SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

ORIGINAL

MICHAEL ROGERS,

Plaintiff,

-against-

PETER SCALAMANDRE & SONS, INC.,

Defendant.

PETER SCALAMANDRE & SONS, INC.,

Third-Party Plaintiff,

-against-

CERTIFIED INTERIORS, INC.,

Third-Party Defendant.

Index No.
618568/2016

Motion Seq:
001 Mot.D
002 Mot.D
004 Mot.D
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	20-33; 36-40; 75-94
Answering Papers.....	74; 97; 99
Reply.....	53-55; 100-101
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Before the Court is an action sounding in Labor Law for damages allegedly arising from serious injuries sustained by plaintiff as a result of an accident while working on a project where defendant/third-party plaintiff was retained pursuant to a written agreement by the premise

owner on a job site known as The Long Island Welcome Center in Dix Hills, New York. Plaintiff was employed by the third-party defendant on the date of the accident.

Plaintiff Michael Rogers ("Rogers") moves this Court for an Order granting summary judgment pursuant to CPLR § 3212 on plaintiff's claims of common law negligence, and violations of the Labor Law, specifically, §§ 240(1) and 241(6) (Motion Sequence 001).

Defendant/Third-Party Plaintiff Peter Scalamandre & Sons, Inc. ("Scalamandre") cross-moves this Court for an Order pursuant to CPLR § 3212 granting partial summary judgment with respect to claims pursuant to Labor Law §§ 241(6), and denying plaintiff's motion for summary judgment (Motion Sequence 002).

Third-Party Defendant Certified Interiors, Inc. ("Certified") moves this Court for an Order pursuant to CPLR § 3212, dismissing the third-party complaint because it is barred by, *inter alia*, the Worker's Compensation Law Section 11 (Motion Sequence 004).

Plaintiff is entitled to summary judgment in his favor on the Labor Law § 240(1) claim. Furthermore, defendant/third-party plaintiff's cross-motion is denied. Finally, as to the third-party defendant's motion seeking summary judgment and dismissing the third-party complaint against it is denied.

BACKGROUND

On the day of the accident, the State of New York owned the subject premise where the accident occurred. The State of New York hired Scalamandre as a general contractor for the construction of a welcome center and road rest stop in Dix Hills, New York. Scalamandre hired various subcontractors for the project, including Certified for carpentry work at the project. Plaintiff was employed by Certified at the time of the accident.

A. Plaintiff's Deposition Testimony

Since 1983 plaintiff has been a union carpenter with Local 290 where he has served as a steward. At the time of the accident he was working for Certified as a carpenter of the Long Island Welcome Center project. Mr. Rogers testified that he had taken safety courses including OSHA 30, OSHA 10, first aid and CPR. He also was trained on the use of aerial lift.

Mr. Rogers described the lift as extending with a bucket for about two people and that it reached the top of a one-story building. Over the year's plaintiff testified that he had used boom lifts to do exterior framing. Additionally, Mr. Rogers stated that for the exception of a few stitched he had no prior workplace accidents.

Mr. Rogers joined the Certified crew after they had commenced work on the subject project and was the steward. Certified had two articulating boom lifts and a couple of interior man lifts at the time of the accident. The articulating boom lifts were used to do sheathing, facias, framing and architectural wrap and the plaintiff used it four times a week.

Mr. Rogers testified that while using Certified equipment that although Kenneth White of Certified might have been on the jobsite he wasn't supervising plaintiff because he "knew [his]

job and [he] did [his] job" and Certified had his certifications. Mr. Rogers testified he had used the subject lift instead of Certified's lift because it was twice as high. To get to the louvres work he needed something greater than Certified's twenty-foot lift, because grading and digging prevented stationing Certified's lifts there.

Mr. Rogers testified that he had used Scalamandre's stick boom for the prior two days and in that time had probably used it ten times. Mr. Rogers was wearing a safety harness, hardhat and safety glasses at the time of the accident. Mr. Rogers did not ask for permission to use the stick boom. Mr. Rogers checked the boom prior to use looking at the tires and to make sure nothing was leaking.

Mr. Rogers does not remember the accident.

B. Wayne Smith's Deposition Testimony (Defendant/Third-Party Plaintiff Scalamandre)

Wayne Smith is an employee of defendant/third-party plaintiff Scalamandre. He has been Scalmandre's safety director since 2014. He prepared a safety and incident report pertaining to the subject accident in the course of his employment. The document he prepared identified plaintiff Rogers as "who was hurt."

Wayne Smith testified that the plaintiff was working in a dog house dormer installing a metal louvre at the time of the subject accident. He further testified that plaintiff was elevated off the ground while doing this work. Mr. Smith collected information from Max Rodriguez the superintendent working for Scalamandre. Smith stated that Certified was a subcontractor of the general contractor Scalamandre.

Smith testified that the lift had a malfunction in his report and that the "malfunction is it failed to meet his expectations of remaining extended while in use" specifically that "the drive chain had broken inside the main mast" which he noted while examining the equipment. He testified that "while taking pictures post-accident, I came to realize the drive chain had snapped and due to the access plate being ruptured and the chain being visibly protruding through that part." From eyewitness testimony Smith determined "the equipment malfunctioned resulting in a sudden vertical movement of the lift operator's basket."

During the course of his investigation Smith testified that no one told him that Rogers used the boom in an unsafe or otherwise inappropriate manner. Nor had he received any complaints about plaintiff working in an unsafe or otherwise inappropriate manner. During the course of his investigation Smith testified that no one told him that Rogers did not use the boom without permission. Smith said Certified's employees had permission to use the lift and that it was Scalmandre's duty to supervise the use of the boom lift. Plaintiff was "permitted [to use the boom lift] because Certified had need of it when they ought to have their own equipment there, and rather than bring their own equipment on site, as they were contractually required to do they borrowed ours." Mr. Smith testified that he was told plaintiff was wearing a harness.

Smith testified that the doghouse dormer was 18 feet off the ground. Scalamandre has records relative to the annual inspection of the subject lift. Smith is not an eyewitness to the event.

C. *Kenneth White Deposition Testimony (Third-Party Defendant Certified)*

Mr. White was the supervising foreman for third-party defendant Certified Interiors, who was also plaintiff's employer and was plaintiff's supervisor. As such, Mr. White testified that he personally saw plaintiff in basket of boom lift, near vertical when accident then occurred.

Mr. White also testified that plaintiff did not need to maneuver the boom arm to near vertical to perform his work. White testified that depending on the task it would be fair an accurate when a Certified worker is using this kind of boom lift the boom arm should not be vertical. He further testified that he surprised to see it vertical.

Mr. White also testified that one to two weeks prior to the accident, that plaintiff used Certified's scissor lifts and thirty-foot articulating boom lifts to access and work on the same roof, including roof gables. While Mr. White was supervising plaintiff's work, he did so without having any certification for proper and safe operation of any kind of aerial boom lifts.

Mr. White testified that 1-2 days before the accident, plaintiff told him he would ask Scalamandre's permission to use the subject boom lift. Plaintiff used it on those days prior to the accident, with no problems. In plaintiff's prior use of Scalamandre's boom lift, he would extend it to work or gable/louver on roof and then when done with the work, he would lower it down to the ground.

D. Andrew Rubin Deposition Testimony (Non-Party Witness)

Mr. Rubin is a union electrician with Local 25. At the time of the accident he was working for Bana Electric as an electrician on the Long Island Welcome Center project. Before the accident Mr. Rubin testified that he saw the plaintiff at the jobsite and that Mr. Rubin was a foreman on another job so he would spend half of the week on the subject project.

Mr. Rubin stated that he did not know the plaintiff until prior to the subject project. Mr. Rubin testified that Scalamandre had hired Bana Electric to do the electrical work at the project and that there were as many as twenty electricians on the jobsite at its peak.

Mr. Rubin testified that at the time of the accident Mr. Rogers was working on the louvre on the building on what was described as a doghouse. Mr. Rubin testified that subsequent to the accident he has not communicated with Mr. Rogers. Mr. Rubin testified that he had met with the plaintiff's attorney at a diner and had a forty-five minute discussion and had spoken with the attorney over the phone five or six times.

Mr. Rubin then testified that he had given a statement to the "safety guy" after Mr. Rogers had been taken by ambulance and that he did not take any photos. Although Mr. Rubin could not recall the exact date, he did testify that it happened in the fall and that it was a Saturday. He further testified that he was in charge of the solar panels and the lighting protection. Mr. Rubin had to work on the roof for those assignments and used an extension ladder to get on the roof. The day prior to the subject accident Mr. Rubin stated that an employee of Bana Electric Barry Carne had used the aerial boom lift that was related to Mr. Rogers' accident. Based on his experience Mr. Rubin believed it to be a forty-foot boom.

Mr. Rubin testified that he saw the plaintiff in the boom for more than one day installing the louvre on the building. Mr. Rubin testified that it was a sunny day. On the day of the accident he was installing solar panels with another electrician and a helper. He had seen Mr. Rogers on the boom because he had asked when Mr. Rogers thought he would be finishing up because the electricians had to get in the same position as well to install the panels.

Mr. Rubin testified that while the plaintiff was installing the louvre he was almost touching the roof, just hovering off the roof. He estimated that the bottom of the boom basket was probably fifteen to eighteen feet in the air. Mr. Rubin testified that the ground was RCA, crushed concrete aggregate, ready for road pavement and concrete pads had been poured for the air condition units. Mr. Rubin testified that the wheels of the boom were near the curb of the corner of the driveway that foes into a garage area. Mr. Rubin further testified that the telescopic boom was fully extended forty feet.

Mr. Rubin testified that the plaintiff had pulled the boom away and turned the basket away from the electricians. Mr. Rubin then testified, "it seemed like the machine jerked and really what happened is the arm telescoped in and as it telescoped in, he was almost kind of like in a free-fall, but from what you can tell form the distance, it appeared that he was caught on the lift itself, probably by the harness." Mr. Rubin testified, "I know he was definitely wearing the harness because when he got down I had to take the harness off of him, unattach the lanyard from him when we got him out of the accident." At the time of the accident the telescopic arm was probably thirty feet up. He testified that nothing was preventing plaintiff from moving the lift. After the lift had collapsed Mr. Rubin yelled from the roof to Mr. Rogers to see if he was alright and he saw blood coming from the bottom of the basket.

Mr. Rubin tried to manipulate the ground levers on the subject boom and they were not working. Several other tradesmen and Scalamandre employees ran over to the scene of the accident. Mr. Rubin testified that he dialed 911 and that he asked someone to get another lift so that he could retrieve the plaintiff and begin administering first aid. He then testified that Mr. Rogers came to and manipulated the boom levers from the basket bringing it down so he could be removed. Mr. Rogers was standing but had placed his weight on Mr. Rubin and the Scalamandre employee.

E. Procedural History

Plaintiff commenced the instant action by service of a Summons and Verified Complaint on November 16, 2016. Defendant joined issue on January 6, 2017 by service of an Answer. A third-party action was commenced by a Third-Party Summons and Complaint on January 23, 2017. Third-party defendant joined issue in the third-party action by a Verified Answer on March 15, 2017. This action was transferred from Justice Ford's inventory to this Part by Administrative Order 78-19 of the Administrative Judge of Suffolk County on October 18, 2019.

With the instant motions and cross-motion plaintiff, defendant/third-party plaintiff, and third-party defendant submit the deposition testimony of all parties and non-party witnesses, medical reports, accident reports with statements and photos, and the expert testimony of

Grahme Fischer, P.E. All parties also submit the pleadings as well as the Bill of Particulars and the Note of Issue.

DISCUSSION

A. CPLR § 3212: Summary Judgment Legal Standard

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

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 issue of fact from the case (***Alvarez v. Prospect Hosp.***, 68 NY2d 320 [1986]; ***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). Once such proof has been offered the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and "must show facts sufficient to require a trial of any issue of fact" (**CPLR § 3212[b]; *Zuckerman v. City of New York***, 49 NY2d 557 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (***see Roth v. Barreto***, 289 AD2d 557 [2d Dept 2001]; ***O'Neil v. Town of Fishkill***, 134 AD2d 487 [2d Dept 1987]).

B. Labor Law § 240(1) Claim

Essentially Labor Law § 240 (1) is a New York State workplace safety law designed to provide safety protection to workers performing construction, demolition or repair work involving any building or structure. The plaintiff herein, move for summary judgment dismissing the Labor Law § 240 (1) claim. Defendant/third-party plaintiff cross-moves for summary judgment in his favor as to liability on said claim. Labor Law § 240 (1), also known as the Scaffold Law, which, in pertinent part provides:

> "All contractors and owners and their agents . . . [involved] 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (***Valensisi v. Greens at Half Hollow, LLC,*** 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (***Makarius v. Port Auth. of NY & N. J.***, 76 AD3d 805, 807 [1st Dept 2010]). Instead, 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]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (***Cahill v. Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 39 [2004]).

1. Plaintiff's Motion

Plaintiff established, prima facie, his entitlement to summary judgment concerning the Labor Law § 240 (1) claim.

Where a ladder or scaffold or other safety device, such as an aerial boom lift, collapses or malfunctions for no apparent reason plaintiff is entitled to a presumption that the ladder or scaffolding device was not good enough to afford proper protection (B***lake v. Neighborhood Housing Services of NYC***, 1 NY3d 280, 289 [2003]; ***Romano v. Hotel Carlyle Owners Corp.***, 226 AD2d 441 [2d Dept 1996]; ***Squires v. Marini Builders***, 293 AD2d 808, 809 [3d Dept 2002], lv. denied 99 NY2d 502 [3rd Dept. 2002][it is well settled that a plaintiff's Labor Law 240(1) claim "is resolved as a matter of law where [an elevation-related safety] device collapses, slips or otherwise fails to perform its function of supporting the workers and their materials"]).

Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials (***Romano v. Hotel Carlyle Owners Corp.***, 226 AD2d 441 [2nd Dept 1996][emphasis added]; ***Basmas v. J.BJ Energy Corp.***, 232 AD2d 594 [2d Dept 1996]; ***Danton v. Van Valkenburg***, 13 AD3d 931, 931-932 [3d Dept 2004][where the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law 240(1) and the burden shifts to the defendant]). Having met its prima facie burden and the burden shifting to the defendant no triable issue of fact was raised. Thus, plaintiff is entitled to summary judgment dismissing the Labor Law § 240 (1) claim against them.

2. Defendant/Third-Party Plaintiff's Cross-Motion

The defendant/third-party plaintiff has failed to establish its entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim.

In order for a defendant to be successful on a motion of summary judgment in a Labor Law § 240 (1) claim they must either show the statute was not violated, and that the violation was not the proximate cause of the plaintiff's injuries. "[T]here can be no liability under section 240 (1) where there is no violation and the worker's actions . . . are the sole proximate cause of the accident" (***Blake v. Neighborhood Hous. Servs. Of NY City***, 1 NY3d 280, 290 [2003]; ***Robinson v. East Med. Ctr., LP,*** 6 NY 3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Any arguments by defendant/third-party plaintiff that Labor Law § 240 (1) does not apply to the facts of this case are unavailing. An aerial boom lift is one of the devices contemplated in the statute and construction is one of the contemplated hazards (**Labor Law § 240 [1]**; ***Narducci***, 96 NY2d 259, *supra*). Here, the defendant/third-party plaintiff fail to demonstrate, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action insofar as asserted against them by failing to demonstrate proximate cause (*see* ***Estevez-Rivas v. W2001Z/15CPW Realty, LLC***, 104 AD3d 802, 803 [2d Dept 2014]; ***Melchor v. Singh***, 90 AD3d 866, 868 [2d Dept 2012]; ***Harris v. Eastman Kodak Co.***, 83 AD3d 1563, 1564 [2d Dept 2011]). No evidence provided establishes that the plaintiff was the proximate cause of his injuries. Further, the argument here is one of a collapsing safety device. Showing proximate cause without the benefit of a competing expert, defendant/third-party plaintiff cannot meet its burden. Accordingly, defendant/third-party plaintiff's cross motion for summary judgment pursuant to Labor Law § 240 (1) is denied.

C. Labor Law § 241(6) Claim

The defendant/third-party plaintiff moves for summary judgment dismissing the Labor Law § 241 (6) claim. Plaintiff cross-moves for summary judgment in his favor as to liability on said claim. Labor Law § 241 (6) provides, in pertinent 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) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v. L.A. Wenger Contr. Co.***, 91 NY2d 343, 348 [1998]; *see also* ***Ross***, 81 NY2d at 501—502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (***Ross***, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (***Annicaro v. Corporate Suites, Inc.***, 98 AD3d 542, 544 [2d Dept 2012]).

Plaintiff lists a single violation of the Industrial Code as 12 NYCRR § 23-9.2(a) in his Bill of Particulars. That section of the Industrial Code provides in pertinent part "[m]aintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest" (***12 NYCRR § 23-9.2[a]***).

As Labor Law § 241(6) is not self-executing, a plaintiff must set forth a specific violation of a rule or regulation promulgated pursuant to it (*see* ***Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 11-12 [2011]). A regulation that merely recites common-law safety principles is insufficient (*see* ***St. Louis v. Town of N. Elba***, 16 NY3d 411, 414 [2011]). The alleged regulation here sufficiently mandates a distinct standard of conduct to support a Labor Law § 241(6) clam (*see* ***Misicki v. Caradonna***, 12 NY3d 511 [2009][upholding claim based in part on 12 NYCRR § 23-9.2[a]]).

1. Plaintiff's Motion

In support of this motion plaintiff submits the expert testimony of Grahme Fischer, P.E.

Under the circumstances presented, the plaintiff fails to demonstrate, prima facie, its entitlement to summary judgment. The Court has already determined that this regulation is applicable to the facts of the case, and that it is undisputed the regulation would be violated if Scalamandre had failed to repair upon discovery or actual notice of the problem. Therefore, the sole remaining path for plaintiff's summary judgment application is whether Scalamandre discovered or had actual notice of the problem (*see* ***Simmons v. City of New York***, 165 AD3d 725, 729 [2d Dept 2018]).

In the expert opinion of Grahme Fischer, P.E. the engineer goes to great lengths to discuss the duty but fails in any way to show discovery or actual notice. Failing to fulfill its prima facie burden the sufficiency of the defendant/third-party plaintiff opposition is disregarded (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d at 853, *supra*).

Accordingly, the Labor Law § 241(6) branch of plaintiff's motion for summary judgment is denied.

2. Defendant/Third-Party Plaintiff's Cross-Motion

Defendant/third-party plaintiff misreads ***Misicki v. Caradonna***, the Court of Appeals did find that 12 NYCRR § 23-9.2[a] contained the requisite specificity in which to allow a right of action. Assuming that § 23-9.2[a] is applicable, plaintiff needs to allege a breach of this provision of the Code. It would then remain for a jury to decide whether a violation, in fact, occurred; and whether the negligence of some party to, or participant in, the construction project caused plaintiff's injuries. If negligence is established, the employer would be vicariously liable for plaintiff's injuries without regard to fault (***Misicki v. Caradonna***, 12 NY3d at 521, *supra*). The question the Court of Appeals did not answer was whether the handheld device at issue there

and not properly brought on appeal fit within the heavy equipment definition of the Industrial Code Section. An aerial boom lift most certainly is a piece of heavy equipment. The Second Department in a subsequent opinion said "that portion of 12 NYCRR § 23-9.2[a] which imposes 'an affirmative duty on employers to "correct[] by necessary repairs or replacement," "any structural defect or unsafe condition" in equipment or machinery "[u]pon discovery," or actual notice of the structural defect or unsafe condition,' sets forth safety standards specific enough to permit recover under Labor Law Section 241(6)" (***Hircus v. Aurora Contractors, Inc.***, 64 AD3d 1004, 1005-1006 [2d Dept 2009]).

As the defendant/third-party plaintiff fails to make a prima facie showing its cross-motion for summary judgment on the Labor Law § 241(6) is denied.

D. Third-Party Defendant's Motion

An employer may be held liable for contribution or indemnification only when its employee has sustained a grave injury as defined by the Workers' Compensation Law or when there is a "written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant" (***Workers' Compensation Law § 11***; *see* ***Persaud v. Bovis Lend Lease, Inc.***, 93 AD3d 831, 832 [2d Dept 2012]; ***Mikulski v. Adam R. West, Inc.***, 78 AD3d 910, 911 [2d Dept 2010]). The Workers' Compensation Law does not bar indemnification or contribution pursuant to a written agreement that was entered into by the contractor and subcontractor (*see* ***Falkowski v. Krasdale Foods, Inc.***, 50 AD3d 1091, 1092-1093 [2d Dept 2008]). "[I]ndemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed" (***Mikulski v. Adam R. West, Inc.***, 78 A.D.3d at 911, *supra*). "'The right to contractual indemnification depends upon the specific language of the contract'" (***Dos Santos v. Power Auth. of State of N.Y.***, 85 AD3d 718, 722 [2d Dept 2011], quoting ***George v. Marshalls of MA, Inc.***, 61 AD3d 925, 930 [2d Dept 2009]; *see* ***Alayev v. Juster Assoc., LLC***, 122 AD3d 886, 887 [2d Dept 2014]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***Alayev v. Juster Assoc., LLC***, 122 A.D.3d at 887, *supra*; *see* ***Hooper Assoc. v. AGS Computers***, 74 NY2d 487, 491–492 [1989]).

Here, there has been no showing that the plaintiff suffered a grave injury as listed in the statute. Therefore, third-party defendant's motion hangs on the written contract. Paragraph six of the subcontract states in relevant part:

> That (Certified) hereby agrees and does indemnify (Scalamandre) . . . and hold them harmless for all losses, liability claims, damages, suits, actions and proceedings whatsoever (and expenses and counsel fees arising therefrom) which may be brought on account of injuries including... damage to persons... in connection with the subcontractor's performance of this work... for the benefit of (Scalamandre)... (Certified) will furnish (Scalamandre) at once with certificates of worker's compensation

> insurance, for commercial general liability insurance . . . with limits commensurate with the requirements of the prime contractor. All of said insurance shall be written by insurance carrier(s) licensed by the State of New York . . . and certificates will indicate... contractor or added insureds under the policies.

There is clearly a written contract for indemnification. Pursuant to General Obligations Law § 5–322.1, however, any construction contract purporting to indemnify a party for its own negligence is void and unenforceable, although contracts requiring parties to procure insurance are not similarly void (*see, **Kinney v. G.W. Lisk Co.***, 76 NY2d 215 [1990]). Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence; to any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor (***Bellefleur v. Newark Beth Israel Med. Ctr.***, 66 AD3d 807 [2d Dept 2009] (quoting ***Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.***, 58 AD3d 660, 661 [2d Dept 2009]); *see also* ***Gen. Oblig. Law* 5–322.1**; ***Reynolds v. Cty. of Westchester***, 270 AD2d 473, 474 [2d Dept 2000]). "In contrast, where a question of fact exists regarding the owner's negligence, a conditional ordeation must be denied as premature." (***Bellefleur v. Newark Beth Israel Med. Ctr.***, 66 AD3d at 808-809, *supra*). Here, since there has been no determination as to negligence, granting the third-party defendant's motion for summary judgment dismissing the third-party action would be premature (*see **Brennan v. R.C. Dolner, Inc.***, 14 AD3d 639, 639, [2d Dept 2005]; ***Marano v. Commander Elec., Inc.***, 12 AD3d 571, 573 [2d Dept 2004]).

As to the common law indemnification third-party defendant fails to establish, prima facie, not only that it was not negligent, but also that the other party was responsible for the negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the plaintiff's injury (*see **Shaughnessy v. Huntington Hosp. Assn.***, 147 AD3d at 999 [2d Dept 2017]; ***Mohan v. Atlantic Ct., LLC***, 134 AD3d 1075, 1078–1079 [2d Dept 2015]; ***Nasuro v. PI Assoc., LLC***, 49 AD.3d 829, 832 [2d Dept 2008]; ***Benedetto v. Carrera Realty Corp.***, 32 AD3d 874, 875–876 [2d Dept 2006]).

Finally, as to the breach of contract claim the third-party defendant motion for summary judgment is denied, without regard to the sufficiency of the papers submitted in opposition (***Lawson v. R&L Carriers, Inc.***, 126 AD3d 944, 945 [2d Dept 2015]; *see **Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d at 853, *supra*).

Thus, third-party defendant's motion for summary judgment is denied.

CONCLUSION

Plaintiff is entitled to summary judgment in his favor on the Labor Law § 240(1) claim. Furthermore, defendant/third-party plaintiff's cross-motion is denied. Finally, as to the third-party defendant's motion seeking summary judgment and dismissing the third-party complaint against it is denied.

Upon the foregoing; it is

ORDERED, that plaintiff's motion seeking summary judgment is granted on its Labor Law § 240(1) branch as detailed above; and it is further,

ORDERED, that defendant/third-party plaintiff's cross-motion is denied as detailed above; and it is further,

ORDERED, that third-party defendant's motion for summary judgment is denied as detailed above; and it is further

ORDERED, that the parties appear for a conference before this Court on June 26, 2020.

The foregoing constitutes the decision of this Court.

Dated: May 15, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE EJSC
/S/
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]