Franklin v T-Mobile USA, Inc.
2018 NY Slip Op 30879(U)
May 4, 2018
Supreme Court, New York County
Docket Number: 161510/14
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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MARK FRANKLIN,

Plaintiff,

-against- Index No. 161510/14

T-MOBILE USA, INC. and DYCKMAN REALTY ASSOCIATES, L.P.,

Defendants. Motion Sequence Nos. 004 & 005

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T-MOBILE USA, INC. and DYCKMAN REALTY ASSOCIATES, L.P.,

Third-Party Plaintiffs,

-against- Third-Party Index No.

ENERGY DESIGN SERVICE SYSTEMS, LLC, 595451/15

Third-Party Defendant.

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ENERGY DESIGN SERVICE SYSTEMS, LLC,

Second Third-Party Plaintiff,

-against- Second Third-Party Index No.

TAREC, LLP, 595664/15

Second Third-Party Defendant.

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GERALD LEBOVITS, J.:

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of the instant motions for summary judgment:

Papers	**NYSCEF Documents Numbered**
Notice of Motion in Support of Motion Sequence 004	111
Affirmation in Support of Motion Sequence 004	112 (exhibits 113-126)
Affirmation in Opposition	131
Affirmation in Opposition	146 (exhibits 147-149)
Affirmation in Opposition	163 (exhibits 164-170)
Reply Affirmation	155

Reply Affirmation	156
Notice of Motion in Support of Motion Sequence 005	132
Affirmation in Support of Motion Sequence 005	133 (exhibits 134-145)
Affirmation in Opposition	151
Affirmation in Opposition	152
Affirmation in Opposition	158
Reply Affirmation	160
Reply Affirmation	161

Motion sequence numbers 004 and 005 are consolidated for disposition.

This action arises out of a construction site accident that occurred on September 2, 2014 at the premises located at 174 Dyckman Street in Manhattan (hereinafter, the premises). Defendants/third-party plaintiffs T-Mobile USA, Inc. (T-Mobile) and Dyckman Realty Associates, L.P. (Dyckman) move under CPLR 3212 for: (1) summary judgment dismissing plaintiff's Labor Law §§ 200, 241 (6), and common-law negligence claims; (2) summary judgment on their third-party claims for contractual indemnification against third-party defendant/second third-party plaintiff Energy Design Service Systems, LLC (Energy Design); (3) summary judgment dismissing the cross-claims/counterclaims of Energy Design as against them; and (4) summary judgment dismissing the cross-claims/counterclaims of second third-party defendant Tarec, LLP (Tarec) as against them (motion sequence number 004).

Plaintiff Mark Franklin moves under CPLR 3212 for partial summary judgment on the issue of liability under Labor Law §§ 200, 240 (1), and 241 (6) (motion sequence number 005).

BACKGROUND

It is undisputed that Dyckman was the owner of the premises on the date of the accident. T-Mobile was the lessee of the ground floor commercial space. Pursuant to a Master Agreement effective June 3, 2014, T-Mobile retained Energy Design as a general contractor to install LED lighting in T-Mobile retail stores. Energy Design subsequently hired Tarec as a subcontractor. Plaintiff was an employee of Tarec on the date of his accident.

Plaintiff testified that he was working as a journeyman electrician for Tarec in September 2014 (plaintiff tr at 18). He had an accident at about 10 p.m. on September 2, 2014, at the subject premises (*id.* at 46). Plaintiff was removing fluorescent lights and replacing them with LED lights in the T-Mobile store (*id.* at 49-50, 52). In order to perform his work, plaintiff was required to access the 12-foot drop ceiling, cut the chains from which the old fixtures hung, and disconnect the chains (*id.* at 50-51, 59). Tarec supplied two portable scaffolds, but did not provide any safety belts or harnesses (*id.* at 42-43, 54-55, 123, 187). Tarec's supervisor set up the scaffolds in the T-Mobile store before plaintiff began to work (*id.* at 57-58).

At one point, plaintiff's supervisor "put [him] on a ladder" because more senior employees were using the scaffolds (*id.* at 65, 68-69). According to plaintiff, the ladder was an eight-foot aluminum and fiberglass A-frame ladder (*id.* at 71). Plaintiff overheard the T-Mobile manager discussing the ladder with Tarec's supervisor, before the manager escorted him to the break room to retrieve the ladder (*id.* at 76). Plaintiff brought the ladder out onto the retail floor and began his work (*id.* at 77). Plaintiff observed that the ladder opened unevenly, and was "wobbly" and "crooked" (*id.* at 77, 161-162). Tarec's supervisor sometimes held the ladder

while plaintiff used it (*id.* at 79-81, 130-131, 134, 161). When the accident occurred, plaintiff was demolishing old lights, and no one was holding the ladder (*id.* at 80, 92). The ladder was not tall enough for plaintiff to reach the ceiling's interior, and the angle was such that it was difficult for him to turn and pull the fixture out (*id.* at 96-99). The floor beneath the ladder was level and not slippery (*id.* at 161-162, 186). As plaintiff raised one foot toward the next rung of the ladder, plaintiff and the ladder fell to the ground (*id.* at 100, 118-119). After plaintiff fell to the floor, he was removed from the premises by ambulance (*id.* at 105-106). Plaintiff did not remember how many rungs he climbed, but believed that it was more than three (*id.* at 92). He believed that he had his feet on the sixth rung from the bottom of the ladder immediately before the accident (*id.* at 118). Before using the ladder, plaintiff read the stickers on the ladder, which warned against stepping on the top two steps (*id.* at 119).

Luis Diaz testified that he was the supervisor of the Tarec team on the night of the accident (Diaz tr at 33). Diaz stated that he never gave plaintiff any instructions about how to use the ladder (*id.* at 12). Diaz viewed the video from T-Mobile's security camera (*id.*). According to Diaz, plaintiff's use of the ladder was unsafe; the ladder was positioned away from what plaintiff was trying to remove or fix, plaintiff was off balance, and was facing the wrong direction while standing on the ladder (*id.* at 14). Diaz stated that he was sure that he had a ladder in his van (*id.* at 18).

Massiel Martinez, the manager of the T-Mobile store, testified that T-Mobile stored one ladder in the back room for use in the store, "to change like light bulbs or dusting or anything like that by sales employees" (Martinez tr at 14, 36-37). Martinez stated that there was nothing wrong with the ladder, and that it was used by T-Mobile employees a week or two weeks before the accident (*id.* at 40-41).

Plaintiff commenced this action on November 19, 2014, asserting five causes of action seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240 (1), 241 (6) and the New York State Industrial Code.

T-Mobile and Dyckman subsequently impleaded Energy Design, seeking: (1) common-law indemnification, (2) contribution, (3) contractual indemnification, and (4) damages for failure to procure insurance. As relevant here, Energy Design asserts the following cross-claims against T-Mobile and Dyckman: (1) common-law indemnification; (2) apportionment of damages; (3) apportionment of liability; and (4) failure to procure insurance.

Energy Design then brought a second third-party action against Tarec, asserting the following claims: (1) contractual indemnification; (2) failure to procure insurance; (3) common-law indemnification; and (4) contribution. In its answer to the second third-party complaint, Tarec asserts the following cross-claims against T-Mobile and Dyckman: (1) common-law indemnification; (2) contribution; (3) contractual indemnification; and (4) failure to procure insurance.

DISCUSSION

It is well established that "[a] party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). Thus, "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012] [internal quotation marks and citation omitted]).

Labor Law § 240 (1)

Plaintiff moves for partial summary judgment as to liability under Labor Law § 240 (1), arguing that he is entitled to judgment based upon the evidence that the ladder tipped and failed to support him.

Defendants counter that there is a question of fact about what caused plaintiff to fall. According to defendants, either plaintiff was injured because (1) he improperly used the ladder by failing to make sure that the ladder was in the open position, stepping too high on the ladder, standing in the wrong direction on the ladder, and leaning off the ladder on one foot immediately before the fall, or (2) he fell because the ladder was bent and wobbly. As support, defendants submit surveillance video of the store, along with an affidavit from Brian Hall, T-Mobile's manager of enterprise security operations, indicating that the video is an exact duplicate of the video recorded by T-Mobile's cameras and preserved by T-Mobile (Hall aff, exhibit A). Defendants argue that the video depicts plaintiff stepping above the second from the top rung of the ladder (*id.*, compact disc at 1:15:07).

Tarec[1] argues, in opposition, that plaintiff has failed to show a violation of Labor Law § 240 (1), or that the violation was a proximate cause of his accident. As argued by Tarec, a reasonable jury could conclude that plaintiff's misuse of the ladder constituted the sole proximate cause of his accident, in view of: (1) plaintiff's testimony that he read the warnings on the ladder, which warned against stepping above the second rung from the top of the ladder; (2) his testimony that he did not remember whether he stepped onto the second rung from the top of the ladder or the top of the ladder; and (3) the surveillance video and still footage depicting plaintiff stepping above the second rung from the top of the ladder.

For the following reasons, plaintiff is entitled to partial summary judgment on the issue of liability under section 240 (1).

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

> "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."

The statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm*

[1] Energy Design joins in the arguments made in Tarec's opposition to plaintiff's motion.

directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). To prevail under Labor Law § 240 (1), the plaintiff must prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation was a proximate cause of his or her injuries (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]). The purpose of Labor Law § 240 (1) is to protect workers "by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]).

Labor Law § 240 (1) requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (Labor Law § 240 [1]; *accord Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "It is well settled that the failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Plywacz v 85 Broad Street LLC*, 159 AD3d 543, 544 [1st Dept 2018], quoting *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]). The plaintiff is not required to show that the ladder was defective (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]).

Proper Defendants

As a preliminary matter, the court notes that there is no dispute that Dyckman was the owner of the premises. In addition, it is undisputed that T-Mobile was the lessee of the premises on the date of the accident, and that T-Mobile hired Energy Design on the project (Sohnen affirmation in support, exhibit K). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). Thus, both T-Mobile and Dyckman may be held liable under Labor Law § 240 (1).

Statutory Violation and Proximate Cause

Here, plaintiff has made a prima facie showing of entitlement to judgment under section 240 (1), in light of the evidence that the unsecured ladder on which he was standing suddenly moved (*see Tuzzolino v Consolidated Edison Co. of N.Y.*, -- AD3d -- , 2018 WL 1914913, at *1 [1st Dept 2018] [holding that plaintiff established a prima facie violation of section 240 (1) "when the unsecured ladder on which he was standing suddenly slipped out from under him"]; *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 465 [1st Dept 2013] [holding plaintiff made prima facie showing of liability under Labor Law § 240 (1) where he testified that "the unsecured ladder on which he was working moved, causing him to fall"]). Plaintiff testified that the ladder was too short to perform his work (plaintiff tr at 97). He stated that, as he was moving his foot to the next rung, the ladder fell to the floor, causing him to fall also (*id.* at 101). According to plaintiff, the ladder was unstable and misaligned (*id.*).

Defendants and third-party defendants have failed to raise an issue of fact about whether plaintiff was the sole proximate cause of his accident.

> "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 [or she] was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his [or her] injur[ies]"

(*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Thus,

> "'[t]o raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained'"

(*Quinones v Olmstead Props., Inc.*, 133 AD3d 87, 89 [1st Dept 2015], quoting *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]).

Although defendants and third-party defendants rely on plaintiff's supervisor's testimony that "the ladder was position[ed] away from what he was trying to remove or fix"; that plaintiff "was off balance"; that plaintiff "wasn't in the right position on the ladder"; and that plaintiff "was actually turned around facing the opposite way that you should be facing on the ladder" (Diaz tr at 14), and the surveillance video and still frames of the accident (Hall aff, exhibit A, compact disc; Kardisch affirmation in support, exhibit L), they have not refuted plaintiff's testimony that the ladder collapsed underneath him, and caused him to fall. Therefore, plaintiff cannot be held solely responsible for his accident (*see Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). Plaintiff's actions would constitute, at most, comparative negligence, which is not a defense to liability under Labor Law § 240 (1) (*see Saavedra v 89 Park Ave. LLC*, 143 AD3d 615, 615 [1st Dept 2016] [finding that electrician's use of six-foot A-frame ladder, which required him to stand on top step, rather than eight-foot ladder, did not make him sole proximate cause of his accident, where the eight-foot ladder could not be opened in the space due to the presence of construction debris]; *accord Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 474 [1st Dept 2007] ["It does not avail defendants to argue that the manner in which plaintiff set up and stood on the ladder was the sole cause of the accident, where there is no dispute that the ladder was unsecured and no other safety devices were provided"]). Moreover, plaintiff was not required to show that the ladder was defective (*see Orellano*, 292 AD2d at 290-291).

Finally, defendants have not demonstrated that plaintiff was the sole proximate cause of his injuries for failing to use Tarec's own ladder. Tarec's supervisor testified that he was "sure" that he had a ladder in the van (Diaz tr at 18). He also stated that it was possible that he did not have a ladder for plaintiff to use (*id.* at 19). But even if Tarec had a ladder, defendants have not submitted any evidence indicating that plaintiff knew about the ladder and that he was expected to use the ladder for his work, and did not use the ladder without any good reason (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012] ["Even if other ladders were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those ladders and for no good reason chose not to do so"]; *accord Torres v Our Townhouse, LLC*, 91 AD3d 549, 549 [1st Dept 2012] [finding that plaintiff was not the sole proximate cause

of his injuries where "no evidence was presented that plaintiff knew where the ladder was or that he knew he was expected to use it and for no good reason chose not to do so"]).

Accordingly, the branch of plaintiff's motion for partial summary judgment on the issue of liability under section 240 (1) is granted as against Dyckman and T-Mobile.

Labor Law § 200 and Common-Law Negligence

Plaintiff contends that there is no question that T-Mobile owned and maintained the ladder and provided it to him for use on the premises. In addition, plaintiff maintains that defendants created and had actual or constructive notice of the ladder's defective condition, and that the ladder's unsafe condition caused his accident and injuries.

Defendants argue, in support of their own motion, that the accident was caused by the means and methods of the work. According to defendants, the accident occurred because no one was holding the ladder, and because he was not given any safety devices to prevent his fall from the ladder.

Labor Law § 200 (1) provides, in pertinent part, that:

> "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."

A claim pursuant to this section is "tantamount to a common-law negligence claim in a workplace context" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Bradley v HWA 1290 III LLC*, 157 AD3d 627, 629 [1st Dept 2018] [internal quotation marks and citation omitted]).

On the one hand, "[w]here the injury was caused by the manner and means of the work, including the equipment used, 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] [internal quotation marks omitted]; *accord O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]).

On the other hand, "[w]here an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Vazquez v Takara Condominium*, 145 AD3d 627, 628 [1st Dept 2016] [internal quotation marks and citation omitted]; *accord Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]).

> "Where . . . plaintiff allege[s] that defendants—the premises owners—provided him with the defective ladder, 'the legal standard that governs claims under Labor Law § 200 is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof,' not whether the accident arose out of the means and methods of plaintiff's work"

(*Jaycoxe v VNO Buckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept 2017], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2d Dept 2008]; *accord Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]).

In this case, plaintiff alleges that T-Mobile provided him with the allegedly defective ladder (plaintiff tr at 43-44, 76-78). The issue is whether defendants "created the dangerous or defective condition or had actual or constructive notice thereof" (*Jaycoxe*, 146 AD3d at 412). Under these circumstances, "whether [defendants] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims" (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]). Because defendants only argue that they did not supervise or control plaintiff's work, defendants have failed to meet their prima facie burden. Thus, the branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

As previously noted, plaintiff testified that the ladder was "wobbly" and "crooked" and opened unevenly (plaintiff tr at 77, 162-163). Nevertheless, plaintiff has failed to make a prima facie showing of entitlement to summary judgment on the section 200 and common-law negligence claims. Plaintiff has not pointed to any evidence that T-Mobile and Dyckman created the defective condition of the ladder. Contrary to plaintiff's contention, it cannot be said that T-Mobile and Dyckman created the condition simply by virtue of being the owner and lessee of the premises. In addition, plaintiff's attorney's affirmation is without evidentiary value. Moreover, in light of plaintiff's testimony, there are issues of fact about whether T-Mobile and Dyckman had actual or constructive notice of the ladder's defective condition (*see Higgins*, 261 AD2d at 225). Therefore, plaintiff's motion must be denied, regardless of the sufficiency of defendants' opposing papers (*see Alvarez*, 68 NY2d at 324).

In view of the above, the branches of plaintiff's motion and defendants' motion with respect to plaintiff's section 200 and common-law negligence claims are denied.

Labor Law § 241 (6)

Labor Law § 241 (6) provides that "[a]ll 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."

Labor Law § 241 (6) is not self-executing because it depends upon an outside source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). The Court of Appeals has held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not"

(*Ross*, 81 NY2d at 505).

Therefore, "[]to establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). "A violation of an explicit and concrete provision of the Industrial Code by a participant in a construction project constitutes some evidence of negligence, for which the owner or general contractor may be held vicariously liable" (*Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]). The plaintiff's comparative negligence is a valid defense to a claim under this statute (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

Plaintiff's verified bill of particulars alleges violations of 12 NYCRR 23-1.5; 12 NYCRR 23-1.7 (a)-(h); 12 NYCRR 23-1.8 (a)-(d); 12 NYCRR 23-1.15 (a)-(e); 12 NYCRR 23-1.16 (a)-(f); 12 NYCRR 23-1.17 (a)-(e); 12 NYCRR 23-1.21 (a)-(f); 12 NYCRR 23-1.22 (a)-(c); 12 NYCRR 23-5.1 (a)-(k); 12 NYCRR 23-5.2; 12 NYCRR 23-5.3 (a)-(h); 12 NYCRR 23-5.4 (a)-(e); 12 NYCRR 23-5.5 (a)-(h); 12 NYCRR 23-5.6 (a)-(g); 12 NYCRR 23-5.7 (a)-(e); 12 NYCRR 23-5.8 (a)-(h); 12 NYCRR 23-5.9 (a)-(g); 12 NYCRR 23-5.10 (a)-(f); 12 NYCRR 23-5.11 (a)-(e); 12 NYCRR 23-5.12 (a)-(d); 23-5.13 (a)-(d); 23-5.14 (a)-(e); 23-5.15 (a)-(b); 23-5.16 (a)-(d); 23-5.17 (a)-(c); 23-5.18 (a)-(i); and 23-5.19 (a)-(d) (verified bill of particulars, ¶ 12).

Plaintiff moves for partial summary judgment under Labor Law § 241 (6) based upon violations of 12 NYCRR 23-1.21 (b) (1); 12 NYCRR 23-1.21 (b) (3); and 12 NYCRR 23-1.21 (b) (4).

T-Mobile and Dyckman also move for summary judgment under plaintiff's Labor Law § 241 (6) claim, arguing that plaintiff has failed to allege an applicable Industrial Code regulation and that the cited regulations were not violated in this case. In opposition to T-Mobile and Dyckman's motion, plaintiff relies only on 12 NYCRR 23-1.21 (b) (1), (b) (3), and (b) (4), and has, therefore, abandoned reliance on the remaining Industrial Code provisions (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]). Consequently, the court will only consider the alleged violations of sections 23-1.21 (b) (1), (b) (3), and (b) (4).

12 NYCRR 23-1.21

Section 23-1.21, entitled "Ladders and ladderways," provides, in relevant part, as follows:

"(b) General requirements for ladders.

> "(1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.
>
> ***
>
> "(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
>
> > "(i) If it has a broken member or part.
> >
> > "(ii) If it has any insecure joints between members or parts.
> >
> > "(iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.

> "(iv) If it has any flaw or defect of material that may cause ladder failure.
>
> "(4) Installation and use.
>
> "(i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.
>
> "(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings"

(12 NYCRR 23-1.21 [b] [1], [b] [3], [b] [4]).

Section 23-1.21 has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654 [2d Dept 2014]; *De Oliveira v Little John's Moving*, 289 AD2d 108, 109 [1st Dept 2001]).

Here, plaintiff testified that his accident occurred because the ladder was "unstable and misaligned" (plaintiff tr at 101). Thus, there is no evidence that any component of the ladder broke, dislodged or loosened or that the ladder was incapable of supporting "four times the maximum load intended to be placed thereon" (12 NYCRR 23-1.21 [b] [1]; *accord Croussett v Chen*, 102 AD3d 448, 449 [1st Dept 2013]).

As noted above, plaintiff testified that the ladder folded unevenly, and was "wobbly," "crooked," "warped," and "bent" (plaintiff tr at 77, 161-162). However, Martinez stated that, in September 2014, there was nothing wrong with the ladder, and that it was used by T-Mobile employees about a week before the accident (Martinez tr at 40-41). Thus, there are triable issues of fact about whether sections 23-1.21 (b) (3) and (b) (4) (ii) were violated (*see Dwyer*, 98 AD3d at 884). But section 23-1.21 (b) (4) (i) is inapplicable because the ladder was not used "as a regular means of access between floors or other levels in any building or other structure" (12 NYCRR 23-1.21 [b] [4] [i]; *accord Dwyer*, 98 AD3d at 884; *Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Therefore, the branch of plaintiff's motion for partial summary judgment under section 241 (6) is denied, and the branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim is granted, except as to 12 NYCRR 23-1.21 (b) (3) and (b) (4) (ii).

In sum, plaintiff has a valid Labor Law § 241 (6) claim to the extent that it is predicated on violations of 12 NYCRR 23-1.21 (b) (3) and (b) (4) (ii).

T-Mobile and Dyckman's Request for Contractual Indemnification from Energy Design

T-Mobile and Dyckman move for contractual indemnification from Energy Design, pursuant to the following indemnification provision in the Master Agreement:

> "**5.1. Indemnification**. Supplier [Energy Design] will indemnify, defend and hold harmless T-Mobile, T-Mobile Affiliates, and their respective officers,

> directors, employees, stockholders, agents and representatives (collectively, the 'Indemnified Parties') from and against all third party claims, damages, assessments, proceedings, actions, suits, costs, expenses, losses and other liabilities of any kind or nature, including without limitation, reasonable attorneys' fees ('Claims'), to the extent the Claims arise out of, in connection with or relate to allegations concerning any of the following (collectively, the 'Indemnified Claims'): (a) Supplier's or Supplier's subcontractors' or employees' performance of this Agreement, (b) Supplier's or Supplier's subcontractors' or employees' breach or failure to comply with this Agreement, including without limitation an Addendum or Order; (c) a material error or omission caused by Supplier or Supplier's subcontractors or employees in the performance of the Services or Deliverables; (d) failure or omission of Supplier or Supplier's subcontractors or employees to comply with Applicable Law; *(e) a negligent act or omission of Supplier [Energy Design] or Supplier's [Energy Design's] subcontractors or employees; (f) personal or bodily injury, or property damage or loss caused by the Deliverables, Services, Supplier [Energy Design], or Supplier's [Energy Design's] subcontractors or employees*; or (g) infringement or violation of any Intellectual Property Rights of a third party ('Infringement Claim'). Supplier's obligations under this Section 5.1 are in addition to any other rights or remedies available to T-Mobile under this Agreement or at law"

(Sohnen affirmation in support, exhibit K, ¶ 5.1 [emphasis added]).

T-Mobile and Dyckman argue that Energy Design is obligated, pursuant to this provision, to indemnify T-Mobile for its negligence and for the negligence of its subcontractors. As argued by T-Mobile and Dyckman, Tarec was actively negligent because it failed to provide plaintiff with adequate safety devices.

In response, Energy Design contends that T-Mobile and Dyckman have failed to establish Energy Design's negligence. Additionally, Energy Design contends that the provision is unenforceable under General Obligations Law § 5-322.1. Energy Design further maintains that, even if the indemnification provision is enforceable, there are questions of fact about whether T-Mobile was negligent in providing plaintiff with a defective ladder.[2]

"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]). It is well established that "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

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[2] Although Energy Design argues that defendants failed to show that it did not procure adequate insurance naming T-Mobile as an additional insured, T-Mobile and Dyckman sought summary judgment only on their contractual indemnification claim against Energy Design (*see* defendants/third-party plaintiffs' notice of motion at 2; Sohnen affirmation in support at 15).

To establish entitlement to full contractual indemnification, the indemnitee "'need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability'" (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). But an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this limiting language, it may nevertheless be enforced 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]).

Here, the indemnification provision does not contain recognized savings language (i.e., "to the fullest extent permitted by law"), and does not limit Energy Design's indemnification to its own negligence. But the provision may be enforceable at trial if a jury finds that T-Mobile was not negligent. In addition, T-Mobile and Dyckman are not entitled to full contractual indemnification from Energy Design because they have failed to establish their own freedom from negligence (*see Correia*, 259 AD2d at 65). As noted above, T-Mobile and Dyckman failed to show that they did not create or have actual or constructive notice of the defective condition of the ladder. T-Mobile and Dyckman also have not demonstrated that the provision is triggered; their only argument in support of indemnification was that Tarec was negligent in failing to provide plaintiff with proper safety equipment, and there are issues of fact about whether Tarec was negligent in this regard.[3] To the extent that T-Mobile and Dyckman argue in reply that plaintiff's accident was caused by a violation of the Labor Law, the court does not consider this argument, because T-Mobile and Dyckman did not make this argument in their moving papers (*see Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion"]). Moreover, it is well settled that liability for a violation of Labor Law § 240 (1) is "not the equivalent of negligence and does not give rise to an inference of negligence" (*Brown*, 76 NY2d at 179).

Therefore, the branch of T-Mobile and Dyckman's motion seeking contractual indemnification from Energy Design is denied.

Energy Design's Cross Claims Against T-Mobile and Dyckman

Energy Design's Contractual Cross-Claims Against T-Mobile and Dyckman

[3] Conditional contractual indemnification is also premature because "the contractual indemnification provision on which [T-Mobile and Energy Design rely] contains no language limiting indemnification to damages arising from accidents caused by [plaintiff's employer's] negligence, or precluding indemnification for damages caused by their own negligence" (*Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]).

T-Mobile and Dyckman move for summary judgment dismissing Energy Design's contract-based cross-claims asserted against them. In opposition, Energy Design does not argue that there are any contracts requiring T-Mobile or Dyckman to indemnify it or purchase insurance coverage for Energy Design's benefit. Therefore, these cross-claims are dismissed.

Energy Design's Cross-Claims for Common-Law Indemnification and Contribution Against T-Mobile and Dyckman

T-Mobile and Dyckman also move for summary judgment dismissing Energy Design's cross-claims for common-law indemnification and contribution as against it.

The First Department has held that, "[t]o be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *accord McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part"]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Although defendants argue that Dyckman was an out-of-possession landlord, defendants have failed to demonstrate that Dyckman did not have an obligation to repair dangerous conditions by contract or a course of conduct (*see Colon v Mandelbaum*, 244 AD2d 292, 293 [1st Dept 1997] [finding issues of fact about whether landlords assumed responsibility for repair of water heater]). Notably, T-Mobile and Dyckman have not submitted T-Mobile's lease. In addition, there are issues of fact about whether T-Mobile and Dyckman created or had actual or constructive notice of the defective conditions of the ladder (*see Lyons v Schenectady Intl.*, 299 AD2d 906, 906-907 [4th Dept 2002] [holding that summary judgment was properly denied on common-law indemnification claim, where contractor failed to establish that it did not create or have notice of a dangerous condition at work site]).

Therefore, T-Mobile and Dyckman are not entitled to dismissal of Energy Design's cross- claims for common-law indemnification and contribution as against them.

Tarec's Cross-Claims Against T-Mobile and Dyckman

Tarec's Cross-Claims for Contractual Indemnification and Failure to Procure Insurance Against T-Mobile and Dyckman

T-Mobile and Dyckman also request summary judgment dismissing Tarec's cross-claims as against them. In response, Tarec argues that their motion should be denied to the extent that it

seeks common-law indemnification and contribution. Thus, Tarec's contractual indemnification and failure to procure insurance claims against T-Mobile and Dyckman are dismissed.

Tarec's Cross-Claims for Common-Law Indemnification and Contribution Against T-Mobile and Dyckman

T-Mobile and Dyckman have failed to demonstrate entitlement to summary judgment on Tarec's cross-claims for common-law indemnification and contribution against them. They have failed to demonstrate that Dyckman cannot be held liable as an out-of-possession landlord, i.e., that Dyckman did not have an obligation to repair any dangerous conditions in the demised premises. Moreover, questions of fact exist about whether T-Mobile and Dyckman created or had knowledge of the allegedly defective condition of the ladder. Therefore, the branch of T-Mobile and Dyckman's motion seeking dismissal of these claims is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of defendants/third-party plaintiffs T-Mobile USA, Inc. and Dyckman Realty Associates, L.P. for summary judgment is granted to the extent of dismissing (1) plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.21 (b) (3) and 12 NYCRR 23-1.21 (b) (4) (ii), (2) third-party defendant Energy Design Services, LLC's contract-based cross-claims as against them, and (3) second third-party defendant Tarec, LLP's cross-claims for contractual indemnification and failure to procure insurance as against them, and the motion is otherwise denied; and it is further

ORDERED that the motion (sequence number 005) of plaintiff Mark Franklin for partial summary judgment is granted as to the issue of liability under Labor Law § 240 (1) as against defendants T-Mobile USA, Inc. and Dyckman Realty Associates, L.P., with the issue of plaintiff's damages to await the trial of this action, and is otherwise denied.

Dated: May 4, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.