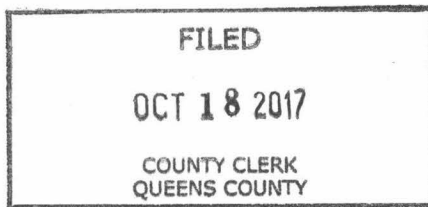


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| Calle v 1411 IC-SIC Prop., LLC |
| 2017 NY Slip Op 32419(U) |
| October 11, 2017 |
| Supreme Court, Queens County |
| Docket Number: 704429/2013 |
| Judge: Cheree A. Buggs |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IA Part 30

FELIX CALLE,

Plaintiff,

-against-

1411 IC-SIC PROPERTY, LLC, ET AL.,

Defendants.

Index
Number 704429/2013

Motion
Dates: June 19, 2017
July 17, 2017
August 1, 2017

Mot. Seq. Nos.: 5,6,8, 9

The following e-file papers numbered EF63 to EF169 read on these motions by defendant, DVP Enterprises, LLC (DVP) (Seq. 5); by defendants, Roc Nation, LLC and Roc Nation Apparel Group, LLC (Roc Nation) (Seq. 6); by defendant, W5 Group, LLC (W5 Group) (Seq. 8); by defendant, 1411 IC-SIC Property, LLC (1411) (Seq. 9), all seeking, among other things, summary judgment dismissing the complaint; and a cross motion by plaintiff (Seq. 9), seeking summary judgment on liability against defendants, 1411 and W5 Group, pursuant to Labor Law § 240 (1).

Papers
Numbered

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|--|-------------|
| Notices of Motion and Cross Motion - Affirmations - Exhibits | EF63-EF128 |
| Answering Affirmations - Exhibits..... | EF129-EF162 |
| Reply Affirmation, Exhibits..... | EF165-EF169 |

Upon the foregoing papers, it is ordered that the instant motions and cross motion, all for, among other things, summary judgment pursuant to CPLR 3212, are determined as follows:

Plaintiff, a construction worker employed by nonparty, Calvin Maintenance, Inc. (Calvin), allegedly sustained serious personal injuries while working on the 38th floor of a building located at 1411 Broadway, New York, New York, owned by 1411, on July 25, 2013. The owner hired W5 Group, as general contractor, to perform demolition services on the 38th floor. W5 Group sub-contracted its demolition work to Calvin, plaintiff's employer.

Plaintiff alleges he was seriously injured when, as he attempted to remove a ceiling beam located on the 38th floor, it fell, striking his right leg. Plaintiff commenced this action alleging common law negligence and violations of Labor Law §§ 200, 240 and 241. Defendant, Roc Apparel Group, LLC, filed a cross claim against all other defendants alleging common law and contractual indemnification and breach of contract to procure insurance. W5 Group and DVP filed cross claims against all other defendants, alleging common law indemnification and contribution. Roc Nation filed a cross claim against 1411, DVP and W5 Group, again sounding in contractual and common law indemnification and contribution, and breach of contract to procure insurance.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2016]; *Bravo v Vargas*, 113 AD3d 579 [2014]).

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires

denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The court will first address plaintiff's cross motion (Seq. 9), seeking summary judgment on liability against defendants solely on the Labor Law §§ 240 (1) claim. Defendants have argued that plaintiff's cross motion was filed "late," pursuant to CPLR 2215, and that plaintiff's expert was not properly identified, pursuant to CPLR (d) (1) (i), and, therefore, neither should be considered by the court. However, there has been no evidence of an intentional or willful failure to disclose or violate the court directive on the part of the plaintiff, or a showing of prejudice by the defendants in their opportunities to contest this cross motion (*see Elgart v Berezovsky*, 123 AD3d 970 [2014]; *Arcamone-Makinano v Britton Property, Inc.*, 117 AD3d 889 [2014]; *SCG Architects v Smith, Buss & Jacobs, LLP*, 100 AD3d 619 [2012]). As such, the court will consider plaintiff's cross motion and evidence therein.

Labor Law § 240 (1) protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" (*Ross v Curtis Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658 [2014]; *Misseritti v Mark IV Construction Co, Inc.*, 86 NY2d 487 [1995]; *Zamora v 42 Carmine St. Associates, LLC*, 131 AD3d 531 [2015]), and the duty imposed upon owners, contractors and lessees that control the work being performed pursuant to it is nondelegable (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Scofield v Avante Contracting Corp*, 135 AD3d 929 [2016]). Liability is imposed where there exists a hazard contemplated under the statute; a failure to utilize a safety device enumerated therein, or the use of an inadequate such device; and "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]).

Plaintiff must demonstrate that at the time the object fell, it was either being hoisted or secured, or required securing for the purpose of the undertaking at hand, and fell due to "the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Where there is no statutory

violation, or where a hoisting or securing device of the type enumerated in the statute would not be necessary (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Garcia v Market Assoc.*, 123 AD3d 661 [2014]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2013]), or where the plaintiff's actions are the sole proximate cause of his or her own injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712 [2017]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700 [2017]), Labor Law §240 (1) will not apply.

“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 [2014]). Such statute is not applicable unless plaintiff's injuries result from an elevation-related risk and the inadequacy of the safety device (*see Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658). “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)” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, at 267).

In the case at bar, based upon the evidence presented, plaintiff has satisfied his prima facie burden of demonstrating that the subject accident involved a Labor Law § 240 (1) type accident, and defendants have failed to show that “plaintiff's injuries did not result from the type of elevation related hazard to which the statute applies” (*Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2012]). Further, plaintiff's expert opined as to “the necessity of any particular safety device to perform the specific task the plaintiff was performing at the time of the accident” (*Carrasco v Weissman*, 120 AD3d 531, 534 [2015]).

In opposition, defendant owner and general contractor contend that plaintiff's actions were the sole proximate cause of his injuries, and submit an expert's affidavit to bolster such argument, contradicting plaintiff's expert as to the necessity of statutorily required protective devices, and opining that such requirement would be “illogical” considering the intent of plaintiff's work was to take down the ceiling and beams, not support them. Further, defendants contend that the accident would not have occurred had plaintiff not disobeyed his superior's command to all workers to halt work on the subject ceiling, which resulted in plaintiff performing the task alone. Such argument is supported by plaintiff's concession that he acted on his own in continuing to work on the subject ceiling after being ordered to cease such work.

As such, opposing defendants' arguments raise an issue of fact which is sufficient to deny a finding of summary judgment for plaintiff. Plaintiff has failed to eliminate all issues of fact with regard to whether a violation of the statute, i.e., the absence of a safety device of the kind specified therein, was a contributing cause of the accident and the proximate

cause of plaintiff's injury (*see Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280; *Weininger v Hagedorn & Co*, 91 NY2d 958 [1998]; *Cacanoski v 35 Cedar Place Assoc., LLC*, 147 AD3d 810 [2017]), and plaintiff's cross claim for a judgment on liability, under Labor Law § 240 (1), is denied.

The branches of the separate motions by defendants, 1411 (Seq. 9) and W5 Group (Seq. 8), seeking dismissal of the causes of action in the complaint based on violations of Labor Law § 240 (1), parallel, in form and substance, the aforementioned opposition argument they made to the branch of plaintiff's cross motion seeking summary judgment based on that statute. The same arguments and law are proffered, and the same result ensues, Said defendants have failed to demonstrate entitlement to summary judgment, as their evidence has failed to eliminate all issues of fact with regard to whether they violated their nondelegable duty toward plaintiff, and that plaintiff's actions were the sole cause of his accident, as the contributory or comparative negligence of the plaintiff are not defenses to a § 240 (1) claim (*see Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280; *Cacanoski v 35 Cedar Place Assoc., LLC*, 147 AD3d 810). Consequently, said branches of the motions of 1411 and W5 Group, are denied.

Defendants, 1411 and W5 Group, also sought dismissal of the causes of action against them based upon common law negligence and Labor Law §§ 200 and 241 (6). Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor or agent to provide construction site workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290; *DeMilo v Weinberg Bros., LLC*, 122 AD3d 895 [2014]; *Nicoletti v Iracane*, 122 AD3d 811 [2014]). To be held liable for injuries, pursuant to Labor Law § 200 or for common-law negligence, where, as here, plaintiff's claim arises out of the methods or manner of the work, rather than an alleged dangerous condition on the property, "recovery against the owner or general contractor cannot be had ... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see Rodriguez v Mendlovits*, 153 AD3d 566 [2017]). The right to generally supervise the work, or stop the work if a safety violation is noted, or to monitor compliance with contract specifications or safety regulations, is insufficient to impose liability under Labor Law § 200 or common law negligence (*see Derosas v Rosmarin Land Holdings, LLC*, 148 AD3d 988 [2017]; *Messina v City of New York*, 147 AD3d 748 [2017]).

In the case at bar, 1411 and W5 Group have submitted sufficient evidence to, prima facie, demonstrate entitlement to summary judgment by demonstrating they did not have the authority to, nor did they, exercise supervisory control over the contractor's means and methods of performing the demolition, and that they did not have constructive notice of any unsafe method utilized by plaintiff (*see Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088

[2016]; *Ortega v Puccia*, 57 AD3d 54). Plaintiff has failed to oppose this branch of the motion, and, thus, has failed to raise a triable issue of fact in opposition. Consequently, this branch of 1411 and W5 Group's motion is granted, and the Labor Law § 200 and common law negligence causes of action against them are dismissed.

Labor Law § 241 (6), imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2012]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). Thus, 1411, being the owner, and W5 Group, being the general contractor, of the subject workplace, had a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of any said defendants (*see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]; *Zaino v Rogers*, 153 AD3d 763 [2017]). To succeed in denying summary judgment under this section, said defendants must establish either that the Industrial Code sections allegedly violated cannot serve as a predicate for liability pursuant to Labor Law § 241 (6), because they merely set forth general standards of care for employers, and did not involve a violation of a provision of the Industrial Code that set forth specific applicable safety requirements or standards, which was a proximate cause of plaintiff's accident (*see St. Louis v Town of N. Elba*, 16 NY3d 411; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935 [2016]; *Torres v City of New York*, 127 AD3d 1163 [2015]); *Carey v Five Bros., Inc.*, 106 AD3d 938 [2013]), or that such sections did not apply in this case or were not violated (*see Tuapante v LG-39, LLC*, 151 AD3d 999 [2017]; *Cruz v Cablevision Systems Corp.*, 120 AD3d 744 [2014]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221 [2011]).

Plaintiff's pleadings assert that defendants violated several Industrial Code Rules. "The defendants established, prima facie, that those sections of the Industrial Code are either not specific enough to give rise to the duty imposed by Labor Law § 241 (6), or are inapplicable to the facts of this case" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2014]). Plaintiff has opposed this branch of defendants' motion solely with regard to Rules 23-1.7 (a) and 23-3.3 (g), thereby effectively abandoning those remaining violations by failing to support them in his opposition to this motion to dismiss.

Both contested provisions may serve as predicates for liability under Labor Law § 241 (6), as they involve a violation of a "specific, positive command" or "concrete specification"

of the Industrial Code (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350; see *Carey v Five Bros., Inc.*, 106 AD3d 938; *Forschner v Jucca Co.*, 63 AD3d 996 [2009]).

Rule 23-1.7 (a) (1) and (2) refer to protection from overhead hazards in places that are “normally exposed to falling material or objects”. Defendants made a prima facie showing that such Rule was inapplicable, as the room in which plaintiff was working was not “normally exposed to falling material”. Plaintiff has failed to raise a triable issue of fact in opposition (see *Millette v Tishman Const. Corp.*, 144 AD3d 1113 [2016]; *Vatavuk v Genting New York, LLC.*, 142 AD3d 989 [2016]). Rule 23-3.3 (g) pertains to areas that are “subject to the hazard of falling debris or materials from above,” and is not applicable in this case since plaintiff “was working in the area where the ... falling material [was], and was not subject to falling debris from another area” (*Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622 [2003]). Consequently, plaintiff has failed to rebut defendants’ prima facie entitlement to summary judgment because he has failed to demonstrate that either said specific Code Rule applied to the facts herein (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494; *Lopez v New York City Dep’t. of Environmental Protection*, 123 AD3d 982 [2014]; *Kozlowski v Ripin*, 60 AD3d 638 [2009]), and the branch of defendants’ motions seeking to dismiss the causes of action predicated upon Labor Law § 241 (6) violations is granted.

The remaining branch of 1411’s motion seeks summary judgment on its causes of action for common law and for contractual indemnification against defendant, W5 Group. “The right to contractual indemnification depends upon the specific language of the contract (citations omitted) ... [and] should not be found unless it can be clearly implied from the ... purpose of the entire agreement and the surrounding circumstances (citations omitted)” (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*Alayev v Juster Assoc., LLC*, 122 AD3d 886, 887 [2014]; see *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]; *Lawson v R & L Carriers, Inc.*, 126 AD3d 944 [2015]). Contracts that fail to contain an express agreement to indemnify, or to procure insurance, cannot form the basis for a declaration that a duty to indemnify, or procure insurance, exists (see *Ruiz v Griffin*, 50 AD3d 1007 [2008]; *O’Berg v MacManus Group, Inc.*, 33 AD3d 599 [2006]; *405 Bedford Ave. Development Corp. v New Metro Constr., Ltd.*, 26 AD3d 408 [2006]).

1411, the owner of the subject property, entered into a written contract with W5 Group to perform demolition work on the 38th floor at the subject premises. W5 Group sub-contracted its demolition work to Calvin, plaintiff’s employer. The contract between 1411 and W5 Group contained an indemnification clause requiring W5 Group and its “Agents”

to indemnify the “Owner.” As such, 1411 has demonstrated the existence of a valid contract and indemnification agreement between itself and W5 Group, wherein W5 Group specifically agreed to indemnify the property owner and its agents for claims like the one brought by plaintiff herein, thereby rendering the instant claim for contractual indemnification meritorious. However, movant, 1411, has failed to establish entitlement to judgment granting contractual indemnification as a matter of law. The party seeking contractual indemnification, as well as a party seeking to dismiss such a cause of action, “must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Mohan v Atlantic Court, LLC*, 134 AD3d 1075, 1078 [2015], quoting *Cava Constr. Co, Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; *Bleich v Metropolitan Management, LLC*, 132 AD3d 933 [2015]). 1411 has neither shown itself to be free from negligence, nor has it demonstrated that W5 Group was negligent herein (*see Shaughnessy v Huntington Hosp. Ass’n.*, 147 AD3d 994 [2017]; *Mohan v Atlantic Court, LLC*, 134 AD3d 1075), thereby failing to establish its prima facie entitlement to judgment as a matter of law, and warranting the denial of this branch of its motion as being premature (*see Sawicki v GameStop Corp.*, 106 AD3d 979 [2013]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]).

Similarly, common-law or implied indemnification allows one who has been made to pay for another’s wrong to recover from that wrongdoer the damages it paid to the injured party (*see Schottland v Brown Harris Stevens Brooklyn, LLC*, 137 AD3d 997 [2016]; *Bivona v Danna & Assoc., P.C.*, 123 AD3d 956 [2014]). “The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is ‘a separate duty owed the indemnitee by the indemnitor’” (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]; *see Rehberger v Garguilo & Orzechowski, LLP*, 118 AD3d 765 [2014]). In the case at bar, the cross claim against W5 Group adequately alleges the existence of a duty owed by W5 Group to 1411 (*see Raquet v Braun*, 90 NY2d 177 [1997]; *Balkheimer v Spanton*, 103 AD3d 603 [2013]). However, as previously stated, the issue of liability in this matter has yet to be determined. Consequently, the branch of 1411’s motion seeking judgment on the common-law indemnification cause of action against W5 Group is denied as premature.

Defendants, Roc Nation (Seq. 6), moved for summary judgment dismissing plaintiff’s complaint, and all cross claims, as against them. Said defendants demonstrated that they were prospective tenants on the 38th floor of the subject property, who had not yet entered into possession of the leased premises at the time plaintiff’s accident occurred. By stipulation, dated May 31, 2017, plaintiff discontinued his action against Roc Nation, without prejudice. Further, no other party has opposed the instant motion, and, thus, said parties have failed to raise an issue of fact sufficient to deny movant’s entitlement to summary judgment. As such, Roc Nation’s motion is granted, and the complaint and all

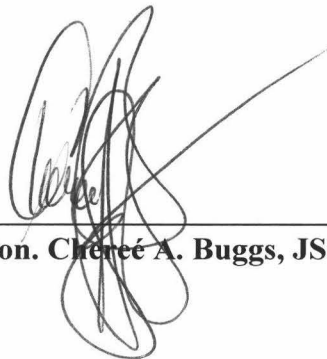
cross claims against them are dismissed.

Defendant, DVP (Seq. 5), moved for summary judgment dismissing plaintiff's complaint, and all cross claims, as against it. Said defendant demonstrated it was engaged in construction work solely on the 6th floor of the subject premises at the time of plaintiff's accident, and did not commence any work on the 38th floor of said premises until September 2013, some two months after plaintiff's accident. No other party has opposed the instant motion. As such, DVP's motion is granted, and the complaint, and all cross claims, against it are dismissed.

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, plaintiff's cross motion (Seq. 9) is denied. The branches of the motions by 1411 (Seq. 9) and W5 Group (Seq. 8) are granted as to dismissal of the claims under Labor Law §§ 200 and 241 (6), and denied with regard to the claims under Labor Law § 240 (1). The branch of the motion by 1411 seeking judgment on its claims for common law and contractual indemnification against W5 Group is denied. The motions by DVP (Seq. 5) and Roc Nation (Seq. 6) are both granted, and the complaint, and all cross claims, as against each of them are dismissed.

Dated: October 11, 2017



Hon. Chereé A. Buggs, JSC

FILED
OCT 18 2017
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QUEENS COUNTY