Hurtado v 1501 Pitkin Owners, LLC
2020 NY Slip Op 30818(U)
March 4, 2020
Supreme Court, Kings County
Docket Number: 1585/16
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of March, 2020.

PRESENT:

HON. DAWN JIMENEZ-SALTA,
Justice.

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AROLDO HURTADO,
Plaintiff,

- against -

Index No. 1585/16

1501 PITKIN OWNERS, LLC, 1501 PITKIN REHAB CREDIT MT, LLC, POKO MANAGEMENT CORP., POKO BUILDERS, LLC, and POKO CORE BUILDERS, LLC,
Defendants.

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POKO BUILDERS, LLC and POKO CORE BUILDERS, LLC,
Third-Party Plaintiffs,

- against -

EVERLAST SOLUTIONS CORP. and DEVINE CONTRACTING, INC.,
Third-Party Defendants.

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1501 PITKIN OWNERS, LLC, and POKO MANAGEMENT CORP.,

Second Third-Party Plaintiffs,

- against -

EVERLAST SOLUTIONS CORP. and DEVINE CONTRACTING, INC.,

Second Third-Party Defendants.

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Seq #s 11, 12, 13, 14, 15

The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	82-83, 87, 89, 161, 163, 174-175, 193, 194-195 219-220, 245
Opposing Affidavits (Affirmations)	152, 155, 157, 249, 250, 251, 253, 255, 257, 258, 261, 266, 270, 271, 273, 275, 281, 287
Reply Affidavits (Affirmations)	267, 269, 270, 271, 292, 293, 293, 294, 296, 298, 300

Upon the foregoing papers, plaintiff Aroldo Hurtado moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor with respect to liability on his Labor Law § 240 (1) cause of action and setting the matter down for a trial with respect to damages (motion sequence number 9). Third-party and second third-party defendant Everlast Solutions Corp. (Everlast) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint and the second third-party complaint as against it (motion sequence number 11). Defendants and third-party plaintiffs Poko Builders, LLC, and Poko Core Builders, LLC (collectively referred to as the Poko Defendants), move for an order, pursuant to CPLR 3212, granting: (1) summary judgment dismissing plaintiff's complaint and all cross claims as asserted against them, and (2) summary judgment in their favor with respect to their (a) third-party claims for common-law and contractual indemnification against Everlast, and (b) contractual indemnification claims against third-party and second third-party defendant Devine Contracting, Inc. (Devine) (motion sequence number 12). Third-party and second third-party defendant Devine moves for an order: (1) pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint,

the second third-party complaint, and all cross claims as asserted against it; and (2) pursuant to CPLR 3211(a) (7), dismissing the third-party and second third-party claims for contribution and common-law indemnification as against it for failing to state a cause of action (motion sequence number 13). Defendants and second third-party plaintiffs 1501 Pitkin Owners, LLC (1501 Pitkin), and Poko Management Corp. (collectively referred to as the Owner Defendants) move for an order, pursuant to CPLR 3212, granting: (1) summary judgment dismissing the complaint, all cross claims and all counterclaims as against them; (2) summary judgment in their favor as against the Poko Defendants on their cross claims for contribution, contractual indemnification, common-law indemnification and breach of contract for failing to obtain insurance coverage; and, alternatively, (3) summary judgment on their second third-party claims for contribution, contractual indemnification, common-law indemnification and breach of contract for failing to obtain insurance coverage as against Everlast, and their second third-party claims for contractual indemnification and breach of contract for failing to obtain insurance coverage as against Devine (motion sequence number 14).

Plaintiff's motion (motion sequence number 9) is denied.

Everlast's motion (motion sequence number 11) is granted to the extent that: (1) the third-party and second third-party causes of action for contribution and common-law indemnification are dismissed; (2) the breach of contract for failure to obtain insurance coverage causes of action brought against it by the Owner Defendants and the Poko

Defendants are dismissed; (3) Poko Management Corp.'s cause of action for contractual indemnification is dismissed as against it. Everlast's motion is otherwise denied.

The Poko Defendants' motion (motion sequence number 12) is granted to the extent that: (1) plaintiff's common-law negligence and Labor Law §§ 200, 240 (2), 240 (3) and 241 (6) causes of action are dismissed; (2) all cross claims and/or counterclaims against them for contribution or common-law indemnification are dismissed; (3) they are entitled to summary judgment in their favor on their contractual indemnification claim as against Everlast; and (4) Poko Core Builders is entitled to conditional summary judgment on its contractual indemnification claim as against Devine pending a determination of negligence as against Devine. The Poko Defendants' motion is otherwise denied.

Devine's motion (motion sequence number 13) is granted to the extent that: (1) the cross claims and the third-party and second third-party causes of action for contribution and common-law indemnification are dismissed as against it; (2) the breach of contract for failure to obtain insurance coverage causes of action by Owner Defendants, the Poko Defendants and Everlast are dismissed; and (3) the contractual indemnification causes of action by Owner Defendants and Poko Builders, LLC, are dismissed as against it. The motion is denied only with respect to the contractual indemnification claims brought against Devine by Everlast and Poko Core Builders, LLC.

The Owner Defendants' motion (motion sequence number 14) is granted to the extent that: (1) plaintiff's common-law negligence and Labor Law §§ 200, 240 (2), 240 (3) and 241

(6) causes of action are dismissed; (2) the Labor Law § 240 (1) cause of action is dismissed as against Poko Management Corp.; (3) all cross claims and counterclaims for indemnification and contribution against the Owner Defendants are dismissed; and (4) 1501 Pitkin is entitled to summary judgment in its favor with respect to the contractual indemnification cross claims asserted as against the Poko Defendants. The Owner Defendants' motion is otherwise denied.

BACKGROUND

Plaintiff Aroldo Hurtado alleges causes of action premised on common-law negligence and Labor Law §§ 200, 240 (1), (2) and (3), and 241 (6) that are based on injuries he allegedly suffered on January 26, 2016, when he slipped and fell to the ground from metal framing while he was performing construction work in the basement of a building located in Brooklyn, New York. The building at issue was owned by 1501 Pitkin and managed by Poko Management Corp. In January 2014, 1501 Pitkin, pursuant to a written contract, hired the Poko Defendants to act as the general contractor and construction manager for a project involving the renovation of the basement and fifth floor of the building. Poko Core Builders, LLC, thereafter subcontracted work that included metal framing and carpentry to Everlast, which in turn, subcontracted this metal framing and carpentry work to Devine. Plaintiff was employed by Devine as a framer.

On the morning of his accident, plaintiff was working in the basement installing metal framing that would serve to support a concrete deck intended to extend a preexisting concrete

deck. According to plaintiff's deposition testimony and his affidavit submitted in support of his motion, this preexisting concrete deck stood four to five feet above the basement floor, and the top of the framing plaintiff was installing was four inches below the preexisting deck. Immediately before the accident, plaintiff was using a drill to install the screws that attached the frames to a track that was a few inches below the top of the preexisting concrete deck. Plaintiff, who stated that he was five feet, seven inches tall, asserted that, in order to reach these screws and apply sufficient pressure to screw them into the track, he needed to climb up onto the preexisting concrete deck. Plaintiff further asserted that there was not enough space in the area he was working to set up the 8 to 10 feet tall A-frame ladders that were available to Devine employees on site, and that he was not provided with step ladders, step stools or similar devices that could be used in the area. The accident happened when plaintiff was finished installing the screws and had stepped down onto one of the frame studs in order to climb down to the floor. Plaintiff, however, slipped on the stud, which came coated with oil or some like substance to prevent it from rusting, and cut his hand on a metal piece as he fell to the floor of the basement.

In contrast to plaintiff's averments and testimony, Julio Oswaldo Bueno, a principal of Devine, and Jorge Reinoso, Everlast's president, testified at their depositions that the top of the framing was only a couple of feet off of the basement floor. As such, they each asserted that plaintiff could have performed his work from the basement floor, and that there was thus no reason for plaintiff to climb up onto the framing and preexisting concrete deck

to perform this task. Additionally, Bueno testified that there were steps at one end of the preexisting concrete deck that plaintiff could have used to climb down to the basement floor. Of note with respect to this latter assertion, plaintiff testified at his deposition that there was debris and material stored on this concrete deck. In this regard, plaintiff has submitted a copy of a photograph of the accident location, apparently taken shortly after the accident, that shows material stored on the deck covering a large portion of the deck area.

