

Wong v Morgan Stanley & Co., LLC
2018 NY Slip Op 30553(U)
March 19, 2018
Supreme Court, New York County
Docket Number: 152338/13
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
CHARLES WONG and PEGGY SUK WONG;

Plaintiffs,

-against-

Index No. 152338/13

MORGAN STANLEY & CO., LLC, MORGAN
STANLEY & CO., INCORPORATED, SECURITY
SERVICES & TECHNOLOGIES, INC. and
ADT SECURITY SERVICES, INC.,

Defendants.

Motion Sequence Nos. 005 & 007

-----X
MORGAN STANLEY & CO., LLC, MORGAN
STANLEY & CO., INCORPORATED,

Third-Party Plaintiffs,

-against-

Third-Party Index No.
595308/14

ALLAN BRITWAY ELECTRICAL
CONTRACTORS, INC.,

Third-Party Defendant.

-----X
Gerald Lebovits, J.:

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of the instant motions for summary judgment and cross-motion for partial summary judgment.

Papers	NYSCEF Documents Numbered
Notice of Motion in Support of Motion Sequence 005	122
Affirmation in Support of Motion Sequence 005	123 (exhibits 124-141)
Memorandum of Law in Support of Motion Sequence 005	142
Affidavit in Support of Motion Sequence 005	143 (exhibit 144)
Notice of Cross Motion	168
Affirmation in Opposition and in Support of Cross Motion	169 (exhibits 170-185)
Affirmation in Opposition	228 (exhibits 229-233)
Memorandum of Law in Opposition	235
Affirmation in Opposition	235 (exhibits 236-238)
Affidavit	252 (exhibits 253-257)
Memorandum of Law in Reply	268

Notice of Motion in Support of Motion Sequence 007	186
Affirmation in Support of Motion Sequence 007	187 (exhibits 188-203)
Memorandum of Law in Support of Motion Sequence 007	205
Affirmation in Opposition	222 (exhibits 223-227)
Memorandum of in Opposition	234
Reply Affirmation	269

Motion sequence numbers 005 and 007 are consolidated for disposition.

In this action arising out of a construction site accident, third-party defendant Allan Briteway Electrical Contractors, Inc. (Briteway) moves, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law §§ 240 (1), 240 (2), 240 (3), and 241 (6) claims in the main action, all cross-claims against it, and the third-party complaint (motion sequence number 005).

Plaintiffs Charles Wong (Wong or plaintiff) and Peggy Suk Wong cross-move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) against defendants Morgan Stanley & Co., LLC, Morgan Stanley & Co., Inc. (together, Morgan Stanley), Security Services & Technologies, Inc. (SST), and ADT Security Services, Inc. (ADT).

Morgan Stanley also moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiffs' claims under Labor Law §§ 240 (1), 240 (2), 240 (3), and 200, and for common-law negligence; and (2) summary judgment on their third-party claim for contractual indemnification against Briteway and cross-claim for contractual indemnification against defendant Tyco Integrated Security LLC f/k/a ADT, as successor-in-interest to SST (Tyco) (motion sequence number 007).

BACKGROUND

Wong, an electrician employed by Briteway, was allegedly injured on January 2, 2013, at the premises located at 1585 Broadway in Manhattan. Morgan Stanley is the owner of the premises. Morgan Stanley retained Tyco to perform certain security camera upgrades in the building. Tyco purchased SST and ADT, and is the successor-in-interest to these companies. SST entered into a Master Services Agreement with Morgan Stanley in 2007. The obligations of SST under the Master Services Agreement were assumed by ADT and then by Tyco. Tyco hired Briteway as a subcontractor to perform the security camera upgrade in the building.

Wong testified that he was working for Briteway when he was injured (plaintiff tr at 22-25). He had been working as an electrician for Briteway since 1985 (*id.* at 22). Briteway maintained tool shanties on the C2 level and the 24th floor (*id.* at 53). Briteway stored safety harnesses in its tool shanty in the 7M machine room (*id.* at 37, 42-43). David Donohue was the building maintenance foreman (*id.* at 40). Donohue gave Wong his work orders on January 2, 2013 (*id.* at 94-95, 101). Wong was paired to work with his coworker Victor Cheung (*id.* at 90). Wong reported to Donohue on C2, the two took an elevator to the mezzanine floor and proceeded to the area just outside the entryway to the plenum (*id.* at 102-103, 109, 132). Donohue told Wong "[m]ake sure you wear your safety harness when you work in the plenum

area” and “When you’re ready to get the harness it will be in my office on 7M” (*id.* at 141). Donohue said that Wong should use his safety harness when working in the plenum (*id.* at 196-197).

After pointing to what needed to be done in the plenum, Donohue took Wong to the outdoor sidewalk in front of the building’s 48th Street entrance, immediately below the plenum, to show him where the new security camera had to be mounted (*id.* at 136). After that, Wong went down to the building’s C2 level, grabbed his hardhat and his flashlights, and returned to the plenum access area on the mezzanine level (*id.* at 143-145). Wong intended to “scope out” the job – take a closer look at the existing cables to determine what type and how much cable he needed to complete the job, as well as identify the type of cable supports required and where to reroute the new cables (*id.* at 146-149). Wong stated that he did not think it was necessary to put on his safety harness and tie off to the lifeline before entering the plenum because he “was just scoping out the stuff that [he] was looking for, if [he] need[s] them, or material that [he] need[s]. [He] did not actually start to work in the plenum area, so [he] felt satisfied by stepping onto the plank” (*id.* at 151). “That never [came] across [his] mind that [he] should go back and get [his] safety harness, no. [He] was just looking at the material [he] need[s] for the scope of work [he] need[s] to get the job done. That was [his] focus at the time” (*id.* at 159). Wong entered inside the plenum by stepping off an A-frame ladder onto the floor plank closest to the ladder (*id.* at 115, 151, 153). He saw three floor planks positioned side by side extending lengthwise above and across the hinged access panels of the plenum (*id.* at 154). Wong took two steps along the plank and lost his balance and, as he was taking his third step, fell through an access panel onto the sidewalk below (*id.* at 160-162, 166-167). After Wong lost his balance, the next thing he remembered was waking up in the hospital (*id.* at 166). Wong explained that the did not put on his harness because Donohue only told him to do so when working in the plenum (*id.* at 237).

Donohue testified that he gave Wong his assignment to reposition the video cabling in the inside of the plenum as part of the installation of a security surveillance camera on the outside of the plenum (Donohue tr at 16, 59). According to Donohue, the plenum was “an overhand open space that’s not used for occupying” (*id.* at 21). Prior to the date of the accident, Donohue surveyed the plenum and a safety line was run from east to west in the plenum based upon his recommendation (*id.* at 53). Donohue stated that, on January 2, 2013, he pointed to the location in the plenum with his flashlight on a pointer, and then took Wong outside onto the street level, and showed him the location where the cable was and pointed out various things under the plenum (*id.* at 67-68). They discussed that it was a hardhat area and that he needed to wear a safety harness in the plenum, and strap onto the guide cable (*id.* at 82). The harness was a one-piece harness (*id.* at 209-210). The tether was a yellow four-foot expandable cord (*id.* at 209-210). Donohue instructed Wong to wear the tether and harness before he went into the plenum area (*id.* at 210-212).

Brian McCarthy testified that he was the property manager of 1585 Broadway, Morgan Stanley’s headquarters building (McCarthy tr at 9-10, 13-14). An interior fit-out was being performed at the time (*id.* at 46).

According to Tyco’s witness, Morgan Stanley hired Tyco to upgrade the building’s security system (Meenan tr at 14-16, 23-24). Tyco was required to replace and install new

outdoor security cameras known as “PTZ” cameras, for pan-tilt-zoom (*id.* at 27, 66-67, 92-93). Tyco hired Briteway as a subcontractor to perform the installation (*id.* at 69, 71, 98-99). Tyco purchased SST and ADT (Kitchen tr at 11-12). The Master Services Agreement covered the camera installation job (*id.* at 67-68, 89-90).

Plaintiffs commenced this action on March 14, 2013, asserting claims for common-law negligence and for violations of Labor Law §§ 240 (1), 240 (2), 240 (3), and 241 (6).

Morgan Stanley subsequently impleaded Briteway, seeking contractual indemnification, common-law indemnification, contribution, and damages for failure to procure insurance. As relevant here, Morgan Stanley asserted a cross-claim for contractual indemnification against Tyco.

DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

A. Labor Law § 240 (1)

Briteway moves for summary judgment dismissing plaintiffs’ Labor Law § 240 (1) claim, arguing that Wong was the sole proximate cause of his accident. Briteway argues that Wong consciously chose not to wear his safety harness and tie-off to the lifeline in the plenum. As support, Briteway submits an affidavit from their engineering expert, Shawn Z. Rothstein, M.S., P.E., who opines that:

“At the time of the accident, Wong had been furnished with suitable safety devices in the form of a full-body safety harness with a retractable lanyard and an accessible lifeline above him to tie off to; the safety line served as an appropriate and proper tie-off point inside the plenum . . . The safety harness and overhead lifeline gave Wong proper and adequate protection from the risk of falling through an access panel in the plenum down to the sidewalk below”

(Rothstein aff, ¶ 13). Rothstein points out that Donohue instructed Wong three times to use his safety harness before entering the plenum and to tie-off to the overhead line when inside that space (*id.*). Additionally, Rothstein opines that Wong’s excuse for not wearing his safety harness and not being tied off to the safety line is unreasonable. According to Rothstein, scoping out work is “part-and-parcel of, and indivisible from working,” and Donohue had already scoped out the work with Wong with his laser pointer that morning before the accident (*id.*).

Similarly, Morgan Stanley argues that plaintiffs' section 240 (1) claim should be dismissed because Wong was the sole proximate cause of his accident for failing to use his harness and lifeline. Like Briteway, Morgan Stanley points out that Wong was instructed to use his harness and safety line three times before he entered the plenum. In addition, Morgan Stanley contends that Wong's reason for not obtaining his harness – that he was only scoping out the job and was not yet working at the time – defies logic.

Plaintiffs also cross-move for partial summary judgment under Labor Law § 240 (1) against Morgan Stanley, SST, and ADT. Plaintiffs contend that defendants violated section 240 (1) because: (1) Wong fell from an elevated work surface that lacked guardrails and safety railings; (2) defendants failed to provide proper planking in the plenum; and (3) the hatchway opening in the plenum was unguarded. To support their position, plaintiffs submit an affidavit from a construction safety expert, Daniel M. Paine, C.S.E., who states that the plenum floor was not fully planked, in contravention of 12 NYCRR 23-5.1 (e); there were no "safety railings" inside the plenum, in contravention of 12 NYCRR 23-5.1 (j); and the access panel through which Wong fell had not been covered or cordoned off with a railing, in violation of 12 NYCRR 23-1.7 (b) (1) (Paine aff at 5-12).

In opposition to plaintiffs' cross-motion, Tyco argues that Wong was the sole proximate cause of his injuries, in view of the evidence that Wong ignored repeated instructions to wear his safety harness.

Labor Law § 240 (1) provides, in relevant part, as follows:

"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured from harm directly flowing from the application of . . . gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis omitted]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that such violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

"Where a 'plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach'" (*Robinson v E. Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [citation omitted]). In other words, a worker may be found to be the sole proximate cause of an injury "if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*id.*). "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the

immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident” (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *accord Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Although plaintiffs’ expert states that a safety railing was required in the plenum, and that the planks constitute a “scaffold” (Paine aff at 6-12), plaintiffs’ expert opines that Labor Law § 240 (1) was violated based on Industrial Code §§ 23-1.7 (b) (1), 23-5.1 (e), and 23-5.1 (j). But Labor Law § 240 is “a self-executing statute which, containing its own specific safety measures, does not defer to the rule-making authority of the [Industrial Board of Appeals]” (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). Plaintiffs’ reliance on an Occupational Safety and Health Act (OSHA) violation is similarly misplaced, as the statute contains its “own specific safety measures” (*Cruz v Cablevision Sys. Corp.*, 120 AD3d 744, 746 [2d Dept 2014]).

Here, there are issues of fact about whether Wong was provided with adequate protection, but failed to use it “for no good reason” (*Gallagher*, 14 NY3d at 88).

First, the record presents issues of fact about whether Wong was provided with adequate safety devices (*see Giordano v Tishman Constr. Corp.*, 152 AD3d 470, 471 [1st Dept 2017] finding [issues of fact about whether plaintiff was provided with adequate anchoring point to tie off his harness]; *cf. Miglionico v Bovis Lend Lease Inc.*, 47 AD3d 561, 565 [1st Dept 2008]). Wong testified that Donohue pointed to the safety line and told him that “[t]hat’s a safety tie-off that you must use a safety harness while you’re working in the plenum area” (plaintiff tr at 126-127). Wong received that instruction three times (*id.* at 196). Donohue said “Make sure you wear your safety harness when you work in the plenum area” and “When you’re ready to get the harness it will be in my office in 7M” (*id.* at 141). Donohue similarly testified that he instructed Wong to attach the tether to the line and wear the harness before he went into the plenum (*id.* at 210-212). Even though plaintiffs argue that Wong could not reach the safety cable from where he stood, there are issues of fact about whether Wong could have tied off to another anchorage point. Wong testified that he could not reach the safety line from the plank that he was standing on (plaintiff tr at 172). Donohue stated that a worker could not reach the safety cable from the entrance of the plenum; the OSHA planks would have to be repositioned in order to reach the safety line (Donohue tr at 85). Significantly, Donohue also testified that “there are other structures outside that he could fasten onto first and then release with his partner as he’s tying onto the cable. There’s a procedure that you follow” (*id.* at 85-86). According to Donohue, if Wong was wearing the harness and connected it to the tether, he would not have fallen all the way to the ground (*id.* at 213-214).

Second, there are issues of fact about whether Wong, based on his training, prior practice, and common sense, knew or should have known that he was expected to use his harness and lifeline in the plenum (*see Robinson*, 6 NY3d at 553-554). Wong explained that “[he] was just scoping out the stuff that [he] was looking for, if [he] need[s] them, or material that [he] need[s]. [He] did not actually start to work in the plenum area, so [he] felt satisfied by stepping onto the plank” (*id.* at 151). “That never [came to] [his] mind that [he] should go back and get [his] safety harness, no. [He] was just looking at the material [he] need[s] for the scope of work [he] need[s]

to get [his] job done. That was [his] focus at the time” (*id.* at 159). However, Wong further testified that there was nothing preventing him going and getting the harness and the stand light (*id.* at 162-164).

Accordingly, the branches of Briteway’s motion, plaintiffs’ cross-motion, and Morgan Stanley’s motion, with respect to plaintiffs’ Labor Law § 240 (1) claim, are denied.

B. Labor Law §§ 240 (2) and (3)

Briteway argues that Labor Law §§ 240 (2) and (3) are inapplicable, because the wood planks in the plenum were not intended or designed to function as a scaffold (Rothstein aff. ¶ 17). In addition, Briteway contends that, since the plenum had an integrated fall protection system consisting of a lifeline and safety harness with a lanyard, these sections were not violated. According to Morgan Stanley, these sections were not violated because Wong was the sole proximate cause of his accident.

Labor Law § 240 (2) provides as follows:

“Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.”

In addition, Labor Law § 240 (3) states that “[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use.”

“[S]ubdivision (1) of Labor Law § 240 states when and by whom devices must be provided and then details in subdivisions (2) and (3) more specific requirements when working at an elevated height” (*Bryant v Gen. Elec. Co.*, 221 AD2d 687, 689 [3d Dept 1995]).

Plaintiffs did not specifically address their Labor Law §§ 240 (2) and (3) claims in opposition to defendants’ motions. Accordingly, plaintiffs have abandoned their Labor Law §§ 240 (2) and (3) claims (*see Tornabene v City of New York*, 40 Misc 3d 992, 1009, n 1 [Sup Ct, Kings County 2013]). In any event, these statutes do not apply because Wong was not working on a scaffold at the time of his accident (*see id.*). Therefore, plaintiffs’ section 240 (2) and (3) claims are dismissed.

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides as follows:

"All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

"6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation, and demolition work. The statute requires that all areas in which construction, excavation, or demolition work is being performed be made reasonably safe (*see Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct" rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross*, 81 NY2d at 505). In addition, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). Unlike Labor Law § 240 (1), the plaintiff's comparative negligence is a valid defense to liability pursuant to Labor Law § 241 (6) (*Once v Service Ctr. of N.Y.*, 96 AD3d 483, 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]).

Briteway and Morgan Stanley move for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim, arguing that the regulations relied on by plaintiff are inapplicable or were not violated in this case.

In their cross-motion, plaintiffs also seek partial summary judgment under Labor Law § 241 (6). However, in reply, plaintiffs withdrew the branch of their motion seeking summary judgment with respect to Labor Law § 241 (6) (Sassower reply affirmation, ¶ 29, n 3).

Plaintiffs' verified bill of particulars alleges violations of 12 NYCRR 23-1.7 (b) and 12 NYCRR 23-1.16 (verified bill of particulars, ¶ 12). In a supplemental verified bill of particulars, plaintiffs allege violations of numerous OSHA regulations and Building Code regulations (supplemental verified bill of particulars, ¶ 22). A second supplemental verified bill of

particulars alleges violations of 12 NYCRR 23-5.1 (b) and (c) (second supplemental bill of particulars, ¶ 1). In opposition to Briteway's and Morgan Stanley's motions, plaintiffs only rely on 12 NYCRR 23-1.7 (b) (1) and 23-5.1 (e) and (j) (Lustig affirmation in opposition and in support of plaintiffs' cross motion at 33-34; Sassower affirmation in opposition at 10-13). Therefore, the court shall only consider these Industrial Code sections¹ (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant [] moves [for summary judgment dismissing a plaintiff's Labor Law § 241 (6) claim], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

12 NYCRR 23-1.7 (b) (1)

Section 23-1.7 (b) (1) states, in relevant part, as follows:

"(b) Falling hazards.

"(1) Hazardous openings.

"(i) Every 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).

"(ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.

"(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

"(a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or

"(b) An approved life net installed not more than five feet beneath the opening; or

"(c) *An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage*"

¹ In any case, OSHA regulations and provisions of the Building Code cannot serve as predicates for a Labor Law § 241 (6) claim (*see Miller v Savarino Constr. Corp.*, 103 AD3d 1137, 1140 [4th Dept 2013]; *Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept 2006], *lv dismissed* 7 NY3d 864 [2006]).

(12 NYCRR 23-1.7 [b] [1] [emphasis added]).

Section 23-1.7 (b) (1) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]). The First Department has held that “[t]he safety measures required by 12 NYCRR 23-1.7 (b) (1) ‘bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit’” (*Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007], quoting *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Here, it is undisputed that Wong fell through the access panel to the sidewalk. In light of the conflicting evidence about whether there was an appropriate anchorage point for Wong’s harness, there are issues of fact about whether a violation of this section was a proximate cause of Wong’s accident (*see Cordeiro*, 87 AD3d at 906 [finding issues of fact as to violation of section 23-1.7 (b) (1) where plaintiff fell through hatchway doors]; *Luckern v Lyonsdale Energy Ltd. Partnership*, 281 AD2d 884, 887 [4th Dept 2001] [finding that defendants “failed to meet their initial burden of establishing that a safety belt would not have prevented plaintiff from being drawn into the rupture disc hole after the implosion”]). “[I]t is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]).

12 NYCRR 23-5.1

Subpart 23-5 of the Industrial Code governs scaffolding. In pertinent part, section 23-5.1, entitled “General provisions for all scaffolds,” provides as follows:

“(e) Scaffold planking.

“(1) Except on needle beam and pole scaffolds, scaffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. *Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place*”

“(j) Safety railings.

“(1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule).

“Exceptions: Any scaffold platform with an elevation of not more than seven feet; the platforms of needle beam scaffolds; floats and rivet heater platforms in use by structural ironworkers; ladder jack scaffold platforms; and trestle and extension trestle ladder scaffold platforms”

(12 NYCRR 23-5.1 [e] [1], [j] [1] [emphasis supplied]).

Subsection 23-5.1 (e) (1) has been held to be a proper predicate for a worker's section 241 (6) claim (*Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]). In addition, the First Department has determined that subsection 23-5.1 (j) (1) may support a plaintiff's Labor Law § 241 (6) claim (*see Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002] [finding issues of fact "as to whether the scaffold from which plaintiff fell was at least seven feet high such as would support a violation of Industrial Code" of section 23-1.7 (j) (1)]).

But sections 23-5.1 (e) and (j) are inapplicable because Wong was not working on a scaffold at the time of his accident (*see Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013] ["section 23-5.1 (c) and (d) are inapplicable because plaintiff was not working on a scaffold at the time of his accident"]; *Pilato v Nigel Enters., Inc.*, 48 AD3d 1133, 1134-1135 [4th Dept 2008] [finding section 23-5.1 was inapplicable where plaintiff lost his balance while straddled across ceiling joists and fell]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002] [finding various provisions of subpart 23-5 were inapplicable where the plaintiff was not using a scaffold]).

In view of the above, plaintiffs have a valid Labor Law § 241 (6) claim only to the extent that it is predicated upon a violation of 12 NYCRR 23-1.7 (b) (1). Thus, the branches of Briteway's and Morgan Stanley's motions seeking dismissal of plaintiffs' section 241 (6) claim are granted, except as to this regulation.

D. Labor Law § 200 and Common-Law Negligence

Morgan Stanley contends that plaintiffs' Labor Law § 200 and common-law negligence claims should be dismissed because Wong only received instructions from his supervisor. In response, plaintiffs argue that liability against Morgan Stanley is based on the dangerous condition of the premises, and that Morgan Stanley has failed to make a prima facie showing of entitlement to summary judgment.

Labor Law § 200 (1) provides as follows:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Labor Law § 200 is a codification of the common-law duty imposed upon landowners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "Liability pursuant to Labor Law § 200 may fall into two broad categories: workers 'injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed'" (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093 [2d Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

As for the first category involving dangerous or defective premises conditions, “a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]).

With respect to the second category of cases where the worker is injured as a result of the manner in which the work is performed, including tools and equipment, “the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Prevost v One City Block LLC*, 155 AD3d 531, 533-534 [1st Dept 2017], quoting *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

To the extent that Wong’s accident arose from the means and methods of the work, Morgan Stanley has established that it did not have supervisory control over the work. Wong testified that he only received instructions from Donohue (plaintiff tr at 65). In addition, Donohue testified that he determined what safety devices and precautions were necessary for Wong to perform his work in the plenum (Donohue tr at 222). Plaintiffs have failed to raise an issue of fact as to the means and methods standard.

As argued by plaintiffs, Wong’s accident was also allegedly caused by a dangerous premises condition (the unlocked access door in the plenum through which he fell) (*see Bonura v KWK Assoc.*, 2 AD3d 207, 207 [1st Dept 2003] [finding issues of material fact as to whether building owners had actual or constructive notice that escape hatch cover on elevator cab, which gave way under mechanic, posed a hazard, and whether owners’ employees caused hazardous condition]). Morgan Stanley failed to demonstrate that it did not create or have notice of the condition — Morgan Stanley only argues that it did not exercise supervisory control over the work. Therefore, the branch of Morgan Stanley’s motion seeking dismissal of plaintiffs’ Labor Law § 200 and common-law negligence claims is denied.

E. Morgan Stanley’s Contractual Indemnification Claims Against Tyco

Morgan Stanley moves for contractual indemnification from Tyco, based upon the contractual indemnification provision in the Master Services Agreement, which provides as follows:

“CONSULTANT shall be solely responsible for the quality of its work and for all third party claims alleging injuries to persons, including death, and all physical damage to property occurring on account of or in connection with the performance of CONSULTANT’s duties hereunder. CONSULTANT shall indemnify, defend and hold COMPANY and its officers, shareholders, directors, partners, employees or agents, harmless against all liabilities, losses, damages, claims and actions, costs or expenses (including, but not limited to, attorneys’ fees, or liability for the payment of worker’s compensation and disability benefits), upon any and all claims on account of such injuries to, or death of persons, or physical damage to property, including recoverable collateral damages flowing or arising therefrom, and from all

costs and expenses in suits which may be brought against COMPANY on account of any such injuries to or death of persons or physical damage to property. CONSULTANT shall be solely responsible for any loss or expenses incurred by COMPANY as a result of act or omission on the part of personnel of CONSULTANT, including, but not limited to, any liability or damage resulting from theft of material or services by any such personnel”

(Castellitto affirmation in support, exhibit M, ¶ 15 [c] [emphasis added]).

In opposition, Tyco argues that: (1) the indemnification provision is unenforceable under General Obligations Law § 5-322.1; and (2) Tyco was not negligent or otherwise at fault in the happening of the accident.

“The right to contractual indemnification depends upon the specific language of the contract” (*Roldan v New York Univ.*, 81 AD3d 625, 628 [2d Dept 2011]). It is well established that “[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

General Obligations Law § 5-322.1 (1) provides that the following:

“A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable”

Thus, an indemnification agreement is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). But an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210-211 [2008]) [holding indemnification “to the fullest extent permitted by law” contemplated partial indemnification and was permissible under General Obligations Law § 5-322.1]; *accord Farrugia v I440 Broadway Assoc.*, 157 AD3d 565, 569 [1st Dept 2018]). Even if the indemnification clause does not contain the savings language “to the fullest extent permitted by law,” it may still be enforced in instances where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v. Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]).

Here, the indemnification provision does not contain the recognized savings language “to the extent permitted by law” or similar language limiting indemnification to the extent that Morgan Stanley was not negligent or to Tyco’s negligence. However, the indemnification provision may be enforceable if a jury finds that Morgan Stanley is free of negligence. Moreover, even if Tyco was not negligent, Tyco may be required to indemnify Morgan Stanley for “claims alleging injuries to persons . . . occurring on account of or in connection with the performance of [Tyco’s] duties hereunder” (Castellitto affirmation in support, exhibit M). It is undisputed that Tyco hired Briteway to install security cameras on the premises, and that Wong was injured while working for Briteway. Therefore, the branch of Morgan Stanley’s motion seeking contractual indemnification from Tyco is denied.

F. Morgan Stanley’s Contractual Indemnification Claim Against Briteway

Briteway moves for summary judgment dismissing Morgan Stanley’s contractual indemnification claims asserted against it. Briteway argues that Morgan Stanley’s liability is direct, not vicarious. Therefore, according to Briteway, Morgan Stanley can never pass on its negligence to Briteway. But, as noted above, the court has found issues of fact about whether Labor Law § 240 (1) was violated and whether Wong was the sole proximate cause of his accident. Thus, a jury may find that Morgan Stanley’s liability is vicarious.² Therefore, Briteway is not entitled to dismissal of Morgan Stanley’s contractual indemnification claim as against it.

For its part, Morgan Stanley seeks summary judgment on its contractual indemnification claim against Briteway.

The general terms and conditions in the subcontract between Tyco and Briteway contain the following indemnification provision:

“3. Indemnification. *Subcontractor agrees to indemnify, defend, protect and save Tyco, Tyco’s Customer, and anyone else required by the Prime Contract and each of their respective parents, subsidiaries, affiliates, agents, employees, servants, representatives, invitees, directors and officers the ‘Indemnitees’)* harmless *from any claims, losses, damages, suits, actions and proceedings, as well as all attorneys’ fees and costs which may be asserted against the Indemnitees arising out of, or occurring in connection with (1) the performance or nonperformance of the Subcontractor’s obligations hereunder; or (2) any act, omission, fault or negligence, whether active or passive, of Subcontractor whether on the work site or proceeding therefrom to/from the work site; or (3) any assertions or claims under Workers Compensation or similar acts made by persons furnished by Subcontractor*

² In addition, as argued by Morgan Stanley, even if plaintiffs’ claims were dismissed, Morgan Stanley would still be entitled to recover its attorneys’ fees and costs incurred in the defense of plaintiffs’ claims from Briteway, provided that the provision was triggered (*see Burns v Lecesso Constr. Servs. LLC*, 130 AD3d 1429, 1435 [4th Dept 2015], *rearg denied* 132 AD3d 1328 [4th Dept 2015] [finding subcontractor’s “claim for attorney’s fees and costs pursuant to its indemnification agreement with third-party defendant was not rendered moot by the dismissal of the complaint against it”]).

or of Subcontractor’s sub-subcontractors; or (4) any failure of Subcontractor or supplier of Subcontractor to perform all Work required within the scope of this Agreement in strict accordance with the provisions of this Agreement. *Except as otherwise provided by law, such rights to indemnification shall exist regardless of whether any act, omission, misconduct, negligence or default (other than gross negligence or willful misconduct) on the part of Tyco or Tyco’s Customer or any of their officers, employees, or agents contributed or may be alleged to have contributed to the personal injury, loss, damage, death or property damage in any way thereto”*

(Castellitto affirmation in support, exhibit N, Attachment 1- General Terms and Conditions, ¶ 3 [emphasis supplied]).

Morgan Stanley argues that Wong’s accident necessarily arises out of the performance of Briteway’s work because Wong was injured in the course of his employment with Briteway.

In response, Briteway contends that New York is not the proper forum for Morgan Stanley to prosecute its contractual indemnification claim. Specifically, Briteway asserts that Broward County, Florida is the sole venue, and Florida law is the sole governing law, for resolution of Morgan Stanley’s contractual indemnification claim, pursuant to paragraph 10 of Briteway’s subcontract. Thus, Briteway argues that this court lacks subject matter jurisdiction to entertain Morgan Stanley’s contractual indemnification, let alone grant summary judgment on it. In addition, Briteway argues that Morgan Stanley has failed to demonstrate its freedom from negligence.

Paragraph 10 of the general terms and conditions of Briteway’s subcontract states that:

“Governing Law. For all Work performed on private property, any controversies or legal issues arising out of this Agreement and any action involving the enforcement or Interpretation of any rights hereunder shall be submitted to the jurisdiction of the State Courts of the Seventeenth Judicial Circuit of Broward County, Florida, the venue situs, and shall be governed by the laws of the State of Florida. For all Work performed on public property, the governing law provisions of the Prime Contract shall prevail”

(*id.*, exhibit N, Attachment 1- General Terms and Conditions, ¶ 10).

Contrary to Briteway’s contention, the forum selection clause does not affect this court’s subject matter jurisdiction to hear Morgan Stanley’s contractual indemnification claim. “It is axiomatic that a court cannot be divested of its subject matter jurisdiction by a contract” (*Lischinskaya v Carnival Corp.*, 56 AD3d 116, 122 [2d Dept 2008], *lv denied* 12 NY3d 716 [2009]). “Thus, while the forum selection clause at issue may be enforceable as a term of the contract between the parties, it does not affect the jurisdiction of the Supreme Court” (*id.*).

Moreover, as noted by the First Department, “since forum clause and lack of standing defenses do not implicate subject matter jurisdiction, they are subject to waiver and

abandonment” (*CDR Creances S.A.S. v. Cohen*, 77 AD3d 489, 490 [1st Dept 2010]). There, the Court held that a forum selection clause defense was “waived by defendants’ general appearance and participation in this litigation over a period of several years, failure to assert the defenses in their original answers, and failure to seek amendment as of right” (*id.* at 490). Here, Briteway did not assert a forum selection clause defense in its answer to the third-party complaint, and participated in this action for years without asserting this as a defense. Briteway also sought summary judgment in its favor on this claim in its own motion. Thus, Briteway waived the forum selection clause defense.

“Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction” (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]). Given that Briteway’s subcontract indicates that Tyco is a Florida limited liability company (Castellitto affirmation in support, exhibit N), the court finds that the choice-of-law clause should be enforced (*see Astoria Fed. Mtge. Corp. v Pellicane*, 78 AD3d 622, 623 [2d Dept 2010]; *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 732, 734 [2d Dept 2007]). The court must, therefore, determine whether Morgan Stanley is entitled to contractual indemnification under Florida law.

Florida courts have held that summary judgment on a contractual indemnification claim is premature where liability has not been established (*see Dade County School Bd. v Radio Station WQBA*, 731 So 2d 638, 644 [Fla 1999] [finding that summary judgment was premature on contractual indemnification prior to determination of liability in personal injury action]; *Rea v Barton Protective Servs., Inc.*, 660 So 2d 772, 773–774 [Fla 4th DCA 1995] [holding that summary judgment was entered prematurely on a cross claim for contractual indemnification when liability had not yet been determined]; *Linpro Florida Inc. v Almandinger*, 603 So 2d 666, 667 [Fla 4th DCA 1992] [reversing dismissal of defendant’s third-party contractual indemnification claim when the main claim was not yet resolved]). As noted above, the court has found issues of fact as to plaintiffs’ Labor Law §§ 240 (1), 241 (6), and 200 claims and common-law negligence claims against Morgan Stanley. In the event that the jury finds Morgan Stanley vicariously liable under Labor Law §§ 240 (1) or 241 (6) and not actively negligent, Morgan Stanley would be entitled to contractual indemnification from Briteway under Florida law (*see Rea*, 600 So 2d at 773-774).³ Accordingly, the branch of Morgan Stanley’s motion seeking contractual indemnification from Briteway is denied.

G. Briteway’s Request for Dismissal of Tyco’s Contractual Indemnification Claim

Although Briteway seeks summary judgment on Tyco’s contractual indemnification, Tyco asserts that it did not assert claims for contractual indemnification against Briteway in New York; rather, Tyco brought a claim to enforce its subcontract in Florida (Adams affirmation in

³ Morgan Stanley’s claim for contractual indemnification against Briteway is not unenforceable under Florida Statutes § 725.06, since Morgan Stanley is being sued under a theory of vicarious liability and not solely for its own negligence (*see Linpro Fla. Inc.*, 603 So 2d at 667 n 1 [finding indemnification provision was unenforceable under section 725.06 to the extent that it sought indemnification for the indemnitee’s own negligence, but was enforceable to recover for the negligence of another])

opposition at 2, 5). Since there is no pending claim in this action, Briteway’s request for dismissal of this claim is denied.

H. Common-Law Indemnification and Contribution Claims Against Briteway

Briteway argues that the common-law indemnification and contribution claims against it should be dismissed, because Wong did not suffer a “grave injury.” Tyco argues, in opposition, that in the event that plaintiffs’ case survives summary judgment, then Briteway owes common-law indemnification and contribution to Tyco. However, at the same time, Tyco points out that it did not sue Briteway for common-law indemnification and contribution in New York (Adams . affirmation in opposition at 5).

Workers’ Compensation Law § 11 defines a “grave injury” as “one or more of the following”:

- “death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

“The categories of grave injuries listed in section 11, providing the sole bases for a third-party action, “are deliberately both *narrowly and completely described*”; the list, both ‘exhaustive’ and ‘not illustrative’” (*Fleming v Graham*, 10 NY3d 296, 300 [2008] [citation omitted]).

Plaintiffs’ verified bill of particulars alleges, among other things, injuries to the cervical and thoracic spine (verified bill of particulars, ¶ 17; supplemental verified bill of particulars, ¶ 17). Such injuries do not constitute a “grave injury” within the meaning of Workers’ Compensation Law § 11 (*see Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004] [neck and back injury]). There is no issue of fact as to whether Wong suffered a “grave injury.” Therefore, the common-law indemnification and contribution claims against Briteway must be dismissed.

I. Failure to Procure Insurance Claims Against Briteway

Briteway moves for summary judgment dismissing the breach of contract claims against it.

The insurance procurement provision in Briteway’s subcontract provides as follows:

“5.1. Subcontractor shall purchase and maintain for the duration of the Agreement at Subcontractor’s own expense all necessary insurance against claims for injuries to persons or damage to property arising from or in connection with the Work. Such coverage shall meet or exceed the following:

"5.1.3. Comprehensive General Liability (including Products, Completed Operations and Contractual Liability coverage) insurance providing coverage for a combined single limit of \$1,000,000 for each occurrence and \$4,000,000 in the aggregate.

"5.1.4. Subcontractor shall provide Tyco with written proof of such coverage prior to commencing the Work and Tyco shall be granted status as an additional insured with respect to the General Liability and Automobile policies"

(Zegarelli affirmation in support, exhibit N at AB-000268).

Briteway asserts that it purchased the required insurance, and submits a primary policy with a per occurrence limit of \$2 million and an aggregate limit of \$4 million, and an excess policy with a per occurrence limit of \$10 million (*id.*, exhibit O at 1, 3; exhibit P at 1-2). No party has opposed this part of Briteway's motion. Accordingly, the breach of contract claims against Briteway are dismissed.

Accordingly, it is

ORDERED that the motion (sequence number 005) of third-party defendant Allan Briteway Electrical Contractors, Inc. for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law §§ 240 (2) and (3) claims, plaintiffs' Labor Law § 241 (6) claim except as to 12 NYCRR 23-1.7 (b) (1), the common-law indemnification and contribution claims against it, and the breach of contract claims against it, and the motion is otherwise denied; and it is further

ORDERED that the cross motion of plaintiffs Charles Wong and Peggy Suk Wong for partial summary judgment under Labor Law § 240 (1) and Labor Law § 241 (6) claim is denied; and it is further

ORDERED that the motion (sequence number 007) of defendants/third-party plaintiffs Morgan Stanley & Co., LLC and Morgan Stanley & Co., Inc. for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law §§ 240 (2) and (3) claims, and plaintiffs' Labor Law § 241 (6) claim except as to 12 NYCRR 23-1.7 (b) (1), and the motion is otherwise denied.

Dated: March 19, 2018



J.S.C.

HON. GERALD LEBOVITS
J.S.C.