

Topuria v ANE, LLC

2017 NY Slip Op 32342(U)

November 1, 2017

Supreme Court, Kings County

Docket Number: 501745/14

Judge: Bernard J. Graham

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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of November, 2017.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

-----X
JONDÓ TOPURIA,

PLAINTIFF,

- AGAINST -

Index No. 501745/14

ANE, LLC; NORTHBAY PLAZA, LLC, LONG
LASTING CONSTRUCTION CORP., DAL H. CHUN
ENGINEER, P.C., KOH ARCHITECTURE, PLLC,
DOUGLASS G. PETERSON AND ASSOCIATES, INC.
AND IGOR GUREVICH, P.E., AND MVP MECHANICAL
SYSTEMS, INC.,

DEFENDANTS.

-----X
LONG LASTING CONSTRUCTION CORP.,

THIRD-PARTY PLAINTIFF,

- AGAINST -

LAWRENCE GLASS, INC.

THIRD-PARTY DEFENDANT.

-----X
NORTHBAY PLAZA, LLC.

SECOND THIRD-PARTY PLAINTIFF,

- AGAINST -

LAWRENCE GLASS, INC.

SECOND THIRD-PARTY DEFENDANT.

-----X

LONG LASTING CONSTRUCTION CORP.,

THIRD THIRD-PARTY PLAINTIFF,

- AGAINST -

MVP MECHANICAL SYSTEMS, INC.

THIRD THIRD-PARTY DEFENDANT.

-----X
ANE, LLC AND NORTHBAY PLAZA, LLC,

FOURTH THIRD-PARTY PLAINTIFFS,

-AGAINST -

MVP MECHANICAL SYSTEMS, INC.,

FOURTH THIRD-PARTY DEFENDANT,

-----X
ANE, LLC AND NORTHBAY PLAZA, LLC,

FIFTH THIRD-PARTY PLAINTIFFS,

-AGAINST -

VISION CUSTOM BUILDING, LLC,

FIFTH THIRD-PARTY DEFENDANT.

-----X
LONG LASTING CONSTRUCTION CORP.,

SIXTH THIRD-PARTY PLAINTIFF,

-AGAINST -

VISION CUSTOM BUILDING, LLC,

SIXTH THIRD-PARTY DEFENDANT.

-----X

The following papers numbered 1 to 23 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-3, 4-5, 6-7, 8-9, 10-11</u>
Opposing Affidavits (Affirmations)_____	<u>12-17</u>
Reply Affidavits (Affirmations)_____	<u>18-23</u>

Upon the foregoing papers, plaintiff Jondo Topuria (plaintiff) moves, in motion sequence 3, pursuant to CPLR 3212, for summary judgment on the issue of liability on his causes of action under Labor Law §§ 240 (1) and 241 (6).

Defendant, fourth third-party plaintiff/fifth third-party plaintiff ANE, LLC (ANE), and defendant/second third-party plaintiff/fourth third-party plaintiff/fifth third-party plaintiff Northbay Plaza, LLC (Northbay) move, in motion sequence 6, pursuant to CPLR 3212, (a) for summary judgment dismissing plaintiff's common-law negligence claim and his Labor Law §§ 240 (1), 241 (6) and 200 causes of action; (b) for summary judgment on its cross claims against defendant/third-party plaintiff/third third-party plaintiff/sixth third-party plaintiff Long Lasting Construction Corp. (LL); (c) for summary judgment dismissing the cross claims of LL; and (d) for summary judgment dismissing the cross claims of defendant/third third-party defendant/fourth third-party defendant MVP Mechanical Systems, Inc. (MVP).

LL moves, in motion sequence 4, pursuant to CPLR 3212, (a) for summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) causes of action and the cross

claims of ANE and Northbay for common-law and/or contractual indemnification, and (b) for summary judgment on its claims for (1) contractual indemnification and breach of contract against third-party defendant/second third-party defendant Lawrence Glass, Inc. (Lawrence Glass), and (2) common-law indemnification against fifth and sixth third-party defendant Vision Custom Buildings, LLC (Vision).

MVP moves, in motion sequence 7, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint insofar as asserted against it, and the third and fourth third-party complaints against it.

Vision moves, in motion sequence 5, pursuant to CPLR 3212, for summary judgment dismissing the fifth and sixth third-party complaints asserted against it.

Facts And Procedural History

The instant action arises out of personal injuries plaintiff sustained on January 7, 2014 when he fell through a mechanical shaft on the third floor of a three-story building under construction, located at 215-15 Northern Boulevard in Queens, New York (the premises). The building was owned by ANE and Northbay. Northbay hired LL as the general contractor, Vision as its construction consultant or manager, and All About Safety as its safety consultant. Northbay, Vision, or LL hired MVP, a mechanical subcontractor. LL hired Lawrence Glass, a glass subcontractor. At the time of the accident, plaintiff was employed by Lawrence Glass.

At his deposition, plaintiff testified that he had been working at the premises for a month and a half prior to the accident for Lawrence Glass, a glass company, as a mechanic's assistant, helping to install and remove windows, and to move glass from one place to another. Prior to each work day, plaintiff and his co-workers would arrive at the Lawrence Glass office, were given their assignments for the day, and were driven by Lawrence Glass in the company's vehicle to their work locations.

On the morning of the accident, plaintiff and his two co-workers were told by their supervisor "Valeri" to cover the exterior of the elevator shaft on the roof of the building with panels. Plaintiff and his co-workers drove to a store, purchased the panels, and brought the panels and other tools to the premises, including a "chop saw." Plaintiff did not receive instructions for the work from anyone other than Valeri and his co-workers, only used tools provided by Lawrence Glass, and was not familiar with any companies named "Northbay Plaza," "MVP" or "Long Lasting Construction."

One of plaintiff's co-workers connected the chop saw to an extension cord and plugged the other end of the extension cord into an outlet located on the third floor. The cord ran from an opening on the stairwell on the third floor up to the roof.¹ There were no outlets or places to plug in tools on the roof, and the outlet into which the extension cord was plugged on the third floor was the outlet closet to the stairs.

¹The stairs extended from the ground floor to the roof.

Plaintiff and his co-workers worked on the roof from approximately 9:00 a.m. until 3:00 p.m., and then packed their tools to go home. Plaintiff's co-workers left the roof first. Plaintiff then wrapped the extension cord around his arm and went down the stairs to the third floor to unplug it. He could not see where the extension cord was plugged in because he was "walking along the cord," or "following it," or "looking at the extension cord and . . . following that." He testified as follows:

“Q: As you were following the extension cord to the outlet, were you looking at the cord or were you looking someplace else?”

A: When I got out of the stairs as I followed the extension cord, basically, I just stepped on that opening and fell through.

Q: But, what I'm asking is where were you looking? Were you looking at the cord, were you looking straight ahead, were you looking up, something else?

A: I was just following the extension cord.

Q: Were you looking at the cord?

A: Yes.”²

After taking two or three steps, and before he reached the outlet, plaintiff fell through “some kind of opening” which he did “not notice.” The opening was “covered” by “some kind of metal,” which was thin. Specifically, plaintiff elaborated that “when [he] . . . stepped

²Plaintiff also testified that he could not see the outlet from where he was on the third floor because he “was looking at the extension cord and [he] was following that,” and did not look “on [his] sides.” When asked if he was looking exclusively at the extension cord and no where else as he was walking on the third floor, plaintiff testified: “Yes, only I followed the extension cord.” When asked if he looked down at his feet as he was coming down the stairs, he replied: “I was following the extension cord.”

onto the third floor . . . there was this kind of a wooden piece” and he “walked around it [,] [stepped onto the metal that was covering the opening] and . . . fell into that opening” or shaft, down to the first floor. The opening was near the wall, “almost in front of the elevator shaft.” Other than seeing the piece of wood or “wooden post” that he walked around before the accident, or other than seeing the wooden piece and the piece of metal that was covering the opening, plaintiff did not see any other wood around the area of the opening, any plywood over the opening, any orange netting around the outside of the opening or anywhere in the area where the opening was, any signs indicating that there was a shaft in the area,³ or any sign on the wooden barricade or the metal plate warning that there was a shaft there. When asked: “[d]id you make any attempt to locate the outlet without walking around the wooden barricade,” plaintiff replied “No.”⁴

Plaintiff was shown an Incident Report dated January 7, 2014 containing photographs and testified that the first photograph looked like the wooden piece to which he had referred. This photograph depicts a barricade-like object comprised of a piece of wooden plank placed on the ground with two vertical pieces of wood approximately four to five feet high, each connected by two diagonal pieces of wood crossing each other, and covered by orange mesh. When asked if the “wooden barricade” in the photograph looked familiar to him, plaintiff replied: “Yes, yes, I remember it. It was there.” When asked whether he saw “this type of

³The outlet into which the cord was plugged was to his right when coming down the stairs.

⁴Counsel had previously asked the same question using the word “wooden piece” in place of the word “wooden barricade,” but rephrased the question as indicated above.

barricade while [he was] trying to unplug the extension cord?" he replied: "So, I went downstairs and I was following the extension cord. As soon as I got to the third floor, yes, I somehow noticed, but at the same time I fell." With respect to this same photograph, he also testified that he remembered the wood with the orange on it but did not remember anything else; that he did not know what the wood with the orange on it was, but also said that it was "something like wood" and that "[t]here was "something there;" that there was only metal on the floor at the time of his accident, not wood as depicted in the photograph; and that he did not notice the "wood with the piece of orange around it on top of that metal covering (i.e. the barricade depicted in the photograph) before his accident. According to plaintiff, "[i]t was somewhere there. So, before I fell, I - - it was not on the top of this metallic something, but it was somewhere there." When asked: "And, when you noticed this barricade, the wood with the orange around it, what did you think it was there for," he replied: "I even did not pay attention to it." When asked if, before his accident, after he had come down the stairs from the roof to the third floor, whether he saw the pieces of board with the orange netting around it right before he fell, he replied: "Yes, I noticed that there was something wooden there, a wood piece there." When asked if the wood piece that he noticed had orange netting around it, he replied: "Yes, yes, it was something around it." He also testified that the wood piece with the orange netting around it was in front of the metal piece, next to the stairs; and when asked: "After you took the last step and ended up on the third floor, did you have to pass the wood piece with orange netting before you got to the metal piece you stepped on?" plaintiff replied: "Yes, it was there and I passed it." Plaintiff also

testified that right before he fell he observed the extension cord over the metal piece that he stepped on, and that he knew that he was going to put his foot on the metal piece.

Specifically, the following colloquy occurred:

“Q: The extension cord that you were following as you were walking down the stairs and then once you landed on the third floor, did you observe that extension cord travel over the metal piece that you stepped on right before you fell?”

A: Yes, yes, I saw it. I saw it, I followed it and I saw it.

Q: Did you see the cord go over that metal piece that you stepped on?

A: Yes, yes, it was over. Yes, as soon as I got there, I observed. And, I saw that extension cord was on the metal piece and I knew that I was going to put my foot on this metal piece.”

Plaintiff testified that the photograph on the top of the third page of the Incident Report, which depicted the same barricade-like object from a different angle, looked like the wooden piece he walked around but said that “there was only one of that piece and I can see there are two pieces on this photo here.”

Lawrence Glass provided plaintiff and his co-workers with safety harnesses and lanyards which they would use if the work required them. Plaintiff and his co-workers did not take the harnesses on the day of the accident because Valeri did not tell them to do so.

By summons and complaint dated February 26, 2014, plaintiff commenced the instant action against ANE/Northbay, LL, Dal H. Chun Engineer, P.C., KOH Architecture, PLLC, Mottola Rini Engineers, P.C., Douglas G. Peterson and Associates, Inc., and Igor Gurevich, P. E., alleging common-law negligence and violations of Labor Law §§ 240 (1), 241 (6) and

200. Northbay interposed its answer asserting cross claims against LL for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance; LL interposed its answer asserting cross claims against ANE and Northbay for contribution and common-law and contractual indemnification; and ANE interposed its answer asserting cross claims against LL and MVP for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

Subsequently, LL commenced a third-party action against Lawrence Glass for contribution and common-law and contractual indemnification, and Northbay commenced a second third-party action against Lawrence Glass for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance. Lawrence Glass interposed its answer generally denying the allegations of the third-party and the second third-party actions, and asserting the affirmative defense of the Workers' Compensation Law § 11.

Thereafter, LL commenced a third third-party action against MVP for contribution and common-law and contractual indemnification. MVP interposed its answer generally denying the allegations and, as relevant here, asserting cross claims against ANE, Northbay, and Lawrence Glass for contribution and contractual indemnification, and asserting a counterclaim against LL for contribution and common-law indemnification. Subsequently, ANE and Northbay commenced a fourth third-party action against MVP for contribution and common-law and contractual indemnification. MVP interposed its answer generally denying the allegations of the complaint and, as relevant here, asserting cross claims against ANE,

Northbay, LL, and Lawrence Glass for contribution and common law and contractual indemnification and a counterclaim against ANE and Northbay for contribution and common-law indemnification.

ANE and Northbay then commenced a fifth third-party action against Vision for contribution and common-law and contractual indemnification. Vision interposed its answer generally denying the allegations of the complaint.

Subsequently, plaintiff amended the complaint to add MVP as a direct defendant. MVP then interposed its answer asserting cross claims, as relevant here, against ANE, Northbay, LL, Lawrence Glass, and Vision for contribution and contractual indemnification.

Thereafter, LL commenced a sixth third-party action against Vision for contribution and common-law indemnification. Vision interposed its answer generally denying the allegations of the complaint.⁵ After the completion of discovery, plaintiff filed a note of issue and certificate of readiness on August 22, 2016. The time to file motions in this matter was then extended to December 30, 2016. Subsequently, plaintiff moved for summary judgment and re-filed his note of issue on or about November 18, 2016. Northbay, LL, MVP, and Vision subsequently filed their own motions for summary judgment, all of which are presently before the court for disposition.

⁵The complaint was dismissed as against Douglas G. Peterson & Associates, Mottola Rini Engineers, P.C., and Koh Architecture, PLLC.

Discussion

“Labor Law § 240 (1) provides, in relevant part, that ‘[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, . . . 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’” (*Silva v FC Beekman Assoc., LLC*, 92 AD3d 754, 755 [2d Dept 2012], quoting Labor Law § 240 [1]).

Labor Law § 240 (1) was enacted to “prevent those types of accidents in which the 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 [1993]).

“The Labor Law imposes upon ‘[a]ll contractors and owners and their agents’ nondelegable duties to provide workers with proper safety devices and adequate protection” (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2d Dept 2007], quoting Labor Law § 240 [1] and § 241 and citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500, 502 [1993]). Accordingly, “the duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross*, 81 NY2d at 500). “To recover on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident” (*Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653

[2d Dept 2014]). As relevant here, a fall from an unsecured floor or opening gives rise to liability under Labor Law § 240 (1) (*see e.g. Grigoropoulos v Moshopoulos*, 44 AD3d 1003, 1004 [2d Dept 2007]).

In support of his motion for summary judgment, plaintiff argues that Northbay and LL, as owner and general contractor, respectively, are strictly liable under Labor Law § 240 (1) because they failed to provide him with an adequate safety device to protect him from the elevated risk of falling two floors through the subject shaft, and that this violation was the proximate cause of his injuries (*Grigoropoulos*, 44 AD3d at 1004). To further support his claim that he was not provided with an adequate safety device, plaintiff relies upon the affidavit of his expert, an engineer/construction-site safety supervisor who opines, based upon the deposition testimony of the witnesses, that defendants violated Labor Law § 240 (1) because the subject shaft was not barricaded nor was there a substantial cover secured to the concrete floor or a safety railing around the perimeter of the opening to prevent him from falling into the opening and being injured.

Plaintiff also asserts that he was required to work near the subject shaft because his job involved using a chop saw, which had been plugged into an outlet on the third floor, and he was required to unplug the extension cord which ran down the stairs, across the third floor and onto the inadequate metal decking covering the subject shaft.

Plaintiff also argues that he was not a recalcitrant worker, there having been no instructions he disobeyed to avoid walking in and around the area of the subject shaft, no evidence of any barricades which blocked his access to the area, and no evidence that he

observed any signs instructing him to avoid walking in the area. In addition, plaintiff contends that his actions were not the sole proximate cause of his accident because he did not misuse, remove or fail to use an available safety device, as the only safety device provided him was the unsecured metal decking which failed to prevent his fall, and there was no evidence that he had the time (one hour) or the necessary tools to uncover the shaft opening had it been covered with plywood. In particular, plaintiff argues that since the allegedly defectively-covered shaft, which was a statutory violation, was “a proximate cause of [his] injury,” he “cannot be solely to blame for it,” and thus cannot be the *sole* proximate cause of his injury (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290-291 [2003]).

In support of that branch of its motion to dismiss plaintiff's Labor Law § 240 (1) cause of action, LL asserts that plaintiff's actions in admittedly walking around the barricade which prevented access to the subject shaft - which he had seen prior to his accident - and looking only at the extension cord when walking onto the metal decking, was the sole proximate cause of his injuries. Northbay argues that although plaintiff will argue that the failure to secure the cover over the shaft was the proximate cause of the accident, like the plaintiff in *Montgomery v Fed. Express Corp.* (4 NY3d 805, 806 [2005]), who used an inverted bucket to gain access to his work despite the fact that ladders were available, plaintiff's “normal and logical response” should have been to walk around the barricaded area instead of willfully ignoring it” (Motion of Northbay for Summary Judgment at ¶ 83, quoting *Montgomery*, 4 NY3d at 806).

In the alternative, LL argues that plaintiff cannot establish that adequate safety devices were not in place to prevent the accident, because Meir Babaev, owner of Northbay, testified that prior to the accident, he observed large pieces of plywood, as well as orange mesh around the subject area, which acted to block people, as well as metal decking and plywood secured to the floor, which covered the subject shaft.

In opposition to this branch of LL's motion for summary judgment, with respect to whether plaintiff caused his own accident by walking around a wooden barricade, plaintiff contends that the evidence demonstrates that he "stepped onto a piece of metal decking *that he believed was lying on top of the concrete third floor deck*"; but that the metal decking was "in fact partially covering a cut out in the floor for a vertical mechanical shaft . . .".⁶ (emphasis added). Plaintiff further asserts that although he observed a piece of wood near the metal decking, it was not on top of the decking, that the piece of wood did not "*prevent [him] from accessing the area as he traversed across the concrete floor,*" that the undisputed testimony demonstrates that "nothing stood in [his] path as he walked across the concrete floor towards the electrical outlet," and that had an actual barricade been in place, it would have been impossible for him to have walked past it (emphasis added). In addition, plaintiff contends that the only safety device present near the shaft was a large piece of unsecured "metal sheeting" on top of the shaft opening and a piece of "vertical timber *near and not on*

⁶Plaintiff reiterates later in his opposition that he "stepped on [the metal sheet on the floor] thinking it was metal sheet on top of the concrete floor" (Plaintiff's Affirmation in Opposition to Defendant's Motion at ¶¶ 8, 12).

top of that piece of metal sheeting,” and that there is no evidence that “proper securement and/or barricades,” signs, or safety railings were in place when he fell.

In opposition to plaintiff’s motion for summary judgment, Northbay and LL argue that plaintiff’s “assigned/required” work of installing panels to the exterior of the elevator shaft did not expose him to an elevation-related risk because it did not involve the third floor where he “purposefully ventured” and was “not supposed to be,” as evidenced by the presence of the barricade. Defendants also argue that at the every least, a material issue of fact exists with respect to whether plaintiff’s work extended to the removal of the extension cord.

In addition, Northbay contends that a material question of fact exists as to whether defendants violated Labor Law § 240 (1) because the statute does not specifically enumerate plywood covering, which plaintiff claims was deficient, as an applicable safety device.

In reply, plaintiff asserts that to the extent defendants contend that he was prohibited from walking on the third floor to retrieve the extension cord, and that he was therefore not exposed to an elevation-related risk, there is no evidence of same, nor was he instructed not to do so. In this regard, plaintiff contends that the record reveals that he was required to retrieve the extension cord because there were no outlets. Plaintiff also argues that because Labor Law § 240 (1) was intended to protect workers from the risks associated with performing work at elevated heights, defendants’ contention that plywood covering is not an enumerated safety device is misplaced. Plaintiff also contends that his actions in walking near the shaft was not a proximate cause of his injuries because the “vertical piece of timber”

or “piece of vertical plywood” near the unsecured metal decking was not a sufficient or available safety device under the statute.

Neither plaintiff nor defendants have made a prima facie showing entitling them to summary judgment under Labor Law § 240 (1). As an initial matter, Northbay contends that plaintiff’s motion must be denied because it is based upon his unsigned and therefore inadmissible deposition transcript. However, plaintiff’s transcript, “which was submitted in support of the plaintiff’s motion for summary judgment, [is] admissible under CPLR 3116 (a), since the transcript was submitted by the party deponent himself, and therefore, was adopted as accurate by the deponent” (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]).

As a second threshold issue, plaintiff’s assigned work exposed him to an elevation-related risk.

“[A] plaintiff in a section 240 (1) action who was injured because he or she fell must establish that (1) the task required the plaintiff to work at an elevation, (2) the plaintiff was exposed to the effects of gravity at that elevation and fell as a direct result of the force of gravity, and (3) the protective devices envisioned by the statute, e.g., ladders, scaffolds and similar devices, were designed to prevent the hazard that caused the fall” (*Jones v 414 Equities LLC*, 57 AD3d 65, 73 [1st Dept 2008]).

Here, plaintiff was exposed to the effects of gravity since the shaft cover collapsed while he was walking across it, causing him to fall, and the fall was the direct result of the effects of gravity. In addition, the protective devices envisioned by the statute were designed to prevent a worker from falling through a collapsing floor (*id.*). Lastly, defendants do not

dispute that in order to perform his work, the extension cord for plaintiff's chop saw needed to be plugged into an outlet, and that there were no outlets on the roof where he was assigned to work. Defendants also fail to dispute that plaintiff was required to unplug the extension cord from the outlet on the third floor in order to retrieve his tool once he completed his work. Further, plaintiff testified that the outlet into which the extension cord was plugged on the third floor was the closet to the stairs, namely to his right when coming down the stairs, presumably not near the shaft.

However, plaintiff's own testimony raises a material question of fact as to whether his actions were the sole proximate cause of his injuries (*Smigielski v Teachers Ins. & Annuity Ass'n of Am.*, 137 AD3d 676, 676 [1st Dept 2016]). On the one hand, plaintiff testified that after taking a few steps onto the third floor, while "following" or looking at the extension cord, and before he reached the outlet, he walked around a "wooden piece" and stepped onto "some kind of metal" which was "thin" covering the opening of the shaft, into which he fell. He also testified that other than observing the wooden piece he walked around (or the wooden piece and the piece of metal covering the shaft opening), he did not see any other wood around the area, any plywood over the shaft opening, any orange netting around the outside of the shaft opening, or any sign on the wooden piece or "metal plate" warning that there was a shaft in that area. Further, when shown the photograph of the wooden barricade covered with orange mesh on page two of Mr. Johansen's Incident Report, plaintiff testified that there was only metal on the floor at the time of his accident, not wood as depicted in the photograph, and that he did not notice the "wood with the piece of orange around it on top

of that metal covering” (i.e. the barricade depicted in the photograph) before his accident. According to plaintiff, “[i]t was somewhere there. So, before I fell, I - - it was not on the top of this metallic something, but it was somewhere there.”

On the other hand, plaintiff testified that the photograph of the wooden barricade covered with orange mesh on page two of Mr. Johansen’s Incident Report looked like the wooden piece which he had observed before falling; that when asked whether “he saw this type of barricade while [he was] trying to unplug the extension cord,” he replied: “So I went downstairs and I was following the extension cord. As soon as I got to the third floor, *yes, I somehow noticed, but at the same time I fell* (emphasis added); that with respect to this same photograph, he also testified that he remembered the wood with the orange on it but did not remember anything else; that he did not know what “the wood with the orange on it” looked like, but also testified that it was “something like wood,” and that there was “something there;” that when asked: “And, when you noticed this barricade, the wood with the orange around it, what did you think it was there for,” he replied: “I even did not pay attention to it;” that when asked whether “before his accident, after [he] had come down the stairs from the roof to the third floor, did [he] see the pieces of board with the orange netting around it” he replied: “Yes. I noticed that there was something wooden there, a wood piece there;” that when asked “[a]nd, that wood piece there that you noticed, did it have orange netting around it,?” he replied: “ Yes, Yes, it was something around it;” that this wood piece with the orange netting around it was in front of the metal piece, next to the stairs; and that when asked: “[a]fter you took the last step and ended up on the third floor, did you have to

pass the wood piece with orange netting before you got to the metal piece you stepped on?” he replied: “Yes, it was there and I passed it.” Moreover, plaintiff testified that but for observing the wooden piece which he walked around, he looked only at the extension cord as he was walking toward the shaft, and that he followed the extension cord over the metal decking, after having seen either the wooden piece or the barricade.

Further, although plaintiff argues that he “stepped on a piece of metal decking *that he believed was lying on top of the concrete third floor deck;*” but that the metal decking was “in fact partially covering a cut out in the floor for a vertical mechanical shaft . . .” (emphasis added)⁷ plaintiff *never testified* that he thought the metal decking was lying on top of the concrete floor, nor do his citations to his own testimony support this claim (Plaintiff’s Deposition at 49-50).

Under the circumstances, plaintiff’s own deposition testimony that he looked at the extension cord while walking, albeit having observed a wood piece, and that he saw either a wooden piece which he walked around, or a barricade with orange mesh, raises a material question of fact as to whether his conduct was the sole proximate cause of his accident.

The evidence also raises a material question of fact as to whether the shaft was secured by or covered with an adequate safety device to prevent plaintiff’s fall. As noted above, plaintiff testified that the opening to the shaft was only covered with metal and that

⁷Plaintiff’s Affirmation in Opposition to Defendant’s Motion for Summary Judgment at ¶¶8,12).

there was a wooden piece near it, but he also testified that before he fell, he saw a barricade near the shaft covered with orange mesh.

In addition, Meir Babaev, owner of Northbay, testified that a week to 10 days before the accident, he had observed that the subject shaft on the third floor was barricaded; that it had "always [been] barricaded . . . or blocked" when he walked through the job site; that the barricade weighed between 50 and 100 pounds and was comprised of "a piece of large timber that has a 4-foot piece of wood attached to it vertically and horizontally every 2 feet, and there's an orange mesh secured around it which basically blocks people" from going into and falling through the shaft; and that at that time, the subject shaft was covered by metal decking which was covered by plywood, which was attached to the ground or secured into the floor.⁸ He also testified that a person would need a hammer to remove the plywood from the floor; that if the plywood was not secured, it could not be removed easily because it is heavy, and that unless the plywood and metal decking were moved, they could not fail.

Further, Meir Babaev identified the photograph on the second page of Mr. Johansen's Incident Report as showing the barricade in front of or near the shaft on the third floor, as well as that same barricade at a different angle on the top of page three of the report depicting how barricades were typically set up prior to January 7, 2014. He also identified photograph number four of a January 7, 2014 safety report prepared by Mr. Ellerby, the site

⁸Meir Babaev also testified that there was plywood covering the opening which was either bolted or screwed onto a piece of wood or wall, and that the plywood over the metal decking was larger than the metal decking.

safety representative for the project, as depicting how the shaft looked, albeit with the plywood and the barricade on it.⁹

In addition, Albert Babaiev, owner of LL, testified that on the two or three occasions he was at the job site a week before the accident, he never saw the subject shaft uncovered, without barricades or without orange mesh, and that during that same time period, the subject shaft was covered with “plywood on the top and . . . with nails and . . . wood around it, and it was red mesh cover on top of the wood.”

Finally, Mr. Johansen, owner of Vision, testified that when he was on the site on the morning of the accident, before the accident had occurred, the subject shaft had been covered with barricades with a cross brace with orange construction fencing across the front and a four by eight foot sheet of plywood as depicted in photographs one and two of his Incident Report, as well as a sign saying “hoe” (meaning “hole”); that there may have been metal decking loosely placed over the shaft opening which may have been under the plywood; and that the shaft on the third floor had three open sides, which were all covered.¹⁰

On the other hand, Mr. Johansen also testified that plywood, metal decking, or any other thing covering the opening to the shaft was not attached to each other or secured or

⁹This photograph depicts a shaft covered with what appears to be metal decking from which a vertical piece of wood extends upward. It does not depict a barricade or orange mesh (Motion of Northbay, Exh. Y).

¹⁰Inasmuch as plaintiff’s expert fails to address the above conflicting testimony in his affidavit, particularly that of plaintiff with respect to whether he saw a barricade around the shaft before he fall, the expert’s affidavit lacks probative value (*see* Plaintiff’s Motion for Summary Judgment, Exh. 18, Expert Affidavit of Mr. Herbert Heller, Jr., P.E. at § 12 (“there is nothing in the record to suggest that Plaintiff acted unreasonably or disregarded a known or obvious risk”).

bolted to the cement floor or anything else, although the barricades (or the vertical portion), weighed 100 pounds each; and that while the first photograph on his Incident Report depicting a barricade showed how the subject shaft looked before the accident, it showed plywood without metal decking. Further, Christopher Papa, owner of MVP, testified that plaintiff fell through the larger shaft depicted in photograph four of Mr. Ellerby's January 7, 2014 safety report, which shows a shaft covered only with plywood, with the notation: "Barricade on top of 3rd floor duct shaft not secured, I advised MVP to secure the plywood from movement immediately." However, Meir testified that Mr. Ellerby was only at the site on the day of the accident after the accident had occurred, and thus did not create the report, including taking pictures of the accident location, until after the accident occurred.

Based upon the conflicting testimony, a material question of fact exists as to whether the subject shaft was properly covered to prevent someone from falling through it.

Northbay's contention that a material question of fact exists as to whether defendants violated Labor Law § 240 (1) because the statute does not specifically enumerate plywood covering as an applicable safety device, which plaintiff claims was deficient, is rejected. As noted above, the safety devices required under the statute include "other devices [which] shall be so constructed . . . as to give proper protection" (Labor Law § 240 [1]) (emphasis added). Here, the plywood covering the shaft was meant to protect workers from falling through the shaft down to the ground and thus constituted a safety device within the meaning of Labor Law § 240 (1) (*see e.g. Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 363 [1st Dept 2007] [plaintiff sustained her prima facie burden on her Labor Law

§ 240 (1) claim through admissible evidence that her decedent, who was engaged in renovating the property, fell through an open hole from an unsecured piece of plywood that had been laid over the beams when the platform shifted, and that no safety device was provided to prevent his fall]).

Plaintiff also moves for summary judgment on his Labor Law § 241 (6) cause of action, premised solely upon the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), while Northbay and LL move to dismiss this claim.¹¹ In support of that branch of its motion to dismiss this cause of action, Northbay argues that plaintiff's conduct was the sole proximate cause of his injuries (*see Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010]). Further, both Northbay and LL seek dismissal of this cause of action on the grounds that this regulation is inapplicable to the facts of this case.

"Labor Law § 241 (6) imposes on owners and contractors a nondelegable duty 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'" (*Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1085-1086 [2d Dept 2015], quoting *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982 [2d Dept 2014], *lv denied* 26 NY3d 905 [2015]). "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was

¹¹Plaintiff cites 12 NYCRR 23-1.7 (b) (1) but only references 12 NYCRR 23-1.7 (b) (1) (i) in his papers as the applicable regulation upon which he relies to support this cause of action.

a proximate cause of the accident" (*Vatavuk v Genting N.Y., LLC*, 142 AD3d 989, 990 [2d Dept 2016]).

Here, inasmuch as the court has already determined that a material question of fact exists as to whether plaintiff's conduct was the sole proximate cause of his injuries, this branch of plaintiff's motion for summary judgment must be denied (*Gurung*, 79 AD3d at 970).

As to the branches of defendants' motion for dismissal of this cause of action, 12 NYCRR 23-1.7 (b) (1) (i) provides that: "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)" (12 NYCRR 23-1.7 [b] [1] [i]). This provision is sufficiently specific to support a cause of action under Labor Law § 241(6) (*Palumbo v Transit Tech., LLC*, 144 AD3d 773, 774 [2d Dept 2016]). Further, "although the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole--particularly the safety measures delineated therein--it is apparent that the regulation is inapplicable where the hole is too small for a worker to fall through" (*Rice v Bd. of Educ.*, 302 AD2d 578, 579 [2d Dept 2003], *lv denied* 100 NY2d 516 [2003] [internal citations and quotation marks omitted]). Here, plaintiff allegedly fell through the shaft, making this regulation applicable. However, LL argues that the provision is inapplicable because Meir Babaev, owner of Northbay, testified that the shaft was barricaded, contained orange netting and a warning sign, and was covered with plywood affixed to the floor, which blocked people from entering the shaft. LL also argues that it did

not perform work in or around the shaft before the accident; that Albert Babaiev, owner of LL, testified that a week before the accident he saw that the shaft was covered with plywood which was secured to the ground, and was comprised of wood covered by orange mesh;¹² and that on the date of the accident, the only subcontractor working in the subject shaft was MVP. In addition, LL contends that the regulation is inapplicable because the opening was not required for plaintiff's work.

Northbay also argues that the regulation was not violated because the shaft was guarded by a substantial cover fastened in place. In this regard, Northbay points out that on the morning of the accident, before the accident occurred, Mr. Johansen observed wooden planking, metal decking, and a vertical barricade in place.

In opposition, plaintiff contends that the regulation was violated because the opening to the shaft was neither barricaded on its three open sides nor covered by "adequate secure covering," and that the shaft opening was large enough for him to fall through to sustain this claim (Plaintiff's Affirmation in Opposition to Defendant's [sic] Motion for Summary Judgment at ¶ 21). Although plaintiff fails to support the former argument by any citation to the record, he presumably relies upon his recitation of the facts, made in support of Labor Law § 240 (1) argument, that the only safety device over the subject shaft was "a piece of

¹²When asked what was covering the subject shaft, Albert Babaiev replied: "It was like plywood on the top and I believe it was with the nails and it was wood around it, and it was red mesh cover on top of the wood." When asked if anything other than plywood was covering the cutout that he saw at that time, Albert replied: "I think it was decking, also. I don't remember now. I think decking, plywood and the rest." He then testified that he was not sure if he saw nails in the plywood.

unsecured and improperly placed metal sheeting on top of the opening and a piece of vertical timber *near but not on top* of that piece of metal sheeting” (*id.* at ¶ 9). Plaintiff also argues that one of the defendant’s sole reliance upon inadmissible hearsay testimony of Mr. Mikhail Mashkevich, manager of Lawrence Glass at the time of the accident, fails to raise a material issue of fact as to how the accident occurred and whether a proper safety device was provided.¹³

Defendants have failed to make a *prima facie* showing entitling them to dismissal of this cause of action. As noted above, a material question of fact exists as to whether the subject shaft was properly secured. Moreover, while defendants cite to testimony indicting that the subject shaft was properly covered before the accident, they fail to address plaintiff’s testimony, albeit equivocal, that the shaft was only covered by metal decking. Further, although plaintiff cites his own testimony that the shaft was only covered with metal decking, he fails to acknowledge his own testimony that he walked by a barricade before he fell, as well as the testimony of Meir Babaev and Albert Babaiev, noted above, that in the week or so before the accident, the shaft was sufficiently covered with plywood, metal decking, and contained a wooden barricade with orange mesh. Thus, these branches of defendants’ motions seeking to dismiss plaintiff’s Labor Law §241 (6) cause of action are denied.

¹³The court cannot locate this argument in any of defendants’ papers.

Indemnification Claims

Northbay moves for summary judgment on its cross claims against LL for contribution and common-law and contractual indemnification. Northbay also seeks dismissal of LL's cross claims against it for contribution and common-law and contractual indemnification. In support of these branches of its motion, Northbay first argues that its claim for contractual indemnification should be granted and that LL's claim against it for contractual indemnification should be dismissed because the indemnification provision in its contract with LL provides that LL agreed:

“to the fullest extent permissible by law . . . to indemnify and hold the owner harmless . . . from and against any and all losses, claims, [and] damages . . . arising from bodily injury or death to any person and/or property damage including loss of use arising out of or in any way relating to this work performed or omission caused by the general contractor, agents, or employees of the general contractor as well as subcontractors hired by the general contractor under this contract.”

Further, Northbay asserts that LL was responsible for creating, covering, and replacing the shaft cover; and that even assuming LL was not negligent, there is no evidence that it (Northbay) was negligent because the right to inspect the site, as well as the right to observe and report safety violations, does not create liability.

Northbay also argues that both it and ANE are entitled to common-law indemnification from LL, and that for the same reason LL's claims against it for contribution and common-law indemnification must be dismissed, because there is no evidence that they

caused or contributed to plaintiff's accident. In this regard, they contend that they were not at the building when the accident occurred and did not supervise or control plaintiff's work.

LL moves for summary judgment dismissing Northbay's claims for contractual and common-law indemnification and opposes Northbay's motion for summary judgment on these claims (LL does not oppose that branch of Northbay's motion to dismiss LL's claims against Northbay for contribution and common-law and contractual indemnification). In support of this branch of its motion, LL asserts that Northbay and ANE have failed to demonstrate that they were not actively negligent, or that they only maintained "general supervisory authority" over the work at the site. Specifically, LL argues that Northbay's retention of Mr. Ellerby from All About Safety, as site safety consultant, evidences Northbay's responsibility for the safety at the site and for any failures there. In particular, LL asserts that Northbay hired Mr. Ellerby to ensure that the entire job site was safe and that all workers were "following the rules;" that Mr. Ellerby reported unsafe conditions at the site directly to Vision, not to LL; that Mr. Ellerby prepared written safety reports regarding required safety measures, and provided them to Mr. Johansen, owner of Vision, and Meir Babaev, owner of Northbay; and that after receiving these reports, Mr. Johansen was responsible for ensuring the safety measures identified by Mr. Ellerby were implemented; and that Northbay would contact the trade involved, tell them they were not following protocol, and to "please shape up." LL also points out that Northbay retained authority to stop the work and that Meir Babaev, owner of Northbay, conducted walk-throughs of the entire job site every week to identify issues that needed to be rectified. Both these factors,

LL argues, purportedly rendered Northbay “actively involved in the supervision, direction and control of the job site.”

In addition, LL contends that Northbay’s claims against it are merely conclusory allegations of negligence, which fail to demonstrate that it contributed to any dangerous condition at the site. In support of this claim, LL argues that Northbay, through its retention of Mr. Johansen, owner of Vision, was actively involved in controlling the job site because all witnesses identified Mr. Johansen, who reported solely to Northbay, as being in charge of the project; Northbay retained contractors for the project, including Vision, MVP, and All About Safety, all of whom reported to Northbay; and certain deposition testimony (albeit unidentified) shows that “there is no basis for liability against” it (Motion of Northbay at ¶ 147).

Further, in its opposition, LL argues that Mr. Johansen was on the site on a daily basis to supervise the day-to-day activities of the job site; that Meir Babaev, owner of Northbay, learned about the work done at the site from him; that Mr. Johansen would report to Northbay during weekly meetings; that Mr. Johansen had the ability to stop work at the job site if he saw an unsafe condition and the authority to stop a worker from performing work incorrectly; that if the subcontractors had questions about work they were to perform, they would ask Mr. Johansen; that Mr. Johansen “was like a super and project manager together . . . He was constantly on the job . . . He was the manager on the job . . . He was telling everyone what to do;” that Mr. Johansen was required to prepare daily reports for Northbay, which he gave to Meir Babaev; that Northbay had authority to direct work, which it did

through Mr. Johansen of Vision and Mr. Ellerby; and that Northbay was on site regularly and held progress meetings with Vision and Mr. Ellerby and other contractors on occasion.

LL also contends that Northbay cannot establish that it is free from negligence because it did not visit the site 10 days before the accident until after the accident occurred. On the other hand, LL contends that it was not negligent because it did not receive any complaints about the subject shaft; Albert Babaiev, owner of LL, did not see the shaft without barricades within a week before the accident; it (LL) did not have control over the work site and subject shaft because Meir Babaev and Mr. Johansen testified that if a subcontractor's work involved the subject shaft, that subcontractor was responsible for putting the plywood and barricade back into position when the work was completed; Meir Babaev testified that 10 days before the accident, MVP was working in and around that subject shaft, that in January 2014, MVP was performing mechanical work in the shaft and had access to it before the accident, and that if MVP was doing working on or around the shaft, it would be responsible to secure the plywood covering over the shaft; the manner in which the shaft was covered was determined by Mr. Ellerby; and that it did not supervise or control plaintiff's work.¹⁴

"The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability"

¹⁴LL also argues that ANE is not entitled to contractual indemnification because it is not named in the Northbay/LL contract. However, in its two replies, Northbay only argues that it, and not ANE, is entitled to contractual indemnification from LL, thus abandoning its claim that ANE is also entitled to contractual indemnification from LL.

(*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931 [2d Dept 2016]). “The right to contractual indemnification depends upon the specific language of the contract” (*Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 503 [2d Dept 2014]). Further, “[i]n order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury” (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2d Dept 2015]). Finally, “[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the [authority to] supervise and control . . . necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200” (*cf. Robinson v County of Nassau*, 84 AD3d 919, 920 [2d Dept 2011]).

Here, Northbay met its initial burden of demonstrating that it is entitled to contractual indemnification from LL. First, Northbay's contract with LL contains an express indemnification clause in favor of Northbay, as owner, which obligated LL “to the maximum extent permissible by law,” to indemnify Northbay for losses or claims “arising out of . . . the work performed or omission caused by the general contractor, agents, or employees of the general contractor as well as subcontractors hired by the general contractor under this contract” (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773-774 [2d Dept 2010]). In this case, the accident involved plaintiff, who was employed by Lawrence Glass, which was hired by LL.

Further, Northbay has established, prima facie that where, as here, “a worker at a job site is injured as a result of a dangerous or defective premises condition,” it did not “create[] the condition, or ha[ve] actual or constructive notice of it and a reasonable amount of time within which to correct the condition” (*Wadlowski v Cohen*, 150 AD3d 930, 931 [2d Dept 2017] [internal citations and quotation marks omitted]). In this regard, Meir Babaev, owner of Northbay, testified that it was LL which installed or pre-installed the subject shaft; that LL had initially set up the metal decking, plywood, and barricade over the shaft opening; and that it was the responsibility of LL to cover the shaft with the barricade and follow “whatever safety measures” where present there unless a subcontractor was working on it, in which case it was subcontractor’s responsibility to replace the covering when finished with its work. In addition, as noted in the Labor Law § 240 (1) discussion, Meir Babaev, owner of Northbay, testified that a week to 10 days before the accident, he had observed that the subject shaft on the third floor was barricaded; that it had “always [been] barricaded . . . or blocked” when he walked through the job site; that the barricade, which weighed 50-100 pounds, was comprised of “a piece of large timber that has a 4-foot piece of wood attached to it vertically and horizontally every 2 feet, and there’s an orange mesh secured around it which basically blocks people” from falling through the shaft; and that at that time, the subject shaft was covered by metal decking which was covered by plywood, which was attached to the ground or secured into the floor.

In opposition, LL has failed to a triable issue of fact as to why the indemnification provision should not be enforced. The evidence submitted by LL in opposition merely

establishes that Northbay, “undertook general duties to oversee the work and to ensure compliance with safety regulations,” which is insufficient to raise a triable issue of fact as to whether Northbay was negligent and, therefore, was not entitled to contractual indemnification (*id.*). In this regard, Meir Babaev testified that he did not supervise any of the work at the job site, and that his involvement at the site was limited to weekly walk-throughs with Mr. Johansen, “[j]ust to confirm the building was being built,” and weekly meetings with Mr. Johansen and possibly with LL, if it was at the site. Thus, that branch of Northbay’s motion for contractual indemnification against LL is granted, and that branch of LL’s motion to dismiss Northbay’s claim for contractual indemnification is denied. Further, that branch of Northbay’s motion to dismiss LL’s claim for contractual indemnification against it is granted as Northbay has demonstrated its entitlement to indemnification under its contract with LL, and LL has failed to submit any opposition.

That branch of Northbay’s motion for summary judgment on its claim for common-law indemnification against LL is denied. While Northbay has made a *prima facie* showing that it was not negligent, a material question of fact exists as to whether LL created the allegedly dangerous shaft condition or had notice of it. On the one hand, LL has demonstrated that it did not have notice of the allegedly dangerous shaft condition. In this regard, LL argues that Albert Babaiev, owner of LL, testified that on any of the occasions he had been at the site, no one ever complained to him about the condition of the site as far as safety was concerned; that when he visited the job site two or three times one week before the accident, he observed that the subject shaft was covered with plywood with wood around

it, and that the top of the wood was covered red mesh; and that in that week, he had never seen the subject shaft uncovered or without barricades or orange mesh.

However, as to whether LL created the allegedly dangerous shaft condition, Meir Babaev, owner of Northbay, testified, in effect, that LL was responsible for creating, covering and replacing the shaft (*supra*). LL does not address this deposition testimony. Further, the testimony cited by LL with respect to MVP's involvement at the site fails to demonstrate that MVP was working at the shaft location on the day of the accident or that it created the allegedly dangerous condition. In this regard, the cited testimony only indicates that MVP was working in or around the shaft a week to 10 days before the accident, and that on the day of the accident, MVP was performing mechanical installation (installing duct work or a metal sheet) on one of the floors in the building. In addition, when Albert Babaiev, owner of LL, was asked who determined the manner in which the shaft was supposed to be covered, he replied: "Again, I'm going to tell you the same thing. *Usually we do that,*" and that he had learned how from Mr. Ellerby (emphasis added). On the other hand, as LL asserts, Mr. Papa, owner of MVP, testified that Mr. Johansen would coordinate and take responsibility for opening and closing the shaft at the request of the subcontractors; and that MVP employees did not open or close shaft openings, but would ask Mr. Johansen to do so, because it was not part of MVP's job. Thus, a material question of fact exists as to whether LL was responsible for creating the allegedly dangerous shaft condition.

Based upon the foregoing, that branch of Northbay's summary judgment motion for common-law indemnification against LL is denied, that branch of LL's motion to dismiss

Northbay's claim for common-law indemnification against it is denied, and that branch of Northbay's motion to dismiss LL's claim against it for common-law indemnification is denied.

Northbay and LL move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Plaintiff does not oppose these branches of defendants' motions. LL's affirmation in partial opposition to Northbay's motion for summary judgment does not oppose this branch of Northbay's motion, although, as noted above, it opposes those branches of Northbay's motion seeking contribution and indemnification from it. In any event, "Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Wadlowski*, 150 AD3d at 931).

In light of the court's determinations that Northbay has made a prima facie showing that it was not negligent, and that a triable issue of fact exists as to whether LL was negligent, this branch of Northbay's motion to dismiss plaintiff Labor Law § 200 and common-law negligence claim is granted, and this branch of LL's motion to dismiss plaintiff's Labor Law §200 and common-law negligence claims is denied.

Northbay also moves to dismiss MVP's cross claims and counterclaims for contribution and contractual indemnification. With respect to MVP's contribution claim, Northbay argues that it has not contributed to plaintiff's accident. With respect to MVP's claim for contractual indemnification, Northbay contends that it did not enter into a contract with MVP. MVP has not opposed this branch of Northbay's motion.

MVP moves for summary judgment dismissing Northbay's fourth third-party complaint against it, which seeks contribution and common-law and contractual indemnification. In support of this branch of its motion, MVP argues that it was not negligent and did not enter into a contract with Northbay.

As an initial matter, both of these parties concede that they did not enter into a contract with one another. Moreover, as MVP points out, Mr. Johansen testified that he did not review a contract between MVP and any entity involved in the project. Further, none of the defendants in this action have produced a copy of an agreement entered into with MVP. As such, that branch of Northbay's motion to dismiss MVP's claim against it for contractual indemnification, and that branch of MVP's motion to dismiss Northbay's claim for contractual indemnification against it are granted.

That branch of Northbay's motion to dismiss MVP's claim for contribution is also granted. Northbay has demonstrated that it did not contribute to plaintiff's accident, and MVP has failed to submit any opposition.

That branch of MVP's motion to dismiss the remainder of Northbay's third-party complaint against it (contribution and common-law indemnification), is also granted. In this regard, MVP has made a prima facie showing that it did not contribute to plaintiff's accident or that it did not have notice of the allegedly dangerous shaft condition. As MVP argues, and the court has already determined, Meir Babaev's testimony that MVP worked in the subject shaft in January 2014 fails to demonstrate that MVP created the allegedly dangerous shaft condition. In any event, Meir Babaev subsequently testified that he did not know when MVP

last worked where the accident occurred. Moreover, as MVP asserts, Albert Babaiev, owner of LL, merely testified that as of the date of the accident, the shaft was in place for the HVAC contractor, which was MVP, that he did not know whether MVP created the cutout for the subject shaft; that while he saw MVP's truck at the site on the day of the accident, he did not see any of their workers, did not know if MVP was present at the site at the time of or before the accident; and that he was not present at the site on the day of the accident. Further, MVP points out that Mr. Johansen testified that there were two shafts at the work site, which were depicted on the photographs on his Incident Report, and that the larger one was used to run duct work through, and Mr. Papa, part owner of MVP, also testified that there were two shafts at the site, but that plaintiff did not fall from the shaft that was cut for MVP to run its duct work through. Rather, Mr. Papa testified that plaintiff fell down the shaft that was created for black iron ducts for the kitchen exhaust system from Pizza Hut, which was used by Pizza Hut (on the first floor) and other trades, but to which MVP did not have access.

Moreover, while Meir Babaev and Mr. Johansen testified that if a subcontractor had to use the subject shaft, and had to remove the barricade, it was responsible to replace it when finished, there was no testimony that MVP ever removed any covering over the subject shaft. In addition, even assuming that plaintiff fell through the shaft which had been created for MVP, as opposed to the shaft used by Pizza Hut, Mr. Papa testified that MVP workers did not create that shaft, did not open or close the shaft, and were not responsible for uncovering or covering that shaft when its workers were working in that area because the

procedure was to contact Mr. Johansen, who would arrange for Ernie, who worked for LL, to do so (“I [Mr. Papa] would have went to Ron [Johansen]. I wouldn’t have paid my guys to open up and close holes. It’s not part of our job”). Also, MVP points out that Mr. Johansen testified that at the relevant time period, no trades were working in the larger shaft depicted in his Incident Report because his photographs showed that the shaft “was wide open in terms of nothing in it” and that had there been trades working in the shaft, plaintiff could not have fallen through it.¹⁵ Further, Mr. Papa testified that while work was ongoing, the subject shafts were covered with plywood and a barricade, which was like a fence.

Finally, MVP argues, in effect, that Mr. Ellerby’s January 7, 2014 safety report, containing the notation “Barricade on top of 3rd floor duct shaft not secured, I advised MVP to secure plywood from movement immediately,” fails to raise an issue of fact because the shaft depicted in the photograph does not, according to Mr. Papa, depict the shaft through which plaintiff fell. In any event, as noted above, even assuming this photograph (number 4) depicts the subject shaft, based upon the foregoing, MVP has demonstrated, *prima facie*, that it was not negligent with respect to the subject shaft. In light of MVP’s showing, and inasmuch as Northbay has failed to oppose MVP’s motion, that branch of MVP’s motion to dismiss the remainder of the causes of action of Northbay’s third-party complaint, asserting

¹⁵He also testified that on the day of the accident, MVP was doing work in other parts of the building and had nothing to do with the shaft; and that on the day of the accident, MVP was running the ducts along the ceilings of the first, second and third floors.

causes of action for common-law indemnification and contribution, is granted. In sum, that branch of MVP's motion to dismiss Northbay's third-party complaint against it is granted.

MVP also moves to dismiss LL's third third-party complaint against it, which seeks contribution and common-law and contractual indemnification. LL does not oppose this branch of MVP's motion. As to LL's claim for contractual indemnification, as noted above, MVP points out that Mr. Johansen testified that he did not review any contract entered into between MVP and another entity. In light of the foregoing, and inasmuch as LL does not oppose this branch of MVP's motion, this branch of MVP's motion to dismiss LL's claim for contractual indemnification against it is granted.

As to LL's remaining common-law claims, as noted above, MVP has made a prima facie showing that it was not negligent, and LL has failed to oppose this branch of MVP's motion. Thus, this branch of MVP's motion to dismiss LL's common-law claims against it is also granted. Thus, that branch of MVP's motion to dismiss LL's third-party complaint against it is granted.

MVP also moves to dismiss the complaint insofar as asserted against it, namely, the claims for common-law negligence and the violations of Labor Law §§ 240 (1), 241(6), and 200. Where a subcontractor demonstrates that it was not acting as a statutory agent of either the owner or the general contractor, it is entitled to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) (*Thomas v Benton*, 112 AD3d 812, 813 [2d Dept 2013]). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no

statutory agency conferring liability under the Labor Law” (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

In support of this branch of its motion to dismiss, MVP has made a prima facie showing that it was not a statutory agent of Northbay or LL. In this regard, it has demonstrated that it did not enter into any contract which may have delegated its authority to supervise or control the work of any other entity at the site or the subject shaft. Further, it has demonstrated that it did not create the allegedly dangerous shaft condition and that it was not responsible for removing or replacing the covering over the shaft when it was working in the area where the shaft was located, nor did it uncover or cover the subject shaft (*see Bell v Bengomo Realty, Inc.*, 36 AD3d 479 [1st Dept 2007]; *Walls*, 4 NY3d at 864).

As noted, Mr. Johansen testified that he did not review a contract between MVP and any entity involved in the project. Further, as MVP contends, none of the defendants in this action have produced a copy of an agreement entered into with MVP. In addition, as MVP argues, Albert Babaiev, owner of LL, admitted that LL was the general contractor and testified that Mr. Johansen was in charge of all the day-to-day operations of the construction site (i.e. Mr. Johansen hired most of the subcontractors for the project; “was like the super and project manager together . . . constantly on the job . . . telling everyone what to do,” was “handling the project,” and “was actually the boss.” Similarly, Meir Babaev testified that Mr. Johansen was responsible for coordinating with LL to make sure the subcontractors were at the site; to ensure there was enough manpower to complete the job in a timely manner; and that he supervised the day-to-day activities of LL’s “everyday work.” Further, MVP also

correctly argues that the testimony by Meir Babaev and Mr. Johansen that the individual subcontractors were responsible for removing and replacing the barricade over the shaft demonstrates that MVP was not “delegated plenary authority” to control and supervise the work site (including plaintiff’s work)” (*Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589 [1st Dept 2013][internal citations and quotation marks omitted]). Finally, plaintiff testified that he was only supervised by his employer. Thus, MVP has demonstrated that it was not acting as a statutory agent of either the owner or general contractor and, therefore, it cannot be held liable under those statutory provisions (*id.*, see also *Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668, 669 [2d Dept 2008]).

“A subcontractor ‘may be held liable for negligence where the work it performed created the condition that caused the plaintiff’s injury even if it did not possess any authority to supervise and control the plaintiff’s work or work area’” (*Thomas*, 112 AD3d at 813, quoting *Poracki v St. Mary’s R.C. Church*, 82 AD3d 1192, 1195 [2011]). “An award of summary judgment in favor of a subcontractor on a negligence claim is improper where the evidence raise[s] a triable issue of fact as to whether [the subcontractor’s] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff’s injuries” (*id.* [internal citations and quotation marks omitted]). Here, as noted above, MVP has made a prima facie showing that it did not create the allegedly dangerous shaft condition that caused the plaintiff’s injury.

Plaintiff has failed to oppose this branch of MVP’s motion. Accordingly, that branch of MVP’s motion to dismiss plaintiff’s complaint insofar as asserted against it is granted.

LL moves for summary judgment on its claims against Lawrence Glass for contractual indemnification, breach of contract and attorney's fees. However, inasmuch as the court has already determined that a triable issue of fact exists as to whether LL was negligent, its claim for contractual indemnification must be denied (*Jardin*, 138 AD3d at 931). That branch of LL's motion for summary judgment on its claim against Lawrence Glass for breach of contract for failure to procure insurance is also denied because LL merely asserts, in conclusory fashion and without proof in evidentiary proof (i.e. from someone with knowledge), that "it is undisputed that [Lawrence Glass] failed to procure insurance naming [LL] as an additional insured as explicitly required" by its contract with Lawrence Glass.¹⁵

Lastly, LL moves for summary judgment against Vision for common-law indemnification. Vision, on the other hand, moves for summary judgment to dismiss the third-party complaints of Northbay and LL against it (the fifth and sixth third-party complaints, respectively). This branch of LL's motion must be denied because the court has already determined that a material question of fact exists as to whether LL was negligent (*Mohan*, 134 AD3d at 1078-1079).

As to that branch of Vision's motion to dismiss LL's complaint seeking contribution and common-law indemnification, Vision argues that Mr. Johansen, Vision's sole member, described his role, during his deposition, as that of a construction consultant, although others

¹⁵In its motion, LL argues that Lawrence Glass' cross claims and counterclaims against it must be dismissed. However, LL did not move for this relief in its motion. In any event, Lawrence Glass did not assert any cross claims or counterclaims against LL (Motion of LL, Exh. G).

referred to him as a construction manager; that Mr. Johansen was frequently on the site to enable him to report on the status of the construction; that it was Mr. Ellerby who was hired to handle site safety, which was not Vision's responsibility; that Mr. Johansen did not supervise the contractors or have a written contract defining Vision's role or obligating Vision to "obtain insurance;" that there appears to be no fact or legal theory which would make it liable to plaintiff; that Vision was an agent for Northbay; and that Albert Babaiev's testimony "could not legally implicate Vision nor did [Albert] identify any relevant act or omission." Vision concludes that "this case is in need of pruning so that plaintiff can effectively proceed against" the entity who bears legal liability. Vision raises the same argument with respect to that branch of its motion to dismiss Northbay's third-party complaint against it seeking contribution and common-law and contractual indemnification, but instead argues that "the scope of Vision's role could not implicate it. [Meir] Babaev did not identify any relevant act or omission of Vision."

Vision has failed to make a prima facie showing entitling it to dismissal of the third-party complaints of LL and Northbay. In this regard, Vision fails to cite any deposition testimony to support its claims, and makes the conclusory claim that testimony of Meir Babaev and Albert Babaiev did not "identify any relevant act or omission," without addressing whether Mr. Johansen created the allegedly defective shaft condition or had notice of it (*see Wadlowski*, 150 AD3d at 93-1). "[T]he 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 demonstrate the absence of any material issues of fact" (*Alvarez v*

Prospect Hosp., 68 NY2d 320, 324 [1986]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*). In view of the foregoing, the court need not consider the opposition of LL.¹⁶ Accordingly, Vision’s motion to dismiss the third-party complaints of Northbay and LL against it is denied.

In summary, plaintiff’s motion (motion sequence 3) for summary judgment against Northbay and LL on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) causes of action is denied.

That branch of Northbay’s motion (motion sequence 6) to dismiss plaintiff’s Labor Law §§ 240 (1) and 241 (6) causes of action insofar as asserted against it is denied; that branch of Northbay’s motion to dismiss plaintiff’s common-law negligence and Labor Law § 200 claim insofar as asserted against it is granted; that branch of Northbay’s motion for contractual indemnification against LL is granted; that branch of Northbay’s motion for contribution and/or common-law indemnification against LL is denied; that branch of Northbay’s motion to dismiss LL’s claim against it for contractual indemnification is granted; that branch of Northbay’s motion to dismiss LL’s claims against it for contribution and/or common-law indemnification is denied; that branch of Northbay’s motion to dismiss MVP’s claim against it for contractual indemnification is granted; and that branch of Northbay’s motion to dismiss MVP’s claim against it for contribution is granted.

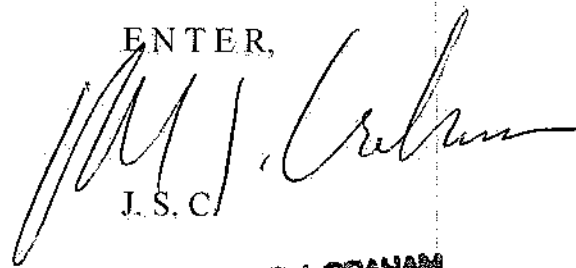
¹⁶Northbay did not submit opposition to Vision’s motion to dismiss its third-party complaint.

That branch of LL's motion (motion sequence 4) to dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6), 200 and common-law negligence claims insofar as asserted against it is denied; that branch of LL's motion to dismiss Northbay's claim for contractual indemnification against it is denied; that branch of LL's motion to dismiss Northbay's claim for common-law indemnification is denied; that branch of LL's motion for contractual indemnification and breach of contract against Lawrence Glass is denied; and that branch of LL's motion for common-law indemnification from Vision is denied.

MVP's motion (motion sequence 7) to dismiss plaintiff's complaint insofar as asserted against it, and the third-party complaints of Northbay and LL against it, is granted.

Vision's motion (motion sequence 5) to dismiss the third-party complaints of Northbay and LL against it is denied.

This constitutes the decision and order of the court.

ENTER,

 J. S. C.
 HON. BERNARD J. GRAHAM