

Vargas v Marsh & McLennan Cos., Inc.

2020 NY Slip Op 34059(U)

December 10, 2020

Supreme Court, New York County

Docket Number: 153377/2016

Judge: David Benjamin Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

ENRIQUE VARGAS, DENISE VARGAS,
Plaintiff,

- v -

MARSH & MCLENNAN COMPANIES, INC., EDWARD J.
MINSKOFF EQUITIES, INC., VERUS CONSTRUCTION
SERVICES INC.,

Defendant.

-----X

MARSH & MCLENNAN COMPANIES, INC., EDWARD J.
MINSKOFF EQUITIES, INC., VERUS CONSTRUCTION
SERVICES INC.

Plaintiff,

-against-

PRECISION INTERIOR CONSTRUCTION CORP.

Defendant.

-----X

INDEX NO. 153377/2016
MOTION DATE 09/30/2020,
09/30/2020
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595945/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 101, 102, 104, 106, 108, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 128, 129

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 103, 105, 107, 121, 122, 123, 124, 125, 126, 127, 130, 131

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

Upon the foregoing documents:

Motion sequence numbers 002 and 003 have been consolidated for disposition.

In motion sequence number 002, plaintiffs Enrique Vargas and Denise Vargas move, pursuant to CPLR 3212, for an order granting partial summary judgment as to plaintiffs' claims of violations of Labor Law §§ 240 (1) and 241 (6).

In motion sequence number 003, defendants/third-party plaintiffs 1166 LLC and Versus Construction Services Inc. (Versus), move, pursuant to CPLR 3212, dismissing plaintiffs' claims for common law negligence and violations of Labor Law §§ 200 and 241 (6); granting contractual indemnification or an order of conditional contractual indemnification against third-party defendant Precision Interior Construction Corp. (Precision); and dismissing all cross-claims against defendants/third-party plaintiffs.

FACTUAL ALLEGATIONS

Plaintiff Enrique Vargas' Deposition

Plaintiff testified that on April 14, 2016, he was injured at a construction site located at 1166 Avenue of the Americas in New York City. At the time of his accident, plaintiff was working for Precision as a drywall taper on the 21st floor of the premises. Plaintiff's supervisor was named Alex who also worked for Precision. Plaintiff also recalls meeting with a foreman at the site from Precision. Plaintiff received directions from Precision's foreman or Precision's carpenter foreman. Plaintiff testified that Versus was the general contractor at the site and that he was unsure who owned the building.

Plaintiff was provided with a six-foot Baker scaffold by Precision to perform his job. The scaffold could be adjusted to different heights. Plaintiff would use a spackle knife and an aluminum plate. Plaintiff testified that there were electricians, plumbers, and carpenters that also utilized scaffolds at the site. Plaintiff maintains that on the date of his accident, he was not wearing a hard hat, as he was told that he did not need it by the carpenter foreman. He was

working with tapers from Precision. He maintains that he was not required to have a harness, safety lines, or lanyards.

Plaintiff testified that the foreman had taken him to the 21st floor and showed him which scaffold to utilize. The scaffold was already set up when he arrived. Plaintiff testified that before getting on the scaffold, he locked the four wheels. He observed that the scaffolding did not have railings. Plaintiff did not recall seeing guardrails in place the entire time.

Plaintiff testified that in order to move the scaffold, he would descend, unlock the wheels, and then move the scaffold to the next area before locking the wheels and ascending. Plaintiff testified that prior to his accident and on several other occasions he requested a railing from the foreman. While the foreman told plaintiff that he would request the railing, plaintiff was never provided with the railing.

Plaintiff maintains that prior to his accident, he was on the scaffold for an hour, and that he was standing on the center of the platform about two and a half feet away from a wall. Plaintiff's right hand was spackling an area above him, while his left hand was holding a tool. Plaintiff proceeded to step back and lost his balance. He recalls that he fell back off the scaffold and landed on the concrete ground. Plaintiff landed on his back, hitting his head and his left hand. Plaintiff maintains that Edwin, a co-worker, witnessed the accident. Plaintiff was helped over to a window sill and contacted his union representative. He recalls that his foreman also came to the location to assist.

Plaintiff testified that scaffold surfing is when workers move their body to push themselves around on the scaffold. He testified that in all of the years that he worked on scaffolds, he did not engage in surfing.

Peter Giunta's Deposition

Peter Giunta (Giunta) testified that he works for Versus, the site's general contractor, as a construction superintendent. He maintains that Michael Abiuso was the owner of Versus.

Giunta was at the site every other day and that the work was completed in June of 2016. Giunta maintains that Versus had an employee who was present at the site on a daily basis named Wilson who was responsible for maintaining the floor and dealing with issues with the subcontractor. On the job site, he and Wilson were to make routine and random job site inspections to identify new hazards and to monitor the effectiveness of safety and health.

Giunta testified that biweekly safety meetings were held with the superintendent and the owner of Precision. He maintains that Al Tiseo (Tiseo), Precision's general superintendent, was typically on-site on a daily basis. Giunta testified that at safety meetings, discussions included utilizing rails on a scaffold, the prohibition of surfing, locking wheels, and utilizing scaffolds with safety railings. Giunta recalls observing safety rails on the Bakers scaffolds utilized by Precision workers. He recalls seeing an electrician utilizing a scaffold without rails, but did not recall speaking with anyone from Precision.

Giunta testified that Baker scaffolds at the subject project should have had a railing. He maintains that Precision provided the Baker scaffolds for this project. He did not recall observing any workers surfing at this site and did not recall seeing Precision workers with unlocked wheels. Giunta testified that Tiseo called him regarding plaintiff's accident and explained that a taper had fallen at the site on the 21st floor and was taken to a hospital. Giunta visited the site of the accident with Tiseo and observed that the only scaffold at the location had unlocked wheels with no rails on the longer sides.

Giunta did not know anyone who could verify that the scaffold was brought to the 21st floor by the plaintiff and did not know if anyone unlocked the wheels after the fall took place. Giunta testified that there were no safety harnesses at the job site. Giunta did not recall learning of any witnesses of the accident and he did not witness the accident.

Thomas Lohrer's Deposition

Thomas Lohrer (Lohrer) testified that he worked for Precision as a vice president. Lohrer's duties included ensuring that the workers were performing work in a safe manner and making sure there was enough equipment. He maintains that Tiseo was the field superintendent and responsible for ensuring that each scaffold had guardrails.

Lohrer testified that the Baker scaffolds used at the site were to be locked, that there was no surfing allowed, and that the scaffold should not have been brought to the top height without a guardrail. He maintains that Precision workers assembled their own Baker scaffolds and that guardrails could be attached later if needed or when the scaffolds were originally assembled.

Lohrer testified that in April of 2016, Precision had four Baker scaffolds with guardrails for the tapers and carpenters on the 20th and 21st floors. Lohrer would visit the site once a week. When he visited, he saw Precision workers utilizing scaffolds with guardrails. Lohrer maintains that there was not an occasion in which he saw a carpenter or taper utilizing a Baker scaffold without a guardrail, and guardrails could be quickly provided if there was a shortage.

Lohrer testified that Tiseo told Lohrer about plaintiff's accident. When Lohrer visited the site after the accident, he observed the subject scaffold with unlocked wheels and without guardrails. He maintains that Tiseo would conduct tool box meetings, that tapers would have been instructed to use guardrails with the scaffold, and that they would be instructed not to surf. Lohrer was not informed that any of the Baker scaffolds were in disrepair. He believes that he

was told that plaintiff's accident was a result of surfing, but was not aware of any direct witnesses. Lohrer maintains that other than hardhats and guardrails, there were no other safety devices provided to workers on the scaffolds.

Thomas Lohrer's Affidavit

Lohrer submits an affidavit which states that he visited the accident location where he found the Baker scaffold in an open space near nothing which could have caused an accident. He maintains that the scaffold wheels were unlocked and that there was no guardrail on the scaffold itself. Lohrer observed guardrails leaning on a wall nearby.

