At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the day 31 day of July, 2019.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice.

----------X

OSCAR MERCHAN GONZALES,

Plaintiff,

- against -

Index No. 504294/16

2727 KNAPP STREET STORAGE, LLC, PINNACLE COMMERCIAL DEVELOPMENT, INC., KBM, INC., S&S CONSTRUCTION GROUP, INC., AND NEW YORK CITY HEALTH AND HOSPITAL CORPORATION (KINGS COUNTY HOSPITAL CENTER AND BELLEVUE HOSPITAL CENTER),

Defendants.

----------X

KBM, INC.

Third-Party Plaintiff,

- against -

METALLICA STEEL INC.,

Third-Party Defendant.

----------X

The following papers numbered 1 to 22 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5, 6-7
Opposing Affidavits (Affirmations)	8-18
Reply Affidavits (Affirmations)	19-22

Upon the foregoing papers, plaintiff Oscar Merchan Gonzales (plaintiff) moves, pursuant to CPLR 3212, for summary judgment against defendants 2727 Knapp Street Storage, LLC (Knapp) and Pinnacle Commercial Development, Inc. (Pinnacle) (collectively, defendants or Knapp/Pinnacle) on his common-law negligence and Labor Law §§ 240 (1), 241-a, 241 (6) and 200 causes of action, and against defendant S&S Construction Group, Inc. (S&S) on his claim for common-law negligence. Knapp/Pinnacle moves, pursuant to CPLR 3212, for a conditional order of summary judgment on their cross claims for contractual indemnification against S&S and defendant/third-party plaintiff KBM, Inc. (KBM), less any degree of fault if apportioned to Knapp and/or Pinnacle upon a trial of the action, including but not limited to reimbursement of all attorney's fees, expenses, costs and disbursements incurred in the defense of plaintiff's claim and in the enforcement of the indemnification agreement, and for summary judgment, pursuant to CPLR 3212, against S&S on their cross claims for breach of contract to procure insurance including, but not limited to damages for the premiums paid for their own insurance, any out-of-pocket costs that may have been incurred incidental to the subject insurance policy, and any increase in future insurance premiums resulting from plaintiff's claim. S&S moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint insofar as asserted against it and the cross claims asserted against it by Knapp/Pinnacle, KBM and New York City Health and Hospital Corporation (NYCHHC) (Kings County Hospital Center and Bellevue Hospital Center).

Overview

The instant personal injury action arises out of an accident that occurred on August 17, 2015 when plaintiff walked backward into the uncovered/unguarded opening of an elevator shaft on the roof of a building under construction, and fell four stories through the shaft to the ground floor. The building was owned by Knapp and was located at 2727 Knapp Street in Brooklyn. Knapp hired Pinnacle as the general contractor for the project, and Pinnacle hired KBM as the steel subcontractor to furnish the steel structure for the building and to construct the roof above the fourth floor. Pinnacle also hired S&S as the masonry subcontractor to perform masonry work at the construction site, including construction of the subject elevator shaft, as well as other concrete work involving walls, floors and grade beams. KBM, allegedly without Pinnacle's knowledge, subcontracted all of its contractual obligations to third-party defendant Metallica Steel Inc. (Metallica), plaintiff's employer.

Facts and Procedural History

Plaintiff testified at his depositions[1] that on the day of the accident, he was working for Metallica as a "helper," performing cleaning, taking measurements, and working with nails and screws. The subject job involved the construction of a "five-story" storage facility (the building), and Metallica's work involved "nailing the beams" on the "last floor" in order to install the roof.[2] Before and on the day of the accident, Metallica had been installing metal

---

[1]Plaintiff testified on three different days.

[2]Although plaintiff testified that he was assisting in the installation of the roof on the *fifth* floor of the building, the contract between Knapp and Pinnacle called for the new construction of (continued...)

decking on the roof level of the building, and on the day of the accident it was completing the installation of metal beams on the roof.

Metallica was owned by a man named "William." Plaintiff was working with a Metallica helper named "Jefferson," who was the only person who instructed him on how and what work was to be performed; "William's manager," a man from Brazil "appointed" by William, was responsible for directing and supervising Metallica's work at the site; and two other Metallica workers, one of whom was Portuguese. Only Metallica provided plaintiff and his coworkers with equipment, including tools for measuring.

There were two elevator shafts at the building, one toward Knapp Street in the front of the building, into which plaintiff fell, and the other one in the back of the building, where there was an inlet of water. The subject elevator shaft was square, its opening was even with the "top level" or roof, and it was wide enough for three or four persons to fit though.

Just prior to the accident, plaintiff and his Portuguese coworker were on the "last" or "top" floor, preparing "things in order to install [the] roof," when plaintiff's coworker told him to take measurements.[3] To perform this task, plaintiff's coworker would hold a box containing a string, and plaintiff would take the string and walk backward until instructed by

---

[2](...continued)
a 100,000-square-foot four-story self-storage facility without a basement. Further, plaintiff testified that there was no ceiling above the level on which he was working, that there was nothing above him but sky, and that he and Metallica were putting a roof on the level on which he was working.

[3]Plaintiff also testified that this coworker "didn't ask me to do anything," then testified at his second deposition that measuring was the first task he was instructed to do when he arrived at work, and that his supervisor was the person who had told him to take measurements.

his coworker to stop and take the measurement. At the location where plaintiff would stop, he would release the string, which would strike the ground and leave an orange chalk mark.

As plaintiff was standing in the "middle" of the building with his coworker, who was holding the box, plaintiff's coworker told plaintiff to take the string from the box and walk with it in order to take the appropriate measurement. Plaintiff took the string and began to walk backward while waiting for his coworker's instruction to stop. When plaintiff started to walk backward, he was five meters away from the subject elevator shaft. When plaintiff was just a few meters away from his coworker, he fell down the subject elevator shaft. Plaintiff's coworker did not tell plaintiff when to stop or warn him that there was an elevator shaft behind him.

Plaintiff had seen the opening of the elevator shaft before his accident and it was not "blocked off," he had never seen anything blocking its entrance, and the elevator shaft had been there from the first day he starting working at the site. When he began to walk backward, he was not aware that he was walking towards the elevator shaft, or that the elevator shaft was approximately five meters away, and before he started walking backward, he did not look to see where he was going to be walking, but was just waiting for his coworker's instructions. On the other hand, plaintiff also testified that he had looked to see where he was going to be walking, and that he had been aware of his surroundings. When plaintiff was taking measurements, he was never facing the shaft because "[he] was told to take measurements." Before he started walking backward, there was no period of time when

he could have seen the shaft, but he would have seen it if he had been standing where his coworker had been standing.[4]

Plaintiff never had to wear a harness to perform any task at the project; no one at the job site told him that he should be wearing a harness or tying off to something while he was performing work at the "top level;" there were no harnesses on the site for him to use; no fall protection was available to Metallica workers at the site; he was not aware of any area on the top level where he could have tied off to a harness; and there was nothing he could have used at that top level to prevent the accident from occurring. When asked whether he had anything on his person which would have allowed him to "tie off" while working on the roof or top level, plaintiff replied "[no], I didn't have anything else to tie on."

At the time of the accident, aside from his supervisor, only Metallica workers were on the roof, but plaintiff did not know who they were; plaintiff did not see anyone on the roof or "top level" putting up any type of "perimeter protection;" and when asked if there was perimeter protection on the roof or top level, plaintiff replied that "[t]here were cords" but he did not know who put the cords there. At the time of the accident, plaintiff was wearing a helmet. Plaintiff had never heard of Knapp, Pinnacle, KBM or S&S.

Following the accident, plaintiff commenced the instant action alleging common-law negligence and violations of Labor Law §§ 240 (1), 241-a, 241 (6) and 200 against Knapp, Pinnacle, KBM, S&S, and medical malpractice against NYCHHC. Issue was joined by all

---

[4]Plaintiff also testified at his second deposition that he had not seen the elevator shaft on the day before his accident and at his third deposition that prior to the accident, he had not "seen the elevator shaft that morning."

parties between April, 2016 and January 31, 2017. In their answer, Knapp/Pinnacle asserted cross claims against KBM and S&S for, among other things, contractual indemnification and breach of contract for failure to procure insurance. In its answer, KBM asserted cross claims against S&S for contribution and common-law indemnification. After discovery was complete, plaintiff, Knapp/Pinnacle, and S&S made the above motions for summary judgment, which are presently before the court for disposition.

Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment against Knapp/Pinnacle on his claims for common-law negligence and Labor Law §§ 240 (1), 241-a, 241 (6) and 200.

Labor Law § 240 (1)

Labor Law § 240 (1) provides that:

> "[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure will furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (Labor Law § 240 [1]).

The statute "imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks" (*Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; *Carlton v City of N.Y.*, 161 AD3d 930, 931 [2d Dept 2018]), "'instead of on workers, who are scarcely in a position to protect themselves from accident'" (*Mingo v Lebedowicz*, 57 AD3d 491, 493 [2d Dept 2008], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985] [internal quotations marks

omitted]). Specifically, "[t]he statute was designed to prevent accidents in which a 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" (*Sullivan v N.Y. Athletic Club of City of N.Y.*, 162 AD3d 950, 953 [2d Dept 2018], *lv dismissed* 32 NY3d 1196 [2019] [internal citations and quotation marks omitted]). Accordingly, "[t]he purpose of the statute is to protect against 'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Mendez v Jackson Dev. Group., Ltd.*, 99 AD3d 677, 678 [2d Dept 2012], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "'"The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompasses any and all perils that may be connected in some tangential way with the effects of gravity"'" (*Simmons v City of New York*, 165 AD3d 725, 726 [2d Dept 2018], quoting *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999], quoting *Ross*, 81 NY2d at 501). Nevertheless, the statute's purpose of protecting workers "is to be liberally construed" (*Ross*, 81 NY2d at 500). "To succeed on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his injuries" (*Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722 [2d Dept 2010]).

As plaintiff argues, based upon his testimony that he fell through an uncovered and unguarded elevator shaft while working at the roof of a building under construction, the testimony of Mr. Horvath, the Pinnacle supervisor, Mr. McNelis, the Pinnacle project

manager, and Mr. Shi, the owner of S&S, that plaintiff fell through the subject shaft which was not covered and did not contain any planking on the inside or any protection at all (Mr. Shi), his own testimony that he was not provided with any safety devices to prevent his fall, and his testimony and that of the Mr. Horvath, Mr. McNelis, and Mr. Shi, collectively, that there were no places to tie-off or secure any safety devices, either inside or outside the elevator shaft or on the roof, plaintiff has made a prima facie showing entitling him to summary judgment on his Labor Law § 240 (1) cause of action against Knapp, the owner of the building, and Pinnacle, the general contractor (*Davidson v E.Q.K. Green Acres,* 298 AD2d 546, 547 [2d Dept 2002] [plaintiff entitled to summary judgment on Labor Law § 240 (1) claim "when, as he and a coworker were hanging a plastic curtain wall along the edge of the mezzanine level of the building, he fell more than 19 feet through an uncovered elevator shaft" and there were no safety devices on the site to prevent his fall]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 424-425 [1st Dept 2015] [protection of Labor Law § 240 (1) applicable where decedent elevator mechanic fell to his death down an unguarded elevator shaftway, and was not provided with adequate safety devices to prevent his fall]; *Barwicki v Friars 50th St. Garage,* 288 AD2d 14, 14 [1st Dept 2001] [plaintiff entitled to summary judgment on his Labor Law § 240 (1) where, "while repairing an elevator, [he] slipped on some grease or oil and fell into the elevator's shaft" and was not provided with "any safety device"]; *see also Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 669-670 [2d Dept 2018] [plaintiffs entitled to summary judgment on their Labor Law § 240 (1) cause of action where they "established, prima facie, that the plaintiff was injured when he fell through an open, unfinished stairwell and that he was not provided with safety devices to

prevent or break his fall"]; *Durando v City of New York*, 105 AD3d 692, 695 [2d Dept 2013] ["The plaintiffs established their prima facie entitlement to judgment as a matter of law (under Labor Law § 240 [1]) by showing that there was a failure to provide a proper safety device to prevent the injured plaintiff from falling through a hole in the deck of the ship's cargo hold"]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 727 [2d Dept 2012] [plaintiff entitled to summary judgment on his Labor Law § 240 (1) cause of action when he partially fell into an unprotected opening in the floor that was large enough for his body to have passed through and was injured]; *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 808 [2d Dept 2010] [plaintiff entitled to summary judgment on his Labor Law § 240 (1) cause of action where he "fell from a seven-foot high metal scaffold while attempting to dislodge a ceiling pipe with a hammer . . . [and] continued to fall into an unprotected three-by-four feet 'hole' in the temporary plywood floor, landing in the basement and sustaining injuries"]).[5]

In opposition to this branch of plaintiff's motion, Knapp/Pinnacle argues that plaintiff's decision to knowingly walk backward toward the open elevator shaft - without using available safety devices which had been used by his coworkers - was the sole proximate cause of his accident. As an initial matter, as plaintiff replies, "[w]here, as here, a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed the sole proximate cause" (*Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849, 852 [2d Dept 2009]; *see also Melito,* 129 AD3d at 425 ["Nor can defendants rely upon the defense of sole proximate cause, since they failed to provide adequate safety

[5]The court notes that plaintiff does not rely upon the affidavit of his expert, Certified Site Safety Manager Kathleen Hopkins, in support of any of the relief he seeks.

devices in the first instance"]). Moreover, as plaintiff asserts, the Second Department has already held that walking backward into an unprotected opening where a worker has not been provided with a safety device constitutes a prima facie showing under Labor Law § 240 (1), and thus cannot be considered the sole proximate cause of the accident (*Brandl v Ram Bldrs., Inc.*, 7 AD3d 655, 655-656 [2d Dept 2004]). Further, as plaintiff argues, whether or not he was provided with a safety device such as a harness or a lanyard is irrelevant since there were no places on the roof or inside the shaft to which these safety devices could have been attached.

In any event, Knapp/Pinnacle has failed to raise a material question of fact as to whether safety devices were available for plaintiff's use on the day of the accident. First, Mr. McMelis' testimony that "William," the owner of Metallica, told him that plaintiff was the only Metallica employee who was not wearing a harness when he fell constitutes inadmissible hearsay. In any event, during his deposition, Mr. McNelis testified that workers on the roof depicted in two separate photographs before the date of the accident were not wearing any harnesses. Second, while defendants point out that Mr. Horvath and KBM owner, Mr. Connell, testified that they had observed "some" Metallica workers (Mr. Horvath), as well as other trades (Mr. Connell) on the roof who were tied-off using harnesses and lanyards, neither testified that they made these observations on the day of the accident. Further, Mr. Connell testified that he had never seen workers on the roof who were tied-off to the roof decking before the accident, and Mr. Horvath, when asked whether he had observed workers wearing harnesses when walking on the job site, testified that he "wasn't looking for that. I didn't observe anything in that nature." Thus, that other Metallica

workers and trades were using harnesses on some unspecified day at the construction site fails to establish that harnesses were available for use by plaintiff on the day of the accident (*Salinas,* 170 AD3d at 1222 ["The sole proximate cause defense applies where the plaintiff, acting as a 'recalcitrant worker,' misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available"]). Thus, this branch of plaintiff's motion for summary judgment against Knapp/Pinnacle on his Labor Law § 240 (1) cause of action is granted.

Labor Law § 241-a

Labor Law § 241-a provides, in relevant part, that:

> "Any men working in or at elevator shaftways . . . in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men . . .".

Plaintiff has made a prima facie showing entitling him to summary judgment on his Labor Law § 241-a cause of action. Specifically, plaintiff testified that on the day of the accident, he was performing work in connection with the construction of the roof of the building above the fourth floor; Mr. Horvath testified that on the day of the accident, metal decking was being constructed up to the elevator shaft; and Mr. McNelis testified that on the day of the accident, steelworkers were working on the decking on the roof. Further, as plaintiff points out, and as noted above, he, Mr. Horvath, Mr. McNelis and Mr. Shi testified that on the day of the accident, he fell through the subject elevator shaft which was not protected by any planking either within or on top of the elevator shaft at the level on which he was working.

