

Sakho v Harrison St. Residences, LLC
2019 NY Slip Op 32295(U)
July 29, 2019
Supreme Court, New York County
Docket Number: 154556/2015
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

BOUBOU SAKHO,

Plaintiff,

- v -

HARRISON STREET RESIDENCES, LLC, PAV-LAK
CONTRACTING INC.,

Defendant.

INDEX NO. 154556/2015

MOTION DATE 03/21/2019,
03/21/2019

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

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HARRISON STREET RESIDENCES, LLC

Plaintiff,

Third-Party
Index No. 595189/2016

-against-

BAY RIDGE MECHANICAL CORPORATION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 134, 135, 136

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 006) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 118, 120, 130, 131, 132, 133

were read on this motion to/for JUDGMENT - SUMMARY

GOETZ, J.:

In this Labor Law action, defendant/third-party plaintiff Harrison Street Residences, LLC (Harrison) and defendant Pav-Lak Contracting, Inc. (Pav-Lak) move pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff Boubou Sakho's complaint and all cross claims and counterclaims (motion sequence 005). Defendants also move for contractual

indemnification as against third-party defendant Bay Ridge Mechanical Corporation (Bay Ridge). In motion sequence 006, plaintiff moves pursuant to CPLR 3212 for an order granting summary judgment as against Harrison and Pav-Lak for their alleged violations of Labor Law §§ 240(1) and 241(6). The motions are consolidated for disposition.

BACKGROUND

Plaintiff alleges that he suffered personal injuries on March 19, 2014, after falling from a ladder at a construction site located at 7 Harrison Street, New York, New York (amended verified complaint).

Plaintiff's Deposition Testimony

Plaintiff testified that at the time of his accident, he worked for Bay Ridge as a plumber. (Plaintiff's 4/18/17 EBT, at 42). He maintains that his boss was "Carl" who was the foreman for Bay Ridge (*id.* at 43). Plaintiff testified that Bay Ridge had an office in the basement of the premises where it kept equipment (*id.* at 45-49).

Plaintiff testified that on the date of his subject accident, Carl ordered him to go to the third floor of the premises in order to repair pipes (*id.* at 53-55). He testified that Carl, acting as his supervisor, was the only person to tell him what work to perform (*id.* at 54). Plaintiff was unaware of who owned the building (*id.*). Plaintiff testified that after working on the third floor, Carl instructed him to move to the ground floor of the building in order to finish cutting the sprinkler system (*id.* at 59-61). He maintains that he was working near the street on the ground floor (*id.* at 82). Plaintiff recalls that at this time, a co-worker named "Moussa" who was assisting with the work, was instructed by Carl to go to another location (*id.* at 82-83).

Plaintiff testified that he retrieved a ladder and brought it to the area in which he was working in order to cut a sprinkler pipe (*id.* at 84). He maintains that when he ascended the ladder to cut the pipe, he stopped halfway up and observed that two of the ladder's feet were missing (*id.* at 91-92). The ladder began to tremble (*id.* at 92). Plaintiff testified:

"Q. Were you actively cutting a piece of the pipe when the accident happened?
A. Yes. I was in the middle of cutting. So when I was in the middle of cutting a piece, the ladder made a bad action and it was at that point that another piece of the pipe hit my finger. I fell on the floor."

(*id.* at 111).

Plaintiff testified that the ladder fell to the floor and that plaintiff proceeded to fall backwards, hitting his head (*id.* at 114-117). He maintains that the tool which he was utilizing to cut the pipes had nothing to do with why his accident occurred (*id.* at 118). Plaintiff called Carl on his personal cell phone and told him that he had an accident and to contact an ambulance (*id.* at 120-121). When Carl arrived, he took plaintiff by car to a pharmacy to purchase bandages and then left him off at a bus stop (*id.* at 122).

Plaintiff testified that he had complained to Carl at least five times about issues with the ladders (*id.* at 87). Plaintiff maintains that Bay Ridge had safety meetings at the job site, but that he did not attend such meetings (Plaintiff's 4/25/17 EBT, at 107). He did not receive training from anyone other than Bay Ridge regarding how to use the equipment (*id.* at 109-110).

Plaintiff's Affidavit

Plaintiff submits an affidavit dated November 1, 2018 which states that while he was in the process of cutting a sprinkler pipe on the ground level of the subject premises, he was caused to fall off of an A-frame ladder. (Edelman Affirmation, exhibit N). He states that the subject ladder shook and tipped over while he was cutting the pipe, causing him to fall to the ground.

The subject ladder was missing rubber feet on its two right legs and the joints holding it together were weak, causing it to shake as he ascended. Plaintiff maintains that the ladder was eight feet tall.

Deposition of Mousa Bahaga (Bahaga) (laborer for Bay Ridge)

Bahaga testified that he worked as a laborer for Bay Ridge (Bahaga EBT, at 11). On the date of plaintiff's accident, Bahaga maintains that he was cutting standing pipe from the eighth floor down to the basement level (*id.* at 18-19). He testified that Carl Benjamin from Bay Ridge (Benjamin) instructed the workers to cut the pipe (*id.* at 19). Bahaga maintains that he and plaintiff started removing pipes inside the building on the eighth floor and descended to each lower floor (*id.* at 22). Bahaga testified that at the time, they were using an eight-foot A-frame ladder (*id.* at 25-26).

Bahaga testified that when the workers reached the basement level, Benjamin instructed Bahaga to go to a work site located at 930 Broadway (*id.* at 29-30). Bahaga testified that when he left 7 Harrison Street, the stand pipe was removed from the ground level all the way to the top floor and that the only location in which the standpipe remained was in the basement (*id.* at 30). Bahaga testified that when he later returned to 7 Harrison Street, plaintiff was located in the basement shanty because he had gotten injured (*id.* at 35). Plaintiff explained to Bahaga that he was hurt while cutting pipe in the basement (*id.* at 36). Bahaga noticed that there was one or two types of pipe remaining, but everything else was no longer in the building (*id.* at 42).

Bahaga testified that he recalled observing a ladder in the basement, but that plaintiff did not tell him that he was on a ladder when he got hurt (*id.* at 46). Bahaga testified that before he left for 930 Broadway, he recalls helping plaintiff carry tools to the basement including the

ladder (*id.* at 56). Bahaga maintains that while Benjamin emphasized the importance of working together for the assignment as the pipe was heavy, Benjamin did not assign another worker to work with plaintiff once he left (*id.* at 73-74).

Deposition of Carl Benjamin (Benjamin) (Bay Ridge foreman)

Benjamin testified that at the time of plaintiff's accident, he was working as a foreman for Bay Ridge and that his duties included assigning daily work (Benjamin EBT, at 12). Benjamin testified that he recalls visiting the job site at 7 Harrison Street on a daily basis as Bay Ridge was conducting plumbing and sprinkler work (*id.* at 16). Benjamin testified that at the site, he was in charge of the workers from Bay Ridge (*id.* at 20-21).

Benjamin testified that the subject building had six floors and a cellar level and that the standpipe went from the top of the sixth floor to the bottom of the cellar (*id.* at 31). Benjamin maintains that to cut the standpipe, one worker had to cut it while another worker assisted (*id.* at 39). He maintains that safety gear such as eye protection and dust masks were provided by Bay Ridge and that Bay Ridge had a shanty in the cellar area in which ladders were located (*id.* at 42-43). Benjamin would run Bay Ridge's safety meetings (*id.* at 46). Benjamin testified that he spoke with the superintendent and the project manager but did not interact with anyone from the building's ownership (*id.* at 50).

Benjamin maintains that on the day of the subject accident, plaintiff and Bahaga were working in the cellar as instructed (*id.* at 29). He recalls seeing plaintiff and Bahaga cutting and removing portions of the standpipe and placing it outside into a dumpster (*id.* at 52-53). He testified that neither worker needed to use a ladder in the course of cutting and removing the standpipe in the cellar because the standpipe would have been at the height of their chests (*id.* at

53). He maintains that he did not witness the workers performing work in an unsafe manner (*id.* at 53-54).

Benjamin testified that before leaving the site, he told plaintiff and Bahaga to remove the standpipe in the cellar and maintains that during that morning, plaintiff had not performed any work on any floor other than the cellar (*id.* at 54). Benjamin maintains that on the day of the accident, there was no work being performed on the top floor of the building (*id.* at 74). He learned of plaintiff's accident when plaintiff contacted him via phone (*id.* at 55). Benjamin testified that when he arrived at the site, he went to a Rite Aid store with plaintiff to wrap and dress the injury (*id.* at 56). Benjamin testified that he was not aware that plaintiff suffered any injuries other than to his hand (*id.* at 65).

Benjamin states that plaintiff "told me he was cutting a piece of pipe. He cut through the pipe and the pipe ricocheted and pinned his finger between the pipe and the wall. And that's how he told me it happened" (*id.* at 58-59). Benjamin maintains that the pipe was two or three inches from the closest wall and that plaintiff did not tell Benjamin that he had fallen (*id.* at 59). Benjamin testified that plaintiff never mentioned anything to him about a ladder's involvement in the accident (*id.* at 69).

Benjamin maintains that he believes that Bahaga had said that he went to the bathroom at the time of the accident (*id.* at 59-60). Benjamin testified that the workers were given clear instructions that if a worker goes to the bathroom, work had to stop until the worker came back due to the weight of the pipe (*id.* at 60-61).

Benjamin contends that when he inspected the cellar after the accident, he did not see any ladders and testified that there was no need for any ladder to be placed in that location to cut the pipe (*id.* at 68). He maintains that Bay Ridge had about six ladders at the site and that the

ladders were secured with a chain and lock (*id.* at 70-71). Benjamin testified that prior to the day of the accident, he had never learned that any of the ladders were missing rubber feet (*id.* at 94-95). He maintains that the ladders which were twelve feet had rubber feet, while the ladders which were six feet were wooden (*id.* at 95).

Deposition of Scott Sabbagh (Sabbagh) (consultant/authorized representative of Harrison)

Sabbagh testified that in 2014, he worked as a consultant/authorized representative of Harrison, the owner of the premises (Sabbagh EBT, at 6). He maintains that his duties included making recommendations pertaining to the development of 7 Harrison Street (*id.*). Sabbagh testified that prior to March 19, 2014, he did not have any employees that were at that site on a daily basis (*id.* at 9). He maintains that Pav-Lak was a construction manager and that it had one or two people at the premises during working hours (*id.*). He testified that the project manager was Francis Caridi and that he would speak with him about Bay Ridge's progress (*id.* at 10). Sabbagh never spoke with or knew any of the workers who worked for Bay Ridge or gave directives to Bay Ridge (*id.* at 11). He believes that the foreman for Bay Ridge was Benjamin, but that he did not have any interaction with him (*id.* at 12).

Sabbagh believes that prior to March 19, 2014, subcontractors stored ladders at the premises (*id.* at 13). Sabbagh testified that Harrison did not provide any ladders for any of the subcontractors for Pav-Lak, or for any of the workers at the building (*id.* at 14). He believes that Pav-Lak would host the safety meetings (*id.*).

Sabbagh maintains that Pav-Lak decided which subcontractors were to be hired (*id.* at 20). He maintains that Pav-Lak entered into a contract with Bay Ridge to conduct plumbing work at the premises (*id.* at 20-21). Sabbagh testified that he did not exercise any control over

the manner in which the trades performed their job (*id.* at 30-31). If he was to see anything hazardous or dangerous at the site, he would have alerted Pav-Lak (*id.* at 31).

Deposition of Francis Caridi (Caridi) (Project Manager of Pav-Lak)

Caridi testified that he was employed as a project manager by Pav-Lak, a construction management company (Caridi EBT, at 5). In 2014, Pav-Lak, was conducting a gut renovation of a building located at 7 Harrison Street (*id.*). Caridi's duties included drafting change orders, conducting submittals, preparing requisitions, ensuring that subcontractors received payment, and overseeing the schedule (*id.* at 6). Caridi maintains that he was at the subject location for four days out of the week and that his office was located on the first floor of the building (*id.* at 7-8). Caridi maintains that Pav-Lak reviewed proposals from vendors and made the final decision as to which subcontractors were utilized (*id.* at 11). Caridi testified that Sabbagh provided authorization to hire the subcontractors (*id.* at 11-12).

Caridi testified that Pav-Lak retained Bay Ridge to perform work on the plumbing and the fire sprinkler systems (*id.* at 14). He maintains that he would talk with Benjamin, Bay Ridge's foreman, who made sure that his workers were conducting the needed work (*id.* at 15). He maintains that Chris, the owner of Bay Ridge, would come to the site once every two weeks and that Peter Pav-Lak, the president of Pav-Lak, visited the site and conducted general meetings regarding change orders and scheduling (*id.* at 16-17). Safety meetings were held weekly with the subcontractors (*id.* at 17).

Caridi testified that neither he nor anyone from Pav-Lak controlled the means or methods by which Bay Ridge performed the plumbing or sprinkler work (*id.* at 34). He maintains that the subcontractors provided their own ladders and that neither Pav-Lak nor Harrison provided any ladders (*id.* at 20). Caridi testified that no one from Pav-Lak received complaints about the

ladders (*id.* at 21). Caridi reviewed daily reports generated by his supervisor which indicate that on March 19, 2014, Bay Ridge was not conducting plumbing work on the ground floor (*id.* at 28).

Caridi could not find an accident report regarding plaintiff's accident (*id.* at 30). He maintains that Pav-Lak did not provide safety devices to any of the subcontractors who worked at the subject location (*id.* at 33). Caridi testified that he never witnessed any workers using a ladder which was unstable or defective (*id.* at 34). If he observed a hazardous or dangerous condition, he had the ability to stop the work at the site (*id.* at 34-35).

DISCUSSION

Summary Judgment standard

It is well-established that “[t]he 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” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). 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” (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dep’t 2011], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O’Brien v. Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Labor Law § 240 (1)

Plaintiff argues that summary judgment must be granted on his Labor Law § 240 (1) claim, and defendants move for summary judgment dismissing the same claim. Labor Law § 240 (1) provides in part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

It is well settled that "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] [stating that "the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials"]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" [*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011] [internal quotation marks omitted]].

The statute also "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "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)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] 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*, 13 NY3d at 603). Therefore, in order to prevail on a Labor Law § 240 (1) claim, a plaintiff must demonstrate that

there was a violation of the statute and that the violation was a proximate cause of the injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to “absolute liability” (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Plaintiff contends that Harrison, as the owner, and Pav-Lak, as the general contractor, are liable pursuant to Labor Law § 240 (1). Plaintiff argues that he was caused to fall from a specifically enumerated safety device, that the ladder was defective as it was missing rubber feet, and that the joints which held the ladder together caused it to be unsteady. Plaintiff argues that the defective nature of the ladder was the proximate cause of his injuries.

Plaintiff argues that with regards to Harrison, the Labor Law imposes upon the owner absolute liability for failing to provide protection to workers employed on construction sites. Plaintiff contends that Pav-Lak should also be held liable as it was responsible for coordinating and supervising the entire construction project and was invested with the power to enforce safety standards and to hire responsible contractors.

Defendants argue that Benjamin testified that plaintiff admitted that his accident occurred when he was cutting a piece of pipe and the pipe ricocheted and pinned his finger between the wall. Defendants argue that plaintiff never mentioned to Benjamin that he fell from a ladder, that plaintiff told Benjamin that he was working in the cellar, and that plaintiff was not instructed to perform any work requiring a ladder.

Here, there is a question of fact as to whether a ladder was involved in plaintiff's accident and whether the alleged accident involved an elevation-related hazard. While plaintiff testified

that he fell from a ladder on the ground floor, Benjamin's testimony calls into question whether plaintiff was working on that floor and also whether a ladder was utilized or could have been utilized in that location (Plaintiff EBT at 84, 91-92, 114-18; Benjamin EBT at 52-54). Benjamin testified that plaintiff did not mention that his accident involved a fall from a ladder and that his injuries were limited to his hand (*Id.* at 58-59). Given the conflicting testimony regarding whether or not a ladder was involved in the alleged accident, the part of plaintiff and Harrison's motion seeking summary judgment as to the claims made pursuant to Labor Law § 240 (1) must be denied. (*Psihogios v Stavropoulos*, 269 AD2d 295, 296 [1st Dept 2000] [holding issues of credibility should be left for resolution by the trier of fact]).

Defendants also argue that plaintiff's motion against Pav-Lak must be denied as Pav-Lak was a construction manager and cannot be held vicariously liable as a statutory agent for the purpose of the Labor Law. "To hold a defendant liable under the Labor Law as a 'statutory agent' of either the owner or the general contractor, it must be shown that the defendant had the 'authority to supervise and control' the injury producing work" (*Santos v. Condo 124 LLC*, 161 A.D.3d 650, 653 [1st Dep't 2018]). "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), 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]).

Here, Caridi testified that Pav-Lak did not provide any safety devices to any of the subcontractors who worked at the subject location and that neither he nor anyone from Pav-Lak controlled the means or methods by which Bay Ridge performed their plumbing or sprinkler work (Caridi EBT at 14-17, 20-21, 34). However, Caridi also testified that he retained Bay Ridge

to perform the work and that he had authority to stop work in the event of unsafe practices. This is sufficient to create an issue of fact as to whether Pav-Lak was a statutory agent for purposes of the Labor Law and thus summary judgment with respect to this claim must be denied (*Santos*, 161 A.D.3d at 653 (the authority of defendant's employee to stop work in the even of unsafe practices raises an issue of fact as to whether the defendant was a statutory agent)).

Alternatively, defendants argue that plaintiff intentionally used a ladder that he knew was defective and thus was the sole proximate cause of his injury. "[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Defendants contend that plaintiff should not have been using the ladder if he was aware that it had missing feet. However, defendants do not reference specific testimony which refutes plaintiff's testimony that he had first learned of the missing feet while ascending the ladder (Plaintiff's 4/18/17 EBT at 91-92). Therefore, defendants fail to meet their burden to demonstrate that plaintiff was the sole proximate cause of his own injury.

Labor Law § 241 (6)

Plaintiff alleges that summary judgment must be granted as to his Labor Law § 241(6) claim, and defendants move for summary judgment dismissing the claim. Labor Law § 241 (6) reads, in relevant part, that:

"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, equipped,

guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

The statute imposes a duty upon owners, contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). “The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, “[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, “a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct” (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]). The injury also must have occurred “in an area in which construction, excavation or demolition work is being performed” (*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007] [internal quotation marks omitted]).

Although plaintiff alleges violations of Industrial Code sections 23-1.10, 23-1.12, 12-1.12(c), 23-1.16, 23-1.21, 23-1.32, 23-1.5, 23-1.7, and 23-5 in the verified bill of particulars, he only addresses sections 23-1.21(b)(3)(ii) and (iv), and 23-1.21(b)(4)(ii) in his papers. Moreover, plaintiff failed to address the other Industrial Code sections in his opposition. Thus, plaintiff has abandoned his reliance on these other Industrial Code provisions as predicates for liability under

Labor Law § 241(6) (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013]; *Cardenas v One State St., LLC*, 68 AD3d 436 [1st Dept 2009]). Accordingly, plaintiff is not entitled to summary judgment on that part of the Labor Law § 241(6) claim predicated on sections 23-1.10, 23-1.12, 23-1.12 (c), 23-1.16, 23-1.32, 23-1.5, 23-1.7, and 23-5, and defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on these abandoned provisions.

Industrial Code sections 23-1.21 (b) (3) (ii) and (iv) provide:

"(b) General requirements for ladders.

(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

(ii) If it has any insecure joints between members or parts.

(iv) If it has any flaw or defect of material that may cause the ladder failure."

Industrial Code section 23-1.21 (b) (4) (ii) provides:

"(4) Installation and use.

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

Industrial Code sections 23-1.21 (b)(3)(ii) and (iv), as well as section 23-1.21 (b) (4) (ii), are sufficiently specific enough to support a Labor Law § 241 (6) claim (*See Croussett v Chen*, 102 AD3d 448, 448 [1st Dept 2013]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]; *De Oliveira v Little John's Moving, Inc.*, 289 AD2d 108, 109 [1st Dept 2001]).

Defendants argue that section 23-1.21(b)(3) pertains to the maintenance and replacement of ladders, which was not violated. They argue that the ladder did not have a broken member or part, insecure joints, worn down wooden rungs or steps, and that it did not have any flaw or defect of material. However, based upon the testimony of plaintiff, a question of fact is raised as to whether this section was violated as plaintiff testified that the ladder was defective as it was missing two feet causing it to be unsteady (Plaintiff's EBT, at 91-92).

Defendants also contend that section 23-1.21(b)(4)(ii) does not apply as a slippery surface or insecure objects were not being used as ladder footings. As there is an allegation that the ladder lacked two rubber feet which may have caused the ladder to be unsteady, this section may be applicable. Moreover, the conflicting testimony of plaintiff and Benjamin raises issues of fact as to whether a ladder was even involved in plaintiff's accident, therefore the court must deny the part of defendants' motion seeking to dismiss plaintiff's Labor Law 241(6) claim which is premised on sections 23-1.21(b)(3)(ii)(iv), and 23-1.21(b)(4)(ii) of the Industrial Code.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants also move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 (1) provides, in relevant part:

“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.”

The statute codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Claims brought under this section “fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). “Where the injury was caused by the manner and means of the work, including

the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work” (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants’ stop work authority insufficient to establish that the defendant actually “exercised any control over the manner and means of plaintiff’s work”]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

Defendants contend that plaintiff was supervised exclusively by Benjamin of Bay Ridge and that no one from Harrison or Pav-Lak directed, supervised, or controlled plaintiff’s work. Defendants maintain that based upon the testimony, Harrison did not provide any equipment for the construction or exercise any control over the manner in which the trades performed their work. Defendants argue that Caridi testified that Pav-Lak hired Bay Ridge to perform the plumbing and fire sprinkler work, that Pav-Lak did not receive any complaints about the condition of the ladders, that Pav-Lak did not provide the ladders for the job, and that Pav-Lak did not control the means and methods by which Bay Ridge performed its work.

The testimony from Caridi and Sabbagh specifically demonstrates that Pav-Lak and Harrison did not maintain or provide the ladders (Caridi’s EBT, at 20; Sabbagh’s EBT, at 14) and did not exercise control or instruct plaintiff to conduct the work which allegedly caused his injury (Caridi’s EBT. at 34; Sabbagh’s EBT, at 30-31).

In opposition, plaintiff fails to meet his burden to demonstrate that defendants had supervision or control over the injury-producing work or that they had actual or constructive notice of the alleged defective condition of the ladder (*Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011] [“the mere presence of Con Edison's personnel on site is insufficient to infer supervisory control. Nor is a triable issue presented by the fact that Con Edison employees may have inspected the excavations and admonished Roadway employees to hurry the work. Moreover, there is no evidence that Con Edison gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under [Labor Law § 200”] [citations and quotations omitted]).

Therefore, because defendants make a *prima facie* showing of entitlement to summary judgment as a matter of law as to the allegations of common law negligence and a violation of Labor Law § 200, and because plaintiff fails to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact, the part of defendants’ motion seeking summary judgment as to plaintiff’s claims of common law negligence and a violation of Labor Law § 200 must be granted.

Contractual Indemnification

Defendants also move for an order granting them both contractual indemnification from Bay Ridge.

“A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed. 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. However, where a triable issue of fact exists

regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature.”

(*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011] [quotations and citations omitted]).

Defendants argue that they each entered into a Trade Contractor Agreement with Bay Ridge and that both agreements contain the same indemnification language. Defendants contend that various provisions in the agreements made Bay Ridge responsible for site safety, obligated Bay Ridge to provide the labor and equipment necessary to complete the plumbing work, obligated Bay Ridge to supply, install and maintain all required fall protection, and to submit its own site specific health and safety plan prior to commencing work. They maintain that in each contract, Harrison is identified as the Owner, Pav-Lak is identified as the Construction Manager, and Bay Ridge is identified as the Trade Contractor.

The Trade Contractor Agreement provides:

“[i]n consideration of the Contract Agreement, and to the fullest extent permitted by law, the Trade Contractor shall defend and indemnify and hold harmless at the Trade Contractor's sole expense, the Construction Manager/GC, all entities the Construction Manager/GC is required to indemnify and hold harmless, the Owner of the Property . . . from and against all liability or claimed liability for bodily injury . . . arising out of or resulting from the work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Trade Contractor or by anyone whose acts the Trade Contractor may be held liable, excluding only liability created by the sole and exclusive negligence of the indemnified parties”

(NYSCEF DOC. NO. 116, Zecca Affirmation, Trade Contractor Agreement, at 4, ¶ A).

Bay Ridge only opposes that part of the motion for summary judgment for contractual indemnification as it pertains to Harrison. Bay Ridge maintains that because it is already providing a defense and indemnification to Harrison, the motion seeking contractual

indemnification should be denied as the anti-subrogation rule bars its claims unless or until Bay Ridge's coverage is exhausted.

"Pursuant to the common-law anti-subrogation rule, an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*New York City Dept. of Transp. v Petric & Assoc., Inc.*, 132 AD3d 614, 614 [1st Dep't 2015] [quotations and citation omitted]). However, "it is black-letter law that New York law does not bar insurance companies from seeking indemnification for settlements or judgments that exceed the limits of an insurance policy" (*Mitchell v. NRG Energy, Inc.*, 142 A.D.3d 1366, 1367 [4th Dep't 2016]).

Defendants contend that they are entitled to contractual indemnification as against Bay Ridge to the extent they are not barred by the anti-subrogation rule for amounts not covered under the insurance policies which are providing coverage to Harrison and Pav-Lak as additional insureds. Defendants maintain that plaintiff has demanded a judgment of \$7,000,000 and that this amount clearly exceeds the \$1,000,000 general liability policy limit which Bay Ridge's carrier is currently providing to Harrison and Pav-Lak as additional insureds.

As the Trade Contractor Agreement specifically provides that Bay Ridge would defend and indemnify and hold harmless the construction manager and owner, and as plaintiff fails to demonstrate that Harrison and Pav-Lak were negligent, the part of defendants' motion seeking an order for conditional judgment on the issue of contractual indemnification must be granted to the extent plaintiff's damages exceed the amount of insurance coverage provided by Bay Ridge (*Keena v. Gucci Shops*, 300 A.D.2d 82, 82 [1st Dep't 2002]).

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that defendant/third-party plaintiff Harrison Street Residences, LLC, and defendant Pav-Lak Contracting, Inc.'s motion for an order dismissing plaintiff's claims for common law negligence and a violation Labor Law § 200 is granted; and it is further

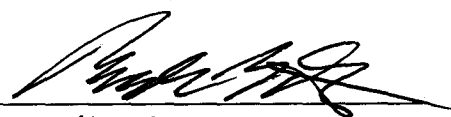
ORDERED that defendants' motion to dismiss plaintiff's Labor Law 241(6) claim is granted to the extent this claim is premised on alleged violations of Industrial Code sections 23-1.10, 23-1.12, 23-1.12 (c), 23-1.16, 23-1.32, 23-1.5, 23-1.7, and 23-5, and is otherwise denied; and it is further

ORDERED that defendants' motion seeking summary judgment dismissing the Labor Law § 240 (1) is denied; and it is further

ORDERED that the part of defendant/third-party plaintiff Harrison Street Residences, LLC, and defendant Pav-Lak Contracting's motion seeking a conditional order granting summary judgment on their claim for contractual indemnification as against third-party defendant Bay Ridge is granted for amounts not covered under the Bay Ridge insurance policies providing coverage to Harrison and Pav-Lak; and it is further

ORDERED that plaintiff Boubou Sakho's motion seeking summary judgment pursuant to Labor Law §§ 240 (1) and 241 (6) is denied.

7/29/19
DATE


Hon. Paul A. Goetz, JSC

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: