

Deschaine v Tricon Constr., LLC
2019 NY Slip Op 30997(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 161654/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ROBERT DESCHAIINE,

Index No.: 161654/2014

Plaintiff,

-against-

TRICON CONSTRUCTION, LLC, NATIONAL REALTY
& DEVELOPMENT CORP., MICHAEL BOYLE, DOLLAR
TREE STORES INC. and C.P. PLAZA LIMITED
PARTNERSHIP,

Defendants.

-----X
DOLLAR TREE STORES INC.,

Third-Party Index No.:
595123/2015

Third-Party Plaintiff,

-against-

AMZ CONSTRUCTION SERVICES, INC.,

Third-Party Defendant.

-----X
MICHAEL BOYLE,

Second Third-Party Index
No.: 595166/2015

Second Third-Party Plaintiff,

-against-

AMZ CONSTRUCTION SERVICES, INC.,

Second Third-Party Defendant.

-----X
TRICON CONSTRUCTION, LLC and C.P. PLAZA LIMITED
PARTNERSHIP,

Third Third-Party Index
No.: 595184/2015

Third Third-Party Plaintiffs,

-against-

AMZ CONSTRUCTION SERVICES, INC.,

Third Third-Party Defendant.

-----X
Edmead, J.:

Motion sequence numbers 003, 007, 008 and 009 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a carpenter on March 6, 2013, when, while removing a light fixture at a construction site located at 123 Merchant Place, Cobleskill, New York (the Premises), he fell from a Baker scaffold after being shocked by a live wire that he was cutting.

In motion sequence number 003, plaintiff Robert Deschaine moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third third-party plaintiffs Tricon Construction, LLC (Tricon) and C.P. Plaza Limited Partnership (Plaza) (together, the Plaza defendants) and defendant/third-party plaintiff Dollar Tree Stores Inc. (Dollar Tree).

Dollar Tree cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and/or counterclaims against it, and for summary judgment in its favor on its cross claims for contractual indemnification and breach of contract against Tricon and defendant/second third-party plaintiff Michael Boyle (Boyle).¹

In motion sequence number 007, the Plaza defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them, and for summary

¹It should be noted that although in his deposition, Boyle testified that he owns a company called Michael Boyle Construction, in this action, he is being sued in his individual capacity as “Michael Boyle.” Therefore, throughout this decision, the court will be referring to Boyle in his individual capacity, and not as a legal entity.

judgment in their favor on their cross claim for contractual indemnification against Boyle.

In motion sequence number 008, third-party/second third-party/third third-party defendant AMZ Construction Services, Inc. (AMZ) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party/second third-party and third third-party complaints against it.

In motion sequence number 009, Boyle moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against him, and for summary judgment in his favor on his second third-party claim for contractual indemnification against AMZ.

BACKGROUND

On the day of the accident, Plaza owned the Premises where the accident occurred. Dollar Tree, a tenant of the Premises, hired Tricon, pursuant to a contract (the Dollar Tree/Tricon Contract), to serve as the general contractor to oversee the construction of one of its stores there (the Project). Tricon's duties included scheduling, retaining subcontractors and coordinating the work on the Project. Boyle, who was retained to act as the on-site superintendent on behalf of Tricon, hired AMZ, a subcontractor on the Project. It is Boyle's position that it assisted Tricon in retaining AMZ because it had a relationship with AMZ, and because Tricon did not have enough time to prepare and complete the standard paperwork necessary to retain AMZ directly, essentially serving as a conduit between the two entities as a favor to Tricon. Plaintiff was employed by AMZ as carpenter on the day of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that he was working for AMZ as a carpenter for the Project on the day of the accident, and that his foreman was Daniel Zink. Upon arriving at work, Zink would instruct plaintiff as to his duties for the day. Plaintiff asserted that he did not discuss equipment

choices or take any instructions from anyone else on the Project but Zink, with the exception of AMZ's owner, Joshua Zappia. Plaintiff also maintained that he never met Boyle in connection with the Project, nor did he ever take any instructions from Boyle.

On the day of the accident, Zink asked plaintiff to remove an existing light fixture from a drop ceiling, which was approximately 12 feet above the floor, as part of some demolition work that was being conducted at the Premises. In order to reach the drop ceiling, it was necessary for plaintiff to utilize a metal Baker scaffold, which was already in place when he arrived at the job site. Plaintiff described the scaffold's platform as being four or five feet off the ground and without any railings at the front and back of it. Plaintiff believed that the scaffold was owned by AMZ. He maintained that only AMZ workers used the scaffold. Plaintiff also described the scaffold as feeling secure against movement.

At the time of the accident, plaintiff was working with Jason Badillo, an AMZ co-worker. As he was standing on the scaffold, intending to remove a light fixture and expecting the electrical power to have been shut off, plaintiff extended his arms upwards in order to cut some wires. The next thing that plaintiff recalled was being on the ground and feeling "like a rag doll" (plaintiff's tr at 127). Plaintiff was later told that it appeared that he had been shocked by the light fixture that he was attempting to remove.

Plaintiff testified that he was never provided with a harness, hard hat or any other safety device during his time on the Project, nor did he ever see anyone else wearing such safety equipment. In addition, plaintiff maintained that he never refused to wear a harness, hard hat or any other such safety equipment.

Deposition Testimony of Richard Carlucci (Tricon's Vice President)

Richard Carlucci testified that he was the vice president of Tricon on the day of the accident, and that he was involved in the bidding for the Project, as well as the signing of all of the pertinent contract documents. He explained that on the day of the accident, Dollar Tree was leasing a portion of the Premises, and that it was building a store there. After Tricon's bid was accepted by Dollar Tree, Tricon was retained as the general contractor, pursuant to the Tricon/Dollar Tree Contract. Tricon was the only general contractor on the Project.

As the general contractor of the Project, Tricon retained various subcontractors and scheduled and coordinated their work. Tricon's project manager, Rick Newman, was responsible for ensuring that the work of the subcontractors was carried out pursuant to their contract specifications. He also had the authority to stop work in the event that the means and methods of their work was not safe. Carolucci further testified that Tricon did not provide any scaffolding, harnesses, ropes, netting or other kinds of safety devices to the subcontractors.

Carolucci explained that Boyle was retained by Tricon, pursuant to a contract (the Tricon/Boyle Subcontract), to perform the work that Dollar Tree hired Tricon to perform. That said, Boyle did not serve as a general contractor on the Project.

Deposition of Daniel Zink

Zink testified that he was AMZ's foreman on the Project, and that plaintiff reported directly to him. He explained that AMZ provided its workers all of the tools and equipment that they needed to perform their work, and that he had constructed the three-foot tall scaffold from which plaintiff was working at the time of the accident. Zink, who admitted that he had no medical training and that he could not state with certainty as to what caused plaintiff to fall, testified that it was his belief that plaintiff "passed out" because he observed that plaintiff's "eyes

were closed and his arms did not come up when he hit the floor” (Zink tr at 68-69). He also maintained that a few days after the accident, plaintiff’s stepson’s girlfriend’s son, Jason Badillo, another AMZ worker, informed him that plaintiff had a prior history of passing out.

Deposition Testimony of Josh Zappia (AMZ Vice-Principal)

Josh Zappia testified that he was AMZ’s vice principal on the day of the accident. He testified that plaintiff had permission to use the subject scaffold, which was provided by AMZ, and that he did not disregard any instructions to use other equipment to perform his work. Zappia described the platform of the scaffold as being two and a half to three feet off the ground.

Zappia also testified that he was not aware of Zink ever instructing plaintiff to use a scissor lift or ladder, rather than the scaffold. Zink also explained that Boyle contracted away all of his responsibilities on the Project, which he undertook pursuant to the Tricon/Boyle Subcontract, to AMZ.

Deposition Testimony of Michael Boyle

Boyle testified that his sole connection to the Project was to serve as a middleman between Tricon and AMZ, as a favor to Tricon. Boyle had an existing business relationship with Tricon, and Tricon did not have adequate time to prepare the necessary paperwork to retain AMZ directly.

Boyle further explained that pursuant to the Tricon/Boyle Subcontract, he was to perform and oversee the carpentry duties for the Project, including drywall, shelving, doors and walls. However, in fact, Boyle subcontracted this work out to AMZ. In that vein, Boyle only visited the Premises once, and he never performed any work or provided any tools for the Project. In addition, not only did Boyle never oversee any of AMZ’s work, AMZ’s workers reported directly

to Tricon.

Affidavit of Joseph J. McHugh, PE (Expert Engineer)

In his affidavit, Joseph McHugh stated that he did not inspect the subject scaffold until October 15, 2018, five years and seven months after the accident. He averred that the scaffold, which he asserted was never modified or altered since the day of the accident, was no more than two feet and three inches in height. He also stated that his investigation did not uncover any deficiencies or defects in the scaffold.

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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims

In their separate motions, the Plaza defendants, Dollar Tree and Boyle move for dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them. As

plaintiff does not oppose those parts of said motions which seek to dismiss these claims, these unopposed claims are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [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 Plaza defendants, Dollar Tree and Boyle are entitled to dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them.²

The Labor Law § 240 (1) Claim Against the Plaza Defendants, Dollar Tree and Boyle (motion sequence numbers 003, 007, 009 and Dollar Tree's Cross Motion)

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the Plaza defendants and Dollar Tree. In their separate motions, the Plaza defendants, Dollar Tree and Boyle move for dismissal of said claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

²In any event, as to the Labor Law § 241 (1) claim, in the bill of particulars, the only Industrial Code provision that plaintiff allegedly asserts was violated by defendants is section 23-5.1 (j) (1), which requires that “[t]he open sides of all scaffold platforms . . . shall be provided with safety railings.” However, as one of the express exceptions to this section provision pertains to scaffold platforms with elevations under seven feet, said rule does not apply to the facts of this case.

“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 the owner and general contractor, the Plaza defendants may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined as to whether Dollar Tree, their tenant, and Boyle, a subcontractor, may also be liable under the statute as either an owner or as an agent of the owners and/or general contractor.

As to whether Dollar Tree can be deemed an owner of the Premises for the purposes of the statute, it should be noted that “[t]he meaning of ‘owners’ under Labor Law § 240 (1) . . . has

not been limited to titleholders but has 'been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for its benefit.'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). "[O]wnership of the premises where the accident occurred - standing alone - is not enough to impose liability under [the] Labor Law . . . where the property owner did not contract for the work resulting in the plaintiff's injuries Rather, . . . [there must be] some nexus between the owner and the worker" (*Morton v State of New York*, 15 NY3d 50, 56 [2010] [internal quotation marks and citations omitted]; *Abbate v Lancaster Studio Assoc.*, 3 NY3d 46, 52 [2004]).

Here, it is undisputed that Dollar Tree not only had a lease interest in the Premises, it fulfilled the role of an owner by contracting to have the subject construction work performed for its benefit. Accordingly, Dollar Tree is a proper Labor Law defendant and may be held liable for plaintiff's injuries under Labor Law § 240 (1).

As to Boyle, it is important to note that

“[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] 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”

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

Here, plaintiff does not oppose that part of Boyle's motion which seeks dismissal of the Labor Law § 240 (1) claim against him. In any event, Boyle may not be held liable under Labor Law § 240 (1) as an agent of the owners, because he did not supervise and/or control the injury-

producing work, i.e., plaintiff's removal of the subject light fixture while standing on the Baker scaffold, which was allegedly lacking proper railings. To that effect, a review of the record reveals that plaintiff's work was solely supervised by his AMZ foreman, and that Boyle had nothing to do with said work.

Thus, as Boyle is not a proper Labor Law defendant, Boyle is entitled to dismissal of the Labor Law § 240 (1) claim against him. Therefore, in the remainder of this decision, the Labor Law § 240 (1) claim will be addressed in regard to the Plaza defendants and Dollar Tree only.

As noted previously, plaintiff was injured when he was allegedly shocked by a wire that he was cutting, which caused him to fall from the Baker scaffold. Plaintiff asserts that he was caused to fall from the scaffold because it lacked proper railings, and because he was not provided with other necessary safety devices to keep him from falling, such as a safety harness and a place to tie off.

As the subject scaffold did not prevent plaintiff from falling while he performing his work, the Plaza defendants and Dollar tree are liable for his injuries under section 240 (1). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Peralta v American Tel. and Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]).

It should be noted that not only did the Baker scaffold fail to prevent plaintiff from falling, given the nature of the work that he was performing at the time of the accident, wherein it

was foreseeable that he might be shocked by a live wire, a scaffold without proper railings was not the proper safety device for the job at hand. “[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” (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, “where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake”], quoting *Conway v New York State Teachers’ Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Wright v State of New York*, 110 AD2d 1060, 1061 [4th Dept 1985] [Labor Law § 240 (1) applied where the scaffold that the plaintiff fell from “lack[ed] . . . guardrails or other protective devices]).

As such, additional safety devices to prevent plaintiff from falling were required (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004]). For example, a tie off point on the scaffold and a safety harness or horizontal safety line; or other means of vertical elevation, like a device with rails, would have been more suitable for the job in order to prevent plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that “was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface,” the Court considered that “[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over”]; *Nimirovski*, 29 AD3d at 762-763 [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor

Law § 240 (1)).

In opposition to plaintiff's motion, the Plaza defendants and Dollar Tree argue that he is not entitled to judgment in his favor because he has not shown that the scaffold was defective. However, plaintiff is not required to demonstrate that a safety device was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

The Plaza defendants and Dollar Tree also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them on the ground that plaintiff was the sole proximate cause of his accident. On this note, they argue that plaintiff was working with a pre-existing medical condition, which may have caused him to faint. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

However, the Plaza defendants and Dollar Tree do not offer any evidence, other than mere speculation, to raise a bona fide issue as to 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]). Moreover, even assuming that a pre-existing medical condition caused plaintiff to faint, plaintiff cannot be held solely responsible for the accident because, first and foremost, the Plaza defendants and Dollar Tree failed to provide sufficient safety devices to keep plaintiff from falling from the scaffold while he performed his work (*Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1106 [2d Dept 2016] [where “the plaintiff was provided with only an unsecured ladder and no safety devices, the plaintiff [could] not be held solely at fault for his injuries”]; *Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1059 [2d Dept 2015]).

Accordingly, any action on the part of plaintiff whereby he worked with such a medical condition, at most, goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *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”]). “[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that ‘if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it’” (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Where “the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff’s injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and

citations omitted]” (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; see *Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants’ contention that plaintiff was the sole proximate cause of his injuries]).

In addition, these defendants have not sufficiently established that this is a case where “(a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for ‘no good reason’ he chose not to use them; and (d) had he used them, he would not have been injured” (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012], citing *Auremma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; see also *Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

Further, plaintiff was under no duty to fetch an alternate safety device on his own because “[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place” (*DeRose v Bloomingdale’s Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). To that effect, “workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work” (*id.*).

Finally, while it is argued that plaintiff’s motion should have been supported by expert testimony establishing that a safety device was needed to keep plaintiff safe, expert testimony is required only when the subject matter is “beyond the ken of the typical juror,” or when the issues involved are of “such scientific or technical complexity as to require the explanation of an expert in order for the jury to comprehend them” (*Hendricks v Baksh*, 46 AD3d 259, 260 [1st Dept

2007)). Here, these defendants have not sufficiently established that the subject matter and issues involved herein are of the kind that would make such expert testimony necessary.

Importantly, Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citation omitted]). “As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, ‘those best suited to bear that responsibility’ instead of on the workers, who are not in a position to protect themselves” (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

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

Dollar Tree’s Cross Claims for Breach of Contract and Contractual Indemnification Against Tricon (Dollar Tree’s Cross Motion)

Dollar Tree cross-moves for summary judgment in its favor on its cross claims for breach of contract for failure to procure insurance and contractual indemnification against Tricon.

Additional Facts Relevant To This Issue:

Dollar Tree (headquartered in Virginia) and Tricon (headquartered in Pennsylvania) entered into the Tricon/Dollar Tree Contract on February 11, 2013. The Dollar Tree/Tricon Contract provided that Tricon would act as the general contractor on the Project, and that Tricon would also provide certain materials and equipment. The Dollar Tree/Tricon Contract contained

both an insurance procurement and indemnification obligation running from Tricon to Dollar Tree. The insurance procurement obligation, which is contained in article 3, paragraph 3.4, provides, in pertinent part, as follows:

“Subject to the terms of [Dollar Tree’s] lease for the premises which may require high levels of coverage, [Tricon] will carry public liability . . . insurance with carriers reasonably satisfactory to [Dollar Tree] . . . in amounts not less than \$1 million, with an endorsement naming [Dollar Tree] and its landlord of the premises as additional insured thereunder”

(Dollar Tree’s notice of cross motion, Exhibit M, the Dollar Tree/Tricon Contract, article 3, paragraph 3.4).

The Dollar Tree/Tricon Contract also contained an indemnification provision (the Dollar Tree/Tricon Indemnification Provision), which is contained in article 4, paragraph 4.2. The Dollar Tree/Tricon Indemnification Provision provides, in pertinent part, as follows:

“[Tricon] shall hold [Dollar Tree] and its landlord for the premises harmless from and indemnify them against all liability . . . which may arise from and may accrue from the performance of the work or any obligation of the contractor or its subcontractors or any failure of the contractor or its subcontractor to perform any work”

(Dollar Tree’s notice of motion, exhibit M, the Dollar Tree/Tricon Contract, the Dollar Tree/Tricon Indemnification Provision, article 4, paragraph 4.2).

The Dollar Tree/Tricon Contract also provides that if Dollar Tree wishes to pursue remedies against Tricon, it must do so in a “court of competent jurisdiction in the Commonwealth of Virginia” (Dollar Tree’s notice of motion, exhibit M, the Dollar Tree/Tricon Contract, article 5, paragraph 5.4).

Here, Dollar Tree is not entitled to summary judgment in its favor on its breach of contract for failure to procure insurance as against Tricon. As reflected in a certificate of

insurance, Tricon obtained an insurance policy, which named Dollar Tree as an additional insured, as per the terms required by the Dollar Tree/Tricon Contract. Moreover, in its reply to Tricon's opposition on this issue, Dollar Tree conceded that on May 2, 2018, Arch Insurance, Dollar Tree's insurer, and Grange Mutual Casualty Company, Tricon's insurer, entered into a settlement agreement which resolved this issue.

With respect to Dollar Tree's contractual indemnification claim against Tricon, it is important to note that 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]).

Initially, a review of the record reveals that no negligence on the part of Dollar Tree caused or contributed to the accident, and that its only role in plaintiff's injuries is statutory, as it is an alleged owner under the Labor Law. That said, a review of the record also reveals no evidence that Tricon's work on the Project caused or contributed to the accident. To that effect, plaintiff testified that his equipment, including the scaffold that he fell from, was provided by his employer, AMZ. Additionally, plaintiff testified that his work was solely supervised by his AMZ supervisors. In fact, while Tricon hired many of the subcontractors on the Project, it was Boyle, and not Tricon, that subcontracted directly with AMZ.

Thus, Dollar Tree is not entitled to summary judgment on its cross claim for contractual indemnification against Tricon.

It should be noted that in opposition to Dollar Tree's cross motion, Tricon puts forth the

Dollar Tree/Tricon Contract's choice of law clause which requires that Dollar Tree pursue any remedies against Tricon in the state of Virginia, which, like many states, has an "anti-indemnity" statute with regard to construction work, in order to prevent contractual indemnity of at-fault owners and general contractors (see Virginia Code § 11-4.1).

However, as Tricon argues, in its cross motion, Dollar Tree does not assert that New York law should be applied over Virginia law and makes no arguments regarding the same. In any event, whether the law of New York or Virginia is applied, the outcome would be the same under either state law. As such, the court declines to reach this issue.

The Plaza Defendants' Contractual Indemnification Claim Against Boyle (motion sequence number 007)

The Plaza defendants move for summary judgment in their favor on their cross claim for contractual indemnification against Boyle.

Additional Facts Relevant To This Issue:

The Tricon/Boyle Subcontract contained an indemnification provision (the Tricon/Boyle Indemnification Provision) which states, in pertinent part, as follows:

"[Boyle] shall defend, indemnify and hold Contractor and Owner harmless against and from any and all claims made against, and losses incurred by, Contractor and Owner based upon, arising out of, or in any way related to:

- a. the performance of services by [Boyle] for the project;
- b. the products manufactured, produced or installed by [Boyle] for the project;
- c. the conduct of Subcontractor's business;
- d. any negligent act, misfeasance or nonfeasance by [Boyle], or any of [his] agents, contractors, servants or employees"

(the Plaza defendants' notice of motion, exhibit S, the Tricon/Boyle Subcontract, the Tricon/Boyle Indemnification Provision, article 8, ¶ 8.5).

Here, there is no evidence in the record to suggest that any negligence on the part of the Plaza defendants caused or contributed to the accident. In addition, while Boyle may have been hired to oversee the work on the Project, a review of the record indicates that no performance of services, products manufactured or installed or conduct or negligence on the part of Boyle caused the accident to occur. That said, Boyle did enter into a subcontract with AMZ, whereby AMZ would perform the work that Boyle had contracted with Tricon to perform, and, therefore, AMZ was one of Boyle's subcontractors. As noted previously, plaintiff testified that his work was solely supervised by AMZ; and that AMZ provided all of his equipment necessary to perform said work. As the equipment that AMZ provided to plaintiff failed to keep him safe, AMZ's negligence caused or contributed to plaintiff's accident.

Thus, pursuant to the Tricon/Boyle Indemnification Provision, which provides that Boyle must indemnify the Plaza defendants for claims arising out of the negligence of his subcontractors, the Plaza defendants are entitled to summary judgment in their favor on their cross claim for contractual indemnification against Boyle.

Dollar Tree's Cross Claims for Breach of Contract and Contractual Indemnification Against Boyle (Dollar Tree's Cross Motion)

Dollar Tree also cross-moves for summary judgment in its favor on its cross claims for breach of contract for failure to procure insurance and contractual indemnification against Boyle.

Notably, on the first page of the Tricon/Boyle Subcontract, Dollar Tree was designated as an owner of the Premises. Therefore, the insurance procurement and indemnification obligations

running from Boyle to the Plaza defendants also run from Boyle to Dollar Tree.

Dollar Tree's Cross Claim for Breach of Contract Against Boyle

As to Dollar Tree's cross claim for breach of contract for failure to procure insurance against Boyle, Dollar Tree does not put forth any evidence establishing that Boyle failed to obtain the appropriate insurance. In contrast, in opposition to Dollar Tree's cross motion on this issue, Boyle puts forth an insurance policy from Pinnacle Insurance Agency Inc. (The Boyle Policy), which covered the time of the accident, and which included a "Contractors Extension Endorsement" (the Endorsement) specifically identifying Dollar Tree as an additional insured. To that effect, the Endorsement provided additional insured status to "[a]ny . . . organization(s) for whom you are performing operations . . . when you . . . have agreed in writing in a contract or agreement that such person or organization be added as an additional insured . . ." (Boyle's opposition to Dollar Tree's cross motion, exhibit H, the Boyle Policy, the Endorsement). Notably, the Endorsement also covered liability for bodily injury caused by "[t]he acts or omissions of those acting on [Boyle's] behalf" (*id.*).

Thus, Dollar Tree is not entitled to summary judgment in its favor on its cross claim for breach of contract for failure to procure insurance against Boyle.

Dollar Tree's Cross Claim for Contractual Indemnification Against Boyle

As to Dollar Tree's cross claim for contractual indemnification against Boyle, again, the facts of this case indicate that negligence on the part of AMZ contributed or caused the accident, as the safety device that AMZ provided to plaintiff, i.e., the Baker scaffold, failed to prevent plaintiff from falling while performing his work. As noted above, AMZ was one of Boyle's subcontractors. Thus, pursuant to the Tricon/Boyle Indemnification Provision, Dollar Tree is

entitled to contractual indemnification from Boyle.

The Cross Claims Against the Plaza Defendants (motion sequence number 007)

The Plaza Defendants move for dismissal of any and all cross claims against them.

“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 [internal quotation marks and citations omitted]” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]).

“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]).

As there is no evidence in the record to suggest that any negligence on the part of the Plaza defendants caused or contributed to the accident, these defendants are entitled to dismissal of any and all cross claims asserted against them for contribution and/or common-law indemnification.

In addition, as no contracts exist which require these defendants to indemnify any party, the Plaza defendants are also entitled to dismissal of any cross claims against them for contractual indemnification and/or breach of contract.

Thus, the Plaza defendants are entitled to dismissal of any and all cross claims against

them.

The Cross Claims Against Dollar Tree

Dollar Tree moves to dismiss all cross claims against it for contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance.

The Cross Claims for Contribution and Common-law Indemnification Against Dollar Tree

As discussed previously, no negligence on the part of Dollar Tree contributed or caused the accident. Thus, Dollar Tree is entitled to dismissal of all cross claims against it for contribution and common-law indemnification.

The Cross Claims and Counterclaims for Contractual Indemnification and Breach of Contract for Failure to Procure Insurance Against Dollar Tree

With the exception of the lease between Dollar Tree and Plaza (the Lease), there were no contracts between Dollar Tree and any other party which required that Dollar Tree procure insurance or provide indemnification on their behalf.

Thus, Dollar Tree is entitled to dismissal of any and all cross claims and/or counterclaims asserted against it by Tricon, Boyle and AMZ for contractual indemnification and/or breach of contract.

As to the contractual obligations running from Dollar Tree to Plaza under the Lease, the Lease did include insurance procurement language which required that Dollar Tree obtain a commercial general liability policy and an umbrella policy. Specifically, the Lease required that Dollar Tree would

“carry general commercial liability insurance covering the Premises and [Dollar Tree’s] use thereof, with a minimum limit of One Million Dollars (\$1,000,000) for any casualty resulting in bodily injury . . . and a minimum limit of Two Million Dollars (\$2,000,000) general aggregate and an umbrella policy with a

minimum additional coverage of One Million Dollars (\$1,000,000)

(Dollar Tree's notice of cross motion, exhibit S, the Lease, ¶ 22).

In support of its cross motion to dismiss said cross claim, Dollar Tree attaches a copy of an insurance policy, Policy Number 41GPP4953904-GL, which was issued to Dollar Tree by Arch Insurance Company, and which was in effect from January 1, 2013 to January 1, 2014 (the Policy). The Policy, which covers the date of the accident, included a \$1 million per occurrence coverage limit and a \$2 million general aggregate, as required by the Lease. Also included within the Policy was an additional insured endorsement naming Plaza as an additional insured.

Therefore, as Dollar Tree obtained the proper insurance as required under the Lease, and as Plaza does not oppose this part of Dollar Tree's cross motion, Dollar Tree is entitled to dismissal of any cross claim against it for breach of contract for failure to procure insurance by C.P. Plaza.

The Third-Party Claims for Contribution and Common-Law Indemnification Against AMZ (motion sequence number 008)

AMZ moves for dismissal of Dollar Tree, Boyle and the Plaza defendants' third-party claims against it for contribution and common-law indemnification.

Initially, as plaintiff was an employee of AMZ, relevant to this issue is Workers' Compensation Law § 11, which prescribes, in pertinent part, as follows:

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

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

Additional Facts Relevant To This Motion:

The Bill of Particulars

In the supplemental verified bill of particulars, plaintiff alleges that as a result of the accident, he “sustained a traumatic brain injury resulting in, among other things, residual difficulties with dizziness and balance,” which has caused him to fall and sustain “fractures to his ribs as well as injuries to his shoulders” (Dollar Tree’s notice of cross motion, exhibit C, verified bill of particulars).

The Medical Reports

On October 31, 2017, plaintiff was examined by Dr. Ashok Anant, a neurology surgeon. After examining plaintiff and reviewing his medical records, Dr. Anant determined that while plaintiff displayed dizziness and depression, his speech was clear, his attention span and concentration was intact, he understood and responded normally to questioning and his gait was normal. Dr. Anant concluded that while plaintiff was no longer able to perform the duties of a construction worker, he was able to perform sedentary jobs with the appropriate occupational therapy. In addition, plaintiff can drive, walk without aids and is capable of performing all daily activities. It was also Dr. Anant’s opinion that if plaintiff undergoes epidural hematoma surgery, it is likely that he will completely recover.

On August 14, 2017, plaintiff was examined by Dr. Rene Elkin, a neurologist. Dr. Elkin

found no evidence of any neurological injury preventing plaintiff from returning to his pre-accident level of functioning or preventing him from returning to his prior employment and daily activities.

Here, the only purported injury put forth by plaintiff, which could possibly be considered “grave” for the purposes of the workers’ compensation law, is plaintiff’s claim of traumatic brain injury. That said, while the accident has caused plaintiff to experience various brain conditions, such as dizziness and faulty balance, a review of the expert medical evidence in this case reveals that he did not sustain any injury which rendered him no longer employable “*in any capacity*,” the standard adopted by the Court of Appeals for determining whether a brain injury rises to the level of a permanent total disability (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]; *see also Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 574 [1st Dept 2015] [“The evidence that plaintiff suffered from certain brain conditions, including headaches and post-concussion syndrome, did not satisfy the standard for grave injury” because it was not established that he was “no longer employable in any capacity” [citations omitted] ; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 501 [1st Dept 2015] [no grave injury was found where “[a]lthough experts who examined plaintiff averred that the accident had caused various brain conditions including seizures, persistent headaches, and depression, defendants [did not show] that plaintiff ‘[was] no longer employable in any capacity’” [citation omitted]).

It should be noted that the expert report of Kenneth Reagles, PhD, a vocational rehabilitation expert retained by Dollar Tree, opined that plaintiff is unemployable within the competitive labor market, again, the standard “for permanent disability under section 11 is one of unemployment *in any capacity*,” which is “a more objectively ascertainable test than equivalent,

or competitive employment” (*Rubeis*, 3 NY3d at 417). Moreover, Dr. Reagles stated that he observed plaintiff to only have minor, rather than serious, cognitive deficits.

Thus, AMZ is entitled to dismissal of all third-party claims asserted against it for contribution and common-law indemnification.

The Third-Party Claims for Contractual Indemnification and Breach of Contract for Failure to Procure Insurance Against AMZ (motion sequence number 008 and 009)

AMZ moves for dismissal of Dollar Tree, Boyle and the Plaza defendants’ third-party claims against it for contractual indemnification and breach of contract for failure to procure insurance. Boyle moves for summary judgment in his favor on his second third-party claim for contractual indemnification against AMZ.

As to said third-party claims, it should be noted that “[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract” (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; see also *Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers’ Compensation Law § 11, it must be shown that the contract was “sufficiently clear and unambiguous” (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]). “When 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 [internal quotation marks and citation omitted]” (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Initially, neither Dollar Tree nor the Plaza defendants oppose those parts of AMZ's motion which seek dismissal of the third-party breach of contract and contractual indemnification claims against it. In addition, there were no contracts or agreements, written or otherwise, between AMZ and Dollar Tree or AMZ and the Plaza defendants. Thus, AMZ is entitled to dismissal of the third-party claims for breach of contract and contractual indemnification asserted by Dollar Tree and the Plaza defendants.

Boyle's Second Third-Party Claim for Contractual Indemnification Against AMZ

Additional Facts Relevant To This Issue:

Pursuant to the subcontract entered into between Boyle and AMZ (the Boyle/AMZ Subcontract), AMZ agreed to indemnify Boyle for any claims arising out of the performance of AMZ's services on the Project. Specifically, the Boyle/AMZ Subcontract provides that AMZ "agrees to indemnify and hold harmless [Boyle] from all claims, losses, expenses [and] fees . . . arising out of the performances of the Services" (Boyle's notice of motion, exhibit N, Boyle/AMZ Subcontract, ¶ 5 [a]).

This matter arises out of injuries allegedly sustained by plaintiff while he was working within the scope of his AMZ employment, and as a result of the failure of a safety device, which was provided by AMZ. In addition, no negligence on the part of Boyle caused or contributed to the accident. Thus, pursuant to the Boyle/AMZ Subcontract, AMZ owes contractual indemnification to Boyle.

It should be noted that in its opposition, AMZ argues that it does not owe Boyle contractual indemnification because the indemnification provision in the Boyle/AMZ Subcontract violates GOL § 5-322.1, in that it purports to indemnify Boyle for his own

negligence and does not contain a “savings clause” (*see Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2d Dept 2006] [an indemnification clause that purports to indemnify a party for its own negligence is not void under General Obligations Law § 5-322.1 if it authorizes indemnification “to the fullest extent permitted by law”] [internal quotation marks and citations omitted]).

However, as in the instant case, where there is no negligence on the part of the proposed indemnitee, that statute does not apply (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 177 [1990]). General Obligations Law § 5-322.1 “only prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, or had the authority to supervise, direct, or control the work that caused the injury” (*Naranjo v Star Corrugated Box Co., Inc.*, 11 AD3d 436, 438 [2d Dept 2004] [citations omitted]).

Thus, Boyle is entitled to summary judgment in his favor on the second third-party contractual indemnification claim against AMZ. Accordingly, AMZ is not entitled to dismissal of said second third-party claim against it.

Boyle’s Second Third-Party Claim for Breach of Contract for Failure to Procure Insurance Against AMZ (motion sequence number 008)

AMZ moves for dismissal of Boyle’s second third-party claim for breach of contract for failure to procure insurance against it.

Additional Facts Relevant To This Issue:

Prior to the commencement of AMZ’s work, AMZ provided Boyle with a Certificate of Liability Insurance evidencing that it had obtained builder’s all risk insurance against personal injuries and property damage, pursuant to the requirements of the AMZ/Boyle Subcontract.

Boyle even testified that AMZ's Josh Zappia sent him the certificates. However, it should be noted that said certificates do not explicitly identify Boyle as an additional insured, and, in any event, even if they did, such certificates do not sufficiently demonstrate the existence of AMZ's insurance compliance. The certificate of insurance "constitutes evidence of [an] agreement to insure [Boyle] but it is neither conclusive proof of the existence of such a contract nor, in and of itself, a contract to insure [Boyle]" (*Morrison-Knudsen Co. v Continental Cas. Co.*, 181 AD2d 500, 500 [1st Dept 1992]). Moreover, while AMZ asserts that it did, in fact, obtain a proper insurance policy with Cincinnati Insurance Company, it failed to attach said policy to its motion papers.

Thus, as a question of fact exists as to whether AMZ procured the proper additional insurance coverage on behalf of Boyle, AMZ is not entitled to dismissal of Boyle's second third-party claim against it for breach of contract for failure to procure insurance.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Robert Deschaine's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants/third third-party plaintiffs Tricon Construction, LLC (Tricon) and C.P. Plaza Limited Partnership (Plaza) (together, the Plaza defendants) and defendant/third-party plaintiff Dollar Tree Stores Inc. (Dollar Tree) is granted; and it is further

ORDERED that the parts of Dollar Tree's cross motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence, Labor Law §§ 200 and 241 (6) claims and all cross claims and counterclaims against it are granted, and

these claims are dismissed as to Dollar Tree; and it is further

ORDERED that the part of Dollar Tree's cross motion (motion sequence number 003) for summary judgment in its favor on its cross claim for contractual indemnification against defendant/second third-party plaintiff Michael Boyle (Boyle) is granted, and the motion is otherwise denied; and it is further

ORDERED that the parts of the Plaza defendants' motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence, Labor Law §§ 200 and 241 (6) claims and all cross claims against them is granted, and these claims and cross claims are dismissed as against the Plaza defendants; and it is further

ORDERED that the part of the Plaza defendants' motion (motion sequence number 007) for summary judgment in their favor on their cross claim for contractual indemnification against Boyle is granted, and the motion is otherwise denied; and it is further

ORDERED that the parts of third-party/second third-party/third third-party defendant AMZ Construction Services, Inc.'s (AMZ) motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the third-party, second third-party and third third-party claims for contribution and common-law indemnification are granted, and these claims are dismissed as against AMZ; and it is further

ORDERED that the parts of AMZ's motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing Dollar Tree's third-party and the Plaza defendants' third third-party claims for contractual indemnification and breach of contract for failure to procure insurance against it is granted, and these claims are dismissed as against AMZ, and the motion is otherwise denied; and it is further

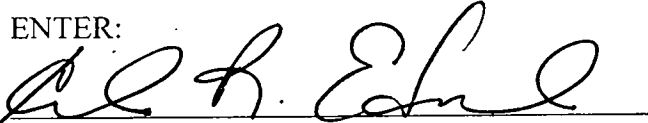
ORDERED that the part of Boyle's motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing the complaint against him is granted, and the complaint is dismissed as against Boyle with costs and disbursements to Boyle as taxed by the Clerk of Court and the Clerk is directed to enter judgment in favor of Boyle; and it is further

ORDERED that the part of Boyle's motion, pursuant to CPLR 3212, for summary judgment in his favor on his second third-party claim for contractual indemnification against AMZ is granted; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this Order with Notice of Entry within twenty [20] days of entry on all counsel.

Dated: April 5, 2019

ENTER:


Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.