SHORT FORM ORDER

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INDEX No. 13-9631
CAL. No. 18-00126OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 5-15-18 (001 & 002)
MOTION DATE 6-26-18 (003)
MOTION DATE 6-5-18 (004)
ADJ. DATE 6-26-18
Mot. Seq. # 001 - MotD
002 - MotD
003 - MD
004 - MotD

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SEBASTIAN BATTAGLIA and VICTORIA BATTAGLIA,

Plaintiffs,

- against -

6340 NB LLC., TD BANK, CUSTOM COMMERCIAL CONSTRUCTION CORP, GIAQUINTO MASONRY, INC., and GIAQUINTO MASONRY, LLC,

Defendants.

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Upon the following papers numbered 1to 108 read on these motions for summary judgment: Notices of Motion and supporting papers 1- 21, 22-37, 38-58, 59-73; Answering Affidavits and supporting papers 74-76, 77-79, 80-82, 83-97; and Replying Affidavits and supporting papers 98-99, 100-101, 102-103, 104-106, 107-108; and after due deliberation, it is,

ORDERED that the motion (001) by defendant Giaquinto Masonry, Inc., the motion (002) by defendants Custom Commercial Construction Corp. and T.D. Bank, the motion (003) by plaintiff Sebastian Battaglia, and the motion (004) by defendant 6340 NB, LLC, are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Giaquinto Masonry, Inc., for, inter alia, summary judgment dismissing the complaint and the cross-claims against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by defendants Custom Commercial Construction Corp. and T.D. Bank for, inter alia, summary judgment dismissing the complaint against them is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by plaintiff Sebastian Battaglia for partial summary judgment in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim is denied; and it is

ORDERED that the motion by defendant 6340 NB, LLC, for, inter alia, summary judgment dismissing the complaint and the cross-claims against it is granted to the extent indicated herein and is otherwise denied.

Plaintiff Sebastian Battaglia commenced this action to recover damages for personal injuries he allegedly sustained as a result of an accident that occurred on November 27, 2012, while working at a construction site located at 6340 Northern Avenue, East Norwich, New York, where a new branch of T.D. Bank was being erected. T.D. Bank leased the property on which the bank was being built from defendant 6340 NB, LLC. Plaintiff allegedly fell and was injured at the worksite when he stepped from a wooden scaffold onto a Styrofoam board that had been laid horizontally across adjoining scaffold frames to create a makeshift rain shed utilized by other workers at the site. Plaintiff alleges that he stepped on the Styrofoam board believing there was a wooden plank beneath it, as the remainder of the scaffold had been made up of such planks. At the time of the accident, plaintiff was employed by non-party Hammerhead Construction ("Hammerhead"), a carpentry subcontractor. T.D. Bank's general contractor for the project was defendant Custom Commercial Construction Corp. ("Custom"). The masonry subcontractor, which plaintiff alleges erected the rain shed from which he fell, was defendant Giaquinto Masonry, Inc., a/k/a Giaquinto Masonry LLC ("Giaquinto"). By his complaint, plaintiff alleges causes of action against the defendants based upon common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The complaint also includes a derivative claim on behalf of plaintiff's wife, Victoria Battaglia, for loss of consortium and services. Defendants joined issue denying plaintiffs' claims and asserting cross-claims against each other. The note of issue was filed on January 17, 2018.

Giaquinto now moves for summary judgment dismissing the complaint and the cross-claims against it on the grounds that it was not an owner, agent, or general contractor at the time of the alleged accident and that it lacked the authority to supervise plaintiff's work or safety practices. Giaquinto further asserts that

the breach of contract and contractual indemnification cross-claims against it must be dismissed as any contractual duty it might have to indemnify the co-defendants was not triggered and it had fulfilled its obligation to procure insurance naming them as additional insureds. T.D. Bank and Custom (hereinafter collectively referred to as "Custom") also move for dismissal of the complaint and for conditional summary judgment on their contractual indemnification cross claim against Giaquinto. Custom argues, inter alia, that Labor Law § 240 (1) is inapplicable because the Styrofoam board in question was being utilized to create a rain shed rather than a safety device and that plaintiff's conduct was the sole proximate cause of the accident, as he was engaged in the unauthorized use of the scaffold at the time of his accident. Custom further asserts that plaintiff has failed to cite the violation of specific applicable sections of the Industrial Code in support of his Labor Law § 241 (6) claim and that plaintiff's common law negligence and Labor Law § 200 claims should be dismissed, because Custom was not in exclusive control of the worksite and it was Hammerhead that possessed the sole authority to supervise plaintiff's work at the time of the accident.

