SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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JUAN GUEVARA-AYALA,

Plaintiff,

- v -

TRUMP PALACE/PARC LLC., SPRING SCAFFOLDING LLC., THE BOARD OF MANAGERS OF TRUMP PARC CONDOMINIUMS, SWING STAGING, LLC.,

Defendant.

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INDEX NO. 157610/2015

MOTION DATE 10/07/2020, 10/07/2020, 10/07/2020

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

THE BOARD OF MANAGERS OF TRUMP PARC CONDOMINIUMS

Plaintiff,

-against-

Defendant.

Third-Party
Index No. 595726/2016

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THE BOARD OF MANAGERS OF TRUMP PARC CONDOMINIUMS

Plaintiff,

-against-

4 STAR CONTRACTING, INC., ISG RISK MANAGEMENT, INC.

Defendant.

Second Third-Party
Index No. 595479/2018

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 257, 262, 266, 270, 279, 280, 290, 291, 292

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 256, 263, 264, 267, 281, 282, 283, 284, 285, 286, 287, 288, 289, 294, 295, 296, 297, 298

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 258, 265, 268, 271, 272, 273, 274, 275, 276, 277, 278, 293

were read on this motion to/for DISMISS.

In this Labor Law case, defendants Trump Place/Parc LLC (Trump Palace) and The Board of Managers of Trump Parc Condominium (Board of Managers) move for summary judgment dismissing all claims against Trump Palace, dismissing plaintiff's Labor Law § 200 claim against the Board of Managers, granting the Board of Managers summary judgment on its contractual indemnification claim against 4 Star Contracting, Inc. (4 Star) and its common law indemnity claim against Swing Staging, LLC (Swing Staging) (motion sequence # 005). Plaintiff moves for partial summary judgment on his Labor Law § 240(1) claims against all defendants (motion sequence # 006). Defendant Swing Staging moves for partial summary judgment dismissing plaintiff's Labor Law § 240 (1) and 241 (6) claims (motion sequence # 007).

BACKGROUND

On August 15, 2013, defendant Board of Manager, as "The Board of Managers, as Agent c/o Trump Corporation" as "Owner," entered into a contract with 4 Star for façade repairs and roof replacement work at 106 Central Park South, New York (see Sklan affirmation Exhibit O). The building is a mixed-use building with 340 residential units as well as commercial storage units, laundry room units, a garage and roof. The roof is a "common element" of the building which is not accessible or open to any unit owners (see Sklan affirmation exhibit I at 10:9-11:5,

17:6-15, 22:4-25:2). Defendant Trump Palace is the owner of the building's garage, laundry room and various storage and residential units (see Sklan affirmation, exhibit P and Q).

On September 4, 2013, 4 Star hired Swing Staging to furnish and install a scaffold system over the roof of the building from which suspended scaffolds, or baskets, were hung (see Sklan affirmation exhibit R). Swing Staging installed the system and suspension scaffold along with all component parts on the roof of the building (see Sklan affirmation, exhibit R). Pursuant to its contract with 4 Star, Swing Staging was to use only OSHA compliant planks when erecting the system and suspension scaffolding (see Sklan affirmation exhibit J at 65).

The building's roof has a large HVAC unit/cooling tower and water tank (with a catwalk for egress) as part of the permanent roof structure. An elevated scaffold walkway was erected around these permanent roof structures during the project (see Sklan affirmation, exhibit I at 17:6-20:12, 22:4-24:4, 43:14-46:4, and exhibit K at 9:11-18:2, 22:18-23:10, 25:10-14). Trump Park and the Board of Managers claim that Swing Staging installed this scaffolding walkway, and Swing Staging claims it did not install the walkway or the planking involved in plaintiff's accident (*id.*; see also Benowitz affirmation, exhibit D).

On October 13, 2014 at approximately 8:30 a.m., plaintiff, a 4 Star employee, decided that rather than using the scaffolding walkway to walk around the roof's HVAC unit, he would walk across pipes which were laid over the HVAC unit as part of the system scaffolding (see Fischman affirmation, exhibit D at 158-159). Plaintiff stepped up on to the pipes and, traversing the pipes, reached the other side of the HVAC unit. Plaintiff then attempted to descend from the pipes to the walkway three feet below (*id.* at 160-161). To do so, plaintiff grabbed, with both hands, a vertical pipe that was about two feet in front of him (*id.* at 165-66, 168). While leaning forward, holding the vertical pipe in front him, plaintiff "threw" one foot toward to the plank of

the walkway below him (*id*. at 164-65). As he was bringing his foot or feet down to the walkway (plaintiff did not recall if he had both feet on the walkway plank at the time of the accident), the wooden walkway plank broke causing him to fall eight feet to the catwalk below (*id*. at 168, 171-172; see also Sklan affirmation, exhibit M at 134:8- 18,137:15-138:2, and exhibit K, at 22:18-23:10). The plank involved in plaintiff's accident was not an OSHA compliant plank (see Sklan affirmation exhibit K at 25:10-27:9).

On July 23, 2015, plaintiff commenced this action by filing a summons and complaint. On August 21, 2015, plaintiff served a supplemental summons and amended complaint (see Sklan affirmation exhibit A). Issue was joined by Trump Palace and the Board of Managers on October 15, 2015 (see Sklan affirmation, exhibit B).

On or about September 23, 2016, the Board of Managers commenced a third-party action against Swing Staging. Swing Staging interposed an Answer on October 26, 2016 (see Sklan exhibit D). On October 31, 2016, plaintiff filed a second supplemental summons and second amended complaint adding Swing Staging as a direct defendant. On May 14, 2018, Swing Staging commenced a second third-party action against 4 Star which 4 Star Answered on June 5, 2018 (see Sklan exhibit F).

On June 15, 2018, the Board of Managers filed a third third-party action against 4 Star asserting third-party claims against it for contribution, common law indemnity, contractual indemnity and breach of contract seeking judgment against 4 Star (see Sklan affirmation, exhibit G). On July 5, 2018, 4 Star served its Verified Answer to the Board of Managers' third third-party complaint against it seeking no affirmative relief against the Board (*id*.)

Plaintiff's Deposition Testimony

At his deposition, plaintiff, a 4 Star employee, testified that on the date of accident 4 Star was doing painting, waterproofing and removing stones from the walls on the façade of the building (see Benowitz affirmation, exhibit L at 1). Plaintiff had been working at this site for two months (*id.* at 13). To perform his work plaintiff needed to walk around all the pipes on the roof (*id.* at 16) Plaintiff was provided with harnesses from 4 Star (*id.* at 118). While other 4 Star employees were painting, waterproofing and removing stone from the exterior of the building, plaintiff's job was to bring materials and supplies to the people working on the hanging scaffolds, or baskets, to perform the above noted work (*id.* at 120). Plaintiff would bring the materials to the people working on the hanging scaffolds by walking on the pipe scaffold (*id.* at 122). When plaintiff first arrived on the site the scaffolding was already covering the complete roof area (*id.* at 127). Plaintiff testified that there was a wooden platform in front of the cooling tower on the roof (*id.* at 132). Plaintiff would walk through the pipes of the scaffold to get to the area where the hanging scaffolds were located (*id.* at 136-37). The scaffold pipes were not meant to be a work surface but to support the beams from which the hanging scaffold hung (*id.* at 136).

On the date of accident, there was one 4 Star employee on one hanging scaffold and one on different hanging scaffold. Plaintiff needed to walk over to each of them to ask what they needed to perform their waterproofing work that day (*id.* at 149). Plaintiff and a co-worker brought primer to the roof at 8:00 a.m. on the date of accident (*id.* at 152).

Plaintiff then went to the person on the first hanging scaffold to see what he needed (*id.* at 155). He did this by walking on the pipes over the HVAC unit (*id.* at 156). On the way back, Plaintiff stepped or "swung" his foot down, two or three feet, from the pipe he was standing on, onto a walkway plank platform. The plank broke and plaintiff fell (*id.* at 157, 170-172). Plaintiff

testified that OSHA planks are flexible and did not break if they are jumped on (*id.* at 177). When asked if he had "jumped" on to the walkway plank from the pipes he was standing on, plaintiff stated that he did not jump (*id.* at 166).

Plaintiff did not know who had placed the wood planks in the area of the walkway where his accident occurred (*id.* at 354). The plank that broke was already there when plaintiff arrived at the site (*id.* at 368).

Testimony of Patricia Hernandez for The Board of Managers of Trump Palace

Hernandez testified at her deposition that at the time of accident she was resident manager at subject building (see Benowitz affirmation, exhibit I at 10). Her employer was the Board of Managers (*id.* at 10-11). Hernandez testified that in 2014 the Board of Managers represented the unit owners of the condo development, as the owner of the building (*id.* at 15, 73-74). In 2014, the Board of Managers hired 4 Star to perform roof top repair and brick work on the building (*id.* at 27-28, 41).

Hernandez testified that none of the storage or residential units owned by Trump Palace were located on or appurtenant to the roof of the building where the accident occurred (*id.* at 24-25, 26).

Testimony of Troy Mazanek for Swing Staging, LLC

Mazanek testified at his deposition that at the time of the accident, he was employed by Swing Staging with the title of "sales" (see Benowitz affirmation exhibit J at 8-9). His job duties include speaking with customers, visiting the job sites to give pricing on installation and dismantling (*id.* at 11). Mazanek stated that Swing Staging was in the business of suspended scaffolding rental and sales, including rental and selling of pipe scaffolding (id. at 12). Swing Staging entered into a contract with 4 Star for the rental of pipe and suspended scaffolding in

September 2013 for work to be performed at 106 Central Park South (*id.* at 15). This project included both suspended and system scaffolding. Suspended scaffolding hangs from the beams on top of the system scaffolding (*id.* at 17-18).

Mazanek was shown an agreement and identified the rental agreement between 4 Star and Swing Staging. The rental agreement required Swing Staging to deliver, install and pick-up the system scaffolding. Included with the rental agreement are drawings of the scaffolding (*id.*). This was the only contract Swing Staging entered into with 4 Star for work at this site (*id.* at 100-101). According to Mazanek, Swing Staging delivered the equipment and installed the system and suspended scaffolding pursuant to the contract (*id.*at 21). Mazanek believed the installation was started within a couple of weeks of the signing of the contract and would have taken approximately 30 days to complete (*id.* at 23). Mazanek was present on site for the installation on three separate days and saw the Swing Staging employees installing the scaffolding (*id.* at 23-24).

Mazanek testified that the walkway plank that broke and caused plaintiff's fall, a spruce plank, could not have been Swing Staging's plank since it didn't have spruce planks and it only used OSHA planks (*id.* at 65).

According to Mazanek, Swing Staging did not have an employee present on site on a weekly basis, and the rental contract between 4 Star and Swing Staging did not require Swing Staging to perform inspections of the scaffold (*id.* at 86). Swing Staging did not provide any instruction to 4 Star regarding the use of the system or suspended scaffolding or use of any planking it rented to 4 Star (*id.* at 86-87). Swing Staging did not provide any direction to the workers using the suspended scaffolding (*id.* at 89).

Testimony of Robert Amrhein for 4 Star Contracting, Inc.

Amrhein testified at his deposition that, at the time of the accident, he was 4 Star's president (see Benowitz affirmation, exhibit S at 8-9). Amrhein testified that 4 Star was in the business of exterior waterproofing and restoration (*id.* at 10). As the President, Amrhein did all the administrative work, as well as sales and production.

According to Amrhein, 4 Star was hired by the Board of Managers to do façade restoration and waterproofing for the subject building (*id.* at 13-14). 4 Star then hired Swing Staging to do the initial setup of the scaffolding equipment on the roof (*id.* at 15). Amrhein testified that Swing Staging installed the scaffolding in September 2013 which took between two to three weeks to install (*id.* at 21-22). Swing Staging was not required to do any inspections after they put up the system scaffolding (*id.* at 48). After the initial installation of the system scaffolding, Swing Staging was only at the site to make deliveries (*id.* at 75). Amrhein testified that he was aware of plaintiff's accident, and that Swing Staging was not on site at the time of the accident *id.* at 30, 80).

According to Amrhein, 4 Star had a job foreman for this project named Robert Moran. As the foreman, Moran oversaw the other 4 Star employees (*id.* at 34). As part of the system scaffolding, the 4 Star workers needed to work in suspended swing scaffolds, or baskets, to perform their work on the exterior of the building (*id.* at 72). The swing scaffolds would need to be moved to different areas of the site. 4 Star workers would move these suspended scaffold as their work progressed (*id.* at 72).

Testimony of Robert J. Moran for 4 Star Contracting, Inc.

Moran testified at his deposition that on the day of the accident, he was a foreman at 4 Star and he supervised plaintiff's work (see Benowitz affirmation, exhibit T at 1, 155). As a

foreman at the 106 Central Park South site, he was at the site on a daily basis (*id.* at 24). Moran noted that the scaffolding at the site was swinging scaffolding, which is the type that hangs off the building (*id.* at 24).

DISCUSSION

"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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiffs' Motion (Seq # 006)

Plaintiff moves for summary judgment against defendant Board of Managers on the issue of liability on his Labor Law § 240(1) claim arguing that there is no question that his injuries were caused by the application of gravity when the wood plank he stepped on, which was part of

the scaffold system in place at the time of the accident, broke causing him to fall to the catwalk below.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant:

> "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."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v NY Stock*

Exchange, 13 NY3d 599, 603 [2009]). Therefore, in order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim. There is no dispute that the scaffolding walkway from which plaintiff fell was constructed with non-OSHA planking. The non-OSHA planking, which broke and collapsed, causing plaintiff's fall was part of an inadequate safety device in violation of Labor Law § 240(1). There is uncontracted testimony by the 4 Star owner, Robert Amrhein, stating that only OSHA planking should have been used in the construction of the scaffolding (see Sklan affirmation, exhibit K at 22-23, 25).

The Board of Managers argue that plaintiff's injury does not fall within Labor Law § 240(1) protection, because plaintiff was using the walkway, an area of egress, at the time of his accident and he was not in an area working. In support of this argument the Board of Managers rely *on Jackson v Hunter Roberts Constr. Group, LLC*, (161 AD3d 666 [1st Dept 2018]) and *Brown v. Broadway Trio, LLC*, (2020 NY Slip Op 30221(U) [Sup Ct, NY County 2020]); however, those cases are distinguishable.

In *Jackson*, the plaintiff fell while holding a heavy pipe and ascending a ramp which was about 6 -10 inches in height. The *Jackson* Court dismissed plaintiff's Labor Law § 240(1) claim

holding that the 6-10-inch elevation was not a risk contemplated by the Labor Law. Further, the cause of plaintiff's fall was the weight of the pipe, and not the elevation (*Jackson*, 161 AD3d at 667). The Court also found that the ramp was not being used as a scaffold, but rather as a walkway. In *Brown*, the plaintiff, who was stepping on a snow-covered I-beam placed on the ground, slipped on the snow, and fell to the ground. The *Brown* court dismissed plaintiff's Labor Law § 240(1) claim holding that the I-beam in question was not being used as a scaffold, and that, in any event, plaintiff's injury was due to slipping on the snow which covered the I-beam, not from an elevated risk.

Here, however, the walkway from which plaintiff fell was part of an elaborate scaffolding system erected to permit plaintiff, and other 4 Star employees, to perform roof and façade repair at a high elevation. Notably, when the walkway plank collapsed, plaintiff fell 8 feet to the catwalk below, not a mere 6-10 inches as in the *Jackson* case.

Further, in *Auriemma v Biltmore Theatre*, (82 AD3d 1 [1st Dep. 2011]), the First Department rejected the claim that Labor Law Sec. 240(1) does not apply to ramps or planks being used as a passageway. In *Auriemma*, the plaintiff needed to go to retrieve a tool that was stored in a mechanical room located in an excavated pit. The only way to access the mechanical room was to walk down a wooden plank into the bottom of the pit. The plaintiff was injured when he fell from the wooden plank. The *Auriemma* court rejected defendants' argument that Labor Law § 240(1) did not apply because the plank was used as the equivalent of stairs or a passageway. In granting plaintiff summary judgment on his Labor Law § 240(1) claim, the Court held that "[w]hether the plank served as a functional substitute for a staircase or a passageway, as opposed to a safety device is irrelevant since the defendants had a statutory duty to protect the plaintiff from an elevation related hazard, and failed to do so" (*id.*).

The Board of Managers argues further that summary judgment must be denied because plaintiff is the sole proximate cause of his injuries. The Board of Managers note that instead of using the walkway to walk around the HVAC unit, plaintiff decided to take a short cut over the HVAC requiring him to jump from the HVAC onto the walkway below. Therefore, according to the Board of Managers, plaintiff's decision not to use the walkway and to jump onto the walkway plank is the sole proximate cause of his injuries.

Contrary to the Board of Managers contentions, whether plaintiff took a short cut causing him to have to then step onto the plank, or, as Board of Managers argues, jumped onto the plank, it owed plaintiff a duty to provide proper safety devices; notably, a scaffold walkway constructed with OSHA compliant planks (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523-524 [1985]; *Cherry v Time Warner, Inc.*, 66 AD3d 233 [1st Dept 2009]).

Accordingly, plaintiff's motion for partial summary judgment against the Board of Managers on his Labor Law § 240(1) claim must be granted.

Trump Palace and The Board of Managers' Motion for Summary Judgment (Seq #005)

Not an Owner Under the Labor Law – Trump Palace

Trump Palace moves for summary judgment dismissing all claims and crossclaims against it, arguing it did not own or maintain the roof, and did not contract for, oversee or have any involvement with the façade/roof replacement work. Trump Palace avers that its mere status as an owner of certain condominium units does not render it liable to plaintiff under Labor Law §§ 240(1), 241(6), 200 or for common law negligence.

Trump Palace has established prima facie entitlement to summary judgment dismissing all claims against it by demonstrating that it owned individual units in the building, and had no control over the building's common elements (*see Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 49-

50 [1st Dept 2016]). A claim arising from the condition or operation of the common elements does not lie against the owners of the individual units. Rather, the proper defendant on such claims is the board of managers (*see Pekelnaya v Allyn*, 25 AD3d 111, 120 [1st Dept 2005]; *O'Toole v Vollmer*, 130 AD3d 597, 598 [2d Dept 2015]; *Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431, 431-432 [1st Dept 2008]).

4 Star does not oppose Trump Palace's motion.

In opposition, plaintiff argues that Trump Palace failed to demonstrate that it did not own any units on the roof, and therefore, it is not entitled to summary judgment. However, Trump Palace established that it was the owner of several storage and residential units at the premises and, therefore, only a fractional owner of any common area such as the roof. Further, resident manager Hernandez testified that none of the units owned by Trump Palace were located on the roof. Moreover, there is no dispute that Trump Palace did not have control over the roof or the work being performed on the roof.

Accordingly, plaintiff fails to raise an issue of fact precluding summary judgment in Trump Palace's favor.

Indemnification –The Board of Managers

The Board of Managers move for summary judgment on their contractual claim against 4 Star and common-law indemnification claims against Swing Staging.

With respect to the contractual indemnification claim, defendant Board of Managers cite to the indemnification provisions in the parties' contract, which is attached as exhibit O to the affirmation of Alicia Sklan. However, the contract is not authenticated as required by CPLR 4518(a) and, thus, is inadmissible and cannot form the basis to grant summary judgment (*Clarke v American Truck & Trailer*, Inc., 171 AD3d 405, 406 [1st Dept 2019] [holding agreement

between parties, annexed to an attorney affirmation, was not authenticated and, therefore, was not admissible and not an appropriate basis on which to grant summary judgment]).

With respect to Board of Managers' claim seeking common-law indemnification against Swing Staging, since issues remain as to whether and to what extent Swing Staging might be negligent in having caused the scaffold to collapse, denial of this branch of the motion is warranted (*see Nenadovic v P.T. Tenants Corp*., 94 AD3d 534, 535 [1st Dept 2012]; *Callan v Structure Tone, Inc*., 52 AD3d 334 [1st Dept 2008]; *Benedetto v. Carrera Realty Corporation*, 32 AD3d 874, 874, 875 [2d Dept 2006]). On this record, there is a question of fact regarding who erected the scaffold walkway from which plaintiff fell and who placed the non OSHA compliant planks in the walkway area of plaintiff's fall.

Accordingly, the Board of Managers' motion for summary judgment on its contractual and common-law indemnification claims must be denied.

Swing Staging's Motion (Seq #007)

Swing Staging moves for partial summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims on the ground that, as scaffolding subcontractor, it was not the statutory agent of the owner, and therefore, not a proper Labor Law defendant. Swing Staging also argues that it did not install the planking which collapsed causing plaintiff's fall. In support of this contention, Swing Staging submits the affidavit of Jimmer Estrella (Estrella) a foreman on the project, sworn to on May 7, 2020 stating that Swing Staging did not install, maintain, or repair the walkway at issue. (see Laird affirmation, exhibit A). Estrella reviewed photographs of the walkway and broken plank at issue and stated that Swing Staging never erected, maintained, repaired or was required to erect, maintain or repair the walkway shown in the photographs (*id.* at ¶12). According to Estrella, the only walkway that was ever erected by Swing Staging was

temporary in nature, and only used by Swing Staging's employees when they originally erected the system and suspended scaffolding in October 2013 (*id.*). Once the installation was complete, Swing Staging immediately removed the temporary walkway they had erected to install the system and suspended scaffolding (*id.*).

Swing Staging also argues that pursuant to its contract with 4 Star, it was not hired to erect the walkway where plaintiff's accident occurred (see Laird affirmation, exhibit B).

A subcontractor, rather than the general contractor, may be held liable for a plaintiff's injuries under Labor Law §§ 240 and 241 if it had the authority to supervise and control the work giving rise to the obligations imposed by these statutes, which would render it the general contractor's statutory agent (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–318 [1981]; *Murphy v Herbert Constr. Co.,* 297 AD2d 503 [1st Dept 2002]). To be treated as a statutory agent, the contractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury (*see Walls v Turner,* 4 NY2d 861, 84-65 [2005]*; Headen v Progressive Painting Corp*., 160 AD2d 319, 320 [1st Dept 1990]).

Here, there is no evidence that Swing Staging had any supervision or control over the work plaintiff was performing at the time of his accident. However, there is a question of fact whether Swing Staging erected the walkway which caused plaintiff's injury because the Board of Managers claims Swing Staging installed the scaffolding walkway. Consequently, there is an issue of fact whether Swing Staging was the Board of Managers' statutory agent for the purposes of erecting a proper safety device, the scaffold walkway. Accordingly, Swing Staging's motion for partial summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims must be denied.

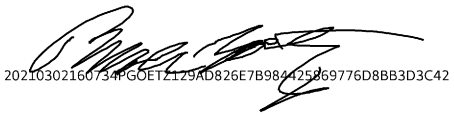
CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on liability on his Labor Law § 240(1) claim against defendant Board of Managers (motion sequence #006) is GRANTED; and it is further

ORDERED that defendants Trump Palace's motion for summary judgment dismissing all claims against it (motion sequence #005) is GRANTED; and the Board of Managers' motion for summary judgment seeking dismissal of the complaint (motion sequence #005) is DENIED; and the Board of Managers' motion for summary judgment on its claims for contractual and common law indemnification (motion sequence #005) is DENIED; and it is further

ORDERED that Swing Staging's motion for partial summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241 (6) claims (motion sequence # 007) is DENIED.



3/2/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE