| **Badzio v East 68th St.Tenants Corp.** |
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| 2020 NY Slip Op 32885(U) |
| September 2, 2020 |
| Supreme Court, New York County |
| Docket Number: 150037/2017 |
| Judge: Robert D. Kalish |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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THOMAS BADZIO,

Plaintiff,

-against- Index No.: 150037/2017

EAST 68TH STREET TENANTS CORP., WALLACK MANAGEMENT CO., INC., SAGEWOOD CONSTRUCTION & DESIGN CORP. and SIENIA CONSTRUCTION, INC.,

Defendants.

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EAST 68TH STREET TENANTS CORP. and WALLACK MANAGEMENT CO., INC.,

Third-Party Plaintiffs,

-against-

GEOFFREY HUNTER, MARIE-JOSE HUNTER, SAGEWOOD CONSTRUCTION & DESIGN CORP., PATRICK D'ANGELO, UGIA JACOBS, and SIENIA CONSTRUCTION, INC.,

Third-Party Defendants.

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**KALISH, J.:**

Motion sequence numbers 002, 003, 004, 005, and 006 have been consolidated for disposition.

In motion sequence 002, defendant/third-party defendant Sienia Construction Inc. i/s/h/a Sienia Construction, Inc. (Sienia), moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff Thomas Badzio's (plaintiff) complaint and all cross claims asserted against it.

In motion sequence 002, Plaintiff cross-moves against defendants, pursuant to CPLR 3212, for an order granting summary judgment as to his allegation that Labor Law § 240 (1) was violated.

In motion sequence 003, third-party defendants Patrick D'Angelo (D'Angelo) and Ligia Jacobs s/h/a Ugia Jacobs (Jacobs) (collectively, the D'Angelos), move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint and all cross claims against them.

In motion sequence 004, third-party defendants Geoffrey Hunter and Marie-Jose Hunter (the Hunters), move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint and all cross claims against them.

In motion sequence 005, defendants/third-party plaintiffs East 68th Street Tenants Corp. (East 68th Street) and Wallack Management Co., Inc. (Wallack), move, pursuant to CPLR 3212, for an order dismissing plaintiff's claims of common law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). East 68th Street and Wallack also move for summary judgment for contractual indemnification against the Hunters and the D'Angelos, and to dismiss all cross claims filed by these third-party defendants as against the defendants/third-party plaintiffs.

In motion sequence 006, defendant/third party defendant Sagewood Construction & Design Corporation (Sagewood), moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's amended verified complaint and dismissing all cross-claims and third party claims against it.

**BACKGROUND**

This Labor Law action involves a worksite accident which occurred on October 19, 2016, at the premises known as 6 East 68th Street, in Manhattan, New York. Plaintiff alleges that while working as an employee of Intersystem S & S Corp. (Intersystem), a non-party, he fell from a height of 25 to 30 feet to a sidewalk bridge while in the process of dismantling Intersystem's scaffold.

Plaintiff alleges that the accident occurred when he was ascending to the top of the scaffold to dismantle it. Plaintiff states that he was climbing up the scaffold by hooking and unhooking his lanyard as he ascended. Plaintiff further states that after he unhooked his lanyard to ascend to a higher rung, and as he was reaching for the lanyard to hook above himself and attempting to get a tighter grip, he lost his grip and proceeded to fall. Plaintiff alleges that although he was provided with a safety harness and lanyard, he was not provided with a safety line to attach his harness or any other fall arresting device.

The subject scaffold which plaintiff was climbing was originally erected for Sienia, a general contractor who was conducting renovation work for an apartment on the fourth floor which was owned by D'Angelo. Sienia's work commenced in 2014 and was allegedly completed by the end of 2015, with the exception of punch-list items. Thereafter, Sagewood, the general contractor which was hired by the Hunters, a couple who resided above D'Angelo on the fifth floor, agreed with Sienia to have the scaffold extended to the fifth floor to assist with their renovation. This was done following the suggestion of the defendant building.

Sienia arranged with Intersystem to extend the scaffold from the fourth floor to the fifth floor. Although the scaffold was being utilized by Sagewood, Intersystem continued to charge a

rental fee to Sienia. It was agreed between the contractors that Sagewood paid Sienia for the entire rental fee, who then paid Intersystem. Sagewood was to add Sienia as an additional insured on their insurance policy. When Sagewood was finished with its work at the premises, they contacted Intersystem to remove the scaffold. The fee for the removal was paid by Sagewood.

It is alleged by Sienia that at the time of plaintiff's accident, the work on the D'Angelos' apartment had been completed and the scaffold was no longer necessary for their project. It is also alleged, that the scaffold was being dismantled since there was no longer a need for its use for either of the renovation projects.

**Thomas Badzio's EBT**

Plaintiff testified that on the date of his subject accident, he was working at a work site on 69th Street in Manhattan, New York, for Intersystem. Plaintiff testified that his brother Michael was a supervisor at Intersystem. There was also a foreman for Intersystem whose name he did not recall. Plaintiff testified that, on the day of his accident, he was supervised and received his instructions from his foreman.

Plaintiff maintains that he was not present with the crew that erected the scaffold. Plaintiff testified that when he arrived at the site on the day of the accident, the foreman instructed him that he was to assist with taking down the pipe scaffold. He testified that the pipe scaffolding was supplied by Intersystem. Each piece of vertical scaffolding was about six feet long and the netting was already removed from around the scaffolding.

Plaintiff brought a hammer, safety belt, hard-hat, and wrench with him to the site. He maintains that Intersystem had provided him with the safety belt with a point of attachment

which would expand to prevent a fall. At the end of the tail there was a snap ring or a hook which would have connected to a "D ring" on the harness. Plaintiff recalled that he first assisted with lowering pieces of scaffolding while utilizing a hoist.

Thereafter, the foreman asked plaintiff to climb up the scaffolding to its top level from the scaffold bridge platform. Plaintiff testified:

> "Q. After you came up to the top of the bridge, what did he tell you to do?
> A. All he told me was to come up, to go to the top. I was helping at the bottom to help -- usually you have one person at the bottom collecting the stuff that they hoist down. There was no need for two people down there so he told me to come up.
> Q. I am having problems with the term 'come up.'
> A. He told me to climb up the scaffolding.
> Q. To the top?
> A. Yes."

Plaintiff's EBT tr, at 57-58.

When plaintiff started to climb up to the top, his method in climbing up the scaffold was to tie and untie his harness to the scaffold as he ascended. He testified that he was tied off above where he was standing, climbed up two or three feet, unhooked and reached up and then tied off again with a hook.

Plaintiff testified that he continued this process of clipping off-and-on as he climbed higher until his accident took place. At the location of the accident, he took the clip off of one part of the scaffold and went to clip it to the next location while reaching up, but could not get the clip back on. He recalls that first his hand slipped and then he fell backwards. Plaintiff had the clip in his right hand when his left hand slipped from the rail. At that time, he was located about 25 feet above the sidewalk bridge and his feet were positioned in a climbing ladder motion.

Plaintiff specifically testified:

"Q. Were you already holding on to the piece of scaffold when you unhooked?
A. I was holding on to the scaffold. And as I was trying to get a better grip while I was prying myself up to get the latch on, I slipped out.
Q. You were holding on to the scaffold and at the point that you were holding on to the scaffold but you were still latched below, did you have a grip?
A. Yes.
Q. Did you feel that you had a good grip at that point?
A. At that point, yes.
Q. Did you change that grip at all before the accident happened?
A. I was trying to get a better grip, more up. I was hoisting myself up to get a higher latch up."

Plaintiff's EBT tr, at 242.

Plaintiff testified that the upper rungs were too high above him to grab and that the lower rungs were too low. Plaintiff maintains that he fell about 20 to 30 feet and landed on his back. Plaintiff testified that there was nothing below him with the exception of the scaffold bridge.

Plaintiff testified that prior to his accident, he did not make any complaints to anyone about the job site, nor hear anybody else make any complaints to anyone about the job site. Plaintiff testified that no one other than his foreman or Intersystem provided him with any tools, materials or equipment to perform his job. He testified that no one from Intersystem ever told him that he was using the wrong method to climb the scaffold. Intersystem did not hold any types of meetings for safety or toolbox meetings, but plaintiff did recall watching an OSHA training video.

Plaintiff testified that he used the ladders as he went up the scaffold that are integral to each section of the scaffold frame and that he reached over his head, attached the snap hook on his tail line to the scaffolding above with his right hand as he went up. He then climbed two

to three feet, unhooked the clip, reached above his head and clipped it on again. The accident occurred after he clipped off-and-on a couple of times. Plaintiff testified he always used the same "clip on, climb, clip off, clip on, climb, clip off" method he learned at OSHA training.

**Plaintiff's affidavit**

Plaintiff submits an affidavit dated December 19, 2019. Plaintiff states that on October 19, 2016, he was in the process of dismantling scaffolding at defendants' premises by climbing five stories to the top level. Plaintiff was provided with a safety harness and lanyard, but was provided no safety line or anchorage.

Plaintiff states that in order to climb the scaffold, he would attach the lanyard, climb up, and reattach it above while continuing to climb. Plaintiff states that while about 30 feet high, he detached his lanyard from the scaffolding to move to the next position when he lost his balance and suddenly fell 30 feet to the sidewalk shed below.

Plaintiff states that the workers were not provided with a safety line from the top of the building to the sidewalk bridge below, nor were they provided with any other fall arresting devices. He states that every time the workers detached the lanyard as they climbed the scaffolding, the workers were exposed to falls.

