Greene v Raynors Lane Prop. LLC, SDC LLC
2019 NY Slip Op 32741(U)
September 16, 2019
Supreme Court, New York County
Docket Number: 159170/2016
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

MARC GREENE,

Plaintiff,

- v -

RAYNORS LANE PROPERTY LLC,SDC LLC,

Defendant.

---X

INDEX NO. 159170/2016

MOTION DATE ______________

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 112

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were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries allegedly sustained by a carpenter on February 22, 2016, when, while working on the construction of a one-story single-family home located at 8 Raynors Lane, Bellport, New York (the Property), a piece of lumber that he was manually lifting up, so that the blades of a forklift could be positioned underneath it, dropped when his foot slipped on sloped and muddy ground.

In motion sequence 001, defendant/third-party plaintiff SDC LLC d/b/a Schuchart/Dow LLC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it, as well as for summary judgment in its favor on its third-party claim for contractual indemnification against third-party defendant Haddock Contracting Inc.

In motion sequence 002, defendant/third-party plaintiff Raynors Lane Property LLC (Raynors) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, as well as all cross claims and counterclaims, against it.

Plaintiff Marc V. Greene cross-moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs Raynors and SDC.

Haddock cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it.

Motions 001 and 002 are consolidated for disposition in this decision.

BACKGROUND SUMMARY

On the day of the accident, Raynors owned the Premises where the accident occurred. Victoria Newhouse was the sole member of Raynors, a limited liability company with no employees. Raynors hired SDC to serve as the general contractor on a project to construct a single-family weekend home for Newhouse and her husband on the Property (the Project). SDC hired third-party defendant Haddock Contracting, Inc. (Haddock) to perform the carpentry/framing work for the Property. Plaintiff was employed by Haddock as a carpenter.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was working as a carpenter for Haddock (plaintiff's tr at 25). Haddock was hired to perform the framing work on a custom-built one-story single-family vacation home (*id.* at 40). Plaintiff's work was supervised by his foreman, Nick Raab, also an employee of Haddock, and his work assignments were given to him by Phillip Converse, Haddock's supervisor (*id.* at 46). Converse reported directly to Wayne

Haddock, Haddock's owner (*id.*). Plaintiff was not familiar with Raynors or Newhouse (*id.* at 66-67).

That day, plaintiff was cutting lumber which was intended to be installed as part of the structural support of the Property (*id.* at 42-43). Haddock provided the tools he needed to perform his work, such as saws, nail guns and air-pressure tools to cut the various lengths of lumber (*id.* at 27). Just prior to the time of the accident, Converse instructed plaintiff to cut some pieces of lumber that were located outside the Property (*id.* at 42, 53-55). In order to cut the lumber, plaintiff had to move a piece of lumber that was resting on top of some other lumber that he intended to cut (*id.* at 58). When plaintiff asked Converse how to move the piece of lumber, he was instructed to get help from Raab (*id.* at 58). Thereafter, Raab operated a forklift called a lull to manually lift the piece of lumber off the pile because it was "too heavy to lift by hand" (*id.* at 58, 59).

In order to perform this work, it was necessary for Raab to position the blades of the lull under the piece of lumber without damaging the one underneath (*id.* at 58, 59). Plaintiff explained that in order to get the blades of the lull under the lumber, and at Raab's direction, he had to manually lift the end of the lumber (*id.* at 60). Plaintiff further explained that, while standing on the ground, and as he was attempting to lift the lumber, his foot slipped on the "sloped" and "very muddy" ground (*id.* at 60, 61). Plaintiff believed that the ground was "very muddy" because it had rained the day before (*id.* at 62).

Plaintiff further testified that he had lifted the approximately "thousand pound[]" piece of lumber about "a foot" (*id.* at 61, 69). After his foot slipped, he "felt a sharp tearing sensation . .

. in [his] back, and [he] knew he was hurt right away" (*id.* at 60-61). The piece of lumber then landed in the same position on the pile that it was in prior to the lift (*id.* at 196).

Plaintiff also testified that he was told at one point that "only the machines were allowed to lift the wood, the big heavy pieces . . .. We're not allowed to try to lift them by hand" (*id.* at 58). That said, on prior occasions, plaintiff "wrestle[d] [the lumber] around a little bit," rather than lifting it (*id.* at 65).

Plaintiff's Affidavit

In his affidavit, plaintiff stated that he was employed as a carpenter by Haddock on the day of the accident (plaintiff's aff, ¶ 2). The pieces of lumber that he was cutting that day "were approximately 36 feet long and weighed in excess of 500 pounds each" (*id.*, ¶4). Plaintiff also stated that "[d]ue to their extreme weight, the plan was to use a forklift to move each beam from the stack to the cutting area" (*id.*, ¶ 6). The piles of lumber were stacked "directly on an uneven and muddy area of the property" (*id.*, ¶ 5).

Plaintiff explained that the pieces of lumber rested "directly on top of one another and there was no space between the beams for the forks of the lift to be inserted under the top of [the piece of lumber] being removed" (*id.*, ¶ 8). As a result, plaintiff was instructed by his supervisor "to lift the end of the top beam by hand to give the space needed for the forks of the lift to get underneath the beam so that the beam could then be moved to the cutting area" (*id.*, ¶ 9).

Plaintiff described the piece of lumber that he was lifting at the time of the accident as being "approximately three feet above the ground" (*id.*, ¶ 10). Plaintiff "could not hold the weight and the beam fell" (*id.*, ¶ 11). Plaintiff testified, "As a result, the heavy beam fell

causing me to sustain serious and permanent injuries to my low back requiring me to undergo a lumbar fusion surgery and rendering me totally disabled from employment" (*id.*, ¶ 13).

Plaintiff noted that he was not provided with any safety devices, such as "hoists, slings, ropes, cables or jacks," to help him lift the beam from the stack, and that he "was specifically directed by [his] supervisor to lift it manually by himself" (*id.*, ¶ 12).

The Bill of Particulars

In his bill of particulars, plaintiff alleges that as a result of the accident, he sustained personal injuries, which included "lumbar radiculopathy," which requires him to take various pain medications and undergo physical therapy (Haddock's notice of cross motion, exhibit C, the bill of particulars). Plaintiff also claims that as a result of the accident, he suffers from "pain [in his] left hip, groin and leg with burning sensation and numbness; requir[ing] epidural steroid injections and requir[ing] surgery" (id.). Plaintiff has also experienced dehydration, vomiting, back pain, due to herniated discs, and difficulty walking.

Victoria Newhouse's Deposition Testimony (Raynors' Sole Member)

Newhouse testified that Raynors was the sole owner of the Property, and "[t]he company has no function [except] owning that property" (Newhouse tr at 9, 10). She also stated that she was the sole member of the limited liability company on the day of the accident, and that Raynors does not have any employees (*id.* at 15). She asserted that SDC served as the general contractor for the Project (*id.* at 23-24). As the general contractor, SDC was responsible "for directing and controlling the construction work" at the Project (*id.* at 83). SDC hired Joseph O'Malley of Haddock to be the superintendent for the Project (*id.* at 31).

Newhouse testified that she only occasionally visited the job site "with fabric samples to look at colors in the light there" (*id.* at 33). She did not "ever direct any work performed by anyone that was erecting lumber at the property" (*id.* at 64). Newhouse did not recall the ground outside the Property ever being wet, nor did she ever receive complaints that it was ever "wet or muddy" (*id.* at 51).

Joseph O'Malley's Deposition Testimony (SDC's Superintendent)

Joseph O'Malley testified that he was SDC's superintendent on the day of the accident (O'Malley's tr at 40). He explained that SDC served as the general contractor on the Project, and that he oversaw and coordinated the field operations and safety (*id.* at 22-23). He explained that if he observed any worker doing anything he deemed to be unsafe, he would tell the worker to correct it (*id.* at 188). O'Malley testified that he never "instruct[ed] any of the Haddock employees as to how to move materials on [the] job site" (*id.* at 188).

O'Malley further testified that he could not remember exactly how many times he talked to Newhouse, and he maintained that these "casual" conversations were limited to "fabric swatches and about non-project topics" (*id.* at 35, 141-142). In addition, he never observed Newhouse directing any construction work or discussing the Project in any way with any of the Project's workers (*id.* at 142).

Phillip Converse's Deposition Testimony (Haddock's Foreman)

Phillip Converse testified that he served as the project manager and foreman for Haddock, the framing subcontractor for the Project, on the day of the accident (Converse's tr at 16, 17, 19). Converse "would get the blueprints and . . . go build the house and direct the

employees on how to build the house" (*id.* at 16). Converse was not familiar with Newhouse (*id.* at 19).

Converse explained that Haddock used forklifts to move lumber on the job site (*id.* at 65). In addition, he confirmed plaintiff's testimony that, at times, the lumber had to be shifted manually in order to allow the forklift's forks to get underneath it (*id.* at 70). That said, Converse did not specifically instruct plaintiff to manually lift the lumber prior to the accident (*id.* at 70-71).

Affidavit of Herbert Heller, Jr., PE (Plaintiff's Expert)

In his affidavit, plaintiff's expert, Herbert Heller, stated that the piece of lumber that plaintiff was moving at the time of the accident was "inherently heavy and bulky and it was unsafe to require a worker to manually lift or hoist the beam, especially while standing on uneven ground" (Heller's aff, ¶ 9). In addition, he maintained that a safety device, "such as a hoist, sling, rope, pulley, cable or jack . . . was absolutely necessary in order for [plaintiff] to safety raise the heavy beam so that the forks of the lift could get underneath the beam" (*id.*, ¶ 10). He further stated that "the need for such a device was amplified by the uneven and muddy surface of the ground where [plaintiff] was working" (*id.*, ¶ 10).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*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]).

The Timeliness of Plaintiff's Cross Motion

Initially, Raynors argues that plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against it because his cross motion is untimely, in that it was made after the expiration of the court's 60-day deadline for bringing such motions. Here, the parties entered into a stipulation wherein the time to file dispositive motions was extended until March 25, 2019. Plaintiff filed his cross motion for summary judgment a month after the summary judgment deadline, and plaintiff has not offered any excuse for the late filing.

However, as plaintiff argues,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, that part of plaintiff's cross motion seeking relief on the Labor Law § 240 (1) claim is "nearly identical" to that raised by Raynors in its motion to dismiss that claim against it.

Therefore, the court will consider plaintiff's request for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against SDC and Raynor.

Whether Raynors is a Proper Labor Law Defendant

"Owners of one- or two-family dwellings are exempt from liability under Labor Law § [§ 240 (1) and] 241 unless they directed or controlled the work being performed" (*Jimenez v Pacheco*, 73 AD3d 1129, 1130 [2d Dept 2010] [where the defendant occupied a single-family home and the plaintiff was injured while renovating the home's detached garage, and the defendant did not control or direct the work, the defendant was entitled to the statutory exemption]; *Harper v Holland Addison, LLC*, 75 AD3d 495, 496 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]). Only "where the 'owner supervises the method and manner of the work'" will the owner be held liable under the Labor Law (*Spinillo v Strober Long Is. Bldg. Materials Ctrs.*, 192 AD2d 515, 516 [2d Dept 1993], quoting *Rimoldi v Schanzer*, 147 AD2d 541, 545 [2d Dept 1989]). The exemption is construed in favor of homeowners because these individuals "generally do not have the business sophistication to obtain the insurance required to protect them from the absolute liability imposed upon them by the statute" (*Angelucci v Sands*, 297 AD2d 764, 766 [2d Dept 2002]).

As asserted by Raynors, it is undisputed that the Premises was being built exclusively for use as a vacation home by Newhouse and her family. In addition, sufficient evidence has been submitted to establish that Raynors and/or Newhouse "did not direct or control the method or manner of the work being performed" (*Ortega v Puccia*, 57 AD3d 54, 59 [2d Dept 2008]). Here, Newhouse's conversations in regard to the Project were limited to fabric choices and non-project conversations. As a result, Raynors' "participation in some of the preliminary stages of the

project did not rise to the level of 'direct[ion] or control [of] the work' within the meaning of the statutes" (*Cannon v Putnam*, 76 NY2d 644, 651 [1990]).

In opposition, plaintiff has failed to raise an issue of fact as to the applicability of the homeowners' exception. Notably, contrary to plaintiff's assertion, "[t]he fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual homeowner does not, in and of itself, preclude application of the exemption" (*Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 556 [2d Dept 2015]; *Baez v Cow Bay Constr.*, 303 AD2d 528, 529 [2d Dept 2003] [the statutory exemption applied where the plaintiff's injury "involved the construction of two single-family houses which were going to be used as residences for the sole shareholder of Russia House and his family"]). Therefore, plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against Raynors are "not viable in light of the homeowner's exemptions set forth in the statutes" (*Alvarado v French Council LLC*, 149 AD3d 581, 582 [1st Dept 2017]).

Accordingly, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against Raynors, and Raynors is entitled to dismissal of those claims against it.

The Labor Law § 240 (1) Claim Against SDC

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes,

and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" (Harris v. City of New York, 83 A.D.3d 104, 108 [1st Dep't 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 section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). 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]).

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

Initially, it is of no consequence that plaintiff was not struck by a falling object, but rather, his injury was caused when his foot slipped on the sloped and muddy ground that he was standing on, causing the pulling downwards of the 500-100 pound piece of lumber to strain his back. In the case of *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 604 [2009]), the Court of Appeals explicitly held that "the applicability of the statute in a falling object case . . . does not . . . depend upon whether the object has hit the worker." Rather, "[t]he relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker

- is rather whether the harm flows directly from the application of the force of gravity to the object" (*id.*).

In *Runner*, the plaintiff and several of his co-workers were instructed to move a large reel of wire, which weighed approximately 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the stairs, the workers tied one end of a ten-foot length of rope to the reel and then wrapped the rope around a horizontally-placed metal bar which was positioned horizontally across a door jamb at the same level of the reel. The plaintiff and his co-workers held the loose end of the rope while two other workers began to push the reel down the stairs. As the reel began to descend, it pulled the plaintiff and his co-workers, who were acting as counterweights, toward the metal bar. The plaintiff injured both his hands when they were jammed into the bar (*id.* at 602).

In finding that the plaintiff was entitled to recovery under Labor Law § 240 (1), the Court of Appeals reasoned:

> "Here, as the District Court correctly found, the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path. The latter worker would certainly be entitled to recover under section 240 (1) and there appears no sensible basis to deny plaintiff the same legal recourse"

(*id.* at 604; *see Harris v City of New York*, 83 AD3d 104, 110 [1st Dept 2011]; *Apel v City of New York*, 73 AD3d 406, 407 [1st Dept 2010]). Here, even though plaintiff's foot slipping may have precipitated the events leading up to lumber dropping, ultimately, plaintiff's injury was the direct consequence of the application of gravity to the lumber, and thus, he is entitled to recovery under Labor Law § 240 (1).

In opposition, SDC argues that in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work, and that the work site itself must be elevated above, or positioned below, the area where the object is being secured or hoisted (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, at the time of the accident, plaintiff had allegedly lifted the piece of lumber upwards only a foot or so.

However, as set forth by the Court of Appeals in the more recent case of *Wilinski v 334 East 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 7 [2011]), a height differential cannot be considered de minimis if the heavy weight of the object that fell makes it capable of generating an extreme amount of force, even though it traveled only a short distance (*see also Harris v City of New York*, 83 AD3d at 110 [where "the slab weighed more than one ton . . . [its] rapid descent of just three feet was capable of generating a significant amount of force"]; *Runner v New York Stock Exch.*, 13 NY3d at 605 [the elevation differential at issue could not "be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent"]; *Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013] ["(g)iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis"]). Here, in light of the substantial weight of the piece of lumber, it cannot be said that the height differential was de minimis.

Further, as it was established that the ground was sloped and muddy at the time that plaintiff was injured, it was foreseeable that plaintiff might slip while performing the work. Therefore, safety devices, such as a hoist, rope or cable, were necessary to secure the piece of

lumber in addition to the forklift, to ensure that plaintiff would be safe against it dropping. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake"], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Dasilva v A.J. Contr. Co.*, 262 AD2d 214, 214 [1st Dept 1999] [where the plaintiff "was injured when the unsecured A-frame ladder he was standing on was struck by a section of pipe he had cut, causing him to fall," the Court found that "the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"]).

SDC also argues that as plaintiff was provided with a forklift to hoist the lumber, and, as he was told not to lift the lumber manually, he was the sole proximate cause of his accident, and, therefore, not entitled to summary judgment in his favor. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Here, evidence in the record establishes that it was customary and sometimes necessary for the pieces of lumber being moved to sometimes be lifted by hand in order to get the forks of the forklift underneath them. In any event, any action on the part of plaintiff in doing so, at most, goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]).

Finally, while defendants allege that plaintiff refused to follow an instruction not to lift the lumber manually, "even if plaintiff had disobeyed an instruction to [not lift the lumber manually] .

. . [defendants'] liability for failing to provide adequate safety devices [would not] be reduced" (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334 [1st Dept 2008]). "An instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely" (*Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993] [noting that "an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device.'" Court found that recalcitrant worker defense did not apply where the plaintiff disobeyed his supervisor's instructions not to use a broken ladder unless someone was available to secure it for him]).

Further, plaintiff was under no duty to obtain an alternate safety device on his own because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). In effect, it would place workers in a nearly impossible position by requiring them to "demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in

a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against SDC, and SDC is not entitled to dismissal of that claim against it.

The court has considered SDC's remaining arguments on this issue finds them unavailing.

The Labor Law § 241 (6) Claim Against SDC

SDC moves for dismissal of the Labor Law § 241 (6) claim against it. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

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]).

In his supplemental bill of particulars, plaintiff alleges violations of Industrial Code sections 23-1.5 (a) and (b) and 23-1.7 (d), (e) (1) and (2). Initially, as sections 23-1.5 (a) and (b) are not sufficiently specific to support a Labor Law § 241 (6) claim, as they relate to only general safety standards, SDC is entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on those alleged violations (*see Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]; *Sihly v New York City Tr. Auth.*, 282 AD2d 337, 337 [1st Dept 2001]; *Hawkins v City of New York*, 275 AD2d 634, 635 [1st Dept 2000]). Further, although plaintiff alleges a violation of Industrial Code sections 12 NYCRR 23-1.7 (e) (1) and (2) in his bill of particulars, he did not address these sections in his papers nor in his opposition to SDC's motion. Thus, plaintiff has abandoned his reliance on these Industrial Code provisions as predicates for liability under Labor Law § 241(6) (*see Perez v. Folio House, Inc.*, 123 AD3d 519, 520 [1st Dep't 2014]; *Rodriguez v. Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-31 [1st Dep't 2013]). Accordingly, defendant SDC is entitled to dismissal of that part of the Labor Law Law § 241(6) claim predicated on these abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Initially, Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Courts have held that accidents that occur on the ground in open outside areas, which are exposed to the elements, like in the instant case, do not fall within the purview of section 23-1.7 (d) because such areas do not constitute a floor, passageway or walkway for the purposes of section 23-1.7 (d) (*see Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 586 [1st Dept 2014] [open and unpaved area was not a passageway for the purposes of section 23-1.7 (d) liability]; *O'Gara v Humphreys & Harding*, 282 AD2d 209, 209 [1st Dept 2001] [section 23-1.7 (d) did not apply where the plaintiff's accident occurred on muddy ground, which was located in an open area exposed to the elements]).

Thus, SDC is entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (d).

The Common-Law Negligence and Labor Law § 200 Claims As Against Raynors

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

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

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]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

In order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]). "[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v*

Tishman Constr. Corp., 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Plaintiff was injured when the piece of lumber that he was manually lifting up, so that the blades of a forklift could be positioned underneath it, was caused to drop downwards when his foot slipped on the sloped and muddy ground. Based on the evidence presented, the accident was caused by the lack of a proper safety device to support the lumber as plaintiff lifted it – the means and methods of how the work was performed – not the result of a dangerous condition.

Here, neither Raynors nor SDC can be held liable under a means and methods analysis because plaintiff testified that he received his work instructions solely from Haddock employees, such as Raab and/or Converse. In addition, plaintiff testified that Haddock provided him with all of the tools that he needed to perform his work.

As to Raynors, Newhouse also testified that she never directed any of the construction work going on at the site, and, in fact, plaintiff testified that he was not familiar with Raynors, nor did he ever communicate with Newhouse. As to SDC, O'Malley, SDC's superintendent, testified that he never instructed Haddock's employees as to how to move materials. Moreover, while O'Malley may have overseen and coordinated field operations and safety at the site, such

"general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

It should be noted that plaintiff asserts that defendants are not entitled to dismissal of these claims because the uneven and wet ground that he was exposed to could be viewed as an unsafe condition. In any event, there is no evidence in the record establishing that Raynors and/or SDC created or had actual or constructive notice of said alleged unsafe condition, so plaintiff has not established that these defendants are not entitled to dismissal on this ground.

To that effect, Newhouse, who only visited the Property on occasion, testified that she was not aware that the site was wet and muddy on the day of the accident, and that she never received any complaints in that regard. In addition, there is no other testimony in the record, nor any documentary evidence, which establishes that wet and slippery conditions were noticeably present at the site on the days immediately leading up to the day of the accident, and that defendants were aware of, or should have been aware of, such conditions.

Thus, Raynors and SDC are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

The Cross Claims and Counterclaims Against Raynors

In its motion, Raynors also requests that this court dismiss any and all cross claims and/or counterclaims asserted against it. Here, third-party defendant Haddock has asserted "cross-claims" against Raynors for common law indemnification and contribution. In light of the dismissal of plaintiff's claims against Raynors, these claims must be dismissed.

The Third-Party Claims for Contribution and Common-Law Indemnification Against Haddock

Haddock cross-moves for dismissal of the third-party claims for contribution and common-law indemnification against it. Haddock argues that these claims are barred by Workers' Compensation Law § 11 as it is undisputed that plaintiff was working for Haddock at the time the accident occurred, received workers compensation benefits for his injuries and did not suffer a "grave injury" as defined by Workers' Compensation Law § 11. Haddock, as plaintiff's employer, would only be liable for common-law contribution and indemnification if the plaintiff suffered a "grave injury" as a result of the accident (*Owens v Jea Bus Co.*, 161 AD3d 1188, 1190 [2d Dep't 2018]). The term "grave injury" is narrowly defined by the statute and thus the only determination that needs to be made is whether the injury falls within the statute's objective requirements (*Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 401 [2001]). Here, Haddock has met its prima facie burden of showing that plaintiff did not suffer a grave injury by submitting plaintiff's supplemental verified bill of particulars, which reveals that plaintiff did not suffer a grave injury for the purposes of Workers' Compensation Law § 11. Thus, pursuant to Workers' Compensation Law § 11, Haddock is entitled to dismissal of the contribution and common-law negligence claims against it.

SDC's Third-Party Claim for Contractual Indemnification Against Haddock

SDC moves for summary judgment in its favor on its third-party claim for contractual indemnification against Haddock. Haddock cross-moves for dismissal of all third-party claims asserted against it.

Additional Facts Relevant To This Issue:

In the section "r" of the "General Conditions" portion of the "Master Subcontractor Agreement" between SDC and Haddock (the Agreement), which covered the work Haddock performed for the Project, Haddock agreed

> "[t]o the fullest extent of the law, to defend, indemnify and save harmless Owner and Contractor . . . from every claim . . . arising out of or in any manner connected with the Work performed under [the] Agreement and/or any acts or omission of [Haddock] or anyone for whom it is responsible"

(SDC's notice of motion, exhibit L, the Agreement, ¶ 2 General Conditions, § r). In addition, the Agreement's indemnification provision states that Haddock's "duty to indemnify Contractor and Owner shall not apply to liability for damages arising out of bodily injury to persons . . . caused by or resulting from the sole negligence of Contractor or Contractor's agent or employee" (*id.*).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). The one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La*

Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]). "Even in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Here, the accident arose from the work that Haddock performed on the Project, and it cannot be said that any negligence on the part of SDC solely caused the accident. Thus, pursuant to the indemnification provision contained in the Agreement, SDC is entitled to summary judgment in its favor on its third-party claim for contractual indemnification against Haddock, and Haddock is not entitled to dismissal of that third-party claim against it as it relates to SDC.

However, as Raynors has not opposed Haddock's cross-motion for summary judgment on the third-party claim for contractual indemnification against Haddock, this third-party claim is deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]). Thus, Haddock is entitled to dismissal of the third-party claim for contractual indemnification as it relates to Raynors.

The Third-Party Claim for Breach of Contract for Failure to Procure Insurance

Haddock moves for dismissal of the third-party claim for breach of contract for failure to procure insurance against it. As neither Raynors or SDC has opposed dismissal of this third-party claim, Haddock is entitled to dismissal of the breach of contract third-party claim for failure to procure insurance asserted against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant/third-party plaintiff SDC LLC d/b/a Schuchart/Dow LLC's motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it is granted, and these claims are dismissed as against SDC; and it is further

ORDERED that the part of SDC's motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment in its favor on the third-party claim for contractual indemnification against third-party defendant Haddock Contracting, Inc. (Haddock) is granted, and the motion is otherwise denied; and it is further

ORDERED that defendant/third-party plaintiff Raynors Lane Property LLC's (Raynors) motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted, and the complaint and all cross-claims and counterclaims asserted against Raynors are dismissed, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and continued; and it is further

ORDERED that plaintiff Marc V. Greene's cross motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against SDC is granted, and the motion is otherwise denied; and it is further

ORDERED that the parts of Haddock's cross motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party claims against it for contribution, common-law indemnification, breach of contract for failure to procure insurance and contractual indemnification in regard to Raynors is granted, and the motion is otherwise denied; and it is further

ORDERED that the caption is amended to remove defendant/third-party plaintiff Raynors Lane Property LLC entirely and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Raynors shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

9/16/19
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	