Plaintiff's testimony and that of the witnesses from Devine and Everlast establish that plaintiff essentially acted as his own supervisor. While he received direction from the Poko Defendants' project superintendent regarding the timing, location and nature of the work to be performed, plaintiff did not receive any direction from the Poko Defendants, Everlast or Devine with respect to the method or manner in which to perform his work.

LABOR LAW § 240

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with working at an elevation proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]).[1] Here there is no dispute that 1501 Pitkin,

[1] As is relevant here, Labor Law § 240 (1) provides that:
"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the

as owner, and the Poko Defendants, as general contractor, may be held liable under section 240 (1) (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *cf. Guryev v Tomchinsky*, 20 NY3d 194, 199-201 [2012]),[2] or that plaintiff's framing work was of the kind of work covered under section 240 (1) (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-883 [2003]; *Panek v County of Albany*, 99 NY2d 452, 457-458 [2003]). At issue, however, are defendants' assertions that plaintiff could have, among other things, performed the work from the basement floor because the framing at issue was only approximately two feet high or used the stairs on the preexisting concrete deck rather than climbing down via the framing.

Liability under Labor Law § 240 (1) depends on whether the injured worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). The kind of accident triggering section 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis

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> 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."

[2] Of note in this respect, 1501 Pitkin admitted that it was an owner in response to a notice to admit, and the witnesses who provided deposition testimony on behalf of the Poko Defendants stated that the Poko Defendants acted as the general contractor for the project.

removed], quoting *Ross*, 81 NY2d at 501). In considering the need for statutory devices, a plaintiff may not trigger coverage under the statute by unnecessarily performing work at an elevation (*see Broggy*, 8 NY3d at 681-682 [plaintiff did not need to stand on desk to clean windows]; *Maracle v Autoplace Infiniti, Inc.*, 161 AD3d 1524, 1525 [4th Dept 2018] [plaintiff did not need to stand on rock to install a sign]; *McNeight v Railcar Custom Leasing, LLC*, 345 Fed Appx 612, 614-615 [2d Cir 2009]). Under such circumstances, a worker's conduct would constitute the sole proximate cause of the accident, as would other unforeseeable conduct (i.e. choosing a dangerous means of performing the work or unsafely exiting the job site) (*see Miller v Webb of Buffalo, LLC*, 126 AD3d 1477, 1477-1478 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]; *Serrano v Popovic*, 91 AD3d 626, 627 [2d Dept 2012]; *Canosa v Holy Name of Mary R.C. Church*, 83 AD3d 635, 637 [2d Dept 2011]; *Capellan v King Wire Co.*, 19 AD3d 530, 532 [2d Dept 2005]).

Here, Reinoso and Bueno's testimony, that the framing was only around two feet off of the ground and that plaintiff could have performed his work while standing on the basement floor, presents a factual issue as to whether plaintiff needlessly exposed himself to an elevation hazard in order to perform his work (*see Broggy*, 8 NY3d at 681-682; *Maracle*, 161 AD3d at 1525; *McNeight*, 345 Fed Appx at 614-615). While Reinoso and Bueno's testimony demonstrates the existence of factual issues that require the denial of plaintiff's motion, plaintiff's own testimony, that the framing was four to five feet tall and that he could not properly attach the screws while standing on the ground, presents factual

issues regarding his need to work at an elevation that require the denial of defendants' motions (*see Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *DeKenipp v Rockefeller Ctr., Inc.*, 60 AD3d 550, 550 [1st Dept 2009]; *see also Doto v Astoria Energy II, LLC*, 129 AD3d 660, 661-662 [2d Dept 2015]; *but see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

In addition, Bueno's testimony that there were steps that plaintiff could have used to climb down from the preexisting concrete deck also presents a factual issue as to whether plaintiff's actions, in choosing to descend from the frame, were the sole proximate cause of the accident. Despite the absence of testimony that plaintiff was instructed to use those steps, plaintiff was effectively working as his own supervisor, and a jury could infer based on his training, experience and common sense that plaintiff should have known to use the steps to get down from the concrete deck rather than the framing (*see Valente v Lend Lease (US) Constr. LMB, Inc.*, 29 NY3d 1104, 1105 [2017] [addressing plaintiff's decision to use makeshift ramp constructed from grease covered planks], *reversing* 143 AD3d 625 [1st Dept 2016]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712, 713-714 [2d Dept 2017]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 701 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]; *Hernandez v Town of Hamburg*, 83 AD3d 1507, 1508 [4th Dept 2011], *lv denied* 17 NY3d 717 [2011]; *Sophia v Combustion Engineering, Inc.*, 261 AD2d 911, 912 [4th Dept 1999]). Nevertheless, Bueno's testimony fails to establish that plaintiff should have used the steps, as a matter of law, in view of plaintiff's testimony regarding debris on the concrete deck and the photograph of the accident location showing material stored on the concrete deck that

may have prevented plaintiff from accessing those steps (*see Ferguson v Durst Pyramid, LLC*, 178 AD3d 634, 635 [1st Dept 2019]).

In view of these factual issues as to whether plaintiff needed to work at an elevation and whether his failure to use the steps down from the platform constituted the sole proximate cause of his accident, plaintiff's motion, the Poko Defendants' motion, and the Owner Defendants' motion with respect to 1501 Pitkin Owners, LLC, must be denied with respect to plaintiff's Labor Law § 240 (1) cause of action.[3]

Poko Management Corp., however, has demonstrated its prima facie entitlement to dismissal of the action as against it by presenting evidence through the deposition testimony and affidavit of Richard Olson that, although Poko Management Corp. had broad authority with respect to the management of the building under its contract with 1501 Pitkin, it did not act as 1501 Pitkin's agent with respect to the project at issue. In this regard, 1501 Pitkin contracted directly with the general contractors. In addition, Poko Management Corp.'s management responsibilities were limited to the portions of the building that had already been leased to tenants and it had no role with respect to the fifth floor and basement that were under construction at the time of the accident. As such, Poko Management Corp. has demonstrated, prima facie, that it had no authority to supervise or control the work at issue, and thus may not be held liable as a statutory agent of 1501 Pitkin under Labor Law § 240

[3] While plaintiff and the Poko Defendants each submit affidavits from engineers that address the Labor Law § 240 (1) cause of action, the conclusory assertions of each expert fail to demonstrate the absence of factual issues (*see Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 735 [2d Dept 2015]).

(*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Reyes v Bruckner Plaza Shopping Ctr., LLC*, 173 AD3d 570, 571 [1st Dept 2019]; *cf. Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009]; *Corona v Metropolitan 298-308 Assoc., Inc.*, 281 AD2d 447, 448 [2d Dept 2001]). Since plaintiff has failed to submit evidentiary proof addressing this issue, Poko Management Corp. is entitled to summary judgment dismissing the Labor Law § 240 (1), (2) and (3) causes of action as against it.[4]

Defendants have also demonstrated their entitlement to dismissal of plaintiff's Labor Law §§ 240 (2) and (3) causes of action, as plaintiff was not working on a scaffold. In any event even if the framing may be deemed the functional equivalent of a scaffold under those provisions, plaintiff was not working at a height greater than twenty feet as is required for liability under section 240 (2) (*see Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853, 855 [3d Dept 1995]) and plaintiff's fall was not proximately related to any failure to comply with the scaffold load requirements of section 240 (3) (*cf. Kyle v City of New York*, 268 AD2d 192, 199 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]).

LABOR LAW §§ 200 & 241 (6) and COMMON-LAW NEGLIGENCE

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a

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[4] These facts also serve as an additional ground warranting dismissal of the Labor Law §§ 200, 241 (6) and common-law negligence causes of action as against Poko Management Corp. (*see Reyes*, 173 AD3d at 571).

violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, plaintiff, in his bill of particulars, premises his section 241 (6) cause of action on violations of Industrial Code sections 12 NYCRR 23-1.5, 23-1.7 (b), (d), (e) (1) & (e) (2), 23-1.15, 23-1.16, 23-1.16 (a) & (b), 23-1.17, 23-1.21, 23-1.21 (b) (1), (b) (3) (i), (b) (4) (ii), & (b) (4) (iv), 23-5, and 23-9.6. Defendants have demonstrated, prima facie, that sections 12 NYCRR 12 NYCRR 23-1.5, 23-1.7 (b), (e) (1) & (e) (2), 23-1.15, 23-1.16, 23-1.16 (a) & (b), 23-1.17, 23-1.21, 23-1.21 (b) (1), (b) (3) (i), (b) (4) (ii), & (b) (4) (iv), 23-5 and 23-9.6. are inapplicable to the facts herein and/or were not violated under these subject facts. Plaintiff has abandoned reliance on those sections by failing to address them in his moving and opposition papers (*see Pita*, 156 AD3d at 835; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]) and by failing to identify many of the specific subdivisions of those sections that are alleged to have been violated (*see Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 441 [1st Dept 2018]).