**Michael Badzio's EBT**

Michael Badzio (Michael) testified that he works for Intersystem as a field supervisor and supervises workers. He maintains that he assigned plaintiff, his brother, to the job at 68th Street where workers were dismantling scaffolding. Michael maintains that plaintiff was provided with 10 hours of OSHA training and 32 hours of training for a scaffold installation and

dismantling license. Michael did not remember who gave plaintiff his harness but recalls that plaintiff's harness had a lanyard with a hook.

Michael testified that at the site, the workers utilized a lanyard attached to the harness with a hook. Michael maintains that he spoke with the foreman regarding what work was being conducted on that day. He recalls that the foreman called to alert him that plaintiff fell. When he arrived at the subject premises, the foreman told him that plaintiff was climbing, when he fell backwards. Plaintiff told him that he had lost his grip.

Michael testified that the procedure to follow while utilizing a safety lanyard while climbing a scaffold is that a worker clips off-and-on at a safe point. He testified that he told the foreman the manner to conduct the work who then instructed his workers. Michael testified that he did not remember if there were safety lines available and present on the date of plaintiff's accident.

**Patrick D'Angelo's EBT**

D'Angelo testified that he lives on the fourth floor of 6 East 68th Street in Manhattan, New York. He maintains that Wallack is the current management of the building and that Sienia was hired by him as the general contractor for renovation work in his apartment.

D'Angelo testified that he was aware that prior to the commencement of the renovation work that a scaffold had to be installed. He testified that the subject scaffold extended to the fourth floor. He maintains that the Hunters on the fifth floor sometime later commenced a renovation project and the scaffold was extended an additional floor. D'Angelo recalls that the scaffolding was about to be taken down when his project was completed when the Hunters

received approval for their own renovation. D'Angelo recalls that he was not billed separately for the scaffolding and that he did not see a sign regarding who installed the scaffold.

**Ligia Jacobs' EBT**

Jacobs testified that she lives at 6 East 68th Street with D'Angelo who is her husband. The couple hired an architect named Resitano to conduct renovations on their apartment. She recalls that a general contractor recommended putting up scaffolding at the building. She was not sure who selected the scaffold company. Jacobs was not aware that the scaffolding was extended to the Hunter's level. She estimates that six months after they moved in to the apartment, the scaffold was removed.

**Geoffrey Hunter's EBT**

Geoffrey Hunter testified that he lives at 6 East 68th Street in Apartment 5. He recalls that when he purchased the unit, he signed a "Proprietary Lease" as well as an "Alteration Agreement." As part of his renovation of his apartment, he was required to receive permission form the Cooperative Board prior to the work.

Geoffrey Hunter believes that he started renovation work on his apartment in the fall of 2015. He maintains that he became aware that the scaffolding used for the D'Angelos' apartment below was to be extended up to his apartment on the fifth floor.

Geoffrey Hunter testified that he was not aware of the Alteration Agreement to procure insurance. He maintains that work at his apartment concluded in the fall of 2016. He testified that he never hired or discussed scaffolding with Sienia.

**Marie-Jose Hunter's EBT**

Maire-Jose Hunter testified that she resides at 6 East 68th Street, in apartment 5. She

and her husband purchased the apartment in 2014. When they purchased the apartment, they proceeded to conduct renovations in 2015 with Sagewood serving as the contractor. Marie-Jose Hunter testified that scaffolding was required for the work and that the architect and Sagewood decided that the scaffolding needed to be extended from the level at which it already was present. She never hired anyone from Sienia to conduct renovations.

**Sylwester Kaczynski's EBT**

Sylwester Kaczynski (Kaczynski) testified that he is an owner of Sienia, which conducts construction and renovation work. Kaczynski maintains that with regards to the D'Angelos' project on the fourth floor at 6 East 68th Street, Sienia was conducting the entire renovation. Sienia was hired by D'Angelo. He maintains that before Sienia conducted any work, it was necessary to install a sidewalk shed and scaffolding.

Kaczynski contacted Intersystem for the scaffold. The initial scaffolding which was installed ascended to the fourth floor to D'Angelos' apartment. After installation of the scaffold, Sienia commenced their work with the project which took about 10 to 12 months. Kaczynski testified that Sagewood contacted him with regards to renovating the apartment on the fifth floor as it wanted to utilize Sienia's scaffold. He testified that the building did not want to remove the scaffold and have to make another penetration in the building for an installation of an additional scaffold.

Following the conversation with Sagewood, Sienia contacted Intersystem to install the additional scaffolding. Kaczynski maintains that Sienia continued to pay the monthly rental cost after the additional extension was made. He testified that either the owner or the contractor

for the fifth-floor apartment paid the full rental cost of the scaffold and shed after the scaffold was extended.

Kaczynski testified that thereafter, the owner of the fifth floor contacted him by e-mail to let him know that the work had been completed and that they wanted to arrange to have the scaffolding removed. He recalls that the scaffold was taken down on October 19, 2016 by Intersystem. Kaczynski maintains that Krzysztof Sienkiewicz (Sienkiewicz), was sent to the building to ensure that the scaffold was safely removed. Sienkiewicz did not record an accident report regarding plaintiff's accident and Kaczynski maintains that he first learned of its occurrence a long time after the accident allegedly occurred.

Kaczynski testified that he did not have any involvement in the fifth-floor project and that in October of 2016, there were no Sienia employees at the job site as it had completed its project in the end of 2015.

**Joana Nunes Sampaio's EBT**

Joana Nunes Sampaio (Sampaio) testified that she works for Sagewood as a project manager. She testified that Sagewood was a general contractor which was performing renovation work on the fifth floor of 6 East 68th Street in Manhattan. Sampaio testified that prior to Sagewood's project for the fifth-floor apartment, there had previously been scaffolding erected outside the building in connection with another project.

Sampaio testified that in order to continue to start the work on the fifth-floor apartment, it was necessary to raise the pre-existing scaffolding located on the exterior of the building from the fourth floor. Sampaio testified that Sagewood spoke with the general contractor responsible for the fourth floor and received a proposal for the extension of the

scaffolding. She testified that they agreed orally and paid Sienia. Sampaio testified that Sagewood paid a monthly rental for the scaffolding and that Sagewood did not pay anyone to remove the scaffolding.

**Admir Diniz's EBT**

Admir Diniz (Diniz) testified that he worked for Sagewood as a site supervisor for the Hunters' project located on the fifth floor of 6 East 68th Street. He maintains that the project began at the end of 2015. When the workers arrived at the site, the scaffold ascended only to the fourth floor. He maintains that the Hunters told his boss that it was necessary to add one more level to the scaffolding so that it reached the fifth floor.

Diniz maintains that the work finished first on the fifth floor in September of 2016. Diniz testified that Marie-Jose Hunter told him that the tenant on the second floor was anxious to get the scaffolding taken down. He maintains that after he made a request, the scaffolding was removed within two weeks. Diniz testified that he was not familiar with Intersystem.

**Rob Schenk's EBT**

Rob Schenk (Schenk) testified that he works as a property manager for Wallack. In October of 2016, one of the properties which he managed was located at 6 East 68th Street. Schenk recalls that in 2015, there was sidewalk scaffolding at the subject premises for alterations related to the D'Angelos' fourth floor apartment. Wallack facilitated the paperwork related to the work which the D'Angelos wanted to complete. Schenk maintains that the scaffolding was extended to the fifth floor as those residents embarked on their own renovation.

Schenk testified that he did not know if there was any coordination between the contractors which D'Angelo utilized and the contractors which the Hunters used in terms of when their work was to be completed. Schenk testified that Intersystem was hired to perform scaffolding work at the project and that he had no interaction with it while it was removing the scaffold. Schenk testified that no one from Wallack or from East 68th Street directed or supervised contractors retained by the Hunters or the D'Angelos or provided any tools or equipment for the contractors involved.

**Bernard P. Lorenz's affidavit**

Bernard P. Lorenz (Lorenz), a licensed and registered professional engineer, submits an affidavit for the Hunters. Lorenz reviewed the amended verified complaint, verified bill of particulars, supplemental verified bill of particulars; plaintiff's response to combined demands for discovery and inspection; color photocopies of photographs; and deposition transcripts of plaintiff, Schenk, Diniz, and Jacobs.

Lorenz concludes that Labor Law § 200 was not violated as the Hunters did not control the means and methods of work being performed by plaintiff at the time of his accident. Lorenz also states that although plaintiff alleges a violation of Labor Law § 240 (1), this section was not violated as plaintiff was provided with a harness and lanyard which did not fail at the time of his accident. Lorenz also states that with regards to plaintiff's alleged violation of Labor Law § 241 (6), there was no violation of any applicable section of the Industrial Code.

**DISCUSSION**

**Summary Judgment Standard**

"The 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 eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Furthermore, the failure to make such a showing "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Id.* Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal quotations omitted). "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the [nonmoving party] . . . the court on a summary judgment motion must indulge all available inferences . . . ." *De Lourdes Torres v Jones*, 26 NY3d 742, 763 (2016). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

**Motion sequence 002 by Sienia**

**Summary of arguments**

Sienia moves for summary judgment dismissing plaintiff's complaint and dismissing all cross-claims against it. Sienia contends that the causes of action for common law negligence and violations of Labor Law §§ 200; 241 (1), (2), (3), (4), (5) and (6); 240 (1), (2) and (3) are all dismissible as to this defendant.

