At an IAS Term, Part 9 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 29th day of June, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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LAURA GLAZIER-SMITH, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF GEORGE D. SMITH, DECEASED,

PLAINTIFF,

- AGAINST -

BRIARWOOD MP LLC, PAV-LAK CONTRACTING INC., AGL INDUSTRIES, INC. AND CRV PRECAST CONSTRUCTION LIMITED LIABILITY COMPANY,

DEFENDANTS.

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BRIARWOOD MP LLC AND PAV-LAK CONTRACTING INC.,

THIRD-PARTY PLAINTIFFS,

- AGAINST -

CRANES EXPRESS, INC.,

THIRD-PARTY DEFENDANT.

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AGL INDUSTRIES, INC.,

SECOND THIRD-PARTY PLAINTIFF,

- AGAINST -

CRANES EXPRESS, INC.,

SECOND THIRD-PARTY DEFENDANT.

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DECISION/ORDER

INDEX NO. 506180/17

MOTION SEQUENCE NOS. 12-16

The following e-filed papers read herein:	NYSCEF Doc. Nos.[1]
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	205-228, 229-230, 232-267,268-285, 286-311
Opposing Affidavits (Affirmations)	337, 339-341, 351, 359, 368-370, 323-325, 365-366,374-376, 326-328, 330-333,335, 367, 377-379, 405, 334-336, 342-346, 357
Reply Affidavits (Affirmations)	381-386, 387-389, 393-395, 396, 390-392, 398-404

Upon the foregoing papers, defendants/third-party plaintiffs Briarwood MP LLC (Briarwood) and Pav-Lak Contracting Inc. (Pav-Lak) move, in mot. seq. 12, for an order, pursuant to CPLR 3212, granting them summary judgment: 1) dismissing the claims asserted against them by Laura Glazier-Smith, Individually, and as Administrator of the Estate of George D. Smith, deceased, as well as dismissing the cross claims asserted by defendants/second third-party plaintiff AGL Industries, Inc. (AGL) and defendant CRV Precast Construction Limited Liability Company (CRV); or 2) on the issue of indemnification against third-party defendant Cranes Express, Inc. (Cranes); and 3) on the issue of indemnification on their cross claim against AGL; and 4) on the issue of

[1]New York State Courts Electronic Filing Document Numbers

indemnification on their cross claim against CRV. AGL moves, in mot. seq. 13, for an order, pursuant to CPLR 3212, granting it summary judgment: 1) dismissing the complaint and dismissing all of the cross claims asserted against it; or 2) against CRV on the issues of indemnification and breach of the covenant to procure insurance; and 3) against Cranes on the issue of indemnification. Plaintiff moves, in mot. seq. 14, for an order, pursuant to CPLR 3212, granting her partial summary judgment: 1) against all defendants on the issue of their liability pursuant to Labor Law §§ 240 (1) and 241 (6); and 2) against CRV on the issue of liability pursuant to Labor Law § 200. Cranes moves, in mot. seq. 15, for an order, pursuant to CPLR 3212, granting it summary judgment 1) dismissing all third-party claims asserted against it; or 2) against CRV on its purported cross claim for indemnification.[2] Lastly, CRV moves, in mot. seq. 16, for an order: 1) pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's Labor Law § 240 (1) claim and 2) pursuant to CPLR 3211 (a) (1) and (7), dismissing AGL's and Cranes' contractual indemnification claims.

Background

Plaintiff commenced the instant action by electronically filing a summons and verified complaint in this court on March 28, 2017. The pleadings indicate that plaintiff's decedent was a crane operator who was killed when a steel beam fell approximately 40 feet

[2]There are "cross claims" asserted against CRV, Briarwood, Pav-Lak and AGL by Cranes, who is solely a third-party defendant in this action, in Cranes' answer to the third-party complaint of Briarwood and Pav-Lak as well as their answer to AGL's third-party complaint. They are, in reality, counterclaims. However, as there is no third-party complaint brought by CRV against Cranes, there are in fact no cross-claims or counterclaims brought by Cranes against CRV.

and crushed the crane cab which he was sitting in. This occurred at a construction site located at 81-10 135th Street in Queens, on November 22, 2016. Plaintiff further alleges therein that defendants were the property owner and the construction contractors hired by the property owner, or their agents, to complete a construction project, and, therefore, defendants are subject to the Labor Law's absolute vicarious liability provisions.

Plaintiff asserts causes of action sounding in common-law negligence and Labor Law § 200 against the defendants and also alleges that defendants violated Labor Law §§ 240 (1) and 241 (6). Plaintiff claims that defendants, as owners, contractors or their agents, are vicariously liable for such violations without regard to fault, and that her decedent, who was performing construction work at all relevant times, therefore qualified for the protections in Labor Law §§ 240 (1) and 241 (6). Plaintiff also claims that the Labor Law violations and the breach of the common-law duty to keep the work site safe proximately caused her decedent's death and thus she seeks damages.

Specifically, the record indicates, as established through investigations by both administrative and law enforcement authorities, that, at all relevant times, the decedent was a crane operator employed by Cranes. Briarwood, who owned the subject premises and intended to construct a building thereon, hired Pav-Lak as the general contractor to oversee the subject construction project. Pav-Lak then hired AGL to fabricate and erect the steel structure,[3] as well as to provide building materials. AGL hired CRV to erect the steel

[3]AGL disputes that it was responsible for the erection of the steel, but the written agreement between it and Pav-Lak specifies otherwise.

structure, and CRV, in turn, subcontracted with Cranes to lease a hoisting crane and to provide CRV with a crane operator to operate it.

CRV's workers, before the accident, had attached a steel beam which weighed more than 6,000 pounds to the subject crane using a sling they had selected. The beam was intended to serve as the base of the subject building's fourth floor. The record establishes that the sling, chosen and attached by CRV workers, was inadequate for the task, as it was intended for loads no heavier than 3,000 pounds. Decedent, who followed the hoisting directions given to him by CRV's signalmen,[4] hoisted the beam to the fourth floor, where CRV workers were intending to install it by attaching it (horizontally) to the steel structure. One worker temporarily attached one end of the beam to the structure, but another worker, Elizandro E. Ramos (Mr. Ramos), who was standing on the beam being hoisted, was unable to attach the other end. Several attempts to attach the beam failed. CRV employees then directed decedent to reposition the load for another attempt. The sling ripped while he was doing so, causing the steel beam to fall. Mr. Ramos was still standing on the beam and fell to his death. The beam landed on and crushed the crane's cab and killed decedent.[5]

Plaintiff, who was awarded letters of administration for decedent's estate by the Surrogate's Court commenced the instant action. She contends in the complaint that defendants had a duty to provide safe equipment to protect the workers from elevation-

[4]The court uses "signalman" and "flagman" interchangeably.

[5]The parties have submitted video recordings, but the court has based its findings solely on the written record's. Interpreting images is the jury's province.

related hazards. However, plaintiff continues, the equipment provided (especially, the subject sling) was either defective, poorly maintained and/or inadequate for the task. Plaintiff further contends that defendants had a duty to ensure that all hoisting and crane operations complied with the applicable provisions of the Industrial Code, 12 NYCRR ch. 1, subch. A. Lastly, plaintiff maintains that defendants breached the common-law duty to keep the premises safe for workers with regard to insurance.

Defendants interposed answers[6] with cross claims and (except for CRV) commenced third-party actions against Cranes, decedent's employer. The cross claims and third-party claims in essence, assert the right to contribution and/or indemnity as well as damages for alleged breaches of the trade contracts with regard to insurance.

Extensive discovery and motion practice followed, and on July 25, 2018, plaintiff filed a note of issue and certificate of readiness, indicating that all discovery was complete. However, several items of discovery remained outstanding and extensive post-note of issue discovery continued. The parties to this action and a second action, also stemming from this accident, brought by the representative of the deceased CRV worker, Mr. Ramos, consented to extend the time to file dispositive motions until November 22, 2019. The court so-ordered that stipulation, and these five summary judgment motions followed.

[6]Briarwood and Pav-Lak filed one answer and are apparently united in interest.

Briarwood and Pav-Lak's Arguments Supporting Their Summary Judgment Motion (Mot. Seq. 12)

Briarwood and Pav-Lak, in support of their summary judgment motion, first assert that the record establishes that neither party committed a negligent act or omission regarding the plaintiff's claims. Therefore, they reason, any claim depending on a finding of their negligence, e.g., plaintiff's common-law negligence and Labor Law § 200 claims, as well as the cross claims for common-law indemnity and contribution, must be dismissed.

Here, Briarwood and Pav-Lak allege, the record reflects that no premises defect contributed to the accident. Instead, they argue, the accident resulted from the means and methods of the subcontractors' work. Specifically, they contend that the position of the crane, underneath the hoisted beam, coupled with an inadequate sling to hoist the load, caused the subject accident. They assert that the record shows that the inadequate sling failed, which caused the beam to fall, crush the cab, and kill the decedent. Thus, they reason that only the means and methods of the subcontractors' work led to the accident.

Briarwood and Pav-Lak note the legal standard for liability for construction accidents resulting from the means and methods of the work: only the parties that exercised authority (supervision and control) over the work are subject to liability pursuant to the law of common-law negligence or Labor Law § 200. They allege that the authority exercised must be specific to the work and that the general authority to supervise construction and inspect the premises is insufficient for liability purposes. Here, they continue, the record establishes that they exercised no authority over the subject work. They highlight that they were not involved with the steel erection in general or with the subject sling and rigging in

particular. Furthermore, they claim the record reflects that CRV's employees and agents were exclusively responsible for rigging the crane and for providing the signalman (or flagmen) to give decedent hoisting directions. In sum, they maintain that they had no authority to supervise or control the hoisting work.

Briarwood and Pav-Lak maintain that their witnesses' deposition testimony corroborates these arguments. Moreover, they stress that AGL's deposition witness explicitly averred that only CRV's employees and agents were responsible for sling selection and beam hoisting. The same witness, they continue, also testified that CRV was responsible for ensuring that CRV workers supervised hoisting activities as an added safety measure. These CRV workers had the authority and responsibility to order hoisting to stop upon observing an unsafe condition. Briarwood and Pav-Lak add that Cranes' witness also testified that only a CRV employee would rig the crane, which here involved choosing the sling, placing it on the beam and attaching the sling to the crane. Additionally, this witness testified that CRV owned all of the slings at the site. Furthermore, they emphasize that the three CRV employees produced for depositions gave testimony consistent with the assertion that CRV had exclusive control over the selection and use of the subject sling. The salient testimony, they continue, also establishes that only CRV employees supervised beam hoisting.

Briarwood and Pav-Lak conclude that the record establishes that the failure to choose and use an adequate sling directly caused the accident. They further assert that the record indicates that such a failure was wholly within CRV's and its agents' responsibility. They also reiterate that they were not responsible for the positioning of the crane, which

unfortunately contributed to decedent's death. Hence, Briarwood and Pav-Lak argue that no negligence-based claim is viable as asserted against them, and such claims must therefore be dismissed.

Next, Briarwood and Pav-Lak contend that they are entitled to a conditional judgment of contractual indemnification on their cross claims against AGL and CRV. They assert that a party is entitled to contractual indemnification in instances where the intent to indemnify is clearly established by the language and purpose of the relevant written agreement. Pav-Lak alleges that its written agreement with AGL covers the erection of the structural steel. Also, Pav-Lak points out that a provision of this written agreement requires AGL to defend and indemnify Pav-Lak for all bodily injury claims arising within the scope of the work. Pav-Lak notes that the indemnity clause contains the language that the obligation to indemnify is to the fullest extent permitted by law. Pav-Lak also claims that the contractual requirement for AGL to defend and indemnify Briarwood makes Briarwood a third-party beneficiary of the written agreement with AGL. Briarwood and Pav-Lak conclude that the written agreement to indemnify is in effect, and is valid and enforceable, thus entitling them to a conditional judgment of contractual indemnification against AGL.

Similarly, Briarwood and Pav-Lak contend that Pav-Lak’s written agreement with CRV requires CRV to indemnify both entities for any work done by CRV or its employees. They maintain that the record shows that CRV and its agents and employees performed the work that led to decedent's death, and that such work was negligently performed. They note that the indemnity clause contains the language that the obligation to indemnify is to the fullest extent permitted by law. Briarwood and Pav-Lak again conclude that the written

agreement to indemnify was in effect, and is valid and enforceable, therefore entitling them to a conditional judgment of contractual indemnification against CRV.

Also, Briarwood and Pav-Lak assert that they are entitled to summary judgment on the issue of common-law indemnity against CRV. They reiterate that the record establishes that they are free of negligence and that CRV engaged in a negligent act when its employees used an inadequate sling to rig the beam to the crane. Accordingly, they argue that CRV should be required to indemnify them under the common-law doctrine as they are directly sued in this action and their liability (if any) stems from CRV's negligence.

Moreover, Briarwood and Pav-Lak argue that they are also entitled to a judgment requiring Cranes to indemnify them pursuant to the doctrine of common-law indemnification.[7] They reiterate that the record establishes they are not responsible for any negligent acts or omissions, and their potential liability in this action is merely vicarious. In contrast, they continue, Cranes and decedent should have chosen a safer location to park the subject crane, which would have prevented decedent's death. Therefore, they assert that Cranes was actually negligent and reason that, as they are subject to vicarious liability, the common-law rule allows them to obtain indemnification from an actually negligent party, such as Cranes.

Lastly, Briarwood and Pav-Lak argue that they are entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 and 241 (6) claims because decedent was the sole

[7]The Workers' Compensation Law generally bars claims for common-law indemnification against an injured worker's employer except for cases where, as here, the worker suffered a "grave" injury, which includes the worker's death.

proximate cause of his injuries. They acknowledge that these statutes place a nondelegable, absolute duty of care on owners and contractors, who are subject to liability thereunder without regard to fault. However, they contend that an injured worker or his representative is not entitled to recover damages under these statutes if his actions were the sole proximate cause of his injury. Here, they reiterate, decedent should have parked the crane somewhere other than directly beneath the load. They contend that parking elsewhere would have removed the risk of the beam falling on and crushing the crane's cab. Therefore, they conclude, decedent's failure to properly position the crane was the sole proximate cause of the accident and his injuries. Hence, Briarwood and Pav-Lak argue that plaintiff has no viable Labor Law §§ 240 (1) or 241 (6) claims as asserted against them, and these claims should be dismissed.

AGL's Arguments Supporting Its Summary Judgment Motion (Mot. Seq. 13)

AGL, in support of its summary judgment motion, first argues that it is not properly subject to liability pursuant to Labor Law §§ 240 (1) or 241 (6). AGL claims that those statutes apply only to property owners and general contractors, and, here, it is neither. AGL argues that it was Pav-Lak's subcontractor, and, as such, its work was limited to fabricating (not hoisting, installing or erecting) steel beams. AGL claims that once the other parties began erecting the steel, it no longer had any involvement in any construction activities and had no employees or agents present on the site. Moreover, AGL alleges that it had no authority to supervise or control plaintiff's work, and, accordingly, is not vicariously liable pursuant to the Labor Law as an agent of the property owner or the general contractor. Indeed, AGL continues, the record establishes that only Cranes was responsible for

directing decedent's work and (along with Pav-Lak) ensuring site safety. AGL adds that only CRV employees were responsible for and involved in the improper selection of the inadequate sling and the unsafe rigging of the crane. AGL reiterates that it had no agents on the site at relevant times, and thus did not observe the acts and omissions leading to the accident. AGL reasons that it is thus not an owner, contractor or agent of either of them as those terms are understood for purposes of Labor Law §§ 240 (1) and 241 (6). Accordingly, AGL continues, it cannot be subject to vicarious liability pursuant to those statutes. Therefore, AGL concludes, it is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims asserted against it.

AGL also argues that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed. AGL maintains that Labor Law § 200 claims are only applicable in two situations: where the allegedly liable party supervised or controlled the work that produced the injury, or when the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury. Here, AGL reiterates that only CRV's employees supervised the hoisting activities. AGL also posits that, to the extent plaintiff argues that decedent's accident and death was caused by a hazardous premises condition, the record establishes that AGL neither created the alleged hazard nor had notice of it. Indeed, AGL continues, the sling, the crane and all related equipment were owned or maintained by entities other than AGL. In sum, AGL concludes that neither basis for Labor Law §200 liability applies to it, and, accordingly, it is not subject to liability pursuant to that statute. Accordingly, AGL argues, the court should grant AGL summary judgment dismissing plaintiff's Labor Law § 200 and common law

negligence claims.

Additionally, AGL states that plaintiff's reliance on *res ipsa loquitur* for claims against it is meritless. AGL notes that the *res ipsa loquitur* doctrine is only applicable against a defendant who had exclusive control of the instrumentality that led to the accident. Here, AGL continues, the instrumentality was the subject crane, operated by decedent (Cranes' employee) and directed by CRV's agents. AGL advocates rejecting any res ipsa loquitur claims asserted against it as it did not have exclusive control over the equipment that caused the accident.

Next, AGL argues that it is entitled to a judgment requiring CRV to indemnify it on two independent grounds. First, AGL references common-law principles, namely, that the record establishes that 1) it is free of negligence regarding the subject accident; and 2) the accident unquestionably resulted from CRV's negligent acts and omissions (i.e., failure to safely and properly rig the crane to hoist the subject beam). AGL further asserts that decedent was CRV's special employee. Under common-law principles, AGL continues, since it is facing vicarious liability for CRV's negligence, it is entitled to indemnification from CRV, the actually negligent party. Lastly, AGL acknowledges that, usually, the Workers' Compensation Law prohibits common-law indemnity claims against an injured worker's employer, but the "grave injury" exception applies here, where the workplace accident resulted in the worker's death.

Additionally, AGL claims that it is entitled to contractual indemnification from CRV. It acknowledges that some of the documents which embody the agreement between it and CRV contain typographical errors and incorrect references. However, AGL argues, it and

CRV (among other parties) unquestionably executed a clear and explicit written indemnity agreement. This agreement, AGL avers, identifies CRV as the "Lower Tier Subcontractor" and specifies that such subcontractor agrees to hold AGL (among other parties) harmless from any claims arising from the work such Lower Tier Subcontractor performed. AGL asserts that the subject indemnity agreement is applicable, enforceable, clear and was in full force and effect at all relevant times. Hence, AGL concludes that it is entitled to a judgment requiring CRV to indemnify it under the written agreement, as no meritorious argument questions that the accident and claims arose from CRV's work.

Lastly, AGL argues that it is entitled to summary judgment dismissing all cross claims asserted against it. First, AGL asserts, the cross claims are conclusory, as they assert no facts suggesting that AGL's acts or omissions led to the subject accident. AGL maintains that these cross claims are asserted not for any factual basis, but because plaintiff accused the co-defendants of liability. AGL characterizes such an assertion as insufficient for a sustainable cross claim, and submits that the cross claims should be dismissed on this ground. Alternatively, AGL contends that the record belies any factual basis for a cross claim against it. AGL reiterates that the record contains nothing suggesting its acts or omissions contributed to the accident. Rather, AGL continues, the record establishes that it was CRV's negligence which resulted in decedent's death.

AGL argues, regarding contractual indemnification, that it is not a party to any written indemnity agreement with any co-defendant other than Pav-Lak. Accordingly, AGL claims that any contractual indemnification cross claims by other co-defendants should be dismissed on this ground. Pav-Lak's indemnification cross claim, AGL continues, is an

impermissible attempt under the General Obligations Law (GOL) to have other parties indemnify it for its own negligence. Alternatively, AGL claims that Pav-Lak improperly seeks indemnity from AGL for the negligent acts of CRV, a lower subcontractor that AGL did not hire. Lastly, AGL claims that any breach of contract argument must be rejected, as the record shows that AGL procured general liability insurance as the written agreement required. These reasons, AGL concludes, entitle it to summary judgment dismissing all cross claims asserted against it, and, coupled with its other arguments, AGL contends that its summary judgment motion should be granted in its entirety.[8]

Plaintiff's Arguments Supporting Her Partial Summary Judgment Motion (Mot. Seq. 14)

Plaintiff, in support of her partial summary judgment motion, first argues that she is entitled to partial summary judgment against defendants on the Labor Law § 240 (1) claim. Plaintiff observes that this statute is meant to be construed as liberally as possible to protect construction workers. Plaintiff also claims that this statute imposes absolute strict vicarious liability on certain parties, regardless whether the injuries were caused by their fault. Specifically, plaintiff notes that Labor Law § 240 (1) imposes liability on owners, contractors and their agents when a construction site failure to adequately protect against elevation-related risks proximately causes injuries. Plaintiff further maintains that when the record, as here, does not contain a serious factual dispute, summary judgment on the issue

[8] In correspondence to chambers, electronically filed document number 405, AGL acknowledged that although it did not formally submit separate papers in opposition to plaintiff's motion, discussed below, AGL asks this court to consider the arguments contained in support of its summary judgment motion as opposition to plaintiff's motion.

of strict vicarious liability under Labor Law § 240 (1) is appropriate.

Further, plaintiff argues that the subject sling was a safety device used to hoist the subject beam and intended to protect workers (such as decedent) from gravity-related risks (e.g., the risk of a heavy hoisted steel beam falling, and causing injury, or, as here, decedent's death). Plaintiff further contends that the sling, chosen and rigged by CRV's employees, was rated for less than half the weight of the subject steel beam, and, therefore, unquestionably was inadequate for the task. Plaintiff asserts that the sling failed, caused the beam to fall and crush the crane cab and decedent, and, thus the record establishes a Labor Law § 240 (1) violation and proximate causation. She maintains that, as defendants are "owners" or "contractors" as those terms are used in the statute, she has demonstrated prima facie entitlement to summary judgment as a matter of law regarding defendants' Labor Law § 240 (1) liability. Plaintiff further argues that defendants have no valid defense to overcome plaintiff's prima facie showing, and, therefore, she is entitled to partial summary judgment against them on the issue of their liability under Labor Law § 240 (1).

Next, plaintiff argues that she is entitled to partial summary judgment on the issue of defendants' Labor Law § 241 (6) liability. Plaintiff reiterates that decedent was unquestionably a worker engaged in construction work when the accident occurred, and, as such, the statute applies to this action. She observes that Labor Law §241 (6) also imposes absolute vicarious liability on owners, contractors and their agents for Industrial Code violations that proximately cause injuries. Plaintiff points to an Industrial Code section, § 23-8.1 (f) that requires rigged cranes to be inspected to ensure that loads are properly

secured, and reasons that CRV, whose employees were responsible for selecting and rigging the sling, were similarly responsible to inspect, to ensure that the beam was secure before hoisting began. She submits that the facts of this accident demonstrate there was no inspection done to ensure that the subject steel beam was secure, that the relevant Industrial Code provision was therefore violated, and that defendants are vicariously liable for this violation under Labor Law § 241 (6). She posits that the record eliminates any factual issue as to causation, demonstrates the lack of any defenses to this claim and entitles her to partial summary judgment against defendants on the issue of their liability under Labor Law §241 (6).

Lastly, plaintiff asserts that she is entitled to partial summary judgment against CRV on the issue of liability under Labor Law § 200. This statute, plaintiff continues, requires that workers such as decedent be provided with a safe workplace and that all equipment and machinery is operated to provide adequate protection to workers. Plaintiff claims that liability is premised on whether defendants had the authority to supervise the injury-producing work. Here, plaintiff contends that there is no serious question that CRV, whose employees were responsible for selecting the slings and rigging the crane, selected an inadequate sling for the hoist, and had the authority to supervise the subject work. Likewise, plaintiff adds that there is no serious question that CRV's selection of the inadequate sling constitutes negligence and that this negligence proximately caused decedent's death. Accordingly, plaintiff concludes that she is entitled to partial summary judgment against CRV on the issue of liability under Labor Law § 200 and urges the court to grant her motion.

Cranes' Arguments Supporting Its Summary Judgment Motion (Mot. Seq. 15)

Cranes, in support of its summary judgment motion, suggests that all claims asserted against it lack merit and/or evidentiary basis, and, therefore, must be dismissed. First, Cranes highlights that it has a written trade agreement with CRV, but not with any other party. Moreover, Cranes continues, the only indemnity provision contained in the written agreement with CRV is a provision which requires that CRV must indemnify Cranes. Therefore, reasons Cranes, any contractual indemnification claim that Briarwood, Pav-Lak and AGL assert lacks merit and must be dismissed.

Similarly, continues Cranes, any common-law indemnification claim asserted against it lacks merit. Cranes emphasizes that such claims are viable only against parties that were actually negligent, and, it is beyond dispute in this record that only CRV committed negligent acts. Cranes asserts that CRV alone controlled the entire hoisting operation, determined where the crane was placed and provided all the rigging equipment (including the inadequate sling that failed). It also notes that a CRV signalman directed decedent's operation of the crane and that decedent remained in the cab and only followed CRV's employees' instructions at all relevant times. Cranes concludes it is indisputable, based on these facts, that it is not responsible for any negligent act or omission and any common-law indemnification claims asserted against it should be dismissed.

Lastly, Cranes argues that it is entitled to indemnification, either contractual or pursuant to common-law principles, from CRV.[9] Cranes acknowledges that the record does

[9]The court notes that Cranes' claim for this relief was never properly asserted in any action herein, as there is no caption that both Cranes and CRV are included in.

not contain a copy of its written agreement with CRV. Nevertheless, Cranes continues, the record contains evidence of its extensive past dealings with CRV, and, therefore, the custom and practice between them is established, which demonstrates CRV's intent to indemnify Cranes for incidents arising from the subject crane's operation. Cranes also points out that appellate authority suggests that the absence of a copy of the written agreement is of no moment, given the evidence of their custom and practice. Alternatively, Cranes asserts that it is entitled to common-law indemnification from CRV and claims that the record shows that it was free of negligence. Also, Cranes reiterates that the record contains ample evidence that the accident was proximately caused by the negligence of CRV, namely, that CRV's employees chose to use an inadequate sling for hoisting the subject beam. Cranes argues that perusing the record establishes that CRV's unsafe work practices caused the accident, and, thus, under common-law principles, it is required to indemnify Cranes for the fees and costs incurred in defending these claims. Based on the foregoing, Cranes concludes that it is entitled to summary judgment requiring CRV to indemnify it.

CRV's Arguments Supporting Its Summary Judgment and Dismissal Motion (Mot. Seq. 16)

CRV, in support of the branch of its summary judgment motion which seeks to dismiss plaintiff's Labor Law § 240 (1) claim, argues that the foolish positioning of the subject crane was the only proximate cause of the subject accident. CRV notes that an OSHA regulation prohibits performing construction work under a suspended load, but the crane was nevertheless positioned in that manner. CRV also asserts that decedent alone was responsible for positioning the crane and had ample opportunity to move it to another

approved location. Therefore, CRV reasons that since decedent was the sole proximate cause of his death, the Labor Law § 240 (1) claims lack merit and thus should be dismissed.

Next, CRV argues that it is entitled to an order dismissing the contractual indemnification claims that AGL and Cranes assert against it and, in this regard, argues that it is not a party to any written indemnity agreement with either AGL or Cranes. CRV maintains that there was no applicable written contract with either AGL or Cranes that covered the work that led to the accident and contained a written promise to indemnify.

Specifically, CRV argues regarding Cranes that there was simply no written agreement in place for the date of the accident.[10] CRV acknowledges that there are written agreements between it and AGL, but claims these agreements are incomprehensible. CRV states that these written agreements contain incorrect titles for the parties (such as defining AGL as both contractor and subcontractor) and refer to another entity as the relevant party. Moreover, CRV continues, the indemnity agreement does not provide indemnification for AGL. CRV concludes that any written agreement between it and AGL does not contain a written and enforceable promise to indemnify. Similarly, CRV asserts that there was no written agreement between it and Cranes. CRV also claims that the record contains no indication that a written proposed agreement with Cranes for the day in question was ever presented to it. CRV reasons that the absence of proof of a written agreement negates any

[10]The apparent custom between the two parties was to execute a daily written crane rental and operation agreement, but no copy of the agreement for the applicable date is part of the record.

contractual indemnification claim. Hence, CRV concludes that its motion to dismiss the contractual indemnification claims asserted by AGL and Cranes should be granted.

Briarwood and Pav-Lak's Arguments
Partially Opposing AGL's Summary Judgment Motion (Mot. Seq. 13)

Briarwood and Pav-Lak, in partial opposition to AGL's summary judgment motion, first argue that plaintiff's Labor Law §§ 240 (1) and 241 (6) claims should not be dismissed as against AGL. They acknowledge that such claims are viable against owners, contractors and their agents. Assuming that AGL is not an owner or contractor, they continue, the record establishes, at the very least, that issues of fact exist as to whether AGL is an agent of the general contractor, Pav-Lak.

Briarwood and Pav-Lak note that, despite AGL's protestation, the written trade agreement between them specifies that AGL is responsible for both the delivery of fabricated steel as well as its installation. Moreover, they continue, the written agreement specifies that AGL had the right and responsibility to supervise site safety, including the hoisting operations. They claim that AGL thus had the right to supervise and control the steel beam hoisting, which was the work that precipitated the accident. Therefore, they reason that AGL's right to control the work that brought about the accident renders it an agent, subject to strict vicarious liability, pursuant to Labor Law §§ 240 (1) and Labor Law 241 (6). Also, they add that AGL's failure to exercise its right to supervise and control the subject steel beam hoisting work, along with AGL's delegation of such work to CRV, who further contracted with Cranes, is of no moment, as AGL is a Labor Law agent solely because it had the right to control the work that brought about the injury. Briarwood and

Pav-Lak thus conclude that, at the very least, a factual issue exists as to whether AGL was an agent of Pav-Lak, and thus subject to absolute vicarious liability pursuant to Labor Law §§ 240 (1) and 241 (6). Accordingly, they argue that AGL's summary judgment motion should be denied to the extent it seeks dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims.

Next, Briarwood and Pav-Lak assert that AGL's summary judgment motion should be denied to the extent it seeks to dismiss their contractual indemnification cross claims. They reiterate that they exercised no supervision or control over steel beam hoisting, and there was no hazardous premises condition that contributed to the accident. Therefore, they reason that the record establishes that they did not commit any negligent act or omission. They add that they are not seeking indemnification for their own negligence and conclude that their attempt to seek indemnity does not run afoul of the GOL (General Obligations Law). Moreover, they emphasize that the subject written agreement specifies that AGL is responsible for all steel installation and that the indemnity provision applies to any claims arising from such work. They argue that AGL's decision to subcontract out the steel installation to CRV is irrelevant for indemnity purposes. In sum, Briarwood and Pav-Lak claim that the record establishes that the subject written indemnity clause in Pav-Lak's favor is applicable, enforceable and was in full force and effect at all relevant times. They thus argue that they are entitled to judgment on their contractual indemnification cross claim against AGL and conclude that AGL's summary judgment motion should be denied to the extent it seeks to dismiss their contractual indemnification cross claim.

Briarwood and Pav-Lak's Arguments Partially Opposing Plaintiff's Partial Summary Judgment Motion (Mot. Seq. 14)

Briarwood and Pav-Lak, in partial opposition to plaintiff's partial summary judgment motion on the issue of liability under Labor Law §§ 240 (1) and 241 (6), assert that plaintiff cannot recover damages pursuant to those statutes because decedent was the sole proximate cause of his injuries. They claim that decedent, a licensed and experienced crane operator, either knew or should have known about the many government and administrative regulations that prohibit hoisting loads directly above a crane's cab. They also note that decedent chose where to position the mobile crane, but failed to position it in a safe location. They further claim that the record indicates that decedent could have easily moved the crane to a safer location before hoisting the subject beam. They argue that, at least, an issue of fact exists as to whether decedent's unwise acts, not the failed sling, was the sole proximate cause of the accident. Hence, Briarwood and Pav-Lak advocate denying plaintiff's motion insofar as it seeks partial summary judgment regarding defendants' liability under Labor Law §§ 240 (1) and 241 (6).

Briarwood and Pav-Lak's Arguments Partially Opposing Cranes' Summary Judgment Motion (Mot. Seq. 15)

Briarwood and Pav-Lak, in partial opposition to Cranes' motion, argue against awarding Cranes summary judgment dismissing their contribution and common-law indemnity claims asserted against Cranes. They first observe that it is undisputed that the subject accident occurred while the subject steel beam was hoisted and further note that no serious dispute exists in the record that decedent, the subject crane operator, was a Cranes employee. They recognize that the Workers' Compensation Law generally bars claims for

contribution and common-law indemnification against an injured worker's employer, except where, as here, the accident resulted in the worker's death.

Briarwood and Pav-Lak reject Cranes' contention that it is unquestionably free from negligence. They stress that Cranes is vicariously responsible for the negligence of decedent, its crane operator employee and allege that the crane was improperly positioned. They further posit that the hoisting activity which led to the subject accident violated the applicable crane use permit, the Industrial Code, OSHA regulations, and the City of New York Building Code. They accuse decedent of having engaged in negligent hoisting that proximately caused his own death.

Briarwood and Pav-Lak reiterate that they are subject to absolute vicarious liability for this accident, despite not being responsible for either the means and methods of decedent's work or his crane. However, they reason that they are entitled to contribution and common-law indemnification against parties that committed negligent acts. This record, they continue, at least shows an issue of fact exists as to whether Cranes' negligence qualifies as a basis for common-law indemnification and contribution. Therefore, Briarwood and Pav-Lak urge denying Cranes' summary judgment motion to the extent it seeks an order dismissing Briarwood and Pav-Lak's common-law indemnification and contribution claims against Cranes.

AGL's Arguments Partially Opposing Cranes' Summary Judgment Motion (Mot. Seq. 15)

AGL, in partial opposition to Cranes' motion, first asserts that Cranes has not demonstrated entitlement to summary judgment dismissing AGL's common-law

indemnification claim. AGL suggests that Cranes committed a negligent act which contributed to decedent's death. Specifically, AGL continues, the record establishes that decedent could have (and should have) placed the subject crane in a safer location before the subject hoisting activities commenced. AGL accuses Cranes (and CRV) of committing a negligent act when they allowed hoisting to occur with the crane cab below the subject steel beam. AGL suggests that at least a factual exists as to whether this negligence proximately caused the subject accident.

AGL reasons that since it is now subject to vicarious liability as a result of Cranes' (or CRV's) negligent act, and since the record, it claims, establishes that it was not directly negligent, the requirements for asserting a claim for common-law indemnification are at least arguably presented. AGL further states that the Workers' Compensation Law generally bars claims for contribution and common-law indemnification against an injured worker's employer, except where, as here, the accident resulted in the worker's death. Accordingly, AGL asserts that Cranes' summary judgment motion must be denied to the extent it seeks an order dismissing AGL's common-law indemnification claim.

AGL's Arguments Partially Opposing CRV's Summary Judgment Motion (Mot. Seq. 16)

AGL, in partial opposition to CRV's motion, first asserts that, contrary to CRV's contention, there is a clear written agreement, applicable and in effect at all relevant times, containing CRV's intent to indemnify AGL for claims arising from CRV's work. AGL submits a copy of the relevant documents, notes that the deposition testimony of a CRV co-owner also establishes CRV's intent to indemnify AGL and points out that the subject written agreement is enforceable "to the fullest extent permitted by law." Lastly, AGL

states that the record is replete with details establishing that the subject accident was precipitated by CRV's negligent methods. Accordingly, AGL concludes that CRV's motion, insofar as it seeks summary judgment dismissing AGL's contractual indemnity cross claim against CRV, must be denied.

Similarly, AGL argues that CRV's motion must be denied to the extent it seeks summary judgment dismissing AGL's common-law indemnity and contribution cross claims. AGL reiterates that the record establishes beyond serious argument that CRV was responsible for all aspects of steel beam hoisting and steel erection, stresses that the subject sling was unquestionably inadequate, its failure caused the accident and decedent's death, and that CRV's employees both selected the sling and rigged the crane. AGL again notes that its involvement in the subject construction project was limited to fabricating the steel beams offsite, then delivering them to the site, and, as such, reasons that it cannot have been negligent with respect to the steel beam hoisting or erection. AGL argues that the record establishes that AGL is defending claims not caused by its negligence, but from CRV's negligence and thus CRV's summary judgment motion must be denied to the extent it seeks to dismiss AGL's cross claims for contribution and common-law indemnity from CRV.

AGL's Arguments Partially Opposing Briarwood and Pav-Lak's Summary Judgment Motion (Mot. Seq. 12)

AGL, in partial opposition to Briarwood and Pav-Lak's motion, first asserts that Pav-Lak has not established AGL's clear, written intention to indemnify Pav-Lak (and/or Briarwood) for claims arising from accidents such as the instant one. AGL acknowledges that its written agreement with Pav-Lak contains a provision whereby AGL agrees to hold

Pav-Lak harmless for liability arising from work within the agreement's scope and reiterates that its "presence" on the construction site was limited to fabrication and delivery of the steel beams and other materials. AGL further notes that the subject written agreement with Pav-Lak explicitly specifies this. AGL claims that the record establishes beyond dispute that its agents or employees were not involved in the steel erection work. Indeed, AGL continues, Briarwood and Pav-Lak's own arguments indirectly concede this point, as their contention is that only CRV's employees were responsible for steel beam hoisting and installation. AGL reasons that such an argument acknowledges that the accident did not arise from AGL's work, which, again, was limited to steel beam fabrication and delivery. AGL concludes that, since the accident did not arise from its work, the subject indemnity provision contained in its written agreement with Pav-Lak is inapplicable here, and that neither Briarwood nor Pav-Lak is entitled to contractual indemnification from AGL herein.

Alternatively, AGL contends that Pav-Lak is not entitled to summary judgment with respect to its claim for contractual indemnification because Pav-Lak is attempting to have AGL hold it harmless for its own negligence, an impermissible result under the GOL. AGL alleges that the relevant written agreements among the several contractors establish that Pav-Lak was ultimately responsible for construction site safety. AGL claims that the accident happened because of Pav-Lak's failure to properly monitor the construction site. Therefore, reasons AGL, Pav-Lak is attempting to obtain indemnification for its own negligence. AGL submits that, to the extent that the relevant indemnity provision may be read as described, the provision violates the GOL and is also void as against public policy.

Thus, AGL argues, the motion should be denied to the extent that Briarwood and Pav-Lak seek summary judgment directing AGL to indemnify them for the instant claims.

Cranes' Arguments Partially Opposing
AGL's Summary Judgment Motion (Mot. Seq. 13)

Cranes, in opposition to AGL's motion, first asserts that the record does not support AGL's common-law indemnification claim against Cranes. Indeed, Cranes continues, AGL, in its memorandum of law, does not even advance an argument regarding this claim, and that absence alone is sufficient to deny AGL's request.

Alternatively, Cranes claims that the record contains no evidence that it committed a negligent act or omission that led to the accident. Cranes further submits that AGL, in the arguments supporting its motion, has not identified any evidence that Cranes committed a negligent act or omission that led to the accident. It observes that the common-law indemnification doctrine requires a proposed indemnitee (in this instance, AGL) to demonstrate that the alleged indemnitor (here, Cranes) committed a wrongful act or omission. Cranes notes in this regard that the record is replete with evidence that CRV and its employees, and only CRV and its employees, committed negligent acts, namely, the selection of the inadequate sling which failed and caused the subject steel beam to fall. Cranes reiterates that its crane operator did not exercise any independent judgment and only operated the subject crane in accordance with the directions given by CRV's employees. Moreover, Cranes continues, the record contains no evidence that the decedent operator failed to properly control the subject crane or even that the accident stemmed from crane operation at all. Cranes further notes that AGL was contractually responsible for steel

erection (even though such work was contracted out to CRV) as well as steel beam fabrication and delivery, and AGL must show that it committed no negligent act or omission to obtain contractual indemnification. Cranes posits that AGL has failed to make such a showing and has failed to show that it was not negligent, or that Cranes was negligent. Cranes concludes that AGL is not entitled to common-law indemnification from it and that AGL's summary judgment motion should be denied with regard to AGL's claim for common-law indemnification against Cranes.

Lastly, Cranes notes that AGL seeks summary judgment dismissing all common-law indemnification and contribution claims asserted against AGL. Cranes again maintains that AGL has not demonstrated that it did not commit a negligent act or omission that led to the subject accident. Cranes asserts that AGL's failure to make such showing means that the contribution and common-law indemnification claims against AGL should not be dismissed. Hence, Cranes concludes that AGL's summary judgment motion seeking to dismiss all contribution and common-law indemnification claims against it should be denied.

Cranes' Arguments Partially Opposing
Briarwood and Pav-Lak's Summary Judgment Motion (Mot. Seq. 12)

Cranes, in partial opposition to Briarwood and Pav-Lak's summary judgment motion, first alleges that they have misstated the evidence in the record regarding the positioning of the subject crane before the accident. Cranes notes that CRV, in conjunction with its engineer, was solely responsible for the operating instructions (including placement) of the subject crane. Cranes reasons that, therefore, neither it nor decedent was responsible for crane positioning. Next, Cranes notes that decedent was not among the

workers who actually drove the crane and placed it in its location and that those workers received placement instructions solely from CRV and its engineer. In short, Cranes continues, and contrary to Briarwood and Pav-Lak's contentions, decedent (and thus Cranes) was not responsible for positioning of the subject crane.

Moreover, Cranes adds, the record establishes that decedent was not responsible for directing the hoisting operations. Rather, decedent only operated the crane in accordance with directions from CRV's workers. Cranes notes that the testimony of CRV's deposition witness, and the relevant provisions in the crane rental agreement, both indicate that CRV alone controlled the hoisting operations. Therefore, Cranes reasons, Briarwood and Pav-Lak's attempt to attribute responsibility for the hoisting operations to decedent and Cranes should be rejected.

Cranes asserts that these arguments and references to the record establish that Briarwood and Pav-Lak are not entitled to partial summary judgment against it (Cranes) on the issue of common-law indemnification, and their motion seeking that relief must be denied. Alternatively, Cranes maintains that any common-law indemnification award against it must be limited to the costs incurred defending the main action (not prosecuting its indemnification claims).

Cranes' Arguments Partially Opposing
CRV's Summary Judgment Motion (Mot. Seq. 16)

Cranes, in partial opposition to CRV's motion, first asserts that CRV, in its motion papers, does not mention Cranes' common-law indemnification claim against it and has advanced no arguments against such claims. Cranes reasons that its common-law

indemnification claim survives even if CRV's motion is granted and the other claims are dismissed.

Next, Cranes notes that most of CRV's arguments are based on unsworn witness statements in contrast to the sworn testimony contained in this record. Cranes emphasizes that the record in this action overwhelmingly indicates that CRV's failure to use an adequately strong sling for hoisting the subject steel beam proximately caused the accident. Also, Cranes asserts that the record shows that decedent solely followed CRV's employees' instructions when hoisting. Cranes further highlights that the applicable written crane lease agreement specifies that decedent was to be under CRV's control during the crane operations and thus concludes that CRV was solely responsible for the accident.

Lastly, Cranes disputes CRV's assertion concerning the absence of a written agreement between them which contains a standard indemnity clause whereby CRV agreed to indemnify Cranes for claims arising from the operation of the subject crane. Cranes acknowledges that the actual written daily crane rental agreement for the accident date cannot be located, but argues that CRV's deposition witness testified to a working relationship with Cranes for more than eight years. Cranes adds that the record establishes (with an apparent concession by CRV) that Cranes would daily transmit a draft written crane rental agreement to CRV and that a CRV principal would execute it at the end of the day. Cranes notes that during the course of the above mentioned extensive working relationship, CRV never objected to the language of the standard form written daily crane rental agreement. Indeed, Cranes continues, the only dispute in this record that it has with

CRV about the parties' regular daily crane rental custom and practice is that Cranes asserts that the renter would execute the written daily crane rental agreement at the beginning of the work day, and that CRV maintains that the agreement was signed at the end of the work day. In any event, Cranes argues, there is no dispute that the subject agreement was executed or that it contained an indemnity clause whereby CRV agreed to indemnify Cranes for claims arising from the operation of the subject crane.

Cranes reiterates that applicable appellate authority provides that the contractual indemnification claim based on the missing written agreement is nevertheless viable, and the failure to produce the agreement is not fatal to the claim. Cranes maintains that the subject indemnity provision is applicable, enforceable and was in effect at all relevant times. Cranes further contends that the crane, including the crane operator it provided to CRV, was wholly under CRV's supervision and control at all relevant times. Indeed, Cranes continues, the record reflects that the subject crane operator always followed the CRV signalman's commands. Cranes adds that the record contains no indication that Cranes committed a negligent act or omission in connection with the accident. Cranes reasons that, based on the foregoing, plaintiff's claims against it are wholly vicarious and stemming from CRV's acts or omissions. Therefore, argues Cranes, the subject indemnity provision is active, and CRV is thus required to defend and indemnify it. Hence, Cranes concludes that CRV's motion, insofar as it seeks summary judgment dismissing Cranes's contractual indemnification claim, must be denied.

Plaintiff's Arguments Opposing
Defendants' Summary Judgment Motions (Mot. Seq. 12, et seq.)

Plaintiff, in opposition to defendants' summary judgment motions, first argues that Labor Law §§ 240 (1) and 241 (6) unquestionably apply to the instant facts. First, plaintiff asserts regarding § 240 (1) that the single decisive question is whether the injuries were the direct consequence of a failure to provide adequate protection against the risk arising from a significant elevation differential. Here, plaintiff maintains, decedent was killed because the subject sling failed and the steel beam consequently fell and crushed the crane cab while decedent was inside it, killing him. Plaintiff further claims that the record establishes that the subject sling was inadequate, failed and consequently caused the accident, and any argument that decedent's acts or omissions were the sole proximate cause of his death must be rejected. Plaintiff states that the sling failure was a Labor Law § 240 (1) violation that led to decedent's death and his own acts cannot be a sole proximate cause of the accident. Accordingly, plaintiff concludes that defendants' arguments concerning Labor Law § 240 (1) must be rejected.

Next, plaintiff argues that the record also shows that defendants violated Labor Law § 241 (6). Specifically, plaintiff claims that an Industrial Code provision, § 23-8.1 (f), which requires inspection of crane rigging and loads, was violated, as a person conducting even a cursory inspection would have noted that the sling's load rating was approximately half of the load's weight. Plaintiff argues that this failure to inspect proximately caused decedent's death, and, like Labor Law § 240 (1), decedent's acts and omissions cannot have

been the sole proximate cause of his death. Hence, plaintiff concludes that defendants' motions must also be denied regarding Labor Law § 241 (6).

Lastly, plaintiff rejects AGL's arguments concerning whether it is subject to absolute vicarious liability under the Labor Law and notes that the Labor Law's applicable vicarious liability provisions apply to owners, contractors and their agents. She alleges that, assuming AGL is neither an owner nor a contractor for statutory purposes, it is nevertheless an agent of a contractor (i.e., Pav-Lak). Plaintiff cites appellate authority holding that a party retained by a general contractor who has the authority to control the activities that produced the injuries is a statutory agent. Here, plaintiff notes, AGL had the authority to control all aspects of the steel erection at the subject construction project and the same referenced appellate decisions hold that AGL's delegation of the steel hoisting and installation duties to CRV is of no moment. Plaintiff concludes that AGL is properly subject to absolute vicarious liability under the Labor Law, and, as such, its arguments to the contrary should be rejected.

CRV's Arguments Opposing
Briarwood and Pav-Lak's Summary Judgment Motion (Mot. Seq. 12)

CRV, in opposition to the motion of Briarwood and Pav-Lak, asserts that these movants have no right to contractual indemnification herein. Specifically, CRV claims that there was no written agreement with them for the work CRV performed at relevant times herein and it cannot properly be found that CRV expressed an intent to indemnify either Briarwood or Pav-Lak. Additionally, CRV argues that Briarwood and Pav-Lak, to obtain contractual indemnification, if there was a contract, requires that the record support a

finding that they committed no negligent acts or omissions, and that CRV's negligent acts or omissions contributed to the subject accident. CRV maintains that such a finding would presently be premature.

Similarly, CRV argues that neither Briarwood nor Pav-Lak has established prima facie entitlement to a judgment of common-law indemnification against it. CRV claims in this regard that common-law indemnification is available only against entities that had the right to direct or control the means and methods of the subject work, and that there is no indication that CRV qualifies as such an entity. CRV further posits that Briarwood and Pav-Lak, who argue that decedent was the sole proximate cause of his accident, cannot concurrently suggest that CRV was negligent and that such negligence led to the accident. At best, CRV adds, Briarwood and Pav-Lak's summary judgment motion for indemnification is premature and must be denied.

CRV's Arguments Partially Opposing
AGL's Summary Judgment Motion (Mot. Seq. 13)

CRV, in opposition to AGL's motion, first notes the applicable standard for summary judgment and emphasizes that where the existence of a factual issue is even debatable, summary judgment must be denied. Next, CRV observes that AGL's arguments stem from its assertion that it had no authority to direct and control the steel erection work that precipitated the subject accident. However, CRV continues, a cursory reading of the applicable written construction trade agreement between Pav-Lak and AGL establishes the exact opposite: AGL was responsible for, and had the authority to control, all aspects of the project's steel erection work. CRV asserts that the fact that AGL chose to delegate some of

the steel construction work to CRV is of no moment and that the record shows that AGL did in fact have the authority to control the work that led to the accident and decedent's death.

Next, CRV argues that AGL's contractual indemnification cross claim against it is meritless and must be dismissed. CRV acknowledges that it is a party to a written construction trade agreement with AGL, but alleges that the agreement is contained in "two contradictory documents" which contain undecipherable typographical errors, nonsense and misidentification and mislabeling of the subject parties. CRV also claims that any indemnity provisions in these documents refer to a company that is not even a party to this action and describes the indemnity provisions as "nonsensical."

CRV describes the agreement as lacking a coherent, unambiguous indemnity clause. Indeed, CRV continues, the clause states that "contractor" shall hold "contractor" harmless, and the agreement erroneously identifies AGL as both "contractor" and "subcontractor." Also, adds CRV, the written agreement references an entity named PCM Group that is otherwise unidentified. CRV states that the written agreement "makes absolutely no sense" and certainly does not eliminate all factual issues as to whether it must indemnify AGL. Therefore, CRV concludes that AGL's summary judgment motion should be denied to the extent it seeks to dismiss CRV's contractual indemnification cross claim.

CRV next rejects the contention that decedent was its special employee and recounts that both wage statements and a completed Workers' Compensation Board proceeding have already established that solely Cranes employed decedent. CRV acknowledges that its signalmen directed decedent's hoisting operations, but emphasizes that only decedent's

supervisor, a Cranes employee, directed decedent's work location, work schedule and wages. CRV highlights that it neither trained decedent nor selected him as the subject crane's operator. Lastly, CRV asserts that, given the above facts, any contractual language suggesting a special employment relationship is irrelevant. In sum, CRV argues that appellate courts, interpreting facts substantially similar to the foregoing facts. have held that no special employment relationship existed.

Next, CRV maintains that it did not breach the covenant to secure and maintain general commercial liability insurance which covered AGL as an additional insured. CRV presents a copy of the relevant insurance documents and claims that the documents establish that AGL was in fact an additional insured on the relevant policy. Moreover, CRV asserts that it provided AGL with a certificate of insurance that establishes its additional insured status. CRV concludes that any cross claim against it asserted by AGL for breach of a covenant to procure insurance is proven meritless by the record, and, to the extent that AGL's motion seeks summary judgment with respect to this issue, it must be denied.

Lastly, and alternatively, CRV argues that any motion that seeks summary judgment on the issue of indemnification, either contractual or common-law, must be denied as premature and may be rendered only against a party that has committed a wrongful act and that the record does not presently support a finding that CRV committed such an act. Therefore, CRV reasons, it would be premature for the court to award a judgment of indemnification against it and to dismiss CRV's cross claims for indemnification against the other parties. CRV concludes that AGL's motion must be denied to the extent it seeks such

relief.

CRV's Arguments Opposing Plaintiff's Summary Judgment Motion (Mot. Seq. 14)

CRV, in opposition to plaintiff's motion, first argues that the motion must be denied because material factual issues as to proximate causation preclude judgment as a matter of law. CRV submits that an injured worker may not recover under Labor Law §§ 240 (1) or 241 (6) when the worker's negligent acts or omissions were the sole proximate cause of the injuries. Here, CRV continues, the record contains factual issues as to whether decedent both improperly positioned the crane and whether he improperly hoisted the steel beam in violation of an Industrial Code provision which prohibits lifting loads directly above the crane cab. CRV asserts that decedent had the authority to properly position the crane and to refrain from hoisting the beam above the cab. CRV claims that decedent nevertheless placed the crane and hoisted the beam in an unwise manner, which proximately caused his death. Hence, CRV concludes that a factual issue at least exists as to whether plaintiff may even recover damages under Labor Law §§ 240 (1) and 241 (6). Moreover, CRV posits regarding Labor Law § 241 (6) that plaintiff has not adequately pled and proved that a violation of an applicable Industrial Code provision occurred at the work site. In any event, CRV adds that proximate causation is an issue which is generally within a jury's province to resolve, and summary judgment should be denied on this additional ground.

CRV's Arguments Opposing Cranes' Summary Judgment Motion (Mot. Seq. 15)

CRV, in opposition to Cranes' summary judgment motion, asserts that not only should the motion be denied as to CRV, but also that Cranes' contractual indemnification claim against CRV must be dismissed. CRV reiterates that its relationship with Cranes

involved having a CRV agent, daily, execute a written crane rental agreement. CRV submits that the record contains no copy of the agreement for the date of the accident and that no such agreement was signed on that date. Therefore, CRV reasons, there was no written contract between CRV and Cranes in effect at relevant times and, specifically, no indemnity provision in effect. CRV thus reasons that Cranes, which asserts a contractual indemnification claim, therefore cannot prove its claim with competent evidence (i.e., a written indemnity provision that is both applicable and in effect at relevant times). CRV concludes that Cranes' contractual indemnification claim must therefore be dismissed.

Lastly, CRV argues that Cranes is not entitled to common-law indemnification. First, CRV notes that common-law indemnification is available only against actually negligent parties and the record does not establish that CRV was actually negligent. Next, CRV reiterates that decedent foolishly failed to properly position the crane, thereby making decedent the sole proximate cause of his injuries. CRV alternatively claims that no determination of actual negligence has occurred and common-law indemnification would thus be premature. CRV concludes that Cranes' motion, to the extent it seeks common-law indemnification against CRV, must therefore be denied.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v*

Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept

1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

However, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, “averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman*, 3 NY2d at 404 [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept

2009]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

Motions to Dismiss

A motion to dismiss a complaint or a cause of action pursuant to CPLR 3211 (a) (1) may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* John R. Higgitt, *CPLR 3211[a][1] and [a][7] Dismissal Motions—Pitfalls and Pointers*, 83 NY St BJ 32, 33-35 [Nov./Dec. 2011]). The evidence submitted in support of such a motion must be " 'documentary' " or the motion must be denied (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010] quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22). For evidence submitted under a CPLR 3211 (a) (1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010] [internal quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary

evidence in the proper case" (*Fontanetta*, 73 AD3d at 84-85 [internal quotation marks omitted]). At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1)" (*Granada Condominium III Assn.*, 78 AD3d at 997 [internal quotation marks omitted]; *see Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta*, 73 AD3d at 86).[11]

On a motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the court must accept each and every allegation as true, without expressing any opinion as to whether plaintiff ultimately will be able to establish the truth of the averments (*219 Broadway Corp. v Alexander's Inc.*, 46 NY2d 506, 509 [1979]). The court's inquiry is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). When extrinsic evidence is introduced attacking the complaint, however, the truthfulness of the pleaded allegations is not assumed, and the inquiry is as to whether the pleader has a cause of action or defense, not whether he has properly stated one (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

Labor Law § 240 (1) and § 241 (6)

Labor Law § 240 (1) pertinently states that:

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[11]The court notes that the definition of "documentary evidence" in the Second Department is narrower than in the First Department. See "Rule 3211 (a) (1) Documentary Evidence in an Electronic Age," NYLJ, 8/15/18.

> "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 . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable. Therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall 's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer*, 65 NY2d at 524). One of the hazards contemplated by the statute is the risk that a worker will be injured by an object falling from a height (*see, e.g.*, *Thompson v Ludovico*, 246 AD2d 642, 642-643 [1998]; *see also White v Dorose Holding*, 216 AD2d 290 [2d Dept 1995], *lv denied* 87 NY2d 806 [1996]; *Rocovich*, 78 NY2d at 514). To recover in a "falling object" case, a plaintiff must show that the object either was being "hoisted or secured" or "required securing for the purposes of the undertaking" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] and *Outar v City of New York*, 5 NY3d 731, 732 [2005]). The plaintiff must also demonstrate that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). Lastly, this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

Next, Labor Law § 241 provides, in applicable 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*, 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc*., 54 AD3d 753, 754 [2d Dept 2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto*, 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants

violated an Industrial Code provision that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d at 505) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 349). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

Here, there is no serious dispute that decedent, a crane operator, was performing construction work related to the erection of a building when the accident occurred. Therefore, he was a protected worker performing a protected activity within the scope of Labor Law §§ 240 (1) and 241 (6). Labor Law § 240 (1) is applicable herein because the steel beam was "a load that required securing for the purposes of the undertaking at the time it fell" (*Narducci*, 96 NY2d at 268; *see also Orner v Port Auth.*, 293 AD2d 517, 518 [2d Dept 2002]; *Outar v City of New York*, 286 AD2d 671, 672 [2d Dept 2001], *affd* 5 NY3d 731 [2005]). Moreover, the record establishes that the subject sling was a device used in hoisting, was inadequate for the task, and that it failed, which led to the accident and decedent's death. Plaintiff has thus shown prima facie entitlement to judgment as a matter of law with respect to Labor Law 240 (1) (*Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011] [proper protection issue is factual question except when safety device "collapses,

moves, falls, or otherwise fails"]).

Contrary to defendants' and Cranes' arguments, there is no merit to the argument that decedent was a recalcitrant worker. To the contrary, the record establishes that, irrespective of whether the actions of decedent were cautious, they were directed by CRV signalmen and were thus consistent with his supervisor's instructions (*Walls v Turner Constr. Co.*, 10 AD3d 261, 262 [1st Dept 2004] [worker is recalcitrant only when such worker "disobeyed immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device"], *affd on other grounds* 4 NY3d 861, 862 [2005]; *see generally Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). The argument that decedent was recalcitrant thus fails (*Laquidara v HRH Constr. Corp.*, 283 AD2d 169, 170 [1st Dept 2001], citing *Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96, 99 [1st Dept 2000]). Similarly, and again contrary to plaintiff's opponents, there is no merit to the contention that any of decedent's acts or omissions, such as positioning the crane or hoisting the beam above the cab,[12] were the "sole" proximate cause of his death. To be sure, if an injured worker's foolish conduct was the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach (*see Tomlins v DiLuna*, 84 AD3d 1064, 1065 [2011]; *Herrnsdorf v Bernard Janowitz Constr. Corp.*, 67 AD3d 640, 642 [2d Dept 2009]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2d Dept 2009]). However, where a violation of

[12]Contrary to defendants' arguments, the record establishes that decedent chose neither where to position the crane nor how or where to hoist the beam. Instead, the record makes clear that CRV directed these operations.

Labor Law § 240 (1) is a proximate cause of an accident, the injured worker's conduct, of necessity, cannot be deemed the sole proximate cause *(see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Triola v City of New York*, 62 AD3d 984, 986 [2d Dept 2009]). Conversely, if the injured worker is solely to blame for the injury, it necessarily means that there has been no statutory violation *(see Blake*, 1 NY3d at 290). Here, there is no reasonable view of the record from which it might be concluded that decedent's "actions were the sole proximate cause of his injuries" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998], *rearg denied* 92 NY2d 875 [1998]). As stated above, the subject sling was inadequate for the weight of the steel beam, and when the sling failed and snapped, the beam fell, leading to the accident and decedent's death. The Labor Law § 240 (1) violation and causation are thus established. Since plaintiff has established that the breach of duties imposed by Labor Law § 240 (1) was a proximate cause in bringing about the accident and decedent's death (see *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271-272 [1st Dept 1999]), decedent's unwise acts and omissions would amount, at most, to contributory negligence, which is not a defense to a Labor Law § 240 (1) claim (*see Rocovich*, 78 NY2d at 513 [1991]; *Zimmer*, 65 NY2d at 521). Since none of the affirmative defenses have any merit, plaintiff is entitled to partial summary judgment against the owners, contractors and their agents on the issue of liability pursuant to Labor Law § 240 (1).

There is no dispute that Briarwood is an owner and that Pav-Lak is a contractor for Labor Law § 240 (1) purposes; those entities are thus vicariously liable for the violation without regard to fault (*Zimmer*, 65 NY2d at 521 [1985] [owner or contractor is liable for

Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]). AGL asserts that it is not a defendant that is properly subject to absolute vicarious liability pursuant to the Labor Law because it is not an owner or general contractor. This argument, however, fails. Despite AGL's argument in the papers, its written agreement with Pav-Lak specifies that AGL is responsible for both the fabrication and the installation of the steel beams. Thus, AGL had the authority to oversee the erection of the steel structure, which is the work that was in progress at the time of the subject accident. To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240 (1) or 241 (6), there must be a showing that it had the authority to supervise and control the work (*see Temperino v DRA, Inc.*, 75 AD3d 543, 544-545 [2d Dept 2010]; *Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668, 669 [2d Dept 2008]; *Kehoe v Segal*, 272 AD2d 583, 584 [2d Dept 2000]). "The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" (*Bakhtadze v Riddle*, 56 AD3d 589, 590 [2d Dept 2008] [internal quotation marks and citations omitted]). Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). AGL had, in fact, the right to exercise supervision and control over the erection of the steel - the fact that it delegated that right to CRV[13] is of no moment. Thus, plaintiff has established, as a matter

[13] The court rejects AGL's contention that it was "forced" to hire CRV as unsupported and irrelevant. If anything, the record suggests that one of the terms of AGL's written agreement with Pav-Lak was that AGL would hire CRV. Specifically, AGL agreed that CRV

of law, that AGL had the authority to supervise and control the work and was the statutory agent of the general contractor, and is thus subject to vicarious absolute liability pursuant to Labor Law 240 (1) and 241 (6) (*Van Blerkom v America Painting, LLC*, 120 AD3d 660, 662 [2d Dept 2014], citing *Inga v EBS N. Hills, LLC*, 69 AD3d 568 [2d Dept 2010]; *Bakhtadze v Riddle*, 56 AD3d at 590).

The same reasoning and authority suggests that CRV is subject to liability under the vicarious liability provisions of the Labor Law. The record establishes that CRV had supervision and control over the hoisting and installation of the steel beams, which is the activity that brought about the accident. Thus, CRV is also a statutory agent of Pav-Lak (*Walls*, 4 NY3d 861, 864).

Similarly, the record establishes that Cranes is not a statutory agent of the general contractor. Specifically, the record indicates that Cranes had provided one employee, plaintiff's decedent, to operate the crane that CRV had leased. While plaintiff's decedent was an employee of Cranes and was working on the hoisting operations, he did so only under the direction and control of CRV's employees.[14] It is apparent that decedent was the only Cranes employee present on site at relevant times, and he had no authority to exercise any control over the erection of the steel structure. Indeed, the record reflects that even the hoisting activities, although operated by decedent, were directed and controlled by CRV flagmen. This fact eliminates Cranes from vicarious Labor Law liability (*see, e.g., Jaeger v*

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would be the steel erection contractor in its contract with Pav-Lak.

[14] The court rejects any suggestion that decedent was a "special employee" of any entity.

Costanzi Crane Inc., 280 A.D.2d 743 [3d Dept 2001]; *see also Townsend v Nenni Equip. Corp.*, 208 AD2d 825 [2d Dept 1994]). Finally, and most pertinently, there is nothing in the record that indicates that decedent had any control, or for that matter, knowledge, of the inadequate sling - the failure of which caused the subject accident - chosen and rigged by CRV's employees. The record thus proves that Cranes had no authority to control the subject work, and, despite the protestations of the opponents of Cranes' motion, also had no responsibility for the subject accident. The fact that Cranes provided decedent to operate the crane leased by CRV is insufficient to support liability against Cranes (*see Diamond v Reilly Homes Constr. Corp.*, 245 AD2d 763, 765 [2d Dept 1997]). As Cranes is not, for Labor Law purposes, an owner, contractor or statutory agent thereof, Cranes is not properly subject to absolute vicarious liability under the Labor Law[15] and plaintiff's Labor Law 240 §§ (1) and 241 (6) claims are dismissed as against it (*see, e.g., Mahoney v Turner Constr. Co.*, 37 AD3d 377 [1st Dept 2007] [crane company that merely leased crane is not subject to vicarious Labor Law liability]).

Next, plaintiff has demonstrated entitlement to partial summary judgment against Briarwood, Pav-Lak, AGL and CRV on the issue of their liability pursuant to Labor Law 241 (6). Plaintiff correctly notes that Industrial Code, 12 NYCRR 23-8.1 provides, in applicable part, as follows:

[15] The court also rejects any suggestion that decedent was required to ignore the instructions of CRV's flagmen/signalmen and exercise independent judgment with respect to the hoisting.

> (f) Hoisting the load.
> (1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made.
> . . .
> (iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

This provision "is not merely a general safety standard, but sets forth a specific standard of conduct" sufficient to support a Labor Law § 241 (6) claim (*Cammon v City of New York*, 21 AD3d 196, 199 [1st Dept 2005]; *see also McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 310 [1st Dept 2007] [permitting amendment of bill of particulars to include Labor Law § 241 (6) claim based on alleged violation of Industrial Code 23-8.1 (f) (1) (iv)]). This Industrial Code provision is sufficiently specific to support a Labor Law 241 (6) cause of action and, when causation is established, support judgment as a matter of law in favor of an injured worker (*Cammon*, 21 AD3d 196). Here, it is apparent that the sling was not inspected when hoisting activities began on the date of the accident. Otherwise, the inspecting worker would have ascertained that the subject sling was totally inadequate for hoisting the subject steel beam. Such an inspection would have prevented the accident, and, as such, proximate causation is established. Lastly, since Briarwood, Pav-Lak, AGL and CRV are all either an owner, contractor or an agent thereof, they are liable for the Labor Law 241 (6) violation without regard to fault. Plaintiff is thus entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6) against Briarwood, Pav-Lak, AGL and CRV. Whether the decedent was comparatively negligent remains an issue for trial (S*ee Quizhpi v S. Queens Boys & Girls Club, Inc.*, 166 AD3d 683 [2d Dept 2018], citing *Carlos Rodriguez v City of NY*, 31 NY3d 312 [2018]).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto*, 91 NY2d at 352); *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d

Dept 1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, the record establishes that decedent's accident and death was caused by the inadequate sling, chosen and rigged by CRV's employees, which failed, snapped and caused the subject steel beam to fall. There is thus no indication that a premises condition was involved (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007] ["Where a plaintiff's injuries stem . . . from a dangerous [premises] condition, an owner [or its agent] may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and . . . created the dangerous condition . . . or had actual or constructive notice of the dangerous condition that caused the accident"]). Accordingly, owners, contractors and their agents—such as Briarwood, Pav-Lak, AGL and Cranes herein—are subject to liability only if they exercised actual control or supervision over the work (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2d Dept 2004], citing *Lombardi*, 80 NY2d at 295).

The record establishes that neither Cranes nor any defendant other than CRV

directed decedent's work; in fact, the record suggests that decedent received his instructions only from CRV employees. Accordingly, plaintiff has no viable Labor Law § 200 or common-law negligence claims against Briarwood, Pav-Lak or AGL (*see, e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]; *see also Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] ["The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted"]). The allegation that entities other than CRV had workers or supervisors present on the site is irrelevant, since "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" in common-law negligence or under Labor Law § 200 (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [3d Dept 2004], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]; *see also Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the work site is insufficient to give rise to a question of fact as to the defendant's direction and control"]). Moreover, the accident occurred as a result of CRV's negligence - specifically, the negligence of its employees when they selected and rigged a crane with a sling that was rated for a maximum load of less than half the weight of the subject steel beam. Coupled with the fact that none of the employees of Briarwood, Pav-Lak, AGL or Cranes was involved in supervising or controlling decedent's work, the fact that the accident arose from the means, methods and equipment of CRV, a subcontractor, plaintiff's Labor Law § 200

claims against parties other than CRV are unsustainable (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008] [no Labor Law § 200 liability if accident arose from methods of subcontractor and other companies exercise no supervisory control over the work], citing *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2d Dept 2006], *lv denied* 8 NY2d 807 [2007]). Plaintiff's Labor Law 200 and common-law negligence claims against Briarwood, Pav-Lak and AGL must therefore be dismissed.

Plaintiff correctly points out that the record suggests that CRV both committed a negligent act and had the authority to control the injury-producing work, since CRV's workers selected and installed the clearly inadequate sling. For this reason, this court will not dismiss plaintiff's common-law negligence and Labor Law § 200 claims against CRV (*see, e.g., Klimowicz v Power Cove Assoc., LLC*, 111 AD3d 605, 607-608 [2d Dept 2013] [reversing dismissal of Labor Law § 200 claims]; *see also Ortega v Puccia*, 57 AD3d 54, 60 [2008]). However, the authority established by *Klimowicz*, cited by plaintiff, is not sufficient authority to grant summary judgment in a plaintiff's favor. Since "[n]egligence cases by their nature do not usually lend themselves to summary judgment" (*Gilmartin v Helmsley-Spear, Inc.*, 162 AD2d 275, 275-276 [1st Dept 1990]), plaintiff's motion, insofar as it seeks partial summary judgment on the issue of liability pursuant to Labor Law § 200 against CRV, is denied.[16]

[16] This court declines to make a ruling on whether plaintiff may offer evidence on the doctrine of res ipsa loquitur at the time of trial.

Indemnification and Breach of Contract

Briarwood, Pav-Lak, AGL and Cranes are entitled to summary judgment against CRV with respect to common-law indemnification. A party is entitled to summary judgment against another for common-law indemnification if it "prove[s] not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999]; *see also Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [2004]). In this regard, the Court of Appeals has explained and clarified that "[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision over the work (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011], citing *Felker v Corning, Inc.*, 90 NY2d 219, 226 [1997] and *Colyer v K Mart Corp.*, 273 AD2d 809, 810 [4th Dept 2000]). Where the proposed indemnitee's liability is purely statutory and vicarious, summary judgment for common-law indemnification is premature absent proof, as a matter of law, that the proposed indemnitor "was either negligent or exclusively supervised and controlled plaintiff's work site" (*Reilly v DiGiacomo & Son*, 261 AD2d 318 [1st Dept 1999]).

Contrary to CRV's protestations, this court can properly find, as a matter of law, that the proposed indemnitees were not guilty of any negligence and that CRV was in fact the negligent party. The accident was the direct result of the failed sling---a sling that was rated for loads less than half the weight of the subject beam. The record establishes that the sling

was chosen and rigged exclusively by CRV workers; no agent of any other company was involved. Indeed, only CRV is responsible for choosing and rigging the sling that failed and led to decedent's death. Moreover, the record indicates that only CRV supervised, controlled and directed the work that led to the accident. Other than the inadequate sling and CRV's directions, no other dangerous condition, equipment or method[17] was involved in the accident. Therefore, the two criteria for common-law indemnification have been met: the record establishes that no other party is guilty of negligence[18] and that CRV committed a negligent act (*see, e.g. Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]). Briarwood, Pav-Lak, AGL and Cranes are therefore entitled to summary judgment on their claims for common-law indemnification against CRV (*see, e.g. Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 947 [2d Dept 2019] [lower court should have granted motions of parties who were only statutorily vicariously liable against party that controlled plaintiff's work]).

With respect to the claims for contractual indemnification, Pav-Lak is entitled to summary judgment against AGL on that issue. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and

[17] The court reiterates that the record establishes that solely CRV employees directed decedent's crane operations, with CRV flagmen.

[18] The court reiterates that the record suggests that neither decedent nor any other Cranes employee were responsible for positioning the subject crane. Instead, the record indicates that CRV and its employees and agents made such determinations.

circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Here, the record indicates that Pav-Lak and AGL executed a written trade agreement in which AGL agreed to indemnify Pav-Lak for all claims arising out of AGL's work. As stated above, steel beam erection is work within the scope of the subject agreement. Moreover, the record reflects that the agreement was in effect at all applicable times. Lastly, and again, as stated above, there is no evidence that Pav-Lak is attempting to have AGL indemnify it for its own negligence (*cf.* GOL § 5-322.1 [1]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997] [for party to be entitled to indemnification must demonstrate that no negligent act or omission on its part contributed to accident and that its liability is therefore purely vicarious]). For these reasons, Pav-Lak has demonstrated that it is entitled to a judgment of contractual indemnification against AGL.

Similarly, CRV executed a written indemnification agreement in favor of Pav-Lak (exhibit P to Pav-Lak's motion, last two pages) that covers the subject work, covers the instant claims, and is both enforceable and in full force and effect. Pursuant to the same reasoning as above, Pav-Lak is thus entitled to a judgment of contractual indemnification against CRV.

Also, Briarwood and Pav-Lak have demonstrated that they were not responsible for any negligent acts or omissions. They have also demonstrated that any applicable indemnity provisions were exclusively in their favor. Accordingly, any claims asserted by Cranes or AGL against Briarwood and Pav-Lak are without merit and must be dismissed.

The court will neither award AGL summary judgment against CRV on the issue of contractual indemnification, nor will it dismiss AGL's claims for the same. The record reflects that a written agreement, including an indemnity provision, exists between the two parties. However, and as CRV points out, multiple typographical errors prevent this court from finding the parties' intent as a matter of law. Nevertheless, the existence of typographical errors and poorly-drafted language does not render the written agreement unenforceable. Instead, issues of fact exist, and thus the court denies both AGL's motion for summary judgment and CRV's motion to dismiss on the issue of contractual indemnification.

Also, the court declines to award AGL summary judgment dismissing Pav-Lak's breach of the covenant to procure insurance cross claim. AGL asserts that it complied with this covenant, but there does not appear to be in the record any proof of insurance obtained by AGL that covers Pav-Lak. The court does award AGL summary judgment dismissing CRV's claim for breach of the covenant to procure insurance, as AGL has demonstrated, with a copy of an applicable certificate of insurance, that CRV was insured at all relevant times.

Similarly, the court will not award Cranes summary judgment on the issue of contractual indemnification against CRV nor grant CRV's motion to dismiss Cranes' third-party claims. It is undisputed that an extensive business relationship exists between these two entities, and it is also undisputed that, at all relevant times, representatives of CRV and Cranes would execute a daily crane rental and operation written agreement (which contains

an indemnity clause). Given that the record reflects the extensive relationship between these parties, and their customs and practices, and that the terms of virtually identical written agreements are not in dispute, the fact that the particular written agreement for the date of the accident is not part of the record is not fatal to Cranes' contractual indemnification claims. However, given that Cranes cannot produce the subject written agreement, it has not demonstrated prima facie entitlement to judgment as a matter of law on this issue. In short, issues of fact exist as to the contractual relationship between Cranes and CRV, and both motions are denied with regard to this dispute.[19] Accordingly, it is[20]

ORDERED that the motion of Briarwood MP LLC and Pav-Lak Contracting Inc., mot. seq. 12, is granted solely to the extent that 1) the claims of asserted by plaintiff Laura Glazier-Smith, Individually, and as Administrator of the Estate of George D. Smith, deceased, based on Labor Law § 200 and common-law negligence are dismissed as asserted against them; and 2) Briarwood MP LLC and Pav-Lak Contracting Inc. are awarded a judgment of common-law indemnification against CRV Precast Construction, LLC; and 3) Pav-Lak Contracting Inc. is awarded a judgment of contractual indemnification against AGL Industries, Inc.; and 4) all cross claims asserted by CRV Precast Construction, LLC and AGL Industries, Inc. against Briarwood MP LLC and Pav-Lak Contracting Inc. are

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[19] However, Cranes has demonstrated that all other claims must be dismissed as asserted against it. The record establishes that Cranes was not actually negligent nor a party to a contract with any company other than CRV.

[20] The court reaches its decisions without reference to the opinions of purported experts submitted by the parties. The opinions are largely conclusions of law, which are not the province of experts. Also, the court did not consider the video recordings submitted by the parties. Indeed, considering video evidence seems improper in light of the fact that the recordings cannot be uploaded to the electronic filing system at the present time, and are thus outside of the record.

dismissed, and is otherwise denied; and it is further

ORDERED that the motion of AGL Industries, Inc., mot. seq. 13, is granted solely to the extent that 1) plaintiff's claims based on Labor Law § 200 and common-law negligence are dismissed; and 2) AGL Industries, Inc. is awarded a judgment of common-law indemnification against CRV Precast Construction, LLC; and 3) the indemnification and breach of contract claims asserted by CRV Precast Construction, LLC against AGL Industries, Inc. are dismissed, and is otherwise denied; and it is further

ORDERED that the motion of plaintiff, mot. seq. 14, is granted solely to the extent that plaintiff is awarded partial summary judgment on the issue of liability pursuant to Labor Law 240 (1) and 241 (6) against Briarwood MP LLC, Pav-Lak Contracting Inc., AGL Industries, Inc., and CRV Precast Construction, LLC, and is otherwise denied; and it is further

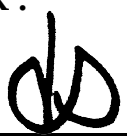
ORDERED that the motion of Cranes Express, Inc., mot. seq. 15, is granted to the extent that all claims asserted against it are dismissed; and it is further

ORDERED that the motion of CRV Precast Construction, LLC, mot. seq. 16, is denied in its entirety.

IT IS FURTHER ORDERED, that any dispute as to the amount of the attorneys' fees and costs which any party granted indemnification pursuant to this decision and order claims to be entitled to, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and costs to be awarded to such party.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R :



Hon. Debra Silber, J.S.C.