

<b>Djuric v City of New York</b>
2018 NY Slip Op 30919(U)
May 4, 2018
Supreme Court, New York County
Docket Number: 151057/2012
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

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MICHAEL DJURIC and MARIA DJURIC,

Index No.: 151057/2012

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and SHAW ENVIRONMENTAL & INFRASTRUCTURE  
ENGINEERING OF NEW YORK, P.C.,

Defendants.

-----x  
SHAW ENVIRONMENTAL & INFRASTRUCTURE  
ENGINEERING OF NEW YORK, P.C.,

Third-Party Plaintiff,

-against-

BIDWELL ENVIRONMENTAL, LLC,

Third-Party Defendant.

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**Lebovitz, J.:**

Motion sequence numbers 006, 007 and 008 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a steamfitter on October 20, 2011 at the North River Waste Water Pollution Control Plant, located on the Hudson River between 137th Street and 146th Street in Harlem, New York (the Premises), when he was struck on the back of the neck by a pipe saddle (the Saddle), which was part of a pipe hanger assembly system.

In motion sequence number 006, defendant/third-party plaintiff Shaw Environment & Infrastructure Engineering of New York, P.C. (Shaw) moves under CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it.

In motion sequence number 007, third-party defendant Bidwell Environmental, LLC (Bidwell) moves under CPLR 3212 for summary judgment dismissing the third-party complaint and all cross-claims against it.

In motion sequence number 008, defendants the City of New York (the City) and the

New York City Department of Environmental Protection (the DEP) (together, the City defendants) move CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against them.

Plaintiffs Michael Djuric (plaintiff) and Maria Djuric cross-move under CPLR 3212 for summary judgment in their favor on the Labor Law §§ 240 (1) and 241 (6) claims as against Shaw and the City defendants.

### BACKGROUND

On the day of the accident, the City defendants owned the Premises where the accident occurred. Following a fire and explosion at the Premises, the DEP hired Shaw to act as construction manager on a project to restore and reconstruct it (the Project). While the DEP contracted directly with the various prime contractors for the Project, Shaw retained Bidwell, an environmental consulting firm, to perform hazardous material investigations and to provide environmental health and safety services for the Project. Plaintiff, a steamfitter by trade, was employed by nonparty Gottlieb Skanska a/k/a Skanska Mechanical and Structural Inc. (Skanska), the mechanical contractor and general contractor on the Project.

#### *Plaintiff's Deposition Testimony*

Plaintiff testified that, on the day of the accident, he was employed by Skanska to perform fire remediation work at the Premises. Skanska provided plaintiff with all of the direction and instruction that he needed to perform his work. Plaintiff was not familiar with Shaw or its role on the Project. Plaintiff explained that he was part of a crew working to repair a boiler that was damaged by a fire which had occurred on the minus-five level of the Premises. He described the minus-5 level of the Premises as having two walkways lined by pumps. It was located one level below the generator room.

Plaintiff testified that, as he worked, he observed quarter-size pieces of debris falling from above him. Plaintiff opined that the debris was the result of vibrations from the demolition work being performed by Skanska laborers. Plaintiff noted that there were no safety nets or catchalls in place to catch the falling debris.

Plaintiff testified that, prior to the accident, he was sitting on a tool bucket lubricating some nuts and bolts. There were pipes hanging from the ceiling above him. The pipes hung from the ceiling via a threaded rod that was drilled into the concrete ceiling. Plaintiff noted that he did not observe that the pipes were rusted or damaged, and that he never complained to anyone about their condition.

Plaintiff explained that, as he was “slumped over with [his] hands . . . on the pump . . . he felt something heavy hit [him] on the back of the neck, shoulder area” (plaintiff’s tr at 177). Plaintiff did not hear anything fall “because [there was] so much noise going on and plus [he] was wearing earplugs” (*id.*). At first he thought that his co-worker was “messing around with

him,” but then he realized that “[i]t was a saddle that comes off a roller hanger assembly that’s on a pipe” (*id.* at 182).