In sum and substance, Siena argues:

1. That it was not a contractor or agent as defined under the Labor Law;
2. That plaintiff's work was outside the scope of Sienia's work;
3. That Sienia was essentially a rental supplier of the scaffold, rather than a general contractor for purposes of the Labor Law;
4. That Sienia's work was completed at the time of plaintiff's accident;
5. That Sienia cannot be held liable for the actions of plaintiff's employer non-party Intersystem;
6. That plaintiff's cause of action pursuant to Labor Law § 200 must be dismissed, as Siena did not supervise the subject work;
7. That plaintiff's cause of action pursuant to Labor Law § 241 (6) must be dismissed as plaintiff has failed to identify the specific provision of the Industrial Code that was violated; and
8. That plaintiff's cause of action pursuant to Labor Law § 240 (1) must be dismissed as plaintiff was given an adequate safety device but he misused it.

In partial support of Sienia' motion, Sagewood contends that Labor Law §§ 240 (1), 241 (6) and 200 are not applicable to the present set of factual allegations as plaintiff unhooked his own lanyard. Sagewood argues that the claims regarding the Industrial Code, OSHA and the Rules of the Board of Standards and Appeals are also inapplicable.

However, to the extent that plaintiff does have viable claims against any party, Sagewood also argues, in partial opposition to Sienia's motion, that Sienia is not entitled to summary judgment based upon a theory that it is not a contractor or agent per New York's Labor Law. Rather, Sagewood maintains that based upon the testimony of Sienia's owner,

Sienia was involved with supervision on the day of the alleged accident and can be considered to be a contractor pursuant to the statute.

Plaintiff opposes Sienia's motion and cross-moves pursuant to Labor Law § 240 (1). Plaintiff contends that defendants' failure to provide a safety line to attach to his harness constitutes a violation of Labor Law § 240 (1). Plaintiff argues that as a result of the lack of the safety line, he was required to detach and reattach his lanyard as he climbed up the scaffold leaving him exposed to an elevation related hazard (i.e. falling) when he detached. Plaintiff also argues that because defendants failed to provide an adequate safety device in the first instance, plaintiff could not be the sole proximate cause of the accident. Plaintiff also contends, in opposition to Sienia's motion, that the claims against Sienia as a party who contracted for the work, give rise to a nondelegable duty, and therefore, plaintiff's Labor Law § 241 (6) claims should also not be dismissed.

In support of Sienia's motion, the Hunters contend that plaintiff has failed to state a prima facie case sufficient for summary judgment as to his Labor Law § 240 (1) claim as he has not shown that the absence or failure of a safety device was the proximate cause of his accident. They also argue that plaintiff was the sole proximate cause of his accident and that his affidavit is self-serving.

East 68th Street and Wallack, argue in partial opposition to Sienia's motion, that while plaintiff has not opposed the part of Sienia's motion seeking to dismiss plaintiff's claims of common law negligence and a violation of Labor Law § 200, material questions of fact preclude summary judgment as to each. East 68th Street and Wallack also argue that Sienia was a contractor or agent within the meaning of Labor Law §§ 240 (1) and 241 (6), that at the time of

plaintiff's accident it was a commercial and residential construction and renovation contractor which was not in the business of renting scaffolding, and that Sienia was responsible for installing and removing the scaffold and remained responsible until the work was accomplished.

In support of Sienia's motion, East 68th Street and Wallack contend that Sienia's motion to dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6) claims on the merits should be granted. In opposition to the motion, they argue that Sienia's application to dismiss all cross-claims including those served by East 68th Street and Wallack should be denied.

**Applicability of the Labor Law as to Sienia**

Sienia contends that it cannot be considered to be a general contractor or agent pursuant to Labor Law §§ 240 (1) or 241 (6). Sienia contends that when its work under its contract with D'Angelo was completed, it left the job site and rented the existing scaffolding to Sagewood for its use for the Hunters' apartment. Sienia argues that it did not return to the building until the scaffolding was scheduled to be removed and that Sagewood paid for the scaffolding prior to the removal. Sienia contends that given that Sienia did not exercise any supervision or control over the Hunters' project, or the scaffolding disassembly, it cannot be deemed to be a contractor or agent of the owner.

In opposition to Sienia's motion, East 68th Street and Wallack contend that Sienia is a proper Labor Law defendant. East 68th Street and Wallack contend that there is no evidence to suggest that Sienia entered into any agreement to have anyone else assume its responsibility for maintaining the scaffolding or for removing the scaffolding. East 68th Street and Wallack also contend that the fact that Sagewood was also a general contractor and responsible for

maintaining and removing the scaffolding did not relieve Sienia of its obligation as the D'Angelos' general contractor. They argue that the fact that Sagewood possessed concomitant or overlapping authority to supervise the work did not negate Sienia's authority to supervise and control work or responsibility under the Labor Law.

Sagewood opposes the part of Sienia's motion in which Sienia alleged that it is not a contractor or agent per New York's Labor Laws. Sagewood argues that Sienia hired and contracted with Intersystem to install and remove the scaffolding and that Sienia was involved with supervision on the day of the alleged accident per the sworn testimony of Sienia's owner, Kaczynski, who testified that he sent a super onsite to ensure that everything was done correctly regarding the removal of scaffolding.

Here, Sienia was hired by D'Angelo to conduct the entire renovation of his apartment. This work included obtaining and working with a scaffolding system. Sienia demonstrated its authority over the work by contacting Intersystem to install the scaffolding. Sienia had the scaffolding installed at the beginning of the D'Angelos' project and did not have it taken down prior to the accident. *See Weber v Baccarat, Inc.,* 70 AD3d 487, 488 (1st Dept 2010) (holding "[m]oreover, it demonstrated this authority by subcontracting a portion of the HVAC work to plaintiff's employer").

There is no evidence to suggest that Sienia ever entered into any agreement to have anyone else assume its responsibility for maintaining the scaffolding or for removing the scaffolding. Furthermore, Kaczynski stated that Sienia continued to pay the monthly rental cost after the additional extension was put on the scaffolding to extend it to the fifth floor.

Based upon the record, the court finds that the part of Sienia's motion arguing that the Labor Law is not applicable, must be denied. Sienia was a proper Labor Law defendant because plaintiff's accident falls within the purview of the statute, and because Sienia contracted to have the scaffold installed in the first instance and had the overall responsibility to remove the scaffolding which was utilized for a construction project for which they were the general contractor.

**Labor Law § 240 (1)**

In addition, Sienia contends that plaintiff's claims against it for a violation of Labor Law § 240 (1) must be dismissed while plaintiff cross-moves for partial summary judgment as to this section of the Labor Law.

Labor Law § 240 (1) imposes a nondelegable duty upon owners, general contractors, and their agents to provide workers with safety devices to protect from risks at elevated work sites. *See McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 (2011).

Labor Law § 240 (1) provides in part:

> "[a]ll 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 failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (internal quotation

marks and citations omitted); *see also Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90, 96 (2015); *Saint v Syracuse Supply Co.,* 25 NY3d 117, 124 (2015); *Soto v J. Crew Inc.,* 21 NY3d 562, 566 (2013).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc*., 96 NY2d 259, 267 (2001); *citing Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 (1993).

Furthermore, to show that the plaintiff was the sole proximate cause of an injury, the defendant must establish that "plaintiff 'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.'" *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 (1st Dept 2011), *quoting Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004). However, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc*., 1 NY3d 280, 290 (2003).

**Arguments as to alleged Labor Law § 240 (1) violation**

Sienia contends that while plaintiff was provided with safety devices including a scaffold and harness lanyard system, plaintiff unhooked his harness lanyard to reach another level. Sienia argues that as a result, he fell not because of any defect with the scaffold or harness or lanyard system, but because he slipped. Sienia maintains that this intervening act was the sole

proximate cause of his accident. Sienia also contends that its work pursuant to the contract was completed a year prior to the accident.

In partial support of Sienia, Sagewood also argues that plaintiff's cause of action pursuant to Labor Law § 240 (1) must be dismissed because plaintiff did not fall due to a lack of an adequate safety device as he unhooked his lanyard so he could move up the scaffold.

Plaintiff cross-moves for partial summary judgment as to Labor Law § 240 (1) as against East 68th Street, Wallack, Sienia and Sagewood. Plaintiff argues that the evidence demonstrates that he had nowhere to tie off his harness and lanyard while working from the scaffolding. He maintains that as a result, not only was it impossible for him to be the sole proximate cause of his accident, but that summary judgment should be granted due to defendants' failure to provide fall arresting devices while he was working upon the scaffolding. While plaintiff was provided with a safety device, he testified that he had to detach the device due to its length. Plaintiff asserts that, because he had to regularly detach the single lanyard from an anchor point on the scaffold and then reattach it to a higher anchor point as he climbed, the harness and lanyard was inadequate for his assigned task as he was exposed to the risk of falling whenever he was required to detach and reattach. Plaintiff asserts that had he been provided with a safety line to attach his lanyard, he would not have to regularly be exposed to the risk of falling when he was required to detach-and-reattach.

In opposition to the cross motion, East 68th Street and Wallack argue that plaintiff's cross motion is procedurally defective as plaintiff deliberately elected to cross-move for partial summary judgment, pursuant to CPLR 3212, in connection with Sienia's motion. They argue that the cross motion did not include any exhibits, but specifically incorporated by reference

Sienia's exhibits. They argue that this cross motion did not comply with this Part's Rule which provides that "[e]very motion must have its own full set of motion papers specific to the motion. Parties may not submit omnibus motion papers—do not submit papers intended to be applicable to multiple motions." On this point, while the court does recognize the procedural issues of the cross motion, the court will consider the arguments raised therein as there is no indication that any party has been prejudiced or lacked an adequate opportunity to respond.

East 68th Street and Wallack further argue that plaintiff was employed by Intersystem, was provided with proper safety devices, and that the scaffold provided secure anchor points. They also argue that plaintiff could have taken the elevator to the 4th or 5th floor, that there is no expert testimony to suggest that plaintiff was not provided with anything other than the proper safety devices to perform his work, and that plaintiff's deposition testimony is inconsistent with his affidavit in which he states that he lost his balance.

Here, the question—which must be determined as to the alleged violation of Labor Law § 240 (1)—is whether plaintiff's injuries from the fall were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.

Plaintiff states in his affidavit that while he was provided with a safety harness and lanyard, he was not provided with a safety line or anchorage point. Plaintiff states that while he was about 30 feet high on the scaffolding, he detached his lanyard from the scaffolding to move to the next position when he lost his balance and suddenly fell to the sidewalk shed below. Plaintiff states that every time that he detached the lanyard as he climbed the scaffolding, he was exposed to a potential fall. Plaintiff states that he was not provided with a

safety line from the top of the building to the sidewalk bridge below, nor was he provided with any other fall arresting devices.

The Appellate Division, First Department, analyzed a similar fact pattern in *Anderson v MSG Holdings, L.P.*, 146 AD3d 401 (1st Dept 2017). There, the plaintiff, an iron worker, commenced an action alleging, among other things, violations of Labor Law §§ 240 (1) and 241 (6), and sought to recover for injuries he sustained when he fell from a concrete panel being installed as part of a step-like surface for the seating at Madison Square Garden.
The plaintiff was wearing a harness at the time of his accident, but he was not tied off because there was no location to do so.

The court noted that the plaintiff was standing six inches to a foot from the edge of the panel, that he was attempting to move, and that he lost his balance and fell off the panel. The court held that while plaintiff was provided with a safety harness, he was not provided with a proper place to secure his harness and therefore Labor Law § 240 (1) was violated. The court also held that the plaintiff was entitled to summary judgment as to liability on the Labor Law § 241 (6) claim predicated on a violation of 12 NYCRR 23-1.16 (b).

Similarly, in *Jerez v Tishman Constr. Corp. of New York*, 118 AD3d 617 (1st Dept 2014), the court held that plaintiff, a carpenter, was injured while working at the construction of a building when the brace he had secured his lanyard to, gave way, and caused him to fall 14 feet. The court held that plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of defendants' liability pursuant to Labor Law § 240 (1). The court held that in opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries and noted that defendant Port Authority's witness

plainly testified that plaintiff was not provided "with two lanyards for 100% fall protection." *Id*. at 617.

Lastly, in *Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984 (2d Dept 2012), the Appellate Division, Second Department, awarded summary judgment to the plaintiff ironworker who fell after losing his balance while walking along a steel beam. In that case, the plaintiff was provided with "a safety harness with a hook that could be attached to a safety line" and the plaintiff "walked along the beam with his harness hooked to the safety line until he reached "a second location, about 20 feet away, [where] no safety lines were available." *Id.* at 986.

The Second Department reasoned that because plaintiff lost his balance in this area where no safety line was available, the plaintiff had "not been provided with appropriate safety devices that could have prevented his fall and that the lack of such devices was the proximate cause of the accident." *Id*. at 985-986. Further, the court stated that the plaintiff had established his prima facie burden based upon his deposition testimony that he had not been furnished with the appropriate safety devices.

Similarly, here, plaintiff was potentially exposed to falling from the scaffolding every time he unclipped his lanyard to climb higher. There is no indication that he was provided with two lanyards for "100% fall protection." Furthermore, defendants have not sufficiently refuted plaintiff's testimony that there was no place for him to tie the harness or that a safety line was provided. At most, defendants' attorneys, and a retained opinion witness, have made conclusory assertions that the harness and lanyard were adequate safety devices or that plaintiff's act of detaching and reattaching his lanyard—something he was required to do without a safety line or a second lanyard—was the sole proximate cause of his accident. The

record is devoid of any specific factual assertion that a safety line may have been inappropriate for plaintiff's assigned task or that plaintiff was in fact provided with a safety line, or some other device, such as "two lanyards for 100% fall protection." *Compare McCoy v 43-25 Hunter L.L.C.*, 2020 NY Slip Op 32505[U], **6 (Sup Ct, New York County 2020) (finding, inter alia, that the defendants had raised specific issues of fact as to whether the safety device—that plaintiff alleged should have been provided—was "impractical" for the plaintiff's assigned task).

Regarding, East 68th Street and Wallack's argument that plaintiff could have taken the elevator instead of climbing the scaffold, there is no evidence that plaintiff was made aware of such an option. Rather, the evidence on this motion establishes that the scaffold was erected *because* East 68th Street and Wallack refused to allow workers to use said elevators.

Therefore, plaintiff has met his prima facie burden by showing that he was provided with only a safety harness with a single lanyard, and no safety line to attach to, and that it proved to be inadequate to prevent him from falling. In opposition, defendants have failed to raise an issue of fact that there was no violation of Labor Law § 240 (1). As a result, plaintiff's cross motion seeking summary judgment as to his Labor Law § 240 (1) violation must be granted and the part of Sienia's motion dismissing the claims of the Labor Law § 240 (1) violation must be denied.

Finally, the court notes that although defendants argue that plaintiff may have been negligent, the issue of comparative negligence is not a bar to granting summary judgment on a claim for Labor Law § 240 (1). *Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp.*, 176 AD3d 627, 629 (1st Dept 2019) ("[d]efendants' contentions would amount to, at most, comparative negligence, which is not a defense to a Labor Law § 240 [1] violation"); *see also Rodriguez v City*

*of New York*, 31 NY3d 312, 312 (2018) (holding that plaintiff does not bear the burden of demonstrating the absence of comparative fault to obtain partial summary judgment).

**Labor Law § 240 (2)**

Sienia contends that plaintiff's claims made pursuant to Labor Law § 240 (2) must be dismissed as it is not applicable to plaintiff's accident. Labor Law § 240 (2) provides:

> "[s]caffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure."

Here, the record is devoid of any indication that a suitable safety railing was lacking or that the scaffolding or staging was not fastened to prevent it from swaying. Furthermore, plaintiff fails to refute the part of Sienia's motion seeking such relief. Therefore, plaintiff's allegation that Labor Law § 240 (2) was violated, must be dismissed.

**Labor Law § 240 (3)**

Sienia contends that plaintiff's claims made pursuant to Labor Law § 240 (3) must be dismissed because it is not applicable to plaintiff's accident.

Labor Law § 240 (3) provides:

> "[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."

There is no indication in the record that the scaffolding was not constructed to bear the appropriate weight amount. Also, plaintiff fails to object to Sienia's argument that Labor Law § 240 (3) was not violated. Therefore, plaintiff's allegation that Labor Law § 240 (3) was violated, must be dismissed.

**Labor Law §§ 241 (1), (2), (3), (4), and (5)**

Sienia contends that plaintiff's claims pursuant to Labor Law §§ 241 (1), (2), (3), (4) and (5) must be dismissed because the subject accident involves scaffolding and thus, these sections are not applicable.

Labor Law §§ 241 (1), (2), (3), (4) and (5) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.
>
> 2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.
>
> 3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.
>
> 4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications.
>
> 5. If elevators, elevating machines or hod-hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor and at each landing level shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used

> for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edges of such shafts or openings."

Here, plaintiff's accident involves a fall from a scaffold and did not involve floors, floor beams, elevators, elevating machines or a hod-hoisting apparatus, as discussed in the statute. Therefore, plaintiff's allegations of a violation of Labor Law §§ 241 (1), (2), (3), (4) and (5) must be dismissed.

**Labor Law § 241 (6)**

Sienia argues that plaintiff's claims for a violation of Labor Law § 241 (6) must be dismissed. Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . 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 . . . ."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor. *St. Louis v Town of N. Elba*, 16 NY3d 411, 413 (2011). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements. *Nostrom v A.W. Chesterton Co.,* 15 NY3d 502, 507 (2010).

Sienia contends that despite alleging several violations of the Industrial Code, plaintiff fails to specify any subsections of the following Industrial Code sections: §§ 23-1.5, 23-1.8, 1.18,

1.19, 1.20, 1.22, 1.30, 1.32, 1.33, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.2, 3.3, 3.4, 4, 5.1-22 and 7.1. As plaintiff fails to address such sections of the Industrial Code, such claims that these sections were violated are deemed abandoned. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003).

Siena argues that Industrial Code § 23-1.16 sets standards for safety belts and does not apply because plaintiff was not using any such device. Siena argues that, rather, plaintiff testified that he unhooked his safety lanyard at the time of the accident, and therefore §23-1.16 does not apply.

In opposition to Sienia's motion, plaintiff argues that he was not provided with a safety line to which he could have attached his lanyard. He argues that, therefore, Industrial Code § 23-1.16 was violated by the defendants. Industrial Code § 23-1.16 is titled "Safety belts, harnesses, tail lines and lifelines." Plaintiff does not specify which subsection it is relying on, but it appears to the court that subsection (b) is being referenced as he discusses the lack of an attachment of a safety line.

Section 23-1.16 (b) provides:

"(b) Attachment required.

> Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

A violation of Industrial Code section 23-1.16 (b) has been held to be sufficiently specific to warrant the imposition of liability. *See Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560 (1st Dept 2010).

Here, plaintiff states in his affidavit that he was provided with a safety harness and lanyard, but was not provided with a safety line or anchorage which remained secured. Therefore, because plaintiff's testimony raises a question as to whether this section of the Industrial Code was violated, the part of Sienia's motion for summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b), must be denied. *See Jerez*, 118 AD3d at 617-18.

Although plaintiff also alleges violations of Article 1926 of OSHA as against defendants, such allegations will not support liability under Labor Law § 241 (6), because OSHA is limited to the safety practices of an employer. *See Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 (1st Dept 2001). Plaintiff fails to refute Sienia's arguments. Therefore, the part of plaintiff's complaint alleging OSHA violations pursuant to Labor Law § 241 (6) must be dismissed.

Sienia also contends that plaintiff's claim based upon a violation of Section C 26-1907.1-9 from the 1968 Building Code, which was later codified as § 27-1042 through § 27- 1050 of the New York City Administrative Code, must be dismissed. *See* NYC Administrative Code 27-1042. Sienia argues that those sections were repealed on July 1, 2008 and must be dismissed. Plaintiff fails to refute the arguments of Sienia. Therefore, plaintiff's allegation that defendants violated the 1968 Building Code must be dismissed.

**Labor Law § 200**

Sienia contends that plaintiff's claims pursuant to Labor Law § 200 must be dismissed. Labor Law § 200 (1) states, in pertinent part, as follows:

> "[a]ll 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 protection to all such persons . . . ."

Liability pursuant to Labor Law § 200 may be based either upon the means and method by which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's means and method, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998); *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 (1st Dept 2012).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident. *See Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004).

Sienia contends that this section of the Labor Law should be dismissed because plaintiff was supervised exclusively by his employer Intersystem and that Intersystem was in charge of the manner in which the scaffold was erected and dismantled. Sienia also contends that the common law negligence claims must also be dismissed. Sienia contends that it had no connection to plaintiff which gave rise to a duty and that its contract with D'Angelo creates no

such duty. Sienia maintains that the Court of Appeals carved out only three very narrow exceptions where a contracting party may be said to have assumed a duty of care, and thus, be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and, (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. *See Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 (2002).

Sienia argues that it did not perform any physical work with respect to the scaffold assembly and dismantling and thus, cannot be said to have launched a force or instrument of harm. Sienia contends that it has failed to allege detrimental reliance on Sienia's continued performance of its contractual obligations or that Sienia entirely displaced the duty of the building or tenants to maintain its premises in a safe condition.

In opposition to Sienia, plaintiff maintains his allegations that Labor Law §§ 240 (1) and 241 (6) were violated, but fails to dispute Sienia's argument regarding the dismissal of the Labor Law § 200 and common law negligence claims. *See Perez v Folio House, Inc*., 123 AD3d 519, 520 (1st Dept 2014) (holding that failure to address a claim indicates an intent to abandon it as a basis for liability).

As a preliminary matter, this court finds that the accident arose out of the means and methods by which the subject work was performed. While Sienia's owner Kaczynski, testified that he sent a superintendent "Krzysztof" onsite to make sure work was done safely, plaintiff testified that his work was being supervised exclusively by Intersystem, plaintiff's employer,

and does not testify that he received any instructions from Krzysztof. Furthermore, general supervision of a project is insufficient to raise a triable issue of fact as to liability pursuant to Labor Law § 200. *See Haider v Davis*, 35 AD3d 363, 364 (2d Dept 2006) (holding "the owner's general supervision of the project, which consisted mostly of inspections and admonitions to hurry the work, was insufficient to raise a triable issue of fact as to the owner's liability under Labor Law § 200 or based on common-law principles").

Therefore, because Sienia has met its burden and because plaintiff fails to oppose the motion and demonstrate that anyone other than his employer Intersystem supervised or instructed his injury producing work, the part of plaintiff's complaint alleging causes of action for common law negligence and a violation of Labor Law § 200 must be dismissed. *See Cappabianca,* 99 AD3d at 139.

Finally, East 68th Street and Wallack argue that while plaintiff has not opposed Sienia's motion to dismiss plaintiff's claims of common law negligence and violation of Labor Law § 200, material questions of fact preclude summary judgment as to each. The court rejects such argument by East 68th Street and Wallack that issues of fact exist as to Sienia's liability under Labor Law § 200 and common law negligence as such argument is speculative and conclusory.

**Cross claims**

Sienia also contends that any claims made for contractual indemnification as against it must be dismissed because no party has any contract requiring Sienia to indemnify it. Sienia contends that without such a contract, the claims pursuant to contractual indemnification must be dismissed. As no opposition was presented to refute this claim, the part of Sienia's motion seeking to dismiss cross claims for contractual indemnification must be granted.

In addition, as the claims for negligence and pursuant to Labor Law § 200 and common law negligence have been dismissed as against Sienia, the cross claims by the co-defendant East 68th Street for common law indemnification and contribution as against Sienia must also be dismissed. *See Diaz v 313-315 W. 125th St.*, 138 AD3d 599, 600-601 (1st Dept 2016) ("K&K's [GC's] common-law indemnification and contribution cross claims against appellants should be dismissed. 313 West [owner] made a prima facie showing of its lack of actual fault, by presenting evidence that it did not provide any construction work, materials, equipment or supervision at the work site."); *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 (1st Dept 2007) (denying general contractor leave to assert indemnification and contribution claims against owner after showing of general contractor's liability pursuant to Labor Law § 240 [1]); *Einhorn v Fine Times, Inc.*, 277 AD2d 8, 9 (1st Dept 2000) (general contractor not entitled to indemnification or contribution for Labor Law § 240 (1) claim]); *Robinson v Shapiro*, 646 F2d 734, 739 (2d Cir 1981) (owner, found liable for violations of Labor Law §§ 240 [1] and 241 [6], was not entitled to contribution from general contractor, where there was no finding that the latter was "at least partially responsible for the accident").

**Motion sequence 003 by D'Angelo and Jacobs**

**Summary of Arguments**

D'Angelo and Jacobs contend that East 68th Street and Wallack's third-party complaint must be dismissed which alleges causes of action for contractual indemnification, common-law indemnification, contribution and failure to procure insurance. It is conceded by East 68th Street and Wallack that they do not oppose the part of the D'Angelo's motion which seeks

dismissal of the third-party claims for common law claim indemnification and contribution. NYSCEF Doc. No. 360, ¶ 27.

In opposition to the D'Angelos' motion, plaintiff, who does not have direct claims as against the third-party defendants, contends that the failure of East 68th Street and Wallack to provide plaintiff with a safety line to attach to his harness constitutes a violation of Labor Law §§ 240 (1) and 241 (6). The court notes that the opposition does not specifically address the D'Angelos' arguments.

East 68th Street and Wallack argue in partial opposition to the D'Angelos' motion as they have not opposed the part of the motion seeking to dismiss the claims for common law negligence and Labor Law § 200. They contend that the scaffold removal work by Intersystem at the time of the accident arose out of and was related to the D'Angelo alteration and that the D'Angelos' motion to dismiss East 68th Street and Wallack's claim for contractual indemnification under the lease agreement must be denied.

East 68th Street and Wallack contend that pursuant to the Proprietary Lease, the Alteration Agreement, and the Rider, D'Angelo is required to indemnify East 68th Street and Wallack for the acts of his contractors. Here, East 68th Street and Wallack have pleaded four claims against these third-party defendants:

> 1. Under the Proprietary Lease, D'Angelo and Jacobs agreed to hold East 68th Street and Wallack harmless from liability arising out any work that was not performed in accordance with the rules and regulations of the Lessor and governmental agencies having jurisdiction thereof;
>
> 2. Under the Alteration Agreement, D'Angelo and Jacobs agreed to indemnify East 68th Street and Wallack for liability as a result of the work or their contractors' failure to conform with any law or ordinance;
>
> 3. Under the Alteration Agreement, D'Angelo and Jacobs agreed to have their

contractors provide insurance coverage for East 68th Street and Wallack;

4. To the extent that East 68th Street and Wallack are held liable, third-party defendants are liable for contribution and common law indemnification.

**Contractual Indemnification**

D'Angelo argues that with regards to the claim for contractual indemnification, pursuant to the Proprietary Lease, Alteration Agreement, and Rider, entered between himself and the owners, third-party plaintiffs are not entitled to indemnification unless the injury arose from D'Angelo or Jacobs' acts or omissions or their failure to comply with another lease provision.

Paragraph 11 of the Proprietary Lease states:

"[t]he Lessee agrees to save the Lessor harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision thereof, or due wholly or in part of any act, default or omission of the Lessee or of any person dwelling or visiting in the Apartment, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee."

Paragraph 21 of the Proprietary Lease states:

"The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld or delayed, make in the Apartment or building, or on any roof, penthouse, terrace or balcony appurtenant thereto . . . any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, kitchen or laundry appliances, or any other installation or facility in the Apartment or Building. The performance by Lessee of any work in the Apartment shall be in accordance with the applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof . . . ."

NYSCEF Doc. No. 323.

Paragraph 3 (d) of the Alteration Agreement provides:

> "I hereby indemnify and hold you, your engineers, architects, employees, individual directors and managing agent, and the other shareholders and residents of the Building, harmless against any loss or damages suffered to person or property as a result of the Work. I shall reimburse you, your engineers, architects, employees, individual directors, and managing agent, and other shareholders and residents of the Building for any losses, costs, fines, fees and expenses (including without limitation attorney's fees and expenses on a dollar-for-dollar basis) incurred as a result of the Work; and/or my or my contractors'/consultants' failure to conform with this Agreement or any law or ordinance and which may be incurred by you in the defense of any suit, action, claim or violation in connection with the Work or the abatement thereof. This indemnification and promise of reimbursement includes loss in the nature of attorney's fees incurred by you in the course of defending any action commenced by any shareholder or resident of the Building against you, any of your directors, or your managing agent by reason of any aspect of the Work or any condition arising therefrom. It is intended that my obligation hereunder shall be unconditional and absolute, regardless of fault or negligence on my part or the part of my contractors and subcontractors."

The rider attached to the Alteration Agreement states:

> "[y]ou agree to release and discharge, and to the fullest extent permitted by law, to indemnify, defend and hold harmless, the corporation and its employees, agents (including, without limitation, the Corporation's Managing Agent), officers, and directors, from and against any and all claims, demands, penalties, causes of action, judgments, fines, liabilities, settlements, damages, costs or expenses of whatever kind or nature (including, without limitation, counsel fees and expenses) arising out of or in any way related to, the Alteration or other construction in the Apartment."
>
> NYSCEF Doc. No. 324

D'Angelo and Jacobs argue that based upon a plain reading of the indemnification provision, third-party plaintiffs are not entitled to contractual indemnification whereas plaintiff's fall from the scaffolding, approximately one year after construction was completed by the D'Angelos, was not occasioned by any failure to comply with other lease provisions. They argue that the Alteration Agreement and

Rider are limited to injuries resulting from claims arising out of, or in any way related to, the alteration or other construction in the apartment.

The D'Angelos also contend that although the Alteration Agreement requires them to obtain insurance naming third-party plaintiffs as additional insureds, their failure to obtain such a policy does not entitle third-party plaintiffs to indemnification for the subject accident. They argue that even if plaintiff's accident was caused due to the D'Angelos' renovations, third-party plaintiffs procured their own insurance for the construction performed in the D'Angelos' apartment, and the D'Angelos are not liable for the full amount of damages resulting from the underlying claim.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 (1987), quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 (1973). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assoc., v AGS Computers, Inc.,* 74 NY2d 487, 491 (1989).

To establish entitlement to full contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *Correia v Professional Data Mgmt., Inc*., 259 AD2d 60, 65 (1st Dept 1999). A court may also grant conditional indemnification, which

"serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed." *Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 (1st Dept 2018) (citations omitted). The First Department has ruled that an award of conditional indemnification is warranted where the indemnification provision does not purport to indemnify an indemnitee for his or her own negligence. *See Cerverizzo v City of New York*, 116 AD3d 469, 472 (1st Dept 2014); *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 (1st Dept 2010).

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002). Whether or not an agreement is ambiguous is an issue of law for the court. *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 (1990). The proper inquiry in determining whether an agreement is ambiguous is whether the agreement is reasonably susceptible to more than one interpretation. *Chimart Assoc. v Paul*, 66 NY2d 570, 573 (1986); *Chiusano v Chiusano*, 55 AD3d 425, 425 (1st Dept 2008).

> "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole. The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning. An agreement is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion."

*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244-245 (2014) (internal quotations and citations omitted).

Here, the court finds that the D'Angelos' reading of the agreement is too narrow. The rider of the agreement specifically states that the tenant agreed to release and discharge, and to the fullest extent permitted by law, to indemnify, defend and hold harmless, the owner from and against any and all claims, demands, penalties, causes of action, judgments, fines, liabilities, settlements, damages, costs and expenses arising out of or in any way related to, the alteration or other construction of their apartment.

Plaintiff's accident was a result of the D'Angelos' work as he was injured on a scaffold which was needed and primarily installed for their apartments' renovation. The subject scaffold was installed with the approval of the building for the renovation. Until the scaffold was removed from the premises, the tenants' responsibility for the scaffold did not terminate.

Furthermore, while the D'Angelos' contractor, Sienia, was not supervising the work of plaintiff, Sienia was aware of its obligation to return the building back to its pre-scaffolding condition which meant that any holes that were created by the attachment of the scaffold needed to be properly repaired. Therefore, as the language of the agreements are specific as to the indemnification requirements, and as the indemnification agreement was triggered by the accident at the premises, the part of the D'Angelos' motion seeking to dismiss the claims for contractual indemnification must be denied. To hold otherwise, would be to ignore unambiguous terms of the aforementioned agreements.

While the D'Angelos contend that third-party plaintiffs cannot allege that they are vicariously liable for plaintiff's injuries whereas the D'Angelos would be exempt from

liability pursuant to Labor Law's homeowner exemption, the court notes that plaintiff has not set forth any direct claims of Labor Law violations as against the D'Angelos.

**Common law indemnification, contribution, and breach of contract**

With regards to the cross claim for breach of contract to provide insurance which was alleged by East 68th Street and Wallack, Christi M. Kunzig, counsel for the D'Angelos, states in paragraph 25 of her affirmation in support of the motion that "[a]lthough the Alteration Agreement requires D'Angelo and Jacobs to obtain insurance naming third-party plaintiffs as additional insureds; D'Angelo and Jacobs' failure to obtain such a policy does not entitle third-party plaintiffs as indemnification for the subject accident." NYSCEF Doc. No. 212.

This statement suggests that insurance was not procured and the D'Angelos fail to show that they complied with that provision. Therefore, the part of the D'Angelos' motion seeking to dismiss the cross claim for breach of contract must be denied. The D'Angelos' also moved for summary judgment dismissing the third-party claims for common law indemnification and contribution as well as all cross-claims, which East 68th Street and Wallack do not oppose. *See* NYSCEF Doc. 352, ¶ 42. Accordingly, said claims for common law indemnification and contribution are dismissed.

**Motion sequence 004 by the Hunters**

**Summary of Arguments**

The Hunters argue that summary judgment must be granted in their favor dismissing East 68th Street and Wallack's third-party claims. The Hunters contend that they are entitled to summary judgment as to East 68th Street and Wallack's claims for contractual indemnification

and contribution because plaintiff's accident did not arise out of the work of the Hunters, and because all work on the Hunters' apartment had been completed by Sagewood who was no longer located on-site. They also contend that plaintiff's Labor Law claims must be dismissed, even though plaintiff does not allege any Labor Law claims specifically as against them.

In partial opposition, the D'Angelos' argue that third-party plaintiffs failed to demonstrate that the indemnification clause on the Alteration Agreement was enforceable as against them or triggered by plaintiff's accident and contend that third-party plaintiffs failed to establish their entitlement to judgment on the D'Angelos' claims for common law indemnification and contribution. This argument is not responsive to the motion at hand, specifically the Hunters' motion for summary judgment.

Plaintiff argues in opposition that the Hunters are liable as the fee owner and contractors for their violations of Labor §§ 240 (1) and 241 (6) as the work was being done with their consent. However, plaintiff has no direct claims of Labor Law violations as to the Hunters and the argument is the same which plaintiff made as to the D'Angelos.

In partial opposition, East 68th Street and Wallack allege in their third-party complaint for claims against the Hunters. They include that under the Proprietary Lease, the Hunters agreed to hold East 68th Street and Wallack harmless from liability arising out any work that was not performed in accordance with the rules and regulations of the Lessor and governmental agencies having jurisdiction thereof; that under the Alteration Agreement, the Hunters agreed to indemnify East 68th Street and Wallack for liability as a result of the work or their contractors' failure to conform with any law or ordinance; that under the Alteration Agreement, the Hunters agreed to have their contractors provide insurance coverage for East

68th Street and Wallack; and that East 68th Street and Wallack have also pleaded claims for common law indemnification and contribution in the third-party complaint.

East 68th Street and Wallack contend that they oppose the Hunters motion to the extent that that the Hunters requests summary judgment as to their claims for contractual indemnification and breach of contract to purchase insurance claims; and do not oppose the dismissal of the claims for common law indemnification and contribution.

**Contractual Indemnification**

The Hunters argue that the specific language of the Proprietary Lease between East 68th Street and the Hunters as well as the subsequent Alteration Agreement does not apply to plaintiff's accident. They argue that Intersystem, plaintiff's employer, was not an agent of the Hunters, that work on the Hunters' unit was completed at the time of plaintiff's accident, and that neither the Hunters nor their contractor Sagewood were involved in the removal of the scaffold. The Hunters contend that on or about October 16, 2014, they entered into a Proprietary Lease with East 68th Street for their unit at the premises. The Proprietary Lease states that:

> "[t]he Lessee agrees to save the Lessor harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the Apartment, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee."
>
> NYSCEF Doc. No. 291.

The Hunters maintain that on or about October 21, 2015, the Hunters and East 68th Street entered into an Alteration Agreement for the renovations which the Hunters planned to

have completed on their unit. The Alteration Agreement states that "[We] [the Hunters] hereby indemnify and hold you ... harmless against any loss or damages suffered to persons or property as a result of the Work." Alteration Agreement (NYSCEF Doc. No. 324.

The rider to the Alteration Agreement states:

> "You agree to release and discharge, and to the fullest extent permitted by law, to indemnify, defend and hold harmless, the Corporation and its employees, agents (including, without limitation, the Corporation's Managing Agent), officers, and directors, from and against any and all claims, demands, penalties, causes of action, judgments, fines, liabilities, settlements, damages, costs or expenses) arising out of or in any way related to, the Alteration or other construction in the Apartment."

*Id*.

The Hunters contend that plaintiff was injured while working for Intersystem and that Intersystem supervised, directed, and controlled his work. They maintain that Intersystem was not a contractor or agent of the Hunters and was hired by Siena for renovations to the D'Angelos' unit at the premises. The Hunters contend that while Sagewood completed all of its work at the premises in August of 2016, plaintiff's accident took place on October 19, 2016, nearly two months after Sagewood had finished.

The Hunters argue that at the time the scaffold was extended to reach the fifth floor to allow renovations to the Hunters' unit, work was still ongoing on the fourth floor. They maintain that when all work at the premises was completed, Sienia sent one of its employees to supervise the removal of the scaffold.

Despite the Hunters' argument in support of their motion, the part of their motion seeking to dismiss East 68th Street and Wallack's claims for contractual indemnification must be denied. The Hunters agreed to indemnify, defend and hold harmless the owners from and

against any and all claims, demands, penalties, causes of action, judgments, fines, liabilities, settlements, damages, costs and expenses arising out of or in any way related to, the alteration or other construction in the apartment.

While the subject scaffold was installed with the approval of the building for the renovation work at the D'Angelos' apartment, it was extended for renovation work specifically for the Hunters. Plaintiff was injured as a result of his work on the scaffold. Therefore, as per the rider agreement, the subject injury was related to the construction in the apartment as the scaffolding which was being utilized was related to the alteration in the apartment and for the Hunters' benefit.

**Labor Law §§ 241 (1) (2) (3) (4) and (5); 240 (1); and 241 (6)**

The Hunters contend that the claims made pursuant to Labor Law §§ 241 (1) (2) (3) (4) and (5); 240 (1); and 241 (6) must be dismissed and they submitted a conclusory affidavit from Lorenz. Plaintiff does not have any direct claims of violations of the Labor Law as against the Hunters. Moreover, the court has already and will further address virtually the same arguments as made by the relevant defendants. Therefore, the court will not address any specific arguments here, as made by the Hunters.

**Common law indemnification, contribution, and breach of contract**

It has already been determined that the only entity that supervised and controlled plaintiff's work was his employer, Intersystem. As such, on this motion, there is no triable issue of fact that any defendant or third-party defendant was negligent, and as such there can be no basis for common law indemnification or contribution claims as between these parties. *See*

*supra* at 31-34. Therefore, the branch of the motion seeking to dismiss such claims for common law indemification and contribution is granted.

However, the court will not dismiss East 68th Street and Wallack's claim against the Hunters for breach of contract to provide the insurance required by the Alteration Agreement as the Hunters fail to specifically address such claim.

**Motion sequence 005 by East 68th Street and Wallack**

**Summary of Arguments**

East 68th Street and Wallack move, pursuant to CPLR 3212, to dismiss plaintiff's claims of common law negligence and violations of Labor Law §§ 200, 241 (6) and 240 (1); and to award summary judgment for contractual indemnification against the Hunters, the D'Angelos; and to dismiss all cross claims as against them.

The Hunters argue, in opposition, that East 68th Street and Wallack's claims for contractual indemnification and contribution must be denied. They argue that it is undisputed that at the time of the accident plaintiff was injured while working for Intersystem and that Intersystem supervised, directed, and controlled his work. The Hunters contend that plaintiff was injured during the course of his work with Intersystem and not any work related to the Hunters' renovations of their fifth-floor unit, that Intersystem was not a contractor or agent of the Hunters, and that it was hired by Sienia originally to complete renovations to the D'Angelos' unit at the premises.

The D'Angelos also contend, in opposition, that East 68th Street and Wallack failed to demonstrate that the indemnification clause in the Alteration Agreement was enforceable or triggered by plaintiff's accident. The D'Angelos also contend that East 68th Street and Wallack

failed to establish their entitlement to judgment on their claims for common law indemnification and contribution.

Plaintiff contends in opposition that East 68th Street and Wallack violated Labor Law §§ 240 (1) and 241 (6).

**Labor Law § 200**

East 68th Street and Wallack contend that plaintiff's claims pursuant to Labor Law § 200 and common law negligence must be dismissed. They argue that a review of the relevant testimony and bill of particulars makes clear that plaintiff's accident did not occur as the result of any inherent defect of the premises and that plaintiff testified that he fell after he unhooked his tail line with his right hand when his left hand slipped from a scaffolding rung. They argue that there was nothing wrong with the scaffolding and no foreign substance on the rung and that plaintiff simply lost his grip. East 68th Street and Wallack contend that there was nothing wrong with the premises which caused or contributed to the accident, and therefore East 68th Street and Wallack cannot be liable to plaintiff under Labor Law § 200 as the result of an inherent defect of the premises.

The Court of Appeals has held that there is no liability for accidents involving means and methods at the common law or under Labor Law § 200 unless it is shown that the party to be charged exercised some supervisory control over the operation. *See Ross v Curtis-Palmer Hydro-Electric Co*., 81 NY2d at 505. Here, because defendants have met their burden and demonstrate that no one from East 68th Street or Wallack exercised supervisory control over the injury-producing work, that Intersystem supervised plaintiff's work, and because plaintiff fails to oppose and demonstrate otherwise (see NYSCEF Doc. No. 304), the part of plaintiff's

complaint which alleges common law negligence and a violation of Labor Law § 200 as against East 68th Street and Wallack must be dismissed.

**Labor Law § 241 (6)**

68th Street and Wallack also move for partial summary judgment for plaintiff's claim alleging a statutory violation of Labor Law § 241 (6). As discussed above in motion sequence 002, with the exception of Industrial Code section 23-1.16 (b), all other sections of the Industrial Code have been abandoned and dismissed.

Furthermore, as discussed previously by the court in motion sequence 002, while plaintiff was provided with a safety harness, he was not provided with a proper place to tie off his harness or a safety line. Therefore, the part of East 68th Street and Wallack's motion for summary judgment as to liability on the Labor Law § 241 (6) claim predicated on a violation of 12 NYCRR 23-1.16 (b) must be denied, as there are triable issues of fact.

**Labor Law § 240 (1)**

East 68th Street and Wallack contend that plaintiff's claims pursuant to Labor Law § 240 (1) must be dismissed. They argue that according to plaintiff's testimony, he was supplied with tools and equipment which conformed to his OSHA training and certification for the work he was performing, that he was able to tie off onto the scaffold as he was climbing up, and that this accident occurred when he lost his grip as he was moving the clip on his tail line from one position to the next.

As discussed by the court in motion sequence 002, Labor Law § 240 (1) was designed to prevent accidents in which a scaffold or other protective device proved inadequate to shield

the injured worker from harm directly flowing from the application of gravity. Plaintiff has established that while he was subjected to an elevation-related risk, he was injured due to defendants' failure to provide him with proper fall protection, specifically an appropriate place for him to attach his harness or a safety line. Therefore, the part of East 68th Street and Wallack's motion seeking to dismiss plaintiff's alleged violation of Labor Law § 240 (1) must be denied.

**Contractual Indemnification**

East 68th Street and Wallack contend that pursuant to their Alteration Agreement, the D'Angelos and the Hunters agreed to indemnify East 68th Street and Wallack for any loss or damages suffered to persons or property as a result of the work, and for damages arising out of or in any way related to, the alteration or other construction of the apartment. East 68th Street and Wallack contend that as the lawsuit arises from the alteration work performed for the tenants by the tenants' contractors, the suit and motion have therefore triggered the tenants' obligations to defend and indemnify these defendants under the Alteration Agreement and the rider.

East 68th Street and Wallack contend that the Proprietary Lease and Alteration Agreement include express indemnification provisions which evidence the parties' clear intention for the D'Angelos and the Hunters to indemnify East 68th Street and Wallack against "any loss or damages suffered to persons or property as a result of the Work," and/or "arising out of or in any way related to, the Alteration or other construction in the Apartment." East

68th Street and Wallack argue that a party seeking contractual indemnity need only establish that it was free from negligence.

Here, both the D'Angelos and the Hunters entered into an indemnification agreement with the owners in which they would indemnify East 68th Street and Wallack against loss or damages related to the alteration or other construction in their respective apartments. As discussed in motion sequence 003 and 004, the rider of the agreement specifically states that the D'Angelos and the Hunters agreed to release and discharge, and to indemnify, defend and hold harmless, East 68th Street and Wallack from and against any and all claims, demands, penalties, causes of action, judgments, fines, liabilities, settlements, damages, costs and expenses arising out of the alteration or construction in the apartment.

As plaintiff was injured as a result of a scaffold placed for the renovation work of the D'Angelos' and the Hunters' apartment and there is no issue of negligence on the part of East 68th Street other than vicarious liability and as the indemnification specifically listed the D'Angelos and the Hunters' indemnification responsibilities, the part of East 68th Street and Wallack's motion for summary judgment as to contractual indemnification must be granted.

**Cross claims**

East 68th Street and Wallack contend that all cross claims based upon common law indemnification and contribution must be dismissed as a matter of law as against them. As plaintiff's allegations of common law negligence and a violation of Labor Law § 200 have been dismissed against said parties, so too must the same cross claims based upon these theories of negligence. *See supra* at 31-34.

**Motion sequence 006**

**Summary of arguments**

Sagewood moves for an order granting summary judgment dismissing plaintiff's amended verified complaint; dismissing all cross claims against Sagewood; and dismissing all third party claims against Sagewood. Sagewood contends that the claims made pursuant to Labor Law §§ 200, 240, 241, the Industrial Code and OSHA must be dismissed. Sagewood contends that it is entitled to summary judgment as to the Labor Law claims as Sagewood was not a general contractor, agent or owner as defined by the Labor Law. Further, Sagewood argues that Labor Law §§ 200, 240, 241 and 241 (a) are either not applicable or fail based on plaintiff's own actions.

East 68th Street and Wallack partially oppose the motion and contend that Sagewood was a contractor or agent within the meaning of Labor Law §§ 240 (1) and 241 (6) at the time of Badzio's accident. They maintain that Sagewood admits that it was the general contractor for the Hunters' work, and has attached a copy of its contract for the job. East 68th Street and Wallack contend that while Sagewood delegated this work to Sienia and that Sienia hired Intersystem, Sienia remained the Hunters' general contractor while the scaffolding was being removed.

East 68th Street and Wallack contend that Sagewood's motion to dismiss plaintiff's Labor Law § 241 (6) claims on the merits should be granted. They contend that while not specified in the bill of particulars or memorandum of law, Industrial Code section 23-1.16 (b) allows for a safety harness to be attached to a securely anchored tail line which was done.

They also contend that the part of Sagewood's motion to dismiss East 68th Street and Wallack's cross claims for contribution and common law indemnification must be denied.

Sienia contends that Sagewood has not made a prima facie showing that Sagewood was not a Labor Law defendant susceptible to liability under Labor Law §§ 200, 241 (6) and 240 (1). Sienia contends that Sagewood admits that it was the general contractor for the 5th floor construction. Sienia contends that Sagewood arranged for, paid for, and utilized the subject scaffolding prior to the accident and paid for the dismantling of said scaffolding. Sienia argues that in addition to it being the general contractor subject to liability under the Labor Law, there are significant issues of fact as to whether Sagewood had control sufficient to make it liable under the Labor Law or for negligence.

Plaintiff contends that Sagewood is liable to plaintiff for its violation of Labor Law §§ 240 (1) and 241 (6) and does not oppose dismissal of its Labor Law § 200 and common law negligence claims as to Sagewood.

East 68th Street and Wallack argue that unless this court dismisses plaintiff's complaint in its entirety, Sagewood is a proper Labor Law defendant with respect to plaintiff's claims alleging statutory violation of Labor Law §§ 240 and 241(6); and that Sagewood's application to dismiss East 68th Street and Wallack's cross claims for contribution and common law indemnity must be denied

**Applicability of the Labor Law as to Sagewood**

Sagewood argues that it was not a general contractor, agent or owner as defined by the Labor Law. Sagewood contends that it was not present when the scaffolding was removed, nor were they directing any of Intersytem's employees, and rather that Sienia was supervising the

removal of the scaffolding while Intersystem was directing its employees to remove the scaffolding.

Here, Sagewood submits a copy of its contract with the Hunters in which it is referred to as the "Contractor." Also, the contract discusses the installation and removal of piping scaffold at the front of the building during the job duration. The contact also states in section 8.3, titled "Supervision and Construction Procedures" that "[t]he Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work." NYSCEF Doc. No. 229.

Therefore, as the contract indicates that Sagewood retained control over the general renovation project on the Hunters' apartment, and was defined as a contractor. Therefore, Sagewood's attempt to argue that the Labor Law is not applicable, is rejected by the court.

**Labor Law § 200**

Sagewood contends that it did not exercise supervision or control of the work which led to the alleged injury and, as such, plaintiff's Labor Law § 200 and common law negligence causes of action must be dismissed.

As discussed in motion sequence 002, plaintiff fails to provide any opposition as to the claim that anyone, other than Intersystem, supervised or controlled his injury producing work. In fact, plaintiff testified at his deposition that he was supervised by Intersystem. Therefore, the branch of Sagewood's motion seeking to dismiss plaintiff's Labor Law § 200 and common law negligence causes of action is granted. By the same token, as this court finds that no defendant or third-party defendant was negligent in causing the accident, there can be no basis

for common law indemnification or contribution cross claims as between these parties. *See supra* at 31-34.

**Labor Law § 240 (1) - (3)**

Sagewood argues that with regard to plaintiff's allegation that Labor Law § 240 (1) was violated, plaintiff did not fall due to a lack of an adequate safety device, but instead, chose not to use the safety device with which he was provided. Sagewood contends that plaintiff was trained regarding his work on scaffolding and that plaintiff's own actions caused the alleged accident.

Here, as discussed in motion sequence 002, the court held that plaintiff was not provided with an appropriate attachment for his harness or a safety line which could have prevented his fall. Therefore, for the same reasons, the part of Sagewood's motion seeking summary judgment as to Labor Law § 240 (1) must be denied.

Sagewood also argues that Labor Law §§ 240 (2) and 240 (3), which plaintiff alleges were violated, are inapplicable. Labor Law § 240 (2) relies upon the failure to provide safety rails, while § 240 (3) focuses on the maximum weight to which a scaffolding can support. The Amended Verified Complaint does not allege the lack of safety rails or addresses the maximum weight of the scaffolding. Therefore, Sagewood is entitled to summary judgment as to the claims made as to violations of Labor Law §§ 240 (2) and (3).

**Labor Law § 241 (1) (2) (3) (4) and (5)**

Sagewood contends that the part of plaintiff's amended complaint alleging violations of Labor Law §§ 241 (1) (2) (3) (4) and (5) must be dismissed. As discussed in motion sequence

002, such sections of the Labor Law are inapplicable to plaintiff's accident and must be dismissed.

**Labor Law § 241 (6)**

While plaintiff alleges that Labor Law § 241 (6) was violated, Sagewood contends that plaintiff does not specify which part of Rule 23 is applicable, or which section of the OSHA Safety and Health Standards is applicable. However, as the court discussed in motion sequence 002, plaintiff's testimony suggests that section 23-1.16 (b) of the Industrial Code may have been violated. Therefore, as the applicability of section 23-1.16 (b) remains in dispute, the part of Sagewood's motion seeking summary judgment as to Labor Law § 241 (6) must be denied.

Furthermore, although plaintiff also alleges violations of Article 1926 of OSHA, as discussed in motion sequence 002, such allegations will not support liability under Labor Law § 241 (6), because OSHA is limited to the safety practices of employers. *See Kocurek v Home Depot*, 286 AD2d 577, 580 (1st Dept 2001).

**CONCLUSION and ORDER**

Accordingly, it is

ORDERED that Sienia Construction, Inc.'s motion (sequence 002) dismissing plaintiff Thomas Badzio's complaint is granted in part to the extent that the causes of action alleging common law negligence, violations of Labor Law §§ 200; 240 (2) and (3); 241 (1), (2), (3), (4) and (5); Industrial Code sections: §§ 23-1.5, 23-1.8, 1.18, 1.19, 1.20, 1.22, 1.30, 1.32, 1.33, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.2, 3.3, 3.4, 4, 5.1-22 and 7.1, Section C 26-1907.1-9 from the 1968 Building Code, and Article 1926 of OSHA, and all cross claims are hereby dismissed, and the

motion is denied as to plaintiff Thomas Badzio's causes of action pursuant to Labor Law § 240 (1) and 241 (6) as predicated on a violation of Industrial Code § 23-1.16 (b) and it is further

ORDERED that plaintiff Thomas Badzio's cross motion (sequence 002) for partial summary judgment on the issue of liability for his cause of action pursuant to Labor Law § 240 (1), is granted; and it is further

ORDERED that Patrick D'Angelo and Ligia Jacobs s/h/a Ugia Jacobs motion (sequence 003) for an order granting summary judgment is denied with the exception of the part of D'Angelo and Jacobs' motion seeking to dismiss the third-party plaintiffs' claims for common law indemnification and contribution which are dismissed; and it is further

ORDERED that Geoffrey Hunter and Marie-Jose Hunter's motion (sequence 004) for an order granting summary judgment is denied with the exception of the part of the Hunters' motion seeking to dismiss the third-party plaintiffs' claims for common law indemnification and contribution which are dismissed; and it is further

ORDERED that East 68th Street Tenants Corp. and Wallack Management Co., Inc.'s motion for summary judgment (sequence 005) is granted in part to the extent that the causes of action alleging common law negligence, violations of Labor Law §§ 200; 240 (2) and (3); 241 (1), (2), (3), (4) and (5); Industrial Code sections: §§ 23-1.5, 23-1.8, 1.18, 1.19, 1.20, 1.22, 1.30, 1.32, 1.33, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.2, 3.3, 3.4, 4, 5.1-22 and 7.1, Section C 26-1907.1-9 from the 1968 Building Code, and Article 1926 of OSHA, and all cross claims are hereby dismissed, and the motion is denied as to plaintiff Thomas Badzio's causes of action pursuant to Labor Law § 240 (1) and 241 (6) as predicated on a violation of Industrial Code § 23-1.16 (b); and it is further

ORDERED that the part of East 68th Street Tenants Corp. and Wallack Management Co., Inc.'s motion seeking contractual indemnification is granted as against Patrick D'Angelo, Ligia Jacobs s/h/a Ugia Jacobs, Geoffrey Hunter and Marie-Jose Hunter; and it is further

ORDERED that Sagewood Construction & Design Corporation's motion (sequence 006) is granted in part to the extent that the causes of action alleging common law negligence, violations of Labor Law §§ 200; 240 (2) and (3); 241 (1), (2), (3), (4) and (5); Industrial Code sections: §§ 23-1.5, 23-1.8, 1.18, 1.19, 1.20, 1.22, 1.30, 1.32, 1.33, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.2, 3.3, 3.4, 4, 5.1-22 and 7.1; Section C 26-1907.1-9 from the 1968 Building Code, and Article 1926 of OSHA, and all cross claims are hereby dismissed, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: 9/02/2020

ENTER:

ROBERT DAVID KALISH, J.S.C.