Spano v Sachem Cent. Sch. Dist.
2017 NY Slip Op 31277(U)
May 15, 2017
Supreme Court, Suffolk County
Docket Number: 14648/12
Judge: Paul J. Baisley, Jr.
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JAMES SPANO,

Plaintiff,

-against-

SACHEM CENTRAL SCHOOL DISTRICT, ARCHITECTURAL WINDOW MANUFACTURING CORPORATION AND McCLAVE ENGINEERING, P.C.,

Defendants.

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ARCHITECTURAL WINDOW MANUFACTURING CORPORATION,

Third-Party Plaintiff,

- against -

PROFESSIONAL INSTALLATIONS, INC.,

Third-Party Defendant.

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INDEX NO.: 14648/12
CALENDAR NO.: 201501560OT
MOTION DATE: 9/15/16
MOTION NO.: 001 MOT D; 002 MOT D
003 MG; 004 MD

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Upon the following papers numbered 1 to 73 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-22; 23-38; 39-46 ; Notice of Cross Motion and supporting papers 47-61 ; Answering Affidavits and supporting papers 62-63; 64-65 ; Replying Affidavits and supporting papers 66-67; 68-71; 72-73 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendant/third-party plaintiff Architectural Window Manufacturing Corp., the motion (motion sequence no. 002) of defendant McClave Engineering P.C., the motion (motion sequence no. 003) of defendant Sachem Central School District, and the cross motion (motion sequence no. 004) of plaintiff are consolidated for the purposes of this determination; and it is further

ORDERED that the motion of defendant/third-party plaintiff Architectural Window Manufacturing Corp. for, *inter alia*, summary judgment dismissing the complaint against it is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the motion of defendant McClave Engineering P.C. for, *inter alia*, summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion of defendant Sachem Central School District for summary judgment dismissing the complaint against it is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the cross-motion of plaintiff for partial summary judgment in his favor on the issue of liability is denied.

Plaintiff James Spano commenced this action to recover damages for personal injuries he allegedly sustained on October 20, 2011, while installing windows at the Samoset Middle School, a school located within the Sachem Central School District (the "School District"). The School District hired defendant/third-party plaintiff Architectural Window Manufacturing Corp. ("Architectural Window") to replace windows throughout the school building. Architectural Window then entered into a subcontract with plaintiff's employer, third-party defendant Professional Installations, Inc., to install the windows. Defendant McClave Engineering P.C. allegedly was hired by the School District as the construction manager for the project. At the time of the accident, plaintiff and a co-worker were attempting to install exterior windows at the ground level of the building. Each window weighed approximately 200 pounds, and measured 5 feet high by 4 feet wide. Plaintiff allegedly was injured while he and his co-worker, who were standing on separate A-frame ladders, were attempting to complete the placement of a pre-fabricated window into a window frame. The co-worker allegedly lost his balance and stepped down off his ladder when it became wobbly, leaving plaintiff to handle the entire weight of the partially installed window. As a result, the window allegedly bore down on plaintiff, causing injuries to his face, shoulder and back. By way of his complaint, plaintiff alleges causes of action against defendants based on common law negligence and violations of Labor Law §§240(1), 200, and 241(6).

Defendants joined issue, denying plaintiff's allegations and asserting cross claims against each other. On July 10, 2012, Architectural Window commenced a third-party action against Professional Installations for breach of contract and indemnification. Thereafter, Professional Installations joined the third-party action, asserting various counterclaims and cross claims against Architectural Window and the School District; in response, the School District asserted cross claims against Professional Installations.

Architectural Window now moves for summary judgment dismissing the complaint and the cross claims against it on the grounds that plaintiff's injuries were not caused by an elevation differential between himself and the window he was holding at the time of the accident, that it was neither negligent nor possessed the authority to control or direct plaintiff's work, and that plaintiff failed to allege specific or applicable sections of the Industrial Code as predicates for his Labor Law §241(6) claims. Alternatively, Architectural Window seeks conditional summary judgment on its third-party claim for contractual indemnification against Professional Installations. The School District likewise moves for summary judgment dismissing the complaint against it, and for conditional summary judgment on its indemnification claims against Architectural Window and Professional Installations. By way of a separate motion, McClave Engineering moves for dismissal of the complaint against it on the basis it was wrongly named as a defendant to the action, since the School District had, in fact, hired McClave Construction Management, Inc., a wholly separate and distinct entity, to serve as its construction manager for the project.

Plaintiff opposes the motions by Architectural Window and the School District, and cross-moves for partial summary judgment in his favor on the issue of liability with respect to his claims under Labor Law §§240(1) and 241(6). Plaintiff argues, among other things, that he is entitled to summary judgment on his Labor Law §240(1) claim, as defendants allegedly supplied defective ladders and refused to provide other appropriate safety devices, such as suction cups or a cherry picker. Additionally, plaintiff contends that he alleged sufficiently specific and applicable sections of the Industrial Code in support of his Labor Law §241(6) claim. Alternatively, plaintiff avers that at the very least, triable issues warranting denial of defendants' motions exist as to whether he was made to work in the dark on an uneven work surface and, if so, whether such conduct violates Labor Law §200 and principles of common law negligence.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see O'Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Initially, the court grants the unopposed motion by McClave Engineering for summary judgment dismissing the complaint, as it established, *prima facie*, that it was wrongly named as a defendant, that McClave Construction was the construction manager for the project, and that the School District neither delegated it the duties of an owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 798 NYS2d 351 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]), nor granted it any authority to control plaintiff's safety practices (*Larkin v Sano-Rubin Constr. Co., Inc.*, 124 AD3d 1162, 3 NYS3d 167 [3d Dept 2015]; *Doxey v Freeport Union Free Sch. Dist.*, 115 AD3d 907, 982 NYS2d 539 [2d Dept 2014]). Significantly, the construction agreement providing for the window replacement lists McClave Construction Management, not McClave Engineering, as the construction manager for the project. McClave Engineering also submitted affidavits by James McClave and Brian McClave which state, *inter alia*, that James McClave was the principal of both McClave Construction and McClave Engineering, that both businesses are wholly distinct entities, and that McClave Construction played a mere general supervisory role over the project. Similarly, deposition testimony by principals of Architectural Window and Professional Installations both confirm that McClave Construction played a limited supervisory role over the project, and had no authority to determine their safety practices.

With respect to the branches of the motions by Architectural Window and the School District for summary judgment dismissing plaintiff's Labor Law §240(1) claim, the statute "was designed to prevent those types of accidents in which a scaffold, hoist, stay, ladder 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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). However, the protections of the statute do not encompass any and all perils connected in some tangential way with the effects of gravity (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97, 7 NYS3d 263 [2015]), or guard against routine work place risks found at construction sites (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 895 NYS2d 279 [2009]; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]). Rather, the hazards contemplated by the statute "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 a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407, 795 NYS2d 511 [2005]). "'Liability may, therefore, be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d at 97, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 895 NYS2d 279). Indeed, "[t]he right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49).

Moreover, in cases involving falling objects, a plaintiff must "show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268, 727 NYS2d 37 [2001]). Further, where the injured worker and the falling object are located on the same level, liability under Labor Law §240(1) is generally precluded because of the absence of a physically significant elevational differential (*see Runner v New York Stock Exch., Inc.*, *supra*; *Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31, 948 NYS2d 748 [3d Dept 2012]). In determining whether an elevation differential is physically significant or *de minimis*, the court must consider not only the elevational differential itself, but also "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*Runner v New York Stock Exch., Inc.*, *supra* at 605; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10, 935 NYS2d 551 [2011]; *Christiansen v Bonacio Constr., Inc.*, 129 AD3d 1156, 1158, 10 NYS3d 683 [3d Dept 2015]; *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 976 NYS2d 283 [3d Dept 2013]).

Here, Architectural Window and the School District established their *prima facie* entitlement to summary judgment dismissing plaintiff's Labor Law §240(1) claim by submitting evidence that plaintiff's injuries did not result from a risk which arose from a physically significant elevational differential and that, as a result, plaintiff is precluded from recovery under the statute regardless of whether the accident was caused by his co-worker's defective ladder or a purported falling object (*see Narducci v Manhasset Bay Assocs.*, *supra*; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]; *Carr v McHugh Painting*

Co., Inc., 126 AD3d 1440, 7 NYS3d 739 [4th Dept 2015]; *Zamora v 42 Carmine St. Assoc., LLC*, 131 AD3d 531, 14 NYS3d 695 [2d Dept 2015]; *Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31, 948 NYS2d 748 [3d Dept 2012]; *Garcia v Edgewater Dev. Co.*, 61 AD3d 924 , 878 NYS2d 134 [2dDept 2009]; *Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 760 NYS2d 795 [4th Dept 2003]; *Schwab v A.J. Martini, Inc.*, 288 AD2d 654, 655, 732 NYS2d 474 [3d Dept 2001]; *Tavarez v Sea-Cargoes, Inc.*, 278 AD2d 94, 718 NYS2d 28 [1st Dept 2000]). Significantly, it is undisputed that plaintiff was standing on the same level as the window he was holding at the time of the accident, and that neither he nor the window fell as result of such accident. Further, it is undisputed that the six-inch descent of the window was minor, and that the window, which was already partially resting inside the window frame, was not capable of generating a significant force when it bore down on plaintiff's arm.

Plaintiff failed to raise any triable issues in opposition. The fact that plaintiff was working at an elevation when the window bore down on him is not determinative, as the risk that his co-worker might drop his end of the window, and that plaintiff would have been left to hold the entire weight of the window, existed regardless of whether plaintiff was standing on a ladder or on a flat surface (*see Hasty v Solvay Mill Ltd. P'ship*, *supra*; *Schwab v A.J. Martini, Inc.*, *supra*). Additionally, plaintiff's assertion that his accident involved a significant elevational differential because the window weighed 200 pounds and was cumbersome, is undercut by numerous cases finding that only very heavy objects were capable of generating a great enough force over a minor descent to raise such an issue (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 895 NYS2d 279; [involving a reel of wire that weighed "some 800 pounds"]; *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 43 NYS3d 507 [2d Dept 2016]; *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335, 992 NYS2d 345 [2d Dept 2014][involving bundles of rebar weighing 8,000 to 10,000 pounds]; *see also Rodriguez v Margaret Tietz Ctr. for Nursing Care*, *supra*). Moreover, the cases cited by plaintiff in support of his contention that an injury sustained by a plaintiff while trying to prevent an object from falling is entitled to protection under Labor Law §240(1) are distinguishable, as those cases all involved accidents that occurred as a result of risks arising from a physically significant elevational differential, either between the plaintiff and the level of the required work, or between the level where the plaintiff was positioned and the higher level of a falling object. Therefore, the branches of the motions by the School District and Architectural Window for summary judgment dismissing plaintiff's Labor Law §240(1) claim against them is granted.

Architectural Window and the School District also established their *prima facie* entitlement to summary judgment dismissing plaintiff's claims under the common law and section 200 of the Labor Law. "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work or the provision of the alleged defective equipment (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816; *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 262 NYS2d 476 [1965]). By

contrast, when a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law §200 if they either created the dangerous condition or had actual or constructive notice of its existence (*see Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). Further, while landowners must maintain their premises in a reasonable safe condition (*see Peralta v Henriquez*, 100 NY2d 139, 144, 760 NYS2d 741 [2003]), "they have no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous. . . or where the allegedly dangerous condition can be recognized simply as a matter of common sense"(*Rivas-Chirino v Wildlife Conservation Socy.*, 64 AD3d 556, 557, 883 NYS2d 552 [2d Dept 2009]; *see Boland v 480 E. 21st St., LLC*, 133 AD3d 698, 19 NYS3d 188 [2d Dept 2015]).

Here, Architectural Window and the School District established their *prima facie* entitlement to summary judgment dismissing plaintiff's Labor Law §200 claims by submitting undisputed evidence that they neither possessed the authority to control plaintiff's work nor provided him with any allegedly defective equipment during the project (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Dasilva v Nussdorf*, 146 AD3d 859, 45 NYS3d 531 [2d Dept 2017]; *Zupan v Irwin Contr., Inc.*, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]; *Bennett v Hucke*, 131 AD3d 993, 16 NYS3d 261 [2d Dept 2015]). In this regard, plaintiff and his co-worker, Jeff Smith, both testified that Professional Installations exclusively supervised their work and provided all the equipment they utilized for the window installation project. Professional Installations' principal, Bruce Woznick, also testified that he was plaintiff's supervisor during the project and was solely responsible for determining the means and methods of his work. Additionally, Architectural Window and the School District both demonstrated that they neither created nor had constructive notice of any alleged dangerous condition on the premises, and that even if such a condition – the changing light conditions associated with dusk and the natural slope of the premises – could be said to have existed, it was open and obvious (*see Rivas-Chirino v Wildlife Conservation Socy.*, 64 AD3d 556, 557, 883 NYS2d 552; *Boland v 480 E. 21st St., LLC*, 133 AD3d 698, 19 NYS3d 188 [2d Dept 2015]; *Abbadessa v Ulrik Holding*, 244 AD2d 517, 518, 664 NYS2d 620 [2d Dept 1997]). Plaintiff failed to raise any triable issues in response, as he failed to contradict the defendants' prima facie showing that Professional Installations alone possessed the authority to control the means and methods of his work, or to demonstrate that the defendants either created or had notice of a dangerous condition that proximately caused his accident (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v New York*, *supra*). Accordingly, the branches of the motions by Architectural Window and the School District seeking summary judgment dismissing plaintiff's common law negligence and Labor Law §200 claims are granted.

With respect to plaintiff's remaining claim under Labor Law §241(6), that section of the statute "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law §241[6]; *see Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). To recover damages on a cause of action alleging a violation of Labor Law §241(6), a plaintiff must establish the

defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816; *Ramos v Patchogue-Medford School Dist.*, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; *Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 949 NYS2d 717 [2d Dept 2012]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). Further, whether a regulation applies to a particular condition or circumstance is a question of law for the court (*see Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 938, 914 NYS2d 203 [2d Dept 2010]).

As plaintiff failed to oppose the branches of defendants' motion seeking dismissal of his Labor Law §241(6) claims predicated on violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.30, 12 NYCRR 23-5, and 12 NYCRR 23-6, such claims are deemed abandoned, and are dismissed (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]). In any event, a cursory review of these sections of the Industrial Code reveal that they either include inactionable general safety standards or set forth inapplicable regulations relating to overhead falling hazards, slipping hazards, tripping hazards, drowning hazards, air contamination, protection against corrosive substances, and the use of safety belts, lifelines, tail lines, and life nets (*see Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Kwang Ho Kim v D&W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]; *Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 826 NYS2d 645 [2d Dept 2006]). More particularly, the regulations relating to the condition of and utilization of scaffolds enumerated under 12 NYCRR 23-5 are inapplicable under the facts of this case. So too are the regulations enumerated under 12 NYCRR 23-6 which relate to the standards for certain hoisting equipment not utilized by plaintiff at the time of the accident (*see Mutadir v 80-90 Miaden Lane Del LLC*, 110 AD3d 641, 974 NYS2d 364 [1st Dept 2013]; *Strangio v Sevenson Envtl. Servs., Inc.*, 74 AD3d 1892, 905 NYS2d 729 [4th Dept 2010]). 12 NYCRR 23-1.30, which regulates work place lighting conditions, also is inapplicable under the circumstances of this case, as vague testimony by plaintiff and his co-worker that the accident occurred at "dusk," that some artificial light was emanating from the building, and that they could see some things but not others, is insufficient to create an inference that the lighting fell below the specific statutory standard (*see Kochman v City of New York*, 110 AD3d 477, 973 NYS2d 114 [1st Dept 2013]; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 [2d Dept 1997]; *see also Yannetti v Hammerstein Ballroom*, 130 AD3d 410, 13 NYS3d 368 [1st Dept 2015][12 NYCRR 23-1.30 found inapplicable where the plaintiff failed to show how the alleged lack of lighting proximately caused her accident, and her vague testimony regarding its inadequacy was insufficient to provide a basis for an inference that the lighting in question fell below specific statutory standards]). Many of the subsections of 12 NYCRR 23-1.21, including those relating to the regulation of the use of portable ladders, extension ladders, sectional ladders, ladderways, and leaning ladders are likewise inapplicable, since none of them were in use at the time of plaintiff's accident.

While 12 NYCRR 23-1.21(b)(3)(iv), has been held sufficient to support a cause of action under Labor Law §241(6), the court notes that it is inapplicable under the circumstances of this case, as there is no evidence that its alleged violation was the proximate cause of plaintiff's

accident. Significantly, plaintiff does not contend that any defect with his own ladder was a proximate cause of the accident. Instead, he alleges that a defect with the ladder used by Jeff Smith, namely, a missing rubber foot, caused Smith to fall of his ladder and leave plaintiff holding the entire weight of the window. However, while Smith acknowledged that his ladder was missing one of its rubber feet, he testified that he lost his balance and stepped down from the second rung of the ladder when the ladder shifted due to the unevenness of the ground where it was placed. Indeed, Smith testified that neither he nor his ladder ever fell, that his left foot remained on the ladder throughout the whole incident, and that his right foot slipped off the ladder for 5 seconds before he stepped back on to the device and continued to assist plaintiff (*see Clavijo v Universal Baptist Church*, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]; *Ramos v Patchogue-Medford School Dist.*, *supra*; *Trippi v Main-Huron, LLC*, 28 AD3d 1069, 814 NYS2d 444 [4th Dept 2006]; *McCullum v Barrington Co.*, 192 AD2d 489, 597 NYS2d 295 [4th Dept 1996]). Therefore, the branches of the motions by the School District and Architectural Window for dismissal of plaintiff's Labor Law §241(6) claims against them are granted.

Having granted the School District and Architectural Window summary judgment dismissing all of plaintiff's claims against them, the cross motion by plaintiff seeking partial summary judgment on the issue of liability with respect to his Labor Law §§240(1) and 241(6) claims is denied as moot.

Turning to the branches of the motions by the School District and Architectural Window for summary judgment on their contractual indemnfication claims, the right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (*see Kurek v Port Chester Hous. Auth.*, 18 NY2d 450, 276 NYS2d 612 [1966]). As such, the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 549 NYS2d 365 [1989]). Here, the relevant indemnification provisions contained in the parties' agreements contains language conditioning indemnification upon a finding that plaintiff's injuries were "caused in whole or part by any negligent act or omission" by the contractors, subcontractors, their employees, or anyone for whose acts any one of them may be liable. Therefore, as the complaint is dismissed in its entirety, and plaintiff's injuries are not attributable to the negligence of any of the defendants, the contractual indemnification clauses have not been triggered (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178, 556 NYS2d 991 [1990]; *Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 4 NYS3d 230 [2d Dept 2015]; *Sellitti v TJX Cos., Inc.*, 127 AD3d 724, 6 NYS3d 559 [2d Dept 2015]; *Mikelatos v Theofilaktidis*, 105 AD3d 822, 962 NYS2d 693 [2d Dept 2013]; *Zastenchik v Knollwood Country Club*, 101 AD3d 861, 955 NYS2d 640 [2d Dept 2012]). Accordingly, the branches of the motions by the School District and Architectural Window for summary judgment on their contractual indemnfication claims are denied.

Furthermore, inasmuch as it has been determined that no negligence on the part of either the School District or Architectural Window caused or contributed to plaintiff's accident, the branches of their motions seeking summary judgment dismissing the claims against them for common law indemnification and contribution also are granted (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]; *Nassau Roofing & Sheet Metal Co. v*

Facilities Dev. Corp., 71 NY2d 599, 528 NYS2d 516 [1988]; *Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]).

Dated: May 15, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.