Knapp/Pinnacle does not oppose this branch of plaintiff's motion. Thus, this branch of plaintiff's motion for summary judgment on his Labor Law § 241-a cause of action against Knapp/Pinnacle is granted.

Labor Law § 241 (6)

"Labor Law § 241 (6) imposes upon owners and general contractors, and their agents, a nondelegable duty 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" (*Norero,* 96 AD3d at 728). Moreover, "[t]o prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards" (*id.*).

Plaintiff relies upon 12 NYCRR 23-1.7 (b) (1) (i) and (iii) to support this claim, which provide that:

> "(b) Falling hazards. (1) Hazardous openings. (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> * * *
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
> (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
> (b) An approved life net installed not more than five feet beneath the opening; or
> (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Both regulations are sufficiently specific to support plaintiff's Labor Law § 241 (6) claim (*id.; Stephens v Triborough Bridge & Tunnel Auth.*, 55 AD3d 410, 411 [1st Dept 2008]). In addition, as plaintiff argues, Mr. Horvath and Mr. McNelis both testified that the subject elevator shaft was uncovered and did not contain any safety railings (i.e. protection around the perimeter of the shaft). Further, Mr. Horvath, Mr. McNelis and Mr. Shi testified, collectively, that there was no planking or netting within the elevator shaft. Moreover, plaintiff testified that he was not provided with any safety devices, and Mr. Horvath, Mr. McNelis and Mr. Shi testified, collectively, that there was no anchor on the roof, or inside or outside of the elevator shaft, to which a harness or lanyard could have been tied. Knapp/Pinnacle has not opposed this branch of plaintiff's motion. Based upon the foregoing, plaintiff has made a prima facie showing of entitlement to summary judgment on his Labor Law § 241 (6) cause of action against Knapp/Pinnacle, which Knapp/Pinnacle has failed to oppose. Thus, this branch of plaintiff's motion for summary judgment on his Labor Law § 241 (6) cause of action against Knapp/Pinnacle is granted.

Labor Law § 200/Common-law negligence

"'Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work'" (*DiSanto v Spahiu*, 169 AD3d 861, 862 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). "'Where [as here], a claim is based on an alleged dangerous condition on the premises, an owner or contractor is liable where it created the dangerous condition or had actual or constructive notice of its existence'" (*Gargan v Palatella Saros Bldrs. Group, Inc.*, 162

AD3d 988, 989 [2d Dept 2018], quoting *Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1025 [2d Dept 2016]).

In support of that branch of his motion for summary judgment on his Labor Law 200/common-law negligence claims against Knapp/Pinnacle, plaintiff first argues that Pinnacle had actual and constructive notice of the unprotected elevator shaft because Mr. Horvath, Pinnacle's supervisor, testified that the elevator shaft had been constructed to the level of the roof for "approximately a week" prior to the date of the accident; that on the date of the accident, the elevator shaft was not covered, did not have any protection around its perimeter, and did not contain any interior planking, which created a dangerous condition on the work site; and that as the general contractor, Pinnacle had the authority to direct a subcontractor to safeguard an uncovered/unguarded hole and to prevent workers from working in that area until the hole was closed off. Thus, according to plaintiff, Pinnacle knew about the dangerous condition and recognized it as such, but took no action to remedy it. As to Knapp, plaintiff contends that it "knew of the dangerous condition, or in the exercise of reasonable care should have known of such condition."

In opposition, Knapp/Pinnacle argues that there are triable issues of fact as to whether plaintiff's conduct in walking backward toward the open elevator shaft was the sole proximate and superceding cause of his fall; that a plaintiff who engages in unnecessary and unforeseeable actions endangering his own safety is precluded from establishing a negligence claim; that plaintiff's accident arose from the manner in which he was working, for which they cannot be held liable because they did not supervise or control his work; that even assuming the accident arose from a dangerous condition (the unprotected elevator shaft), it

was S&S which elected not to cover it when it finished its construction and that until the roof installation was complete, the area constituted a "live deck" accessible only by the steelworkers; and that Pinnacle's general duties to oversee the work and to ensure compliance with safety regulations is insufficient to raise a triable issue of fact as to whether it was negligent (*see Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2d 2012]).

Plaintiff has failed to cite any evidence demonstrating that Knapp was aware of the unprotected elevator shaft. However, plaintiff has made a prima facie showing that Pinnacle had constructive notice of the unprotected elevator shaft based upon Mr. Horvath's testimony that he knew the shaft had been constructed up to the roof level approximately one week before the accident, that on the day of the accident the shaft was not covered or protected in any manner, that the shaft constituted a dangerous condition, and that Pinnacle did nothing to remedy it.

In opposition, defendants have failed to raise a triable issue of fact. First, this court has already held that plaintiff's actions were not the sole proximate cause of his accident. Second, contrary to defendants' claim, "[a] plaintiff is no longer required to show freedom from comparative fault in order to establish a prima facie case of the defendants' liability" (*Francois v Tang*, 171 AD3d 1139, 1140 [2d Dept 2019], citing *Rodriguez v City of New York*, 31 NY3d 312 [2018]). Further, that defendants did not supervise or control plaintiff's work is irrelevant because the accident arose from a dangerous condition, which subjects an owner, general contractor or its agent to liability under Labor Law § 200 and common-law negligence where "it created the dangerous condition or [as here] had actual or constructive notice of its existence" (*Gargan,* 162 AD3d at 989). Moreover, while defendants argue, in

effect, that they could not have created the dangerous condition because Pinnacle lacked access to the roof while the decking was being installed, as noted above, plaintiff has made a prima facie showing that Pinnacle had constructive notice of the dangerous condition, having seen the shaft built to the roof level a week before the accident. Lastly, defendants contend that Mr. Horvath's testimony that the shaft opening was not protected on the date of the accident was based on his post-accident inspection of the elevator shaft. First, defendants' citation to Mr. Horvath's deposition does not support this claim. Although Mr. Horvath testified that he observed "the decking on top" after the accident, this does not mean that he did not view the uncovered, unguarded shaft before the accident. In any event, defendants fail to address Mr. Horvath's testimony that he had been aware, based upon his own personal knowledge, that at the time of the accident, the elevator shaft had been constructed to the level of the roof for approximately one week. Thus, this branch of plaintiff's motion for summary judgment on his Labor Law § 200 and common-law negligence is granted as to Pinnacle and denied as to Knapp.[6]

Plaintiff also moves for summary judgment on his common-law negligence claim against S&S. S&S opposes this branch of plaintiff's motion and also moves for summary

---

[6]Plaintiff argues in his reply that summary judgment is also warranted as against Pinnacle because Pinnacle did not merely provide general supervision of the work, but was obligated to comply with its contractual obligations to "erect and maintain" reasonable safeguards at the site and to provide materials to KBM for protection at all of the shafts, which Pinnacle admittedly failed to do. To the extent plaintiff makes this argument to demonstrate that Pinnacle created the dangerous shaft condition, it is not properly before the court because it is raised for the first time in plaintiff's reply (*Gluck v New York City Tr. Auth.*, 118 AD3d 667, 668 [2d Dept 2014] [arguments raised for the first time in reply may be considered if the original movant is given the opportunity to respond and submits papers in surreply]; *Oglesby v Barragan*, 135 AD3d 1215, 1216 [3d Dept 2016] ["Reply papers are intended to address contentions raised in opposition to a motion and not to supplement a motion with new arguments"]), to which Knapp/Pinnacle had no opportunity to respond (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 208 [2d Dept 2014]).

judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action insofar as asserted against it. Plaintiff and Knapp/Pinnacle oppose that branch of S&S's motion seeking dismissal of plaintiff's Labor Law 200/common-law negligence claims insofar as asserted against it, and KBM opposes only that branch of S&S's motion seeking dismissal of plaintiff's "negligence" claim insofar as asserted against it.

Plaintiff has made a prima facie showing that S&S was negligent because its owner, Mr. Shi, testified that: 1) S&S built the subject elevator shaft from the fourth floor to the level of the roof and left the top of the elevator uncovered; 2) he was aware that workers would be working at or near the open shaft when S&S left it uncovered, and 3) "[S&S] ha[s] to safe off [the elevator shaft] to make sure nobody can walk in there," but S&S nevertheless failed to safeguard against a known, dangerous condition.[7]

In opposition to this branch of plaintiff's motion for summary judgment, and in support of that branch of its own motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, S&S argues that it did not owe any duty to plaintiff and that it did not create the dangerous shaft condition. As to the latter claim, S&S asserts that it was not responsible for protecting the *top* of the elevator shaft, as that responsibility rested with Pinnacle, KBM, and Metallica. Further, S&S points out that Mr. Shi testified that S&S protected the elevator *door* opening with two by four lumber to prevent workers from falling into the shaft, which satisfied its obligations under the Pinnacle/S&S masonry subcontract. In particular, according to Mr. Shi, S&S's obligation under the

[7]Mr. Shi explained that "safe-off" meant that "[i]f you make the opening on the floor you have to cover it up" to protect the workers at the site.

subcontract to "[s]upply and install OSHA approved temporary protection *at elevator and stairs shafts*" only required S&S to place protection "*around*" the shaft - not on top of it (emphasis added) (plaintiff's exhibit U, Pinnacle/S&S masonry subcontract, Attachment F, "Masonry Scope of Work," ¶16).

S&S also contends that while plaintiff did not allege in his motion that S&S was Knapp/Pinnacle's statutory agent, and that plaintiff is proceeding solely on a theory of common-law negligence against S&S,[8] as a subcontractor, S&S did not owe plaintiff any duty of care under the Labor Law to provide a safe place work because it did not have authority to supervise plaintiff's work. In this regard, S&S essentially asserts that "a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a non-contracting third party" such as plaintiff (*see Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 856-857 [2d Dept 2018], unless, for example, plaintiff alleged and proved an exception to this general rule, such as "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk . . ." (*id.* [internal citations and quotations marks omitted]; *see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Specifically, relying upon its liability expert Mr. Andrew K. Nieto, CSP, CHST, S&S asserts that once it completed construction of the subject elevator shaft - 21 days prior to the accident - it was not required to protect the "tops of the shafts" because there was no roof deck built to that level, namely 11-16 feet above the nearest walking or working surface, and therefore the opening did not present a dangerous

[8]Plaintiff makes this argument in his affirmation in opposition to S&S's motion for summary judgment.

condition to workers, who could not access the shafts (affirmation of S&S in opposition to plaintiff's motion for summary judgment, exhibit A, Nieto aff, February 8, 2019 at ¶¶ 7, 10). In particular, S&S and Mr. Nieto assert that once KBM/Metallica constructed the metal decking on the roof such that it abutted the top of the elevator shaft, it was incumbent upon KBM, Metallica and Pinnacle to protect the top of the open shaft, which they failed to do (*id.* at 10). In this regard, Mr. Nieto opines that "the top of the elevator shaft only became a dangerous and hazardous condition once the metal decking [on the roof] came into contact with the shaft, and at no time earlier" (*id.*). Mr. Nieto further avers that "as a result, S&S did not violate any safety standards, codes, regulations, or standards of care in connection with the construction of the elevator shaft, and thus S&S had no responsibility in causing the subject incident (*id.*)," and that "during its construction of the elevator shafts, S&S installed fall protection at the elevator door openings in compliance with OSHA regulations, and that the construction of the elevators shafts "conformed to industry practices" (*id.* at 11 [b]). Accordingly, S&S argues that its construction of the subject shaft merely furnished the occasion for the accident, but not the cause (*see Worth Constr. Co., Inc. v Admiral Ins. Co.* 10 NY3d 411 [2008]).

In opposition to S&S's motion and in reply to S&S's opposition to plaintiff's own motion, plaintiff asserts, based upon Mr. Shi's testimony, that S&S is liable under *both* Labor Law § 200 and common-law negligence because S&S created the condition; was contractually obligated to cover the elevator shaft, but failed to do so; and had supervisory control over the "the injury producing work" (the construction of the elevator shaft and the choice to leave the top of the shaft open).

Knapp/Pinnacle and KBM also oppose this branch of S&S's motion, raising the same arguments as plaintiff. However, in addition, Knapp/Pinnacle asserts that the phrase in the Pinnacle/S&S masonry subcontract requiring S&S to provide protection "at elevator . . . shafts" encompasses all planes and is not restricted to requiring S&S to provide protection solely at the vertical openings of the elevator shafts, as S&S argues. Further, in response to S&S's argument that the Pinnacle/S&S masonry subcontract does not *explicitly* state that protection must be provided at the *top* of the shaft, Knapp/Pinnacle argues that under the contract, S&S agreed that its work would strictly comply with Pinnacle's Safety Requirements, obligating contractors to install "guardrails . . . and covers . . . wherever there is danger of employees . . . falling through floor, roof, or wall openings [] [which] shall be guarded on all exposed sides" (Knapp/Pinnacle, affirmation of Allison Snyder in opposition to S&S's motion, exhibit 3, "Pinnacle Contractor Site Safety Policy, "Guardrails, handrails, and covers," ¶ L [1], at 11); to barricade floor openings "on all sides;" and to cover floor holes with a secure and clearly marked cover (*id.*; "Minimum Basic Project Safety Rules," ¶ 9.19, p. 7).[9] Thus, Knapp/Pinnacle contends that inasmuch as the terms of the Pinnacle/S&S masonry subcontract are clear and unambiguous, the contract must be enforced

[9]In his affidavit, Mr. Dennis Rome, Vice President and co-owner of Pinnacle, points out that the Pinnacle/S&S masonry subcontract provides that: "All work must be done in a professional and workmanlike manner with strict compliance of all OSHA, NYC Best Squad, *Pinnacle Safety Requirements*, and other safety requirements (i.e. wearing hardhats, safety goggles, protective footwear, etc.)" (plaintiff's motion for summary judgment, exhibit U, Pinnacle/S&S masonry subcontract, Attachment F, "Masonry Scope of Work," ¶ 24). Mr. Rome further avers that the "Pinnacle Safety Requirements" refer to Pinnacle's "Contractor Site Safety Policy" (Knapp/Pinnacle, affirmation of Allison Snyder in opposition to S&S's motion, exhibit 2, Rome aff at ¶ 5).

according to its terms, particularly where, as here, it is undisputed that the contract was negotiated at arm's length in a commercial context by sophisticated business entities.

Knapp/Pinnacle also asserts that S&S's expert affidavit should be disregarded because Mr. Nieto fails to reference the Pinnacle/S&S masonry subcontract, to lay a foundation with respect to his expertise in the masonry industry, to identify any foundational facts, and to identify any standards of care, industry standards, codes or regulations on which he relied in forming his opinions and that, in any event, his opinions should be disregarded as speculative, conclusory and lacking in any probative value.

In contrast, Knapp/Pinnacle asserts that their own site safety expert, Mr. Martin R. Bruno, CHST, opines that S&S was not only contractually obligated to protect the shaft opening, but also had to cover the shaft opening in order to safeguard its own workers and the steelworkers it knew would be installing roof decking in the vicinity of the open shaft (Knapp/Pinnacle, affirmation of Allison Snyder in opposition to S&S's motion, exhibit 1, Bruno aff at ¶¶ 27, 31). Mr. Bruno also asserts that S&S "could have easily covered the elevator shaft opening with OSHA Grade planking and secured it in some manner when S&S was last working on the elevator shaft [i.e. before it installed the last course of CMU block (cinder blocks) at the top of the shaft and] before Mr. Gonzalez' fall" (*id.* at ¶ 28). Knapp/Pinnacle also relies upon the affidavit of Mr. Dennis Rome, who states that although Mr. Shi testified as his deposition that he was not provided with any written safety requirements from Pinnacle, Pinnacle provided S&S with a copy of its "Contractor Site Safety Policy" (dated January 28, 2015) upon S&S's execution of each of the three

subcontracts S&S entered into with Pinnacle (Knapp/Pinnacle, affirmation of Allison Snyder in opposition to S&S's motion, exhibit 2, Rome aff at ¶ 4).

Knapp/Pinnacle further asserts that contrary to S&S's claim, S&S had not completed construction of the elevator shaft at the time of the accident. In this regard, defendants point out that Mr. Shi testified that after finishing the elevator shaft, he would have to return to finish constructing the elevator door, i.e "to fill between the door and the masonry,"and Mr. McNelis testified that S&S would have to return to the site to build two more courses of CMU block (or layers of concrete block) to the top of the shaft after the roof was finished. Defendants further note that this testimony was consistent with the Pinnacle/S&S masonry subcontract requiring S&S to "complete" the elevator shafts by installing two levels of CMU block above the slab [or roof deck]) (plaintiff's motion for summary judgment, exhibit U, Attachment F, ¶ 14 ["Each shaft needs to be completed to a level of 2 courses above slab . . ."]).[10]

---

[10]Knapp/Pinnacle also addresses S&S's reference in its factual recitation to the violations the New York State Department of Buildings (DOB) issued to them after the accident for "Failure to safeguard all persons and property by construction operations" and "Holes not being covered;" both essentially referring to the uncovered elevator shaft. The remedy for the first violation was that Pinnacle was directed to "stop all work on roof level, provide means and methods for operations on roof and openings going forward." The remedy for the second violation was to "provide and maintain hole covers as required." It appears that the second violation was dismissed as duplicative of the first violation. In any event, S&S asserts, albeit not in support of its motion, that during the adjudication of these violations, Pinnacle argued that the remedy was to "provide guardrails, not cover the holes" (S&S motion for summary judgment, exhibit S, DOB Freedom of Information Act records). However, as Knapp/Pinnacle argues, these records should not be considered in support of S&S's motion for summary judgment because they constitute inadmissible hearsay. In its reply, S&S does not argue to the contrary, and does not rely on these violations in support of its motion for summary judgment, but merely asserts in a footnote, among other things, that Pinnacle did not install a cover on top of the elevator shaft.

KMB also opposes this branch of S&S's motion, raising some of the same arguments as Knapp/Pinnacle and plaintiff. However, KBM also asserts, among other things, that while S&S was contractually obligated to install temporary protection "at elevator . . . shafts," S&S was also in the best position to do so during construction of the shaft. In this regard, KBM points out that the perimeter cable fall protection (which is placed on the outside or perimeter of the building), could not be installed by Metallica until *after* the roof decking was installed, whereas S&S could have placed plywood covers over and/or under the shaft opening at the time it was constructed.

KBM also argues that the testimony of Mr. Shi (S&S) demonstrates that S&S failed to build the subject elevator shaft two courses above the roof level as required under the Pinnacle/S&S masonry subcontract - leaving the open, unguarded shaft flush with the level of the roof, requiring S&S to return after the steelworkers installed the roof decking to construct those two additional levels around the shaft. In this regard, KBM points out that Mr. Shi testified that as of August 8, 2015 (nine days before the accident), the subject elevator shaft would have extended 8 to 16 inches past the roof, which would be one or two courses of concrete block (each course measuring eight inches in height). However, when Mr. Shi viewed certain photographs of the location where the accident took place (one taken from a video plaintiff took of the area where he was working on the roof a few days before the accident, which depicted what the subject elevator shaft looked like on the day of the accident), he testified that the subject elevator shaft was only one course above grade level in one photograph and "one, two" courses above grade level in the other photograph, or one or two courses above grade level depending on the angle from which it was viewed, but only

one course above grade level if one were observing the metal decking on the roof - despite the fact that the subcontract required the shaft to be completed with a level of two courses above the slab (or roof level).

Further, KBM points out that Mr. McNellis (Pinnacle) testified that S&S could have installed temporary protection, such as plywood and stud framing covering the shaft opening; that Mr. Horvath (Pinnacle) testified that prior to the accident, he had spoken with Mr. Shi and Mr. Wilhelm Pelincel of KBM, who disagreed over which subcontractor was responsible for installing protection around the back elevator shaft (not the shaft at issue), and that the scope of work for both subcontractors in their contracts provided that each subcontractor was responsible for installing OSHA protection;[11] that Mr. Beven Connell, owner of KBM, testified that the contractor which installed the elevator shaft would be responsible for safeguarding its opening; and that in addition to the testimony of Mr. Shi noted by plaintiff and Knapp/Pinnacle (*supra*), Mr. Shi also testified that as the elevator shaft was being built to a higher level, other workers would build the floor at that level before S&S would continue constructing the elevator shaft up to the next level, that the top of the shaft would remain open and unprotected while the floor at each level was being constructed around the shaft, and that this same process was used when the shaft was constructed from the fourth floor to the roof level.

S&S has made a prima facie showing entitling it to summary judgment dismissing plaintiff's Labor Law § 200 claim. However, S&S has failed to make a prima facie showing

[11]However, Mr. Horvath also testified that when he asked Mr. McNelis who was responsible for putting protection around the back elevator, Mr. McNelis told him "as we were going up, it was S&S. Once we got to the roof, it was the steel guy."

entitling it to summary judgment on plaintiff's common-law negligence claim, and has failed to raise a triable issue of fact on this claim in opposition to plaintiff's motion for summary judgment.

"A subcontractor may not be held liable under Labor Law § 200 . . . where it does not have authority to supervise or control the work that caused the plaintiff's injury" (*Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]). However, "[a] subcontractor may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2d Dept 2015]). In particular, "[a]n award of summary judgment in favor of a subcontractor on a negligence claim is improper where the evidence raise[s] a triable issues of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries" (*id.* [internal citations and quotation marks omitted]).

With respect to Labor Law § 200, as S&S argues, plaintiff was employed by Metallica and supervised solely by Metallica's supervisor and coworker when he fell through the elevator shaft. Moreover, S&S was not present at the site when the accident occurred. Thus, S&S may not be held liable under this statute.

Despite the foregoing, S&S has failed to make a prima facie showing entitling it to dismissal of plaintiff's common-law negligence claim, and has also failed to raise a material issue of fact that it was not negligent in opposition to plaintiff's prima facie showing. As relevant here, Mr. Shi, owner of S&S, testified, among other things, that S&S constructed the subject shaft from the fourth floor to the roof level; that the top of the shaft was left open

and unprotected; and that after S&S temporarily left the site, Mr. Shi knew that the roof was going to be erected, and that when workers were installing the roof, they would be walking at or near the elevator shaft which was open.

Further, when asked whether he was aware of any OSHA regulations with respect to openings at a construction site, Mr. Shi conceded that "if you create the opening you have to safe off," meaning "[i]f you make the opening on the floor you have to cover it up" to protect the workers at the site. He also testified that "if people are going to be in an area where they can step into that [open] shaft, then it has to be . . . safe-off."

In addition, Mr. McNelis confirmed that pursuant to the Pinnacle/S&S masonry subcontract, S&S was obligated to "'[s]upply and install all OSHA approved temporary protection *at elevator and stairs shafts.*'" Moreover, S&S fails to address the claim by KBM that it did not build the subject elevator shaft two courses above the roof level as required under the Pinnacle/S&S masonry subcontract, leaving the open, unguarded shaft flush with the level of the roof.

Finally, because the shaft was not covered, plaintiff fell through the opening down four floors, sustaining serious injuries. Therefore, S&S not only failed to comply with its obligation to cover the shaft, but "created an unreasonable risk of harm that was the proximate cause of . . . plaintiff's injuries" (*Lombardo,* 126 AD3d at 950; *see also Giannas,* 166 AD3d at 856-857; *Espinal,* 98 NY2d 136, 140).

In its reply, S&S asserts that the contract does not contain an express provision requiring it to protect the top of the shaft. This argument is without merit. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according

to the plain meaning of its terms" (*Roman Catholic Diocese of Brooklyn, N.Y. v Christ the King Regional High Sch.*, 164 AD3d 1390, 1393 [2d Dept 2019] [internal citations and quotation marks omitted]). Moreover, "[i]t is the role of the courts to enforce the agreement made by the parties—not to add, excise or distort the meaning of the terms they chose to include, thereby creating a new contract under the guise of construction" (*id.*). While Mr. Shi testified that he interpreted the contract as only requiring S&S to place temporary protection "around" the elevator doors, not on top, and only in those areas where there was an adjacent walking surface, S&S's responsibility to place temporary protection "*at* . . . elevator shafts" was not limited to the conditions imposed by Mr. Shi, nor is the plain meaning of the word "at" ("in the location of")[12] restricted to the entrance of the elevator.

S&S also reiterates in its reply that it was not required to protect the tops of the shafts when it left the site because the top of the elevator shaft only became dangerous once the metal decking was installed. In addition, in a related argument, S&S contends that it did not fail to comply with Pinnacle's Contractor Site Safety Policy because the Safety Policy does not address protecting elevator shafts and when it (temporarily) left the site 21 days prior to the accident, there were no "floor openings," "floor holes," or "roof openings" at the top of the elevator shaft, which was approximately 12 feet above the slab of the last floor that was constructed. While there may not have been any floor holes or openings when it left the site, as Mr. Bruno opines, as per the Pinnacle/S&S masonry subcontract, S&S had an independent, contractual obligation to cover the tops of the elevator shafts.

[12]The American Heritage Dictionary, Second College Edition

S&S also argues that even assuming it had a contractual duty to cover the shaft, it did not owe a duty of care to a third-party such as plaintiff because plaintiff has failed to establish that it created an unreasonable risk of harm. However, S&S fails to support this claim with any citation to the record, merely asserting that "the evidence demonstrates that . . . S&S did not create an unreasonable risk of harm" (S&S Reply at ¶ 20). In any event, as noted above, S&S owed a duty to plaintiff because by failing to cover the top of the shaft, it created an unreasonable risk of harm to plaintiff, as well as others working near the shaft. Thus, contrary to S&S's claim, it owed plaintiff a duty of care, it breached that duty, and its breach was a proximate cause of plaintiff's injuries. Accordingly, S&S's additional claim, based upon its expert's opinion, that it merely furnished the occasion for the accident is without merit.[13]

Further, to the extent that S&S relies upon Mr. Horvath's testimony that Mr. McNellis told him that it was KBM/Metallica's responsibility to put protection on the top of the shaft, and not the responsibility of S&S ("the steel guy . . . [has] to put protection around the shaft because, as we were going up, it was S&S. Once we got to the roof, it was the steel guy"), it is rejected. As an initial matter, S&S only raised this argument for the first time in its reply. In any event, a party may not rely upon a hearsay statement to raise a triable issue of fact in opposition to a motion for summary judgment (*Cormack v Burks*, 150 AD3d 1198, 1200 [2d Dept 2017] ["As the defendant presented only unsubstantiated hearsay in opposition to the motion for summary judgment, she failed to raise a triable issue of fact"]).

[13]Moreover, the court finds that the affidavit of Mr. Nieto is conclusory and speculative, and lacking in factual foundation.

Finally, in opposition to that branch of S&S's motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 241-a causes of action, plaintiff maintains that since S&S constructed the subject shaft and was required to cover it ("supply and install all OSHA approved temporary protection at elevator . . . shafts") pursuant to its contract with Pinnacle, S&S had "the requisite control over the work" to be classified as Pinnacle's statutory agent.

"To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work" (*Van Blerkom v American Painting, LLC*, 120 AD3d 660, 661-662 [2d Dept 2014]). Further, "[t]he determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" (*id.*). Finally, "[w]here the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor" (*id.*; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority *over the work being done when the plaintiff is injured*, there is no statutory agency conferring liability under the Labor Law"] [emphasis added]; *Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 720 [2d Dept2014] ["a contractor may be held liable as an agent of the owner, where it had the authority to supervise and control the work at issue"]; *Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 488 [2d Dept 2006] ["the nondelegable liability imposed by Labor Law § 240 (1) attaches only to a contractor that has the authority

to supervise or control *the particular work in which the plaintiff was engaged at the time of his injury*"] [emphasis added]).

Here, as S&S correctly argues, it had no actual or contractually delegated duty to supervise or control plaintiff's work of assisting in the installation of the metal roof decking. In this regard, it is undisputed that plaintiff was employed by Metallica and supervised solely by Metallica's supervisor and coworker when he fell through the elevator shaft. In addition, plaintiff was performing work related to the installation of the metal decking, not the construction of the subject shaft. Finally, S&S was not present at the site when the accident occurred. Thus, S&S may not be held liable as an agent of Pinnacle. The two cases plaintiff cites which are supportive of his argument are *Sanchez v 404 Park Partners, LP* (168 AD3d 491 [1st Dept 2019]) and *O'Connor v Lincoln Metrocenter Partner* (266 AD2d 60 [1st Dept 1999]). In both cases, the subcontractor was deemed the statutory agent of the general contractor for purposes of Labor Law §§ 240 (1) and 241 (6) because the subcontractor was contractually obligated to cover floor openings through which the respective plaintiffs (employed by different subcontractors) fell, and thus had "been delegated the duties imposed by the statute upon the contractor" (*Sanchez*, 168 AD3d at 492; *O'Connor*, 266 AD2d at 61). However, the court declines to follow these holdings as they are inconsistent with Second Department precedent that a contractor may only be considered a statutory agent when it has "the authority to supervise or control the particular work in which the plaintiff was engaged at the time of his injury" (*Coque,* 31 AD3d at 488).

In sum, plaintiff's motion for summary judgment on his Labor Law § 200 claim against S&S is denied, and that branch of his motion for summary judgment for common-law

negligence is granted, and that branch of S&S's motion for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted, but that branch of S&S's motion to dismiss plaintiff's claim for common-law negligence is denied. Further, that branch of S&S's motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241-a, and 241 (6) causes of action is granted.

Indemnification

Knapp/Pinnacle moves for summary judgment on their cross claims against KMB and S&S for contractual indemnification (conditional) and breach of contract for failure to procure insurance. S&S moves to dismiss the cross claims of Knapp/Pinnacle, KBM, and NYCHHC for common-law and contractual indemnification, contribution, and breach of contract for failure to procure insurance insofar as asserted against it.[14]

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Thus, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*id.*). Further, "[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" (*Jamindar v Uniondale Union Free School. Dist.*, 90 AD3d 612, 616 [2d Dept 2011]). Specifically, "[t]o obtain conditional relief on a claim for contractual indemnification, the one seeking

[14]KBM and NYCHCC only asserted cross claims against S&S for contribution and common-law indemnification.

indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability" (*id.*). "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" (*id.*). Further, "[t]he right to contractual indemnification depends upon the specific language of the contract, and [t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096 [2d Dept 2018] [internal citations and quotation marks omitted]).

On the other hand:

> "in the case of 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 for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240 (1)" (*Correia,* 259 AD2d at 65).

The indemnification provisions in the Pinnacle/S&S masonry subcontract and Pinnacle/KMB subcontract provide, in relevant part, that:

> "To the fullest extent permitted by law . . . ("Subcontractor[s] [S&S and KBM]), agree[] to indemnify, defend and hold harmless Pinnacle . . . ("Contractor") [] *[and] all applicable additional Indemnitees*, if any . . . from and against any and all claims . . . related to . . . personal injuries . . . or the alleged violation of any laws [] [or] statutes . . . brought or assumed against any of the Indemnitees by any person . . . arising out of or in connection with or as a result of or as a consequence of the performance of the work to be undertaken by the Subcontractor (the "Work") . . . whether or not caused in whole or part by the Subcontractor or any person or entity employed . . . by the Subcontractor including any sub-contractors [Metallica] and sub-tier contractors thereof and their employees (emphasis added).

> "The parties expressly agree that this indemnification agreement contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any and all liability imposed over and above that percentage attributable to actual fault on the part of the Indemnitees whether by statute, operation of law or otherwise."

As Knapp/Pinnacle asserts, plaintiff's claim "arose out of" and "was in connection with" the work undertaken by S&S and KBM because the accident occurred when plaintiff fell into the subject elevator shaft constructed by S&S, while plaintiff was working for Metallica, KBM's subcontractor, performing work related to installation of the roof, which KMB had contracted with Pinnacle to perform (*see e.g. O'Connor v Serge El. Co.,* 58 NY2d 655, 657-658 [1982] [where indemnity clause in subcontractor's contract included personal injuries "arising out of the work which is the subject of this contract," regardless of whether caused by subcontractor, general contractor or others, and the contract could not be performed, unless plaintiff, employee of subcontractor, could reach and leave workplaces on the job site, plaintiff's injuries which occurred (while on elevator of another subcontractor) while leaving his workplace for lunch were deemed as a matter of law "to have arisen out of the work," and general contractor therefore entitled to indemnification from subcontractor]; *Beharovic v 18 E. 41st St. Partners, Inc.*, 123 AD3d 953, 956 [where indemnification provision in the contract between building owner and cleaning subcontractor provided for indemnification when the claim arose out of the subcontractor's work, even if the subcontractor had not been negligent, although no evidence was submitted as to negligence on the part of the subcontractor, the indemnification agreement required subcontractor to indemnify building owner where plaintiff, the subcontractor's employee, fell

while performing her cleaning duties]; *see also Tobio v Boston Props., Inc.*, 54 AD3d 1022, 1024 [2d Dept 2008] [where indemnification agreement between subcontractor and general contractor provided for subcontractor to indemnify general contractor for liability, including statutory liability, "arising in whole or in part and in any manner from injury and/or death of any person or damage to or loss of any property resulting from the acts, omissions, breach or default" of subcontractor "in the performance of any work by or for (the subcontractor), "(t)he indemnification clause does not, by its terms, limit indemnification only to claims arising out of the negligence of (subcontractor) in the performance of the work"]). Moreover, as noted above, the indemnification provisions here permit indemnification for claims arising out of the work "whether or not caused in whole or part by the Subcontractor or any person or entity employed . . . by the Subcontractor including any sub-contractors [Metallica]."

However, with respect to the cross claim of Knapp/Pinnacle for contractual indemnification against S&S and KBM, the court has already determined that Pinnacle was liable to plaintiff under Labor Law §§ 200 and common-law negligence. Accordingly, this branch of Knapp/Pinnacle's motion for conditional indemnification against S&S and KBM as it relates to Pinnacle is denied (*McDonnell,* 165 AD3d at 1096). To the extent Knapp/Pinnacle argues that Pinnacle is entitled to enforce its claim for contractual indemnification against S&S and KBM even if it has been found negligent for plaintiff's accident based on *Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]) and other, First Department case law, the argument is misplaced. While *Brooks* held that an indemnity provision, like the provisions here which contemplate partial indemnification, can be

enforceable under General Obligations Law § 5.322.1 where the indemnitee (Pinnacle) is negligent, this holding was made in the context of a trial, not upon a motion for summary judgment. Moreover, it is true that the First Department case law relied upon by Knapp/Pinnacle has granted conditional summary judgment where the subcontractor's broad indemnification obligation is triggered by claims arising out of its work and the indemnity provision does not purport to indemnify the owner/general contractor for their own negligence, even where, like here, *there were outstanding issues of fact as to the indemnitee's purported fault* (*see e.g. Cerverizzo v City of New York,* 116 AD3d 469 [1st Dept 2014]). However, this case law is inconsistent with Second Department law on this issue (*McDonnell,* 165 AD3d at 1096) and therefore the court declines to follow it.

As to Knapp, the court has already determined that it is only statutorily liable pursuant to Labor Law §§ 240 (1), 241 (6) and 241-a which, if Knapp were considered an "applicable additional indemnitee," would trigger the indemnification provisions in the S&S and KBM subcontracts since S&S and KBM were obligated thereunder to provide indemnification for "the alleged violation of any laws [] [or] statutes . . . brought . . . against *any of the Indemnitees* by any person . . . arising out of or in connection with or as a result of or as a consequence of the performance of the work" (emphasis added)." In support of this branch of their motion seeking indemnification as to Knapp, Knapp/Pinnacle argues that Knapp was in fact an "applicable additional Indemnitee" under the subcontracts with S&S and KBM because S&S and KBM expressly agreed in their respective subcontracts with Pinnacle that:

> ". . . Subcontractor [S&S and KBM] binds himself to Contractor to comply fully with and to assume all undertaking, obligations and duties of Contractor as set forth in plans, specifications and *general conditions, in so far as [sic] applicable to the work* included in this Sub-Contract . . ." (emphasis added),

and because the General Conditions to Pinnacle's contract with Knapp obligated Pinnacle to indemnify Knapp. Accordingly, defendants argue that to the extent the indemnity provision in Pinnacle's subcontracts with S&S and KMB refer to Pinnacle and "all applicable additional indemnitees," Knapp is clearly an "applicable additional indemnitee."

However, as S&S and KBM argue, they did not enter into any contract with Knapp, Knapp was not identified as an "additional indemnitee" either by name or by general description as an owner, the subcontracts do not state that Pinnacle was a representative of Knapp, and most tellingly the subcontracts provide that "Sub-Contractor [S&S and KBM] agrees to pay and indemnify Contractor [Pinnacle] from and against all losses . . . incurred by the Contractor, on account of failure of Sub-Contractor to perform agreements herein . . ." (plaintiff's notice of motion, Pinnacle/S&S masonry subcontract; Pinnacle/KMB subcontract, exhibits U and V, respectively, "Terms and Conditions" ¶ 1), but does not state that the subcontractors agreed to indemnify the owner or Knapp. Moreover, as S&S argues, the above provisions by which S&S and KBM agreed to indemnify the Contractor are only applicable to the "work" and not to any indemnification obligations. Finally, the term "all additional indemnitees" in the indemnification provisions is not defined. As KBM argues, had the parties intended to identify Knapp as an indemnitee, they could have explicitly done so in the contract.

Nevertheless, for the first time in its reply, Knapp/Pinnacle argues, in effect, that KBM and S&S knew, based upon the subcontracts, not only that Knapp was the owner but that it was also an indemnitee. In this regard, as to S&S, defendants correctly point out that project drawings in the Pinnacle/S&S masonry subcontract identified Pinnacle's "client" as

Knapp, and that the subcontract also required S&S to list Pinnacle and Knapp on the "Certificate of Insurance" "as an Additional Insured."[15]

As to KBM, defendants note that the Pinnacle/KBM subcontract also required KBM to list Pinnacle and Knapp on the "Certificate of Insurance" "as an Additional Insured," and that KBM acknowledged it its own subcontract with Metallica that Knapp owned the project, sought Metallica's acknowledgment that the "General Contractor and/or Owner" had authority to reject Metallica's work if it did not conform to the prime contract between the "General Contractor and/or Owner," and could direct Metallica "to make changes in the work within the general scope" of the sub-subcontract as required by the "GC and/or Owner." However, given that indemnification agreements are strictly construed, the absence of any reference to Knapp as an additional indemnitee, and the requirement in the subcontracts to name Knapp and Pinnacle as additional insureds, contrasted with the absence of a provision in the subcontract naming Knapp as an indemnitee, Knapp/Pinnacle has failed to make a prima facie showing entitling Knapp to contractual indemnification (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005] [internal quotation marks omitted]). Stated otherwise, it cannot "be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" that S&S and KBM were obligated to indemnify Knapp (*id.* [internal quotation marks omitted]). Accordingly, this branch of

[15]Knapp/Pinnacle also states that S&S was expressly obligated to obtain additional insured covered on behalf of Pinnacle "and the Owner of the property" as per Attachment A, para. 1, subsections (c) and (f), which is expressly identified as Knapp, but the Pinnacle/S&S masonry subcontract provided to the court, by both plaintiff and Knapp/Pinnacle, does not contain an Attachment A. Similarly, the Pinnacle/KBM subcontract does not contain an Attachment A.

Knapp/Pinnacle's motion for summary judgment against S&S and KBM on their cross claims for conditional contractual indemnification as to Knapp is also denied.

As to that branch of S&S's motion for summary judgment dismissing the cross claims of Knapp/ Pinnacle, KBM and NYCHHC for contribution and common-law indemnification, the court has already granted that branch of plaintiff's motion for summary judgment against S&S for common-law negligence, i.e because S&S failed to make a prima facie showing that it was not negligent, and failed to raise a material question of fact regarding same in opposition to plaintiff's motion. For the reasons stated above, S&S has also failed to make a prima facie showing that it was not negligent in support of this branch of its motion. Therefore, this branch of S&S's motion must be denied (*Correia,* 259 AD2d at 65). As to that branch of S&S's motion for summary judgment to dismiss the cross claims of Knapp/Pinnacle, KBM, and NYCHHC for contractual indemnification (in fact only Knapp and Pinnacle asserted this cross claim against S&S), it must be denied for the same reason, i.e. S&S has failed to make a prima facie showing that it was not negligent (*id.*).

Breach of Contract for Failure to Procure Insurance

Knapp/Pinnacle also moves for summary judgment on their cross claim against S&S for breach of contract for failure to procure insurance. S&S moves for summary judgment to dismiss this cross claim. In support of their motion, defendants point out that under the Pinnacle/S&S masonry subcontract, S&S was obligated to procure insurance in the amount and form identified in the "Insurance Agreement." The Insurance Agreement provides that S&S was required to procure commercial general liability (CGL) coverage of not less than $1 million for each occurrence, with a $2 million annual aggregate. It also provided that

S&S was required to procure commercial *umbrella* coverage with limits of at least $5 million, that the umbrella coverage had to include as insureds all entities that were additional insureds on the CGL (i.e. Knapp and Pinnacle), and that the umbrella coverage for such additional insureds would be applied "as primary before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insured other than the CGL, Auto Liability and Employers Liability coverages maintained by the Subcontractor" (Knapp/Pinnacle opposition, Pinnacle/KBM subcontract, Pinnacle/S&S masonry subcontract, Exhibits L and O, respectively, "Insurance Agreement," ¶¶ 1 and 3 [a], [b], and [c]).

However, defendants note that the certificate of insurance provided by S&S with respect to S&S's masonry work for the relevant time period references an umbrella liability policy issued by General Star Indemnity Company (General Star) with $4 million per occurrence and only names Pinnacle as an additional insured. Further, as defendants state, the policy itself is in fact an *excess liability* policy (not an *umbrella liability* policy) in the amount of $3 million in the aggregate, and not the required $5 million, and Knapp and Pinnacle are not named as additional insureds. Defendants assert that is therefore evident that the policy fails to satisfy the express terms of S&S's contractual obligations to them, and that they are therefore entitled to judgment as a matter of law on their breach of contract claim.

In support of its own motion, S&S argues that it fulfilled its contractual duty by obtaining a CGL policy through Catlin Specialty Insurance Company (Catlin) and an umbrella policy with General Star.

In opposition to S&S's motion, defendants reiterate their argument noted above and assert that S&S merely states in conclusory fashion that it fulfilled its contractual obligation. In opposition to defendants' motion, S&S asserts that it procured a CGL policy through Catlin that has a $2 million policy limit for each occurrence; that the "General Change Endorsement" to the General Star policy raises the "policy aggregate limit" from $3 million to $4 million, and that it therefore procured the requiste $6 million in insurance as required by the subcontract. S&S also argues that the purchase of the excess liability policy satisfies its contractual obligations because in the "Schedule of Underlying Insurance" in the excess liability policy, it identifies the Catlin CGL policy as a "controlling underlying policy." Thus, S&S explains that while there are certain distinctions between an umbrella policy and an excess policy, both excess and umbrella policies can be applied to the general liability policies, such as the Catlin policy, when the limits in the CGL policy have been reached. Therefore, S&S states that it procured $2 million in primary insurance under the Catlin policy, and that upon exhaustion of that policy, there is $4 million in coverage under the General Star policy.

Moreover, S&S asserts that the Catlin policy contains an additional insured endorsement, and that endorsement, under "Name of Additional Insured Person(s) or Organization(s)," notes that additional insureds are as "per executed written contract prior to a loss," and that the General Star excess liability policy listed the Catlin policy as the controlling underlying policy, and notes in Section I of the Insuring Agreement that it (General Star) will "follow the provisions, conditions, exclusions and limitations of the controlling underlying policy." Finally, S&S argues that to the extent there is a dispute

regarding whether Knapp and/or Pinnacle have been afforded additional insured coverage under the Catlin and General Star policies, that is not an issue "in this motion."

Relying on *Beharovic* (123 AD3d at 956), defendants argue that S&S has failed to satisfy its burden of establishing that it procured the "specific insurance" it was contractually obligated to obtain for them. However, while defendants have established that S&S did not procure an umbrella policy as required under the subcontract, they have failed to demonstrate that S&S did not procure *the specific coverage* required under the masonry subcontract (*id.; Lima v NAB Constr. Corp.*, 59 AD3d 395, 397 [2d Dept 2009] [summary judgment on breach of contract for failure to procure insurance where subcontractor failed to procure the *specific coverage* required under the insurance provisions of its subcontract with defendant/movant]; *Nrecaj v Fisher Liberty Co.*, 282 AD2d 213 [2d Dept 2001]). In this regard, it is true that S&S purchased an excess policy instead of an umbrella policy. Further, as S&S has suggested, an umbrella liability policy broadens coverage for risks that the underlying CGL policy would not cover. However, as noted above, the excess liability policy contains limits as required by the subcontract. Further, pursuant to the excess liability policy, when the limits of the Catlin CGL policy have been reached, the excess liability policy can be applied to the Catlin CGL policy. Given that defendants' liability would be limited to plaintiff's personal injuries, which would be covered in the required amounts under the CGL policy and the excess liability policy, if needed, defendants have not established that the excess policy would provide any less coverage than an umbrella policy or, stated differently, that they suffered any damages as a result of S&S having purchased an excess liability policy instead of an umbrella policy (*compare Nrecaj,* 282 AD2d 214 [breach of contract where the parties'

maintenance contract and the maintenance contractor's insurance policy establish that while the latter was obligated to obtain liability insurance naming defendant as an additional insured and providing combined single limit coverage of at least $ 2,000,000, the policy it obtained had a combined single limit coverage of only $ 1,000,000]). Under the circumstances, this branch of defendants' motion for summary judgment on their cross claim against S&S for breach of contract for failure to procure insurance is denied, and that branch of S&S's motion to dismiss this cross claim is granted.

In summary, that branch of plaintiff's motion for summary judgment on his Labor Law §§ 240 (1), 241-a, and 241 (6) claims against Knapp/Pinnacle are granted and are denied as to S&S. That branch of plaintiff's motion for summary judgment on his Labor Law § 200/common-law negligence claims against Knapp/ Pinnacle is granted as to Pinnacle only. That branch of plaintiff's motion for summary judgment on his common-law negligence claim against S&S is granted. That branch of Knapp/Pinnacle's motion for summary judgment on its cross claim for contractual indemnification against S&S and KBM is denied, and that branch of its motion for summary judgment on its cross claim against S&S for breach of contract for failure to procure insurance is denied. That branch of S&S's motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241-a, 241 (6), and 200 claims is granted. That branch of S&S's motion for summary judgment to dismiss plaintiff's common-law negligence claim insofar as asserted against it is denied. That branch of S&S's motion for summary judgment to dismiss the cross claims of Knapp/Pinnacle, KBM and NYCHHC for contribution, and common-law and contractual indemnification is

denied. That branch of S&S's motion for summary judgment to dismiss the cross claims of Knapp/Pinnacle for breach of contract for failure to procure insurance is granted.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. MARSHA L. STEINHARDT