

Greenwood v Forest City Ratner Cos., LLC
2020 NY Slip Op 30037(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 152007/2014
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH

PART IAS MOTION 29EFM

Justice

-----X

INDEX NO. 152007/2014

FRANCIS GREENWOOD, MARY GREENWOOD,

MOTION DATE 07/24/2019

Plaintiff,

MOTION SEQ. NO. 001 002 003
004

- v -

FOREST CITY RATNER COMPANIES, LLC, SKANSKA
INC., FC SKANSKA MODULAR LLC, ATLANTIC YARDS B2
OWNER, LLC, SKANSKA USA BUILDING INC.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

ATLANTIC YARDS B2 OWNER, LLC, SKANSKA USA
BUILDING INC.

Third-Party
Index No. 595305/2015

Plaintiff,

-against-

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 63, 64, 65, 66, 67,
68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 155, 159, 162, 165, 167, 168, 171, 172,
173, 190, 191, 192, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 264, 265, 269, 272

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 85, 86, 87, 88, 89,
90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 156, 161, 166, 169, 170,
193, 194, 195, 196, 197, 198, 199, 200, 201, 205, 206, 207, 208, 209, 210, 231, 236, 237, 238, 262, 266,
271, 273

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 108, 109, 110, 111,
112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 157, 163,
177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 211, 212, 213, 214, 215, 216, 217, 218,
232, 233, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 267, 274

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 158, 164, 174, 175, 176, 202, 203, 204, 234, 235, 253, 254, 255, 256, 257, 258, 259, 260, 261, 268, 270, 275

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

Motions decided in accordance with the annexed memorandum and decision order.

1/6/2020
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Robert David Kalish
ROBERT DAVID KALISH, J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29**

-----X
FRANCIS GREENWOOD AND MARY GREENWOOD,

Plaintiffs,

- against -

Index No. 152007/2014

FOREST CITY RATNER COMPANIES, LLC, SKANSKA
INC., SKANSKA MODULAR LLC, ATLANTIC YARDS
B2 OWNER, LLC and SKANSKA USA BUILDING, INC.,

Decision and Order

Defendants.

-----X
ATLANTIC YARDS B2 OWNER, LLC and SKANSKA
USA BUILDING, INC.,

Third-Party Plaintiffs,

- against -

BANKER STEEL, INC.,

Third-Party Defendant.

-----X
BANKER STEEL CO., LLC, i/s/a BANKER STEEL, INC.,

Second Third-Party Plaintiff,

- against -

J.F. STEARNS CO., LLC,

Second Third-Party Defendant.

-----X
HON. ROBERT D. KALISH, J.:

In the instant action, Francis Greenwood (plaintiff) and Mary Greenwood (collectively plaintiffs) seek to recover monetary damages for personal injuries to plaintiff and assert violations of the Labor Law. The parties have now timely filed motions for summary judgment under motion sequence numbers 001, 002, 003 and 004 which are consolidated for disposition:

- On motion sequence **001**, Francis Greenwood (plaintiff) and Mary Greenwood (collectively plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) against defendants Skanska Inc., Skanska Modular LLC, and Skanska USA Building, Inc. (collectively, Skanska), and Atlantic Yards B2 Owner, LLC (Atlantic).
- On motion sequence **002**, first third-party defendant / second third-party plaintiff Banker Steel, Inc. (Banker) moves, pursuant to CPLR 3212, for an order: (1) granting its contractual indemnity claim as against J.F. Stearns Co., LLC (J.F.); (2) dismissing the third-party action as against it; (3) granting conditional breach of contract as against J.F. for failure to procure insurance; (4) granting dismissal of plaintiffs' action against defendants; and (5) granting dismissal of all counterclaims and cross claims as against it.
- On motion sequence **003**, second third-party defendant J.F., moves pursuant to CPLR 3212, for an order: (1) dismissing Banker's second third-party complaint and Atlantic and Skanska and Banker's cross-claims as against it, and (2) dismissing plaintiffs' causes of action pursuant to Labor Law §§ 240 (1) and 241 (6) as against defendants.
- On motion sequence **004**, Defendants Atlantic and Skanska, move pursuant to CPLR 3212, for an order: (1) dismissing plaintiffs' Labor Law § 200 claim as against them, and (2) granting them summary judgment on their contractual indemnity claim against Banker and J.F.

BACKGROUND

Plaintiff Francis Greenwood alleges that, on January 23, 2014 he was injured in an accident (the accident) while working on the construction of a new 30-story high-rise modular apartment building located in downtown Brooklyn (the project) known as the B2 Residential Project in Atlantic Yards (the building). Forest City Ratners Companies, LLC (Forest) was the owner of the building and Skanska was the general contractor for the project.¹ Skanska hired J.F. for the erection of steel and the modular units for the building. Plaintiff was working as a union ironworker for J.F. (*See* plaintiff 2015 tr at 17-20, 22-23, 25, 39).

Deposition Testimony of Plaintiff Francis Greenwood

Plaintiff was deposed on two dates: March 24, 2015 and April 28, 2016. Plaintiff stated at his 2015 deposition that, on the date of the accident, there was a seven-man “raising crew” for J.F. that was involved with lifting or hoisting the modular units. He was the superintendent for J.F. and Matthew Bispo was J.F.’s foreman for the raising gang. Joseph Doherty was the crane operator, and his job was to lift the modular units off the trailer with a tower crane in coordination with a signal-man known only as “Dave” who communicated with Doherty by radio (*see* plaintiff 2015 tr at 40, 41, 43-45, 48, 99-100).

Plaintiff stated that, on the date of the accident, he was standing with Skanska’s superintendent Billy Carson watching the modular unit be hoisted when he noticed that the unit was unbalanced and realized that the raising crew had forgotten to lower the chainfalls over the modular unit before the unit was lifted off of the flat-bed trailer (*see id.* at 96). As such, the unit had to be lowered back onto the flat-bed trailer so that the chainfalls could be properly lowered over the unit (*see id.* at 96-97). As the unit was being lowered back onto the trailer, plaintiff

¹ The parties agree that the action against Forest was discontinued and that Atlantic is the owner of the building (oral argument tr. at 83.)

noticed that the dunnage – wood that protects the unit from being damaged – had moved on the trailer, so the unit had to stop being lowered—otherwise the façade of the unit might get crushed against the trailer (*see id.* at 97-98). Plaintiff stated that he decided to fix the dunnage himself and that as he was “reaching underneath kind of in the blind a little bit to grab the dunnage, the wood and to adjust it and then as [he] did that, [he] just kind of noticed something bounced and there was weight on [his] thumb” (*id.* at 98.) Plaintiff stated that he then panicked and yanked his whole body back and then yanked his thumb off his body (*see id.* at 98-99).

Plaintiff further stated that at the time he was reaching under the modular unit to fix the dunnage, the unit was hanging roughly three to four feet over the flat-bed trailer (*id.* at 112). Plaintiff further explained that as he was attempting to fix the dunnage, “the unit, it just, I don’t know, just came down suddenly, it just started bouncing around” (*id.* at 113). Plaintiff added that he did not know if the unit was tipping over and that was why he panicked (*id.* at 113-114).

Plaintiff further stated that prior to his accident, the hoisting of the modular unit was stopped twice: first, when he and the raising crew realized that the unit was “not rigged up right”; and, second, when he realized that dunnage need to be fixed before the unit was lowered back onto the flat-bed trailer (plaintiff 2016 tr at 136-137).

Deposition Testimony of William Carson, Superintendent for Skanska

William Carson testified at his deposition that he was the senior superintendent for Skanska (Carson tr at 9). He was present on the date of the accident when the modular unit was being lifted (*see id.* at 10, 12). He saw that plaintiff went “pretty quick,” running to adjust the dunnage that was underneath the module (*see id.* at 107-108). Carson could not recall that modular unit stopped between the time that the unit began being lowered back onto the trailer and when the accident occurred (*id.* at 138-139). After the accident, plaintiff told him how the

accident occurred: “that he stuck his hands in and the mod came down” (*id.* at 116-117). Carson further stated that right after the accident, plaintiff told him that “he shouldn’t have d[one] that” (*id.* at 117).

Deposition Testimony of Matthew Bispo, J.F. Foreman

Matthew Bispo testified during his deposition that once the modular unit was taken off the flat-bed trailer, they would use the chainfalls to level the unit (Bispo tr at 32). On the date of the accident, he made the determination that the modular unit was not level when taken off the trailer (*see id.* at 42). He told the signal man to stop, and at that point, the unit was directly above the bed of the truck from which it was being lifted (*see id.*). He saw plaintiff go over to the modular unit to adjust the dunnage on the truck (*see id.* at 47). He does not remember if anyone told plaintiff to do that or if plaintiff did that on his own (*see id.*). He saw plaintiff reach his hand into the area where the unit was to adjust the dunnage (*see id.* at 49). Before plaintiff put his hand under the modular unit, the unit was still in the process of coming down (*see id.*). Bispo did not recall if it stopped or if it continued to come down before it crushed Plaintiff’s thumb, but he affirmed that plaintiff “put his hands underneath the module as it was coming down” (*id.* at 50). He did not recall whether the modular unit stopped from the time it was being lowered after it previously stopped at two to four feet above the flatbed (*see id.* at 54).

Written Statement and Deposition Testimony of Joseph Doherty, J.F. Crane Operator

On June 15, 2017, Joseph Doherty signed a sworn, notarized statement in which he described the events surrounding the accident and which he stated that he was asked to provide by an investigator for Defendant Skanska USA Building (Dorherty aff.). Doherty stated that during the hoisting of the subject modular unit he was being directed by a J.F. signalman named Dave and that he and Dave communicated via a McKee system that was “crystal clear” (*id.*)

Doherty stated that after he began raising the modular unit from the flat-bed trailer, the unit appeared “cockeyed” and that Dave signaled to him to stop raising the unit and to lower the unit back onto the trailer because the chainfalls were not properly installed (id). Doherty stated that as he was lowering the unit back onto the trailer Dave told him to stop because the dunnage needed to be adjusted (id.) Doherty stated that shortly thereafter Dave told him to lower the load onto the trailer, but that “[a]s the unit came down because the unit was tilted it caused the snatch-block to roll before I landed it” (id.). Doherty stated that he could not see what happened because the unit was wider than the trailer, but that he was later told by a J.F. crew member that plaintiff was “trying to adjust dunnage and his hand got crushed under the modular unit as it was getting lowered” (id.)

Doherty further added in his written statement:

“In my opinion, if [the unit] was rigged up correctly the first time, the accident would not have happened.

... No one voiced a complaint or comment to me regarding my operation of the crane at the time of the accident. As an operator my signalman Dave is my eyes and ears. I expect that when communicating with him through the McKee system to lower the load that Mr. Greenwood and all workers finish adjusting the dunnage before directing me to come down.”

(Id.)

During Doherty’s deposition, on December 13, 2018, he stated that he did not learn about plaintiff’s accident until the next day (Doherty tr. at 37-38). When asked if he ever witnessed an individual “put dunnage in at the last second as something was coming down,” Doherty responded that “[n]obody would ever do that” but that he did not know if that was what plaintiff did at the time of his accident (id. at 47-48).

Deposition Testimony of Salvatore Mazzella, Site Safety Manager for Skanska

On the day of the accident, Salvatore Mazella was present on the construction site as Skanska's Site Safety Manager (Mazzella EBT at 10). Mazzella stated that his back was turned to J.F.'s hoisting operation at the time of plaintiff's accident, but that he immediately ran over when he heard that plaintiff had gotten hurt (id. at 67).

Mazzella stated that on the day after the meeting he conducted a "stretch-and-flex" discussion with the trades, including J.F. personnel, in which he "mentioned the incident that happened, and the importance of being aware of what's going on around you" (id. at 79). Mazzella stated that following the accident J.F. had to "develop a plan to make sure it doesn't happen again" and that J.F. developed the following corrective action in the Skanska Incident Report which states: "Before the unit is landed the foreman gives an all clear, the unit does not go down until he he[ars] from all 4 men. [A]lso all chain will be lowered to the side of the units whether they are needed or not to avoid resetting" (id. at 79-86; Skanska Incident Report).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba*

Extruders v Ceppos, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against direct defendants Atlantic and Skanska. Atlantic and Skanska oppose this branch of plaintiff's motion, arguing that there is a question of fact concerning whether plaintiff's injury was caused by the failure of an enumerated safety device. First and Second Third-Party Defendants J.F. and Banker oppose plaintiff's motion and separately move for summary judgment dismissing plaintiff's claims against defendants, including plaintiff's Labor Law § 240 (1).

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."

It is well established that Labor Law § 240 (1) applies to "extraordinary elevation risks," and not the "usual and ordinary dangers of a construction site" (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). To establish liability under Labor Law § 240 (1), the plaintiff must establish the following two elements: (1) a violation of the statute, i.e., that the owner or general contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). Where a plaintiff is the sole proximate cause of an injury, liability does not attach under the statute (*id.* at 290).

Here, there is no dispute that the raising gang, led by Matt Bispo, forgot to lower the chainfalls prior to the modular unit being raised by the crane and that this required that the unit be lowered back onto the trailer—so that the chainfalls could be used to level-out the unit. There is also no dispute that plaintiff realized that the dunnage on the trailer needed to be adjusted before the unit could be lowered back onto the trailer.

What is in dispute is what happened next. Plaintiff stated that the crane had stopped moving the unit so that he could adjust the dunnage and that the unit then unexpectedly—and for causes unknown—came down crushing his thumb. In contrast, Bispo stated that plaintiff attempted to fix the dunnage while the unit was being lowered back down. Carson stated that he does not recall that the unit stopped between the time that it began being lowered back onto the trailer and when plaintiff's accident occurred.

Bispo's version of events suggests that there were no equipment failures. Rather, Bispo's version creates the reasonable inference that plaintiff was the sole proximate cause of his accident in that, as the ranking J.F. employee and at his own initiative, he attempted to fix the dunnage as a roughly 14,000-pound modular unit was being deliberately lowered onto said dunnage—and that he simply failed to remove his hand in time.

On the other hand, plaintiff's version of events raises the potential that his accident may have been caused by the failure of an enumerated safety device and, thus, that Atlantic Yards and Skanska should be absolutely liable pursuant to Labor Law § 240 (1). There also seems to be the potential that the accident was caused by a failure of the crane operator Doherty and the radio man Dave to communicate—and that the accident was not caused by the failure of an enumerated safety device.²

² Indeed, the crane operator Joseph Doherty makes no mention of any equipment failures (*see* Doherty aff.).

As such, this Court finds that there are triable issues of fact concerning whether plaintiff's accident was caused by the "inadequacy of a safety device of the kind enumerated" by Labor Law 240 (1) (*Houston v State*, 171 AD3d 1145, 1146 [2d Dept 2019]).

Notwithstanding plaintiff's arguments to the contrary (*see* oral argument tr. at 13), that plaintiff's accident was preceded by the raising gang's failure to lower the chainfalls does not require a finding otherwise. That rigging error "merely furnished the occasion for the accident to occur, rather than its proximate cause" (*Mack v Altmans Stage Light. Co.*, 98 AD2d 468, 473 [2d Dept 1984] [affirming dismissal of action where the plaintiff was injured when he attempted to lower himself from the roof with a rope after his ladder was blown down]; *see also Scarver v County of Erie*, 2 AD3d 1384, 1385 [4th Dept 2003] ["While the fallen pipe furnished the occasion for plaintiff's injuries, it was not the proximate cause thereof, because plaintiff's jump from the ladder was not a normal or foreseeable consequence of any situation created by the defendants"]).

Accordingly, plaintiff's motion (Seq. 001) for partial summary judgment on the issue of liability under Labor Law § 240 (1) and J.F. and Banker's motions (seqs. 002 and 003 respectively) for dismissal of said claim are all denied.

Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment on their Labor Law § 241 (6) claim in his favor for violations of Industrial Code § 23-8.1 (f) (1) (iv) and (2) (i). Atlantic and Skanska oppose plaintiff's motion arguing there is triable issue of fact concerning whether plaintiff's injury was proximately caused by the violation of the aforesaid provisions of the Industrial Code. J.F. and Banker move for summary judgment dismissing plaintiffs' claim Labor Law § 241 (6) in its entirety as against defendants. Plaintiff opposes these branches of J.F. and Banker's motions,

maintaining that he is entitled to summary on his this claim for violations of Industrial Code § 23-8.1 (f) (1) (iv) and (2) (i), and that additionally there is a triable issue of fact concerning his injury was proximately caused by a violation of 12 NYCRR § 23-2.3 (c).

Preliminarily, as Plaintiff does not specifically oppose dismissal of its Labor Law § 241 (6) claim as predicated on any of the other provisions enumerated in his bill of particulars, the branch of J.F.'s motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim as premised on 12 NYCRR §§ 23-1.5, 23-1.7, 23-2.1, 23-1.5, 23-1.7, 23-2.2, 23-5, 23-6, 23-7 and Article 1926 of O.S.H.A is granted, as the Court deems those claimed violations as having been abandoned by plaintiff (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). In addition, during oral argument, plaintiff conceded that 12 NYCRR § 23-8.1 (f) (2) (ii) has no bearing on this case (*see oral argument tr at 22*). The Court will now discuss the provisions of the Industrial Code which plaintiff claims as predicate violations for Labor Law § 241 (6) liability: 12 NYCRR §§ 23-2.3 (c), 23-8.1 (f) (1) (iv) and (2) (i).

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. . . .”

Labor Law § 241 (6) imposes a nondelegable duty “on owners and contractors to ‘provide reasonable and adequate protection and safety’ for workers” (*Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d 494, 501 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that there is a triable issue of fact that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety, and that said violation was a proximate cause of the plaintiff's injuries (*id.* at 505).

12 NYCRR § 23-8.1 (f) (1) (iv) and (2) (i) provide:

“(f) Hoisting the load.

(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:

(iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

(2) During the hoisting operation the following conditions shall be met:

(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.”

There is no question that the aforesaid provisions set forth sufficiently specific safety requirements applicable to the alleged facts in this case (*Cammon v City of New York*, 21 AD3d 196, 199 [1st Dept 2005]; *McCoy v Metro. Transp. Auth.*, 38 AD3d 308, 309 [1st Dept 2007]). There are, however, questions of fact as to whether there was a sudden acceleration as the crane was being lowered, and whether the modular unit was “properly balanced” while it was being lowered or if it bounced (12 NYCRR § 23-8.1 [f] [1] [iv], [2] [i]). Therefore, it cannot be determined at this time whether these Industrial Code provisions were violated.

12 NYCRR § 23-2.3 (c) provides “[w]hile steel panels or structural steel members are being hoisted, tag lines shall be provided and used to prevent uncontrolled movement of such panels or members.” There is no question that this provision presents a sufficiently specific

safety requirement (*Martin v State*, 148 AD3d 439 [1st Dept 2017]). However, this Court finds that this provision is not applicable to the facts of the instant case, which involves the hoisting of a modular unit—not a “steel panel” or a “structural steel member.”

Therefore, the branches Banker and J.F.’s motions seeking dismissal plaintiffs’ Labor Law § 241 (6) claim are granted in part to the extent that plaintiff’s Labor Law § 241 (6) claim as premised on violations of Industrial Code §§ 23-1.5, 23-1.7, 23-2.1, 23-1.5, 23-1.7, 23-2.2, 23-2.3, 23-5 and 23-6, 23-7 and Article 1926 of O.S.H.A. is hereby dismissed and are otherwise denied; and the branch of plaintiff’s motion for summary judgment on his Labor Law § 241 (6) claims as predicated on violations of 12 NYCRR § 23-8.1 (f) (1) (iv) and (2) (i) is denied.

Labor Law § 200 and Common Law Negligence Claims

Atlantic and Skanska move for summary judgment dismissing plaintiffs’ Labor Law § 200 and common law negligence claims as against them. Plaintiff opposes dismissal as against Skanska, but agrees that dismissal of said claims as against Atlantic is appropriate (oral argument tr at 83).

Labor Law § 200 (1) provides:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.”

It is well established that Labor Law § 200 is a codification of the common-law duty imposed upon landowners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), and, therefore, the same standards apply to both Labor Law § 200 and common-law negligence theories of recovery. “Liability pursuant to Labor Law § 200 may fall into two broad categories:

workers ‘injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed’” (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093 [2d Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 150-51 [1st Dept 2012]). As the Court made clear during oral argument, the instant case presents a situation where the injury arises out of the manner in which the work is performed (oral argument tr at 82).

To prevail on a claim under Labor Law § 200 and common-law negligence, where the injury arises out of the means or methods of the construction work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). General supervision over the work, including coordination of the trades and inspection of the quality of the work, is insufficient to impose liability (*see Hughes*, 40 AD3d at 306).

Plaintiff, in sum and substance argues, that Skanska controlled the manner in which the work was performed because Bill Carson – Skanska’s representative – possessed “full authority” to stop work if he observed “an unsafe hoisting method” and that Skanska purportedly directed J.F. to adopt a safer method for hoisting after plaintiff’s accident (oral argument tr. at 86). However, authority to stop work to address a safety issue is not sufficient to impose Labor Law § 200 liability under a means and method theory (*see Hughes v Tishman Const. Corp.*, 40 AD3d 305, 309 [1st Dept 2007] [“That Tishman, Site–Safety, or both, may have had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether Tishman exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence”]). In

addition, as Skanska's Site Safety Manager Salvatore Mazzella's testimony makes clear, Skanska and J.F. discussed the subject accident afterward and J.F. developed a corrective action to "make sure [the accident] doesn't happen again" (Mazzella EBT at 79-86; Skanska Incident Report). Such safety monitoring by Skanska does not raise a triable issue of fact concerning whether Skanska supervised or controlled the manner of the subject hoisting operation to impose liability pursuant to Labor Law § 200 or common law negligence (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380-81 [1st Dept 2007] ["[T]hat a general contractor may have had overall responsibility for the safety of the work done by the subcontractors is insufficient to raise a question of fact as to the negligence of the general contractor itself" [internal quotation marks and emendation omitted]; *Singh v. Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [dismissing Labor Law § 200 and common-law negligence claims against general contractor, even though its project superintendent "conducted regular walk-throughs and, if he observed an unsafe condition, had the authority to find whoever was responsible for the condition and have them correct it or, if necessary, stop the work"]]).

As such, the branch of the motion (Seq. 004) by Skanska and Atlantic to dismiss plaintiff's Labor Law § 200 and common law negligence claims is granted.

Remaining Claims

Having resolved the branches of the motions relating to plaintiff's direct claims, the Court now turns to the remaining branches pertaining to claims for contribution, common law indemnification and contractual indemnification:

- On motion sequence 002, Banker moves, pursuant to CPLR 3212, for an order (1) granting its contractual indemnity claim as against J.F.; (2) dismissing the third-party action as against it; (3) granting conditional breach of contract as against

J.F. for failure to procure insurance; and (4) granting dismissal of all counterclaims and cross claims as against it.

- On motion sequence **003**, second third-party defendant J.F., moves pursuant to CPLR 3212, to dismiss Banker's complaint as against it.
- On motion sequence **004**, Defendants Atlantic and Skanska, move pursuant to CPLR 3212, for an order granting them summary judgment on their contractual indemnity claim against Banker and J.F.

During oral argument, Banker conceded that that the motion for summary judgment on the contractual indemnity claims as against it by Atlantic and Skanska (Seq. 004) should be granted, and Banker withdrew the branch of its motion (Seq. 002) for its breach of contract claim as against J.F. for failure to procure insurance (*see* oral argument tr at 90-92). Further, as stated during oral argument, this Court finds that there is no basis for Banker to maintain contribution and common law indemnification claims as against J.F., and, as such, the branch of J.F.'s motion (Seq. 003) seeking dismissal of these claims is granted (*see* oral argument tr at 55, 67, 92-93).

As such, following oral argument, the remaining branches of the motions are Banker's motion for summary judgment on its contractual indemnification claim as against J.F., and J.F.'s motion to dismiss same. In addition, there remains Atlantic and Skanska's motion for summary judgment for contractual indemnification as against J.F. This Court will first discuss the issue of contractual indemnification as between Banker and J.F.

The relevant indemnification provision of the contract between Banker and J.F. states as follows:

"Indemnification: To the fullest extent permitted by law, the Subcontractor [J.F.] shall defend, indemnify, and hold harmless Banker Steel and its surety, and any other entities that Banker Steel is required to defend and indemnify pursuant to the Trade Contract

(collectively, the "Indemnitees") from and against any claim, expense, cost, or liability, including attorneys' fees and legal expenses (collectively, "Claims") attributable to bodily injury, sickness, disease, or death, or damage to or destruction of property (including loss of use thereof) caused by, arising out of, resulting from or occurring in connection with the performance of the Work by Subcontractor, its sub-subcontractors and suppliers, or their agents, servants, or employees. Subcontractor's duty to indemnify shall arise whether the Claim is caused in part by the active or passive negligence or other fault of Banker Steel or any other Indemnitee, provided, however, that Subcontractor's duty hereunder shall not arise to the extent that any such Claim was caused by the sole negligence of Banker Steel or any other Indemnitee. The obligation on the part of Subcontractor to indemnify Banker Steel is not limited by any immunity Subcontractor may otherwise have under the applicable workers' compensation laws or any other similar law, and applies without limitation to Claims for personal injury asserted by employees of Subcontractor."

(Banker-J.F. Subcontract at 9-10.) In addition the first paragraph of the Banker-J.F. subcontract states as follows:

"This Subcontract Agreement ("the Agreement") is entered into by and between Banker Steel Co., LLC ("Banker Steel") and J.F. Stearns Co., LLC ("Subcontractor"). This agreement shall be effective as of the earlier of August 1, 2013, or the date subcontractor first provides work for the project."

Banker argues that it should be contractually indemnified by J.F. because the subcontract entered into between Banker and J.F., was effective on the date of the accident. In opposition, and in support of its own motion, J.F. argues that the contract was signed after the accident, and thus the indemnification provision was not valid on the date of the accident.

"A term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made as of [a pre-accident date], and that the parties intended that it apply as of that date" (*Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 443 [1st Dept 2003] [internal quotation marks and citations omitted]; see *Stabile v Viener*, 291 AD2d 395, 396 [2d Dept 2002]; *Penske*

Truck Leasing Co. v Home Ins. Co., 251 AD2d 478 [2d Dept 1998]; *Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d 103, 111-112 [4th Dept 1981]). As discussed on the record during oral argument, there is sufficient evidence to show that the contract between Banker and J.F. clearly had a retroactive date and the parties intended that this date apply, even though the contract was signed after the accident occurred (*see* oral argument tr at 50-64, 68-75). Therefore, this branch of Banker's motion is granted and this branch of J.F.'s motion is denied.³

Further, as the above provision further requires J.F. to indemnify any other entities that Banker Steel is required to indemnify pursuant to the Trade Contract, and as Banker admits and the Court has found that Banker is required to contractually indemnify Atlantic and Skanska, J.F. must therefore contractually indemnify Atlantic and Skanska. Accordingly, the branch of Atlantic and Skanska's motion for summary judgment on its contractual indemnification claim as against J.F. is granted, and the branch J.F.'s motion for summary judgment dismissing said claim is denied.

The court has considered the remaining arguments and finds them unavailing.

³ The Court notes that it apparently misspoke when it stated that "there is an issue of fact with respect to Banker's motion for indemnification with respect to contractual indemnification against Stearns on that motion" (oral argument tr at 92). The Court meant to state that there is not an issue of fact with regard to this branch of Banker's motion (Seq. 002).

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment (Seq. 001) on their Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that Banker Steel, Inc.'s motion for summary judgment (Seq. 002) is granted to the extent that the branch of said motion seeking summary judgment on its contractual indemnification claim as against J.F. Stearns Co., LLC is granted and the third-party complaint is dismissed as against Banker Steel except for the claim for contractual indemnification as against it by Atlantic and Skanska, and the motion is otherwise denied; and it is further

ORDERED that J.F. Stearns Co., LLC's motion for summary judgment (Seq. 003) is granted in part in part to the extent that plaintiff's Labor Law § 241 (6) claim as premised on violations of Industrial Code §§ 23-1.5, 23-1.7, 23-2.1, 23-1.5, 23-1.7, 23-2.2, 23-2.3, 23-5 and 23-6, 23-7 and Article 1926 of O.S.H.A. is hereby dismissed and Banker Steel, Inc.'s claims for common law indemnification and contribution are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion (Seq. 004) by defendants Skanska Inc., Skanska Modular LLC, Skanska USA Building, Inc, and Atlantic Yards B2 Owner, LLC for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against them and granting them summary judgment on their claims for contractual indemnification as against Banker Steel, Inc. and J.F. Stearns Co., LLC is granted.

The foregoing constitutes the decision and order of the Court.

Dated: January 6, 2020

ENTER: [Signature]
HON. ESTHER J.S.C. KALICH J.S.C.