Relying on similar bases, 6340 NB also moves for summary judgment dismissing the complaint against it, contending that Labor Law § 240 (1) is inapplicable under the circumstances of the case, that plaintiff's unauthorized attempt to use the Styrofoam board as a scaffold was the sole proximate cause of the accident, and that plaintiff has failed to cite the violations of specific applicable sections of the Industrial Code in support of its Labor Law § 241 (6) claim. 6340 NB further contends that plaintiff's common law negligence and Labor Law § 200 claims against it should be dismissed because it was an out-of-possession landlord at the time of the accident, it did not create or have notice of the alleged condition and it did not possess any authority to control plaintiff's work. In partial opposition to the motions, plaintiff withdraws his Labor Law § 200 claims against all defendants and his common law negligence claims against Custom and 6340 NB only. However, plaintiff continues his common law negligence claim against Giaquinto, contending that it was negligent for erecting the rain shed on scaffold frames adjacent to the scaffold on which plaintiff had been standing without posting any signs warning workers of the trap-like condition. Plaintiff further opposes the branch of defendants' motions seeking dismissal of his Labor Law §§ 240 (1) and 241 (6) claims, arguing that defendants violated their absolute duty to ensure that he was provided with a safety device that was adequately constructed and placed to prevent him from falling, and that he cited the violations of specific and applicable provisions of the Industrial Code, namely, purported violations of 22 NYCRR 23-5.1(c), 22 NYCRR 23-5.4, and 22 NYCRR 23-5.5, in support of his claim under Labor Law § 241 (6).

By way of a separate motion, plaintiff moves for partial summary in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim, arguing that defendants created a significant elevation-related risk when they placed an unmarked and unsecured rain shed next to a scaffold where he was working and that they failed to provide him with adequate safety devices designed to guard against such risk. Custom opposes plaintiff's motion, arguing, inter alia, that the danger posed by the rain shed's proximity to the scaffold was one of those usual and ordinary dangers faced by workers at a construction site and that plaintiff failed, in any event, to eliminate a triable issue as to whether his own negligent conduct in stepping onto the shed was the sole proximate cause of the accident. 6340 NB opposes plaintiff's motion on a similar basis.

Finally, Custom opposes the branch of Giaquinto's motion seeking dismissal of Custom's indemnification and breach-of-contract cross-claims against it, and 6340 NB opposes the branches of the motions by Giaquinto and Custom to the extent they seek to extinguish 6340 NB's cross-claims against those defendants.

Discussion. Initially, the court denies, as moot, the branches of defendants' motions seeking summary judgment dismissing plaintiff's Labor Law § 200 claims against them, as plaintiff voluntarily withdrew such claims against all defendants in his moving papers. Since plaintiff also withdrew his common law negligence claims against Custom and 6340 NB, the branches of their motions for summary judgment dismissing those claims are likewise denied as moot. However, with respect to the branches of defendants' motions seeking summary judgment dismissing plaintiff's cause of action under Labor Law § 241 (6), the court notes that plaintiff has only opposed dismissal of the cause of action as predicated upon the alleged violations of 12 NYCRR 23-5.1 (c), 12 NYCRR 23-5.4, and 12 NYCRR 23-5.5. The court, therefore, deems so much of that cause of action as is predicated on various other sections of the Industrial Code abandoned (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; ***Cardenas v One State St., LLC***, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; ***Genovese v Gambino***, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). Although defendants contend that the structure upon which plaintiff was stepping when he fell was a rain shed, not a scaffold, that "it was unforeseeable that any worker would try to use it as an elevated work platform," and that, therefore, the sections of the industrial code that he alleges were violated - 12 NYCRR 23-5.1 ©, 12 NYCRR 23-5.4, and 12 NYCRR 23-5.5 - are inapplicable because they mandate certain construction and load bearing requirements for scaffolds[1], whether, in the context of plaintiff's cause of action under Labor Law § 241 (6), the structure was, as defendants maintain, solely a rain shed or, as plaintiff alleges, a defective scaffold is a question of fact that cannot be resolved on the current record. Accordingly, the branches of defendants' motions seeking summary judgment dismissing plaintiff's cause of action under Labor Law § 241 (6) are denied.

With respect to Giaquinto, the court notes that Labor Law § 240 liability cannot be assessed against it for plaintiff's injuries where, as here, it was a mere subcontractor and no evidence exists that it operated as statutory agent or exercised control over plaintiff's work (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). Accordingly, the court grants the branch of Giaquinto's motion seeking summary judgment dismissing the Labor Law § 240 (1) claims against it. As to the branch of Giaquinto's motion seeking the dismissal of the common law negligence claim against it, a subcontractor "'may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work

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[1] 12 NYCRR 23-1.4(b)(45) defines "scaffold" as "[a] temporary elevated working platform and its supporting structure including all components." In view of the court's determination that the characterization of the structure presents an issue of fact that cannot be resolved on the current record, it is unnecessary at this time to address plaintiff's further argument that 12 NYCRR 23-1.4(a), in conjunction with the other code provisions upon which he relies, can operate to broaden the Industrial Code definition of "scaffold" or its application.

area'" (***Lombardo v Tag Ct. Sq., LLC***, 126 AD3d 949, 950, 7 NYS3d 187 [2d Dept 2015], quoting ***Poracki v St. Mary's Roman Catholic Church***, 82 AD3d 1192, 1195, 920 NYS2d 233 [2d Dept 2011]). While a defendant may establish its prima facie entitlement to summary judgment by demonstrating that an alleged danger was open and obvious and, as a matter of law, not inherently dangerous (*see* ***Cupo v Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]), such a determination is generally a fact-specific question for the trier of fact (*see* ***Stoppeli v Yacenda***, 78 AD3d 815, 911 NYS2d 119 [2d Dept 2010]), as a condition that is ordinarily apparent may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*see* ***Stoppeli v Yacenda***, *supra*; ***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 1009, 864 NYS2d 554 [2d Dept 2008]). Moreover, where a condition is not regarded as inherently dangerous, proof that it is open and obvious does not preclude a finding of liability but is relevant to the issue of a plaintiff's comparative negligence (*see* ***Sportiello v City of New York***, 6 AD3d 421, 774 NYS2d 353 [2d Dept 2004]; ***Cupo v Karfunkel***, *supra*).

Here, Giaquinto failed to demonstrate its prima facie entitlement to the dismissal of plaintiff's common law negligence claim, as it failed to eliminate significant triable issues as to whether its claimed erection of a rain shed adjacent to the scaffold on which plaintiff was working, without the posting of any warnings thereon, created a dangerous condition that was obscured by plaintiff's attention to his work (*see* ***Sportiello v City of New York***, *supra*; ***Verel v Ferguson Elec. Constr. Co., Inc.***, 41 AD3d 1154, 838 NYS2d 280 [4th Dept 2007]; ***Nelson v Sweet Assocs.***, 15 AD3d 714,788 NYS2d 705 [3d Dept 2005]). Since Giaquinto also adduced testimonial evidence that the blue Styrofoam roof of the shed was open and obvious, such that the condition was not inherently dangerous, a triable issue exists as to plaintiff's comparative negligence for the happening of the accident (*see* ***Cupo v Karfunkel***, *supra*; ***Cooper v American Carpet & Restoration Servs., Inc.***, 69 AD3d 552, 895 NYS2d 96 [2d Dept 2010]). Indeed, during his deposition testimony, plaintiff acknowledged that he knowingly stepped onto the blue Styrofoam board because he believed there was a wooden plank beneath it. Therefore, the branch of Giaquinto's motion seeking the dismissal of the common law negligence claim against it is denied.