In opposing the motions by defendants, plaintiff only specifically addresses the applicability of 12 NYCRR 23-1.7 (d), which addresses slipping hazards. Defendants have demonstrated, prima facie, that section 23-1.7 (d) was not violated here in that, as shown by plaintiff's deposition testimony, the form and the oil or like substance, with which it was coated to prevent it from rusting, were integral to the work, and may not be considered a

"foreign substance" or "debris" within the meaning of that section (*see Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215 [2d Dept 2017]; *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 789-790 [2d Dept 2008], *lv denied* 12 NY3d 709 [2009]). As plaintiff has failed to submit evidentiary proof demonstrating the existence of a factual issue relating to section 23-1.7 (d), defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action.

Turning to the portions of defendants' motions addressed to plaintiff's common-law negligence and Labor Law § 200 causes of action, when such claims arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 635-636 [2d Dept 2010]). Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Pucciea*, 57 AD3d 54, 61 [2d Dept 2008]). However, the common-law and section 200 "duty to provide employees with a safe place to work does not extend to hazards

that are part of, or inherent in, the very work the employee is to perform" (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]; *see Hansen v Trustees of M.E. Church of Glen Cove*, 51 AD3d 725, 726 [2d Dept 2008]; *see also Gasper v Ford Motor Co.*, 13 NY2d 104, 110-111 [1963]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434-435 [1st Dept 2013]).

Here, plaintiff slipped and fell on the framing, the very work he was installing at the time of his accident. Under such circumstances, the hazard presented by walking on the framing was inherent in the work, and cannot be deemed to constitute a dangerous property condition (*see Annicaro*, 98 AD3d at 544; *Bombero v NAB Constr., Corp.*, 10 AD3d 170, 171-172 [1st Dept 2004]; *see also Gasper*, 13 NY2d at 111 [where the structural item at issue is safe for its intended purpose, liability cannot rest on a plaintiff's use of that structure for an unintended use]). As such, recovery against defendants "cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (*Ross*, 81 NY2d at 505; *see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018]) and the deposition testimony of plaintiff and the other witnesses demonstrates, prima facie, that defendants did not exercise more than general supervisory authority over the injury producing work (*see Poulin*, 166 AD3d at 670-673; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2015]; *Sanchez v Metro Builders Corp.*, 136 AD3d 783, 787 [2d Dept 2016]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]). As plaintiff has failed to present evidentiary proof

demonstrating an issue of fact with respect to the existence of a dangerous property condition or defendants' supervision and control of the work, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action.

INDEMNIFICATION, CONTRIBUTION AND INSURANCE

Turning first to 1501 Pitkin's contractual indemnification claims, "[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" and it can demonstrate that it is free from negligence (*Cuellar v City of New York*, 139 AD3d 996, 998 [2d Dept 2016] [internal quotation marks omitted]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 722 [2d Dept 2011], *lv denied* 20 NY3d 856 [2013]; *see also Marulanda v Vance Assoc., LLC*, 160 AD3d 711, 712 [2d Dept 2018]; *Mohan v Atlantic Court, LLC*, 134 AD3d 1075, 1078 [2d Dept 2015]; General Obligations Law § 5-322.1).

Here, the Owner Defendants have demonstrated that they were not negligent in view of the dismissal of the Labor Law § 200 and common-law negligence causes of action as against them, and have, with the affidavit of Richard Olson, produced a copy of the general contract. This general contract includes a form document identified as AIA Document A101-2007, dated December 30, 2015 (GC Contract),[5] that adopts by reference AIA Document

[5] By its plain terms, this December 30, 2015 GC Contract and the documents it adopts by reference constitute the entire agreement amongst the parties and supersedes all prior agreements (GC Contract, Article 1). As such, although the prior agreement amongst 1501 Pitkin, Poko Builders, LLC, and Poko Core Builders, LLC, dated January 1, 2014 adopted by

A201-2007 (AIA A201) and, in doing so, adopts the indemnification provisions contained therein.[6] The indemnification provision contained in sections 3.18.1 and 3.18.1.1 of AIA A201 broadly requires the Poko Defendants to indemnify 1501 Pitkin and its "constituent advisors, partners, employees, agents, representatives, trustees, stockholders, officers and directors, parents, subsidiaries and affiliates" from any "claims costs" and "expenses, including attorneys' fees . . . resulting from or arising out of . . . the performance of the work." In view of this broad language, the owner, 1501 Pitkin is entitled to contractual indemnification from the Poko Defendants despite the fact that the Poko Defendants were not themselves negligent (*see Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 413-414 [1st Dept 2019]; *Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 950, 954 [2d Dept 2018]; *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 491 [1st Dept 2018]; *De Souza v Empire Trans. Mix Inc.*, 155 AD3d 605, 606-607 [2d Dept 2017]).

On the other hand, issues of fact as to whether Poko Management Corp. was an intended beneficiary of the indemnification provisions of the contract with the Poko

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reference a January 15, 2013 indemnification and insurance agreement, this January 15, 2013 agreement is not referenced in the December 30, 2015 document, and is thus not part of the contract in effect as of the date of plaintiff's accident on January 26, 2016.

[6] In the hard copy of the Owner Defendants' papers submitted to the court, the copy of AIA Document A201-2007 that was appended to Olson's affidavit was not part of Exhibit 2 of his affidavit that Olson identified as the contract between 1501 Pitkin and the Poko Defendants, but rather was included as a "Exhibit T - Part 2." In the e-filed version of Olson's affidavit, which was marked as corrected as of June 4, 2019, the day after the initial e-filing of the motion, the AIA Document A201-2007 is attached to the affidavit as part of the Exhibit 2 documents that was identified by Olson as the contract documents at issue. The court notes that the Poko Defendants have made no argument that this version of AIA Document A201-2007 is not the version entered into by the parties to the contract.

Defendants precludes summary judgment in favor of Poko Management Corp. The above noted provision includes 1501 Pitkin's "agents," "representatives," and "affiliates" as entities that are entitled to indemnification but provides no definition of those terms. In the absence of definitions for these terms, it is unclear whether Poko Management Corp. may be considered an agent or representative for purposes of section 3.18.1 of AIA A201 given that, while it may have acted as an agent or representative with respect to the tenants in the building, it played no role with respect to the construction work at issue in the contract. In addition, the use of the word "affiliates" presents ambiguities as to the parties' intent given the varying definitions of the term and conflicting case law as to whether the common or, at least, overlapping ownership and management of 1501 Pitkin and Poko Management Corp., as testified to by Olson at his deposition, would, in and of itself, demonstrate that they may be considered affiliates for purposes of section 3.18.1 of AIA A201 (*see Omnicom Group, Inc. v 880 West Long Lake Assoc.*, 504 Fed Appx 487, 490-492 [6th Cir 2012] [finding use of term affiliates ambiguous]; *see also Veduzco-Soto v Georgia Props., Inc.*, 26 Misc 3d 1222 [A], 2010 NY Slip Op 50215, *2 [U] [Sup Ct, Bronx County 2010]; *compare Securus Technologies Inc. v Global Tel*Link Corp.*, 676 Fed Appx 996, 999-1000 [Fed Cir 2017] [common ownership may make out affiliate status] *with Travelers Indemn. Co. v United States*, 543 F2d 71, 76 [9th Cir 1976] [common ownership, in and of itself, insufficient]).[7]

[7] The court notes that the dismissal of plaintiff's claims as against Poko Management Corp. has not rendered Poko Management Corp.'s contractual indemnification claims moot in that, if it is an intended beneficiary of the indemnification provision, it would be entitled to costs and attorneys' fees associated with defending the action (*see Burns v Lecesse Constr. Servs. LLC*,

The portion of the Owner Defendants' motion that seeks common-law indemnification and contribution from the Poko Defendants is denied as there is no evidence in the record suggesting that the Poko Defendants were actively at fault with respect to plaintiff's accident (*see Duncan v 112 Atlantic Realty, LLC*, 163 AD3d 769, 770 [2d Dept 2018]; *Troia v City of New York*, 162 AD3d 1089, 1092-1093 [2d Dept 2018]; *Castillo v Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 795-796 [2d Dept 2018]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

The portion of the Owner Defendants' motion with respect to the insurance procurement provisions must also be denied as the Owner Defendants have not presented any evidentiary proof demonstrating, prima facie, that the Poko Defendants failed to obtain the insurance required by the contract (*see Tingling v C.I.N.H.R., Inc.*, 74 AD3d 954, 955-956 [2d Dept 2016]; *Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2d Dept 2009]).

As the portion of the Owner Defendants' motion with respect to 1501 Pitkin's contractual indemnification claim as against the Poko Defendants was granted, and 1501 Pitkin only requested relief as against Everlast and Devine in the alternative, the court will not reach the portion of the motion relating to 1501 Pitkin's requests for relief as against Everlast and Devine. The portion of the Owner Defendants' motion in which Poko Management Corp. requests summary judgment on its third-party claims against Everlast and Devine is denied for the reasons stated with regard to Everlast and Devine's respective motions. Finally, with respect to the Owner Defendants, as they have demonstrated that they

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130 AD3d 1429, 1435 [4th Dept 2015]; *Hennard v Boyce*, 6 AD3d 1132, 1133-1134 [4th Dept 2004]; *see also McCoy v Medford Landing L.P.*, 164 AD3d 1436, 1439 [2d Dept 2018]).

were not negligent and did not exercise more than general supervision over the work, they are entitled to dismissal of the cross claims and counterclaims for common-law indemnification and contribution as against them (*see Duncan*, 163 AD3d at 770; *Troia*, 162 AD3d at 1092-1093; *Castillo*, 159 AD3d at 795-796; *see also McCarthy*, 17 NY3d at 377-378).

Turning to Poko Defendants' motion, they have demonstrated their prima facie entitlement to contractual indemnification from Everlast based on their showing that they were not negligent and the broad language of the indemnification provision contained in the "Addendum to Short Form Contract" (Indemnification Addendum), dated December 16, 2015, between Poko Core Builders, LLC, and Everlast. This provision entitles the Poko Defendants to contractual indemnification from Everlast despite the fact that Everlast has demonstrated that it was not negligent (*see Ajche*, 171 AD3d at 413-414; *Sullivan*, 162 AD3d at 954; *Licata*, 158 AD3d at 491; *De Souza*, 155 AD3d at 606-607).[8] Since Everlast has failed to demonstrate the existence of a factual issue in this respect, the Poko Defendants are entitled to summary judgment on their contractual indemnification claims against Everlast.

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[8] Section 1 of the Indemnification Addendum provides that Everlast is required to defend and indemnify the "Contractor" against all liability or claimed liability "arising ou[t] of or resulting from the Work covered by the Contract Agreement to the extent that such Work was performed by or cont[r]acted through the Subcontractor." Although Poko Builders, LLC, was not a party to Poko Core Builders LLC's contract with Everlast, and is not otherwise identified as a "contractor" in the indemnification provision itself, it is specifically identified as a beneficiary of the indemnification provision by way of its inclusion in the "List of Indemnified Parties and Additional Insureds" that is included following section 2.6 of the Indemnification Addendum.

The Poko Defendants' motion must be denied with respect to their common-law indemnification claims against Everlast, since there is no evidence in the record suggesting that Everlast was actively at fault with respect to plaintiff's accident (*see Duncan*, 163 AD3d at 770; *Troia*, 162 AD3d at 1092-1093; *Castillo*, 159 AD3d at 795-796; *see also McCarthy*, 17 NY3d at 377-378).

Poko Core Builders, LLC, is entitled to conditional summary judgment with respect to its contractual indemnification claim against Devine. While Devine asserts that Poko Core Builders, LLC, did not enter into a contract with Devine entitling it to contractual indemnification from Devine, given the fact that there are no other entities involved with the project that contained "Core" as part of their names, the identification of "Core" as the owner in the contract between Everlast and Devine sufficiently identifies Poco Core Builders, LLC, as an intended beneficiary of that indemnification provision. Contrary to Devine's arguments, Poko Core Builders, LLC's position that plaintiff was the sole proximate cause of the accident does not preclude its indemnification claim against Devine because, under the language of the provision contained in Article 7 of Devine's contract with Everlast, Devine's obligation to indemnify extends to "any negligent act or omission of [Devine] or any of its agents, employees, or subcontractors" and thus includes any comparative fault of plaintiff, one of its employees (*see Padovano v Costco Wholesale Corp.*, 28 AD3d 729, 730 [2d Dept 2006]; *Turisse v Dominick Milone, Inc.*, 262 AD2d 305, 306 [2d Dept 1999]; *Schaefer v RCP Assoc.*, 232 AD2d 286, 286 [1st Dept 1996]; *see also Torres v Love Lane Mews, LLC*, 156

AD3d 410, 411 [1st Dept 2017]). Devine's argument that it has no duty to indemnify because it was not negligent since plaintiff was provided with proper equipment, and, in effect, supervised his own work, must likewise be rejected as such an argument, even if true, fails to account for factual issues with respect to plaintiff's own fault.

The portion of the Poko Defendants' motion as it relates to Poko Builders, LLC's claim for contractual indemnification from Devine is denied as nothing in Everlast's contract with Devine suggests that Poko Builders, LLC, was an intended beneficiary of that contract's indemnification provision.

However, as the Poko Defendants have demonstrated that they were not negligent and did not exercise more than general supervision over the work, they are entitled to dismissal of the cross claims and counterclaims for common-law indemnification and contribution as against them (*see Duncan*, 163 AD3d at 770; *Troia*, 162 AD3d at 1092-1093; *Castillo*, 159 AD3d at 795-796; *see also McCarthy*, 17 NY3d at 377-378).

With respect to Everlast, it has demonstrated its entitlement to summary judgment dismissing all of the contribution and common-law indemnification causes of action against it based on its showing that it was not actively negligent. It has also demonstrated its entitlement to dismissal of the contractual indemnification claim by Poko Management Corp. based on the fact that Poko Management Corp. is not identified as an intended beneficiary of the indemnification provision contained in the Indemnification Addendum between Poko Core Builders, LLC, and Everlast. Finally, Everlast is entitled to dismissal of the breach of

insurance procurement provision claims against it by way of its submission of a copy of its general liability policy that demonstrates, prima facie, that it obtained the coverage required by the insurance procurement requirements of the Indemnification Addendum between it and Poko Core Builders, LLC, and the failure of any party to demonstrate the existence of a factual issue in this respect.

Devine is entitled to summary judgment dismissing the third-party claims of the Poko Defendants and the Owner Defendants and the cross claim of Everlast for breach of contract for failure to obtain insurance coverage through its submission of its contract with Everlast, which demonstrates that it owed no duty to obtain insurance benefitting the Owner Defendants and Poko Builders, LLC, and by way of its submission of a copy of its general liability policy that demonstrates that it obtained the coverage required by the insurance procurement requirements of the contract between it and Everlast. The copy of Devine's contract with Everlast also demonstrates Devine's entitlement to dismissal of the Owner Defendants and Poko Builders LLC's contractual indemnification claims because they are not identified as parties Devine must indemnify in that contract.[9] Devine is also entitled to dismissal of all of the contribution and common-law indemnification claims against it through its demonstration that plaintiff was its employee and did not suffer a grave injury (*see Gurewitz v City of New York*, 175 AD3d 658, 665 [2d Dept 2019]; *McDonnell v*

[9] While the indemnification provision provides for indemnification of the "owner," "Core," not 1501 Pitkin, is identified as the owner in the contract (*see Crimi v Neves Assoc.*, 306 AD2d 152, 153 [1st Dept 2003]).

Sandaoro Realty, Inc., 165 AD3d 1090, 1097 [2d Dept 2018]; Workers' Compensation Law § 11). Devine's motion is denied only with respect to Everlast and Poko Core Builders, LLC's contractual indemnification claims for the reasons discussed above with respect to the granting of Poko Core Builder, LLC's motion for conditional summary judgment on its contractual indemnification claim as against Devine.

This constitutes the decision and order of the court.

ENTER,

J. S. C.
Hon. [illegible]
Justice of the Supreme Court

KINGS COUNTY CLERK
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