

Markowski v Dolp 1133 Props. II LLC
2021 NY Slip Op 31006(U)
March 23, 2021
Supreme Court, Kings County
Docket Number: 500950/2017
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 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 23rd day of March, 2021.

PRESENT:

HON. DAWN JIMENEZ-SALTA,
Justice.

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JAN MARKOWSKI,

Plaintiff,

- against -

DOLP 1133 PROPERTIES II LLC, THE DURST ORGANIZATION INC., JOHN GALLIN & SON INC., and TITAN INDUSTRIAL SERVICES CORP.,

Defendants.

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DOLP 1133 PROPERTIES II LLC, THE DURST ORGANIZATION INC., JOHN GALLIN & SON INC.,

Third-Party Plaintiffs,

- against -

CASTLE SANITATION CORP.,

Third-Party Defendant.

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TITAN INDUSTRIAL SERVICES CORP.,

Second Third-Party Plaintiff,

- against -

CASTLE SANITATION CORP.,

Second Third-Party Defendant.

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DECISION/ORDER

Index No. 500950/2017

Motion Sequence Nos. 4 & 5

DOLP 1133 PROPERTIES II LLC, THE DURST ORGANIZATION INC., JOHN GALLIN & SON INC., and TITAN INDUSTRIAL SERVICES CORP.,

Third Third-Party Plaintiffs,

-against-

CASTLE SANITATION CORP.,

Third Third-Party Defendant.

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<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc. Nos.</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>79-97, 98-122</u>
Opposing Affidavits (Affirmations)_____	<u>123,124, 126-127, 129</u>
Reply Affidavits (Affirmations)_____	<u>130</u>

Upon the foregoing papers, plaintiff Jan Markowski (plaintiff) moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability as to his Labor Law § 240 (1) claim against defendants/third-party plaintiffs/third third-party plaintiffs Dolp 1133 Properties II LLC (Dolp), The Durst Organization, Inc. (Durst), John Gallin & Son, Inc. (Gallin) and defendant/second third-party plaintiff/third third-party plaintiff Titan Industrial Services Corp. (Titan) (collectively, defendants). Third-party defendant/second third-party defendant/third third-party defendant Castle Sanitation Corporation (Castle) also moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the plaintiff's complaint and all third-party complaints, as well as all crossclaims asserted against it.

Background

Plaintiff alleges he sustained various injuries on February 23, 2016, while emptying half-yard mini containers filled with construction debris into a garbage truck, which was parked in front of a building known as 1133 Sixth Avenue in Manhattan. Dolp was the

owner of the premises. Durst, acting on behalf of Dolp, hired Gallin to serve as the general contractor for construction work taking place at the premises. Gallin retained Titan, a demolition contractor, to perform demolition work on the 28th floor of the building. Titan, in turn, hired Castle to cart and remove demolition debris from the building. At the time of the accident, the plaintiff was employed by Castle as a truck driver and sanitation worker. During his deposition, the plaintiff testified that Titan's employees would typically load the containers with debris and push them down the loading dock toward him at the street in front of the building where the truck was parked. Plaintiff claims that on the date of the accident, after he unloaded a few containers, he was struck in the back by another container which was filled with debris. Plaintiff contends that when Titan's employees pushed the subject container down the loading dock and a ramp to the sidewalk, the container kept its momentum and slid/rolled into the plaintiff thereby striking him from behind.

Plaintiff subsequently commenced the instant action by electronically filing a summons and complaint on January 17, 2017. Plaintiff alleges that defendants, among other things, violated Labor Law § 240 (1), § 241 (6), § 200, as well as the common-law duty to keep premises and work sites safe. Defendants interposed answers and subsequently commenced third-party actions against Castle, plaintiff's employer. Discovery ensued, and on May 26, 2020, plaintiff filed a note of issue and certificate of readiness with the court. The instant summary judgment motions followed.

Plaintiff's Arguments Supporting His Partial Summary Judgment Motion

In support of his motion for partial summary judgment, plaintiff contends that he was a protected worker performing a protected activity, demolition work, for purposes of Labor Law § 240 (1). Plaintiff further points out that defendants are either owners,

contractors and/or agents thereof within the meaning of the Labor Law. More specifically, plaintiff claims that since he had to receive the debris-filled containers, which were being pushed down a slope toward him, he was subject to an elevation-related risk of injury. Plaintiff maintains that defendants provided him with no personal safety devices, and that the subject ramp, to the extent it can be considered a safety device, was not adequate protection against the risks. Thus, plaintiff argues that the defendants had a nondelegable duty to provide him with adequate protection against gravity-related injury risks.

Plaintiff claims that the only "device" he was provided was the subject ramp. Specifically, plaintiff alleges that the ramp was the functional equivalent of a safety device pursuant to Labor Law § 240 (1), and it "failed miserably when an unguarded, unchecked debris container rolled down the sidewalk ramp's incline" and consequently struck him. Moreover, plaintiff contends that because the debris-filled container was placed at a level on top of the sidewalk's incline, which was at a higher elevation differential than where he was working, the application of gravity unquestionably caused the container to roll down and strike him. Therefore, plaintiff argues that his work exposed him to an elevation-related risk of injury.

Plaintiff claims that the violation is established because he was directed to work at a lower level of elevation than the loading dock, where Titan employees loaded the containers and pushed them down the ramp. Plaintiff concludes that since he was injured when an unsecured container rolling down the ramp struck him, defendants' violation of Labor Law § 240 (1) proximately caused his injuries. Accordingly, plaintiff maintains that

he is entitled to partial summary judgment against defendants on the issue of their liability pursuant to Labor Law § 240 (1).¹

Castle's Arguments Supporting Its Motion

In support of its motion for summary judgment dismissing the complaint as well as all claims asserted against it, Castle first asserts that the vicarious liability provisions of the Labor Law do not apply to plaintiff herein. Specifically, Castle claims that plaintiff was not involved in demolition work (or any other "protected" activity) within the meaning of the Labor Law when the accident occurred. Instead, Castle maintains that Titan's employees were the ones who performed demolition work at the premises, and notes that the plaintiff himself testified that his job at the site was to remain by the garbage and to receive containers of construction debris, which he would empty into the truck. Noting that courts, when considering the vicarious provisions of the Labor Law, must take into account the "practical differences between the usual and ordinary dangers of a construction site," and the "extraordinary elevation risks" encompassed by the vicarious liability statutes, Castle concludes that plaintiff was performing ordinary sanitation work when the accident occurred. Castle therefore argues that plaintiff was not in the "protected" class of workers or activity for Labor Law purposes. As such, it argues that plaintiff's Labor Law § 240 (1) and § 241 (6) claims should be dismissed.

Alternatively, Castle argues that the plaintiff was not exposed to an elevation-related risk. Castle claims that using the measurements proffered by plaintiff of the surface (and so-called ramp) on which the containers rolled down, the reasonable conclusion is that the surface is not a ramp but instead a sloped sidewalk. Castle argues that there is no authority

¹ Plaintiff also claims that Titan employees created a dangerous condition and submits an affidavit of an alleged expert professional engineer in support of this contention.

for a proposition that an object that rolls on an ordinary sloped sidewalk constitutes an elevation-related hazard for Labor Law purposes.

Additionally, Castle claims that an injured worker, such as plaintiff herein, who is struck by an object, is not entitled to recover for an alleged Labor Law § 240 (1) violation unless the worker shows that the object was either being hoisted, secured or that the object required securing for the purposes of the undertaking. Castle points out that the containers were not being hoisted or secured. As for the contention that the containers required securing, Castle alleges that plaintiff fails to consider that the subject task, transporting containers filled with construction debris down from the demolition site toward the garbage truck, necessarily involved pushing containers from the first area to the second. Thus, Castle argues that it would not have been possible for the containers to be secured while this work was occurring; the purpose of the undertaking was to move the containers from one location to the next.

With respect to Labor Law § 241 (6), Castle asserts that for an owner, contractor or agent to be vicariously liable under this provision, an injured worker is required to establish a breach of an Industrial Code rule or regulation which gives a specific, positive command. Castle further argues that, even if the worker alleges the breach of such a specific Industrial Code rule, the Labor Law § 241 (6) claim is unsustainable if the identified rule is inapplicable to the facts of the case. Castle notes that the plaintiff alleges violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.22, 23-1.28, 23-1.30, 23-1.31, 23-1.32, 23-1.33, and 23-2.1. Castle claims that a cursory reading of these sections demonstrates that the provisions therein are either not sufficiently specific to support a Labor Law § 241 (6) claim or are inapplicable to the instant facts. Accordingly, Castle argues that plaintiff's

Labor Law § 241 (6) claim should be dismissed based on plaintiff's failure to identify an applicable and sufficiently specific supporting Industrial Code provision.

As to plaintiff's Labor Law § 200 and common-law negligence claims, Castle notes that liability for such claims is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident. Here, Castle contends that no unsafe condition existed. It maintains that there was nothing inherently dangerous or defective about the subject sloped sidewalk, and thus it did not constitute a defective condition. Moreover, Castle claims that there is no proof that the subject container was defective at any relevant time.² Thus, Castle concludes that the record contains no evidence of a defective condition, let alone evidence that any defendant either created or had notice of one.

Also, to the extent that plaintiff contends that the manner in which the work was performed is at issue, Castle argues that liability for claims sounding in common law negligence and for violations of Labor Law § 200 require a showing that the defendant had the authority to direct, supervise and control the performance of the work. Castle contends that the record contains no evidence that any agents of defendants supervised plaintiff's work. In fact, Castle contends that the record indicates that no defendant supervised or controlled plaintiff dumping containers of debris into the garbage truck. Instead, Castle points out that the plaintiff was advised by a Castle dispatcher, over the phone, of what his job location would be; plaintiff was aware that he would be dumping debris containers into the garbage truck. Castle contends that since there is no evidence that defendants

² The court notes that the record contains indications that the subject container was examined after the accident and that one of its wheels was not in good working order. The parties make various assertions about the significance of this finding (e.g. that the wheel was damaged *by* the accident, and not prior to it). The court notes (as discussed *infra*) that whether the subject wheel was defective is not the only factor in determining whether a dangerous condition existed prior to the accident.

controlled or supervised plaintiff's work, and since there is no evidence that a dangerous condition led to the accident, plaintiff's common-law and Labor Law § 200 claims must be dismissed. Based upon the foregoing arguments, Castle argues that plaintiff's entire complaint should be dismissed.

Lastly, Castle argues that the third-party claims (sounding in contribution and indemnification) lack merit and must be dismissed. Castle notes that these claims have two forms: those related to a written agreement to indemnify, and those based on common-law principles. As for common-law indemnification or contribution, Castle notes that it is undisputed that it was plaintiff's employer at the time of the accident. Castle also points out that the Workers' Compensation Law bars common-law indemnification or contribution claims against an injured worker's employer absent a so-called "grave" injury. Castle argues that there is no evidence of such a grave injury here, and the pleadings indicate merely that plaintiff underwent surgeries to the lumbar spine and right leg/foot. Castle points out that neither qualifies as grave and, for that reason, to the extent that any third-party claims allege common-law contribution or indemnification, those claims must be dismissed.

As to the contractual indemnification claim, Castle first notes that its written agreement is with Titan. Castle alleges that the subject indemnification provision is broad to the point where Castle is ostensibly required to indemnify Titan for the negligence of Titan's employees. Moreover, to the extent that any one party is negligently responsible for plaintiff's injuries, Castle argues that party is Titan since its employees pushed and/or lost control of the subject rolling container that allegedly struck plaintiff. Accordingly, Castle contends that the subject indemnity provision purports to indemnify Titan for its own negligence. Therefore, it argues that the indemnity provision is void and

unenforceable pursuant to the General Obligations Law. Accordingly, regardless of whether the third-party claims are couched in contract or in common-law principles, Castle maintains they lack merit and must be dismissed. Thus, Castle asserts that plaintiff's complaint, as well as all claims asserted against Castle, must be dismissed.

Defendants' Opposition Arguments

In opposition to plaintiff's motion, defendants assert that plaintiff's Labor Law § 240 (1) claim lacks merit on two grounds. First, defendants state that plaintiff was not a protected worker performing a protected activity at the time of the accident. Defendants note that plaintiff alleges that he was performing demolition when the accident occurred. However, they further point out that the record establishes that one of the defendants – namely, Titan and its employees – were performing demolition at that time, and that the plaintiff, in contrast, was merely a truck driver engaged in carting activities. Specifically, defendants contend that while Titan was engaged in the demolition of some interior portions of the building in question, it is clear that the plaintiff himself was not employed by Titan and was not engaged in the type of work enumerated in Labor Law § 240 (1). Therefore, defendants argue that the plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) should be denied on this ground.

Alternatively, defendants argue that plaintiff's Labor Law § 240 (1) claim lacks merit because plaintiff was not subjected to a significant elevation-related risk. Defendant points out that the main authority for the existence of liability pursuant to Labor Law § 240 (1) in a "rolling" object case requires that the object was capable of generating a large amount of force, even over the course of a relatively short descent. Here, in contrast, defendants note that the plaintiff's expert stated that the distance from the loading dock to the curb was 30 feet and the slope was between 1.3 and 1.6 degrees. Defendants contend

those measurements suggest that the height differential from the loading dock to the curb was negligible.

In short, defendants contend the record establishes that the subject cart simply rolled along a gradually sloped sidewalk rather than falling from a height or down a ramp. Defendants assert that, absent a physically significant elevation differential as required by Labor Law § 240 (1), plaintiff has not established entitlement to summary judgment. Thus, defendants claim that given the lack of significant force generated and the negligible elevation differential involved, Labor Law §240(1) does not apply to the facts of this case.

In opposition to Castle's motion, defendants assert that they agree with the arguments that plaintiff's complaint should be dismissed. However, defendants argue that the third-party claim for contractual indemnification between Titan and Castle should not be dismissed. In this regard, defendants note that the subject written indemnity provision is qualified with the language "to the fullest extent permitted by law." Defendants further note that the provision requires Castle to indemnify Titan for any occurrence that arises out of Castle's work. They point out that Titan did not supervise or control the work performed by plaintiff herein, a Castle employee. Moreover, defendants note that the subject container was owned and provided by Castle, and that plaintiff directed the movement of containers when disposing of the subject debris. Defendants maintain that if issues of fact exist as to the quality or the condition of the equipment potentially giving rise to defendants' liability under the Labor Law, or an issue of fact regarding Castle's direction of Titan's laborers with respect to the movement of Castle equipment on the site, such liability would arise out of Castle's work at the site and would lawfully trigger the indemnification obligation to Titan. For these reasons, defendants conclude that Castle's

motion must be denied insofar as it seeks summary judgment dismissing the third-party contractual indemnification claims.

Plaintiff's Opposition Arguments

In opposition to Castle's motion, plaintiff asserts that he has established prima facie establishment to judgment as matter of law with respect to Labor Law § 240 (1) because the record indicates that he was injured when he was struck by a heavy debris container that moved in an uncontrolled descent down a ramp that failed as a safety device. Plaintiff claims that the "sloped sidewalk" was the functional equivalent of a ramp, which is a safety device within the scope of Labor Law § 240 (1). Plaintiff further argues that the subject ramp should have been utilized in a way to protect him from elevation-related hazards, such as the risk that a 200-plus pound container filled with demolition debris would roll down the ramp and strike him. Moreover, plaintiff disagrees with the contention that the subject container did not need to be secured; plaintiff contends that there was no reason for that container to roll down the ramp when he was not prepared to handle it. Therefore, plaintiff argues that the subject container was required to be secured to prevent it from striking him. Plaintiff further maintains that nothing in the record (including accident reports or witness statements) contradicts his arguments or statements of fact. Additionally, plaintiff states that given the force that the container struck him with, there's no merit to the contention that the height differential was not significant for Labor Law § 240 (1) purposes.