Plaintiff described the Saddle, as follows:

“Well, the saddle is about 12 inches long. I would say it weighs about eight pounds. I observed the saddle. It didn’t have any tack marks on it, tack marks meaning weld marks. Usually a saddle is welded to the pipe. So I didn’t see any weld marks to it. It didn’t look like it was installed”

(*id.* at 188-189). No one witnessed plaintiff’s accident, as plaintiff’s partner had left the area to retrieve some materials from the tool room.

***Deposition Testimony of Neil Feldscher (the DEP Health and Safety Chief)***

Neil Feldscher testified that he was employed as the chief of the DEP’s health and safety programs on the day of the accident. He explained that, in furtherance of the fire remediation work at the Premises, the DEP hired Shaw to manage the Project’s construction, coordinate the work of the trades, review and process payments, inspect the work for code compliance and maintain daily incident reports. He explained that the individual contractors on the job were required to identify and develop their own means and methods for their work, and that Shaw’s “only involvement would be if [Shaw] had [safety] issues with the means and methods chosen” (Feldscher tr at 68). To that effect, Shaw would review each contractor’s health and safety plan to identify any potential coordination and/or safety issues. Once the DEP hired Shaw, it no longer had an environmental health and safety presence on the job.

***Deposition Testimony of Syed Ali (Shaw’s Project Engineer)***

Syed Ali testified that he was a project engineer for Shaw, but he had no personal involvement with the Project. He asserted that Skanska was the general contractor for the Project, which included coordinating all work activities. While Shaw was responsible for monitoring its own contract and its own contractors, it was not responsible for monitoring the work of the other contractors.

In addition, Shaw subcontracted out site safety to a site safety management company, Bidwell. Bidwell’s site safety services for the Project included one Bidwell engineer “walking the job site monitoring the contractors work for safety” (Ali tr at 33). This engineer made sure that the workers had “hard hats, safety glasses, vests, boots, [and] gloves” (*id.*). If he or she “came across an unsafe condition,” he or she didn’t [have authority to stop work unless there [was] a real emergency, or if something [was] really visible” (*id.* at 34). Then the Bidwell engineer would “tell a Skanska safety officer that [the] crew was not working safely . . . [and] advise him to stop and notify [the] DEP” (*id.*).

Ali also testified that, if a Skanska employee was involved in an accident, Shaw would

not investigate. But Shaw would “fill out a report based on information given to them or the person and report [it] to [the] DEP” (*id.* at 37-38).

***Deposition Testimony of Ellen Metzger (Owner and Sole Officer of Bidwell)***

Ellen Metzger testified that she was the owner and sole officer of Bidwell, an environmental consulting firm, on the day of the accident. Metzger explained that Bidwell specializes “in supporting environmental investigations and health and safety services for design engineers and construction managers” (Metzger tr at 11). She maintained that Shaw, a construction management company, hired Bidwell to “oversee compliance by the contractors with their safety plans” for the Project (*id.* at 103). Bidwell also “identif[ied] hazards in the workplace and then identif[ied] mitigative measures or control measures for those hazards” (*id.* at 104). When asked if Shaw inspectors had the authority to stop work if they observed an unsafe condition at the site, she replied, “The only one that had the authority to stop the work [was] the [Shaw] resident engineer” (*id.* at 97). Shaw also conducted coordination meetings that Bidwell was required to attend.

***Deposition Testimony of Sean Modd (Skanska's Safety Engineer)***

Sean Modd testified that he was Skanska’s safety engineer on the Project on the day of the accident, as well as the head of Skanska’s safety department. He explained that Skanska was hired by the DEP to

“[c]lean up, the main objective was getting temporary piping from the sewage. The fire had basically blown out the pumps and stuff – pumping all sewage into the Hudson. So one objective was to clean up the area. The other one was to basically run a divergent pipe temporarily and once all the pumps and everything shut down, then they put [up] a permanent structure”

(Modd tr at 11). In addition, if one of Skanska’s workers was in an accident, after being notified, Modd would investigate to assess the condition of the injured worker, determine the cause of the accident, interview witnesses, take photographs and fill out an incident report.

Modd testified that he had no specific concerns about the potential for falling material or debris as a consequence of the subject explosion and fire at the Premises. He stated:

“the fire department assessed the entire area, told [them] the areas [they] could and could not go, cornered off some areas. So we were aligned with the fire department of New York and the DEP to inform us of the areas we could go and couldn’t go. Obviously, we just don’t rely on that, we also rely on our safety engineers, superintendents and our field guys and keep eyes and ears open and let us know”

(*id.* at 25). When asked if there was any ongoing work during the fire remediation that might cause fallen debris or material, Modd replied, “No” (*id.*). In addition, Skanska’s engineers determined that there were no areas on the Project that required “safety netting” or “anything of that nature” (*id.* at 26).

Upon being informed of plaintiff’s accident, Modd went to the accident scene on the minus-five level of the Premises and observed plaintiff sitting on an A-frame ladder hunched over and spitting. He also noticed demolition work going on in the area. Plaintiff then told Modd that he had been struck in the neck by the Saddle. Modd thought that the Saddle was “old,” because “[i]t wasn’t new and [shiny]” (*id.* at 40). As such, Modd made the “assumption” that it had been in the fire (*id.*). He learned later that saddles are supposed to be attached to the pipes by welding them. He was not aware of any other way that they would be attached.

Modd explained that saddles were necessary

“to level the pipe as an elevation basis so . . . if you have a pipe running with water in it to keep that continuous flow, you need the pipe to be leveled. So you would put these saddles in those places where you don’t have a leveled – it also allows the friction of the pipe to move along the runner”

(*id.* at 41). Modd noted that the purpose of the runner was “to allow the movement with the pipe that you might get” (*id.*).

When asked if he ever witnessed any saddles falling from pipes during the Project, Modd replied, “No” (*id.*). It was his expectation that the pipe saddles were connected to the pipes in a way that would not allow them to fall off the pipe. Modd could not state whether anyone from Skanska or the DEP investigated, fixed or replaced any of the piping before work was initiated on it, other than “the obvious, to look around at what you can see . . . during [his] walkthroughs” (*id.* at 42). Modd did not know “where [the Saddle] came from,” nor did anyone he spoke to about it (*id.*).

#### ***Deposition Testimony of George Ryder (Skanska’s Superintendent)***

George Ryder testified that he was Skanska’s Superintendent on the Project on the day of the accident. Skanska was hired to perform fire remediation work at the Premises, and plaintiff was installing a pipe associated with one of the two pumps on the minus-five level of the Premises. At his deposition, when he was shown photographs of the Saddle, he confirmed that it would have come from one of the pipes, but he was unable to identify which one.

Ryder further explained that the purpose of the Saddle was to go underneath the pipe and create a smooth and level surface for the roller to move along the pipe as it expands. He maintained that pipe saddles are supposed to be welded and secured to the pipes.

**The Skanska Incident Report**

Dodd filled out Skanska’s incident report for the accident (the Report). In it, he states that the incident occurred “[p]ossibly [from] the vibration from the diesel engines and the demolition close by caused a pipe saddle which had not been tack welded [to come] loose knocking [plaintiff] on the neck” (plaintiffs’ cross motion, exhibit 10, the Report). He also notes that the “[p]ipe sleeve should have been tack welded” (*id.*).

**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]; accord *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]. If there is any doubt about 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**

In their separate motions, Shaw and the City defendants move to dismiss the Labor Law § 240 (1) claim against them. Plaintiffs cross-move for summary judgment in their favor as to liability on this claim.

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, as owners of the Premises where the accident occurred, the City defendants may be liable for plaintiff's injuries under Labor Law § 240 (1). But it must be determined whether Shaw, as construction manager, may also be liable for plaintiff's injuries as an agent of the owner and/or general contractor. While

"a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

"When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(*Russin*, 54 NY2d at 318).

As set forth above, plaintiff was injured when he was struck by a falling saddle. Although Shaw coordinated the work on the Project and had general safety duties, it did not supervise and direct plaintiff's work, nor was it responsible for properly securing the Saddle to the pipe. There is also no indication in the record that Shaw was the entity in charge of providing fall protection, such as safety netting, in the event that it observed a potential fall

hazard (see *Orphanoudakis v Dormitory Auth. of State of N.Y.*, 40 AD3d 502, 502 [1st Dept 2007]).

Thus, as it is not a proper Labor Law defendant, Shaw is entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. Therefore, in the remainder of this decision, these claims will only be addressed in regard to the City defendants.

In opposition to the motion of the City defendants and in support of their cross-motion, plaintiffs argue that Labor Law § 240 (1) applies to the facts of this case, because plaintiff was charged with working in an area exposed to falling hazards due to the demolition that was underway there. The City defendants violated said statute by their failure to install netting or any other catch-all device to protect him from any resulting falling debris, structures or equipment, including the Saddle, which plaintiffs claim was inadequately welded and secured to the pipes located above plaintiff.

Plaintiffs further argue that they may recover damages from the City defendants for their violation of Labor Law § 240 (1) under a falling objects theory, because the Saddle that fell onto plaintiff "was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699-700 [2d Dept 2013] [finding that plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him, while being hoisted to the top of the building, was inadequately secured]; *Deandreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["Plaintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

In opposition to plaintiffs' cross-motion and in support of their own motion to dismiss, the City defendants argue that plaintiff s must show more than that an object fell and caused injury to a worker; they must show that the object, i.e., the Saddle in this case, fell while being hoisted or secured. But case law dictates that a falling object need not be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240 (1). It is enough that the object simply needed securing "for the purposes of the undertaking" (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005] [finding Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and thus, was not in the process of being hoisted or secured at the time that it fell on the plaintiff]).

In addition, contrary to the City defendants' contention, it is also insufficient to deny plaintiffs summary judgment merely because no other witnesses observed the accident (*Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011] ["The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor"]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290 [1st Dept 2002] [granting plaintiff, who was alone at time of accident and fell from a A-frame ladder

which had no protective devices while installing a light fixture, summary judgment on his section 240 (1) claim “[r]egardless of the precise reason of his fall”).

Further, it should be noted that the City defendants do not offer any evidence, other than mere speculation, to refute plaintiff’s showing or to raise a bona fide issue about how the accident occurred (see *Pineda v Kecheck Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]).

That said, the City defendants successfully argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them because the Saddle was part of the building’s permanent structure, and, as such, the accident was not caused due to the lack of or failure of a safety device whose function was intended to protect plaintiff from a gravity-related hazard, as the statute requires (see *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825 [2d Dept 2009] [finding that Labor Law § 240 (1) not applicable where the plaintiff was injured when a metal bracket used to affix piping to a building’s exterior came loose and struck him on his head, because the bracket “had been installed prior to the plaintiff’s accident . . . and thus became part of the building’s permanent structure”]; *Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574 [4th Dept 2014]; *Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 416 [1st Dept 2012]).

In support of this argument, defendants put forth the case of *Guallpa v Leon D. DeMatteis Constr. Corp.* (121 AD3d 416 [1st Dept 2014]). In *Guallpa*, the plaintiff was injured when a stone block, which was resting on top of a plastic tarp, fell and struck him on the knee. The plaintiff argued that Labor Law § 240 (1) was applicable because his injuries were caused by defendants’ failure to provide an adequate safety device to hold the plastic tarp in place. But the Court in *Guallpa* correctly held that Labor Law § 240 (1) did not apply to the facts of that case because “[t]he purpose of the tarp was to keep possible rain off the object, not to protect workers from an elevated risk” (*id.* at 418).

Likewise, in *Fabrizi v 1095 Ave. of the Ams., LLC* (22 NY3d 658, 663 [2014]), the plaintiff, an electrician, was injured when he was struck by a piece of falling conduit pipe, which was left dangling by a compression coupling connecting it to a similar conduit. At the time of the accident, the plaintiff was “relocating a pencil box” (*id.* at 661). When he removed the pencil box, he left “the top conduit dangling by the compression coupling near the ceiling” (*id.*). About 15 minutes later, while drilling, “the top conduit fell, striking plaintiff on the hand” (*id.*). The court in *Fabrizi* held that the defendants were entitled to dismissal of the Labor Law § 240 (1) claim against them, because, contrary to the plaintiff’s assertion, the inadequate compression coupling, which allegedly failed to prevent the conduit from falling, was not a safety device “‘constructed, placed and operated as to give proper protection’ from the falling conduit” (*id.* at 663). In making its determination, the Court noted that the compression coupling’s

“only function was to keep the conduit together as part of the conduit/pencil box assembly . . . It cannot be said that the coupling was meant to function as a safety device in the same manner as

those devices enumerated in section 240 (1).

"It follows that defendants' failure to use a set screw coupling is not a violation of section 240 (1)'s proper protection directive. A set screw coupling, utilized in the manner proposed by plaintiff, is not a safety device within the meaning of the statute. Plaintiff concedes that compression and set screw couplings are 'basic couplings' that serve identical purposes, namely, to function as support for the conduit/pencil box assembly, not to provide worker protection"

(*id.*).

Importantly, the devices at issue in *Gualpa* and *Fabrizi* were not in place for the purpose of protecting the injured plaintiffs from an elevation or gravity-related risk, they were intended to serve other purposes. Similarly, the Saddle was not the type of device intended to be constructed, placed and operated to give proper protection to the construction worker against elevation-related risks, but, rather, its purpose was to facilitate movement of the pipe within the hangar as it became heated and to protect the pipe covering.

The Court of Appeals case, *Narducci v Manhasset Bay Assoc.* (96 NY2d 259), which has similar facts to the case at bar, is also instructive. In *Narducci*, the plaintiff was injured when he was struck by falling glass from a window at a building where a renovation project was underway. Like the Saddle in the instant case, the glass in *Narducci* was part of the pre-existing building, and, therefore, the court determined that it "was not [the kind of] situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (*id.* at 268; see *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009]). The court noted that "[t]he absence of a necessary hoisting or securing device of the kind enumerated in Labor Law § 240 (1) did not cause the falling glass," but rather, the falling glass "was clearly a general hazard of the workplace, not one contemplated to be subject to Labor Law § 240 (1)" (96 NY2d at 268-269; accord *Wells v British Am. Dev. Corp.*, 2 AD3d 1141, 1143 [3d Dept 2003]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]).

"The 'special hazards' [referred to in Labor Law § 240 (1)] . . . do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured"

(*Ross.*, 81 NY2d at 501 [citations omitted] [noting that Labor Law § 240 (1) "was designed to prevent those types of accidents in which a scaffold, hoist, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*"].)

It should be noted that plaintiffs also argue that Labor Law § 240 (1) applies: Plaintiff’s accident was caused by the failure of the safety device that connected the Saddle itself to the subject pipe because the Saddle was not properly tack-welded to the pipe during its installation. But a tack-welding is not a safety device as contemplated by Labor Law § 241 (1) (*Bednarczyk*, 63 AD3d at 428 [“[T]he suspended light fixture did not pose an elevation-related risk of the kind that would be addressed by safety devices of the kinds enumerated in the statute”]). Other than tack welding, Modd was not aware of any other way that saddles could be attached to piping.

Finally, plaintiffs argue that, due to the damage done to the Premises as a result of the explosion and fire, it was foreseeable that permanent structures to the building might have been damaged, and, as such, additional safety devices, such as netting or other catch-all safety devices, should have been in place to prevent plaintiff from being struck by any compromised objects. Under the circumstances of this case, however, it cannot be said that it was foreseeable that the Saddle would fall. Plaintiff testified that he did not observe the pipes above him to be rusted or damaged. Modd testified that the fire department, Skanska engineers and various field personnel had assessed the Premises and determined that there were no areas that required safety netting or other fall protection.

Thus, as plaintiff was exposed to the usual and ordinary dangers of a construction site, rather than a special hazard contemplated by Labor Law § 240 (1), plaintiffs are not entitled to summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against the City defendants, and the City defendants are entitled to dismissal of said claim against them.

**The Labor Law § 241 (6) Claim**

The City defendants move for dismissal of the Labor Law § 241 (6) claim against them. Plaintiff’s cross-move for summary judgment in their favor as to liability on said claim.

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). Labor Law § 241 (6), however, is not self-executing, and 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 plaintiffs allege multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.7 (a) (1), which deals with overhead hazards, and 23-3.2 (b), which deals with the protection of adjacent structures during demolition, plaintiff does not oppose dismissal of these sections, nor does he move for summary judgment in his favor on them.<sup>1</sup> Therefore, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [holding that where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, the City defendants 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," 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) 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, plaintiff testified that, as he worked, he observed debris falling all around him, as a result of vibrations from demolition work being performed above his head. That said, plaintiff was not struck by debris, but rather, he was struck by a falling saddle that fell, first and foremost, because it was not properly installed by being tack welded to its pipe.

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<sup>1</sup>It should be noted that, in plaintiffs' cross-motion, although plaintiffs' correctly describe the contents of section 23-3.2 (b), they mistakenly identify it as section 23-3.2 (c).

Although the area where plaintiff was working may have been normally exposed to falling debris, it has not been established that it was normally exposed to falling saddles. In fact, Modd testified that he had never witnessed any saddles falling from pipes during the Project. Accordingly, section 23-1.7 (a) (1) does not apply to the facts of this case (*see Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2d Dept 2009]) ["The fact that two brackets had fallen from the building prior to the plaintiff's accident was not a sufficient basis for a finding that the plaintiff's work site was 'normally exposed' to falling brackets"].

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 the City defendants, and the City defendants are entitled to dismissal of the same.

*Industrial Code 12 NYCRR 23-3.2 (b)*

Initially, section 23-3.2 (b) has been deemed sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138 [4th Dept 2005]).

Section 23-3.2 (b) provides, in pertinent part, as follows:

"Protection of adjacent structures. During the demolition of any building or other structure, the employer performing such demolition shall examine the walls of all buildings or other structures adjacent to the one which is to be demolished . . . Where there is any reason to believe that an adjacent building or other structure . . . is unsafe or may become unsafe because of the demolition operations, such operations shall not be performed until means have been provided to insure the stability and to prevent the collapse of such adjacent buildings or other structures."

Here, section 23-3.2 (b) does not apply to the facts of this case, as it is undisputed that plaintiff was injured by an object that fell from directly above him, and said provision only applies to the protection of adjacent structures.

Thus, plaintiffs are not entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-3.2 (b), and the City defendants are entitled to dismissal of the same.

***The Common-Law Negligence and Labor Law § 200 Claims***

In their separate motions, Shaw and the City defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *accord Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) provides 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] [noting that 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”]).

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] [finding 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]).

As discussed previously, the accident occurred when the Saddle, which was a permanent part of the structure of the Premises, broke loose and fell on plaintiff. Accordingly, the accident was caused by a defect inherent in the property, and, as such, it must be analyzed according to an unsafe condition theory.

Here, there is no evidence in the record to support an argument that either Shaw or the City defendants were made aware of any unsafe condition regarding the Saddle, the length of time that the subject unsafe condition existed or whether they received any prior complaints, to

establish that these defendants had constructive notice of the same (see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Murphy v 136 N. Blvd. Assoc.*, 304 AD2d 540, 541 [2d Dept 2003] [finding no constructive notice where plaintiff presented no evidence regarding the length of time the unsafe condition existed, or whether defendant had received any prior complaints about said condition]).

“To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]). A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the injury (*Gordon*, 67 NY2d at 838; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [1st Dept 2008], *affd* 11 NY3d 889 [2008] [finding no constructive notice and noting that it was possible that the piece of carpet that caused the plaintiff’s fall could have been deposited just prior to the time of the accident]).

Moreover, as the City defendants argue, the hazardous defect at issue in this case, i.e., a saddle not properly tack welded to its pipe, can be considered latent, in that it was not evident and observable during the investigations conducted by the various parties during their walkthroughs, nor was it readily visible to plaintiff. “[A]s a matter of law . . . absent any warning of a possible defect” in regard to the Saddle, the subject defendants were “under no duty to tear apart” the building to inspect further (*See Monroe v City of New York*, 67 AD2d 89, 97 [2d Dept 1979] [“The rusted portions of the support bracket [that supported the fire escape that fell on the plaintiff and injured him] were encased within the brick and mortar of the rear wall of the building” that he was demolishing]).

Even if it is argued that, as the Premises was allegedly damaged by fire, the accident was caused by defendants’ failure to properly protect against falling objects resulting from the fire, thereby implicating the means and methods of the work, there is nothing in the record to demonstrate that either Shaw or the City defendants were in charge of fall protection at the site. In addition, “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]; *accord Bednarczyk*, 63 AD3d at 428 [dismissing 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”]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2d Dept 2006] [holding that the general authority to stop work at a construction site does not thereby also create a duty for a party to protect a contractor’s employees]).

Thus, Shaw and the City defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

### *Shaw's Third-Party Claims Against Bidwell*

Bidwell moves to dismiss Shaw's third-party claims for common-law and contractual indemnification and breach of contract for failure to procure insurance as against it.

#### *The Third-Party Claim for Contractual Indemnification*

"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]; accord *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]).

Here, as noted by Bidwell, claims for contractual indemnity and breach of contract for failure to procure insurance can only arise from a contract. Because the scope of Bidwell's work had not yet been agreed, no contract existed between Bidwell and Shaw at the time of the accident. In any event, in its opposition to Bidwell's motion to dismiss, Shaw concedes that no contract was in effect between the parties on the day of the accident. Shaw does not put forth any argument that Bidwell is not entitled to dismissal of the third-party claims.

Thus, Bidwell is entitled to dismissal of Shaw's third-party claim for contractual indemnification and breach of contract for failure to procure insurance as against it.

#### *The Third-Party Common-Law Indemnification Claim Against Bidwell*

"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]).

Here, a review of the record reveals no negligence on Bidwell's part that might have caused the accident, and that its safety responsibilities on the Project were only general in nature. While Bidwell may have walked the site to monitor potential safety issues there and submitted

daily inspection reports, it did not supervise or control plaintiff's work, nor was it in charge of supervising and controlling anyone else's work. Although it is true that Bidwell could stop work in the event that it noticed an unsafe condition or practice during its walkthroughs of the Premises, it was only charged with reporting the condition or practice to the responsible trade's supervisor and was not itself responsible for correcting it. In fact, each contractor was in charge of its own safety and environmental health plan, and each contractor supervised the means and methods of their own employees. Also, it has not been established that Bidwell could have had actual or constructive notice of the unsafe condition at issue in this case — it was not readily observable upon reasonable inspection.

Thus, Bidwell is entitled to dismissal of the third-party claim for common-law indemnification against it. Accordingly, it is hereby


**ORDERED** that defendant/third-party plaintiff Shaw Engineering & Infrastructure Engineering of New York, P.C.'s (Shaw) motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it is granted, and the complaint and all cross-claims are dismissed as against Shaw with costs and disbursements to Shaw as taxed by the Clerk of Court, and movant must serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment in favor of Shaw; and it is further

**ORDERED** that third-party defendant Bidwell Environmental, LLC's (Bidwell) motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross-claims against it is granted, and the third-party complaint and all cross-claims are dismissed as against Bidwell with costs and disbursements as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Bidwell; and it is further

**ORDERED** that defendants the City of New York and the New York City Department of Environmental Protection's (together, the City defendants) motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them is granted, the complaint and all cross-claims are dismissed as against the City defendants with costs and disbursements to the City defendants as taxed by the Clerk of Court, and movant must serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment in favor of the City defendants; and it is further

**ORDERED** that plaintiffs Michael Djuric and Maria Djuric's cross-motion, pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law §§ 240 (1) and 241 (6) claims as against Shaw and the City defendants is denied.

Dated: May 4, 2018

  
HON. GERALD LBOVITS  
J.S.C.