At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 24th day of April 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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MARIUSZ KALISZ and MAGDALENA DANILOWICZ KALISZ,

Plaintiffs,

Index No.: 515487/2016

DECISION & ORDER

-against-

MJM ASSOCIATES CONSTRUCTION LLC, NEL SAFETY PROFESSIONAL, LLC, HARCO CONSTRUCTION, LLC, CA 205 SMITH STREET LLC and JACKSON EX 2 LLC,

Defendants.

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MJM ASSOCIATES CONSTRUCTION LLC, NEL SAFETY PROFESSIONAL, LLC, HARCO CONSTRUCTION, LLC, CA 205 SMITH STREET LLC and JACKSON EX 2 LLC,

Third-Party Plaintiffs,

-against-

SNG BRICK AND STONE INC.,

Third-Party Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	1-8, 9-12
Opposing Affidavits (Affirmations)	13-14, 15, 16-17
Reply Affidavits (Affirmations)	18, 19, 20

Introduction

Upon the foregoing papers, plaintiffs Mariusz Kalisz (plaintiff) and Magdalena Danilowicz Kalisz (collectively, plaintiffs), move, in motion (mot.) sequence (seq.) 9, for an order awarding them summary judgment, pursuant to CPLR 3212, under their Labor Law §§ 240 (1) and 241 (6) causes of action against defendants/third party plaintiffs MJM Associates Construction LLC (MJM), NEL Safety Processional, LLC (NEL), Harco Construction, LLC (Harco), CA 205 Smith Street LLC (205 Smith), and Jackson Ex 2 LLC (Jackson) (collectively, defendants). Defendants move, in mot. seq. 10, for an order awarding them summary judgment dismissing plaintiffs' action against them. Defendants/third-party plaintiffs further move for summary judgment against third-party defendant SNG Brick and Stone, Inc. (SNG) under their third-party contractual indemnification, common-law indemnification, and breach of contract claims. Finally, defendants/third-party plaintiffs move for summary judgment dismissing SNG's counterclaims against them seeking contractual and common-law indemnity.

Background and Procedural History

The instant action arises out of a July 18, 2016 construction site accident in which plaintiff sustained various injuries after falling from a scaffold. The underlying project involved the gut renovation of an existing building located at 205 Smith Street in Brooklyn, New York, for the purpose of creating new commercial/retail space. Prior to the accident, in a written agreement dated November 3, 2014, 205 Smith, which along with Jackson, owned the building, hired Harco to serve as the construction manager on the project. In a written agreement dated March 21, 2016, 205 Smith hired plaintiff's employer, SNG, to perform

masonry work on the project. In a written agreement dated August 29, 2016, Harco hired MJM to perform all remaining services and work required to be performed by Harco pursuant to the aforementioned November 3, 2014 contract between Harco and 205 Smith. According to the deposition testimony of NEL's owner, Arnold Nelson, NEL was hired by Harco in or about the middle of 2016 to perform site safety inspections and safety oversight services on the project. In particular, Mr. Nelson testified that this involved inspecting the work site once a month and ensuring that the general public was protected, that the site itself was properly protected, and that the workers on the site were working in a safe environment. Mr. Nelson further testified that there was no written agreement between NEL and Harco and that NEL was the "general contractor" on the project. In addition, the building permits issued for the project were taken out in NEL's name.

At his deposition, plaintiff testified that he was hired by SNG as a bricklayer approximately two weeks before the accident, and that he began working on the underlying project approximately one week prior to the accident. While working for SNG on the project, plaintiff was responsible for building partition walls in the basement of the building using cinder blocks and cement mix. While working for SNG, plaintiff was supervised by Mariusz Ceislak, an SNG foreman. On the day of the accident, plaintiff built a cinder block wall while standing on the platform of a pipe scaffold. According to plaintiff, the scaffold was already assembled and placed into position when he arrived at the job site on the day of the accident. It is undisputed that there was no safety railing surrounding the scaffold platform. The platform itself, which was approximately six to seven feet above the floor, consisted of wooden planks laid across the frame of the scaffold. While working on the scaffold, plaintiff wore a safety harness. However, according to plaintiff, there was nothing

to which the safety harness's lanyard could be attached. Plaintiff also testified that the planks, which formed the scaffold platform, were not secured to the scaffold frame. Immediately prior to the accident, plaintiff was standing near the edge of the scaffold platform laying blocks onto the wall that he was assembling. The accident occurred when two of the scaffold platform planks that plaintiff was standing on tilted upward. As a result, plaintiff lost his balance, fell off the scaffold, and sustained various injuries when he hit the floor below.

By summons and complaint dated September 1, 2016, plaintiffs commenced the instant action against defendants. Among other things, the complaint alleged that the defendants violated Labor Law §§ 240 (1), 241 (6), 200, and were otherwise negligent and that these Labor Law violations and negligence caused plaintiff's injuries. The complaint also asserted a derivative claim against the defendants on behalf of plaintiff's wife, Magdalena Danilowicz-Kalisz. Thereafter, the defendants interposed a joint answer generally denying the allegations in the complaint. The defendants also commenced a third-party action against SNG seeking common-law indemnification, contractual indemnification, as well as damages for breach of contract to procure liability insurance.

Discussion

Plaintiffs' Labor Law § 240 (1) Claim

Plaintiffs move for summary judgment against defendants under their Labor Law § 240 (1) cause of action. In so moving, plaintiffs point to plaintiff's deposition testimony, which indicates that he was injured while performing construction work when the unsecured scaffold platform planks that he was standing on suddenly tilted, thereby causing him to fall

a distance of six to seven feet to the ground. Plaintiffs also point to the fact that the scaffold platform was not surrounded by a safety railing, which would have prevented plaintiff from falling. In further support of their motion for summary judgment under Labor Law § 240 (1), plaintiffs submit affidavits by his SNG co-workers Wieslaw Rozkowski, Robert Pluta, and Ryszard Mikucki. In this regard, Mr. Rozkowski states that he was working in the basement of the building at the time of the accident and witnessed plaintiff fall a distance of six to seven feet from the scaffold platform to the ground. Mr. Rozkowski also states that he observed the unsecured platform planks tilt immediately before the accident, and further observed that there was no safety railings around the scaffold. Similarly, Mr. Pluta states that he was working in the basement of the building at the time of the accident, that the scaffold plaintiff was using did not have a safety railing, and that the platform planks were not secured. Finally, Mr. Mikucki states that he was working next to plaintiff at the time of the accident, that he observed plaintiff fall off the scaffold, and that "[t]he scaffold was poorly constructed."

According to plaintiffs, the tilting of the scaffold planks, as well as the fact that the scaffold lacked a safety railing, constituted prima facie proof of Labor Law § 240 (1) violations. Plaintiffs also maintain that, as the owners of the building, 205 Smith and Jackson are liable for these violations as a matter of law. In addition, plaintiffs argue that NEL is liable under the statute as it was the general contractor on the project, and Harco and MJM are liable under Labor Law § 240 (1) inasmuch as they were statutory agents which supervised and controlled plaintiff's work.

As a final matter, plaintiffs contend that plaintiff was not a recalcitrant worker or otherwise the sole proximate cause of the accident. Specifically, plaintiffs note that plaintiff

testified that, although he was wearing a safety harness at the time of the accident, there was nothing to which he could attach the harness's lanyard. Plaintiffs further note that this testimony is supported by the affidavits of plaintiff's coworkers, Mr. Rozkowski, Mr. Pluta, and Mr. Mikucki. In any event, plaintiffs maintain that, even if there is an issue of fact as to whether plaintiff could have tied off his safety harness, his failure to do so may not be deemed the sole proximate cause of the accident inasmuch as the accident was also caused by the tilting of the platform planks and the lack of a safety railing.

In opposition to this branch of plaintiffs' motion, and in support of their own motion for summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action, defendants initially contend that Harco and NEL are not subject to liability under the statute inasmuch as they did not own the building or hire plaintiff's employer SNG, and did not otherwise have any authority or control over plaintiff's work. In support of this contention, defendants note that SNG's foreman, Mr. Ceislak, testified that he alone was responsible for supervising SNG employees and plaintiff himself testified that he was supervised solely by Mr. Ceislak. In addition, plaintiff testified that he had never heard of NEL or Harco. Finally, Mr. Nelson testified that NEL personnel only visited the job site once a month and that NEL did not have any authority to supervise the work performed on the project.

In further support of their motion to dismiss plaintiffs' Labor Law § 240 (1) claim, defendants maintain that plaintiff was a recalcitrant worker and that plaintiff's own actions were the sole proximate cause of the accident. In support of this argument, defendants rely upon the deposition testimony of MJM's superintendent, Valentin Diaz. In particular, Mr. Diaz testified that, 10 minutes before the accident, he observed plaintiff working on the scaffold without the lanyard on his safety harness tied off. Mr. Diaz further testified that he

directed plaintiff to "tie off" and that if he failed to do so, he would have to come down off the scaffold. Finally, Mr. Diaz testified that there were anchors on the I-beam above the scaffold to which plaintiff could have affixed his lanyard. Defendants also point to Mr. Ceislak's deposition testimony. In this regard, Mr. Ceislak testified that all SNG workers, including plaintiff, had safety harnesses, that he observed plaintiff wearing a safety harness properly tied off to a beam one day before the accident, and that plaintiff could have wrapped his lanyard around an I-beam while working on the scaffold immediately prior to the accident.

Labor Law § 240 (1) provides, in pertinent part, 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, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) was enacted 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*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id*. at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or

contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500). However, given the exceptional protection afforded by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

As an initial matter, NEL has made a prima facie showing that it is not subject to liability under the Labor Law. It is well-settled that only owners, contractors, and their agents are subject to liability under Labor Law §§ 240 (1) and 241 (6) (*Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Here, it is undisputed that NEL did not own the building. Moreover, although certain deposition witnesses referred to NEL as the "general contractor" on the project, it is clear that NEL was not an actual general contractor. In particular, NEL was not hired by the owners to carry out the renovation project. Indeed, NEL had no contractual relationship with the owners. Further, NEL did not hire any subcontractors or have any control over the work performed on the project. Finally, NEL was not a statutory agent under the Labor Law. "To hold a defendant liable as an agent of the general contractor [or owner] for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work" (*Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661 [2014] [citations omitted]). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [citations omitted]). Here, Mr. Nelson's

uncontroverted deposition testimony indicates that NEL had no authority to supervise or control the work carried out by plaintiff and his SNG co-workers. This testimony also indicates that NEL was only present on the job site once a month. Further, plaintiff himself testified that he had never heard of NEL. Under the circumstances, plaintiffs' Labor Law § 240 (1) claims against NEL are dismissed.

With respect to Harco, it is undisputed that it was not an owner or general contractor on the project. However, there is conflicting evidence regarding whether or not it is subject to liability under the Labor Law as a statutory agent. In particular, as previously noted, Mr. Ceislak testified that he was the only person who supervised and had control over SNG's work on the project. Further, plaintiff testified that he had never heard of Harco and that Mr. Ceislak is the only person who supervised his work. However, Harco's own deposition witness, Urszula Dron, who worked for Harco as a risk manager, testified that Harco had a superintendent present on the job site at all times, and that Harco had the authority to supervise and control the performance of the work taking place. In addition, although Harco ultimately assigned its duties as a construction manager to MJM, this took place in August of 2016, after the accident occurred. Under the circumstances, there is an issue of fact regarding whether or not Harco is subject to liability under the Labor Law as a statutory agent (*Barreto v Metropolitan Trans. Auth.*, 25 NY3d 426, 434 [2015]).

Turning to plaintiffs' Labor Law § 240 (1) claim against MJM, Jackson, and 205 Smith, plaintiffs have made a prima facie showing of their entitlement to summary judgment against these parties.[1] In particular, plaintiff's uncontroverted deposition testimony, as well

[1] Defendants do not dispute that Jackson and 205 Smith are subject to liability under the Labor Law as owners. Further, defendants do not dispute that MJM is subject to liability as a contractor/agent.

as the aforementioned affidavits of his SNG coworkers, demonstrate that plaintiff fell a distance of six to seven feet from a scaffold that lacked safety rails after the unsecured platform planks that he was standing upon suddenly titled upward. It is well-settled that the absence of guardrails on a scaffold platform constitutes prima facie evidence of a violation of Labor Law § 240 (1) when a worker falls from the scaffold (*Marulanda v. Vance Assoc., LLC*, 160 A.D.3d 711, 712 [2018]; *Vasquez-Roldan v. Two Little Red Hens, Ltd.*, 129 A.D.3d 828, 829 [2015]; *Garzon v. Viola*, 124 A.D.3d 715, 716 [2015]; *Silva v. FC Beekman Assoc., LLC*, 92 A.D.3d 754, 755 [2012]; *Moran v. 200 Varick St. Assoc., LLC*, 80 A.D.3d 581, 582 [2011]). It is equally well-settled that a fall from a scaffold caused by the movement or collapse of the scaffold platform's planks constitutes prima facie evidence of a Labor Law § 240 (1) violation (*Mora v. Wythe and Kent Realty, LLC*, 171 A.D.3d 426 [2019]; *Cruz v. Roman Catholic Church of St. Gerard Magella*, 174 A.D.3d 782, 783 [2019]; *Kristo v. Board of Educ. of the City of New York*, 134 A.D.3d 550 [2015]; *Bermejo v. New York City Health and Hosp. Corp.*, 119 A.D.3d 500, 501-502 [2014]). Thus, plaintiffs have demonstrated that plaintiff's injuries were caused by two separate violations of Labor Law § 240 (1) and the burden shifts to defendants to raise a triable issue of fact regarding these violations.

Here, defendants have raised a triable issue of fact regarding whether or not plaintiff's own actions and/or recalcitrance in failing to tie off the lanyard on his safety harness was a proximate cause of the accident. In particular, as noted above, Mr. Diaz testified that shortly before the accident, he observed plaintiff working on the scaffold with an unaffixed lanyard and that he instructed plaintiff to tie off the lanyard. Further, although plaintiff maintains that there was nothing for him to tie off to, both Mr. Diaz and Mr. Ceislak testified that

plaintiff could have tied off his lanyard from his position on the scaffold. Nevertheless, defendants have failed to demonstrate, or otherwise raise a triable issue of fact regarding whether or not plaintiff's recalcitrance and failure to tie off his lanyard was the sole proximate cause of the accident. In this regard, "[a] plaintiff is the sole proximate cause of his or her own injuries when, acting as a 'recalcitrant worker,' he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available" (*Orellana v. 7 West 34th Street, LLC*, 173 A.D.3d 886, 887 [2019] [citations omitted]). However, "[u]nder Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d 280, 290 [2003]). Accordingly, courts hold that, when an injury is caused by a combination of a statutory violation and the plaintiff's own actions, the recalcitrant worker and sole proximate cause defenses do not apply. Thus, a worker's actions in disregarding instructions to replace a manhole cover prior to breaking down an asbestos containment enclosure cannot be the sole proximate cause of the worker's fall through the open manhole when inadequate lighting in the enclosure also contributed to the accident (*Barreto*, 25 N.Y.3d at 433-434). Similarly, a worker's failure to tie off his safety harness to an anchor point is not the sole proximate cause of the worker's scaffold fall accident when the collapse of the scaffold platform and/or movement of the scaffold platform planks also contributed to the accident (*Smith v. State*, 180 A.D.3d 1270, 117 N.Y.S.3d 777 [3d Dept 2020]; *Mora v. Wythe and Kent Realty LLC*, 2017 WL 5655962,

[Sup Ct, Bronx County 2017], *affd* 171 AD3d 426 [1st Dept 2019]). By the same token, a worker's intoxication and failure to lock the wheels on a mobile scaffold were not the sole proximate cause of the worker's fall from the scaffold inasmuch as the scaffold lacked guard rails (*Moran*, 80 A.D.3d at 582).

Here, the uncontroverted evidence before the court demonstrates that plaintiff's accident was caused by movement/tilting of the unsecured scaffold planks as well as the lack of a guard rail on the scaffold. Consequently, it cannot be said that plaintiff's alleged recalcitrance and failure to tie off his safety harness was the sole proximate cause of the accident. Rather, plaintiffs allege action in failing to tie off his safety harness would merely constitute comparative negligence, which is not a defense to a Labor Law § 240 (1) claim. Accordingly, plaintiffs are entitled to summary judgment against Jackson, 205 Smith, and MJM under their Labor Law § 240 (1) cause of action.

Plaintiffs' Labor Law § 241 (6) Claim

Plaintiffs move for summary judgment against defendants under their Labor Law § 241 (6) cause of action. At the same time, defendants move for summary judgment dismissing this cause of action against them. In support of this branch of their motion, plaintiffs maintain that, as a matter of law, defendants violated New York State Industrial Code provisions 12 NYCRR 23-5.1(e)(1), 23-1.16, and 23-5.1(j)(1) and that these violations proximately caused plaintiff's injuries. In opposition to this branch of plaintiffs' motion, and in support of their own motion for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim, defendants reiterate their arguments that plaintiff's own actions were the sole proximate cause of the accident and that the recalcitrant worker defense bars plaintiffs'

claims. Alternatively, defendants maintain that the Industrial Code regulations upon which plaintiffs rely are inapplicable or otherwise too general to support a claim under the statute. Labor Law § 241(6) provides, in pertinent part, that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ortega v. Puccia*, 57 A.D.3d 54, 60 [2008]).

As an initial matter, the court has already determined that NEL is not subject to liability under the Labor Law. Consequently, plaintiffs' motion for summary judgment against NEL under their Labor Law § 241 (6) claim is denied and defendants' motion for summary judgment dismissing this claim against NEL is granted. Further, the court has already determined that there are issues of fact regarding whether or not Harco is subject to liability under the Labor Law. Accordingly, plaintiffs' motion for summary judgment against Harco under Labor Law § 241 (6) is denied.

Turning to the regulations at issue, 12 NYCRR 23-5.1 (e)(1) provides, in pertinent part, that, "scaffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place." This provision is sufficiently specific to support a Labor Law § 241 (6) claim (*Klimowicz v Powell Cove Assocs., LLC*, 111 AD3d 605, 607 [2013]). However, neither plaintiffs nor defendants have made a prima facie showing of their entitlement to summary judgment under the statute with respect to section 23-5.1 (e)(1). In particular, the regulation requires that scaffold planks be fastened when they are inclined and when they extend less than six inches beyond their support. While it is undisputed that the planks were not secured, none of the moving parties have pointed to any evidence regarding whether or not the planks were inclined or extended less than six inches beyond their support.

12 NYCRR 23-1.16 (b) requires that an "approved belt or harness shall be attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline." This regulation is sufficiently specific to support a Labor Law § 241 (6) claim (*King v Villette*, 155 AD3d 619, 623 [2017]). However, there is conflicting evidence regarding whether or not this regulation was violated. In particular, plaintiff testified that there was nothing to which he could anchor his lanyard/tail line while performing his work. However, Mr. Diaz and Mr. Ceislak testified that plaintiff could have anchored his lanyard while working on the scaffold. Accordingly, to the extent that it is based upon a violation of 23-1.16 (b), both plaintiffs' and defendants' motions for summary judgment on the Labor Law § 241 (6) cause of action must be denied.

12 NYCRR 23-5.1 (j)(1) requires that: "[t]he open sides of all scaffold platforms . . . shall be provided with safety railings constructed and installed in compliance with this Part [rule]." However, this regulation exempts from this requirement scaffold platforms "with an elevation of not more than seven feet." Thus, scaffold platforms at an elevation of seven feet or lower are not required to have safety railings. Although this regulation is sufficiently specific to support a Labor Law § 241 (6) claim, it is inapplicable in this case. In particular, all of the evidence before the court, including plaintiff's own deposition testimony, indicates that the scaffold platform was not more than seven feet off the ground. More specifically, plaintiff testified that the platform was between six and seven feet above the ground. Similarly, Mr. Rozkowski and Mr. Pluta state in their affidavits that the platform was approximately six to seven feet above the ground. Accordingly, plaintiffs may not rely upon 23-5.1 (j)(1) in support of their Labor Law § 241 (6) claim.

As a final matter, plaintiffs maintain that there is an issue of fact as to whether or not the accident was caused by a violation of 12 NYCRR 23-5.1 (h). This regulation requires that "every scaffold shall be erected and removed under the supervision of a designated person." Although this regulation is specific enough to support a Labor Law § 241 (6) claim, the Appellate Division, Second Department, has held that it only applies to accidents which occur while the scaffold was being erected or removed (*Allan v DHL Express [USA], Inc*., 99 AD3d 828, 831 [2012]). Here, the scaffold was not being erected or removed at the time of the accident. Accordingly, this regulation may not serve to support plaintiffs' Labor Law § 241 (6) claim.

Under the circumstances, plaintiffs' motion for summary judgment against defendants under their Labor Law § 241 (6) cause of action is denied. That branch of defendants'

motion which seeks to dismiss plaintiffs' Labor Law § 241 (6) claim against NEL is granted. That branch of defendants' motion which seeks to dismiss plaintiffs' Labor Law § 241 (6) claim against the remaining defendants is denied to the extent that plaintiffs rely upon violations of 12 NYCRR 23-5.1 (e)(1) and 1.16 (b). That branch of defendants' motion which seeks to dismiss plaintiffs' Labor Law § 241 (6) against the remaining defendants is otherwise granted. In this regard, sections 23-5.1 (j)(1) and (h) are inapplicable and plaintiffs have abandoned their claim with respect to the remaining violations alleged in the pleadings by failing to address them in their opposition to defendants' motion (*Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [2014]).

Plaintiffs' Labor Law § 200/Common-Law Negligence Claims

Defendants move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims against them. In so-moving, the defendants contend that they did not exercise any control or supervision over the work performed by SNG employees, including plaintiff. In support of this contention, defendants note that both plaintiff and Mr. Ceislak testified that Mr. Ceislak alone had the authority to direct and control plaintiff's work. Defendants further maintain that they did not create or have actual or constructive notice of any dangerous conditions that may have caused plaintiff's accident.

In opposition to this branch of defendants' motion, plaintiffs maintain that MJM, Harco, and NEL had the authority to control and supervise plaintiff's work, and are therefore subject to liability under both their Labor Law § 200 and common-law negligence claims. In support of this argument, plaintiffs note that Harco's deposition witness, Ms. Dron, testified that Harco had a superintendent present on the job site at all times, and that Harco had the authority to supervise and control the performance of the work. In addition, plaintiffs point

out that MJM's deposition witness, Mr. Diaz, testified that he instructed plaintiff to tie off his safety harness or get down from the scaffold only ten minutes before the accident. According to plaintiffs, this demonstrates that MJM had actual notice of an unsafe condition that contributed to the accident. As a final matter, plaintiffs contend that there are issues of fact regarding NEL's control over the work inasmuch as it was the general contractor on the project and its deposition witness, Mr. Nelson, testified that NEL had the authority to correct unsafe conditions on the job site.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]).

On the other hand, "when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had authority to supervise or control the performance of the work" (*id.*). General supervisory authority to

oversee the progress of the work is insufficient to impose liability. Rather, "[a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62). Further, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence" (*Austin v Consolidated Edison, Inc*., 79 AD3d 682, 684 [2] [internal quotation marks omitted]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp*., 83 AD3d 905 [2011]).

Here, the accident arose out of defects and dangers in the materials of the work, namely the scaffold from which plaintiff fell. Accordingly, the determinative factor regarding plaintiffs' Labor Law § 200 and common-law negligence claims is whether or not the defendants had the specific authority to control and supervise the manner in which plaintiff's work was performed. In this regard, it is clear that neither Jackson nor 205 Smith had such authority. In particular, neither of these owners maintained a presence at the job site. Further, plaintiff testified that he had never heard of these entities and that Mr. Ceislak was the only person who directed his work. Similarly, plaintiffs' Labor Law § 200 and common-law negligence claims must be dismissed against NEL as it lacked the authority to control and supervise plaintiff's work. As previously discussed, Mr. Nelson's uncontroverted deposition testimony indicates that NEL had no authority to supervise or control the work carried out by plaintiff and that NEL was only present on the job site once a

month. Moreover, plaintiff testified that he was not supervised by NEL and that he had never heard of this entity.

Turning to plaintiffs' Labor Law § 200 and common-law negligence claims against MJM and Harco, the court finds that there are issues of fact regarding their control and supervision over plaintiff's work which preclude awarding them summary judgment dismissing these causes of action. In this regard, as noted above, both plaintiff and his foreman Mr. Ceislak testified that SNG's work was supervised solely by Mr. Ceislak. However, Harco's deposition witness, Ms. Dron, testified that Harco had a superintendent present on the job site at all times, and that Harco had the authority to supervise and control the performance of the work taking place. In addition, MJM's deposition witness, Mr. Diaz, testified that ten minutes before the accident, he directed plaintiff to tie off his lanyard or get down from the scaffold. Mr. Diaz further testified that MJM had the authority to supervise the work of the subcontractors on the project.

Defendants' Common-Law Indemnification Claim Against SNG

Defendants move for summary judgment against SNG under their common-law indemnification claim. In support of this branch of their motion, defendants point to the undisputed fact that plaintiff's work was controlled and supervised by SNG. Defendants further maintain that they did not supervise plaintiff's work and that the accident was not caused by any negligence on their part. Under the circumstances, defendants maintain that they are entitled to common-law indemnification against SNG. In opposition to this branch of defendants' motion, SNG notes that it was plaintiff's employer and that he was covered under its Workers Compensation policy. Under the circumstances, SNG maintains that

defendants' motion must be denied inasmuch as they have failed to show that plaintiff sustained a grave injury as defined under Workers' Compensation Law § 11.

It is well-settled that Workers' Compensation Law § 11 precludes third-party common-law indemnification or contribution claims against employers for injuries sustained by their employees unless the employee's injuries are shown to be grave (*Castro v United Container Mach. Group*, 96 NY2d 398, 401 [2001]). Further, inasmuch as defendants are moving for summary judgment against the employer SNG under their common-law indemnification claim, they have the burden of demonstrating that plaintiff did not sustain a grave injury (*Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487, 488 [2001]; *Ibarra v Equipment Control, Inc*., 268 AD2d 13, 16-17 [2000]). Here, defendants have not even attempted to show that plaintiff sustained a grave injury. Consequently, defendants' motion for summary judgment against SNG under their common-law indemnification claim is denied.

Defendants' Contractual Indemnification Claim Against SNG

Defendants move for summary judgment under their contractual indemnification claim against SNG. In support of this branch of their motion, defendants point to a clause in the contract between SNG and Jackson whereby SNG agreed to indemnify each of the defendants for any claims "relating to any action or failure to act by the Contractor [SNG], its representatives, its subcontractors, suppliers, or employees . . ." Here, defendants maintain that the accident clearly arose out of the actions of SNG and its employees inasmuch as plaintiff was a SNG employee, was supervised by an SNG employee, and the defective scaffold was owned and erected by SNG. Defendants also argue the

indemnification clause is fully enforceable since the accident was not caused by any negligence on their part.

In opposition to this branch of defendants' motion, SNG notes that the indemnification clause is only triggered if the accident was caused by SNG's actions or failure to act. According to SNG, there has been no showing that the accident was caused by its actions or failure to act. SNG also contends that, to the extent that the defendants negligence caused the accident, their contractual indemnification claim is barred by General Obligations Law § 5-222.1.

"The right to contractual indemnification depends upon the specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). Moreover, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp*., 58 AD3d 660, 662 [2009], citing General Obligations Law § 5-322.1).

Here, it is undisputed that SNG entered into a contract with Jackson whereby it agreed to indemnify the defendants for any claims that arise out of the actions and inactions of SNG and its employees. Here, the accident clearly arose out of SNG's actions and inactions inasmuch as plaintiff was employed and supervised by SNG and SNG owned and erected the scaffold that partially collapsed. Further, the court has already determined that Jackson, 205 Smith, and NEL did not supervise and control plaintiff's work and were not negligent. Accordingly, these defendants are entitled to summary judgment under their

contractual indemnification claims against SNG. However, inasmuch as the court has determined that there are issues of fact regarding MJM and Harco's control and supervision over the work, their motions for summary judgment against SNG under their contractual indemnification claims must be denied (*Cava Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2009]).

Defendants' Breach of Contract Claim Against SNG

Defendants move for summary judgment under their breach of contract to procure liability insurance claim against SNG. In so moving, defendants note that, under its contract with Jackson, SNG agreed to procure liability insurance, as well as excess liability insurance coverage, which listed the defendants as additional insureds. Defendants further note that, although SNG's primary insurance carrier has agreed to provide additional insured coverage to the defendants, the excess carrier, Scottsdale Insurance Company (Scottsdale), has not agreed to provide coverage to date. In particular, after defendants tendered to Scottsdale, the carrier requested additional documents. Further, although these documents were provided, to date, Scottsdale has failed to issue a coverage opinion and has not provided additional insured coverage to defendants.

In opposition to this branch of defendants' motion, SNG maintains that it has obtained additional insured coverage for the defendants as required under the contract. In particular, SNG notes that it has obtained a general liability policy issued by State National Insurance Company naming defendants as additional insureds with limits of $1 million per occurrence. Further, SNG maintains that it has obtained a policy of excess insurance issued by Scottsdale which lists defendants as additional insureds with a policy limit of $5 million per occurrence.

Moreover, SNG notes that defendants have submitted copies of both of these policies in their motion papers.

Here, defendants have failed to make a prima facie showing that SNG breached its agreement to procure liability insurance covering defendants as additional insureds. In particular, SNG's primary carrier has agreed to provide coverage to the defendants. Moreover, although to date, Scottsdale has not agreed to provide coverage on the excess policy, it does not appear that it has refused to provide coverage as Scottsdale has not denied or disclaimed coverage. Accordingly, defendants have failed to establish, as a matter of law, that SNG breached its contractual obligation to procure liability insurance covering defendants.

Remaining Matters

As a final matter, SNG's counterclaims against defendants seeking common-law and contractual indemnification are dismissed without opposition. In particular, no first -party claims have been asserted against SNG by plaintiff. Further, defendants did not enter into any agreements whereby they agreed to indemnify SNG.

Conclusion

In summary, the court rules as follows: (1) that branch of plaintiffs' motion which seeks summary judgment against defendants under their Labor Law § 240 (1) cause of action is granted with respect to Jackson, 205 Smith, and MJM and denied with respect to NEL and Harco; (2) that branch of plaintiffs' motion which seeks summary judgment against defendants under their Labor Law § 241 (6) cause of action is denied; (3) that branch of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action is granted with respect to NEL and denied with respect to the remaining

defendants; (4) that branch of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) cause of action is granted with respect to NEL and denied with respect to the remaining defendants pertaining to violations of sections 23–5.1 (e)(1) and 23-1.16 (b); (5) that branch of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims is granted with respect to Jackson, 205 Smith and NEL and denied with respect to the MJM and Harco; (6) that branch of defendants' motion which seeks summary judgement against SNG under their common-law indemnification claim is denied; (7) that branch of defendants' motion which seeks summary judgment against SNG under their contractual indemnification claim is granted with respect to 205 Smith, Jackson, and NEL and denied with respect to MJM and Harco; (8) that branch of defendants' motion which seeks summary judgment against SNG under their breach of contract claim is denied; and (9) that branch of defendants' motion which seek summary judgment dismissing SNG's common-law and contractual indemnification counterclaims is granted. The action is severed accordingly.

This constitutes the decision, order and judgment of the court.

E N T E R:

5/4/20

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