At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of MAY, 2020.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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MIGUEL MORAN,

Plaintiff(s),

Index No.: 512190/2016

-against-

Decision and Order

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and LEMARK CONSTRUCTION, INC.,

Defendant(s).

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THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Third-Party Plaintiff(s),

-against-

LEMARK CONSTRUCTION, INC. and BLUE WATER CONSTRUCTION & RESTORATION, CORP.,

Third-Party Defendant(s).

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The following *papers* numbered 337 to 430 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	337-338; 341-380
Opposing Affidavits (Affirmations)	381-382;383-384; 386; 388-390; 396; 428-430
Reply Affidavits (Affirmations)	385; 393; 394; 395; 406; 413-419; 421; 423-426

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK move this court for an order granting leave to reargue that portion of the decision dated November 13, 2019 which denied its motion for summary judgement pursuant to CPLR 3212 on its third-party complaint as against BLUE WATER INC. and its claims against LEMARK CONSTRUCTION, INC.; and upon re-argument granting summary judgment to defendant THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK against BLUE WATER INC,; and upon re-argument granting summary judgment to defendant THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK on its claims for contractual indemnification against LEMARK CONSTRUCTION, INC.. (MS#15).

Defendant, LEMARK CONSTRUCTION, INC., also move for an order granting leave to re-argue this courts decision dated November 13, 2019 which granted the plaintiff's motion for summary judgment on Labor Law 240(1) and 241(6). (MS#16).

FACTS

This action arises from an alleged incident occurring on June 20 2016 when Plaintiff was allegedly injured as the result of a falling from an unsecured ladder while conducting work at in a dormitory room at Columbia University located at 70-74 Morningside Drive, New York, New York 10027. It is alleged that at the time of the accident the plaintiff was standing on a 6-foot A frame ladder spackling the ceiling of a

dormitory room. It is alleged Plaintiff fell when the ladder he was standing on began to move and shift, causing him to fall onto nearby compound buckets and then to the ground below. It is alleged that as a result of the aforesaid fall, Plaintiff sustained severe injuries, including a displaced bicondylar tibial plateau fracture of the right leg and comminuted impacted fractures of the proximal tibia and fibula, which required emergent surgical intervention. It is undisputed that THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK is the owner of the property. It is undisputed that LEMARK CONSTRUCTION, INC.is the general contractor of the construction project. It is undisputed that BLUE WATER CONSTRUCTION & RESTORATION, CORP. is a subcontractor who did work at the construction site. It is disputed that BLUE WATER CONSTRUCTION & RESTORATION, CORP., was the employer of the plaintiff, even though at a workers compensation hearing BLUE WATER CONSTRUCTION & RESTORATION, CORP., admitted they were plaintiff's employer.

ANALYSIS

N.Y. C.P.L.R. § 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. N.Y. C.P.L.R. § 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior

motion, but shall not include any matters of fact not offered on the prior motion. N.Y. C.P.L.R. 2221 (McKinney).

Labor Law § 240(1)

Labor Law 240(1) provides:

> "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 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."

Defendants contend that the court misapplied or misapprehended the law with respect to plaintiff's summary Judgment motion regarding Labor Law 240(1). This court disagrees.

"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". (*Salazar v. Novalex Contracting Corp.*, 18 NY3d 134, 139 [2011].) " 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 Exchange*, 13 NY3d 599, 604 [2009] *[quoting Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 (1993)].) In determining the

applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v. New York Stock Exchange,* 13 NY3d at 604.) "The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker." (*Runner v. New York Stock Exchange,* 13 NY3d at 603.) "Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (***Id.***)

"The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*See Runner v. New York Stock Exchange,* 13 NY3d at 603; *see also Davis v. Wyeth Pharmaceuticals, Inc.,* 86 AD3d 907, 909 [3d Dept 2011].) To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Berg v. Albany Ladder Co.,* 10 N.Y.3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC,* 80 AD3d 734, 735, 915 NYS2d 620). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; *see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.,* 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

Again, the legislative purpose underlying Labor Law § 240 (1) was to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*Bland v Manocherian*, 66 NY2d 452, 459, *quoting 1969 NY Legis Ann*, at 407) instead of on workers, who "are scarcely in a position to protect themselves from accident." (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 318.) To that end, "the Legislature determined that owners or contractors shall be liable for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. Liability is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521-522; *Crawford v Leimzider*, 100 AD2d 568, 569). A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence. *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178–79, 556 NE2d 430 (1990)

In the present case, the plaintiff does assert a cause of action under Labor Law § 240 (1) because he had been exposed to an "elevation-related risk" arising from the inadequacy of the protective device (180 AD2d, at 390); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499, 618 NE2d 82 (1993). In the present case, while at work on a construction site plaintiff fell from an unsecured ladder, this is the type of risk that the Labor Law was enacted to protect from. "**It is by now well established that the duty imposed by Labor Law § 240 (1) is nondelegable and that 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" (*see, e.g., Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137); *quoting Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500, 618 NE2d 82 (1993).

Here, it is uncontroverted that Plaintiff was on the ladder when the ladder shifted causing the plaintiff to fall. Thus, creating a presumption that proper protection was not provided. Furthermore, on the question of whether the violation was the proximate cause of the accident. Plaintiff's account of the accident in which he states that the ladder shifted is sufficient to establish that defendants breach was a contributing factor to the accident. "Thus, if a statutory violation is a proximate cause of an accident the plaintiff cannot be solely responsible for causing his accident. Conversely, if the plaintiff is solely to blame for the accident it necessarily means that there had been no statutory violation." *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280 at 290.

In the present case, there has been no testimony that plaintiff misused the equipment provided to him, in any way. In this case, there has been no testimony proffered to contradict plaintiff's testimony. Here, there is no view of the evidence that supports a finding that plaintiff's actions were the sole proximate cause of his accident. Moreover, it is clear, that the plaintiff's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" because there was nothing to secure the ladder plaintiff was working from. Therefore, as a result, it also cannot be said that the plaintiff was the sole proximate cause of this accident. Accordingly, defendants request for re-argument on plaintiffs summary

judgment Labor Law 240(1) claim is granted and upon re-argument the court adheres to its prior decision.

Labor Law 241(6)

"**Labor Law 241(6)** imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable ." (*Fusca v. A & S Construction*, LLC, 84 AD3d 1155, 1156 [2d Dept 2011]).

Plaintiff contends defendants violated Industrial Code Section 12 NYCRR §23-1.21(b)(3), 12 NYCRR §23-1.21(b)(iv)(ii), 12 NYCRR §23-1.21(e)(2) and (e)(3). All of these sections deal with Ladders and apply to the present case. In the present case, because the ladder fell or collapsed, and nothing was given to the plaintiff to secure the ladder, nor had the defense presented any evidence that the ladder itself was not defective those industrial codes apply to the present case. Accordingly, defendant motion for re-argument on plaintiff's Labor Law 241(6) claim is granted and upon re-argument this court adheres to its previous decision.

Next the court shall address indemnification claims and cross-claims raised by the parties.

Indemnification

"The right to contractual indemnification depends upon the specific language of the contract" (*see Holub v. Pathmark Stores, Inc.*, 66 AD3d 741, 742–743, 887 NYS2d 215;

George v. Marshalls of MA, Inc., 61 AD3d at 930, 878 NYS2d 143). It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault (*see, Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1, 6, 358 NYS2d 685, 315 NE2d 751). *Chapel v. Mitchell*, 84 N.Y.2d 345, 347, 642 NE2d 1082, 1083 (1994). The General Obligations Law 5-322.1 statute only prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178-181 [1990]), or had the authority to supervise, direct, or control the manner of the work that caused the injury (*see Naranjo v Star Corrugated Box Co., Inc.,* 11 AD3d 436, 438 [2004]; *Lazzaro v MJM Indus.*, 288 AD2d 440, 441 [2001]). Under the provisions of General Obligations Law 5-322.1, that section declares void agreements purporting to indemnify contractors against liability for injuries "contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part" *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178–79, 556 NE2d 430 (1990).

General Obligations Law 5-322.1 declares void agreements purporting to indemnify contractors against liability for injuries "contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part". The legislative purpose underlying Labor Law § 240 (1) was to place " ' "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor " ' " *(Bland v Manocherian,* 66 NY2d 452, 459, quoting 1969 NY *Legis Ann*, at 407) instead of

on workers, who "are scarcely in a position to protect themselves from accident." *(Koenig v Patrick Constr. Corp.*, 298 NY 313, 318.) To that end, "the Legislature determined that owners or contractors shall be liable for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. Liability is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" *(Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521-522; *Crawford v Leimzider,* 100 AD2d 568, 569). A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence. *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178–79, 556 NE2d 430 (1990). Although an indemnification agreement that purports to indemnify a party for its own negligence is void under General Obligations Law 5–322.1, such an agreement does not violate the General Obligations Law if it authorizes indemnification "to the fullest extent permitted by law," as the subject agreement does here (*Cabrera v. Board of Educ. of City of N.Y.*, 33 AD3d 641, 643, 823 NYS2d 419; *see Bink v. F.C. Queens Place Assoc., LLC,* 27 A.D.3d 408, 813 N.Y.S.2d 94); quoting, *Lesisz v. Salvation Army*, 40 A.D.3d 1050, 1051, 837 N.Y.S.2d 238, 240 (2007). Additionally, it has been alleged that defendant, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK had someone on the worksite with the authority to completely stop the work if any unsafe conditions existed. Therefore, a determination as to the negligence, if any, of defendants, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK must be made before any decision on indemnification can be issued. There are also issues of fact

regarding defendant LEMARK CONSTRUCTION INC.'s control and supervision of the plaintiff's work as well, which also prevents an indemnification finding until such time as negligence, if any, of this defendant had been determined. Moreover, in the present case, there has been no finding regarding any negligence of the defendant's, as such it is too early in the litigation to address the indemnification clause. Therefore, defendants motions to re-argue based on indemnification clauses are hereby granted and upon review the court adheres to its previous decision.

Accordingly, Defendant, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK motion to reargue is granted and upon re-argument this Court adheres to its previous decision, for the reasons stated above. (MS#15). Defendant, LEMARK CONSTRUCTION INC.'s, motion to reargue is granted and upon re-argument this Court adheres to its previous decision, for the reasons stated above. (MS#16).

This constitutes the Decision/Order of the Court.
Date: MAY 28, 2020

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

MAY 28 2020