At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 23rd day of November, 2021.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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MOHAMMAD U. JANJUA,

Plaintiff,

Index No. 518796/2017

-against-

DECISION AND ORDER
MS #5 and MS #6

2848 CHURCH AVENUE HOLDING, LLC, BURGER KING CORPORATION, 2848 CHURCH AVENUE OPERATING LLC, SYED ENTERPRISES NY INC. and SYED RESTAURANTS ENTERPRISES INC.

Defendants,

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The following papers numbered on this motion:

	NYSCEF Doc Numbers
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	125-127, 146-148
Answering Affidavit (Affirmation)	177, 188, 167-170
Reply Affidavit (Affirmation)	189, 184-185
Supplemental Affidavit (Affirmation)	
Pleadings –Exhibits	128-145, 178-183, 149-165, 171-176
Stipulations – Minutes	
Filed Papers	

This action arises from a construction accident that occurred on or about July 14, 2016 at the premises owned by Defendant 2848 CHURCH AVENUE HOLDING, LLC (Defendant HOLDING). Defendant 2848 CHURCH AVENUE OPERATING LLC (Defendant OPERATING) leased the premises. Defendant SYED RESTURANTS

ENTERPRISES INC (Defendant SYED) is the parent company of Defendant OPERATING and is also a lessee of the premises.

Plaintiff was an employee of a contractor hired by JAVID SAYED, to perform work at the property leased from Defendant HOLDING.

Plaintiff had been assigned the task of demolishing, installing, and repairing tiles. At the time of his injury, Plaintiff had been instructed by his employer to take out a tile. Plaintiff had done this type of work on previous days at the same job site. Plaintiff was injured while using said hammer and chisel to remove a floor tile when a metal object flew into Plaintiff's eye.

Plaintiff was not wearing any eye protection at the time of his injury. At the time of the accident, Plaintiff had been provided work gloves by his employer but not eye protection. Plaintiff was not told to wear eye protection and there was no eye protection at the job site where the accident occurred. Plaintiff had been provided eye protection by his employer when working at other job sites while doing grinding or pointing work, but not for tilework.

Plaintiff's complaint alleges four causes of action: negligence, Labor Law Section 200, Labor Law Section 240(1), and Labor Law Section 241(6). Plaintiff moves for summary judgment against all defendants on his claim pursuant to Labor Law § 241(6).

Defendant HOLDING moves to dismiss Plaintiff's negligence claims as well as his claims pursuant to Labor Law Sections 200 and 240(1). Defendant HOLDING also moves to dismiss cross-claims against it by Co-Defendants OPERATING and SYED for common law contribution and indemnification. Finally, Defendant HOLDING moves for summary judgement on its cross-claims against Co-Defendants OPERATING and SYED for contractual indemnification and failure to procure insurance.

Plaintiff's motion for summary judgment

Labor Law § 241(6)

Plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law § 241(6) as against Defendants HOLDING, OPERATING and SYED.

Defendants OPERATING and SYED argue, in opposition, that the instant action should be directed against Plaintiff's employer, who is not a party, because the employer should have provided Plaintiff with proper eye protection but failed to do so. However, Plaintiff has properly brought this action against Defendants OPERATING and SYED because Labor Law § 241(6) applies to "[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, when constructing or demolishing buildings or doing any excavating in connection therewith".

The term "owner" is not limited to the title holder of the property where the injury occurred, but also applies to anyone "who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit" (*Scaparo v. Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v. Ward*, 100 Ad2d 565, 566 [2d Dept 1984]).

Defendant OPERATING was a lessee of the premises and contracted Plaintiff's employer to do work on the premises. Defendant SYED is the parent company of Defendant OPERATING and also hired Plaintiff's employer to perform renovation work at the premises. Therefore, Defendants OPERATING and SYED are "owners" pursuant to Labor Law § 241(6).

"Labor Law § 241(6) imposes a nondelegable duty upon an owner [an owner's agent] or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Grant v. City of New York, 109 AD3d 961, 963 [2d Dept 2013]*). "To establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the Code" (*Galarraga v. City of New York*, 54 AD3d 308, 309 [2d Dept 2008]).

