

<b>Carter v Empire State Realty Trust Inc.</b>
2020 NY Slip Op 31082(U)
April 29, 2020
Supreme Court, New York County
Docket Number: 153276/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

VAN CARTER,
Plaintiff,

- v -

EMPIRE STATE REALTY TRUST INC.,
SPK/LEWIS, INC.,
Defendant.

INDEX NO. 153276/2016
MOTION DATE 01/15/2020, 01/15/2020, 01/15/2020
MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

-----X

SPK/LEWIS, INC.
Plaintiff,

Third-Party
Index No. 595652/2016

-against-

PRECISION INTERIOR CONSTRUCTION CORP.
Defendant.

-----X

EMPIRE STATE REALTY TRUST INC.
Plaintiff,

Second Third-Party
Index No. 595667/2019

-against-

PRECISION INTERIOR CONSTRUCTION CORP., WDFG
NORTH AMERICA LLC
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 81, 82, 83, 84, 85, 86, 88, 94, 95, 96, 97, 98, 140, 152, 153, 155, 156, 157

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 87, 89, 90, 91, 92, 99, 103, 104, 124, 125, 126, 141, 149, 150

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 118, 119, 120, 121,

122, 123, 127, 138, 142, 143, 144, 145, 146, 147, 148, 151

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order awarding him partial summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) claims. Defendant Empire State Realty Trust Inc. (Empire) opposes. By notice of cross motion, defendant/third-party plaintiff SPK/Lewis, Inc. (SPK) cross-moves pursuant to CPLR 3212 for an order awarding it partial summary judgment on plaintiff's Labor Law §§ 200 and 241(6) claims, and third-party defendant Precision Interior Construction Corp. (Precision) cross-moves pursuant to CPLR 3212 for an order awarding it partial summary judgment on plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims. Plaintiff opposes. (Motion seq. 003).

By notice of motion, SPK moves pursuant to CPLR 3212 for an order awarding it summary judgment on its third-party claims against Precision. Precision opposes. (Motion seq. 004).

By notice of motion, SPK moves pursuant to CPLR 3212 for an order awarding it summary judgment as to plaintiff's Labor Law § 240(1) claim. Plaintiff opposes. By notice of cross motion, second third-party defendant WDFG North America, LLC (WDFG) cross-moves pursuant to CPLR 3212(f) for an order holding all summary judgment motions in abeyance until the completion of discovery and denying plaintiff's motion for summary judgment on his Labor Law §§ 240(1) and 241(6) claims. (Motion seq. 005).

### I. BACKGROUND

SPK and WDFG entered into a contract whereby SPK was hired to "provide all labor, materials, supervision, equipment, machinery, tools, services and insurance necessary" and to "maintain good order and discipline among its employees, subcontractors, suppliers and others"

at a gift shop renovation project on the 80th floor of the Empire State Building. Empire, the building's owner, leases the gift shop space to WDFG. SPK thereby also agreed to:

be responsible for all injury or damages of any kind, including damage to existing facilities or property, or to the work of other contractors or subcontractors working on the Project, resulting from Contractor's Work or activities, and Contractor shall indemnify and hold the Owner and Owner's landlord harmless from any loss there from. The Contractor shall be solely responsible for all means, methods, techniques, and sequences involved in performing the Work.

In conjunction with these duties and responsibilities, SPK agreed to comply with "all federal, state and local statutes, ordinances, codes, rules and regulations," as well as with "all statutory, contractual and landlord safety requirements." (NYSCEF 70).

SPK then contracted with Precision to complete work on the project. That contract provides that:

To the fullest extent permitted by law, Subcontractor shall defend, indemnity [sic] and hold harmless Owner, Contractor, Architect, and consultants, agents and employees of any of them (individually or collectively, "indemnitee") from and against all claims, damages, liabilities, losses and expenses, including but not limited to attorneys' fees, arising out of or in any connected with the performance on [sic] lack of performance of the work under the agreement and any change order or additions to the work included in the agreement, provided that such claim, damage, liability, loss or expense is attributable to bodily injury, sickness, disease or death, or physical injury to tangible property including loss of use of that property, or loss of use of tangible property that is not physically injured, and caused in whole or in part by any actual or alleged:

- Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or
- Violation of any standard duty, regulation, ordinance, rule or obligation by an Indemnitee, provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack [of] performance of the work under the agreement.

The Subcontractor's obligations under this contract shall apply regardless of whether or not any such claim damage, liability, loss or expense is or may be attributable to the fault or negligence of the Subcontractor.

In the event that an Indemnitee is determined to be any percent negligent pursuant to any verdict or judgment, then, in addition to the foregoing, Subcontractor's obligation to indemnify the Indemnitee for any amount, payment, judgment, settlement, mediation or

arbitration award shall extend only to the percentage of negligence of the Subcontractor and anyone directly or indirectly engaged or retained by it and anyone else for whose acts the Subcontractor's [sic] is liable.

(NYSCEF 71).

An incident report dated April 5, 2016, reflects that plaintiff, a construction worker employed by Precision, while working on the 80th floor WDFG construction project that day, fell off a ladder that was on top of a rolling scaffold. In the report, it is alleged that the scaffold's wheels were unlocked or unsecured as plaintiff's colleague had rolled the scaffold into place and then walked away. In another accident/incident report, a supervisor recounts that on April 5, 2016, plaintiff was injured when installing sheetrock on top of a baker's scaffold., although he did not see the accident. He provided the same information on an OSHA injury and illness incident report. (NYSCEF 67).

At his deposition, plaintiff testified that on the day of his accident, another Precision carpenter, who was in charge and from whom plaintiff received his instructions at the site, directed him to install, at an elevation of at least 20 feet, sheetrock around some pipes along a wall. Plaintiff brought his own tools to the site and was given no protective equipment. No safety meeting was held before work began.

Plaintiff was assigned a partner at the site, who was to hand him materials while he was on the scaffold, which was eight feet tall and had no safety railings. While at trade school, plaintiff had learned about scaffolds, including that those taller than six feet require safety railings. Plaintiff thus asked other workers whether safety railings were available and was told no. The scaffold was brand new, and although it had warning labels, plaintiff did not read them.

The first time plaintiff climbed the scaffold the day of his accident, he saw that all four wheels were locked, which permitted him to climb onto it. On top of the scaffold was a closed

six-foot A-frame ladder leaning against the soffit of the entrance to the gift shop. He did not read the warning labels on the ladder, although he was aware that they included a warning not to step onto the top step.

Plaintiff worked while standing on the ladder in the closed position. After finishing in one area, plaintiff laid the ladder down on the scaffold, and his partner rolled the scaffold, with plaintiff on it, to the next location where the partner locked the wheels. Plaintiff could hear and feel the wheels locking. At the second location, plaintiff was not properly positioned, requiring that his partner move the scaffold. His partner repeatedly acknowledged plaintiff's reminders to lock the wheels, but at the third location, he did not do so. Plaintiff thought he had felt and heard the wheels lock, and although he could not verify it, he repositioned the ladder on top of the scaffold. His partner handed him a piece of sheetrock, and then left to cut additional pieces. Plaintiff then stepped on the ladder in the closed position, and the scaffold slipped from underneath him and the ladder, causing him to fall and sustain injury.

When shown a surveillance video of the accident, plaintiff confirmed that it fairly and accurately depicted the accident and he identified himself in the video on top of the scaffold and ladder. (NYSCEF 63).

At his deposition, plaintiff's partner testified that at the time of the accident, there was a Precision foreman on site, who gave him instructions, and a supervisor from SPK, who was the "top person" on the site. No one from Empire was on site nor did Empire provide him with tools or equipment. He and plaintiff set up the scaffold, which he estimated to be six feet tall. Scaffolds higher than approximately four or five feet require safety railings, although no one at the site had told him not to use the scaffold without safety railings.

According to plaintiff's partner, the safety railing on site could not be installed onto the

scaffold due to the presence of duct work. Thus, to install it, the scaffold would have to be disassembled, moved, and then reassembled. Plaintiff's partner did not recall the specific reason why they did not put the safety railing up once the scaffold was moved, even though they could have. He had worked with plaintiff on other Precision projects, and on two occasions, plaintiff used a ladder on top of a scaffold, but was told by his supervisor not to do so. Although a 10-foot ladder would have obviated the need to put a ladder on the scaffold, there was none at the site.

Plaintiff's partner does not remember being asked to lock the wheels while plaintiff was on the scaffold. Although he first testified that he had locked the wheels, he later testified that he did not remember whether he had done so before leaving to cut the sheetrock. Nor did he see the accident, but he saw plaintiff as he was about to hit the ground. Before the accident, he had rolled the scaffold to the location and confirmed that plaintiff was working on a closed A-frame ladder on top of the scaffold. Plaintiff was not wearing a hard hat. When asked if the surveillance video depicted the accident, he could only identify himself, the Precision foreman, and an SPK supervisor who was attending to plaintiff after his fall. (NYSCEF 66).

At his deposition, SPK's vice president testified that he first became aware of plaintiff's accident when SPK's site supervisor called him that same day. Although the supervisor was at the site daily and responsible for monitoring site safety, all workers are responsible for their own safety and no person from any company performed safety management other than SPK's supervisor. Additionally, SPK's vice president visited the site and addressed safety violations he had witnessed by bringing it to the attention of the individual worker, SPK's site supervisor, and/or the subcontractor's foreperson. SPK's site supervisor would conduct a weekly informal meeting with the forepersons from the various subcontractors, workers, and sometimes, site owners, and these meetings would include discussions of safety. SPK did not provide the ladders

or scaffold for the project, and hardhats were not required. The vice president was unaware any work stoppage by SPK due to an observed unsafe condition attributable to Precision, although it had the power to do so. (NYSCEF 65).

At his deposition, Empire's assistant director of operations testified that Empire owns the Empire State Building, and WDFG is a tenant. He is unaware of any Empire employees being assigned to monitor the construction. (NYSCEF 64).

In his supplemental bill of particulars, plaintiff alleges, among other things, to have sustained injury to his head and brain, including "[c]losed head trauma with post-concussion syndrome." (NYSCEF 62).

## II. MOTION SEQ. 003

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

### A. Labor Law § 200

In his reply and opposition to the cross motions, plaintiff concedes that he has no cause of action for Labor Law § 200 or common law negligence. (NYSCEF 96).

B. Labor Law § 240(1)

1. Contentions

a. Plaintiff (NYSCEF 59)

Plaintiff contends that he is entitled to summary judgment on his Labor Law § 240(1) claim because the unsecured scaffold and ladder were inadequate to protect him from an elevation-related hazard, and he was not provided with proper safety devices, such as a safety harness or lanyard, to prevent his fall. He denies having been the sole proximate cause of his injuries or that he was recalcitrant, absent evidence that he was instructed or directed by a supervisor to not work from the ladder or scaffold or that he misused them. At most, plaintiff asserts, that he climbed the ladder without ensuring that the wheels were locked renders him comparatively negligent, which is not a defense to a Labor Law § 240(1) claim.

In support, plaintiff submits a surveillance video dated April 5, 2016, which he asserts, depicts him on top of a closed A-frame ladder on top of a scaffold. When he steps on to the ladder, the wheels of the scaffold turn and the scaffold rolls out from under him and the ladder, causing both to fall. After, the other workers in the area rush over to him. (NYCEF 68).

b. SPK (NYSCEF 82)

In its opposition and cross motion, SPK does not address Labor Law § 240(1).

c. Empire (NYSCEF 84)

Empire contends that plaintiff was the sole proximate cause of his accident, given his testimony that he misused the A-frame ladder on the scaffold in the closed position.

d. Precision (NYCEF 86)

Precision argues that an issue of fact as to whether plaintiff was a recalcitrant worker precludes summary judgment on his Labor Law § 240(1) cause of action and observes that

plaintiff had attended safety meetings regarding scaffolds and fall protection, that supervisors told him not to use the ladder on the scaffold, and that he was provided with a safety railing to use on the scaffold but chose not to. As plaintiff was given safety instructions but ignored them, Precision denies that he is entitled to summary judgment on his Labor Law § 240(1) cause of action.

e. Plaintiff's reply (NYSCEF 94-96)

As SPK does not oppose his motion to the extent that he seeks partial summary judgment on his Labor Law § 240(1) cause of action, plaintiff contends that SPK concedes his entitlement to summary judgment on it.

Plaintiff denies having been a recalcitrant worker or the sole proximate cause of his accident absent evidence that he had deliberately refused to obey a direct and immediate instruction to avoid an unsafe work practice. Even had he, his claim is not thereby barred by his alleged violation of the "standing order" that he not use a ladder on the scaffold. In any event, he asserts that whether he is a recalcitrant worker is immaterial, as defendants failed to furnish adequate safety devices to protect him from an elevation hazard. He observes that there is no evidence that anyone at the worksite instructed him to install safety railings or that he knew if or where they were readily available. Likewise, there is no evidence that he knew not to use a closed A-frame ladder on top of a scaffold or that he had been told not to do so. He concedes at most comparative negligence but contends that even if he was negligent for using the A-frame ladder in the closed position, he is not the proximate cause of his accident, as the failure to lock the wheels also constitutes a proximate cause.

f. Precision's reply (NYSCEF 155)

In reply, Precision offers the affidavit of its field supervisor at the construction site in

April 2016 who states that all workers had been told that equipment needed for the job was accessible when needed from the same area for the duration of the project and that plaintiff was specifically told that scaffolds tall enough for his work, with locking wheels and safety railings, were available. Thus, he asserts, “[t]here was no reason for [plaintiff] to put a ladder on top of a scaffold to do his work.” (NYSCEF 156).

## 2. Analysis

Pursuant to Labor Law § 240(1):

All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) “was designed to prevent those types of accidents in which the scaffold, 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 an object or person.” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute protects workers against “‘special hazards’ that arise when the work site is either elevated or positioned below the level where ‘materials or load [are] hoisted or secured.’” The special hazards are “limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.” (*Ross*, 81 NY2d at 502). The statute thus imposes a “‘flat and unvarying’ duty upon the owner and contractor despite any contributing culpability on the part of the worker” (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work

performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Liability under Labor Law § 240(1) requires a showing that either safety equipment was provided but was defective or that no equipment was provided and should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

Plaintiff's deposition and that of others, as well as the surveillance video, demonstrate, *prima facie*, that defendants violated the statute by failing to provide him with a scaffold that was secured and offered proper protection. The wheels of the scaffold were not locked, plaintiff was not provided with a harness, another fall-prevention device, or equipment sufficient to reach his work space, as neither the ladder nor the scaffold were tall enough on their own, and there were no other ladders or scaffolds available. (*See e.g., Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004] [*prima facie* case established where plaintiff fell off closed A-frame ladder on top of unlocked baker scaffold with no safety railings]; *Miranda v NYC P'ship Hous. Dev. Fund Co.*, 122 AD3d 445, 445 [1st Dept 2014] [plaintiff who fell from A-frame ladder on top of scaffold entitled to summary judgment as defendants failed to provide adequate safety device]; *Chlebowski v Esber*, 58 AD3d 662, 662 [1st Dept 2009] [plaintiff who fell from closed ladder on top of scaffold entitled to summary judgment where defendants provided no safety devices]).

Contrary to defendants' contentions (*see infra* at II.C.2.a), plaintiff authenticated the

surveillance video during his deposition. (*See People v Patterson*, 93 NY2d 80, 84 [1999] [“a videotape may be authenticated by the testimony of a witness to the recorded events ... that the videotape accurately represents the subject matter depicted]). That his partner does not remember whether the video accurately depicts the events has no impact on its authenticity.

As plaintiff satisfies his *prima facie* burden, defendants must demonstrate the existence of triable issues of fact. That SPK does not oppose plaintiff’s motion for summary judgment on his Labor Law § 240(1) claim does not preclude the other defendants, including Precision, from raising an issue of fact. (*See Way v George Grantling Chemung Contracting Corp.*, 289 AD2d 790, 792 [3d Dept 2001] [observing that CPLR 3212(b) permits any party to raise an issue of fact]).

Where adequate safety devices were made available by a defendant to the plaintiff, if the plaintiff was instructed to use them and failed to follow the instructions, he or she cannot recover, even if the instructions had been given weeks before the accident. (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 37 [2004]). However, absent the provision of adequate safety devices, the plaintiff may recover even if he had been previously instructed not to use the ladder on the scaffold and misused the ladder by climbing on it in the closed position. (*See Miranda*, 122 AD3d at 446 [as plaintiff not provided with adequate safety device, he was not “sole proximate cause” or “recalcitrant worker”]). And plaintiff’s alleged awareness of the availability of scaffolds of adequate height pertains solely to his possible comparative negligence, which raises no factual issue.

In any event, the partner’s failure to fulfill his responsibility of ensuring that the wheels of the scaffold were locked constitutes another proximate cause of plaintiff’s accident. (*See Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 403 [1st Dept 2017], *lv dismissed* 29 NY3d

1100 [2017] [“comparative negligence is not a defense to a Labor Law § 240(1) claim”]; *see e.g.*, *Torres*, 12 AD3d at 261-262 [plaintiff’s coworker’s failure to ensure that scaffold secured was a proximate cause of accident, entitling plaintiff to partial summary judgment]). While the partner’s inconsistent testimony as to whether he had locked the wheels cannot be resolved on this motion (*see Cosme v City of New York*, 20 AD3d 320, 322 [1st Dept 2005] [court may not resolve ambiguities and apparent contradictions in witness’s testimony so as to clarify and render unclear and imprecise testimony]), the surveillance tape demonstrates conclusively that the wheels were not locked (*see e.g.*, *McFeely v Mercy Hosp. of Buffalo*, 177 AD3d 1279, 1280 [4th Dept 2019] [plaintiff’s deposition testimony that stairs were same or similar in color did not raise issue of fact where surveillance video reflected otherwise]).