Lohrer states that in April 2016 and prior, Precision maintained an inventory of Baker scaffolds, all of which had locking wheel brakes on all four legs, cross-braces or arms on the short sides, and five by eight, plywood boards for the platforms. The wheel brakes or locks consisted of metal pieces operated like foot pedals, for workers to use the toe of his/her boot to push the metal piece down to lock the wheel brake. He maintains that each scaffold leg had slots for the worker to easily insert a guardrail.

Lohrer states that Precision and Tiseo made sure that there were guardrails for each of its Baker scaffolds on the subject site. He states that the workers assembled their own Baker scaffolds and installed the guardrails either during assembly or whenever they began using the scaffolds. Lohrer states that he visited the site at least once a week to physically inspect the site and review the scope of work. He recalls seeing Precision carpenters and tapers utilizing Baker scaffolds with guardrails. He did not see or hear about workers using Baker scaffolds without guardrails. Lohrer maintains that whenever a new union taper came to the job site, Tiseo instructed the workers to use guardrails with the Baker scaffolds and not to "surf" the scaffolds.

Albert Tiseo's Affidavit

Tiseo submits an affidavit dated May 12, 2020. Tiseo states that he was Precision's Field Supervisor for the project on the 20th and 21st Floors at 1166 Avenue of the Americas. Tiseo states that in addition to being on-site on a daily basis, he held weekly safety meetings every Wednesday with Precisions' workers. He states that plaintiff attended about four safety meetings, but would walk away without signing the sign-in sheet. Tiseo states that plaintiff probably attended the safety meeting on the day of his accident. He states that during the meetings he discussed wearing hardhats and following scaffold safety rules, including the use of guardrails, and that scaffold surfing was prohibited. Tiseo states that workers sometimes surf on their scaffolds to save time, but that Precision and he prohibited scaffold surfing.

Tiseo states that he heard about plaintiff's accident after it occurred and visited the location. He inspected the Baker scaffold which plaintiff had been using and found the guardrails leaning up against a nearby wall. Tiseo maintains that it was a new scaffold and was in good condition. Each of the four legs had a wheel with an independent brake lock, but all four brakes were unlocked. Tiseo states that there was nothing wrong with the scaffold.

Tiseo states that plaintiff told Melecio Velasquez that he had been surfing the scaffold. Tiseo maintains he received no complaints about the scaffold, Precision's other scaffolds, or any dangerous conditions on this job

Melecio Velasquez's Deposition

Melecio Velasquez (Velasquez) testified that he worked as a taper and was in charge of the tapers at the site for Precision. Velasquez testified that on the day of plaintiff's accident, Precision had five Baker scaffolds on the job. Precision's rule was that the guardrails had to be installed on the scaffolds. Velasquez maintains that it is possible to surf the scaffold as long as

the wheels are unlocked in order to work faster. He testified that if guardrails were available, he would utilize them when a Baker platform was five feet off the ground. Velasquez maintains that it would take about two or three minutes to install the railings.

Velasquez testified that he never saw guardrails on the scaffold that plaintiff was utilizing. Velasquez testified that plaintiff never used safety rails but also testified that he was not always watching plaintiff on the Baker scaffold. Velasquez did not know if plaintiff locked the wheels on the subject scaffold. He maintains that it was common in the taper industry for workers to surf with or without safety rails. He does not recall plaintiff requesting safety rails. If the safety rails were available, the workers would use them. Velasquez testified that the Baker scaffold was in good condition with wheels and locks.

Velasquez showed plaintiff where to work on the 21st floor prior to plaintiff's accident. He maintains that there was a supervisor from Versus at the site on a daily basis. He testified that someone representing the owner walked around the site several times a week.

Following plaintiff's accident, Velasquez did not recall telling Tiseo that plaintiff's accident was caused by surfing, nor recall being told by anyone that plaintiff was surfing at the time of his accident. Velasquez did not see safety harnesses and testified that they are not worn on Baker scaffolds. He recalls that there was only one guardrail available for five scaffolds which Precision had at the job. Velasquez testified that there were no guardrails available on the 21st floor and he did not recall if there were guardrails on the 20th floor for plaintiff's scaffold.

Daniel Centonze's Affidavit

Daniel Centonze (Centonze) states that he is the Vice President of Construction for Edward J. Minskoff Equities, Inc. He oversees all capital improvements at 1166 Avenue of the Americas, New York, New York, on behalf of the building ownership which includes the 20th

and 21st floor, which were owned by 1166 20-21 LLC. Centonze states that during his weekly visits to the site, he never observed any conditions that appeared hazardous, nor was he informed that Precision had any occurrences of its workers using Baker's scaffolds without guardrails. He was not on-site on the date of plaintiff's accident.

Motion Sequence 002

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 Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Labor Law § 240 (1)

Plaintiffs allege that summary judgment must be granted as to their claims of a violation of Labor Law § 240 (1). Labor Law § 240 (1) provides, in relevant part:

"All contractors and owners and their agents . . . 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."

Plaintiffs argue that it is undisputed that when plaintiff fell, he was taping and spackling drywall and was standing on the platform of a Baker scaffold which was between five and six feet above the ground. Plaintiffs contend that the scaffold was not equipped with side rails to prevent him from falling to the ground and that no other safety devices, such as a safety harness,

rope or lanyard, were provided. Plaintiffs argue that the general contractor was aware that the scaffolds utilized on the project were to have been equipped with safety railings.

Plaintiff maintains that he locked the wheels every time he was on the scaffold, and that when he had to move, he descended, unlocked the wheels, moved the scaffold to the work location, re-locked the wheels, and climbed back onto the scaffold. Plaintiff contends that even if the wheels were unlocked at the time of the accident and that he was moving the scaffold while standing on top, such allegations were, at most, comparative negligence, which is not a defense to a claim pursuant to Labor Law § 240 (1). Plaintiffs contend that there were no witnesses to his accident.

In opposition, 1166 LLC and Versus contend that plaintiff's actions were the sole proximate cause of the accident because he misused the scaffold by not utilizing the wheel locks. Defendants contend that Giunta, Lohrer, and Tiseo observed that the wheels were not locked shortly after the accident and that guardrails were available at the site. Lohrer and Tiseo both testified and stated in their affidavits that the guardrails were distributed and assembled with all of the Baker scaffolds onsite, and that they saw guardrails available for plaintiff to use when they inspected the scene of the accident shortly after it occurred. 1166 LLC and Versus contend that based upon circumstantial evidence, plaintiff must have been surfing on the scaffold due to the post-accident inspections in which it was observed that the scaffold had unlocked wheels.

In opposition, Precision contends that plaintiffs are not entitled to summary judgment because there are issues of fact about how the accident occurred. Precision states that both of its supervisors at this job site, Lohrer and Tiseo, supplied Baker scaffolds with guardrails to their employees, and explained to employees that they were required to use the guardrails, lock the scaffold wheels, and not to surf. Precision contends that when it responded to the accident site,

Lohrer and Tiseo found the subject scaffold with all four wheels unlocked and the guardrails nearby.

Precision argues that after this accident, Velasquez signed a statement saying that plaintiff admitted he was “surfing” when he fell off the scaffold. Precision contends that there is no support for plaintiff’s suggestion that he should have been provided safety devices to tape and spackle the wall, other than the subject scaffold with wheel locks and guardrails. Precision argues that plaintiffs have not offered any expert opinion that harnesses, lifelines or lanyards were necessary for this work.

Liability arises pursuant to Labor Law § 240 (1), upon proof that, "plaintiff's injuries result from an elevation-related risk and the inadequacy of the safety device." *Nicometi v Vineyards of Fredonia, LLC*, 25 NY 3d 90, 97 (2015). There is no liability pursuant to Labor Law § 240 (1), if a proper safety device was readily available and the worker's normal and logical response would be to retrieve it. *Noor v City of New York*, 130 AD3d 536, 539 (1st Dept 2015) citing *Rice v West 37th Group, LLC*, 78 AD3d 492, 495 (1st Dept 2010). The burden is on the defendants to provide evidence which establishes that the scaffold and guardrails were a suitable safety device, was available for use, that plaintiff was instructed to use it, and acted either as a recalcitrant worker or was the sole proximate cause of the accident. *Gutierrez v 451 Lexington Realty LLC*, 156 AD3d 418, 418-419 (1st Dept 2017).

The Appellate Division, First Department, has held that:

“if adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under section 240 (1) does not attach. Hence, in determining whether there is a violation of Labor Law § 240 (1), or whether a worker is the sole proximate cause of his injuries, the issue to be addressed first is whether adequate safety devices were provided, "furnished" or "placed" for the worker's use on the work site.”

Cherry v Time Warner, Inc., 66 AD3d 233, 236 (1st Dept 2009) (citations omitted).

Here, the testimony conflicts as to whether plaintiff was provided guardrails for use with the subject scaffold. Plaintiff testified that he was not provided with guardrails for the scaffold and Velasquez testified that there were no guardrails located on the 21st floor. However, this testimony is contradicted by the statements of Lohrer and Tiseo. Both Lohrer and Tiseo, who worked for Precision, state that the guardrails for use for the subject scaffold, were located near the scaffold following the accident, and that they both observed them at this location. If the scaffold was located next to guardrails following the accident, it remains unclear to the court why plaintiff was not utilizing them at the time of his accident and whether plaintiff misused the device.

"On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Due to the disputed testimony from the witnesses, a question of fact exists as to whether guardrails were provided, whether an adequate safety device was furnished to plaintiff, and whether plaintiff chose not to utilize such device. Therefore, due to the factual issues, the part of plaintiff's motion seeking summary judgment as to Labor Law 240 § (1) must be denied.

Labor Law § 241 (6)

Plaintiff also contends that summary judgment must be granted as to the alleged violation of Labor Law § 241 (6). Labor Law § 241 (6) provides, in part, as follows:

"All 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 (1993) (quotations omitted). 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. *See Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 (2010).

Plaintiff contends that Industrial Code 23-5.18 (b) (12 NYCRR 23-5.18) was violated as a safety railing was not provided for the subject scaffold. Industrial Code 23-5.18 (b) provides:

"(b) Safety railings required.

The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule)."

The Appellate Division, First Department, has held that section 23-5.18 (b) is sufficiently specific to support a Labor Law § 241 (6) claim. *See Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 412-413 (1st Dept 2008); *Vergara v SS 133 W 21, LLC*, 21 AD3d 279, 281 (1st Dept 2005).

In opposition, 1166 LLC and Versus contend that the evidence establishes that defendants complied with this provision by providing guardrails for the Baker scaffolds at the site and that plaintiff chose not to utilize the safety device and surfed. Precision also submits opposition and contends that there is a question as to whether section 23-

5.18 (b) of the Industrial Code is applicable because there is evidence that guardrails were available, but plaintiff chose not to use them. Precision contends that even if section 23-5.18 (b) was violated, there is a question as to whether that violation was a proximate cause of the alleged accident, whether a jury would have to evaluate how much blame should be charged against plaintiff for causing his own accident by surfing the scaffold, and whether guardrails would have prevented him from falling.

Here, while the claims that plaintiff was surfing are speculative as the testimony conflicts as to this assertion, a question of fact exists as to whether section 23-5.18 (b) was violated as it remains disputed from the testimony whether a safety railing was provided with the subject scaffold and whether plaintiff chose not to utilize such device. While plaintiff maintains that he was not provided with guardrails and raised this issue with his supervisor, Lohrer and Tiseo, who worked for Precision, state that the guardrails for use for the subject scaffold were provided and located near the scaffold following the accident.

Therefore, as an issue of fact exists as to whether the guardrails were provided, the part of plaintiff's motion seeking summary judgment as to Labor Law § 241 (6), predicated on a violation of section 23-5.18 (b) of the Industrial Code, must be denied.

Motion Sequence 003

Labor Law § 200

1166 LLC and Versus argue that plaintiff's claims of common law negligence and a violation of Labor Law § 200 must be dismissed. In his affirmation in opposition, Michael S. Levine, Esq., counsel for plaintiffs, states that he has no objection to the dismissal of plaintiffs' claims of a violation of Labor Law § 200 as against these

defendants. Therefore, the part of 1166 LLC and Versus' motion seeking summary judgment as to plaintiffs' claim of a violation of Labor Law § 200 is granted.

Labor Law § 241 (6)

1166 LLC and Versus argue that plaintiffs' allegations of Industrial Code violations must be dismissed. Plaintiffs allege violations of Industrial Code sections 23-1.5; 23-1.7; 23-2.1; 23-1.30; 23-1.15; 23-1.16; 23-1.17; 23- 5.1; 23-5.2; 23-5.3; 23-5.4; 23-5.5; 23-5.6; 23-5.7; 23-5.8; 23-5.9; 23-5.10; 23-5.11; and 23-5.18. However, the only section of the Industrial Code which plaintiffs discuss is section 23-5.18 (b). As plaintiffs fail to address any of the Industrial Code sections other than section 23-5.18 (b), such claims that these sections were violated are deemed abandoned. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003).

While 1166 LLC and Versus contend that the alleged violation of Industrial Code section 23-5.18 (b) must be dismissed, as discussed above in motion sequence 002, an issue of fact exists as to whether section 23-5.18 (b) of the Industrial Code was violated as it is unclear whether guardrails were provided. Although 1166 LLC and Versus contend that section 23-5.18 (b) is not applicable to the facts of this case, as plaintiff was working on a platform that was less than seven feet high, the Appellate Division, First Department, has held that this section of the Industrial Code requires safety rails on manually propelled scaffolds without regard to the height of the scaffold. *See Celaj v Cornell*, 144 AD3d 590, 591 (1st Dept 2016).

Therefore, because an issue of fact exists as to whether guardrails were provided, the court denies the part of 1166 LLC and Versus' motion seeking summary judgment as to Labor Law 241 (6) predicated on a violation of Industrial Code section 23-5.18. (b).

Contractual Indemnification

1166 LLC and Versus contend that the part of their motion seeking summary judgment for contractual indemnification as against Precision must be granted. 1166 LLC and Versus contend that its agreement with Precision dated January 14, 2016, provides, in part, that:

“[t]o the fullest extent of the law, Subcontractor shall indemnify and hold harmless Versus Construction, the Owner, all additional insureds and each of their respective partners, directors, officers, agents and employees from and against any and all claims arising from or in connection with (a) any work or thing whatsoever done, or any condition created in or about the Premises during the period of time that each such subcontractor may have been given to access the Premises and during the period of time that work is being performed until such work is completed, (b) any act, omission or negligence of Subcontractor or licensees or its or their partners, directors, principals, shareholders, officers, agents, employees or contractors, their partners, directors, officers, agents, employees or contractors on or about the Premises; and (c) any accident, injury or damage whatever occurring in, at or upon the Premises together with all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon, including, without limitation, all attorneys’ fees and expenses.”

NYSCEF DOC. NO. 93.

1166 LLC and Versus argue that they have established their prima facie entitlement to judgment on their contractual indemnification claim against Precision based upon the clear and unambiguous language of the indemnity clause contained within the contract between Versus and Precision; plaintiff’s accident occurring within the scope of Precision’s work; Precision’s responsibility to equip, direct, control and supervise plaintiff’s work; and the absence of any active negligence by the defendants/third-party plaintiffs.

1166 LLC and Versus contend that plaintiff’s accident arose out of Precision’s drywall work and was caused by its own alleged acts and/or omissions by failing to

supply plaintiff with a Baker's scaffold with guardrails and instructing plaintiff to work with a Baker's scaffold which did not have the guardrails. They further argue that even if a general contractor or owner had the overall responsibility for the safety of the work done by the subcontractors, this is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control.

In opposition, Precision contends that there are questions about how Versus contributed to the alleged accident by allowing the tapers to disregard relevant safety rules. Precision contends that based upon the testimony of Velasquez, Versus' supervisor was on-site daily but did not change the tapers' behavior of ignoring safety protocols about guardrails and hardhats. Precision argues that Giunta, Versus' supervisor, explained that he struggled to get the workers to follow safety protocols, and yelled at them to install guardrails, lock their wheels and/or put on their hardhats.

"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) (internal quotations and citations omitted). 2002). A court may 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). Conditional indemnification is warranted when the indemnification provision does not indemnify an indemnitee for his or her own negligence, even where there are issues of fact as to an indemnitee's active negligence. *See Cerverizzo v City of New York*, 116 AD3d 469, 472 (1st Dept 2014).

Here, based upon the language of the agreement, Precision was to indemnify and hold harmless all claims arising from or in connection with any work or any condition created in or about the premises during the period of time that work is being performed until such time work is completed. The language of the agreement specifies “all claims” are covered. As plaintiff’s injury arose from his work for Precision, based upon the contractual language, Versus and 1166 LLLC establish entitlement to summary judgment as to their claim of contractual indemnification.

Subrogation

Finally, Precision contends that Versus’ claims against it are barred by the anti-subrogation rule and must be dismissed at least up to the limit of the insurance policy which provides both entities coverage for this plaintiff’s claims. Pursuant to the anti-subrogation rule, an insurer cannot maintain a cause of action against its own insured for a claim arising out of the same risk for which the insured was covered. *See North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 (1993); *Pennsylvania General Ins. Co.*, 510 NYS2d 67 (1986).

Precision argues that it purchased an insurance policy issued by Wesco Insurance Company (Wesco) which covered Precision for a period including the April 13, 2016 date of the underlying accident. It contends that this policy contained a blanket additional insured endorsement which extended coverage to those entities with whom the primary Wesco insured, here Precision, entered into a written contract. Precision contends that given that both Versus and Precision are covered by the subject Wesco policy for purposes of plaintiff’s claims, Versus’ claims against Precision are barred by the anti-subrogation rule at least up to the limit of the Wesco policy.

Here, to the extent that 1166 LLC and Versus' third-party action only seeks recovery for contractual indemnification from Precision for priority of coverage of its separate excess insurance coverage in the event plaintiff's recovery exceeds Precision's primary policy, 1166 LLC and Versus' third-party action does not violate the anti-subrogation rule. *See Bruno v Price Enters.*, 299 AD2d 846, 848 (4th Dept 2002) (holding defendant's "right to recovery under that cause of action is limited to an amount in excess of the applicable insurance policy limits, because indemnification is barred by the anti-subrogation rule up to the amount of the applicable insurance policy limits").

CONCLUSION and ORDER

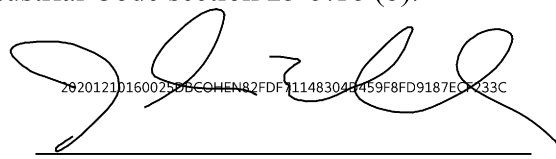
Accordingly, it is

ORDERED that plaintiffs Enrique Vargas and Denise Vargas' motion (sequence 002) for an order granting partial summary judgment as to plaintiffs' claims of violations of Labor Law §§ 240 (1) and 241 (6) is denied; and it is further

ORDERED that defendants/third-party plaintiffs 1166 LLC and Versus Construction Services Inc.'s motion (sequence 003) for contractual indemnification as against Precision Interior Construction Corporation is granted as is the part of the motion dismissing the claim of a Labor Law § 200 violation; and it is further

ORDERED that the part of their motion seeking summary judgment as to Labor Law § 241 (6) is granted in part and claims pursuant to Industrial Code sections 23-1.5; 23-1.7; 23-2.1; 23-1.30; 23-1.15; 23-1.16; 23-1.17; 23- 5.1; 23-5.2; 23-5.3; 23-5.4; 23-5.5; 23-5.6; 23-5.7; 23-5.8; 23-5.9; 23-5.10; 23-5.11 are dismissed. Furthermore,

the court denies the part of 1166 LLC and Versus' motion seeking summary judgment as to Labor Law § 241 (6) predicated on a violation of Industrial Code section 23-5.18 (b).



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12/10/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE