At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 24th day of July 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

----------X

JOHN DICRESCENTO,

Plaintiff,

-against-

FPG CH 350 HENRY, LLC, and
FORTIS PROPERTY GROUP, LLC

Defendants.

----------X

FPG CH 350 HENRY, LLC, and
FORTIS PROPERTY GROUP, LLC,

Third-Party Plaintiff,

-against-

ICS BUILDERS, INC., BIG APPLE DESIGNERS INC., and HEADQUARTERS MECHANICAL INC.,

Third-Party Defendants.

----------X

MS#1 & MS#3.

DECISION & ORDER

Index No.: 514226/2018

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	19-34, 43, 78-98
Opposing Affidavits (Affirmations)	54-76, 105-108, 140-166

Reply Affidavits (Affirmations)_____ 131-138, 171-176
Other Papers: Third-Party Defendant's Memorandum of Law 99

Introduction

Plaintiff, John DiCrescento, moves by notice of motion, sequence number one, pursuant to CPLR § 3212 for summary judgment on his causes of action pursuant to Labor Law §§ 240(1) and 241(6). Defendants, FPG CH 350 Henry, LLC and Fortis Property Group, LLC, and third-party defendant ICS Builders, Inc, oppose this application.

Third-party defendants, ICS Builders, Inc. moves by notice of motion, sequence number three, pursuant to CPLR §§ 3211 and 3212, (1) for summary judgment because the complaint is barred by the anti-subrogation rule; (2) alternatively, to dismiss for breach of contract; (3) alternatively, to dismiss the claims for contribution and common law indemnification as barred by the exclusive remedy provision of Workers Compensation Law §§ 11 and 29; (4) to dismiss as untimely; and (5) pursuant to CPLR §§ 603 and 1010 to dismiss or sever, extending ICS's time to conduct discovery and file a dispositive motion. Third-party plaintiffs oppose this motion.[1]

Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff on July 2, 2018, while working at a construction site located at 350 Henry Street in Brooklyn, New York (the premises). FPG was the owner of the

[1] At a conference call on January 30, 2020, counsel for ICS withdrew that portion of the motion seeking to sever but wishes to proceed on the motion to dismiss based on the anti-subrogation rule.

premises, and Fortis was FPG's designated representative. At the time of the accident, the premises' was undergoing construction, known as the Polhemus project, which involved the renovation of the former Long Island College Hospital from a health care facility to multiple dwelling residential apartments. On July 5, 2016, Fortis, acting on behalf of FPG, entered into a contract with ICS for the latter to serve as the construction manager for the renovation project. Third-party defendants Big Apple Designers. Inc, (Big Apple), and Headquarters Mechanical, Inc. (Headquarters), were subcontractors retained by ICS to perform interior framing/carpentry and plumbing work, respectively, at the premises. Akiva Kobre, the Senior Vice President of Fortis, testified that Fortis was FPG's representative and acted as the liaison with ICS regarding construction-related issues on the project. He testified that ICS was subsequently terminated from the project in August 2018 due to its failure to perform work in accordance with its contractual obligations. At the time of the accident, plaintiff was employed by ICS as a laborer.

During his deposition, plaintiff testified that he had worked for ICS as a laborer for about two weeks before the accident occurred. He was hired to perform demolition work. On the morning of the accident, plaintiff arrived at the site between 6:00 - 7:00 a.m. He could not recall to whom he reported that day, but claimed he was given instructions to sweep the sidewalk by an ICS supervisor. At some point, an ICS foreman, Recco, instructed plaintiff to get a grinder from the job shanty, and report back to the eighth floor. Plaintiff met Recco on the eighth floor with the grinder wearing a hard hat and protective eye wear. Recco then instructed plaintiff to use the grinder to cut a metal

cable. According to plaintiff, the metal cable was wrapped around and/or coming out of the stairs on that floor. Plaintiff testified that just before he was about to start cutting with the grinder, Recco instructed him to move a piece of plywood that was resting on the floor right next to the stairs. Plaintiff described the plywood as measuring about six feet by three feet. He claimed that the plywood was neither nailed down nor painted, and that there were no signs nearby. Using both hands, plaintiff lifted the plywood up from the front and then turned it on its side. As he did so, he took a step and fell 12 feet through a hole/opening in the floor and landed on the seventh floor below. Plaintiff testified that he lifted the plywood with the intention of moving it to the other side of the room. He could not recall the dimensions of the hole through which he fell. Plaintiff also could not recall if there were any other trades working on the eighth floor at the time of the accident. After he fell, an ICS supervisor came to plaintiff's aid on the seventh floor and called an ambulance, which transported him to the hospital.

Plaintiff subsequently commenced the within action on or about July 12, 2018 against FPG and Fortis (collectively, defendants) seeking to recover for personal injuries he allegedly sustained as a result of the incident. His complaint alleges violations of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence. Issue was joined by the filing of FPG's Verified Answer on August 14, 2018, and Fortis' Verified Answer on August 24, 2018. Defendants, thereafter, commenced a third-party action against ICS, Big Apple and Headquarters asserting claims for contractual indemnity, common-law indemnity, contribution and breach of contract for failure to procure insurance. The

parties subsequently engaged in discovery, and the following motions, which are timely, ensued.

Discussion

Plaintiff's Motion (Seq. No. 1)

Plaintiff seeks partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against defendants. It is well settled that "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 demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Zapata v. Buitriago*, 107 A.D.3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v. Prospect Hospital*, 68 NY2d 324; *see also, Smalls v. AJI Industries. Inc.,* 10 N.Y.3d 733 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Labor Law § 240 (1) Claim

In support of his motion for summary judgment on his Labor Law § 240 (1) claim, plaintiff argues that FPG, as the owner, and Fortis, as its statutory agent, are liable for their failure to provide him with adequate safety devices to prevent him from an elevated-

related risk. Relying on his own deposition testimony, in addition to an ICS incident report and various OSHA records, all of which are submitted herein, plaintiff contends that he was required to work on a jobsite on which the defendants failed to ensure that the floor openings were properly marked and guarded so as to prevent workers from stepping into them and being injured. Plaintiff points out that his ICS supervisor, Recco, instructed him to move the plywood covering, and that defendants failed to provide him with any safety devices to prevent or break his fall after such covering was removed. Plaintiff argues that the defendants' failure to provide such protection constitutes a violation of Labor Law § 240 (1), which was a proximate cause of his injuries.

In opposition, defendants initially argue that plaintiff's motion should be denied as premature since the liability portion of plaintiff's deposition has not yet been completed. Defendants further argue that plaintiff's motion is defective in that it failed to include all pleadings as required by CPLR 3212 (b), particularly the pleadings pertaining to the third-party action which was commenced just before plaintiff's motion was filed. Defendants additionally argue that the plaintiff relies on inadmissible evidence in that his deposition transcript is unsigned and, therefore, is not in proper form.

As to the merits of the motion, defendants contend that the plaintiff's allegations are not credible as a matter of law, and that he has failed to establish the absence of material questions of fact. In this regard, defendants argue that issues of fact exist as to whether plaintiff's conduct in removing the plywood covering from the floor opening, rather than any alleged failure to provide proper protection, was the sole proximate cause

of his fall. Defendants additionally contend that, contrary to plaintiff's claims, he was previously aware of the presence of the opening in the floor before he removed the plywood. In support of this contention, defendants rely upon the ICS incident report, which is unsigned, and point to the notation that the plaintiff "lifted floor protection not paying attention and walked into the cut opening" and that the opening through which he fell was on the seventh floor, not the eighth floor as the plaintiff testified (NYSCEF Doc. No. 31).

Defendants also rely on an unsworn statement by Joseph Bianco, an ICS supervisor who worked on the project (NYSCEF Doc. No. 74, Bianco affidavit). In his statement, Bianco stated that, weeks before the accident occurred, he and the plaintiff had cut a hole in the seventh floor, and placed plywood and planks over it, as well as a barrier and orange netting in the area. Bianco admitted he did not witness the accident but claimed Recco told him that the plaintiff lifted the plywood but put it back down to get a tool. When he lifted the plywood a second time, the plaintiff fell 12 feet through the hole from the seventh to the sixth floor. Defendants argue that Bianco's statement raises issues of fact as to whether plywood, planks, barriers and orange netting were previously in place over and around the hole, and whether plaintiff's accident was solely caused by his removal of such protection just prior to his fall.

Defendants additionally argue that the uncertified and redacted records from OSHA submitted by the plaintiff are not in admissible form, and thus are insufficient to establish prima facie entitlement to summary judgment. However, defendants contend

the OSHA investigator's notes also create issues of fact as to the presence of barricades and netting surrounding the opening, as well as whether the plywood was spray painted with the word "HOLE" on it.

Lastly, defendants note that during his deposition, the plaintiff admitted pleading guilty to various felonies/crimes of moral turpitude[2], and being imprisoned as a result thereof. Defendants therefore contend that issues as to plaintiff's credibility and the veracity of his testimony are called into question, thereby warranting a denial of his summary judgment motion. Moreover, defendants contend that, other than plaintiff's unsigned deposition transcript, he has failed to submit competent proof in admissible form from any witnesses to corroborate his claims, which they maintain is significant given his admitted criminal history.

ICS also opposes the plaintiff's motion and argues that it should be denied as premature because it has not yet had an opportunity to conduct any discovery or take any depositions. ICS further argues that it has not had the opportunity to ascertain what non-party witnesses, such as Recco Myers, may have to say about the mechanics of the plaintiff's accident. ICS also argues that the ICS incident report, as well as unsworn statement by Bianco, raise issues of fact warranting a denial of plaintiff's motion.

In reply, plaintiff maintains that his motion is not premature in that the liability portion of his deposition was completed. Although OSHA records were subsequently

[2] During his deposition, plaintiff admitted he was arrested and charged in the U.S. District Court of New Jersey with conspiracy to commit cargo theft and conspiracy to transport stolen property in interstate commerce in connection with a conspiracy to steal $1 million worth of cigarettes in July 2010. Plaintiff testified that he plead guilty and served four years in Allenwood Federal Prison.

obtained after his deposition, plaintiff claims that the defendants have failed to point to any contradictory statements plaintiff made to an OSHA investigator that differs from what he testified to at his deposition. In addition, plaintiff argues that the defendants improperly rely upon the unsworn statement of Bianco, who admittedly never witnessed the accident. Plaintiff further argues that the other documents on which the defendants rely have not been signed or authenticated and are not reliable. Moreover, to the extent such documents are considered as evidence that plaintiff was aware of the hole and lifted the plywood covering before he fell, he maintains that such evidence fails to raise a triable issue of fact as to whether defendants violated Labor Law § 240 (1), and whether such violation was a proximate cause of his injuries.

> Labor Law § 240 (1) provides, in pertinent part, that:
> "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."

This provision imposes upon owners, general contractors, and their agents a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see Misseritti v. Mark IV Constr., Co.*, 86 N.Y.2d 487, [1995]; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494 [1993]; *Rocovich v. Consolidated Edison* Co., 78 N.Y.2d 509 [1991]; *Escobar v. Safi*, 150 A.D.3d 1081 [2 Dept., 2017]). The statute is designed to protect workers from gravity-related hazards

such as falling from a height (*see Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d at 501), and must be liberally construed to accomplish the purpose for which it was framed (*see Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d at 513; *Valensisi v. Greens at Half Hollow, LLC,* 33 A.D.3d 693 [2 Dept., 2006]). Moreover, "[t]o impose liability pursuant to Labor Law § 240 (1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries" (*Tama v. Gargiulo Bros., Inc.*, 61 A.D.3d 958 [2 Dept., 2009]; *see Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280 [2003]; *Godoy v. Neighborhood P'ship Hous. Dev. Fund Co.*, 104 A.D.3d 646 [2 Dept., 2013]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)" (*Treu v. Cappelletti*, 71 A.D.3d 994 [2 Dept., 2010]).

As an initial matter, the court notes that plaintiff's failure to include a copy of the third-party complaint in his motion was remedied by defendants' annexation of the pleading to its opposition (*see Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 A.D.3d 675 [1 Dept., 2013]; *Studio A Showroom, LLC v. Yoon,* 99 A.D.3d 632 [1 Dept., 2012]). Additionally, contrary to defendants' contention, plaintiff has submitted evidentiary proof in admissible form sufficient to support his motion for summary judgment (*see* CPLR 3212 [b]). Although plaintiff's deposition transcript is unsigned, it was certified, and thus it qualifies as admissible evidence for purposes of the plaintiff's motion for summary judgment (*see Zalot v. Zieba*, 81 A.D.3d 935 [2 Dept., 2011]; *Bennett v. Berger*, 283 A.D.2d 374 [1 Dept., 2001]). Moreover, the transcript was

submitted by the party deponent himself and, therefore, was adopted as accurate by him (*Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d 935 [2 Dept., 2012]; *see also* CPLR 3116(a); *Baptiste v. Ditman Park LLC,* 171 A.D.3d 1001 [2 Dept., 2019]; *David v. Chong Sun Lee*, 106 A.D.3d 1044 [2 Dept., 2013]). The court additionally notes that the deposition transcript of Fortis' representative, Kobre, which is unsigned, is also certified by the court reporter and thus, is admissible herein.

However, the uncertified and partially redacted OSHA report submitted by the plaintiff in support of his motion is inadmissible (*see Toussaint v. Ferrara Bros. Cement Mixer*, 33 A.D.3d 991 [2 Dept., 2006]; *Bates v. Yasin*, 13 A.D.3d 474 [2 Dept., 2004]; *see also Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d at 936; *Hernandez v. Town of Hamburg*, 83 A.D.3d 1507 [4 Dept., 2011], *rearg. denied* 86 A.D.3d 934 [4 Dept., 2011], *lv. denied* 17 N.Y.3d 717 [2011]). The court, nonetheless, finds that the plaintiff has made a prima facie showing, through his deposition testimony, that he fell through an uncovered opening, that no safety devices were in place to protect him in violation of Labor Law § 240 (1), and that such violation was a proximate cause of his injuries (*see Brandl v. Ram Builders, Inc.*, 7 A.D.3d 655 [2 Dept., 2004] [plaintiff stepped backwards into unprotected opening in floor of home he was renovating, falling from the ground floor to the basement]). It is undisputed that, apart from the plywood covering, which plaintiff was directed by his supervisor to move, no other protective devices were provided (*see Valensisi,* 33 A.D.3d at 695 [Labor Law § 240 (1) violation where decedent worker instructed to move plywood which covered an opening in floor fell to basement below];

Angamarca v. New York City Partnership Hous Dev. Fund Co., Inc., 56 A.D.3d 264 [1 Dept., 2008]; *Figueiredo v. New Palace Painters Supply Co., Inc.*, 39 A.D.3d 363 [1 Dept., 2007] [plaintiff fell through an open hole from an unsecured piece of plywood that had been laid over the beams when the platform shifted, and no safety device was provided to prevent his fall]; *Clark v. Fox Meadow Builders*, 214 A.D.2d 882 [3 Dept., 1995]).

Under the circumstances presented herein, plaintiff's injuries were clearly the result of the type of elevation-related risk that Labor Law § 240 (1) was intended to guard against (*see Valensisi,* 33 A.D.3d 695; *Brandl,*7 A.D.3d 655 [2 Dept., 2004]; *Segarra v. All Boroughs Demolition & Removal,* 284 A.D.2d 321 [2 Dept., 2001]; *O'Connor v. Lincoln Metrocenter Partners*, 266 A.D.2d 60 [1 Dept., 1999]; *Aiello v. Rockmor Elec. Enter.,* 255 A.D.2d 470 [2 Dept., 1998]; *Carpio v. Tishman Constr. Corp.*, 240 A.D.2d 234 [1 Dept., 1997]). Although the plywood covering may have provided proper protection while it was in place over the opening, as soon as it was removed, the plaintiff became exposed to an elevation-related risk which required additional precautionary measures or devices (*see Clark v. Fox Meadow Builders Inc.*, 214 A.D.2d at 883).

Furthermore, the fact that plaintiff himself was the one who removed the plywood cover does not create a question of fact on the proximate cause issue. Defendants' statutory violation based upon their failure to provide plaintiff with any protection from the elevation-related risk created by the uncovered opening was a proximate cause of plaintiff's injuries (*see id.*). That plaintiff's alleged carelessness, in not watching his step

or paying attention to where the hole was, may have contributed to his fall is irrelevant, since any alleged negligence on plaintiff's part goes to the issue of comparative fault, which is not a defense to a Labor Law § 240 (1) cause of action (*see Bland v. Manocherian*, 66 N.Y.2d 452 [1985]).

In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff's conduct was the sole proximate cause of the accident. The ICS incident report, relied upon by defendants, is not in admissible form since it was neither signed nor authenticated, and it remains unclear who created it or from whom the information was acquired (*see Taylor v. One Bryant Park, LLC*, 94 A.D.3d 415 [1 Dept., 2012] [unsigned and unauthenticated worker's compensation C-2 report relied upon by defendants in opposition to plaintiff's motion as to liability under Labor Law § 240 (1) was neither credible nor admissible]; *Zuluaga v. P.P.C. Constr., LLC*, 45 A.D.3d 479 [1 Dept., 2007]). In addition, Bianco's statement, relied upon by defendants, is unsworn, and thus also not in admissible form. To the extent it conflicts with the plaintiff's version of the accident, Bianco conceded that he did not witness the accident and, therefore, any statements related thereto constitute inadmissible hearsay which is insufficient to raise a triable issue of fact (*see Guanopatin v. Flushing Acquisition Holdings*, LLC, 127 A.D.3d 812 [2 Dept., 2015]; *Moore v. 3 Phase Equestrian Ctr., Inc.*, 83 A.D.3d 677 [2 Dept., 2011]; *Gomes v. Courtesy Bus Co.*, 251 A.D.2d 625 [2 Dept., 1998]; *DiMuro v. Town of Babylon*, 210 A.D.2d 373 [2 Dept., 1994]). "Although hearsay evidence may be considered in opposition to a motion for summary judgment, such evidence alone is not

sufficient to defeat the motion" (*Feinberg v. Sanz*, 115 A.D.3d 705 [2 Dept., 2014]; *see 111–38 Mgt. Corp. v. Benitez*, 107 A.D.3d 862 [2 Dept., 2013]).

Furthermore, where, as here, a violation of Labor Law § 240 (1) is a proximate cause of an accident, plaintiff's conduct cannot be deemed solely to blame for it, especially since it is undisputed that his ICS foreman, Recco, directed him to remove the plywood (*see Pichardo v. Aurora Contrs., Inc.*, 29 A.D.3d 879 [2 Dept., 2006] [plaintiff not the sole proximate cause of his injuries where he was performing his work consistent with his supervisor's instructions]; *see also Harris v. City of New York*, 83 A.D.3d 104, 110 [1 Dept., 2011] [plaintiff not the sole proximate cause of his accident where his foreman directed him to stand on top of piece of wood to keep it in place]; *Kielar v. Metropolitan Museum of Art*, 55 A.D.3d 456 [1 Dept., 2008] [worker who fell through tempered glass skylight was not the sole proximate cause of his injuries where he was following the directions of his foreman]).

The court also rejects defendants' assertion that plaintiff's prior criminal convictions raise an issue of fact as to his credibility, thereby precluding summary judgment. It is well settled that "a criminal conviction by itself [cannot] raise an issue of fact as to credibility when the plaintiff is the sole witness to an accident." (*Marrero v. 2075 Holding Co. LLC*, 106 A.D.3d 408 [1 Dept., 2013]).

Lastly, defendants' contention that an award of summary judgment is premature because of outstanding disclosure is without merit in that they failed to demonstrate that discovery might lead to relevant evidence, or that the facts essential to justify opposition

to the motion are exclusively within the knowledge and control of the plaintiff *(see Williams v. Spencer–Hall*, 113 A.D.3d 759 [2 Dept., 2014]; *see Brabham v. City of New York,* 105 A.D.3d 881 [2 Dept., 2013]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759 [2 Dept., 2006]; *see Leak v. Hybrid Cars, Ltd.,* 132 A.D.3d 958 [2 Dept., 2015]). Furthermore, the court notes that pursuant to a CCP order of the court (Judge Colon), dated February 14, 2020, defendants' motion to compel a further deposition of plaintiff as to liability was denied.

Based upon the foregoing, plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim is granted as against the defendants.

Labor Law § 241 (6) Claim

Plaintiff also seeks partial summary judgment as to liability on his Labor Law § 241 (6) claim against defendants. Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v. J & S Simcha, Inc.*, 39 A.D.3d 838 [2007]). To prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494 [1993]; *Ares v. State of New York,* 80 N.Y.2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive

command and be applicable to the facts of the case (*see Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616 [2008]; *Jicheng Liu v. Sanford Tower Condominium, Inc.*, 35 A.D.3d 378 [2006]).

Here, in his bill of particulars, the plaintiff alleges that defendants violated various Industrial Code provisions including 12 NYCRR 23-2.2 (b); 23-2.3 (a) (1); 23-2.4; 23-2.4 (b) (1); 23-1.7 (b); 23-1.7 (b) (1); 23-1.7 (d) and 23-1.7 (e). In support of his motion, however, plaintiff only relies upon code section 23-1.7 (b) (1) (i), which provides, in pertinent part, that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing . . . ." This provision, which is sufficiently specific to support of Labor Law § 241 (6) claim (*see Scarso v. M.G. Gen. Constr. Corp.*, 16 A.D.3d 660 [2 Dept., 2005]), applies to the facts of this case since the opening was large enough for plaintiff to fall through. In addition, plaintiff made a prima facie showing that the opening was not guarded by either a substantial covering or a safety railing of the kind that the rule requires, which was a proximate cause of his injuries. The defendants failed to raise an issue of fact in opposition. As such, the plaintiff is entitled to partial summary judgment as to liability on his Labor Law § 241 (6) claim predicated on section 23-1.7(b) (1) (i) (*see Norero v. 99-105 Third Ave. Realty, LLC*, 96 A.D.3d 727 [2 Dept., 2012]).

ICS's Motion (Seq. No. 3)

ICS moves pursuant to CPLR 3211 and/or 3212, for an order dismissing defendants' entire third-party complaint, which asserts claims sounding in contractual

indemnification, breach of contract for failure to procure insurance, contribution and common-law indemnification.

Breach of Contract for Failure to Procure Insurance Claim

Pursuant to the contract between FPG and ICS, dated July 5, 2016 (FPG/ICS Contract), ICS was retained to perform certain construction management services at the subject premises (NYSCEF Doc. No. 85, Turkel affirmation, exhibit F). As set forth in section 7of the Rider to the FPG/ICS Contract, ICS was required to procure and maintain certain insurance naming FPG and Fortis as additional insureds. Specifically, the contract required ICS to retain primary commercial general liability insurance, which contained broad form contractual liability without restriction or limitations, on an occurrence basis and in the minimum amounts of $1,000,000 occurrence/$2,000,000 aggregate on a per project basis. ICS was also obligated to procure excess liability umbrella coverage in the amount of $15,000,000 over and above the general liability limits. All insurance policies were to be primary and non-contributory. ICS was also required to obtain statutory workers compensation coverage, including employee's liability insurance, as required by New York State, in an amount not less than $1,000,000. In addition, the FPG/ICS contract provided that it "represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral" and, more importantly, that it "may be amended ***only*** by written instrument signed by both Owner [FPG] and Construction

Manager [ICS]." (NYSCEF Doc. No. 156, FPG/ICS Contract, Article 12.1 [emphasis added]).

ICS contends that the requisite insurance was obtained under various shared polices and, thus, the anti-subrogation rule bars defendants' third-party complaint, including all contractual claims against ICS, as well as those seeking common-law indemnification and contribution. In support of this contention, ICS submitted the affidavit of John O'Rourke, a principal of ICS (NYSCEF Doc. No. 87, Turkel affirmation, Exhibit H, O'Rourke affidavit). O'Rourke avers that pursuant to the terms of the contract, ICS procured Workers' Compensation insurance through the State Insurance Fund, and that the plaintiff received Workers Compensation benefits related to his accident. With respect to the liability insurance requirement, he avers that ICS took a $418,917.00 price reduction on the FPG/ICS Contract, and issued a credit to defendants with the intention of having those funds used to purchase the necessary insurance coverage for the benefit of Fortis, FPG and ICS. O'Rourke has annexed to his affidavit the contract "Payment Application" form, which shows a "$418, 917.00 credit to the insurance category. He has also annexed a copy of an email from an ICS employee to Akiva Kobre, Fortis' principal, referencing the insurance credit.

ICS maintains that the defendants used this insurance credit to procure general liability coverage for the benefit of defendants and ICS in the amount of $2,000.000 per occurrence under a New York Marine and General Insurance Company Policy (Marine) (#GL201600007094), a copy of which is submitted herein, with an initial term covering

7/28/16 to 1/28/18, with extension endorsements which extended the policy to 11/30/18 (NYSCEF Doc. Nos. 88-89). ICS further asserts that the defendants, using the credited contract funds, also obtained three excess/umbrella insurance policies. The first policy, with Starr Indemnity & Liability Company (Starr) (# 1000015485), is for coverage in the amount of $4,000,000 (NYSCEF Doc. No. 90). ICS and FPG are both named as insureds on this policy with effective dates covering 7/28/16 to 7/28/18. The second excess policy, on which FPG and ICS are also named insureds, is with Navigators Insurance Company (Navigators) (#IS16EXC875697IV) for coverage in the amount of $10,000,000, with initial effective dates of 7/28/16 to 1/28/18. ICS contends that a policy extension endorsement, which is submitted herein with the policy, extended the policy term to 11/30/18, and thus includes the date of loss (July 2, 2018) (NYSCEF Doc. Nos 91-92). The third excess policy is with Markel America Insurance Company (Markel) (#MKLM1EUE100023) for coverage in the amount of another $10,000,000 for the initial term 7/28/16 to 1/28/18, which was extended to 7/31/18 (NYSCEF Doc. Nos. 93-94). ICS and FPG are both named insureds on the Markel policy. ICS submitted copies of the above-referenced insurance policies, and corresponding extension endorsements herein. Based upon these policies, ICS maintains it is entitled to a cumulative amount of $26 million dollars (Marine - 2 million, Starr - 4 million, Navigators-10 million and Markel - 10 million) in shared coverage relative to the plaintiff's accident. In addition, ICS has submitted a certificate of insurance indicating that the New York State Insurance Fund

issued ICS a workers' compensation insurance policy (# Z1336 567-1), with effective dates of May 1, 2018 to May 1, 2019 (NYSCEF Doc. No.96).

As to Fortis, ICS argues that while it is not specifically a named insured on the policies, it notes that Fortis' deponent (Kobre) testified that Fortis is "interchangeable" with FPG, as well as FPG's designated representative. ICS, therefore, contends that Fortis is being afforded coverage under the above-referenced policies as FPG's agent, all of which also include ICS as an insured. ICS further contends that there is no other insurance coverage for these claims, and therefore the shared policies procured are primary and non-contributory. ICS notes that in plaintiff's response to ICS's October 14, 2019 Demand for Relief, he stated that he was seeking $25 million in damages, which ICS contends falls within the cumulative limits of the shared primary and excess insurance of $26 million. Therefore, ICS argues that it is entitled to dismissal of defendants' third-party complaint as it is barred by the anti-subrogation rule. Alternatively, ICS contends that it is entitled to dismissal of defendants' third-party claim for breach of contract for failure to procure insurance because no breach has occurred.

In opposition, defendants initially argue that ICS's motion should be denied as premature, pursuant to CPLR 3212 (f), as ICS has yet to respond to any of defendants' discovery demands that were served on October 23, 2019. Defendants contend that evidence necessary to fully oppose the motion is in ICS's possession.

As to the merits, defendants do not dispute that the parties entered into an arrangement to use the credited funds to procure insurance. Rather, they argue that the

insurance policies submitted by ICS are neither certified nor authenticated and, therefore, are not in admissible form. In addition, defendants note that ICS has not submitted a copy of the applicable workers' compensation policy, but merely a certificate of insurance. Defendants further contend that an issue of fact exists as to whether the requisite primary and excess insurance coverage were in effect on the date of the accident, and thus whether ICS breached its insurance procurement obligations under the contract. In this regard, defendants contend that the effective dates of the Marine policy, as well as the Starr and Navigators policies all expired prior to the date of the plaintiff's accident. Defendants further argue that ICS has failed to submit any evidence that any of the excess insurers have agreed to defend and indemnify FPG and Fortis with respect to any possible settlement or judgments entered for an amount in excess of the $2 million limits of the Marine policy.