As to plaintiff's claims under Labor Law § 240 (1), the statute imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see* ***Misseritti v Mark IV Constr. Co., Inc.***, 86 NY2d 487, 634 NYS2d 35 [1995]). "The term 'owner' within the meaning of [the statute] 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, 339-340, 795 NYS2d 223 [1st Dept 2005], quoting ***Copertino v Ward***, 100 AD2d 565, 566, 473 NYS2d 494 [2d Dept 1984]). Therefore, lessees who hire a contractor and have the right to control the work being done are considered "owners" within the meaning of the statute (*see* ***Copertino v Ward***, *supra*). Owners and general contractors will be held strictly liable for any breach of the statute even if "the job was performed by an independent contractor over which they exercised no supervision or control" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 515, 577 NYS2d 219 [1991]). The statute is liberally construed to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, *supra* at 513). "The single decisive question in determining the applicability of the statute is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation

differential" (***Runner v New York Stock Exch. Inc.***, 13 NY3d 599, 603, 895 NYS2d 279 [2009]; *see* ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1,10, 935 NYS2d 551 [2011]).

Labor Law § 240 (1) specifically requires that safety devices, including scaffolds, hoists, stays, ropes, ladders, and "other devices [. . .] shall be so be so constructed, placed and operated as to give proper protection to a worker" exposed to elevation-related hazards (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]). Thus, "[t]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (***Conway v New York State Teachers' Retirement Sys.***, 141 AD2d 957, 958-959, 530 NYS2d 300 [3d Dept 1988]). Moreover, a "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable" (***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 562, 606 NYS2d 127 [1993]).

However, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the failure to use, or the inadequacy of, a safety device of the kind enumerated [in the statute]" (***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). Further, to prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]). While contributory negligence on the part of the worker is not a defense to a Labor Law § 240 (1) claim where no safety devices or inadequate safety devices are provided (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 771 NYS2d 484 [2003]), "[l]iability does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury" (***Gallagher v New York Post***, 14 NY3d 83, 88, 896 NYS2d 732 [2010]; *see* ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; ***Montgomery v Fed. Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]).

Although plaintiff met his prima facie burden on the motion by submitting evidence that defendants failed to provide him with adequate safety devices that were properly placed and operated so as to prevent him from falling (*see* ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 935 NYS2d 551 [2011]; ***Serrano v TED Gen. Contr.***, 157 AD3d 474, 67 NYS3d 620 [1st Dept 2018]; ***Zou v Hai Ming Constr. Corp.***, 74 AD3d 800, 902 NYS2d 610 [2d Dept 2010]), he failed to eliminate significant triable issues from the case as to whether he knowingly stepped from the scaffold on which he working onto the Styrofoam board without first ascertaining whether it was meant to serve as a functioning part of the scaffold and, if so, whether he knew he was expected to use other readily available safety devices to access the subject drive-through pole (*see* ***Gallagher v New York Post***, *supra*; ***Montgomery v Federal Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]; ***Cahill v Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 790 NYS2d 74 [2004];

Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]; ***Bin Gu v Palm Beach Tan, Inc.***, 81 AD3d 867, 917 NYS2d 661 [2d Dept 2011]). Significantly, plaintiff testified that he completed installing brick ties onto the first pole of the drive-through canopy and was attempting to walk across the Styrofoam roof of the rain shed to gain access to the upper level of the second pole. Plaintiff testified that the roof of the shed appeared to be connected to the scaffold on which was already standing, that there were no barriers or warning signs placed around it, and that he stepped on the Styrofoam board assuming there were wooden planks beneath its surface. Nevertheless, plaintiff's testimony also indicates that he failed to ascertain whether it was safe to step of the Styrofoam board despite observing people working beneath it, and that he was aware that his employer had provided readily available safety devices at the work site, such as A-frame ladders, that would have enabled him to access the pole.

Plaintiff's submissions also include testimony by Giaquinto's foreman, Francis Velardo, who testified that plaintiff should not have been working on the upper portion of the pole at the time of his accident because the bricklayers were still working on the lower part of the structure and that no scaffold providing access to the top of the pole would have been erected until the work below was completed. Velardo testified that the shed in question was erected to shield both the bricklayers and the newly laid bricks from the rain that was falling on the morning of the accident. Plaintiff's supervisor, Gary Hamel, confirmed that plaintiff's work at the upper portions of the drive-through poles would not normally begin until the bricklayers had completed laying bricks on the lower portion of the structure and that only then would the masons erect a scaffold that would be used to complete the remainder of the pole. Indeed, Hamel testified that he would not have considered it safe for plaintiff to be standing on a scaffold working on the upper portion of the pole while the bricklayers were still beneath the scaffold performing work. Another Giaquinto employee, Joseph Ardito, testified that the Styrofoam board roof of the shed was obviously not meant to be a scaffold because, unlike the scaffold, its surface was blue, there were no wooden planks beneath it or guard rails surrounding it and there was no access ladder leading to its surface. Ardito further testified that he observed plaintiff utilizing an A-frame ladder while he was installing clips on the first of the two drive-through poles, that he saw the same ladder standing near to the second pole while plaintiff was working there and that he and other Giaquinto employees were working on the lower part of the second pole beneath the rain shed when the accident occurred. Ardito surmised that plaintiff had been working on the upper portion of the pole for several minutes prior to the accident, and he observed plaintiff's ladder and pieces of the blue Styrofoam board laying on the ground next to plaintiff after he fell. Therefore, plaintiff's motion for partial summary judgment in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim is denied.

Custom and 6340 NB also failed to meet their prima facie burdens on the branches of their motions seeking dismissal of plaintiff's Labor Law § 240 (1) claim. In particular, Custom and 6340 NB failed to demonstrate that plaintiff's accident was not covered under the statute because the Styrofoam board in question was being utilized as a rain shed rather than a safety device. There is no dispute that plaintiff was engaged in an activity covered by the statute at the time of his accident and that he fell six feet or more after he stepped from a scaffold onto the unmarked and unsecured roof of the makeshift structure. Plaintiff's accident, therefore, resulted from a risk posed by a significant elevation differential, and comes within the ambit of the statute (*see* ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 935 NYS2d 551 [2011]; ***Serrano v TED Gen. Contr.***, *supra*; ***Zou v Hai Ming Constr. Corp.***, *supra*). The assertion that the Styrofoam roof of the structure was not being used as a safety device does not, ipso facto, remove the

accident from the ambit of those dangers covered by the statute, as defendants do not dispute that the roof of the structure adjoined the scaffold from which plaintiff had already been working and was located directly before the subject canopy pole (*see e.g.* ***Serrano v TED Gen. Contr.***, *supra*; ***Tzic v Kasampas***, 93 AD3d 438, 940 NYS2d 218 [1st Dept 2012]; ***Jablonski v Everest Constr. & Trade Corp.***, 264 AD2d 381, 693 NYS2d 229 [2d Dept 1999]). Because this case involves the alleged creation of a significant elevation-related risk due to the improper placement of the Styrofoam-roofed structure next to an undisputed scaffold and the claimed inadequacy of the safety devices with which plaintiff was provided to prevent him from falling, the court finds this case distinguishable from those in which the statute is held to be inapplicable because the plaintiff was confronted with solely a danger of the type ordinarily faced by workers at a construction site (*see* ***Baun v Project Orange Assoc., L.P.***, 26 AD3d 831, 809 NYS2d 703 [4th Dept 2006]; ***Hargobin v K.A.F.C.I. Corp.***, 282 AD2d 31, 724 NYS2d 155 [1st Dept 2001]; *compare* ***Santos v State of New York***, 2019 NY Slip Op 01479 [3d Dept 2019]), or where a plaintiff is injured as a result of the unforeseeable collapse of a permanent structure (*see* ***Purcell v Visiting Nurses Found. Inc.***, 127 AD3d 572, 574, 8 NYS3d 279 [1st Dept 2015], *distinguishing* ***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 634 NYS2d 35 [1995]). Moreover, as discussed above, the adduced evidence does not demonstrate, as a matter of law, that plaintiff in the circumstances of this case was a recalcitrant worker, such that defendants may not be held liable for his injuries.

Turning to the branch of Custom's motion for conditional summary judgment on its contractual indemnification cross-claim against Giaquinto, paragraph 24 of the agreement between Giaquinto and Custom, provides, in pertinent part, as follows:

> [Giaquinto] shall indemnify, hold harmless and defend the Owner and/or [Custom] and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is: a) attributable to bodily injury, sickness, disease or death to any person . . . b) caused in whole or part by any negligent act or omission of the Subcontractor, any Sub of a Subcontractor, anyone directly or indirectly employed by any one of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder

Paragraph 23 (a) of the agreement further provides that Giaquinto is to purchase general liability insurance listing Custom as an additional insured for that policy.

"The right to contractual indemnification depends upon the specific language of the contract" (***Roldan v New York Univ.***, 81 AD3d 625, 628, 916 NYS2d 162 [2d Dept 2011]), and will not be enforced "unless the intention to indemnify can be clearly implied from the language and purposes of the entire agreement" (*see* ***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 491-492, 549 NYS2d 365 [1989]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (***George v Marshalls of MA, Inc.***, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *see* ***Sobel v City of New York***, 120 AD3d 485, 991 NYS2d 93 [2d Dept 2014]).

To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]).

Here, Custom met its prima facie burden on the contractual indemnification cross-claim against Giaquinto by submitting evidence that the negligence of Custom or T.D. Bank, if any, for the happening of plaintiff's accident is purely vicarious (*see* ***Hastedt v Bovis Lend Lease Holdings, Inc.***, 152 AD3d 1159, 58 NYS3d 812 [4th Dept 2017]; ***Van Nostrand v Race & Rally Constr. Co., Inc.***, 114 AD3d 664, 979 NYS2d 638 [2d Dept 2014]). However, as triable issues exist as to whether negligence on the part of Giaquinto was the sole proximate cause of the accident, and whether plaintiff was comparatively negligent, Custom and T.D. Bank are entitled to summary judgment on their cross-claim for contractual indemnification, conditioned upon a finding as to the existence and extent of negligence on the part of Giaquinto constituting a proximate cause of plaintiff's accident and his resulting injuries (*see* ***Ramirez v Almah, LLC***, 2019 NY Slip Op 01153 [1st Dept 2019]; ***Cuomo v 53rd & 2nd Assoc., LLC***, 111 AD3d 548, 975 NYS2d 53 [1st Dept 2013]; ***Burton v CW Equities, LLC***, 97 AD3d 462, 950 NYS2d 1 [1st Dept 2012]; ***Rivera v Urban Health Plan, Inc.***, 9 AD3d 322, 781 NYS2d 316 [1st Dept 2004]; ***Crimi v Neves Assocs.***, 306 AD2d 152, 761 NYS2d 186 [1st Dept 2003]).

Conversely, since triable issues remain as whether negligence on the part of Giaquinto was a proximate cause of the accident, and whether plaintiff was comparatively negligent, the branch of its motion for summary judgment dismissing the common law indemnification claim against it is denied (*see* ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; ***Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]; ***Correia v Professional Data Mgt.***, *supra*). Finally, although Giaquinto's submissions include a copy of a blanket additional-insured endorsement that purports to insure "any organization it was required to add as an additional insured," the branch of its motion seeking dismissal of Custom's breach of contract cross-claims based on the alleged failure to procure such insurance is denied, as Custom's counsel avers that Giaquinto's insurer has disclaimed coverage on the ground that the above-referenced endorsement relates to excess coverage only (*see* ***Sullivan v New York Athletic Club of City of N.Y.***, 162 AD3d 950, 80 NYS3d 99 [2d Dept 2018]; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]).

Dated: 4/12/2019

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION