SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JOHN MELVIN,

Plaintiff,

-against-

CNY CONSTRUCTION MANAGEMENT, INC., ALLIED 345 RETAIL, LLC, ALLIED MD CONSTRUCTION, LLC, MUSS BROOKLYN DEVELOPMENT CO., L.P. and HILL COUNTRY BROOKLYN, LLC,

Defendants.

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CNY CONSTRUCTION MANAGEMENT, INC.,

Third-Party Plaintiff,

-against-

ALBA CARTING & DEMOLITION, INC.,

Third-Party Defendant.

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Index No.: 158163/2013

DECISION/ORDER
Mot. Seq. 003, 004, 006

KELLY O'NEILL LEVY, J.:

Motion sequence numbers 003, 004 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a demolition worker on July 8, 2013, when a terra cotta wall collapsed on him while he was performing demolition work at a construction site located at 345 Adams Street, Brooklyn, New York (the Premises).

In motion sequence number 003, plaintiff John Melvin moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants Allied 345 Retail, LLC (Allied), Allied MD Construction, LLC (Allied MD),

Muss Brooklyn Development Co., L.P. (Muss) (collectively, the Allied defendants), CNY Construction Management, Inc. (CNY) and Hill Country Brooklyn, LLC (Hill).

The Allied defendants cross-move, pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint and all cross claims against them; (2) leave to amend their answer to assert cross claims for contractual indemnification against Hill and third-party defendant Alba Carting & Demolition, Inc. (Alba), and, upon the granting of said leave to amend, granting Allied and Muss summary judgment in their favor on said cross claims; and (3) summary judgment in their favor on their cross claims for common-law and contractual indemnification as against CNY.

CNY cross-moves (CNY Cross Motion 1), pursuant to CPLR 3212, for summary judgment dismissing the Allied defendants' cross claims against it for common-law and contractual indemnification.

In motion sequence number 004, Alba moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims against it.

CNY cross-moves (CNY Cross Motion 2), pursuant to CPLR 3212, for summary judgment in its favor on its third-party claim for contractual indemnification as against Alba, as well as dismissal of any and all cross claims and counterclaims asserted against it by Alba.

In motion sequence number 006, Hill moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, as well as for summary judgment in its favor on its cross claims for common-law and contractual indemnification and breach of contract for failure to procure insurance as against CNY and Alba.

CNY cross-moves (CNY Cross Motion 3), pursuant to CPLR 3212, for summary

judgment dismissing Hill's cross claims against it for common-law and contractual indemnification.

BACKGROUND

On the day of the accident, pursuant to a deed between Allied 345 and nonparty New York City Economic Development Corporation, defendant Allied 345 owned the Premises where the accident occurred. Hill, who leased the Premises from Allied 345, hired CNY to serve as the general contractor on a project at the Premises, which entailed the demolition and renovation of the Premises for a Hill Country BBQ restaurant (the Project). CNY contracted with Alba, plaintiff's employer, to perform the demolition work for the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he accompanied one of his friends, Paul Horan, to the Premises, in order to assist Alba on the Project. Thomas Kirwan, Alba's supervisor, instructed the two men to knock down two walls of the building. Kirwan provided them with a sledgehammer and a crowbar to perform said work. Plaintiff asserted that Kirwan was the only person to give him "instructions or directions" (plaintiff's tr at 141).

Thereafter, plaintiff and Horan began to perform demolition work on a tile shale wall (the First Wall), which was located in front of an exterior wall. Kirwan instructed the men to start at the bottom of the First Wall and work up, knocking down only the portions of the wall that they could reach from ground level. Plaintiff noticed that, as the men demolished the First Wall, a "shale kind of tile material and the red brick and concrete that was in between them in the middle" fell off of it (*id.* at 117).

After spending between one-half hour and an hour demolishing the First Wall, Kirwan

instructed plaintiff to move to a second wall (the Second Wall) and begin demolishing it with a sledgehammer. Plaintiff explained that, after taking a few swings at the Second Wall with his sledgehammer, the Second Wall collapsed on him. Plaintiff testified that he could not remember the accident. However, he did remember that, at the time of the accident, he was wearing a hard hat and boots. Other than demolishing the two walls, plaintiff's only work on the Project consisted of sweeping up rubble and putting it into bins.

After getting out of the hospital, plaintiff returned to his home country of Ireland, and now attends college classes and participates in some sports.

Plaintiff's Bill of Particulars

In his bill of particulars, plaintiff claims that he suffered, among other things, "[c]losed head trauma with intracranial hemorrhage, mild traumatic brain injury and postconcussion syndrome . . . hearing loss . . . [l]eft knee arthropathy . . .[s]ubdural hematoma layering along the length of the falz celibri and along the left cerebellar tentorium . . . [s]evere headaches . . . [and] [r]elative weakness in the neuropsychological function for simultaneous processing" (plaintiff's notice of motion, exhibit G, bill of particulars).

Deposition Testimony of Paul Horan (Plaintiff's Alba Coworker)

Horan testified that, on the day of the accident, Kirwan instructed him and plaintiff to begin knocking down a wall, which was located opposite of one of the building's entrances. Kirwan told the men to use a sledgehammer, and then he demonstrated how the work was to be performed by hitting the wall three times with the sledgehammer.

Horan testified that, after the collapse of the First Wall, he and plaintiff continued performing demolition work on the Second Wall for about an hour, at which time no one told

them to stop working. Horan further testified that, later, after the men returned from a 20-minute coffee break, wherein they had exited the Premises, Kirwan

> "instructed [him] to start chipping away at crown molding, which is on another wall . . . about eight to ten feet away from where [he] was originally working and instructed [plaintiff] to stay where we were working originally and pick up the rest of the rubble that was left from the fallen pillar and what we had knocked off with the sledgehammers"

(id. at 25-26). Thereafter, plaintiff began picking up the rubble with a shovel and putting it into bags. Horan maintained that the accident area was not cordoned off after the collapse of the First Wall.

Deposition Testimony of Andrew Gaspar (CNY's Superintendent)

Gaspar testified that he was CNY's superintendent for the Project on the day of the accident. As superintendent, Gaspar was in charge of safety at the site, which entailed holding weekly safety meetings, posting safety warnings and making sure that the men wore hard hats on the job. Gaspar had the authority to stop work in the event that he observed an unsafe practice, and he also prepared various daily reports.

Gaspar testified that Alba was the demolition subcontractor on the Project. Kirwan, Alba's foreman, interacted with Gaspar on a daily basis. When he first arrived at the Premises each day, Gaspar reviewed the construction drawings and discussed them with Kirwan. When asked how Alba planned to demolish the walls at the Premises, Gaspar explained that Alba used sky jacks to "take the wall[s] down from top down" (Gaspar tr at 28). Gaspar claimed that he never instructed Alba's workers to demolish the walls from the ground up. In addition, Gaspar did not speak with any of the Alba workers, and he did not perform any demolition work.

Gaspar testified that following the collapse of the First Wall, he called his supervisor and

told him that he was closing off that half of the job site and that demolition work would continue on the other half. Thereafter, Gaspar stopped the job and told Kirwan to "get everybody out of that section, caution tape the area off" and go work on the other side of the site (*id.* at 36). Gaspar also told Kirwan that it was unsafe for the Alba workers to hit the walls while standing at ground level. At this time, Kirwan told him that he had been unaware that his men where using said method to demolish the walls. Gaspar noted that he did not investigate the cause of the First Wall, because he "couldn't get near it" (*id.* at 37).

Gaspar did not observe the accident, though he was only 25 feet away at the time. After hearing of the accident, he rushed over to where plaintiff was located and observed 12" by 12" terra cotta blocks laying on and around him. The blocks weighed only a few pounds each. Gaspar did not know why plaintiff was still present in the accident area at the time of the accident.

Gaspar also testified that prior to getting work on the Project, CNY submitted a proposal, dated April 16, 2013, to Hill. Hill then issued a letter of intent, dated May 30, 2013, which accepted CNY's proposal (the Letter of Intent). The Letter of Intent stated that it was only intended to serve as a place-holder for an eventual AIA contract between the parties. Gaspar also testified that CNY procured and provided to Hill a certificate of insurance, dated May 30, 2013, which named Hill as an additional insured on CNY's commercial general liability policy.

Gaspar further testified that he never had any interactions with Hill during the course of the subject demolition work, and that he had no recollection of anyone from Hill ever being present at the Premises. In addition, Hill did not supervise or direct any of the work on the Project.

Deposition Testimony of Michael Borrico (President of CNY)

Michael Borrico testified that he was CNY's president on the day of the accident. He testified that after CNY contracted with Hill, it entered into a contract with Alba, whereby Alba would perform the demolition work on the Project. When asked, "[a]ssuming the work at this project began prior to contract date of August 12, 2013, would that work [have been] performed pursuant to the terms enumerated in the contract?" Borrico replied, "Yes" (Borrico tr at 33).

Deposition Testimony of William Lukashok (Hill's Vice-President of Real Estate Development and Finance)

William Lukashok testified that he was Hill's vice-president of real estate development and finance on the day of the accident, and that his duties included looking for new sites to develop into restaurants. He testified that Hill entered into a lease for the Premises and retained CNY to serve as the general contractor for the Project. He maintained that Hill played no role in supervising or directing the work on the Project, and that it did not provide any equipment for the same.

Deposition Testimony of Donald MacVicar (Alba's Co-Owner and Project Manager)

Donald MacVicar testified that he was Alba's co-owner and project manager on the day of the accident, and that Alba's work on the Project "wasn't straightforward run of the mill demolition . . . there was some tricky demolition involved" (MacVicor tr at 27). He explained that Alba's contractual work for CNY included demolishing the interior terra cotta arches around the interior columns of the building. At the time that the price of Alba's work was being negotiated, there was a discussion regarding CNY's need to take measurements from within the exterior walls for the flooring, and the fact that small holes needed to be made in these walls in order to accomplish this task. It was also discussed that temporary shoring was needed in the

event that the terra cotta columns were compromised by the holes. MacVicar testified that Gaspar directed Alba to make the probes in the two terra cotta walls prior to their collapse. It was his understanding that Gaspar did not discuss the need for shoring with Kirwan prior to the start of this work.

MacVicar further testified that on the day of the accident, he received a call from Kirwan informing him that a wall had collapsed at the Premises and injured an Alba worker. MacVicar immediately traveled to the job site and spoke with Kirwan about what had happened. Kirwan told him that Gaspar had instructed Kirwan to make probes into some terra cotta walls, so that some measurements could be taken. Kirwan then instructed a couple of Alba workers to create the probes in the walls using sledgehammers. After Kirwan instructed the workers to make the probes, the workers went too far, making the holes too big. This caused the First Wall, which was now undermined, to collapse onto the floor.

MacVicar testified that, after the First Wall collapsed, Gaspar stopped the job immediately and instructed Kirwan to cordon off the area and have the Alba workers resume their work on the other side of the job site. Specifically, MacVicar testified that, when he arrived at the accident site shortly after the accident, he observed that "one half of the work space had been cordoned off by caution tape and there [were] two piles of terra cotta rubble on the floor (*id.* at 37). When asked whether the caution tape encompassed both the area of the first and second collapse, he replied, "Yes, it was an entire bay that had been cautioned off" (*id.* at 97-98). He also asserted that he was told by both Gaspar and Kirwan that, after the first collapse, the area was "cautioned off . . . with yellow caution tape and garbage cans . . . to protect the workers in case the other column or columns collapsed" (*id.* at 51).

MacVicar also testified that Kirwan told him that, at the time of the accident, plaintiff "was broom sweeping in the vicinity or within [the accident area] when the second [wall] collapsed" (*id.* at 54-55). When asked at his deposition if he had any idea why plaintiff was inside the cordoned off area at the time of the accident, MacVicar replied,

> "I've been asking myself that fact for two and a half years, I don't know. Maybe the fact that [plaintiff] only spent three hours on a construction site in his entire life and he didn't know any different and he didn't have supervision to - you know . . . didn't have adequate supervision at the time to say don't go in there"

(*id.* at 98-99). MacVicar also testified that, after the accident, he "lost [his] trust" in Kirwan, and that he "didn't view [Kirwan] ever the same after the instance. He lost [his] trust that day" (*id.* at 106-107).

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim (motion sequence 003, 006 and Allied's Cross Motion)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the Allied defendants, CNY and Hill. In their separate motions, the Allied defendants cross-move and Hill moves for summary judgment dismissing said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated,

and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, plaintiff has not submitted any evidence whatsoever that Allied MD and/or Muss owned the Premises where the accident occurred, or had anything else to do with the Project or the accident.

Thus, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law claims against Allied MD or Muss, and these defendants are entitled to dismissal of said claims against them.

That said, Allied, as the owner of the Premises, and CNY, as the general contractor on the Project, may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined as to whether Hill, as a tenant at the Premises, is also a proper Labor Law defendant, such that it may also be liable for plaintiff's injuries under the statute.

As to Hill, "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has not been limited to titleholders but has 'been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its]benefit.'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008]; *Lacey v Long Is. Light. Co.*, 293 AD2d 718, 718-719 [2d Dept 2002]).

Here, Hill was a party to a lease for the Premises, and it hired CNY to serve as general contractor for the Project, which entailed demolishing and then renovating the Premises for its restaurant. Therefore, as Hill had an interest in the property and fulfilled the role of owner by

contracting for work for its benefit, it will be considered an owner for the purposes of Labor Law § 240 (1).

That said, plaintiff has demonstrated that Labor Law § 240 (1) applies to the facts of this case by establishing that the subject defendants failed to provide adequate safety devices so as to properly secure the Second Wall against collapsing once it was compromised by the collapse of the First Wall, and that this breach was a proximate cause of his injuries (*see Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 573-574 [1st Dept 2015] [Labor Law § 240 (1) liability where the terra cotta wall that fell on the plaintiff was determined to be "'an object that required securing for the purposes of the undertaking,'" and where the "plaintiff established that his injuries were . . . caused by the lack of any safety devices to secure the terra-cotta wall"]; *Greaves v Obayashi Corp.*, 55 AD3d 409, 409 [1st Dept 2008] [Labor Law § 240 (1) liability where the concrete wall that collapsed onto the plaintiff was not properly secured]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 479-480 [1st Dept 2007] [partial summary judgment properly granted where plaintiff, while performing asbestos removal work, was injured when he was struck by a pipe that fell from above, and the record established that no safety devices were provided]).

It is well settled that "[a]bsolute liability for falling objects under Labor Law § 240 (1) arises . . . when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci*, 96 NY2d at 268; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506-507 [2d Dept 2007]).

It should be noted that Allied, CNY and Hill argue that Labor Law § 240 (1) does not apply to the facts of this case, because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work

(*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, the Second Wall was located on the same level as plaintiff when it fell onto him.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), a case wherein the object that fell onto the plaintiff was also located on his same level, the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured four inches in diameter. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605); *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the Second Wall was on his same level, but, given the significant amount of force that its weight generated during its fall, his accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603). In addition, in light of the fact that the Second Wall was compromised when the First Wall collapsed, and as the Second Wall was being demolished from the bottom to the top, and no protective devices, such as slings or ropes, were provided to secure it from falling, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*id.*).

Allied, CNY and Hill also argue that Labor Law § 240 (1) does not apply to the facts of

this case, because plaintiff was the sole proximate cause of his accident. To that effect, they allege that, after the collapse of the First Wall, the entire accident area was properly cordoned off and Alba's workers were specifically instructed to leave the accident area and go work on the other side of the job site. That said, at the time that the Second Wall collapsed, plaintiff was, nevertheless, still working in the accident area.

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Here, importantly, the testimonial evidence firmly establishes that plaintiff did not take it upon himself to continue working in the accident area once it was deemed unsafe. To that effect, he was specifically instructed by Kirwan to continue working there, despite the fact that the Second Wall, which ultimately fell on plaintiff, was dangerously compromised after the collapse of the First Wall. Therefore, any action on the part of plaintiff in being in the area at the time of the accident goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted

in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur(ies)"]).

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

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Allied, CNY and Hill. Accordingly, Allied and Hill are not entitled to dismissal of said claim against them.

The Labor Law § 241 (6) Claim (motion sequence numbers 003, 006 and Allied's Cross Motion)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 241

(6) claim against Allied, CNY and Hill. In their separate motions, Allied cross-moves and Hill moves for dismissal of said claim against them.

Labor Law § 241 (6) provides, in pertinent part, 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.7 (a) (1) and 23-3.3 (b) (3) and (6), plaintiff does not move for summary judgment in his favor, nor does he oppose dismissal of those sections, and therefore, they are deemed abandoned (*see Kempisty v. 246 Spring Street, LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["it is appropriate to find that a plaintiff who fails to respond to allegations [in a defendant's motion for summary judgment] that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]).

Thus, Allied and Hill are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (a) (1)

Initially, section 23-1.7 (a), which prescribes standards for "Overhead hazards" in regard to work and passageways normally exposed to falling materials or objects, is sufficiently specific to support a Labor Law § 241 (6) claim (*see Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997]).

Section 23-1.7 (a) (1) states, in pertinent part, as follows:

> "(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

Section 23-1.7 (a) does not apply to the facts of this case, however, because this section is applicable only where there is evidence that the plaintiff was injured in an area where workers were "'normally exposed to falling objects'" (*Amato*, 241 AD2d at 402, quoting 12 NYCRR 23-1.7 [a] [1]). Here, it has not been asserted that overhead work was the "primary focus of the worksite" (*id.*).

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (a) (1) as against Allied, CNY and Hill, and Allied and Hill are entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-3.3 (b) (3) and (6)

Initially, section 23-3.3 (b) is sufficiently specific to support a Labor Law § 241 (6) claim

(*see Bald v Westfield Academy & Cent. School*, 298 AD2d 881, 882 [4th Dept 2002]).

Sections 23-3.3 (b) (3) and (6), the provisions that apply to the facts of this case, require, among other things, that, during hand demolition, "[w]alls . . . shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration," and that "[w]alls or partitions . . . shall not be left standing more than one story or 15 feet, whichever is less, above the uppermost floor on which persons are working."

Here, the accident was proximately caused by the fact that the Second Wall, which was compromised by the collapse of the First Wall, was allowed to be left standing, unshored and unsupported, while plaintiff worked nearby.

Thus, plaintiff is entitled to summary judgment in his favor as to liability on that branch of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-3.3 (b) (3) and (6), and Allied and Hill are not entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims (motion sequence number 006 and Allied's Cross Motion)

In their separate motions, Allied cross-moves and Hill moves for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 (1) states, in pertinent part, 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the

contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the

event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As noted previously, the accident was caused not only because the Second Wall was not properly supported after being compromised by the collapse of the First Wall, but also because plaintiff was instructed to continue working in the area, despite the fact that it had been deemed hazardous. Therefore, plaintiff's accident was caused due to the means and methods of the work.

Here, a review of the record reveals that neither Allied nor Hill supervised or directed any of the aforementioned work on the Project. Thus, Allied and Hill are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

The Cross Claims Against the Allied Defendants (the Allied Defendants' Cross Motion)

It should be noted that although in their cross motion the Allied defendants request dismissal of any and all cross claims asserted against them, they do not identify any such alleged cross claims or put forth any arguments or evidence in support of their dismissal. Thus, that part of the Allied defendants' cross motion seeking dismissal of any and all cross claims asserted against them is denied.

The Allied Defendants' and Hill's Cross Claims for Common-law Indemnification Against CNY (motion sequence number 006, Allied's Cross Motion, CNY Cross Motion 1 and CNY Cross Motion 3)

In their separate motions, Allied cross-moves and Hill moves for summary judgment in their favor on their cross claims for common-law indemnification against CNY. CNY cross-

moves for dismissal of said cross claims against it.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

In support of their cross motion and in opposition to CNY's cross motion, the Allied defendants adopt the arguments put forth by Alba in its partial opposition to CNY Cross Motion 1. Therein, Alba argues that CNY is not entitled to dismissal of the Allied defendants' cross claim for common-law indemnification against CNY because CNY was an active tortfeasor. To that effect, CNY was in charge of safety at the site. In addition, Gaspar conceded that, although he stopped work after the collapse of the First Wall, he did not call an engineer in to investigate or determine the cause of the accident. Further, MacVicar testified that Gaspar told him that he directed Alba to make probes in the bottom of the columns prior to their collapse, and that he did not discuss the need for shoring with Kirwan.

However, importantly, the deposition testimony of Gaspar and MacVicar sufficiently establishes that once the First Wall collapsed, Gaspar, realizing that the Second Wall was now possibly compromised, ordered that the entire accident area be cordoned off and that Alba's workers be instructed to leave the vicinity and go work on the other side of the site. As such,

Kirwan's act of directing plaintiff to continue working in the accident area severed the causal connection between any alleged negligent acts on the part of CNY and plaintiff's accident.

As the Court of Appeals stated in *Derdiarian v Felix Contr. Corp.* (51 NY2d 308 [1980]):

> "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act, which breaks the causal nexus"

(id. at 315 [internal citations omitted]; *see also Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 371-372 [2d Dept 2014, Dickerson, J., concurring]).

Thus, the Allied defendants and Hill are not entitled to summary judgment in their favor on their cross claims for common-law indemnification against CNY, and CNY is entitled to dismissal of said cross claims against it.

The Allied Defendants' and Hill's Cross Claims for Contractual Indemnification Against CNY (motion sequence number 006, Allied's Cross Motion, CNY Cross Motion 1 and CNY Cross Motion 3)

In their separate motions, Allied cross-moves and Hill moves for summary judgment in their favor on their cross claims for contractual indemnification against CNY. CNY cross-moves for dismissal of said cross claims against it.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14

AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Additional Facts Relevant To This Issue:

The Contract Between CNY and Hill

On August 12, 2013, over one month after the accident, CNY and Hill entered into a contract, whereby CNY would act as the construction manager on the Project (the CNY/Hill Contract). The CNY/Hill Contract provides that it "represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral" (CNY's notice of cross motion against Hill, exhibit S, the CNY/Hill Contract, § 1.1.2).

In addition, § 16.5 of the CNY/Hill Contract, concerning General Conditions, provides, in pertinent part, that:

> "This Contract and the Contract Documents, including the Schedules and Exhibits referred to herein, constitutes the entire agreement between the parties hereto relating to the subject matter hereof and supersedes all prior agreements and understandings, written or oral, among the parties relating to this subject matter. This Contract is to be interpreted and construed solely on the basis of those terms and provisions as are contained in the final form and format of this Contract . . . and that no assumptions, inferences or presumptions shall be drawn or derived from or may be predicated upon any changes, omissions, deletions or additions from or to any prior drafts or earlier versions of this Contract"

(*id.*, § 16.5).

Further, § 1.1.1 of the General Conditions to the CNY/Hill Contract provides:

> "Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, [CNY's] bid or proposal, or portions of Addenda relating to the bidding requirements"

(*id.*, § 1.1.1).

Importantly, with regard to the effective date of the CNY/Hill Contract, the CNY/Hill Contract provides that "This Agreement is entered into as of the day and year first written above [August 12, 2013]" (*id.*, § 8.1.3). Notably, the CNY/Hill Contract's "binding project schedule" began on August 8, 2013 (the Binding Project Schedule) (*id.*, the Binding Project Schedule).

The Letter of Intent Between CNY and Hill

Prior to the execution of the CNY/Hill Contract on May 30, 2013, Hill issued the Letter of Intent to CNY which stated that Hill was "providing this letter [to CNY] as a notice of [its] intent to award the Project to [CNY] based on the proposal dated April 16, 2013" (CNY's notice of cross motion to Hill, exhibit T, the Letter of Intent). The Letter of Intent also stated that it "will be superceded by the timely completion of an AIA contract between [Hill] and [CNY] in form and substance acceptable to both parties" (*id.*). In addition, it stated that "[t]he purpose of this Letter of Intent is to allow the Pre-construction Phase Services to proceed while [Hill] and [CNY] negotiate a construction contract for the Project" (*id.*).

The CNY/Hill Contract's Indemnification Provision

Article 3 of the CNY/Hill Contract contains the following indemnification provision (the CNY/Hill Indemnification Provision):

> "To the fullest extent permitted by law the Contractor shall indemnify and hold

> harmless the Owner, architect . . . and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury... but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(CNY's Cross Motion 3, exhibit S, the CNY/Hill Contract, § 3.18, Article 3).

It should be noted that on page 1 of the CNY/Hill Contract, only Hill, and not the Allied defendants, is defined as the "Owner" (*id.* at 1). In addition, the CNY/Hill Contract states that "No provision in the Contract Documents shall create or give to third parties any claim of right of action against the Owner or the Contractor except as specifically provided herein" (*id.*, § 13.4.3).

Initially, the Allied defendants are not entitled to summary judgment in their favor on their cross claim for contractual indemnification against CNY. As noted above, the Allied defendants are not referenced in the CNY/Hill Indemnification Provision, nor any other part of the CNY/Hill Contract. To that effect, the CNY/Hill Contract identifies only Hill as "Owner." In addition, the CNY/Hill Contract specifically provides that, unless specifically stated in said contract, nothing in the contract documents can give to third parties, such as Allied, any actionable claim as of right.

In addition, neither the Allied defendants nor Hill are entitled to summary judgment in their favor on their cross claims for contractual indemnification against CNY, and CNY is entitled to dismissal of said cross claims against it, because the CNY/Hill Contract, which contained the CNY/Hill Indemnification Provision upon which the Allied defendants and Hill rely, was not executed until more than a month after the date of the accident, and does not contain any language indicating that the parties intended its terms to be retroactively applied, or that the subject

contract's effective date was intended to be any date other than the date that it was fully executed.

In fact, the Letter of Intent specifically stated that it would eventually be "superceded by the timely completion of an AIA contract between [Hill] and [CNY] in form and substance acceptable to both parties," and that "[t]he purpose of [the] Letter of Intent [was] to allow the Pre-construction Phase Services to proceed while [Hill] and [CNY] negotiate a construction contract for the Project" (CNY Cross Motion 3, exhibit T, the Letter of Intent). Accordingly, CNY does not owe the Allied defendants or Hill contractual indemnification based on the CNY/Hill Indemnification Provision, because it was not yet in effect on the date of the accident.

Finally, the Allied defendants and Hill are also not entitled to contractual indemnification from CNY, because, as discussed previously, no negligence on CNY's part contributed to or caused the accident. To that effect, once the First Wall collapsed, Gaspar of CNY properly cordoned off the area and directed Alba to instruct its workers to continue working on the other side of the site. As such, Kirwan's act of directing plaintiff to continue working in the hazardous area severed the causal connection between any alleged negligent acts on the part of CNY and plaintiff's accident (*Derdiarian*, 51 NY2d at 315).

Thus, the Allied defendants and Hill are not entitled to summary judgment in their favor on their cross claims for contractual indemnification against CNY, and CNY is entitled to dismissal of said cross claims against it.

The court has considered the remaining arguments on this issue and finds them to be unavailing.

Hill's Cross Claim for Breach of Contract for Failure To Procure Insurance Against CNY (motion sequence number 006 and CNY Cross Motion 3)

Hill moves for summary judgment in its favor on its cross claim for breach of contract for failure to procure insurance against CNY. CNY cross-moves for dismissal of said cross claim against it.

Additional Facts Relevant To This Issue:

With regard to CNY's obligation to procure insurance on behalf of Hill, pursuant to Article 8 of the CNY/Hill Contract, entitled "Insurance and Bonds," "During the term of this Agreement . . . [CNY] and [Hill] shall purchase and maintain insurance . . . [and] the above coverage shall name [Hill] as an additional insured" (CNY's notice of cross motion against Hill, exhibit S, the CNY/Hill Contract, Article 8).

CNY provided Hill with a certificate of Insurance on May 30, 2013 (the Certificate of Insurance), which provides that "This certificate is issued as a matter of information only and confers no rights upon the certificate holder . . .. This certificate of insurance does not constitute a contract" (CNY's notice of cross motion to Hill, exhibit U, the Certificate of Insurance).

As discussed above, Article 8 of the CNY/Hill Contract required CNY to procure additional insured coverage on behalf of Hill. However, as also discussed above, the CNY/Hill Contract was not in effect on the day of the accident.

Thus, Hill is not entitled to summary judgment in its favor on its cross claim for breach of contract for failure to procure insurance, and CNY is entitled to dismissal of said cross claim against it.

The Allied Defendants' Request for Leave to Amend Their Answer to Assert Cross Claims for Contractual Indemnification Against Alba and Hill (Allied's Cross Motion)

The Allied defendants request leave to amend their answer to assert cross claims for contractual indemnification against Alba and Hill.

> "Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]. Prejudice to warrant denial of leave to amend requires some indication that the defendant[] ha[s] been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"

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

Additional Facts Relevant to this Issue:

The Lease between Allied and Hill

The lease between Allied, as landlord, and Hill, as tenant (the Lease), dated March 1, 2013, was in full force and effect on the date of the accident. An indemnification provision in the Lease (the Lease Indemnification Provision) sets forth, in pertinent part, as follows:

> "Except only as to losses resulting from or caused by the wrongful acts or negligent omissions of Landlord or Landlord's Representatives, Tenant agrees to indemnify and hold harmless Landlord and Landlord's Representatives from all losses, claims, suits, actions, damages, and liability . . . arising (or alleged to arise) from any wrongful acts or negligent omission or breach of this Lease by Tenant or Tenant's Representatives . . . or arising from any injury to or death of any person or persons or damage to or destruction of the property of any person or persons"

(Allied's Cross Motion, exhibit A, the Lease, Article XII, § 12.01 [a], the Lease Indemnification Provision).

CNY's Subcontract with Alba.

On June 21, 2013, CNY entered into a subcontract with Alba (the CNY/Alba Subcontract), whereby Alba would provide demolition services for the Project. Alba's scope of work under the CNY/Alba Subcontract included providing and furnishing "all labor, materials, tools, supplies, equipment, services, facilities, supervision, administration, insurance, and all other items necessary for the . . . performance . . . of the work" (CNY's notice of cross motion to Hill, exhibit V, the CNY/Alba Subcontract, ¶ 1). In addition, pursuant to the CNY/Alba Subcontract, "[CNY] [was] not responsible to provide any protective service for [Alba's] benefit" (*id.*, ¶ 14). Further, the CNY/Alba Subcontract states, in pertinent part, that:

> "Unless specifically excluded from [Alba's] scope of work, the work to be performed by [Alba] includes all work set forth in this Subcontract Agreement, as well as any and all other work incidental or related thereto, including work necessary for an efficient, safe, acceptable, working and complete Project . . . [and Alba] shall provide . . . all . . . items necessary for the proper performance of [Alba's] work"

(*id.*, ¶ 4).

An indemnification provision contained in the CNY/Alba Subcontract (the CNY/Alba Indemnification Provision) states, in pertinent part, as follows:

> "[Alba] shall, to the fullest extent permitted by law, hold [CNY] and the Owner, their agents, employees and representatives harmless from any and all liability, costs, damages, attorneys' fees, and expenses from any claims or causes of action of whatever nature arising from [Alba's] work, including all claims relating to its subcontractors, suppliers, employees"

(Hill's notice of motion, exhibit Q, the CNY/Alba Subcontract, ¶ 14, the CNY/Alba

Indemnification Provision). Notably, the introductory paragraph of the CNY/Alba Subcontract identifies CNY as the Contractor and Hill as the Owner.

In support of their cross motion for leave to amend their answer, the Allied defendants argue that Hill cannot claim prejudice or surprise, since the Lease, which was executed on March 1, 2013 and contains the Lease Indemnification Provision, was in existence at the time that they became litigants to this action (*see Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010] [motion to amend answer to assert cross claims for contractual indemnification granted because "Switzer [could not] reasonably claim to be surprised by his own contractual obligations"]).

However, as Hill argues in opposition, the Allied defendants' request for leave to amend must be denied because the factual basis of the proposed amendment, i.e., the existence of the Lease Indemnification Provision, was known at the time of their original answer, and, yet, they delayed seeking leave to amend their answer to assert said cross claim against Hill for almost four years (*see Lattanzio v Lattanzio*, 55 AD3d 431, 431-432 [1st Dept 2008] [trial court properly denied the defendant's motion to amend answer when "the factual basis of the proposed amended answer was known at the time of the original answer" and leave to amend was sought two years later]).

In addition, the Allied defendants are not entitled to contractual indemnification from Alba because Alba never entered into any contracts with the Allied defendants, and the CNY/Alba Subcontract does not identify the Allied defendants as owners for the purposes of the subject subcontract, only Hill. Moreover, a review of the CNY/Alba Subcontract reveals no provisions indicating that the Allied defendants were expressly or impliedly agents, employees or

representatives of CNY.

Thus, the Allied defendants are not entitled to leave to amend their answer to add cross claims for contractual indemnification as against Alba and Hill.

CNY's Third-Party Claim and Hill's Cross Claim For Common-Law Indemnification Against Alba (motion sequence number 004 and 006)

In its motion, Alba moves for summary judgment dismissing CNY's third-party claim and Hill's cross claim against it for common-law indemnification, as well as for dismissal of any other claims for common-law indemnification asserted against it by any of the other direct defendants. Hill moves for summary judgment in its favor on its cross claim for common-law indemnification against Alba.

Initially, as plaintiff was an employee of Alba at the time of the accident, Workers Compensation Law § 11 applies to the facts of this case. Workers' Compensation Law § 11 prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Here, a review of the bill of particulars and testimonies in this case reveals that plaintiff

has not suffered a grave injury, and, in fact, according to plaintiff's testimony, he has returned to both school and work in his home country of Ireland.

Thus, pursuant to Workers' Compensation Law § 11, Alba is entitled to dismissal of CNY's third-party claim and Hill's cross claim against it for common-law indemnification, as well as to dismissal of any and all other common-law indemnification claims asserted against it by any of the other direct defendants.

CNY's Third-Party Claim and Hill's Cross Claim For Contractual Indemnification Against Alba (motion sequence number 004 and 006 and CNY Cross Motion 2)

Alba moves for summary judgment dismissing CNY's third-party claim and Hill's cross claim against it for contractual indemnification, as well as for dismissal of any other contractual indemnification claims asserted against it by any of the other direct defendants. CNY cross-moves and Hill moves for summary judgment in their favor on their claims for contractual indemnification as against Alba.

Additional Facts Relevant to this Issue:

As noted previously, the CNY/Alba Indemnification Provision provides that Alba hold CNY and Hill

> "harmless from any and all liability, costs, damages, attorneys' fees, and expenses from any claims or causes of action of whatever nature arising from [Alba's] work, including all claims relating to its subcontractors, suppliers, employees"

(Hill's notice of motion, exhibit Q, the CNY/Alba Subcontract, ¶ 14, the CNY/Alba Indemnification Provision).

Notably, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard*

Janowitz Constr. Corp., 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]).

Here, as plaintiff was an employee of Alba at the time of the accident, the accident arose from Alba's work on the project. In addition, as discussed previously, no negligence on the part of CNY or Hill caused the accident. Therefore, pursuant to the CNY/Alba Indemnification Provision, Alba is not entitled to dismissal of CNY and Hill's claims for contractual indemnification against it. Accordingly, CNY and Hill are entitled to summary judgment in their favor on their claims for contractual indemnification against Alba.

That said, as Alba did not contract with any other direct defendant in this litigation, Alba is entitled to dismissal of any and all other claims for contractual indemnification asserted against it.

CNY's Third-Party Claim and Hill's Cross Claim for Breach of Contract for Failure to Procure Insurance Against Alba (motion sequence number 004, 006 and CNY Cross Motion 2)

In its motion, Alba moves for summary judgment dismissing CNY's third-party claim and Hill's cross claim against it for breach of contract for failure to procure insurance on the ground that it procured the appropriate insurance policies. Hill moves for summary judgment in its favor as to said claim against Alba.

Additional Facts Relevant to this Issue:

Paragraph 14 of the CNY/Alba Subcontract indicates that the "Contractor and Owner" will be indemnified as additional insureds. On page one of the CNY/Alba Subcontract, CNY is identified as the contractor and Hill is identified as the owner. In addition, a document was attached to the CNY/Alba Subcontract, entitled "Insurance Requirements for [CNY and Hill]" (the CNY/Alba Insurance Document), which required that Alba be contractually obligated to

obtain general liability insurance naming CNY, Hill and "all other parties as required by contract" to be named as additional insureds on Alba's general liability insurance policy (Hill's notice of motion, exhibit Q, the CNY/Alba Insurance Document).

Thereafter, Alba procured a commercial general liability policy issued by The Burlington Insurance Company [Burlington], which was effective from June 7, 2013 to June 7, 2014 (the Policy). An endorsement to the Policy describes, as additional insureds,

> "Any owner or contractor with whom you have agreed, in a written contract, that such person or organization should be added as an additional insured on your policy, provided such written contract is fully executed prior to an "occurrence" in which coverage is sought under this policy"

(Alba's reply to Hill's opposition, exhibit A, the Policy).

In addition, the subject endorsement states, in pertinent part:

> "Section II - Who is Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" . . . caused, in whole or in part, by "[Alba's] work"

(*id.*).

Here, as Alba argues, Alba is entitled to dismissal of CNY and Hill's claims against it for breach of contract for failure to procure insurance, as it procured the proper additional insured coverage on behalf of CNY and Hill. To that effect, the Policy describes, as additional insureds, "[a]ny owner or contractor with whom [Alba] agreed, in a written contract . . . should be added as an additional insured on [Alba's] policy" (Alba's reply to Hill's opposition, exhibit A, the Policy). As noted previously, on page one of the Alba/CNY Subcontract, Hill is identified as the owner, and CNY is identified as the contractor on the Policy.

It should be noted that in opposition to Alba's motion and in support of its own motion,

Hill puts forth as evidence that Alba was in breach of the insurance procurement provision of the subject subcontract the fact that in response to Hill's tender letter, Burlington declined additional insured coverage for Hill, on the ground that Hill was not specifically named in the Policy as an additional insured, there was no written contract between Alba and Hill and Hill would only qualify as an additional insured with respect to liability for bodily injury caused by Alba's acts or omissions. That said, Burlington encouraged Hill to forward any information that it might have that might have a bearing on Burlington's position.

However, it is of no consequence that Alba's insurance carrier has not yet accepted Hill's tender, as the ultimate issue is whether Alba purchased the required additional insured coverage for the benefit of Hill in the first place. A party is not liable to another for contractual indemnification or breach of contract under the insurance procurement provisions of a contract when that party fulfills its contractual obligation to procure proper insurance for the benefit of the other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996] [third-party defendant was not liable to appellants for breach of contract for failure to procure insurance "inasmuch as [it] had fulfilled its contractual obligation to procure proper liability insurance on behalf of appellants"]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Thus, Alba is entitled to dismissal of CNY's third-party claim and Hill's cross claim against it for breach of contract for failure to procure insurance, and Hill is not entitled to summary judgment in its favor this breach of contract claim against Alba.

In addition, as no other direct defendant is mentioned in the aforementioned insurance procurement provision of the CNY/Alba Subcontract, and as Alba has not contracted with any

other parties, Alba is also entitled to dismissal of any other claims for breach of contract for failure to procure insurance asserted against it.

Alba's Claims Against CNY (CNY Cross Motion 2)

CNY moves for dismissal of any and all claims asserted against it by Alba, on the ground that the accident was not caused by any negligence on the part of CNY, but rather, was due to Alba's negligence. In opposition, Alba argues that CNY was actively negligent in that Gaspar initially instructed Kirwan, Alba's foreman, to make probes in the terra cotta columns, without notifying Kirwan of the need for shoring.

However, as discussed previously, once the First Wall collapsed, Gaspar cordoned off the accident area and directed Alba to instruct its workers to continue working on the other side of the site. As such, Kirwan's act of directing plaintiff to continue working in the hazardous area severed the causal connection between any alleged negligent acts on the part of CNY and plaintiff's accident (*Derdiarian*, 51 NY2d at 315).

Thus, as no negligence on its part caused the accident, as discussed previously, CNY is entitled to dismissal of any and all cross claims asserted against it by Alba.

It should be noted that Alba argues that, in any event, CNY's cross motion (CNY Cross Motion 2), must be denied on the ground that it is untimely and CNY has not acknowledged this fact. To that effect, the preliminary conference order directed that all motions for summary judgment be made within 60 days of the filing of plaintiff's note of issue.[1] Plaintiff filed the note of issue on March 9, 2017, and therefore, any dispositive motions had to be made by May 9, 2017.

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[1] The court notes that Part 19 rules allow summary judgment motions to be filed within 120 days after the filing of the note of issue.

CNY Cross Motion 2 was filed on June 27, 2017.

However,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion. The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, CNY's Cross Motion 2 seeks relief on certain causes of action which are "nearly identical" to those raised by Alba in its timely motion. Thus, based upon the foregoing, the court will consider CNY's Cross Motion 2.

The Cross Claims Against Hill (motion sequence number 006)

Finally, Hill moves for dismissal of any and all cross claims asserted against it. As Hill argues, the record contains insufficient evidence that any negligence on the part of Hill contributed or caused the accident. Thus, Hill is entitled to dismissal of all cross claims against it for common-law indemnification. However, to the extent that any cross claims have been asserted against Hill based upon its contractual relationship to any party, as Hill has not identified any such cross claims, or put forth any argument or evidence in support of its request to dismiss said cross claims, Hill is not entitled to their dismissal.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff John Melvin's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-3.3 (b) (3) and (6) as against defendants Allied 345 Retail, LLC (Allied), CNY Construction Management, Inc. (CNY) and Hill Country Brooklyn, LLC (Hill) is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of Allied, Allied MD Construction, LLC (Allied MD) and Muss Brooklyn Development Co., L.P.'s (Muss) (collectively, the Allied defendants) cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against Allied MD and Muss is granted, and the complaint is dismissed as against these defendants; and it is further

ORDERED that the part of the Allied defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 claims, as well as those parts of the Labor Law 241 (6) claim predicated on the abandoned provisions and Industrial Code 12 NYCRR 23-1.7 (a) (1), as against Allied, is granted, and these claims are dismissed as against this defendant, and the cross motion is otherwise denied; and it is further

ORDERED that CNY's cross motion (CNY Cross Motion 1), pursuant to CPLR 3212, for summary judgment dismissing the Allied defendants' cross claims against it for common-law and contractual indemnification is granted, and these cross claims are dismissed as against this defendant; and it is further

ORDERED that defendant/third-party defendant Alba Carting Demolition, Inc.'s (Alba)

motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing CNY's third-party claims and Hill's cross claims against it for common-law indemnification and breach of contract for failure to procure insurance is granted, and these claims and cross claims are dismissed as against this defendant/third-party defendant, and the motion is otherwise denied; and it is further

ORDERED that the part of CNY's cross motion (CNY Cross Motion 2), pursuant to CPLR 3212, for summary judgment dismissing any and all cross claims and counterclaims asserted against it by Alba is granted, and these cross claims and counterclaims are dismissed as against this defendant; and it is further

ORDERED that the part of CNY's cross motion (CNY Cross Motion 2), pursuant to CPLR 3212, for summary judgment in its favor on its third-party claim for contractual indemnification against Alba is granted; and it is further

ORDERED that the parts of Hill's motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 claims, and those parts of the Labor Law 241 (6) claim predicated on the abandoned provisions and Industrial Code 12 NYCRR 23-1.7 (a) (1), as well as any cross claims asserted against it for common-law negligence, are granted, and these claims and cross claims are dismissed as against this defendant; and it is further

ORDERED that the part of Hill's motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in its favor on its cross claim for contractual indemnification as against Alba is granted, and the motion is otherwise denied; and it is further

ORDERED that CNY's cross motion (CNY Cross Motion 3), pursuant to CPLR 3212, for

summary judgment dismissing Hill's cross claims against it for common-law and contractual indemnification is granted, and these cross claims are dismissed as against this defendant; and it is further

ORDERED that the remainder of this action shall continue.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: March 26, 2018

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.