White v 31-01 Steinway, LLC
2017 NY Slip Op 32297(U)
October 27, 2017
Supreme Court, New York County
Docket Number: 156151/2013
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JEFFREY WHITE,

Index No.: 156151/2013

Plaintiff,

-against-

31-01 STEINWAY, LLC, 31ST STEINWAY PARTNERS, LLC, WHARTON REALTY MANAGEMENT CORP., EXPRESS, LLC, RUSSCO, INC., SIGNS CAD CORP., CAD SIGNS, INC. and RUGGLES SIGN COMPANY, INC.,

Defendants.

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SCHECTER, J.:

Motion sequence numbers 006, 007, 009 and 010 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a worker on April 15, 2013, after he fell from a ladder while installing an awning on the exterior of an Express clothing store located at 31-01 Steinway Street in Queens, New York (the Store).

In motion sequence number 006, defendant Express, LLC (Express) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it, as well as for summary judgment in its favor on its cross claim for contractual indemnification as against defendant Russco, Inc. (Russco).

In motion sequence number 007, defendant John F. Ruggles Jr., Inc. d/b/a Ruggles Sign Company (Ruggles), improperly pleaded as Ruggles Sign Company Inc., moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 009, Russco moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, as well as for leave to amend its answer to allege a cross claim for contractual indemnification against Ruggles.

In motion sequence number 010, defendants 31-01 Steinway, LLC and 31st Steinway Partners, LLC (together, Steinway) and Wharton Realty Management Corp. (Wharton) (together, the Steinway Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them.

Plaintiff Jeffrey White cross-moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against Express, Ruggles, Russco and the Steinway Defendants.

The Steinway Defendants cross-move for summary judgment in their favor on their cross claims for contribution and contractual indemnification as against Express. It should be noted that, in an order of this court, dated March 22, 2017, the court granted said cross motion in its entirety. Therefore, the court will not address it herein.

BACKGROUND

On the day of the accident, Steinway owned the Store where the accident occurred, and Wharton was its managing agent. Express leased the Store from the Steinway Defendants. Pursuant to a contract, Express allegedly retained Russco to serve as the general contractor on a project at the Store (the Express/Russco Contract), which entailed an interior and exterior gut renovation (the Project).

As part of the Project, Express also hired at least five vendors to fabricate and install various items for the Project. Express hired Ruggles to fabricate and install new exterior awnings and signage on the Store. In turn, Ruggles hired plaintiff's employer, nonparty Capitol Design & Construction Service (Capitol), to manufacture the awnings and to install the awnings and signage, as specified in plans furnished by Express, and according to shop drawings created by Ruggles.

Ruggles hired defendants Signs Cad Corp. and Cad Signs Corp. (together, Cad) to obtain the New York City Building Department permits necessary for the installation of the awnings and signage.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Capitol as its head installer and service mechanic. As such, he was "their lead man on all jobs" and "responsible for the job getting done" (plaintiff's tr at 18-19). Plaintiff "didn't have to answer to anybody," and he determined the means and methods of his work (*id.* at 20).

Plaintiff explained that, at the time of the accident, and at the direction of his Capitol foreman, George Kavleski, he and his coworkers were hanging exterior awnings, which entailed installing anchoring clips in the Store's facade. In order to perform this work, plaintiff had to drill holes into the Store's facade, so that lags and shields could be placed inside. Plaintiff needed both hands to operate the drill.

To reach his work area, plaintiff used one of Capitol's 10-foot-high A-frame ladders, which he brought to the construction site. Plaintiff and a coworker set up the ladder so that the open part was facing the street, rather than the wall. Plaintiff explained that he placed the ladder this way, so that he could straddle it for more leverage. In addition, it was necessary to place the opening of the ladder facing toward the street, because the sidewalk was busy with pedestrian traffic and he did not want pedestrians walking underneath the ladder. Plaintiff testified that Kavleski agreed with his placement of the ladder and did not instruct him to place the ladder any other way. At times, plaintiff's coworker held the ladder for him as he worked, because the building had a slight pitch.

Plaintiff testified that, as he was standing on about the eighth rung of the ladder and straddling it with one foot on each side, his drill came into contact with something behind the wall. Specifically, plaintiff testified,

> "I was penetrating the wall. It was going through fine. Once it got through the brick, it encountered some resistance to where my [drill] got jammed up. I reversed it and it wouldn't come [out]. It went forward then I reversed again and I gave a little tug . . . when I pulled out, my balance--"

(*id.* at 130-131).

Plaintiff further testified, "[U]pon my pulling the [drill] out, which is about 20 to 40 pounds, I went back in a backward motion . . .. I couldn't upright myself anymore because there was nothing for me to grab onto . . . so I just let the [drill] go and . . . it hit the ground and then the ladder started to peel off the wall, and I was falling towards the street" (*id.* at 354-355).

Plaintiff testified that there was nothing wrong with the ladder at the time of the accident. He also explained that he did not use a bucket truck to perform his work on the day of the accident, because the "sidewalk was extremely busy" (*id.* at 146-147). He stated that he was never instructed to use a bucket truck, or any other safety devices, while performing his work.

Deposition Testimony of Brenda Reed (Express's Purchasing Manager)

Brenda Reed testified that she was Express's purchasing manager on the day of the accident. She explained that Express hired Russco as the sole general contractor for the Project and it was responsible for overseeing construction and site safety. She stated that "[t]ypically [Express] contract[s] with one general contractor. If there are subs on the job, then they are under the [general] contractor" (Reed tr at 14). Reed did not know of any other contractor other than Russco that Express retained as part of the project (*id.*).

Reed further testified that "Ruggles was hired as one of [Express's] vendors" (*id.* at 15). Express hired Ruggles "[t]o produce and install the signs [and awnings] that are included in the overall architectural construction documents" (*id.*). Russco coordinated the awning and signage installations. Express hired various vendors to provide and install various improvements pursuant to

Express's "Master Vendor Agreement" (the Vendor Agreement) (*id.* at 57). She noted that the Vendor Agreement "didn't cover any particular job, it was an overall agreement entered into on a yearly basis" (*id.*).

Deposition Testimony of Daniel Tompkins (Express's Construction Manager)

Daniel Tompkins testified that he was employed by Express as a construction manager on the day of the accident. He explained that the Project involved the full demolition and remodeling of the Store, including both its "interior and exterior" (Tompkins tr at 28). The Project's exterior work included the installation of new awnings and signage. Tompkins stated that "[Express] hire[d] a general contractor [Russco] to run the Project" (*id.* at 29). Tompkins primarily interacted with Doug Berry, Russco's project manager. In addition to being in charge of the entire site during construction of the Store, Russco was responsible for keeping the site safe for all of the workers hired for the Project, regardless of which entity hired them.

Tompkins testified that Express had a national account with Ruggles, a sign and awning company, and that Express used Ruggles on all of its projects. Ruggles was hired pursuant to a master agreement that was renewed every construction season. Tompkins noted that, sometimes, rather than perform the work itself, Ruggles "hire[d] local installers" (*id.* at 40).

Tompkins testified that it was also Russco's responsibility to coordinate with the sign installer to ensure that the installations were timely. If Tompkins noticed any issues with any of the awnings or signage, he would inform Russco's project manager that those issues needed to be fixed.

Deposition Testimony of Douglas Berry (Russco's Project Manager)

Berry testified that he was Russco's project manager on the day of the accident. He explained that Russco was a "general contract[ing] company engaged in [r]etail construction, tenant fit out" (Berry tr at 13-14). As "general contractor" on the Project, Russco's duties were "to manage,

coordinate [and] supervise the construction of the fit out" (*id.* at 100). In addition, Russco hired and directed the work of between 10 to 12 subcontractors for the Project, which included "[d]emolition, framing, electric, plumbing, HVAC . . . general cleanup [trades]" (*id.* at 31). Russco's job on the Project also included coordinating and managing "the inside of the project and coordinat[ing] and communicat[ing] with the vendors on the outside of the building" (*id.* at 96-97). For example, if a worker was "power washing and prepping to paint [the] side of the building . . . then that was part of Russco's work" (*id.* at 97).

Berry further testified that Ruggles was hired directly by Express "[t]o fabricate and install the signs" (*id.* at 49). Berry was in charge of coordinating with Ruggles regarding the subject installation work. Berry testified that Ruggles subcontracted its work on the Project to plaintiff's employer, Capitol, "the assigned installer for Ruggles' signs" (*id.* at 51). As such, the awning and signage installations were not part of "[Russco's] scope"(*id.* at 28). Berry acknowledged that the installation of the awnings and signage was included in the "overall comprehensive construction project" (*id.*). In addition, as part of his duties, Berry provided Express with updated progress photos of the work. When asked whether the awnings and signage, which are attached to the building, were also part of the lease line of the building, Berry replied, "I assume so" and "yes" (*id.* at 116).

The Affidavit of Douglas Berry

In his affidavit, Berry stated that the responsibilities of the various parties at the Project were set forth in a "Responsibility Schedule" (the Schedule) (Berry aff). A copy of the Schedule is attached to Berry's affidavit. The Schedule indicates that the awnings and signage installation work, which is listed under "Storefront," was the responsibility of Express and Ruggles. The Schedule also notes that Russco was responsible for "Coordinating [the] Installation of Owner Provided Items" (*id.*).

Deposition Testimony of Todd Johnson (Ruggles's Project Manager)

Todd Johnson testified that he was Ruggles's project manager on the day of the accident. Ruggles was hired by Express to fabricate the signs and awnings for the Project. In turn, Ruggles hired Capitol to perform the actual installation of the signs and awnings. Johnson explained that he coordinated Capitol's work on the Project through Russco, the general contractor for the Project. It was also Johnson's understanding that "the general contractor had control over the installers to determine the work that they were doing and make changes if necessary" (Johnson tr at 45). He also testified that Russco supervised the contractors on the Project, and that it even instructed Capitol in regard to how to perform certain installations.

Deposition Testimony of Leah Schiavello (Owner of Capitol)

Leah Schiavello testified that she owned Capitol on the day of the accident. She explained that Ruggles hired Capitol to fabricate and install the signs and awnings for the Project. Schiavello testified that, after the accident, plaintiff told her that there was nothing wrong with the ladder, and that the ladder had not fallen down. Plaintiff told her that he "just fell off the ladder" when "he was reaching for something" (Schiavello tr at 64, 71).

Deposition Testimony of George Kavleski (Capitol's Foreman)

Kavleski testified that he was Capitol's foreman on the day of the accident. He explained that Capitol was retained by Ruggles as the sign installer, and that Capitol supervised the work of its own employees. He stated that Russco, the general contractor for the Project, controlled the construction site, overseeing all of the trades. Russco also had the power to stop work in the event that it observed any unsafe practices. It was also Russco's job to approve Capitol's work.

Kavleski testified that it was his decision for Capitol workers to use a ladder for the subject work, and that plaintiff set up the ladder that he was using at the time of the accident. He explained

that a ladder was a better device for the awning work than a bucket truck, because "its easier to grab a ladder when you're doing low work" (Kavleski tr at 31). He also noted that "under fifteen feet would not be worth using the bucket" (*id.*). Prior to the accident, Kavleski inspected the ladder, as well as its placement in the accident area, to make sure that it was safe.

Kavleski testified that the accident occurred when, while "he had the drill," plaintiff lost his balance. Kavleski also noted that the ladder remained standing following the accident.

The Express/Russco Contract

Pursuant to the Express/Russco Contract, Russco was responsible for "the construction of all Tenant Improvements for a retail store referenced as Express Store #969" (Express's notice of motion, exhibit S, the Express/Russco Contract, § 1). The Express/Russco Contract incorporated by reference the Owner's Standard General Conditions for Construction (the General Conditions), as well as various other project-related documents.

Pursuant to the General Conditions, Russco was to "use its best skill and attention in managing, supervising and directing the Work" (Express's notice of motion, exhibit U, the General Conditions, § 4.3). The "Work" is defined in the General Conditions as "the process by which the construction called for in the Contract Documents is accomplished," including the provision of all "labor, materials and equipment required to construct the Project" (the Express/Russco Contract, § 1.1.3). The General Conditions also stated:

> "[Russco] shall be solely responsible for all construction means, methods, techniques, sequences, procedures, and safety precautions and for the coordination of all of the Work called for in the Contract Documents. [Russco] is solely responsible to the Owner and its affiliates for the acts, omissions and defaults of his employees, Subcontractors, Sub-subcontractors, material men and any other person or entity involved in or performing any of the work called for in the Contract Documents"

(the General Conditions, § 4.3).

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]).

The Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims

At oral argument, plaintiff conceded that defendants are entitled to dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them. Thus, those causes of action are dismissed.

The Labor Law § 240 Claim

In separate motions, the Steinway Defendants, Express, Ruggles and Russco each move for dismissal of the Labor Law § 240 (1) claims. Plaintiff cross-moves for summary judgment in his favor as to liability on the 240(1) cause of action.

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]).

Whether The Steinway Defendants, Express, Ruggles and Russco Are Proper Labor Law Defendants

Initially, as the owners of the Store where the accident occurred, the Steinway Defendants may be liable for plaintiff's injuries under Labor Law § 240 (1).[1] However, it must be determined as to whether their tenant Express and Ruggles, the Project's awning and signage vendor, may also be

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[1] The Steinway Defendants do not argue that Wharton was not a proper Labor Law defendant because it was not an owner.

liable under the statute as either an owner or as an agent of the owners and/or general contractor. In addition, the court must determine whether Russco was the general contractor on the Project, and, as such, whether it may be liable for plaintiff's injuries under Labor Law § 240 (1), or whether it was merely one of approximately five prime contractors with no supervisory control over the work at issue in this case.

The " 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 its 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]). "[O]wnership of the premises where the accident occurred - standing alone - is not enough to impose liability under [the] Labor Law . . . where the property owner did not contract for the work resulting in the plaintiff's injuries . . . . Rather, . . . [there must be] some nexus between the owner and the worker" (*Morton v State of New York*, 15 NY3d 50, 56 [2010] [internal quotation marks and citations omitted]; *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 52 [2004]).

Here, it is undisputed that Express not only had a lease interest in the Store, it fulfilled the role of an owner by contracting to have the subject renovation work performed for its benefit. Accordingly, Express is a proper Labor Law defendant and may be held liable for plaintiff's injuries under Labor Law § 240 (1).

As to Ruggles, it is important to note that

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, Ruggles may not be held liable under Labor Law § 240 (1) as an agent of the owners, because it did not supervise and/or control the injury-producing work--plaintiff's installation of the awning. To that effect, Ruggles completely subcontracted the installation of the awnings and signage to plaintiff's employer, Capitol. Not only did Ruggles have no involvement with any of the subject installations, it had no presence at the Store, whatsoever. Plaintiff, moreover, testified that he only took direction from his Capitol foreman, and that he was solely in charge of the means and methods of his own work.

Thus, as Ruggles is not a proper Labor Law defendant, plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim against Ruggles and that cause of action is dismissed.

Russco argues that the § 240 (1) claim against it should be dismissed because it was not a general contractor, but merely one of several prime contractors hired by Express to perform work on the Project, each in charge of different aspects of it. Russco further asserts that its responsibilities were limited to the interior build-out of the Store, it was not plaintiff's employer, and it was not in privity with Ruggles, the prime contractor in charge of exterior signs and awnings. Therefore, Russco argues, it is entitled to dismissal of the Labor Law § 240 (1) claim against it (*see Villanueva v 80-81 & First Assoc.*, 141 AD3d 433, 434 [1st Dept 2016] [defendant "was, at most, a prime contractor, and therefore not liable under Labor Law § 240 (1) . . . for injuries caused to the employees of other contractors with which it was not in privity of contract, since it had not been delegated the authority to supervise and control plaintiff's work"]).

A review of the documentary and testimonial evidence in this case, however, reveals that Russco clearly was, in fact, the general contractor for the Project, and, therefore, may be liable for plaintiff's injuries under Labor Law § 240 (1). The Express/Russco Contract provided that Russco was responsible for "the construction of all Tenant Improvements for [the Project]" (Express's notice of motion, exhibit S, the Express/Russco Contract, § 1). The General Conditions also provided that Russco was solely responsible for "all construction means, methods . . . and safety precautions and for the coordination of all of the Work called for in the Contract Documents" (the General Conditions, § 4.3). Notably, the subject tenant improvements included improvements made to both the interior and exterior of the Store.

In addition, Reed testified that Express hired only one general contractor--Russco. Ruggles and the other entities hired by Express were merely vendors, as evidenced by the fact that, unlike Russco, they were hired via the Vendor Agreement.

Moreover, not only did Russco's duties reflect that it was a general contractor, but Reed, Tompkins, Johnson, Schiavello and even Berry, Russco's own project manager, specifically testified that Russco served as the general contractor on the Project. Accordingly, as Russco was the general contractor on the Project, it is a proper Labor Law defendant and may be held liable for plaintiff's injuries under the statute.

Whether Labor Law § 240 (1) Applies to the Facts Of This Case

Plaintiff's "unrebutted contention" is that he was injured when, while straddling an A-frame ladder and drilling into a wall, his drill got caught. His attempt to pull the drill loose caused him to lose his balance and fall to the ground. In opposition, defendants have "not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiff['s] showing or to raise a bona fide issue as to how

the accident occurred" (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Desouter v HRH Constr. Corp.*, 216 AD2d 249, 250 [1st Dept 1995]).

Importantly, "'[w]here 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 an unsteady ladder, the plaintiff did not need to show that 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"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], *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, 504 [1st Dept 2013]).

Initially, contrary to defendants' contention, it is not necessary for plaintiff to show that the ladder was defective in order to recover under Labor Law § 240 (1), 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]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim properly granted "since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [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]).

Further, contrary to defendants' argument, this is "not a case where plaintiff simply lost his balance and fell from a secured ladder" (*Lipari v AT Spring, LLC*, 92 AD3d 502, 504 [1st Dept 2012]). Rather, plaintiff was caused to lose his balance and fall, because the ladder was not the proper safety device for the job at hand. To that effect, it was foreseeable that plaintiff, an awning installer, might get his drill get stuck, forcing him to have to pull it backwards in order to free it. As such, an additional or different safety device, such as a baker scaffold with rails, was required to prevent him from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [summary judgment on liability granted as it "was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[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*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim because of plaintiff's own improper placement of the ladder as he set the ladder up with its opening perpendicular (rather than parallel) to the wall that he was drilling, making him the sole proximate cause of the accident. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[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]).

Plaintiff, however, testified that placing the ladder as he did was necessary, in order for him to be able to straddle it, so as to gain more leverage for his work. The ladder placement also accommodated the heavy pedestrian traffic in the accident area. As such, plaintiff had valid reasons for setting up the ladder as he did, and his decision to do so was not unforeseeable under the circumstances.

Further, defendants have not sufficiently shown that plaintiff was a recalcitrant worker by demonstrating that he was specifically instructed to use a particular safety device, such as the bucket crane, 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 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st

Dept 2002]). To that effect,"[t]here is no evidence in the record that [plaintiff] knew . . . that he was expected to use [the bucket crane]" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Moreover, plaintiff was under no duty to fetch an alternate safety device, because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). "[W]orkers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

In any event, any alleged negligence on plaintiff's part in not properly placing the ladder or in using the ladder as opposed to a different safety device, 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]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [even "if there were admissible evidence (that the 'plaintiff failed to attach his safety harness to the lifeline in the proper manner'), the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] ["even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[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. City*, 1 NY3d 280, 290 [2003]). 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" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim.

Express's Cross Claim For Contractual Indemnification Against Russco (motion sequence number 006)

Express moves for summary judgment in its favor on its cross claim for contractual indemnification against Russco.

Section 4.16 of the General Conditions, which was incorporated by reference into the Express/Russco Contract, contains an indemnification provision (the Indemnification Provision), which provides, in pertinent part, as follows:

> "Indemnification. To the fullest extent permitted by law, [Russco] shall indemnify, defend and hold harmless the Owner, its affiliated corporation, the engineers and architects, their respective officers, employees and agents from and against any and all claims, suits or demands including costs, litigation expenses, counsel fees and liabilities incurred in connection therewith, arising out of injury to . . . any person whatsoever . . . to the extent caused by the acts errors or omissions of [Russco], or any other firm, entity or other person for whose acts or omissions [Russco] is responsible, or any of them, while engaged in the performance of the Work"

(Express's notice of motion, exhibit S, General Conditions, § 4.16).