Plaintiff also challenges the notion that he was not a protected worker performing a protected activity when the accident occurred. Specifically, plaintiff argues that his work at the subject premises was part of a large demolition project involving the 28th floor of the building. He maintains that his employer, Castle, was hired by Titan to cart and haul

the demolition debris from the building. Plaintiff reasons that his work was part of a larger demolition project and, therefore, he was a protected worker performing a protected task for Labor Law § 240 (1) purposes. For these reasons, plaintiff claims that defendants and Castle's arguments do not defeat his entitlement to judgment as a matter of law with respect to his Labor Law § 240 (1) claim.

Next, plaintiff argues that dismissal of his remaining claims is not warranted. With respect to Labor Law § 200 and common-law negligence, plaintiff points out that Titan had the authority to supervise and control the work at the demolition site that caused his accident as its workers were responsible for moving the debris containers from the loading dock to the garbage truck. Plaintiff suggests that Titan's acts or omissions negligently contributed to the accident and, as such, triable issues of fact remain as to whether Titan is liable for a violation of Labor Law § 200 and its negligence in causing the subject accident. Moreover, plaintiff asserts that the record suggests that Gallin had control of the subject work site and, as such, is subject to common-law negligence and Labor Law § 200 liability. Lastly, plaintiff asserts that Castle and defendants have ignored an applicable Industrial Code provision in their arguments to dismiss his Labor Law § 241 (6) claim. Plaintiff claims that the Industrial Code required that containers, such as the one that struck him, were stored away from any work area if not in use. Also, plaintiff notes that an Industrial Code provision requires that construction shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal. Plaintiff contends that, at a minimum, the record evinces issues of fact as to whether these provisions were violated. Accordingly, plaintiff concludes that his Labor Law § 241 (6) claim is viable and thus should not be dismissed.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[T]he 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (see *Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]; *Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130

[1st Dept 1991]; *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]).

Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (see *Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, “averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Summary judgment “should not be granted where there is any doubt as to the existence of such issues or where the issue is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure” (*Sillman*, 3 NY2d at 404 [internal citations omitted]). “The court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not resolve such issues” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

Labor Law § 240 (1)

The court now addresses Labor Law § 240 (1) which states, in relevant part, that:

“All 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 . . .”

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis Palmer Hydro Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; see also *Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required “proper protection” against elevation related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]).

However, Labor Law § 240 (1) does not apply to “any and all perils that may be connected in some tangential way with the effects of gravity” (*Ross*, 81 NY2d at 501). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Harrison v State of New York*, 88 AD3d 951, 952 [2d Dept 2011], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; see also *Gutman v City of*

New York, 78 AD3d 886, 887 [2d Dept 2010]). A sustainable cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both “a violation of the statute and that the violation was a proximate cause of his injuries” (*Skalko v Marshall’s Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; see also *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]).

With respect to Labor Law § 240 (1), “the single decisive question is whether 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*, 13 NY3d at 603 [emphasis added]). “Without a significant elevation differential, Labor Law § 240 (1) does not apply, even if the injury is caused by the application of gravity to on an object” (*Simmons v City of New York*, 165 AD3d 725,726-27 [2d Dept 2018] citing *Christiansen v Bonacio Constr., Inc.*, 129 AD3d 1156, 1158 [2015]).

Here, plaintiff has not shown that his injuries were the result of a “physically significant” elevation differential. The record establishes that the ramp or sloped sidewalk had a slope of no greater than 1.6 degrees, and that the truck-loading area was approximately thirty feet. Thus, the loading dock surface was less than one foot higher than the loading area. Given that height differentials of more than four feet have been considered insignificant for Labor Law § 240 (1) purposes (see e.g. *Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005] [accident involving “four-to-five-foot” elevation differential does not present sufficient elevation-related risk for Labor Law § 240 (1) purposes]), plaintiff herein was not subjected to the significant gravity-related risk contemplated by Labor Law § 240 (1). Accordingly, plaintiff’s Labor Law § 240 (1) claim is dismissed on this ground.

Alternatively, plaintiff cannot recover under Labor Law § 240 (1) as he was not involved in a protected task at the relevant time (*see Vasquez v Minadis*, 86 AD3d 604, 605 [2011]; *see also Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). “[F]or Labor Law § 240 (1) to apply, the worker must be working on a building or structure and must be performing a covered task, such as altering or demolishing” (*Kharie v South Shore Record Mgt., Inc.*, 118 AD3d 955, 956 [2d Dept 2014]). The court in *Kharie* noted that 12 NYCRR 23-1.4 (b) (16) defines the term demolition for purposes of a Labor Law § 240 (1) analysis as “[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.” (*see Kharie*, 118 AD3d at 956; 12 NYCRR 23-1.4(b)(16)). Here, despite plaintiff’s protestations, he was not dismantling or razing the subject building; instead, Titan and its employees were engaged in demolition work. To hold that disposal of debris, which was plaintiff’s task, constitutes demolition, would be to expand the scope of Labor Law § 240 (1) to any worker that was employed simply to dispose of materials (*see Toro v Plaza Constr. Corp.*, 82 AD3d 505, 505-506 [1st Dept 2011]). Since those activities are not analogous to those enumerated in the statute, this court declines to hold that trash disposal is “incidental” to demolition (*cf. Kharie*, 118 AD3d at 956). For this additional reason, plaintiff’s Labor Law § 240 (1) claims lack merit and must be dismissed.

Labor Law § 241 (6)

The court turns to plaintiff’s Labor Law § 241 (6) claim. Labor Law § 241 (6) states as follows:

“6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places:

The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith.”

This provision imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*see Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009] [emphasis added], citing *Rizzuto*, 91 NY2d at 348; *see also Ross*, 81 NY2d at 501 502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]). “To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident” (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]). A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated a provision of the Industrial Code that contains “concrete specifications” (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d 494 [1993]) and “mandates a distinct standard of conduct, rather than a general reiteration of common-law principles” (*Rizzuto*, 91 NY2d at 351).

Here, plaintiff’s Labor Law § 241 (6) claim lacks merit and must be dismissed. As previously discussed, the record establishes that plaintiff was employed merely to place debris in a garbage truck. Since Labor Law § 241 (6) is “inapplicable outside the construction, demolition or excavation contexts” (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 770 NYS2d 682 [2003]), the statute does not apply herein. Assuming that plaintiff’s accident qualifies as an industrial accident, such accident that occurs outside

of the context of construction, demolition or excavation simply does not trigger the statute (*Nagel v D&R Realty Corp.*, 99 NY2d at 102; *see also Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639 [1st Dept 2009]). Indeed, the plaintiff's activities were limited to driving the truck and picking up debris, and he had no involvement with any of the demolition work being performed inside the building. Since plaintiff's work was not performed in any such context, this court must dismiss plaintiff's Labor Law § 241 (6) claims (*see Toro v Plasa Const. Corp.*, 82 AD3d at 505-506).

Labor Law § 200 and Common-Law Negligence

Next, the court discusses Labor Law § 200, which states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons.”

Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto*, 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). This duty “applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it” (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM*

Great Neck Assn. II, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury’” (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317).

Here, the record establishes that no defendant supervised or controlled plaintiff’s work. On the contrary, the deposition testimony establishes that only Castle employees supervised plaintiff (a Castle employee). Given that the defendants have established that they exercised no supervision or control over plaintiff’s work (*Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]), defendants are subject to common-law negligence and Labor Law § 200 liability only if they either created or had notice of the alleged dangerous condition that produced the injury (*see e.g. Dalvano v Racanelli Constr. Co., Inc.*, 86 AD3d 550 [2d Dept 2011]).

Based upon a review of the record, the court finds that an issue of fact exists as to whether Titan’s employees caused the subject container to become unsecured and roll into the plaintiff. In this regard, the court notes that Titan’s workers were the ones pushing the container from the loading dock area toward the plaintiff just before the container struck him. Under these circumstances, issues of fact exist as to whether Titan had the authority to control the injury-producing work, and whether Titan’s actions contributed and/or caused the plaintiff’s accident. Accordingly, plaintiff’s common-law negligence and Labor Law § 200 claims against Titan are not dismissed (*see, e.g., Klimowicz v Power Cove Assoc., LLC*, 111 AD3d 605, 607 608 [2d Dept 2013]; *see also Ortega v Puccia*, 57 AD3d 54, 60 [2008]). However, since no other defendant was involved in the means or methods

of plaintiff's work, plaintiff's Labor Law § 200 and common-law negligence claims are properly dismissed against the remaining defendants.

Contribution and Indemnity

Lastly, the court grants Castle's motion insofar as it seeks summary judgment dismissing the third-party contribution and indemnity claims. Any common-law contribution or indemnity claim must be dismissed on the ground that Castle was the plaintiff's employer. Specifically, Workers' Compensation Law § 10 states, in applicable part:

"1. Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury. . . ."

Also, Workers' Compensation Law § 11 states, in applicable part:

"The liability of an employer prescribed . . . shall be exclusive and in place of any other liability whatsoever, to such employee . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise. . . . For purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered. . . . An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

In this action, it is undisputed that Castle was plaintiff's employer at relevant times.

It is well settled that Workers' Compensation Law § 11 bars any third party claim for

common law indemnification and contribution against an employer unless plaintiff suffered a “grave injury” while performing construction work (*see e.g. Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642, 644 [2d Dept 2011]; *Schuler v Kings Plaza Shopping Ctr. & Mar.*, 294 AD2d 556, 558 [2d Dept 2002]). The Court of Appeals has indicated that the grave injury categories listed in the statute are extremely limited and should be narrowly construed (*see e.g. Fleming v Graham*, 10 NY3d 296, 300 [2008]; *Castro v United Container Mach. Group*, 96 NY2d 398, 401 402 [2001]). Here, there is no indication (or even plaintiff’s allegation) that he sustained a grave injury. Accordingly, any third-party common-law contribution or indemnity claims against Castle must be dismissed (*see e.g. Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 832 [2d Dept 2012]).

Also, all third-party contractual indemnity claims against Castle must similarly be dismissed. First, the record indicates that Castle entered into an agreement with Titan but no other entity. Therefore, any contractual indemnity claim asserted against Castle by an entity other than Titan should be dismissed on the ground that no written indemnification agreement exists.

With respect to Titan, a written indemnification agreement exists between the parties. “A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987]). But in order for Titan’s third-party claim for contractual indemnity to be viable, Titan must prove itself free from negligence (*see e.g. Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2009] [“a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor”]).

Otherwise, the subject indemnification provision is unenforceable (*see* General Obligations Law § 5-322.1 [1]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997] [for party to be entitled to indemnification must demonstrate that no negligent act or omission on its part contributed to accident and that its liability is therefore purely vicarious]).

Here, the record establishes that Titan employees were responsible for both securing and propelling toward plaintiff the subject containers. Given that the court is dismissing the vicarious Labor Law causes of action, the only way a defendant will be liable to plaintiff is if Titan is found negligent for the manner in which its employees caused the subject container to strike plaintiff. Logically, if Titan is found negligent, then the contractual indemnity provision would only operate to have Castle indemnify Titan for Titan's own negligence, which would be improper (*Id.*). For that reason, Titan's claim for contractual indemnification against Castle must be dismissed. Accordingly, it is

ORDERED that plaintiff's motion seeking partial summary judgment against Dolp 1133 Properties II LLC, The Durst Organization, Inc., John Gallin & Son, Inc. and Titan Industrial Services Corp. on the issue of liability pursuant to Labor Law § 240 (1) is denied; and it is further

ORDERED that Castle's motion is granted solely to the extent that plaintiff's Labor Law § 240 (1) and Labor Law § 241 (6) claims against Dolp 1133 Properties II LLC, The Durst Organization, Inc., John Gallin & Son, Inc. and Titan Industrial Services Corp. are dismissed, plaintiff's Labor Law § 200 and common-law negligence claims against Dolp 1133 Properties II LLC, The Durst Organization Inc. and John Gallin & Son, Inc. are

dismissed, and the third-party complaints are dismissed as against Castle; the remainder of Castle's motion is otherwise denied.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,



J.S.C.
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court