In addition, defendants argue that policies fail to name Fortis as an additional insured, and that the Marine policy, with the $10,000 deductible, is not in compliance with the insurance procurement provisions of the FPG/ICS Contract. As such, defendants argue that ICS' motion to dismiss their breach of contract for failure to procure insurance claim should be denied.

In reply, ICS argues that defendants' claim that the insurance policies it submitted are not in admissible form is disingenuous. In this regard, ICS points out that in their "Third Party Plaintiffs' Response to Preliminary Conference Order," dated May 9, 2019, defendants provided the identical primary and excess insurance coverage information,

including policy numbers, carriers, etc., and indicated that said policies were in effect on the date of loss. More importantly, defendants concede that they are being defended under the Marine policy (NYSCEF Doc. No. 172), and that the excess policies (Starr, Navigators and Markel) were all issued for the same occurrence. In addition, ICS points out that the policies attached to defendants' response are the identical policies to those submitted by ICS, except that defendants failed to attach the relevant policy extensions, which ICS has submitted herein. Thus, ICS claims that defendants' claims of inadmissibility of the policies is without merit. ICS, however, concedes that it inadvertently failed to submit a copy of the Endorsement Extension to the Marine policy, which extended the policy period to 7/28/18, thereby covering the date of the plaintiff's accident (NYSCEF Doc. No. 173). ICS urges that the court consider its submission of the policy extension, and argues that the defendants are not prejudiced especially since they have already conceded in their discovery responses that the Marine policy was in effect on the date of the plaintiff's accident.

ICS also maintains that all of the excess policies were in effect on the date of the accident. In further support, ICS submits an affidavit from Rose Schneider, the insurance broker who handled these shared policies, in which she avers that the Marine, Starr, Navigators and Markel policies were all shared policies, which named FPG and ICS as insureds, and that they were in effect on the date of loss (NYSCEF Doc. No. 174, Turkel Reply Affirmation, Exhibit C). She further avers that all applicable excess carriers had been put on notice of the third-party complaint as of October 14, 2019, and that she is

unaware of any disclaimers of coverage. ICS in reply by affidavit by O'Rourke avers that that ICS has received no disclaimer of coverage from any of the shared carriers.

In addition, ICS points out that the defendants themselves selected the shared policies and coverage at issue, using ICS's credited funds to purchase same. It argues that the defendants cannot voluntarily procure certain coverage for themselves and ICS, and then turn around and allege that such coverage procured is not in compliance with the contract provisions. Thus, ICS maintains that the defendants, as the parties responsible for procuring the Marine policy with the $10,000 deductible, should be precluded from asserting that such coverage is in breach of the insurance procurement provisions set forth in the FPG/ICS Contract, or that they are entitled to a claim against ICS for $10,000 based on the shared coverage defendants themselves selected. In any event, ICS contends that it is undisputed that the parties share $26 million in shared insurance coverage, with a maximum $25 million demand made by the plaintiff. As such, ICS maintains that the full amount of the shared coverage, including any deductible associated with the Marine policy, is barred by the anti-subrogation rule.

Generally, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, without reference to extrinsic materials outside of the four corners of the document (*see Goldman v. White Plains Center for Nursing Care, LLC,* 11 N.Y.3d 173 [2008]; *WWW Associates*, 77 N.Y.2d 157 [1990]). Here, the FPG/ICS Contract expressly required ICS to procure and maintain certain liability insurance coverage naming FPG and Fortis as additional

insureds during the course of ICS's work on the premises. However, the evidence in the record clearly points to some form of a modification of the insurance procurement provisions that does not appear to have been reduced to a writing signed by the parties. When a written contract, as here, provides that it can be modified only by a signed writing, an oral modification of that agreement is not enforceable unless the oral modification is fully executed, or there has been a partial performance "unequivocally referable" to the oral modification (*see* General Obligations Law § 15–301[1]; *Rose v Spa Realty Assocs.,* 42 N.Y.2d 338 [1977]; *B. Reitman Blacktop, Inc. v. Missirlian*, 52 A.D.3d 752 [2 Dept., 2008]; *Calica v. Reisman, Peirez & Reisman, LLP,* 296 A.D.2d 367 [2 Dept., 2002]; *F. Garofalo Elec. Co. v. New York Univ.,* 270 A.D.2d 76 [1 Dept., 2000]). Where there is partial performance of an oral modification sought to be enforced, the likelihood that false claims would go undetected is diminished. In such a case, the court may consider the conduct of the parties (*see Rose v. Spa Realty Associates*, 42 N.Y.2d at 343–44). Under circumstances in which the conduct of the parties demonstrates a mutual departure from a written agreement requiring any modification of that agreement to be in writing, the party to be charged can be considered to have waived the requirement of written modification contained in the parties' written contract (*id.*).

In the case at bar, ICS maintains that the parties entered into an agreement whereby ICS agreed to give defendants a credit in the amount of $418,917 (reduction in contract price), and in return the defendants agreed to use the credited funds to procure the requisite insurance themselves, for their benefit as well as for the benefit of ICS.

Notably, defendants do not dispute entering into this agreement with ICS; nor do they dispute that they themselves obtained the above-referenced liability insurance policies, all of which name FPG and ICS as insureds. Under these circumstances, such evidence of the parties' conduct -- specifically defendants' procurement of the insurance despite the express terms of the FPG/ICS Contract which clearly placed such insurance procurement responsibility on ICS – strongly suggests that there was some form of oral modification and/or a mutual departure from the written contract (*see B. Reitman Blacktop, Inc.,* 52 AD3d at753–54 [conduct of parties demonstrated mutual departure from written agreement]). Moreover, the court finds that such conduct by the parties amply demonstrates partial performance which is "unequivocally referable" to that purported modification of the written contract. In this Court's view, such partial performance constitutes a material departure from the written FPG/ICS Contract in that it placed the ultimate responsibility of procuring the requisite insurance on defendants, not ICS (*see Rose v. Spa Realty Assoc.*, 42 N.Y.2d at 343-344). As such the modification, although not reduced to a signed writing, is enforceable and, therefore, binding on the parties. Thus, the defendants, not ICS, were obligated to procure the requisite liability insurance naming FPG, Fortis and ICS as insureds during the course of ICS's work on the project.

In this regard, it is undisputed that the defendants did in fact procure primary and excess policies naming both FPG and ICS as insureds. Kobre, Fortis' representative, conceded during his deposition that the joint policies were procured. Defendants, however, attempt to shift the insurance procurement obligations back to ICS, claiming a

breach due to the failure to name Fortis as an insured on the subject policies, and because the primary policy (Marine) has a $10,000 deductible – circumstances for which defendants themselves were completely and solely responsible since they are the ones who procured the insurance. Defendants' position is not only disingenuous but is belied by their course of conduct upon which ICS clearly relied. As such, defendants are estopped from asserting a breach against ICS for circumstances caused entirely by their own conduct (*see generally B. Reitman Blacktop, Inc.,* 52 A.D.3d at 753–754; *see also Griffin's Landscaping Corp. v. Bisesto*, 87 A.D.3d 1111 [2 Dept., 2011]). In addition, to the extent that the FPG/ICS Contract required ICS to procure workers' compensation insurance, contrary to defendants' contention, ICS has established that such insurance was procured and in effect on the date of the plaintiff's accident. Based upon the foregoing, that branch of ICS's motion seeking to dismiss defendants' third-party breach of contract claim for failure to procure insurance is granted. In so holding, this Court notes that there are no issues of fact precluding such determination, and that the defendants, at no point, deny that they entered into this agreement with ICS effectively modifying the contract, or that they acted in furtherance thereof.

Anti-Subrogation Rule

Regardless of who procured the insurance coverage, ICS maintains that the anti-subrogation rule bars defendants' entire third-party action because the parties are covered by the same insurers for the same risk. The anti-subrogation rule provides that "[a]n insurer . . . has no right of subrogation against its own insured for a claim arising from the

very risk for which the insured was covered . . . ... even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. . . . " (*North Star Reins. Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281 [1993]). Indeed, "[a]n insurer may not step into the shoes of its insured to sue a third-party tortfeasor -- if that third party also qualifies as an insured under the same policy -- for damages arising from the same risk covered by the policy" (*Millennium Holdings LLC v. Glidden Co.,* 27 N.Y.3d 406 [2016] [internal quotation marks and citations omitted]). "The anti-subrogation rule applies only to the policy limits of the comprehensive general liability policy at issue, and claims for contribution and/or indemnification beyond the limits of a common insurance policy are not barred" (*Lodovichetti v. Baez*, 31 A.D.3d 718 [2 Dept., 2006]).

A review of the record, including copies of the policies, as well as applicable endorsements, reveals that the following insurance was procured: a primary policy of insurance issued by Marine, with limits of $2 million and effective dates of July 28, 2016 to November 30, 2018; a Starr excess policy, with limits of $4 million per occurrence/aggregate with effective dates of July 28, 2016 to July 28, 2018; an excess Navigators' policy, with limits of $10 million per occurrence/aggregate with effective dates of July 28, 2016 to November 30, 2018, and an excess Markel policy, with limits of $10 million and effective dates of July 28, 2016 to July 31, 2018. As ICS noted, defendants conceded in their response to a prior order that their insurance coverage for plaintiff's underlying claim consisted of the above-referenced policies, which were in effect on the date of the plaintiff's accident. In addition, this Court notes that the

defendants submitted identical copies of the policies as submitted by ICS herein (*see* NYSCEF Doc. No. 113, Preliminary Conference Order dated October 31, 2018 [requiring defendants to provide "Insurance Coverage (including excess and/or umbrella coverage)" with copies of the policies and attachments or, if not furnished, to so advise plaintiff in writing]).

However, as defendants point out, and ICS does not dispute, the above-referenced policies expressly name only FPG and ICS as insureds and make no reference to Fortis. Instead, ICS maintains that FPG and Fortis are "interchangeable" entities and, therefore, are both covered under said policies. In this regard, ICS refers to the deposition testimony of Akiva Kobre, the Senior Vice President of Fortis, wherein he stated that FPG and Fortis were, at times, interchangeable, and admitted that a joint policy was procured (NYSCEF Doc. No. 43, Kobre tr at 92). Although there is evidence in the record indicating that Fortis acted as FPG's agent and/or representative, it is unclear as to whether Fortis is covered as an additional insured under the insurance policies at issue. Therefore, it cannot yet be determined whether the anti-subrogation rule is applicable to Fortis' third-party claims against ICS.

As to FPG, however, it is undisputed that FPG and ICS are both named insureds under the Marine policy, as well as the Starr, Navigators and Markel excess policies. Since FPG and ICS are covered by the same insurers for the same risk, the anti-subrogation rule applies, and thus FPG's contribution and indemnification claims against ICS are barred to the extent that any verdict in favor of the plaintiff is within the limits of

the common shared liability policies (*see Yong Ju Kim v. Herbert Construction Co.*, 275 A.D.2d 709 [2 Dept., 2000]; *Storms v. Dominican Coll. of Blauvelt*, 308 A.D.2d 575 [2 Dept., 2003]). Therefore, the anti-subrogation rule applies to bar FPG's third-party claims against ICS, but only until the limits of liability of the primary Marine policy, and the respective limits of the excess policies are exhausted (*see New York City Dep't of Transp. v. Petric & Assocs., Inc.*, 132 A.D.3d 614 [1 Dept., 2015] [applying the anti-subrogation rule only until the "limit of liability on the [] policy is exhausted"]; *Lodovichetti v. Baez,* 31 A.D.3d 718 [2 Dept., 2006]; *Blanco v. CVS Corp.*, 18 A.D.3d 685 [2 Dept., 2005]; *Storms v. Dominican Coll. of Blauvelt,* 308 A.D.2d 575 [2 Dept., 2003]; *Yong Ju Kim,* 275 A.D.2d at 713; *Morales v. City of New York*, 239 A.D.2d 566 [2 Dept., 1997]). Inasmuch as issues of fact exist as to whether Fortis is afforded coverage under the above-referenced insurance policies, the court will address the remaining third-party claims against ICS.

Contractual Indemnity Claim

Turning to the indemnification clause set forth in the FPG/ICS Contract, that provision states as follows:

> "To the fullest extent permitted by law, Construction Manager/Subcontractor [ICS] will indemnify, defend and hold harmless Owner [FPG], its officers, directors, partners, representatives [Fortis], agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including legal fees and all court costs (including those incurred to enforce the terms of this indemnification) and liability (including statutory liability) arising in whole or in part and in any manner from injury . . . resulting from the acts, omissions, breach of default of

> Construction Manager/Subcontractor, its officers, directors, agents, employees, Subcontractor and Subcontractors' employees, in connection with the performance of any work performed by or for Construction Manager/Subcontractor, except those claims, suits , liens, judgments, damages, losses and expenses caused by the negligence of Owner."

The foregoing language required ICS to defend and indemnify FPG and Fortis against "claims" resulting from ICS's acts or omissions in connection with the performance of its [ICS's] work. Plaintiff's allegations in this action clearly arose out of, or resulted from, ICS's work on the project. Furthermore, the plain and unambiguous terms of the contract did not condition ICS's obligation to indemnify FPG and Fortis on a finding of fault on its part (*see Cuellar v. City of New York*, 139 A.D.3d 996 [2 Dept., 2016]; *Diudone v. City of New York*, 87 A.D.3d 608 [2 Dept., 2011]; *Sand v. City of New York*, 83 A.D.3d 923 [2 Dept., 2011]). However, as noted above, to the extent that the same insurers cover FPG and ICS against the same risk, the anti-subrogation rule applies, and the third-party contractual indemnification claim against ICS for any damages awarded to plaintiff will be restricted to the limits of their shared policies (*see Storms v. Dominican College of Blauvelt*, 308 A.D.2d 575 [2 Dept., 2003]; *Yong Ju Kim,* 275 A.D.2d at 713; *see also Lodovichetti v. Baez*, 31 A.D.3d 718 [2 Dept., 2006]). Additionally, issues of fact as to Fortis' status as an insured under the same policies precludes a dismissal of defendants' contractual indemnification claim at this juncture.

Common-Law Indemnity/Contribution Claims

That branch of ICS's motion seeking to dismiss defendants' common-law indemnity and/or contribution claims on the ground that said claims are barred by the

Workers' Compensation Law is also denied. "[A]n employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits" (*Fleming v. Graham*, 10 N.Y.3d 296 [2008]; *see Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408 [2004]). However, when an employee sustains a "grave injury," as enumerated in Workers' Compensation Law § 11, "a primary defendant may commence a third-party action against the injured plaintiff's employer for common-law indemnification and/or contribution" (*Fleming v. Graham*, 10 N.Y.3d at 299). When moving for summary judgment on a third-party claim for indemnification, it is the burden of the movant to show, by competent admissible evidence, that the plaintiff's injuries were not "grave" (*Fitzpatrick v. Chase Manhattan Bank*, 285 A.D.2d 487 [2 Dept., 2001]). Only after such a showing has been made does the burden shift to the opposing party to show a triable issue of fact to support grave injury through competent medical evidence (*see Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342 [1 Dept., 2006]).

Here, in support of its motion, ICS submitted, *inter alia*, the plaintiff's deposition testimony and bill of particulars and supplemental bills of particulars, which established that the plaintiff was employed by ICS at the time of the accident, that he sustained various injuries, including, but not limited to, a traumatic brain injury, and that he applied for and was awarded workers' compensation benefits related to the within accident. ICS, however, failed to make a prima facie showing that the plaintiff did not sustain a "grave" injury as a result of the accident. Under Workers' Compensation Law § 11, the definition of "grave injury" includes "an acquired injury to the brain caused by an external physical

force resulting in permanent total disability," meaning the injured worker is no longer employable "in any capacity" (*Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408 [2004]). ICS only relied upon plaintiff's deposition testimony pertaining to his current complaints of depression, pain and discomfort, and failed to present any competent evidence demonstrating that plaintiff's alleged brain injury was not "grave". While there may be evidence to show that the plaintiff, in his condition, is employable in some capacity, ICS has proffered no such evidence at this time. The court notes that the parties have not yet conducted any discovery related to third-party action. Accordingly, that branch of ICS's motion seeking to dismiss defendants' common-law indemnity claim as barred by Workers' Compensation Law § 11 is denied (*see Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d at 343–344; *see also Olszewski v. Park Terrace Gardens, Inc.*, 18 A.D.3d 349 [1 Dept., 2005]). The remainder of ICS's motion to the extent is has not been addressed is hereby denied.

Conclusion

Based upon the foregoing, it is hereby:

ORDERED that plaintiff's motion for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as his Labor Law § 241 (6) claim as predicated upon an alleged violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) is granted as against defendants FPG and Fortis; and it is further

ORDERED that the branch of ICS's motion seeking to dismiss defendants' third-party claim for breach of contract for failure to procure insurance is granted; and it is further

ORDERED that the branch of ICS's motion seeking dismissal of the third-party claims as asserted by FPG against ICS is granted to the extent that any award of damages to plaintiff is payable from proceeds of the Marine commercial general liability policy, and the excess Starr, Navigators and Markel policies, and is denied as to any damages awarded to the plaintiff which exceed the amount of coverage provided by those policies; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

The foregoing constitutes the decision and order of the court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.