"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]).

A party seeking contractual indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*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, the Indemnification Provision provides that Russco indemnify Express for all actions "arising out of injury to . . . any person . . . to the extent caused by the acts or omissions of [Russco]. . . while engaged in the performance of the Work." As discussed, plaintiff's injuries arose from Russco's work, which included coordinating and overseeing the entirety of the work underway at the Project, including the awning and signage installation work.

Thus, pursuant to the Indemnification Provision, Express is entitled to summary judgment in its favor on its cross claim for contractual indemnification against Russco.

Russco's Request For Leave To Amend Its Answers To Allege A Cross Claim Against Ruggles for Contractual Indemnification (motion sequence number 009)

Russco requests leave to amend its answer to allege a cross claim for contractual indemnification against Ruggles.

> "Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting

> amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant[] ha[s] been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). In seeking amendment, a "plaintiff need not establish the merit[s] of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

Paragraph 11 of the Vendor Agreement contains an indemnification provision, which provides, in pertinent part, as follows:

> "*Indemnity*. [Ruggles] agrees to indemnify and hold Express and its affiliates, and their respective officers, directors, employees, agents, customers, and those for whom Express may act as agent, harmless from any and all claims, actions, liability, loss, damage or expense (including, without limitation, reasonable attorneys' fees) with respect to any suit, claim, demand or other proceeding arising out of or relating to . . . violations or alleged violations of law by [Ruggles] . . . or . . . [Ruggles'] negligence"

(Russco's notice of motion, exhibit J, the Vendor Agreement, ¶ 11).

It is undisputed that there was no contractual agreement between Russco and Ruggles (*see Stutterheim v First Shot Prods.*, 137 AD3d 690, 691 [1st Dept 2016] [contractual indemnification claim dismissed where no contract existed between the parties]). A 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" (*Hooper Assoc., Ltd. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Tonking v Port Auth. of N.Y. and N.J.*, 2 AD3d 213, 214 [1st Dept 2003], *affd* 3 NY3d 486 [2004]). The Vendor Agreement's language does not clearly evidence an intent for Ruggles to indemnify Russco.

Russco argues that the term "agent," which appears in the Vendor Agreement, evidences an intention that Ruggles assume an obligation to indemnify Russco, as Russco allegedly served as an

agent of Express. Russco, however, is not identified anywhere in the Vendor Agreement and there is insufficient evidence that the term "agent" was intended to include Russco. If Express and Ruggles had intended for Ruggles to assume an obligation to indemnify Russco, they would have manifested such intent in "unmistakable terms" (*Tonking*, 2 AD3d at 214).

Thus, Russco is not entitled to leave to amend its answer to assert a cross claim for contractual indemnification as against Ruggles.

The Cross Claims

In their separate motions, the Steinway Defendants, Ruggles and Russco move for summary judgment dismissing all cross claims against them. However, as these defendants do not identify these alleged cross claims or make any arguments in support of dismissing them, they are not entitled to dismissal of said cross claims against each other.

Accordingly, it is

ORDERED that the parts of defendant Express, LLC's (Express) motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it, are granted, and these claims are dismissed as against Express; and it is further

ORDERED that the part of Express's motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in its favor on its cross claim for contractual indemnification against defendant Russco, Inc. (Russco) is granted; and it is further

ORDERED that the parts of defendant John F. Ruggles Jr., Inc. d/b/a Ruggles Sign Company's (Ruggles) motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted, and the complaint is dismissed as against Ruggles, with

costs and disbursements to Ruggles as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Ruggles, and the motion is otherwise denied; and it is further

ORDERED that the parts of Russco's motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it is granted, and these claims are dismissed as against Russco, and the motion is otherwise denied; and it is further

ORDERED that the parts of defendants 31-01 Steinway, LLC, 31st Steinway Partners LLC and Wharton Realty Management Corp.'s (collectively, the Steinway Defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them is granted, and these claims are dismissed as against the Steinway Defendants, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiff Jeffrey White's cross motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against the Steinway Defendants, Express and Russco is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

This is the decision and order of the court.

Dated: October 27, 2017

ENTER:

Jennifer G. Schecter, J.S.C.