ground]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999]). In addition, plaintiff was not provided with any additional safety devices, such as a device to secure the ladder or a harness, to prevent him from falling. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Lightfoot v State of New York*, 245 AD2d 488, 489 [2d Dept 1997]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012, 1013 [3d Dept 1990]).

Defendants argue that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because plaintiff has not demonstrated that the ladder was defective in any way. However, plaintiff is not required to demonstrate that the ladder was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012]; *McCarthy v*

Turner Constr., Inc., 52 AD3d 333, 333 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

In addition, defendants argue that summary judgment in plaintiff's favor must be denied, because there are genuine issues of fact in dispute as to whether he was the sole proximate cause of his accident. To that effect, defendants surmise that this might be a case where plaintiff simply lost his balance and fell.

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

However, defendants' argument on this issue fails, as there is no evidence in the record to indicate that plaintiff's set up of the ladder itself was improper. Moreover, first and foremost, the accident was caused due to the fact that the ladder was not secured to anything so as to prevent it from tipping over when someone stepped onto it from the scaffold, and because no other safety devices were provided to plaintiff to protect him from falling (*Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1106 [2d Dept 2016] [no sole proximate cause found where "the

plaintiff was provided with only an unsecured ladder and no safety devices, the plaintiff [could] not be held solely at fault for his injuries"]; *Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d at 1059]).

In any event, whether or not plaintiff contributed to the accident by improperly setting up the ladder goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur(ies)"]).

In addition, defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see*

Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]).

It should also be noted that defendants have not offered any evidence, other than mere speculation, to demonstrate that plaintiff fell because he simply lost his balance, so as to raise a bona fide issue as to how the accident occurred (*see Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Wasilewski v Museum of Modern Art*, 260 AD2d at 272).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the Amex defendants and Gallin, and these defendants are not entitled to dismissal of the same. Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

The Labor Law § 241 (6) Claim Against the Amex Defendants and Gallin

The Amex defendants and Gallin also move for summary judgment dismissing the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) provides, in pertinent 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Initially, although plaintiff lists multiple alleged violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.21 (b) (1) and (3), plaintiff does not address these Industrial Code violations in his opposition to defendants' cross motion, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.21 (b) (1)

Industrial Code 12 NYCRR 23-1.21 (b) (1), which refers to "Ladders and Ladderways," states, as follows:

> "(b) General requirements for ladders. (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load intended to be placed thereon."

Initially, section 23-1.21 (b) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008]). However, section 23-1.21 (b) (1) does not apply to the facts of this case, because plaintiff has not alleged that the accident was caused due to a deficiency in the ladder's strength, or due to the ladder breaking, dislodging or a component loosening. Rather, plaintiff alleges that the accident was caused when the ladder tipped over as he stepped from the scaffold onto it. Thus, the Amex defendants and Gallin are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.21 (b) (1).

Industrial Code 12 NYCRR 23-1.21 (b) (3) (iv)

Industrial Code 12 NYCRR 23-1.21 (b) (3) (iv) states:

> "Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: . . . (iv) If it has any flaw or defect of material that may cause ladder failure."

Section 23-1.21 (b) (3) (iv) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*Dwyer v Central Park Studios, Inc.*, 98 AD3d at 884).

Section 23-1.21 (b) (3) (iv), which requires that ladders be maintained in good condition and forbids the use of any ladder having a flaw or defect that could cause the ladder to fail, does not apply to the facts of this case. As discussed previously, plaintiff claims that he was caused to fall when the ladder tipped over because it was not secured, not because of any flaw or defect in

the ladder itself (*see Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d at 1060).

Thus, the Amex defendants and Gallin are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.21 (b) (3) (iv).

The Third-Party Claim for Contractual Indemnification As Against Godsell

Defendants also move for contractual indemnification as against plaintiff's employer, Godsell.

Additional Facts Relevant To This Issue:

Pursuant to a contract, American Express Travel hired Gallin to serve as general contractor on the Project. In turn, pursuant to a purchase order, which was in effect on the day of the accident, Gallin contracted with plaintiff's employer, Godsell, to perform certain ceiling work on the 26th floor of the Premises (the Purchase Order).

As reflected in the terms and conditions section of the Purchase Order, Godsell was responsible for providing safe working conditions for its employees. Godsell was also "solely responsible for the labor it and its subcontractors employ[ed] on the project" (defendants' notice of motion, Exhibit F, the Purchase Order). In addition, pursuant to the Purchase Order, Godsell was required

> "[t]o indemnify, defend and hold harmless, the building owner, [Gallin] and [the Amex defendants] from and against any and all loss, damage, injury or death, or claims therefore, including attorney's fees and court costs, on the project or related thereto, arising out of or related to its own intentional acts or negligence or that of its agents or subcontractors, or from its failure to comply with the terms of this purchase order"

(*id.*).

Initially, as plaintiff was an employee of Godsell, relevant to this issue is Workers'

Compensation Law § 11, which prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Here, plaintiff's injuries to his right elbow and foot do not rise to the level of "grave" as defined by New York Workers' Compensation Law § 11. That said, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d

Dept 2010]).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Here, plaintiff, an employee of Godsell, was injured while installing soffits in the ceiling of a conference room located on the 26th floor of the Premises. Accordingly, his injuries arose from Godsell's work on the Project. In addition, as plaintiff's work was supervised by his Godsell foreman, and as Godsell also provided plaintiff with the subject ladder, it cannot be said that any negligence on the part of defendants caused the accident. Thus, pursuant to the indemnification agreement in the Purchase Order, the Amex defendants and Gallin are entitled to contractual indemnification from Godsell.

Finally, it should be noted that, in their cross motion, the Amex defendants and Gallin also request that the court dismiss any and all cross claims asserted against them. However, as these defendants do not address or make any argument regarding said alleged claims in their cross

motion, this request is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Christopher Galgan's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs American Express Travel Related Services Company, Inc. and American Express Company (together, the Amex defendants) and John Gallin & Son, Inc. (Gallin) is granted, and the motion is otherwise denied; and it is further

ORDERED that the parts of defendants/third-party plaintiffs' Brookfield Properties One WFC Co. LLC, WFP Tower B Co. LP., WFP Tower D Co. L.P., BFP Tower C Co. LLC (collectively, the Brookfield defendants), the Amex defendants, American Express Credit Corporation and Gallin's (collectively, defendants/third-party plaintiffs) cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any and all claims asserted against the Brookfield defendants and American Express Credit Corporation is granted, and the complaint and any and all cross claims are severed and dismissed as against the Brookfield defendants and American Express Credit Corporation, and the Clerk is directed to enter judgment in favor of the Brookfield defendants and American Express Credit Corporation, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the parts of defendants/third-party plaintiffs' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against the Amex defendants and Gallin are granted, and these claims are dismissed as against the Amex defendants and Gallin; and it is further

ORDERED that the part of defendants/third-party plaintiffs' cross motion, pursuant to CPLR 3212, for summary judgment in their favor on the third-party contractual indemnification claim against third-party defendant Godsell Construction Corp. is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: November 28, 2016

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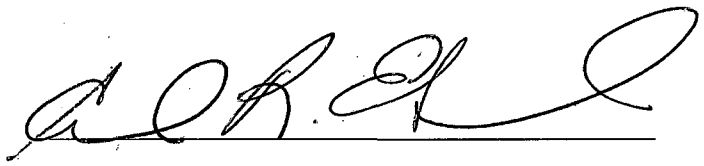

Carol Robinson Edmead, J.S.C.

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