| **Sacko v New York City Hous. Auth.** |
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| 2019 NY Slip Op 33519(U) |
| November 26, 2019 |
| Supreme Court, New York County |
| Docket Number: 157722/2015 |
| Judge: Kathryn E. Freed |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

***Justice***

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**INDEX NO.** 157722/2015

MADIMARO SACKO,

Plaintiff,

**MOTION SEQ. NO.** 003, 004

- v -

NEW YORK CITY HOUSING AUTHORITY, TRINITY WEST HARLEM PHASE ONE LIMITED PARTNERSHIP, TRINITY WEST HARLEM PHASE ONE HOUSING DEVELOPMENT FUND CORPORATION, MEGA CONTRACTING GROUP LLC,

Defendants.

**DECISION + ORDER ON MOTION**

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NEW YORK CITY HOUSING AUTHORITY, TRINITY WEST HARLEM PHASE ONE LIMITED PARTNERSHIP, TRINITY WEST HARLEM PHASE ONE HOUSING DEVELOPMENT FUND CORPORATION, AND MEGA CONTRACTING GROUP LLC,

Third-Party Plaintiffs,

Third-Party
Index No. 595840/2015

-against-

SHAWN CONSTRUCTION, INC.,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 123, 124, 125, 126, 127, 130, 131, 132

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 128, 129

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

Motion Sequence Numbers 003 and 004 are hereby consolidated for disposition.

In this action seeking damages for personal injuries arising from a construction site accident, plaintiff Madimaro Sacko (Sacko) moves in Motion Sequence 003 (Doc No. 63)[1] for summary judgment (CPLR 3212) on his New York State Labor Law §§ 200, 202[2], 240(1) and 241(6) claims against defendants, New York City Housing Authority (NYCHA), Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation (collectively, the Trinity Entities) and Mega Contracting Group, LLC (Mega).

In Motion Seq. 004, NYCHA, the Trinity Entities and Mega move for summary judgment (CPLR 3212) dismissing Sacko's common law negligence and Labor Law § 200 claims and awarding them contractual indemnification against third-party defendant Shawn Construction Inc. (Shawn).

In Motion Sequence Numbers 003 and 004, Shawn cross-moves for summary judgment (CPLR 3212) dismissing the common law claims pursuant to Workers' Compensation Law §11 asserted against it by NYCHA, The Trinity Entities and Mega, as well as Sacko's Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.16.

After oral argument, and a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

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[1] All references labeled "Doc No." are to documents filed in NYSCEF.

[2] Although Sacko seeks judgment in his favor on a Labor Law § 202 claim, a cause of action pursuant to this provision of the Labor Law was neither pleaded in the Complaint nor addressed in the motion-in-chief. Thus, this Court considers the reference to this section a typographical error.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On December 23, 2013, NYCHA, as landlord/owner of 236 West 114th Street in Manhattan (the Premises) executed a ground lease (Doc No. 73) with the Trinity Entities as tenants of the Premises. Simultaneously, and as authorized by the ground lease, the Trinity Entities entered into an agreement (the Construction Contract) (Doc No. 74) with Mega, a general contractor, for the purpose of erecting two residential buildings at the Premises (the Construction Project). Several months later, on or about July 9, 2014, Mega executed an agreement (the Subcontract) (Doc No. 75) retaining Shawn to do carpentry work on the Construction Project including, but not limited to, furnishing and performing all the "work, labor, services, materials, plant, equipment tools, appliances and other things necessary to completely perform" the subcontracted work. (Subcontract at 1, ¶ 1).

Article 34 of the Subcontract, entitled "Liability for Damage & Personal Injury" (Indemnification Provision), states, in pertinent part, as follows:

> "[Shawn] hereby assumes entire responsibility and liability for any and all damages or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of [Shawn] or otherwise, and to all property caused by, resulting from, arising out of, or occurring in connection with the execution of the Work. Except to the extent, if any, expressly prohibited by statute, should any claims for such damage or injury (including death resulting therefrom) be made or asserted, whether or not such claims are based upon Mega Contracting Group LLC['s] alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of Mega Contracting Group, LLC, [Shawn] agrees to indemnify and save harmless Mega Contracting Group, LLC, its members, officers, agents, servants and employees, the Owner, the Funding Agency and all other persons or entities required to be indemnified under the provisions of the [Construction Contract] (hereinafter collectively referred to as 'the Indemnitees') from and against any and all such claims, and further from and against any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements, that the Indemnitees may directly or indirectly sustain, suffer or incur as a result thereof and [Shawn] agrees to and does hereby assume, on behalf of the Indemnitees, the defense of any action at law or in equity which may be brought against the Indemnitees upon or by reason of such claims and to pay on behalf of the

Indemnitees, upon demand, the amount of any judgment that may be entered against the Indemnitees in any such action."

At his depositions (Sacko 1/17/17, 1/25/17 and 5/25/18 Depositions) (Doc Nos. 95, 96 and 100, respectively), Sacko testified that he was employed by Shawn since 2012 to do carpentry work (Sacko 1/17/17 tr 35:14-16, 39:14). In 2014, he was assigned to work at the Premises and had been working there for approximately 10 months (*id.* 54:3-8) when, on March 9, 2015, he was told to install insulation in a 12 to 14-foot high ceiling (the assigned task). To accomplish the assigned task, Shawn's assistant foreman, Dennis Henry (Henry), testified at his deposition that he instructed Sacko to use a pipe scaffold, or to go to Mega's foreman and ask to borrow a 12-foot ladder because Shawn only had 4-foot, 6-foot and 8-foot ladders (Henry tr 16:13-24, 27:18-22, and 38:4-11) (Doc No. 97).

Sacko claims that he found a ladder at the construction site and, when he stepped on it, he noticed that it moved, and so he stepped off of it and observed that its front left leg appeared "raised above the ground" (Sacko 1/17/17 tr 114:2-14, and 115:2-7). He thereafter went to Henry (*id.* 113:2-12) and told him that the ladder was no good because the legs were not of equal length and that the ladder went sideways when he stepped on it (*id.* 114:2-3). Sacko claims that he was told that, if he could not use the ladder, he should go home (*id.* 116:18-12).

Henry asserts that Sacko showed him the 10 to12-foot ladder he was going to use for the assigned task and that he (Henry) approved its use (Henry tr 43:3-6). Henry denied that he provided Sacko with a defective ladder (*id.* 63:7-13, 64:11-17) but admitted that he never instructed anyone to hold the ladder while Sacko used it to perform the assigned task (*id.* 102:22-25, 103:1-2).

After speaking with Henry, Sacko returned to work using the ladder he thought was defective. He climbed it to the ceiling area where he had to work and fell from the ladder when

it moved, shifted and collapsed (Sacko 1/17/17 tr 118-120, 123:21-25). It is undisputed that no one witnessed the accident. There is also no dispute that Shawn had supervisory control over Sacko's assigned task on the date of the accident (*id.* 38:20-25, 39).

In a memorandum dated March 10, 2015 Mega's safety supervisor, Henry Gong (Gong), memorialized what transpired immediately after the accident (Mega's Accident Report) (Doc No. 71). Mega's Accident Report reflects that several people at the job site saw Sacko on the floor after the accident, that he was taken to the hospital in an ambulance, and that he "suffered a broken left wrist and contusion to the left of his face as a result of the fall."

Mega's construction superintendent, Pedro Fernandez (Fernandez), testified at his deposition (Doc No. 98), that he oversaw the construction project (Fernandez tr 7:10-15), did not witness the accident (*id.* 15:8-10), observed Sacko laying on the floor soon after the accident (*id.* 21:19-22), noticed that Sacko's hand was injured, and called an ambulance (*id.* 125:18-21). After his investigation, Fernandez noted in a handwritten accident report (Fernandez's Accident Report) (Doc No. 115) that the cause of the accident was as follows:

> "[Sacko] was lying on the upper elevation of the first floor when I go to him I noticed that his left wrist was [sic] looked disconnected & his left side of his face was swollen He was conscious but I had a hard time communicating w/ him. From what I understood he was on a ladder in the lower elevation of the first floor of 236 & fell off the ladder & made his way to the upper elevation of the first floor in 236 5 to 10 min prior to the accident happening. Ambulance was called at 2:32 pm and arrived shortly [Sacko] was helped by EMT and taken to St. Lukes."

Fernandez testified that he and Gong co-authored Mega's Accident Report (Fernandez tr 38:4-26, 40:14-20, and 41:5-8).

Fernandez's investigation revealed that the subject ladder was an A-frame ladder belonging to the asbestos contractor at the construction site (Fernandez tr 55:16-22, and 65:7-10). Fernandez admitted that, in order for Sacko to perform his assigned task, he would have

needed a ladder or a baker's scaffold (*id.* 56:17-25; and 57:1-2), neither of which was provided to Sacko by Shawn. According to Fernandez, Shawn had six-foot ladders at the construction site (*id.* 59:7-8). After completing his investigation, Fernandez concluded that there was nothing wrong with the subject A-frame ladder used by Sacko (*id.* 73:7-10).

Kenya Smith (Smith), the construction project manager for The Trinity Entities, who neither witnessed nor conducted an investigation of the accident, testified at his deposition (Doc No. 88) that he reviewed Fernandez's Accident Report, understood that Sacko fell from a ladder, and that whatever was written on that report is what happened (Smith tr 19:23-25, and 39:5-15).

Sacko suffered multiple injuries as a result of the accident including, but not limited to, a fractured left wrist which required surgery (see Bill of Particulars and Supplemental Bill of Particulars) (Doc No. 94) and injuries to his neck which subsequently required surgery (Sacko 1/25/17 tr 49:9-13, and 55:5-22; Sacko 5/25/18 tr 32:1-5).

On or about July 28, 2015, Sacko commenced the instant action (the Complaint) (Doc No. 1) against NYCHA, the Trinity Entities and Mega alleging common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The § 241(6) claim was premised on a violation of New York State Industrial Code (Industrial Code) §§ 23-1.16 and 23-1.21. In its answer (Doc No. 7) NYCHA, the Trinity Entities and Mega (Doc No. 8) denied all substantive allegations of wrongdoing and asserted affirmative defenses. NYCHA also cross claimed against co-defendants the Trinity Entities and Mega for contribution, indemnity, and breach of contract.

On or about November 20, 2015 the Trinity Entities and Mega (collectively the third-party plaintiffs) commenced a third-party action (the Third-Party Complaint) (Doc No. 22) against Shawn for common law and contractual indemnification. In its answer to the Third-Party

Complaint (Doc No. 29), Shawn denied all substantive allegations of wrongdoing, asserted affirmative defenses, and counterclaimed against the third-party plaintiffs for contribution.

The note of issue was filed on December 19, 2018 (Doc No. 62) and the instant motions were subsequently filed. In support of his motion (Mot. Seq. 003), Sacko contends that he is entitled to summary judgment on liability because: (a) his injuries were elevation related and flowed directly from the force of gravity to plaintiff's person in violation of Labor Law § 240 (1); (b) there was a Labor Law § 241 (6) violation premised on New York Industrial Code § 23-1.16 because he was not provided with any safety line or harness, and premised on New York Industrial Code § 23-1.21 because the subject ladder was neither steadied by anyone nor otherwise secured in place.

Defendants NYCHA, the Trinity Entities and Mega contend that Sacko's motion for summary judgment must be denied because: (a) no expert opinion was provided asserting that the subject ladder was inadequate and what safety devices should have been provided to Sacko; (b) triable issues of fact exist as to: (i) how the unwitnessed accident occurred; (ii) whether the ladder was defective; (iii) whether plaintiff's actions were the sole proximate cause of his accident: (iv) whether Sacko is a credible witness; and (v) whether there was a violation of Labor Law § 240 (1); and (c) Sacko cannot claim a violation of Labor Law § 241 (6) premised upon Industrial Code § 23-1.16 because safety belts, harnesses, tail lines and life lines were never provided.

NYCHA, the Trinity Entities and Mega further argue that their motion for summary judgment (Motion Seq. 004) dismissing Sacko's common law negligence and Labor Law § 200 claims must be granted because they did not exercise supervision, direction or control over Sacko's work, or have actual or constructive notice of any dangerous or defective conditions at

the construction site. Moreover, they contend that their contractual indemnification claim against Shawn, including reimbursement of attorneys' fees, must be granted in accordance with Article 34 of the Subcontract.

Third-party defendant Shawn contends that the motions for summary judgment by Sacko, NYCHA, the Trinity Entities and Mega (Motion Seq. Nos. 003 and 004) must be denied because: (a) questions of fact exist as to how the accident occurred; (b) Sacko failed to show that a violation of Industrial Code § 23-1.21 proximately caused the accident; and (c) Industrial Code § 23-1.16 is not applicable to the facts of this case. Shawn further argues that its cross motions for summary judgment dismissing the claims for common law indemnification and contribution against it by NYCHA, the Trinity Entities and Mega must be granted because Sacko did not suffer a "grave injury" as defined by Workers' Compensation Law § 11.

**LEGAL CONCLUSIONS:**

As an initial matter, Sacko consents (Doc No. 131, at 2) to the dismissal of the following claims: common law negligence; Labor Law § 200; and Labor Law § 241(6) solely as predicated on a violation of 12 NYCRR 23-1.16. Therefore, to the extent that the motions by NYCHA, the Trinity Entities, Mega and Shawn seek dismissal of the foregoing claims, such relief is granted on consent.

**Summary Judgment Standard**

It is well settled that 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'" (*Saunders v J.P.Z. Realty, LL,* 175 AD3d

1163, 1164 [1st Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.* 70 AD3d 508, 510-511 [1st Dept 2010] [internal quotation marks and citation omitted]). A summary judgment motion should be denied if there "is no doubt as to the absence of triable issues" (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]).

***Labor Law § 240 (1)***

Labor Law § 240 (1) provides in pertinent part:

> "All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering... 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) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003]). Section 240 (1) requires owners, contractors and their agents to "furnish or erect, or cause to be furnished or erected" safety devices, such as ladders or scaffolds, "which shall be so constructed, placed and operated as to give proper protection to a person so employed." The purpose of section 240 (1) is "to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d

494, 501 [1993]). "It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). If the owner, contractor or respective agent fail to supply proper safety devices to protect the worker and as a direct result of that omission the worker is injured, then "absolute liability is 'unavoidable'" in accordance with Section 240 (1) of the Labor Law (*Bland v Manocherian,* 66 NY2d 452, 459 [1985]).

Sacko was a worker employed at a construction project and is thus within the class of persons Labor Law §240 was designed to protect. The deposition testimony reveals that Sacko was on a 12-foot A-frame ladder working on a ceiling about 12 to 14-feet high. It is undisputed that the subject ladder moved, shifted and collapsed, causing Sacko to fall from the ladder to the ground, and that his injuries were elevation related and flowed directly from the force of gravity to his person. By failing to have the subject ladder secured and admittedly not providing him with scaffolding, safety belts, safety nets, guard rails, security, bracing or any other safety devices which would have prevented the accident, defendants violated the requirements of Labor Law § 240. (*Gonzalez v 1225 Ogden Deli Grocery Corp.,* 158 AD3d 582, 583 [1st Dept 2018] [violation of Labor Law § 240 found where plaintiff fell from an unsecured ladder]). Since Sacko's injuries were proximately caused by the violation, defendants are absolutely liable for the occurrence.

The unsubstantiated and conclusory contention that that there is a factual dispute as to the manner in which the accident occurred fails to create an issue of fact sufficient to defeat Sacko's motion for summary judgment (*See Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Cardona v New York City Hous. Auth.,* 153 AD3d 1179 [1st Dept 2017]). It is the burden of a

party opposing a motion for summary judgment to raise triable issues of fact by submitting evidence in admissible form (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), which burden has not been met herein. Moreover, "the Court of Appeals has held that in order to make out a valid claim under Labor Law § 240 (1), '[a] plaintiff need not demonstrate ... the precise manner in which the accident happened'" (*Gordon v Eastern Ry. Supply,* 82 NY2d 555, 562, [1993]). "Rather, the key is whether plaintiff was injured when an elevation-related device failed to perform its function to support and secure him from injury" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 662 [1st Dept 2012]).

Additionally, the fact that the accident was unwitnessed is not a bar to summary judgment (*see Gonzalez* 158 AD3d at 584; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 [1st Dept. 2013]; and *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001]). The evidence presented here sufficiently demonstrates that Sacko fell from a height due to a defective and/or unsecured ladder (*see Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1st Dept 2013]). Notably, no other version of how the accident may have occurred was presented to the court and, thus, Sacko's version of the incident remains unrebutted.

Indeed, plaintiff was not even required to show that the ladder was defective (*see also*, *Nieto v CLDN NY LLC,* 170 AD3d 431 [1st Dept 2019]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d at 290-291["the contention that plaintiff was required to show that the ladder from which he fell was defective in some manner . . . is not the law."]) It "is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*id.* at 291). Even assuming, *arguendo*, that there was nothing wrong with the subject ladder, as Mega contends, there is no evidence contradicting

Sacko's claim that he fell from a height when the unsecured ladder he was on moved, shifted, and collapsed (Doc 66 at 119). Thus, Sacko has established his prima facie entitlement to summary judgment as to liability as against defendants NYCHA, the Trinity Entities and Mega pursuant to Labor Law § 240 (1) and said defendants failed to raise a triable issue of fact in response (*see also Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]).

***Labor Law § 241 (6)***

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents, ... when constructing or demolishing buildings ... shall comply with the following requirements: ...
>
> 6. All areas in which construction ... work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provision of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith."

The Industrial Code is set forth at 12 NYCRR Part 23. "In order to support a claim under section 241 (6) ... the particular provision [of the Industrial Code] relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009], citing *Ross* 81 NY2d at 504-505; *Kelmendi v 157 Hudson St., LLC,* 137 AD3d 567 [1st Dept 2016]).

Sacko's Labor Law § 241 (6) claim is premised on a violated of Industrial Code § 12 NYCRR 23-1.21 (e) (1), (2) and (3), which states, as follows:

> "§ 23-1.21 Ladders and ladderways:
>
> (e) Stepladders.
>
> (1) Length. Stepladders with side rails exceeding 20 feet in length shall not be used.

(2) Bracing. Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked.

(3) Stepladder footing. Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means."

Industrial Code § 12 NYCRR 23-1.21 (e) (3), which applies to "[s]tepladder footing," is sufficiently specific to support a Labor Law § 241 (6) claim since Sacko was working on a 10 to 12-foot ladder at the time of the accident (*see Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]). On a summary judgment motion, once plaintiff presents a prima facie entitlement to the relief sought, as is the case here, it is the opposing party's burden to come forward with "evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact" (*Provost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). No such factual issues were raised by defendants/third-party plaintiffs NYCHA, the Trinity Entities, and Mega, or by third-party defendant Shawn regarding whether a violation of this provision was the proximate cause of Sacko's injury. Rather, it is undisputed that the subject ladder was not steadied by anyone or otherwise secured as mandated by Industrial Code § 12 NYCRR 23-1.21 (e) (3).

***Workers' Compensation Law § 11***

Workers' Compensation Law § 11 prohibits a third-party from bringing a claim for contribution or indemnification against a plaintiff's employer unless the plaintiff sustained a "grave injury" as defined by the statute, which provides, in pertinent part, that:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Since defendants NYCHA, the Trinity Entities and Mega fail to establish that Sacko sustained a "grave injury" within the meaning of the statute, their claims against Shawn for common law indemnification and contribution must fail. However, as discussed immediately below, this does not prevent defendants NYCHA, the Trinity Entities and Mega from pursuing their claim for contractual indemnification against Shawn given that Shawn agreed in writing to provide such indemnification.

***Contractual Indemnification Claim***

"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 Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC,* 160 AD3d 82 [1st Dept 2018]; and *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]). Indemnity contracts "must be strictly

construed so as to avoid reading unintended duties into them" which the parties did not intend to assume (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

There can be no dispute that the Indemnification Provision (Article 34 of the Subcontract) expressly provides that Shawn assumed "responsibility and liability for any and all damages or injury of any kind or nature whatever" to its employees "caused by, resulting from, arising out of, or occurring in connection with" Shawn's work under the Subcontract. As discussed above, Sacko's claims arise from the performance of Shawn's work at the Premises in accordance with the specifications of the Subcontract.

The Indemnification Provision provides that Shawn is required to indemnify Mega (the general contractor), The Trinity Entities (the tenant) and NYCHA (the owner) "whether or not [Plaintiff's claims for personal injury] are based upon [Mega's] alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation." (Indemnification Provision Article 34). Since this Court has determined that Mega, The Trinity Entities and NYCHA are absolutely liable for Sacko's claims pursuant to Labor Law § 240 (1) (as well as strictly liable for his claims pursuant to Labor Law §241 (6) as predicated on Industrial Code Law § 12 NYCRR 23-1.21), they are entitled to summary judgment on their contractual indemnification claim against Shawn. *See Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 (1st Dept 2018).

This Court has considered the remaining arguments raised by the parties and finds them to be without merit or unnecessary to address in light of the findings above.

In light of the foregoing, it is hereby:

ORDERED that the application (Motion Seq. 003) by plaintiff, Madimaro Sacko, for summary judgment on his Labor Law § 240 (1) and § 241 (6), as predicated on New York Industrial Code § 23-1.21, is granted; and it is further

ORDERED that the branch of the application (Motion Seq. 004) by defendants/third-party plaintiffs, New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, and Mega Contracting Group, LLC, to dismiss plaintiff's claims of common law negligence, Labor Law § 200, and Labor Law § 241 (6), as predicated on 12 NYCRR 23-1.16, is granted; and it is further

ORDERED that the branch of the application (Motion Seq. 004) by defendants/third-party plaintiffs, New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, and Mega Contracting Group, LLC, for summary judgment against third-party defendant, Shawn Construction Inc., on their claim for contractual indemnification, is granted; and it is further

ORDERED that the cross motions (Motion Seq. 003 and 004) by third-party defendant, Shawn Construction Inc., seeking summary judgment dismissing all common law claims asserted against it by New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, and Mega Contracting Group, LLC, as well as plaintiff's claim pursuant to Labor Law § 241 (6), as predicated on 12 NYCRR 23-1.16, are denied as moot; and it is further

ORDERED that the Clerk of the Court shall enter judgment on the issue of liability respecting Labor Law § 240 (1) and § 241 (6), as predicated on New York Industrial Code § 23-1.21, in favor of plaintiff, Madimaro Sacko, and against defendants, New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, and Mega Contracting Group, LLC; and it is further

ORDERED that the Clerk of the Court shall enter judgment on the issue of liability in favor of third-party plaintiffs New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, and Mega Contracting Group, LLC on their third-party claim for contractual indemnification against third-party defendant, Shawn Construction Inc.; and it is further

ORDERED that the parties are to appear for a previously scheduled early settlement conference before Senior Settlement Coordinator Miles J. Vigilante on December 4, 2019 at 10 a.m. at 80 Centre Street, Room 103; and it is further

ORDERED that this constitutes the decision and order of the court.

11/26/2019
DATE

KATHRYN E. FREED, J.S.C.

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