#### C. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor’s lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating that the defendant violated a regulation setting forth a specific standard of conduct, the plaintiff must show that the

alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

1. 12 NYCRR §§ 23-5.1(j) and 23-5.18(b)  
Safety railings for scaffold platforms

a. Contentions

Plaintiff contends that 12 NYCRR §§ 23-5.1(j) and 23-5.18(b) were violated because the scaffold platform he used had no safety railings and there is no evidence that he was provided with a safety harness, tie off, lanyard, or other fall-prevention device. (NYSCEF 59).

SPK contends that there is an issue of fact as to whether 12 NYCRR § 23-5.1(j) applies, because there is contradictory testimony as to whether the scaffold was seven feet tall or less. In addition, both regulations are inapplicable, SPK asserts, as the workers had access to a safety railing, but declined to install it due to inconvenience. SPK references the testimony of plaintiff's partner that there was no reason that the safety railings could not have been used, and thus, plaintiff was negligent. (NYSCEF 82). According to Empire, the regulations are inapplicable absent any allegation that the accident was caused by a lack of safety railings, and even if applicable, plaintiff was comparatively negligent by failing to install the readily available safety railings. (NYSCEF 84). Precision adopts SPK's and Empire's arguments. (NYSCEF 86). In reply, plaintiff maintains that the availability of safety railings is irrelevant, absent any dispute that they were not constructed and installed in compliance with the regulations. In addition, he argues, he need not be completely free from negligence in order to be entitled to summary judgment. Plaintiff also asserts that having testified that the scaffold was eight feet tall, he is entitled to summary judgment, notwithstanding contradictory testimony from his partner. Moreover, plaintiff observes that no evidence is offered that he was instructed to install the safety

railings or that it was his responsibility to do so. (NYSCEF 94-96).

b. Analysis

As section 12 NYCRR § 23-5.1(j) does not apply to scaffolds that are seven feet high or less, plaintiff demonstrates, *prima facie*, a violation of this rule. As the contradictory testimony of plaintiff and his partner as to the height of the scaffold cannot be resolved on this motion (*see Jeffrey v DeJesus*, 116 AD3d 574, 575 [1st Dept 2014] [credibility issues are to be resolved by factfinder]), an issue of fact exists.

While it is undisputed that the scaffold lacked safety railings at the time of plaintiff's accident and that such evidence constitutes, *prima facie*, a violation of section 23-5.18(b), for a defendant to be liable under Labor Law § 241(6), it must not only have violated the industrial code, but such violation must have proximately caused the plaintiff's injuries. (*Ares v State*, 80 NY2d 959, 960 [1992]). Consequently, notwithstanding the lack of safety railings, plaintiff fails to demonstrate, *prima facie*, how safety railings would have prevented him from sustaining injuries after falling off the ladder on top of the scaffold. (*See Biafora v City of New York*, 27 AD3d 506, 508 [2006]) [plaintiff must establish how compliance with provision would have prevented accident]).

2. 12 NYCRR § 23-5.18(g)

*Scaffold shall rest upon stable footing and have locked wheels when in use*

a. Contentions

Plaintiff contends that 12 NYCRR § 23-5.18(g) was violated because the wheels were unlocked at no fault of his own. And even if he was at fault, it poses no bar to his entitlement to partial summary judgment on liability. (NYSCEF 59).

SPK argues that in light of the contradictory testimony as to whether the wheels were locked, an issue of fact exists, and that plaintiff cannot rely on the videotape as it has not been

authenticated absent an affidavit attesting to its authenticity and accuracy. (NYSCEF 82).

Empire asserts that plaintiff was the sole proximate cause of his accident, because he misused the A-frame ladder on top of the scaffold without first ensuring that the wheels were locked, and thus, he is not entitled to summary judgment. (NYSCEF 84).

Precision adopts SPK's and Empire's arguments. (NYSCEF 86).

In reply, plaintiff contends that his partner's testimony should be disregarded as incredible and self-serving, because the evidence, including the surveillance video, conclusively demonstrates that the wheels were not locked. Moreover, as the scaffold moved, it is physically impossible that the wheels were locked. As plaintiff testified that the videotape fairly and accurately depicted how the accident occurred, it is admissible. (NYSCEF 94-96).

#### b. Analysis

Plaintiff's deposition and the surveillance video, which is authenticated, demonstrate, *prima facie*, that the wheels were not locked, in violation of 12 NYCRR § 23-5.18(g). The tentative, inconsistent testimony of plaintiff's partner as to whether the wheels were locked does not raise an issue of fact given the surveillance video from which it is reasonably inferred that the wheels moved. (*See supra* at II.B.2).

### 3. Other alleged industrial code provisions

#### a. 12 NYCRR § 23-1.7

##### *Protection from general hazards*

SPK argues that plaintiff does not specify which subsections apply, and that the code in its entirety is inapplicable, as it focuses on protections from falling materials or objects. (NYSCEF 82).

Plaintiff does not dispute that this code provision is inapplicable.

b. 12 NYCRR § 23-1.8

*Personal protective equipment*

SPK argues that 12 NYCRR § 23-1.8 does not cover the fall in issue here, nor does plaintiff claim otherwise in response. (NYSCEF 82).

c. 12 NYCRR § 23-1.15

*Safety railing*

According to SPK, 12 NYCRR § 23-1.15 is inapplicable absent an allegation that the safety railings available at the work site were inadequate in size, construction, or otherwise. To the extent that plaintiff claims that this section was violated by the failure to provide safety railings, SPK contends that plaintiff was comparatively negligent by declining to use them. (NYSCEF 82).

As plaintiff alleges that he was not provided with safety railings, 12 NYCRR § 23-1.15 does not apply. (*See Dzieran v 1800 Bos. Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006] [section does not apply where plaintiff not provided with such safety devices]).

d. 12 NYCRR § 23-1.16

*Safety belts, harnesses, tail lines and lifelines*

SPK denies that this section is applicable because plaintiff was not provided with safety lines, and the failure to provide such devices does not constitute a violation of this section. SPK maintains that plaintiff did not require any of the devices enumerated in the provision. (NYSCEF 82).

This provision is inapplicable absent an allegation that plaintiff was provided with these safety devices. (*Dzieran, supra*, 25 AD3d at 337).

e. 12 NYCRR §§ 23-5.1(e) and (f)

*General provisions for all scaffolds*

Precision argues that section 23-5.1(e) does not apply absent evidence concerning the

measurements of the scaffold's planking, and that plaintiff does not claim otherwise in response. (NYSCEF 86).

Precision contends that section 23-5.1(f) is also not applicable because there is no evidence regarding the maintenance or repair of the scaffold. (NYSCEF 86). Section 23-5.1(f) provides that scaffolds "shall be maintained in good repair and every defect, unsafe condition or noncompliance with this Part (rule) shall be immediately corrected before further use of such scaffold." Merely stating that there is no evidence supporting a claim under this provisions is insufficient to meet Precision's *prima facie* burden. (*See Montemarano v Atl. Exp. Transp. Grp., Inc.*, 123 AD3d 675, 675–676 [2d Dept 2014], *lv dismissed* 32 NY3d 1141 [2019], quoting *Pace v Int'l Bus. Machines Corp.*, 248 AD2d 690, 691 [2d Dept 1998] ["a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense"]). Moreover, as plaintiff has demonstrated non-compliance with a provision of Part 23 of the industrial code (*see supra* at II.C.2.b), Precision fails to demonstrate that section 23-5.1(f) is inapplicable.

f. 12 NYCRR § 23-5.3  
*General provisions for metal scaffolds*

SPK argues that this section does not apply to mobile scaffolds, on which plaintiff was working. In addition, it observes, 12 NYCRR § 23-5.3(g) is a general safety standard that does not support a cause of action for a violation of Labor Law § 241(6). Moreover, the section addresses footings, whereas plaintiff's claims pertain to wheels, not footings. (NYSCEF 82).

As it is undisputed that plaintiff was working on a mobile scaffold, this section is inapplicable. (12 NYCRR § 23-5.3[a] ["This section applies to all scaffolds constructed of metal except mobile types"]).

### III. MOTION SEQ. 004

#### A. Contentions

##### 1. SPK (NYSCEF 76)

SPK contends that if it is held liable for plaintiff's accident, it is entitled to contractual indemnity and contribution from Precision, as Precision expressly agreed to indemnify it for liability arising from the project, and the loss in this case was not caused by its misconduct or negligence. As Precision was responsible for performing and supervising the work site, SPK asserts that it is entitled to common-law indemnity and contribution from it, and that summary judgment may be granted conditionally.

##### 2. Precision (NYSCEF 121)

Precision denies SPK's entitlement to summary judgment on its claims for contractual indemnity because SPK fails to establish that it was not negligent. It contends that SPK contractually assumed and actively exercised control over work site safety, including the safety of work performed at a height. It observes that SPK employees held safety meeting and made job site visits to ensure that work was safely performed.

Precision also contends that the indemnification provision is ambiguous in its suggestion that the obligation is triggered by injuries arising from the hired work and/or Precision's negligence. And, absent a grave injury as defined by Workers' Compensation Law § 11, it asserts that SPK's common law indemnity and contribution claims fail as it is undisputed that the accident happened while plaintiff was working for Precision.

To the extent that plaintiff claims to have sustained a "closed head trauma," Precision maintains that there must also be a showing that he is unable to work in any capacity as a result, and here, plaintiff claims to have been disabled by his orthopedic injuries, not by a closed head

trauma. Rather, it observes, SPK offers no evidence of plaintiff's injuries.

Moreover, Precision argues, SPK is not entitled to common law indemnity because SPK fails to show that it was not negligent and that Precision was negligent. Likewise, as there are issues of fact as to the degree of fault, SPK is not entitled to common law contribution.

Precision also contends that all of SPK's claims against it are barred because an insurer cannot maintain a cause of action against its own insured for a claim arising from the same risk for which the insured was covered. As both SPK and Precision are covered by the same insurance policy, SPK's claims are limited to at least the insurance policy limit.

### 3. Reply (NYSCEF 150)

SPK denies that the contractual indemnification provision is ambiguous and maintains that it obliges Precision to indemnify SPK for personal losses arising from construction work performed by Precision and its employees. It reiterates that plaintiff's injury was not caused by SPK's misconduct or sole negligence, and that summary judgment may be conditionally granted.

SPK references plaintiff's recently amended verified bill of particulars as including an allegation of traumatic brain injury, which is deemed a grave injury if plaintiff is rendered incapable of employment in any capacity, and that as discovery is ongoing as to plaintiff's brain injury, SPK cannot be found as a matter of law not to be entitled to common law indemnity or contribution until discovery is complete.

General supervisory authority is insufficient to establish control over a work site, SPK asserts, and here, there is insufficient evidence to raise an issue of fact as to whether it maintained exclusive control over Precision's employees and their work. And, as SPK's claims against Precision may be advanced for any exposure above the shared insurance coverage limits, its claims are not barred.

## B. Analysis

### 1. Contractual indemnification

As the subcontract unambiguously provides that Precision is to indemnify SPK for any claims arising from the work, but only to the extent that SPK was not negligent, and as it is undisputed that plaintiff's claims arise from the work, the provision is not only enforceable, but SPK is also entitled to a conditional award of summary judgment. (*Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508 [1st Dept 2020]). That SPK may be proved to be comparatively negligent does not preclude a conditional award of summary judgment. (*Id.*).

While an insurer has no subrogation right against its own insured for a claim arising from the risk for which the insured was covered (*Blanco v CVS Corp.*, 18 AD3d 685, 686 [2d Dept 2005], citing *N. Star Reinsurance Corp. v Cont'l Ins. Co.*, 82 NY2d 281, 294 [1993]), it nonetheless has the right to seek indemnification for judgments that exceed the limits of the insurance policy (*Mitchell v NRG Energy, Inc.*, 142 AD3d 1366, 1367 [4th Dept 2016]), and thus, SPK may be granted summary judgment for indemnification to the extent that any judgment exceeds the limit of the applicable insurance policy.

### 2. Common-law indemnification and contribution

#### a. Negligence

A party seeking common law indemnification must not only prove that it was not negligent in causing plaintiff's accident, but also that the proposed indemnitor was negligent or, if not negligent, was authorized to direct, supervise, and control the work giving rise to the injury. (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754 [2d Dept 2018]). As plaintiff's injury allegedly arose from the means and methods of his work, his use of the scaffold, SPK, as the general contractor, is liable if it "actually exercised supervisory control" over plaintiff's work.

(*Prevost v One City Block LLC*, 155 AD3d 531, 533–534 [1st Dept 2017]).

SPK has demonstrated that it did not exercise sufficient control over plaintiff's work for liability to attach, as SPK's supervisor, its sole representative on site, only monitored the site for safety, but did not direct plaintiff in how to complete his work or provide him with any equipment. (*See Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [that defendant's supervisor "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" does not demonstrate sufficient control over work]). Precision raises no issue of fact as to SPK's negligence.

While Precision's negligence has not yet been determined, a conditional grant of summary judgment may nonetheless be awarded. (*See e.g., Taddeo v 15 W. 72nd St. Owners Corp.*, 268 AD2d 468, 469 [2d Dept 2000] [granting conditional summary judgment where third-party plaintiff demonstrated it was free from negligence but third-party defendant's liability has yet to be determined]).

#### b. Grave injury

Pursuant Workers Compensation Law § 11, an employer is not liable for contribution or indemnity to a third person unless the employee sustains a "grave injury." While SPK concedes that more discovery is needed to determine whether plaintiff suffered a grave injury, given plaintiff's amended bill of particulars with the allegation of a traumatic brain injury, an award of summary judgment may be granted and conditioned on a grave injury. (*See Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 551 [1st Dept 2013] [granting conditional summary judgment "subject to whether plaintiff is found to have suffered from a grave injury"]).

#### IV. MOTION SEQ. 005

##### A. SPK's motion

SPK moves for an order summarily dismissing plaintiff's Labor Law § 240(1) claim, or in the alternative, holding the previous motions for summary judgment in abeyance pending the completion of discovery. (NYSCEF 119).

As SPK previously moved for summary judgment and offers no justification for moving again for the same relief, its motion is not considered. (*See Jones ex rel. Cline v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010] ["Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification"]).

Contrary to SPK's contention, that Precision's field supervisor has not been deposed does not preclude considering the motions for summary judgment, as his testimony would raise issues of comparative negligence which does not bar summary judgment. (*See supra* at II.B.2).

##### B. WDFG's cross motion

WDFG cross-moves for an order holding all summary judgment motions in abeyance and denying plaintiff's motion for summary judgment. It argues that as the second third-party action was not commenced until after plaintiff's motion for summary judgment was filed, it has not had an opportunity to conduct discovery, and thus, summary judgment is not warranted. It also adopts Precision's and Empire's opposition to plaintiff's motion for summary judgment. (NYSCEF 142).

While WDFG maintains that discovery is incomplete, it fails to establish what would be revealed in discovery that would warrant denial of summary judgment. (*See State ex rel. Perkins v Cooke Ctr. for Learning & Dev., Inc.*, 164 AD3d 445, 446 [1st Dept 2018], *lv denied* 32 NY3d

919 [2019] [party requesting additional discovery must state more than “a mere hope that evidence sufficient to avoid summary judgment may be uncovered”]). In any event, to the extent WDFG seeks affirmative relief against any party other than SPK, the sole moving party under motion sequence five, a cross motion is an improper vehicle to do so. (*See Asiedu v Lieberman*, 142 AD3d 858 [1st Dept 2016] [cross motion improper vehicle to seek affirmative relief from non-moving party]).

#### V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for summary judgment is granted to the following extent: (1) on his claim under Labor Law § 240(1) and under Labor Law § 241(6), but only as to 12 NYCRR § 23-5.18(g), and is otherwise denied (motion seq. three); it is further

ORDERED, plaintiff’s claims for negligence and under Labor Law § 200 are dismissed as without opposition; it is further

ORDERED, that SPK’s cross motion is granted to the extent of dismissing plaintiff’s Labor Law § 241(6) claim, but only as to 12 NYCRR §§ 23-1.7, 23-1.8, 23-1.15, 23-1.16, and 23-5.3, and is otherwise denied; it is further

ORDERED, that Precision’s cross motion is granted to the extent of dismissing plaintiff’s Labor Law § 241(6) claim, but only as to 12 NYCRR § 23-5.1(e), and is otherwise denied; it is further

ORDERED, that SPK’s motion for summary judgment on the third-party complaint is granted conditionally pending a determination at trial of liability, and specifically as to its claims for common law indemnity and contribution, it is further conditioned on plaintiff having suffered a grave injury (motion seq. four); it is further

ORDERED, that SPK's motion for summary judgment is denied in its entirety (motion seq. five); and it is further

ORDERED, that WDFG's cross motion is denied in its entirety.

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BARBARA JAFFE, J.S.C.

4/29/2020  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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