Coward v Sands Brook, LLC
2021 NY Slip Op 30362(U)
January 4, 2021
Supreme Court, Kings County
Docket Number: 17248/13
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of January, 2021.

PRESENT:

HON. INGRID JOSEPH,
Justice.

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KEVIN COWARD,

Plaintiff,

Index No. 17248/13

-against-

SANDS BROOK, LLC, A&F COMMERCIAL BUILDERS, LLC, THE STOP & SHOP SUPERMARKET COMPANY LLC, and AHOLD U.S.A., INC.,

Defendants.

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SANDS BROOK, LLC,

Third-Party Plaintiff,

-against-

A&F COMMERCIAL BUILDERS, LLC and DGC CAPITAL CONTRACTING CORP.,

Third-Party Defendants.

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A&F COMMERCIAL BUILDERS, LLC,

Second Third-Party Plaintiff,

-against-

DGC CAPITAL CONTRACTING CORP.,

Second Third-Party Defendants.

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THE STOP & SHOP SUPERMARKET COMPANY LLC, and AHOLD U.S.A., INC.,

Third Third-Party Plaintiffs,

-against-

A&F COMMERCIAL BUILDERS, LLC and DGC CAPITAL CONTRACTING CORP.,

Third Third-Party Defendants.

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The following papers numbered 1 to 13 read herein: Papers Numbered[1]

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed 1-2, 3-5, 6-7, 8-11, 12-13

Answer/Opposing Affidavits (Affirmations) ____

Reply Affidavits (Affirmations) ____

The following e-filed papers read herein: NYSCEF #:

Answer/Opposing Affidavits (Affirmations) 22, 25, 26, 33, 43, 44

Reply Affidavits (Affirmations) 27, 28, 29, 30, 38, 41, 42

Upon the foregoing papers, defendants/third third-party plaintiffs The Stop & Shop Supermarket Company, LLC (Stop & Shop) and Ahold U.S.A., Inc. (Ahold) (collectively referred to as the Supermarket Defendants), move for an order: (1) pursuant to CPLR § 3211 and CPLR § 3212, granting them summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) causes of action; (2) pursuant to CPLR §§ 3211 and 3212, granting them unconditional summary judgment on their cross claims and third-party claims for contractual indemnification and breach of contract against defendant/third-party defendant/second third-party plaintiff/third third-party defendant A&F Commercial Builders, LLC (A&F), and third-party defendant/second third-party defendant/third third-party defendant DGC Capital Contracting Corp. (DGC Capital); and (3) pursuant to CPLR § 3211 and CPLR § 3212, granting them summary judgment dismissing all cross claims, counterclaims and third-party claims as against them (motion sequence number 10).

[1] The original motion papers were submitted before the action was converted to an efile case. The opposition papers and reply papers are all efiled and the court has provided corresponsing NYSCEF numbers for such papers.

Defendant/third-party plaintiff Sands Brook, LLC, moves for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the complaint as against it (motion sequence numbers 11 and 14).[2]

DGC Capital moves, pursuant to CPLR § 3212, for an order (1) granting it summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, and (2) granting it summary judgment dismissing Sands Brook's third-party complaint and the Supermarket Defendants' third third-party complaint as against it (motion sequence number 12).

A&F moves for an order, pursuant to CPLR § 3212, (1) granting it summary judgment dismissing plaintiff's complaint; third-party claims of Sands Brook; and the third third-party claims of the Supermarket Defendants as against it; and (2) summary judgment in its favor on its contractual indemnification claims against DGC Capital (motion sequence number 13).

The Supermarket Defendants' motion (motion sequence number 10) is granted to the extent that plaintiff's complaint and any and all cross claims, counterclaims and third-party claims are dismissed as against them. The Supermarket Defendants' motion is otherwise denied.[3]

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[2] The court has not considered Sands Brook's alternative request for summary judgment on its indemnification claims as the court has granted Sands Brook summary judgment dismissing the complaint. In addition, the court notes that, when the parties consented to convert this action to an efile case, Sands Brook resubmitted its summary judgment motion (motion sequence number 11) in the New York State Courts Electronic Filing (NYSCEF) system (NYSCEF document number 3) and the motion support office identified the re-filed motion as motion sequence number 14. However, there is no difference between the paper motion identified as motion sequence number 11 and the efile motion identified as motion sequence number 14.

[3] Plaintiff asserts that Sands Brook's motion should be denied because it is an improper successive summary judgment motion given that Sands Brook made a previous summary judgment motion that was denied in an order dated February 7, 2019 (Fisher, J.) on the ground that it was untimely under Kings County Uniform Rules, Part C. As the court did not address the merits of the motion in that prior order, and as the note of issue was thereafter vacated and there is no issue regarding the timeliness of the current motion, the rule against successive summary judgment motions presents no bar to consideration of Sands Brooks' current motion. Plaintiff also asserts that the motion should be denied because Sands Brook did not serve the supporting exhibits with its notice of motion and supporting affidavit and only made such exhibits available through a "Drop Box" page that plaintiff was unable to access. Although the court finds that Sands Brook's failure to serve its exhibits is improper, this failure does not warrant denial of the motion since all of the exhibits relied upon by Sands Brook relevant to plaintiff's liability were appended to the motion papers of the other defendants or by plaintiff in his opposition papers, and as such, plaintiff has suffered no prejudice as the result of Sands Brook's failure (*see Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1358-1359 [2d Dept 2019]; CPLR 2001]). Moreover, as noted in footnote 1, Sands Brook has since

BACKGROUND

In this action premised upon common-law negligence under Labor Law § 200 and violations of Labor Law §§ 240 (1) and 241 (6), plaintiff, an employee of DGC Capital, alleges that, while he was removing tile and sheetrock from a wall located in a supermarket on September 2, 2013, he suffered injuries when a piece of tile and sheetrock fell from above where he was working and struck him on the arm. The supermarket building (Store) was owned by Sands Brook, which leased it to Stop & Shop, a subsidiary of Ahold. In October 2012, the Store was damaged by Superstorm Sandy, and in May 2013, Ahold hired A&F to act as the construction manager for a renovation of the Store. On June 11, 2013, A&F entered into a contract with DGC Capital to perform renovation work that included the removal of tile and sheet rock from walls in the seafood department of the Store.

According to plaintiff's deposition testimony, he was employed by DGC Capital as a carpenter, and, on the night of the accident, his supervisor, Hector Santiago, asked plaintiff to assist in the removal of tile and sheetrock[4] from an interior wall.[5] The wall was made up of sheetrock that was flush fastened to wall studs by screws and tile that was placed over the sheetrock. In order to perform the work at issue, plaintiff used a grinder[6] to cut a horizontal line through the tile and sheetrock across the length of the wall at a height of seven feet above the floor. After making the cut, plaintiff proceeded to use a hammer to break up the tile and sheetrock that was below the cut

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filed its motion papers and exhibits on NYSCEF.

[4] At his deposition, Henry Ford, plaintiff's coworker, testified that the sheetrock was a kind of sheetrock called Durock, which is a hard variety of sheetrock made out of cement.

[5] At his October 9, 2014 deposition, plaintiff stated that he was first asked to perform the demolition work on the night of the accident. However, at his February 22, 2016 deposition, plaintiff stated that he had performed such work on the three nights prior to his accident.

[6] Plaintiff described the grinder as a circular saw that is used to cut through tile.

and he then anticipated using a crowbar to pull the sheetrock and tile off of the wall.

Plaintiff alleges that he began this work at approximately 10:00 p.m., and the accident occurred at approximately 2:30 a.m. At that time, plaintiff claims he had finished using a hammer to breakup the tile and sheetrock below the cut in a section of the wall and he was planning to use the crowbar to pull the tile and sheetrock off of that section. The accident happened as plaintiff was facing the wall and using his back to push a refrigerator out of the way. As he was doing so, an approximately two foot by three foot piece of tile and sheetrock fell from above the seven foot cut and struck plaintiff on his left forearm. Plaintiff had not noticed any pieces of tile or sheetrock from above the cut line coming loose while he was using the grinder or hammer, nor did any DGC laborers tell him about pieces falling from above the cut at other times, and plaintiff was unaware of any similar incidents during the demolition of the wall. While he was performing his demolition work, plaintiff did not observe any conditions on the walls, on which he was working, that he thought were deteriorated, unstable or unsafe. In his deposition testimony, plaintiff's supervisor Hector Santiago stated that, in his experience in performing such work, nothing is placed to support sheetrock and tile above the cut, and that he believed that the accident was a freak thing, as the piece of wall that fell was supposed to have been attached to the studs.

In contrast to plaintiff's testimony, Henry Ford, a coworker, testified at his deposition that it was another DGC Capital employee who had made the subject cut before plaintiff and Ford started working on the wall. This cut, according to Ford, was only made four feet above the floor, and he and plaintiff were only responsible for removing the water damaged portion of the wall below this cut. While Ford stated that he was working next to plaintiff at the time of the accident, he did not witness the accident. Ford, however, was aware that the accident occurred as plaintiff was striking the wall with his hammer, and that, based on his observation of the wall after the

accident, he believed that the piece of tile and/or Durock that struck plaintiff came from below the four-foot cut since nothing above the cut line was removed or fell. Ford also testified that no other contractors were working in the area where DGC Capital employees were working, and that the work involving the removal of the tile and sheetrock was the only work DGC Capital was performing at the time of the accident.

In support of its motion, A&F submitted an affidavit from Michael Nicolai, A&F's president, who stated that, in his observation of the walls in the area at issue, he did not see any observe any bulging, sagging, delaminated, unsound or unsafe drywall material. Nicolai added that A&F did not receive any complaints regarding the condition of the walls or tiles prior to the time of the accident.

In addition, A&F submitted the affidavit of its expert, Kiwesa King, P.E.,[7] whose opinion is based on her review of deposition testimony taken in this matter and her knowledge of construction and demolition. King based her opinion on plaintiff's claim that the piece that struck plaintiff fell from above the cut line. Ultimately, King opined that the portion of drywall/tile above the cut line did not require shoring or bracing at the time of the accident. In reaching this opinion, King noted that Ford testified that the drywall material being removed was Durock Cement Board. Ms. King described cement board as a cement/fiberglass based material that is vaper permeable, does not generally rot or breakdown in the presence of leaks, is stable, and well suited for attaching tiles, since it is porous and the grout and mortar used to attach tiles adhere well to it. In addition, King explained that the material above the cut line would have been the farthest from the flooding caused by Superstorm Sandy, and least likely to have been damaged by the storm. King further

[7] The court notes that the version of Ms. King's affidavit that was attached as an exhibit to A&F's motion papers was unsworn. However, A&F submitted a sworn version of Ms. King's affidavit that was served on the other parties on March 17, 2020, well before plaintiff served his opposition papers on June 16, 2020.

explained that the fact that plaintiff and his coworkers needed to use a hammer to loosen the tile and cement board before engaging a crowbar to remove the wall suggests that the cement board and tile were properly installed in the first instance. King also indicated that the cut line plaintiff made with the grinder would have effectively scored the wall, and ensured that tile and drywall above the cut line were no longer connected to that below the line.

Plaintiff submitted an affidavit from Kathleen Hopkins, a certified site safety manager, whose opinion contradicts the assertions of King. Hopkins opined that the demolition work would have compromised the tile and wallboard above the cut, and that bracing, supports or some other safety device should have been used to protect plaintiff, and/or that the area should have been inspected by a competent trained person to detect any hazards and brace the area if necessary.

LABOR LAW § 240 (1)

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).[8] For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than

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[8] As is relevant here, Labor Law § 240 (1) provides that, "[a]ll contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). Rather, a plaintiff must show that, at the time the object fell, it was " being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016]; *see Paguay v Cup of Tea, LLC*, 165 AD3d 964, 966-967 [2d Dept 2018]; *Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]; *cf. Fabrizi*, 22 NY3d at 663).

The defendants assert that Labor Law § 240 (1) was not violated because there was no foreseeable need to shore or brace the wall above the cut line with an enumerated section 240 (1) safety device. In support of this proposition, defendants point to plaintiff's own testimony that there were no obvious structural issues with the wall that would have alerted defendants regarding the need to shore or brace it prior to allowing plaintiff to work in the area of the wall. Similarly, A&F's president stated that he did not see structural issues with the wall before plaintiff started his work. While not determinative, the testimony of plaintiff's supervisor regarding the freak nature of the accident and regarding the fact that, in his experience doing such work, shoring or bracing is not used above the cut line similarly suggests that it was unforeseeable that shoring or bracing would be needed (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33-34 [2017]; *cf. Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). Defendants' position is also

supported by the assertions of Kiwesa King, P.E., made in the affidavit submitted by A&F, that, given the nature of the material, how it is generally attached to the studs, the absence of any evidence that the material above the cut had been damaged by the storm, and the fact that the cut line that would have separated the portion of the wall above the cut from that being removed by plaintiff, there was no reason to shore or brace the material that was above the cut line.[9]

Based on such evidence, and assuming that the accident happened as testified to by plaintiff, defendants have demonstrated, prima facie, that the piece of tile and wallboard that struck plaintiff was not an object that required securing given the purpose of the undertaking because it was not foreseeable that the wall above the cut line-- which was a permanent part of the structure and separated from the bottom by the cut -- would have required such securing (*see Fabrizi*, 22 NY3d at 663; *Narducci*, 96 NY2d at 268; *Gurewitz v City of New York*, 175 AD3d 658, 659 [2d Dept 2019]; *Djuric v City of New York*, 172 AD3d 456, 456-457 [1st Dept 2019], *lv denied* 34 NY3d 910 [2020]; *Ruiz v Ford*, 160 AD3d 1001, 1003 [2d Dept 2018]; *Vatavuk v Genting New York, LLC*, 142 AD3d 989, 989, 990 [2d Dept 2016]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]; *McLean v 405 Webster Av. Assocs.*, 98 AD3d 1090, 1095-1096 [2d Dept 2012]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 268-271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]; *Mosquera v Triton Constr. Co., LLC*, 64 Misc3d 1216 [A], 2019 NY Slip Op 51189, *2-3 [U] [Sup Ct, Kings County 2019]; *cf. Clemente v 205 W. 103 Owners Corp.*, 180 AD3d 516, 517 [1st Dept 2020]; *Gonzalez v Paramount Group, Inc.*, 157 AD3d 427, 428 [1st Dept 2018]; *Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 573-574 [1st Dept 2015]; *Ross v DD 11th Ave., LLC*, 109 AD3d 604, 605 [2d Dept 2013]). Moreover, if, as

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[9] In other words, given the cut in the wall was intended to separate the top portion of the wall from the bottom portion of the wall, there would have been no reason to expect that banging on the bottom portion of the tile and sheetrock with a hammer and using a crow bar to pull such tile and sheetrock off would have affected the stability of the tile and sheetrock on top of the cut.

testified to by Ford, the piece that struck plaintiff fell from below the cut line, it was an object slated for demolition that plaintiff would simply have allowed to fall or drop to the ground, and it thus would not have been an object that required securing under the circumstances (*see Maldonado v AMMM Props. Co.*, 107 AD3d 954, 954-955 [2d Dept 2013]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]; *see also Roberts v General Elec. Co.*, 97 NY3d 737, 738 [2002]).

The court notes that cases such as *Clemente*, *Gonzalez*, *Purcell*, and *Ross*, cited by plaintiff in his opposition papers, bear some superficial resemblance to this case. Those cases, however, are distinguishable, in that in each of those cases, and in contrast to the facts here, the need for a securing device was obvious based on the conditions at the worksite, or nature of the work being performed at the time of the accident (*see Clemente*, 180 AD3d at 517-518 [issues of fact regarding whether a bathroom ceiling was in an advanced state of disrepair and whether safety devices were required were presented by plaintiff's testimony regarding water stains in the bathroom ceiling]; *Gonzalez*, 157 AD3d at 428 [concrete blocks fell on plaintiff from above a hole he was opening in a wall by using a sledgehammer], *affirming* 2017 NY Slip Op 30822, *1 [Sup Ct, New York County 2017]; *Purcell*, 127 AD3d at 573 [plaintiff injured when an unsecured concrete slab that had been resting on a piece of steel collapsed when plaintiff pulled on the piece of steel]; *Ross*, 109 AD3d at 605 [plaintiff injured when, after he plied a piece of wooden form from concrete, a separate piece of the form situated above the piece plaintiff had removed fell and struck plaintiff]). Here, for the reasons stated above, there was no reason to believe that the work in removing the tile and sheetrock below the cut line would have affected the stability of the tile and sheetrock above the cut line.

Moreover, the assertions of plaintiff's expert, Kathleen Hopkins, fail to raise an issue of

fact in this respect because her assertion that plaintiff's work in using the grinder to cut a line in the tile and sheetrock and removing it with hammers and crowbars compromised the structural integrity of the wall is wholly conclusory, and fails to demonstrate an issue of fact with respect to whether it was foreseeable that a Labor Law § 240 (1) safety device was required (*see Bosconi v Thomas R. Stachecki Gen. Contr., LLC*, 186 AD3d 1600, 1601 [2d Dept 2020]; *Romero v 2200 Northern Steel, LLC*, 148 AD3d 1066, 1067 [2d Dept 2017]). Since plaintiff has failed to identify other record evidence that demonstrates an issue of fact in this respect, the defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action.

LABOR LAW § 241 (6)

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). At issue here are 12 NYCRR 23-1.7 (a) (1), involving protection against overhead hazards, 12 NYCRR 23-3.3 (b) (3), requiring guarding of walls and other structures if they may fall or collapse as the result of wind pressure or vibration, and 12 NYCRR 23-3.3 (c), requiring that continuing inspections be made to detect hazards resulting from weakened or deteriorated walls or loosened material.

With respect to 12 NYCRR 23-1.7 (a) (1) and 12 NYCRR 23-3.3 (b) (3), the court finds that the defendants met their initial prima facie burden regarding those sections, because plaintiff, in his bills of particulars, alleged that sections 23-1.7 and 23-3.3 (b) were violated, without identifying the particular subdivisions or subsections of those provisions on which he intended to

rely (*see Wnetrzak v V.C. Vitanza Sons, Inc.*, 79 AD3d 939, 940 [2d Dept 2010]; *see also Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 441 [1st Dept 2018]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]; *Sickler v City of New York*, 15 Misc 3d 48, 53 [App Term, 2d Dept 2007]). While this court can properly consider sections 23-1.7 (a) (1) and 23-3.3 (b) (3), even though the subdivision/subsections were first identified in plaintiff's opposition papers (*see Sheng Hai Tong v K&K 7619, Inc.*, 144 AD3d 887, 889 [2d Dept 2016]), under such circumstances it is plaintiff who must bear the initial burden of demonstrating the applicability of those sections (*see Canosa v Holy Name of Mary Roman Catholic Church*, 83 AD3d 635, 637-638 [2d Dept 2011]; *see also Shaw v Scepter, Inc.*, 187 AD3d 1662, 1665 [4th Dept 2020]; *Warchol v City of New York*, 58 Misc 3d 1211 [A], 2018 NY Slip Op 50049, *2 [Sup Ct, Queens County 2018]).

Plaintiff has failed to meet that burden here, in that the testimony of plaintiff and Ford, his coworker, demonstrates that the area where plaintiff was working was an area that was not one that was normally exposed to falling objects for purposes of 12 NYCRR 23-1.7 (a) (1) (*Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]).[10] With respect to 12 NYCRR 23-3.3 (b) (3), the record may show the existence of issues of fact as to whether the hazard that allegedly caused the accident arose from the actual performance of the work as opposed to structural instability caused by the progress of the demolition (*see Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005-1006 [2d Dept 2019]; *Sierzputowski v City of New York*, 14 AD3d 606, 607 [2d Dept

[10] It would also appear that the placement of the safety devices required by section 23-1.7 (a) (1) would be contrary to the objectives of the work in removing the sheetrock and tile from the wall (*Crichigno*, 186 AD3d at 665; *Banaczyk v 1425 Broadway, LLC*, 24 Misc 3d 1213 [A], 2009 NY Slip Op 51443, *4 [U] [Sup Ct, Queens County 2009]; *German v City of New York*, 14 Misc 3d 1204 [A], 2006 NY Slip Op 52406, *5 [Sup Ct, New York County 2006], *abrogated on other grounds Wilinski*, 18 NY3d at 12).

2005]; *cf. Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013]). Nevertheless, as nothing in the language of section 23-3.3 (b) (3) suggests that a securing device under that section would be required if there was no foreseeable need for such securing. Further, as discussed above with respect to Labor Law § 240 (1), the defendants have demonstrated, as a matter of law, that there was no foreseeable need for a section 240 (1) safety device. Thus, the court finds that there was likewise no foreseeable reason to secure the portion of the wall above where plaintiff was working under section 23-3.3 (b) (3).[11]

With respect to 12 NYCRR 23-3.3 (c), through the record proof relating to the foreseeability of the need for securing devices, defendants have likewise demonstrated, prima facie, that any inspection required by that section would not have revealed the need for the material above the cut line to be secured (*see Mercado v TPT Brooklyn Assoc.*, 38 AD3d 732, 733-734 [2d Dept 2007]; *Monroe v City of New York*, 67 AD2d 89, 100 [2d Dept 1979]; *see also Reed v 64 JWB, LLC*, 171 AD3d 1228, 1229 [2d Dept 2019], *lv denied* 35 NY3d 902 [2020]; *Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 551 [2d Dept 2014]). Plaintiff, in opposition, has failed to demonstrate an issue of fact in this respect.[12]

Defendants are entitled to dismissal of the section 241 (6) cause of action with respect to

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[11] 12 NYCRR 23-3.3 (b) (3) provides, with respect to demolition of walls and partitions, that, "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." By requiring guarding if the wall is in a condition that it "*may* fall or collapse or be weakened" necessitates some knowledge that there is a foreseeable need for such guarding under the circumstances. In considering similar language contained in 12 NYCRR 23-1.8 (a), relating to the need for eye protection, courts have held that eye protection is required if there is a foreseeable need for such protection (*see Montenegro v P12, LLC*, 130 AD3d 695, 696-697 [2d Dept 2015]; *Guryev v Tomchinsky*, 87 AD3d 612, 613 [2d Dept 2011], *affd* 20 NY3d 194 [2012]; *Cappiello v Telehouse Intl. Corp. of Am.*, 193 AD2d 478, 480 [1st Dept 1993]). Indeed, reading section 23-3.3 (b) (3) as capable of being violated regardless of any foreseeable need for guarding would run contrary to the reasonableness requirements of Labor Law § 241 (6) (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 159-161 [1982]; *Kenny v George A. Fuller Co.*, 87 AD2d 183, 186 [2d Dept 1982]; *Larabee v Triangle Steel*, 86 AD2d 289, 291-293 [3d Dept 1982]).

[12] If Ford's testimony that the piece at issue fell from below the cut line, its fall would have clearly resulted from the actual performance of the work for purposes of both 12 NYCRR 23-3.3 (b) (3) and 12 NYCRR 23-3.3 (c) (*see Vega*, 103 AD3d at 885)

the remainder of the Industrial Code sections alleged to be applicable in plaintiff's bill of particulars, because those sections are not specific, are not applicable to the facts, and/or because plaintiff has abandoned reliance on them by failing to address them in his opposition papers (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]).

LABOR LAW §200 AND COMMON-LAW NEGLIGENCE

To the extent that plaintiff's common-law negligence and Labor Law § 200 causes of action are premised on the existence of a dangerous property condition, defendants have demonstrated, prima facie, that they did not create or have actual or constructive notice of any defects with the wall through, among other evidence, plaintiff's deposition testimony and the affidavit of A&F's president, who stated they did not observe issues with the wall prior to the accident (*see Villada v 452 Fifth Owners, LLC*, ___ AD3d ___, 2020 NY Slip Op 07121, *2 [2d Dept 2020]; *Ahmed v F&G Group, LLC*, 187 AD3d 972, 974 [2d Dept 2020]). Even if the accident arose out of DGC Capital's means and methods of performing the work, the defendants demonstrated, prima facie, that they did not exercise sufficient control over that work for liability under the common law and section 200. Contrary to plaintiff's contentions, A&F's general contractual safety responsibilities and its authority to stop plaintiff's work are insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670-673 [2d Dept 2018]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]; *Sanchez v Metro Bldrs Corp.*, 136 AD3d 783, 787 [2d Dept 2016]).

THIRD-PARTY ISSUES

Turning to the portion of the Supermarket Defendants' motion requesting summary

judgment on their contractual indemnification claims as against A&F, the contract at issue allows indemnification of the "owner and its parent entity"[13] for claims "arising directly or indirectly out of or resulting from (a) any negligent act or omission of [A&F], any Subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, or (b) any breach or default by [A&F] under the Contract." Since the Supermarket Defendants' indemnification claim does not arise from any breach or default by A&F under the contract, the indemnification claim turns on whether the accident was the result of a negligent act or omission of A&F, DGC Capital or plaintiff. As A&F has demonstrated that it was not negligent, and nothing in the record suggests, at least as a matter of law, that DGC Capital or plaintiff were negligent, the Supermarket Defendants' have failed to demonstrate their prima facie entitlement to summary judgment on their contractual indemnification claim against A&F (*see Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 736 [2d Dept 2015]; *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2d Dept 2007]).

Regarding the Supermarket Defendants' contractual indemnification claim against DGC Capital, the contract between A&F and DGC Capital provides, with respect to indemnification, that, "[t]o the fullest extent permitted by applicable law, [DGC Capital] shall indemnify and hold harmless the Owner, the Architect, and the Construction Manager and all of their agents and employees from and against all claims . . . arising out of or resulting from the performance of [DGC Capital's] work under this contract." In opposing this portion of the motion, DGC Capital asserts that it cannot be held liable under this indemnification provision because A&F's contract with DGC Capital does not identify the owner for purposes of the contract. The Supermarket Defendants, however, argue that they are entitled to be considered as owners under this provision

[13] The contract documents identify Stop & Shop as the owner for purposes of the contract, and there is no factual dispute that Ahold is the parent entity of Stop & Shop.

given that the location of the work in the contract is identified as the Stop & Shop Store at issue, and both Ahold and Stop & Shop are identified as parties to be named as additional insureds in the contract. These provisions in the contract, at the very least, are sufficient to demonstrate factual issues as to whether the Supermarket Defendants may be deemed owners for purposes of the indemnification provision (*compare Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907-908 [2d Dept 2009] *with Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513-514 [1st Dept 2009]).

The court need not resolve whether the Supermarket Defendants may be deemed owners under this indemnification provision as a matter of law at this time, because DGC Capital has demonstrated that its commercial general liability insurer has accepted the Supermarket Defendants' demand that it defend and indemnify them as additional insureds under DGC Capital's policy. Consequently, the Supermarket Defendants' indemnification claim is barred, at least to the extent of the coverage under DGC Capital's policy, by the antisubrogation rule (*see Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 1302 [2d Dept 2020]; *see also Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 415 [2016]; *ELRAC, Inc. v Ward*, 96 NY2d 58, 76 [2001]). Given that the court has dismissed plaintiff's complaint, the Supermarket Defendants' right to indemnification would be limited to any attorney fees and defense costs that may not have been covered by DGC Capital's insurer in assuming their defense. Thus, there does not seem to be any reasonable possibility that the indemnification claim would exceed the coverage available under the policy. Even if there was such a possibility, a determination regarding that matter would be premature at this time (*see Aguilar*, 186 AD3d at 1302).

The Supermarket Defendants have demonstrated their entitlement to dismissal of any cross claims or counterclaims against them. Namely, the Supermarket Defendant have established that there are no contractual provisions allowing for indemnification from them and further, that any

claims for contribution or common-law indemnification are barred because the Supermarket Defendants have demonstrated that they were not actively at fault with respect to plaintiff's accident (*see Ramirez v Almah, LLC*, 169 AD3d 508, 509-510 [1st Dept 2019]; *Duncan v 112 Atl. Realty, LLC*, 163 AD3d 769, 770 [2d Dept 2018]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Moreover, in view of the dismissal of plaintiff's complaint, the common-law indemnification and contribution claims have been rendered moot (*see Canty v 133 E. 79th St., LLC*, 167 AD3d 548, 549 [1st Dept 2018]).

Turning to the portion of A&F's motion relating to its contractual indemnification claim against DGC Capital, there does not appear to be any real issue relating to A&F's right to indemnification from DGC Capital under the terms of their contract. However, DGC Capital has demonstrated that its commercial general liability insurer has accepted A&F's demand that it defend and indemnify A&F as an additional insured under DGC Capital's policy. As such, on par with the court's finding with respect that branch of the Supermarket Defendants' motion, A&F's contractual indemnification claim is barred, at least to the extent of the coverage under DGC Capital's policy, by the antisubrogation rule (*see Aguilar*, 186 AD3d at 1302).

With respect to the portion of A&F's motion requesting dismissal of Sands Brook and the Supermarket Defendants' third-party claims for contribution and common-law indemnification, A&F is entitled to dismissal of those claims based upon a showing that A&F was not actively at fault with respect to plaintiff's accident (*see Ramirez*, 169 AD3d at 509-510; *Duncan*, 163 AD3d at 770; *Pita*, 156 AD3d at 835; *see also McCarthy*, 17 NY3d at 377-378). The claims are also moot in light of this court's dismissal of plaintiff's complaint (*see Canty*, 167 AD3d at 549).

The court will now address that branch of DCG Capital's motion seeking dismissal of

Sands Brook and the Supermarket Defendants' third-party claims for contribution, common-law indemnification, and contractual indemnification.[14] The court finds that the motion must be denied with respect to Sands Brook and the Supermarket Defendants contractual indemnification claims. As previously discussed, the court finds that factual issues exist with respect to which of Supermarket defendants, if any, may be deemed owners under the indemnification provision contained in DGC Capitals' contract with A&F (*compare Baginski*, 68 AD3d at 907-908 *with Picchione*, 60 AD3d at 513-514).

DGC Capital, however, has demonstrated its prima facie entitlement to dismissal of the common-law indemnification and contribution claims on the ground that those claims are barred by Workers Compensation Law §§ 11 and 29 (6). DGC Capital has made this showing through evidence that it was plaintiff's employer and that it procured workers' compensation coverage on his behalf. Although DGC Capital's motion papers did not use the term of art "grave injury," its papers demonstrate, prima facie, that plaintiff did not suffer a grave injury for purposes of Workers Compensation Law § 11 through the submission of plaintiff's bills of particulars and deposition testimony (*see Owens v Jea Bus Co., Inc.*, 161 AD3d 1188, 1169 [2d Dept 2018]; *Barclay v Techno-Design, Inc.*, 125 AD3d 1168, 1169 [3d Dept 2015]; *Aguirre v Castle Am. Constr.*, 307 AD2d 901, 901 [2d Dept 2003]). Neither Sands Brook nor the Supermarket defendants have submitted evidentiary proof demonstrating an issue of fact in this respect and therefore, DGC Capital is entitled to dismissal of the common-law indemnification and contribution claims. These claims, moreover, have been rendered moot by this court's dismissal of plaintiff's complaint (*see Canty*, 167 AD3d at 549).

Based upon the foregoing, Sands Brook's motion (motion sequence numbers 11 and 14) are

[14] The notes that DCG Capital did not raise the antisubrogation rule as a basis for dismissing the indemnification claims in moving.

granted and the complaint is dismissed as against Sands Brook. DGC Capital's motion (motion sequence number 12) is granted to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed, Sands Brook's third-party complaint is dismissed as against it, and the Supermarket Defendant's third third-party claims for contribution and common-law indemnification are dismissed as against DGC Capital. A&F's motion (motion sequence number 13) is granted to the extent that plaintiff's complaint is dismissed as against A&F, Sands Brook, and the Supermarket Defendants' third-party claims for common-law indemnification and contribution are dismissed as against A&F. A&F's motion is otherwise denied.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice