

Palacios v McSam Hotel Group LLC
2017 NY Slip Op 31211(U)
June 6, 2017
Supreme Court, New York County
Docket Number: 160760/2014
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MAURICIO PALACIOS,

Plaintiff,

-against-

MCSAM HOTEL GROUP LLC, IMDN HOLDING
LLC. and CAVA CONSTRUCTION CO., INC.,

Defendants,

CAVA CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

KENRY CONTRACTING, INC.,

Third-Party Defendant.

IMDN HOLDING LLC.,

Second Third-Party Plaintiff,

-against-

KENRY CONTRACTING, INC.,

Second Third-Party Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed (003) (004) (005)	1-3
Opposition Affidavits/Affirmations and Memos of Law annexed (003) (004) (005)	4-11
Reply Affidavits/Affirmations/Memos of Law annexed (003) (004) (005)	12-14

ERIKA M. EDWARDS, J.:

Plaintiff Mauricio Palacios ("Plaintiff") brought this action against Defendants McSam Hotel Group LLC ("McSam") (liaison between lender and co-defendants), IMDN Holding LLC ("IMDN") (owner) and Cava Construction Co., Inc. ("Cava") (general contractor) for personal injuries he sustained when he stepped back and fell through a hole to the floor approximately sixteen feet below while he was working on an unfinished roof at a hotel construction site. IMDN entered into a contract with Cava for Cava to serve as the construction manager/general contractor for the construction of a thirty-five-story hotel on the premises. Cava was responsible for coordinating, supervising and directing the work of the subcontractors and it hired Kenry Contracting, Inc. ("Kenry") (Plaintiff's employer/subcontractor) to do concrete work at the site. Plaintiff was employed by Kenry.

Plaintiff alleged that he was passing plywood up to a co-worker who was standing on an, elevated deck used to construct the bulkhead on the roof. The hole was approximately 26" x 26" and it had been used as a laundry chute. Plaintiff alleged in substance that the hole was not properly covered and secured with plywood and that he was not provided with a safety harness or any other safety device to prevent him from falling.

Plaintiff brought claims under common-law negligence and for violations of Labor Law §§ 200, 240(1) and 241(6), including a violation of NYCRR 23-1.7(b)(1). Cava and IMDN filed separate Third-Party complaints against Kenry for contractual and common-law indemnification, contribution and breach of contract for failure to procure proper insurance coverage required by the agreements between the parties.

There are three motions currently pending before this court: 1) Plaintiff's motion for partial summary judgment in his favor on liability as to his Labor Law § 240(1) claim against

IMDN and Cava under motion sequence 003; 2) Cava's motion for summary judgment dismissal of Plaintiff's common-law and Labor Law §§ 200 and 241(6) claims and for summary judgment in its and IMDN's favor for defense and contractual indemnification against Kenry under motion sequence 004; and 3) McSam and IMDN's motion for summary judgment dismissal of Plaintiff's common-law negligence and Labor Law § 200 claims; summary judgment dismissal of all remaining claims and cross-claims against McSam; summary judgment in their favor against Cava and Kenry for contractual indemnification and a finding of liability against Cava for common-law indemnification under motion sequence 005.

These motions are hereby consolidated for disposition as set forth herein. For the reasons set forth herein, the court 1) grants Plaintiff's motion for partial summary judgment for liability under Labor Law § 240(1) against IMDN and Cava under motion sequence 003; 2) grants Cava's motion for summary judgment dismissal of Plaintiff's common-law and Labor Law § 200 claims, denies Cava's motion for summary judgment dismissal of Plaintiff's Labor Law § 241(6) claims, but grants it as to the alleged violation of Industrial Code § 23-1.24 regarding roofing brackets only, and grants Cava's motion for summary judgment in its favor against Kenry for defense and contractual indemnification of Cava and IMDN under motion sequence 004; and 3) grants McSam's and IMDN's motion to dismiss Plaintiff's common-law negligence and Labor Law § 200 claims against them; grants their motion to dismiss all claims and cross-claims against McSam; grants summary judgment in IMDN's favor as against Cava and Kenry for contractual indemnification and defense of this action; denies summary judgment in McSam's favor against Cava for contractual indemnification and defense of this action; grants summary judgment in McSam's favor against Kenry for contractual indemnification and defense of this

action; and denies summary judgment in IMDN's favor as against Cava for common-law indemnification.

I. SUMMARY JUDGMENT LEGAL STANDARD

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011]).

citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Facts supported by admissible evidence must be viewed in the light most favorable to the non-movant.

II. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS LABOR LAW § 240(1) CLAIMS (Motion Sequence 003)

Plaintiff moves for partial summary judgment in his favor as against IMDN and Cava on his Labor Law § 240(1) claims under motion sequence 003. McSam, IMDN, Cava and Kenry all oppose Plaintiff's motion.

Labor Law § 240(1) states that all contractors, 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]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the

fall or the application of an external force was a foreseeable risk of the task being performed (see *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or the difference between the elevation level where the worker is positioned and a higher level of the materials or load being hoisted or secured (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

An injured employee's comparative negligence does not prevent him from prevailing under the statute, however, an employer is not liable if the employee's own negligence was the sole proximate cause of his injuries, or if the employer made adequate safety devices available and instructed the employee on how to use them, but the recalcitrant employee failed to use the safety device as instructed (*Cahill*, 4 NY3d at 39-40; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 286-287 [2003]).

Furthermore, defendants are liable for all normal and foreseeable consequences of their acts and to establish a prima facie case, a plaintiff is not required to demonstrate the precise way the accident occurred or that the injuries were foreseeable (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 562 [1993]). A plaintiff need only demonstrate that the risk of some injury from defendants' conduct was foreseeable (*id.*). However, an independent intervening act may constitute a superseding cause and be sufficient to relieve defendants of liability if it is of such an extraordinary nature or so attenuated from defendants' conduct that responsibilities for the injury should not reasonably be attributed to them (*id.*; but see *Morocho v Plainview-Old Bethpage Cent. Sch. Dist.*, 116 AD3d 935, 936 [2d Dept 2014] [court determined that a co-worker's act of pulling up a discarded piece of plastic sheeting from the floor, causing it to become entangled

with plaintiff's ladder and causing the ladder and plaintiff to fall was not of an extraordinary nature, nor so attenuated from the statutory violation as to constitute a superseding cause sufficient to relieve the owner of liability)).

Courts have liberally construed Labor Law § 240(1) and found sufficient elevation-related risks to protect workers in various situations (*see Panek v Albany*, 99 NY2d 452 [2003] [worker who fell while dismantling and removing heavy equipment from a tower which was bolted to a ceiling]; *Gottstine v Dunlop Tire Corp.*, 272 AD2d 863 [4th Dept 2000] [worker who fell through an opening in mats suspended over a pit]; *Grant v Gutchess Timberlands Inc.*, 214 AD2d 909 [3d Dept 1995] [worker who hit face on edge of roof when he slipped and fell off of the roof]; *Leshaj v Long Lake Associates*, 24 AD3d 928 [3d Dept 2005] [worker who fell from permanently installed second floor of a house under construction without finished walls when he stepped backward into an open space between exposed wall studs]).

Additionally, the First Department has consistently found that § 240(1) is violated when workers fall through unprotected floor openings or holes (*see Carpio v Tishman Constr. Corp.*, 240 AD2d 234 [1st Dept 1997] [painter stepped into an uncovered hole in the floor when he stepped back while looking up to paint the ceiling]; *McCoo v Lollytogs, Ltd.*, 251 AD2d 195 [1st Dept 1998] [worker injured when he stepped from the bottom rung of a ladder into a hole exposed by missing floor tile]; *Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [worker fell through an opening that was intended to be used to pass debris from one floor to another when he stepped on a piece of unsecured plywood which concealed and covered the hole, causing the plywood to flip up]; and *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60 [1st Dept 1999] [worker fell through a hole when plywood covering the hole shifted and gave way]).

In the instant matter, Plaintiff testified in substance that while he was on the third floor, he was directed to go to the roof to help pass plywood up to a co-worker. He did not see an uncovered hole, but saw a pile of plywood and he began passing the plywood up to his co-worker one by one, while stepping back from on top of the pile to brace himself each time. He denied passing any materials through a hole and he did not unsecure plywood that had been fastened to cover a hole. There is testimony from others that a few days before the accident and even 20 minutes prior to the accident the hole was covered by plywood that was marked and secured with nails. Additionally, shortly before the accident one of the Kenry employees asked a Cava employee whether they could uncover the hole to pass material, but their request was denied. At least two of Plaintiff's co-workers, including his brother, allegedly told a Cava employee that Plaintiff fell while he and co-workers were passing material through a hole.

When applying the applicable law to the facts in this case, the court determines that Plaintiff demonstrated that he is entitled to partial summary judgment as a matter of law for liability on his Labor Law § 240(1) claim against IMDN and Cava. Plaintiff demonstrated that IMDN and Cava violated the statute by failing to provide Plaintiff with an adequate protective device, that such device would have prevented Plaintiff from falling and that such lack of protection was the proximate cause of Plaintiff's injuries. Additionally, Plaintiff demonstrated that he was injured while performing work that was a type of elevation-related hazard to which the statute applies and that he was required to work at the height to complete the task.

Furthermore, Plaintiff established his prima facie case that Cava and IMDN breached their non-delegable duties under the statute to furnish Plaintiff with adequate safety devices, which Plaintiff alleges was a harness and a piece of plywood properly secured to the concrete to

adequately cover the hole at the time of his accident. Such protections would have protected Plaintiff from this elevation-related risk.

Additionally, based on the admissible evidence presented, the court rejects Cava's, IMDN's and Kenry's arguments that there is an issue of fact as to liability, including whether the plywood was properly secured prior to the accident, whether it provided proper protection to relieve Defendants of liability, whether Plaintiff or one of his co-workers removed it, and whether Plaintiff's own actions were the proximate cause of his injuries. The question of whether the plywood cover was secured shortly prior to the accident is irrelevant because liability under Labor Law § 240(1) is not dependent on IMDN's or Cava's notice of the violation. The OSHA and DOB reports and testimony that Plaintiff's brother and a co-worker admitted that Plaintiff was passing material through the hole is hearsay and there is no testimony that Plaintiff deliberately removed the nails and intentionally removed the plywood to uncover the hole (*see Alonzo*, 104 AD3d at 450 [1st Dept 2013]). Additionally, Plaintiff's comparative negligence is inapplicable to claims under this statute. The court finds Defendants' remaining arguments to be unpersuasive on this issue.

Therefore, the court grants partial summary judgment in favor of Plaintiff on the issue of liability under Labor Law § 240(1) against IMDN and Cava and orders a trial on damages regarding this cause of action.

III. CAVA'S MOTION FOR SUMMARY JUDGMENT (Motion Sequence 004)

Cava moves for summary judgment dismissal of Plaintiff's claims against Cava as to Plaintiff's common-law negligence, Labor Law §§ 200 and 241(6) causes of action and in favor of Cava and IMDN as against Kenry for indemnification under motion sequence 004. Plaintiff and Kenry oppose the portions of the motion that pertain to the claims related to them.

For the reasons set forth herein, the court grants Cava's motion to dismiss Plaintiff's common-law and Labor Law § 200 claims; denies it as to Plaintiff's Labor Law § 241(6) claims, but grants it pertaining to a violation of Industrial Code § 23-1.24 regarding roofing brackets only; and grants the motion as to contractual indemnification and defense in favor of Cava and IMDN as against Kenry under Kenry's primary, excess and umbrella policies.

Plaintiff's complaint alleges that McSam, IMDN and Cava breached their duties to provide Plaintiff with a safe place to work; they breached their duties to see that the work site was kept reasonably safe and free of dangers and hazards to the workers; they were negligent, reckless and careless; they had actual and/or constructive notice of the dangerous and defective condition at the work site; that they violated Labor Law § 200 by reason of their negligence and that they violated Labor Law § 241(6) by violating Industrial Code §§ 23-1.7(b)(1), 23-1.15, 23-1.16, 23-1.20 and 23-1.24 and OSHA regulations, including but not limited to, 29 CFR 1926.104, 1926 503(a)(1), 1926 850(i) and 1910.23(a)(3).

A. Plaintiff's Common-Law Negligence and Labor Law § 200 Claims

Cava argues in substance that Plaintiff's claims under common-law negligence and Labor Law § 200 should be dismissed as against Cava because Plaintiff failed to demonstrate that Cava was liable for Plaintiff's injuries in that it did not supervise or control the manner of Plaintiff's work and it did not have notice of a dangerous condition. Cava alleges in substance that it was retained by IMDN as its construction manager of the construction and/or renovation work performed on IMDN's premises and Cava retained Kenry to perform concrete work at the site. Plaintiff was employed by Kenry, Kenry directed and controlled Plaintiff's work, only Kenry employees were present on the roof at the time of the accident and Plaintiff's or Plaintiff's co-workers' removal of the plywood covering the hole is attributable to Kenry.

Plaintiff opposes Cava's motion pertaining to dismissal of Plaintiff's claims and states in substance that if the court grants Plaintiff's summary judgment motion regarding his Labor Law § 240(1) claim, as the court did, then the court need not consider Plaintiff's claims under Labor Law §§ 241(6) or 200, as Plaintiff intends to proceed to trial on the issue of damages under its § 240(1) claim only. The court declines to do so and will continue to address the substance of all motions submitted. Should Plaintiff choose not to continue with his remaining causes of action, then Plaintiff must affirmatively discontinue all other claims.

It is well settled that Labor Law § 200 is the codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). To prevail on such a claim, a plaintiff must demonstrate that a defendant has the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Accordingly, liability can only be imposed if the defendant has exercised control or supervision over the work and has actual or constructive notice of the alleged unsafe condition (*Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 289 [1st Dept 2008]; *Giovengo v P&L Mech.*, 286 AD2d 306, 307 [1st Dept 2001]).

The court granted summary judgment to a construction manager on a plaintiff's common-law negligence and Labor Law § 200 claims and found that the company only had general supervision which was insufficient to trigger liability (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [internal citation omitted]). The court determined that plaintiff never took orders from the company's employees, the company did not direct, manage or oversee the plaintiff's work and although the company's project superintendent conducted regular walk-

throughs, had the authority to investigate and stop work for unsafe conditions, discussed covering the hole and inspected the plywood, it was not enough to impose liability (*id.*).

Based on the admissible evidence presented in the instant matter, the court determines that Cava established a prima facie case of entitlement to summary judgment as a matter of law as to Plaintiff's common-law negligence and Labor Law § 200 causes of action. The arguments asserted by the parties in their opposition papers failed to raise material issues of fact regarding whether Cava was negligently liable for Plaintiff's injuries or whether Cava directed, controlled or supervised Plaintiff's work. Additionally, the actions of Cava's superintendent were insufficient only indicated that he had general supervision of the site. As such, Plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed as against Cava.

B. Plaintiff's Labor Law § 241(6) Claims

Cava further argues that Plaintiff's claims under Labor Law § 241(6) must be dismissed because Plaintiff failed to establish that Cava violated any of the alleged Industrial Code provisions.

Labor Law § 241(6) imposes a nondelegable duty upon an owner or subcontractor, regardless of who controls or supervises the site, to use reasonable care to provide reasonable and adequate protection and safety to employees working at the site (*St. Louis v N. Elba*, 16 NY3d 411, 413 [2011]). Therefore, Plaintiff's § 241(6) claim is not dependent on the degree of Cava's control over his work, rather it is dependent on the application of the specific Industrial Code provision and a finding that the violation of the provision was a result of negligence (*Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [citation omitted]).

Based on the admissible evidence presented in this case, the court determines that Cava failed to establish a prima facie case of entitlement to summary judgment as a matter of law as to Plaintiff's Labor Law § 241(6) cause of action. Since the question of whether Cava directed, controlled or supervised Plaintiff's work is not a consideration for Plaintiff's Labor Law § 241(6) claim and Cava's duty under this statute is non-delegable, Cava failed to demonstrate that it did not violate this statute by violating any of the alleged Industrial Code provisions, particularly § 23-1.7(b)(1). However, the court grants Cava's motion as to § 23-1.24 regarding roofing brackets and finds that this section is not applicable to the facts presented. Questions of fact remain as to whether there was a violation of any other provision. Therefore, the court denies Cava's motion for summary judgment dismissal of Plaintiff's Labor Law § 241(6) claims, except as they pertain to Industrial Code § 23-1.24.

C. Cava's Contractual Indemnification and Defense Claims

Cava alleges that pursuant to the contract between Cava and Kenry, Kenry is obligated to indemnify and defend Cava in this action.

A party's right to indemnification may arise from a contract or may be implied based upon common-law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms [internal quotation marks and citations omitted]" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008]).

Pursuant to the contract between Cava and Kenry, Kenry agreed to keep the premises free from unsafe conditions resulting from its work; to provide safe working conditions for its employees; to comply fully with all local, state and federal ordinances, regulations and laws; to indemnify and hold harmless Cava, as the general contractor, "from any claims of any kind or nature whatsoever by reason of Kenry's failure to fully comply with such laws or orders issued thereunder and to reimburse (Cava) for any fine, expenses, court costs or related damages incurred by (Cava) on account of (Kenry's) failure to so comply." Additionally, Kenry agreed, to the fullest extent permitted by law, to "indemnify, defend and hold harmless" IMDN, as the owner of the premises, and Cava, as the general contractor of the site, "from and against all losses, claims . . . , causes of action, lawsuits, liens, costs, damages, and expenses arising out of the work for any personal injury, sickness, disease or death, but only to the extent caused by the negligent acts or omissions of (Kenry), its employees, sub-contractors, representatives or other persons for whom (Kenry) is responsible. Such obligations shall arise regardless of any claimed liability on the part of (Cava or IMDN), provided, however, (Kenry) shall not be required to indemnify (Cava or IMDN) to the extent attributable to (Cava's or IMDN's) negligence or willful misconduct."

Furthermore, there is an additional indemnification and hold harmless provision in favor of Cava and IMDN as against Kenry which included attorney's fees. Also, one of Kenry's insurance carriers already accepted Cava's tender on behalf of Cava, McSam and IMDN regarding the underlying primary policy, the carrier orally agreed to accept the tender of the excess policy, but there has been no tender of Kenry's umbrella policy with another carrier.

Kenry opposes the motion as it pertains to Kenry's defense and indemnification and argues in substance that the contract has conflicting and inconsistent indemnification clauses; it

is unenforceable as a matter of law; it cannot have contractual indemnification because it is IMDN's agent; IMDN and McSam did not contract with Kenry; and there are questions of fact remaining regarding the parties' intent, Cava's negligence and its role in Plaintiff's work. Additionally, Cava is not entitled to common-law indemnification because it did not establish that Plaintiff sustained a grave injury and the insurance issues are irrelevant to Cava's motion.

Finally, based on the defense and indemnification provisions of the contract between Cava and Kenry, the court grants Cava's summary judgment motion regarding Kenry's common-law and contractual defense and indemnification of Cava and IMDN under Kenry's primary, excess and umbrella policies.

IV. MCSAM'S AND IMDN'S MOTION FOR SUMMARY JUDGMENT (Motion Sequence 005)

McSam and IMDN move for summary judgment in their favor on Plaintiff's claims for common-law negligence and Labor Law § 200; dismissal of all claims and cross-claims against McSam; summary judgment against Cava and Kenry for contractual indemnification; and a finding of liability against Cava for common-law indemnification. Plaintiff, Cava and Kenry oppose the portions of the motion that apply to them.

As set forth herein, the court grants McSam's and IMDN's motion for summary judgment dismissal of Plaintiff's common-law negligence and Labor Law § 200 claims against them; grants summary judgment dismissal of all remaining claims and cross-claims against McSam; grants summary judgment in favor of IMDN for contractual indemnification and defense against Cava and Kenry; denies summary judgment in favor of McSam as against Cava for defense and contractual indemnification; grants summary judgment in favor of McSam as against Kenry for defense and contractual indemnification; and denies the motion requesting a finding that Cava is liable to IMDN for common-law indemnification.

A. IMDN and McSam's Summary Judgment Motion to Dismiss Plaintiff's Common-Law Negligence and Labor Law § 200 Claims and for Dismissal of All Claims Against McSam

IMDN and McSam argue in substance that IMDN is the sole owner of the premises and that there is no evidence that McSam is an owner or contractor of the premises within the meaning of the Labor Law for the work being performed at the jobsite. McSam owns various real estate related companies and it did not have any involvement in this construction, except that it acted as a liaison between the lender, Cava and IMDN. IMDN and McSam further state that Plaintiff and Cava have already signed a Stipulation of Discontinuance of their claims against McSam. Therefore, Kenry's cross-claims are the only remaining claims against McSam.

McSam and IMDN further allege that they never directed or supervised the means, manner and methods of the work being performed on the premises, including any work performed by Plaintiff. McSam and IMDN were not involved in the day to day running of the jobsite, they did not receive any complaints about the work, they were not responsible for the work at the site and they did not receive any notice of the alleged unsafe condition. All of the equipment used by Plaintiff were provided by Kenry. As such, McSam and IMDN argue that McSam is not a proper party to this lawsuit.

Plaintiff opposes the motion and argues in substance that the intertwined relationship between Cava and IMDN raises questions of fact as to IMDN's liability. Plaintiff argues that Peter Serpico was the president of Cava and a member and/or manager of an LLC. The LLC was a member of IMDN and Mr. Serpico signed the construction contract between Cava and IMDN on behalf of IMDN. Additionally, the DOB work permit was issued to Mr. Serpico on Cava's behalf. Plaintiff argues in substance that Mr. Serpico's relationship with both entities raises questions of fact as to whether IMDN supervised or directed Plaintiff's work, whether it

had notice of the defective and dangerous condition, or whether it was responsible for the means and methods of the work.

Similarly, as discussed above pertaining to Cava's motion to dismiss Plaintiff's common-law negligence and Labor Law § 200 claims, IMDN and McSam established a prima facie case of entitlement to summary judgment as a matter of law as to these causes of action and McSam demonstrated its entitlement to dismissal of Kenry's remaining claims and cross-claims. Plaintiff failed to raise any triable issues of fact. As such, the court grants dismissal of Plaintiff's common-law negligence and Labor Law § 200 claims against IMDN and all claims and cross-claims against McSam.

B. IMDN and McSam's Summary Judgment Motion for Contractual Indemnification and Defense as against Cava and Kenry

The contract between IMDN and Cava included Cava's duty to defend, indemnify and hold harmless IMDN, as owner, lender, architect and consultants, and their employees, agents and assigns, to the fullest extent of the law, from and against all losses, claims, causes of action, lawsuits, costs, damages and expenses, attorney's fees, disbursements arising out of the work for personal injuries, damage or injury for any act or omission of Cava or subcontractors, regardless of any claimed liability on the part of an indemnified party, provided, however, Cava shall not be required to indemnify any indemnitee to the extent attributable to such indemnitee's negligence or willful misconduct. Additionally, IMDN and McSam state that Cava's commercial general liability carrier agreed to defend and indemnify IMDN for Plaintiff's claims.

IMDN and McSam also rely on the contract between Cava and Kenry, which was discussed above, to support their arguments that Kenry is also contractually bound to defend and indemnify them against Plaintiff's claims.

Cava alleges that Kenry owes Cava, McSam and IMDN contractual indemnification based on the contract between Cava and Kenry and that the indemnification obligation of Cava has not yet been triggered since there has not been a finding that McSam and IMDN are free from negligence. Additionally, McSam is not a party to the contract between IMDN and Cava. Similarly, as mentioned above, Kenry asserts its same arguments that it used to oppose Cava's motion for summary judgment on its contractual indemnification and defense claims.

Based on the provisions set forth in both contracts, the court finds that there is no evidence of any negligence on the part of IMDN or McSam. Additionally, the contract between IMDN and Cava requires Cava to defend and indemnify IMDN, but not necessarily McSam, as McSam is not named in the contract and there is a question of fact as to whether its role as liaison is covered by the contract. However, the contract between Cava and Kenry clearly requires Kenry to defend and indemnify IMDN and McSam for Plaintiff's alleged claims in this action. Therefore, the court grants summary judgment in IMDN's favor against Cava and Kenry for defense and contractual indemnification, denies it in favor of McSam as against Cava, but grants it in favor of McSam as against Kenry.

C. Finding of Cava's Liability for Common-Law Indemnification

Finally, IMDN argues in substance that Cava is liable for common-law indemnification in IMDN's favor because IMDN is completely free from any negligence and because Plaintiff's injuries were clearly caused by the purported negligence on the part of Cava and Kenry. Furthermore, as the owner of the premises under these circumstances, IMDN argues that it can only be held liable to Plaintiff as a statutory defendant under the Labor Law provisions.

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual

misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary [internal quotation marks and citations omitted]" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal quotation marks and citations omitted]" (*id.* at 367). The shifting of loss under common-law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common-law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

Based on the admissible evidence submitted, the court finds that IMDN failed to demonstrate that it is entitled to common-law indemnification from Cava because it failed to demonstrate the Cava is liable to Plaintiff for Cava's active misconduct, that Cava is negligent for Plaintiff's injuries or that Cava had actual supervision or control over Plaintiff's work.

As such, the court denies this portion of IMDN's motion.

V. CONCLUSION

As set forth above, the court 1) grants Plaintiff's motion for partial summary judgment for liability under Labor Law § 240(1) against IMDN and Cava and orders a trial on damages regarding this cause of action under motion sequence 003; 2) grants Cava's motion for summary judgment dismissal of Plaintiff's common-law and Labor Law § 200 claims, denies Cava's motion for summary judgment dismissal of Plaintiff's Labor Law § 241(6) claims, but grants it as to the alleged violation of Industrial Code § 23-1.24 regarding roofing brackets only, and grants it regarding Kenry's defense and contractual indemnification of Cava and IMDN under motion sequence 004; and 3) grants McSam's and IMDN's motion to dismiss Plaintiff's

common-law negligence and Labor Law § 200 claims against them; grants their motion to dismiss all claims and cross-claims against McSam; grants summary judgment in IMDN's favor as against Cava and Kenry for contractual indemnification and defense of this action; denies summary judgment in McSam's favor as against Cava for contractual indemnification and defense; grants summary judgment in McSam's favor as against Kenry for contractual indemnification and defense; and denies summary judgment in IMDN's favor as against Cava for common-law indemnification.

The court has considered the remaining arguments of all parties and denies any additional relief requested not set forth herein.

Accordingly, it is hereby

ORDERED that under motion sequence 003, the court grants Plaintiff Mauricio Palacios' partial summary judgment motion in his favor for liability on his Third Cause of Action under Labor Law § 240(1) as against Defendants IMDN Holding LLC and Cava Construction Co., Inc. and orders a trial on damages regarding this cause of action; and it is further

ORDERED that under motion sequence 004, the court 1) grants Defendant/Third-Party Plaintiff Cava Construction Co., Inc.'s motion for summary judgment dismissal of Plaintiff Mauricio Palacios' First and Second Causes of Action for common-law negligence and Labor Law § 200 claims and such claims are dismissed as against Defendant/Third-Party Plaintiff Cava Construction Co., Inc.; 2) denies summary judgment dismissal of Plaintiff Mauricio Palacios' Fourth Cause of Action under Labor Law § 241(6) claims for violation of Industrial Code §§ 23-1.7(b)(1), 23-1.15, 23-1.16 and 23-1.20 and OSHA regulations 29 CFR 1926.104, 1926 - 503(a)(1), 1926 850(i) and 1910.23(a)(3), but grants it as to a violation of Industrial Code § 23-

1.24 regarding roofing brackets only; 3) grants summary judgment in favor of Defendant/Third-Party Plaintiff Cava Construction Co., Inc. and Defendant/Third-Party Plaintiff IMDN Holding LLC as against Third-Party Defendant Kenry Contracting, Inc. for defense and contractual indemnification of this action as to Kenry Contracting, Inc.'s primary, excess and umbrella policies; and it is further

ORDERED that under motion sequence 005, the court 1) grants Defendant McSam Hotel Group LLC's and IMDN Holding LLC's summary judgment motion to dismiss Plaintiff Mauricio Palacios' First and Second Causes of Action for common-law negligence and Labor Law § 200 claims and such claims are dismissed as against Defendants McSam Hotel Group LLC and IMDN Holding LLC; 2) grants dismissal of all remaining claims and cross-claims against Defendant McSam Hotel Group LLC; 3) grants summary judgment in Defendant/Third-Party Plaintiff IMDN Holding LLC's favor as against Defendant/Third-Party Plaintiff Cava Constructing Co., Inc. and Third-Party Defendant Kenry Contracting, Inc. for defense and contractual indemnification in this action; 4) denies summary judgment in Defendant McSam Hotel Group LLC's favor as against Defendant/Third-Party Plaintiff Cava Constructing Co., Inc. for defense and contractual indemnification; 5) grants summary judgment in Defendant McSam Hotel Group LLC's favor as against Third-Party Defendant Kenry Contracting, Inc. for defense and contractual indemnification; and 6) denies summary judgment in favor of Defendant/Third-Party Plaintiff IMDN Holding LLC as against Defendant/Third-Party Plaintiff Cava Construction Co., Inc. for common-law indemnification.

Date: June 6, 2017


HON. ERIKA M. EDWARDS, JSC