Plaintiff has plead a violation of Industrial Code § 23–1.8(a). Section 23–1.8(a) specifically covers eye protection and states:

> Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

Plaintiff was employed in *chipping* away floor tiles with a hammer and chisel when his eye was injured. The failure to provide eye protection to Plaintiff while he was employed in *chipping* is itself a violation of Section 23–1.8(a) and is specific enough to state a cause of action under Labor Law § 241(6) (*see Dennis v. City of New York*, 304 AD2d 611 [2d Dept 2003]). The fact that plaintiff did not request glasses does not relieve the Defendants of the non-delegable duty to provide the glasses.

Plaintiff testified that he was not instructed by his boss to use safety glasses, that he was not provided any safety glasses, and that safety glasses were not available at the worksite.

> Q. At the time of the accident, what type of tools were you using?
> A. I had a hammer and chisel.
> Q. Did your boss require you to provide any of your own tools?
> A. No.
> Q. The tools that you were using,

were they provided to you by your employer?
A. Yes, he used give us all the tools.
Q. The tools, the hammer and chisel that you were using, did you use them on any days prior at that location?
A. Yes.
Q. Did you always use the same hammer and chisel or did that change, or something else?
A. Whatever we had in the toolbox, whatever I thought was needed for the job I used that.
(Plaintiff's Deposition, p. 37)

Q. Were any of those safety glasses at the location of Nostrand and 20 Church Avenue?
A. No, there were no glasses.
Q. How do you know there were no glasses there?
A. I was doing tilework there and I used to go to the tool box to take my hammer and stuff, I never saw glasses there.
(Plaintiff's Deposition, p. 44)

Q. Other than your testimony about there being no glasses in the toolbox, was there any other testimony that you wanted to change while you're sitting here?
A. You were asking about where was the safety glasses, whether it was in the car, and I was confused whether it was in my boss's car, or somewhere else, but at that time there was no car on the job site.
Q. How do you know there was no car on the job site?
A. My boss never parked there.
Q. You said before that you had obtained work gloves from your boss who got them from a car, where was the car located when he obtained the work gloves for you?
A. When he parked his car I used to call him and tell him what I needed and he would bring the gloves from the car.
Q. If you had asked him for safety glasses, would you have been able to call him and he would have brought them from the car?
A. When I was working my boss was there with me.
Q. Did you ask him for safety glasses?
A. When I was working on that day he told me to break something and he was there with me, he didn't mention about wearing glasses and I didn't ask about safety glasses, and when I hit, that's when the incident happened.
(Plaintiff's Deposition, p. 50)

Plaintiff testified that there were no glasses in the tool box on site and that his boss' car was not at the job site. Defendants have not submitted any contrary evidence that the glasses were available on the site, that there were glasses in the boss' car, or that

the car was at the site. Thus, Defendants have not raised a question of fact as to whether glasses were available at the site.

Plaintiff has therefore demonstrated his prima facie entitlement to summary judgment on the issue of liability pursuant to Labor Law § 241(6) by showing there was a violation of Industrial Code section 23–1.8(a) and that violation was the proximate cause of his injury (*see Ortega v. Roman Catholic Diocese of Brooklyn*, 178 AD3d 940).

The fact that Plaintiff may have been comparatively negligent in failing to use or ask for glasses is not a bar to his being awarded summary judgment. Plaintiff is not required to demonstrate his freedom from comparative fault in order to be entitled to summary judgment as to liability since any contributory negligence would not bar recovery of damages for his personal injury (*see Rodriguez v City of New York*, 31 NY3d 312, 323 [2018]; *Quizhpi v. S. Queens Boys & Girls Club, Inc.,* 166 AD3d 683, 685 [2d Dept 2018]).

Defendant's reliance on *Cardenas v. 111-127 Cabrini Apartments Corp.,* 145 AD3d 955 (2d Dept 2016) and *Rizzuto v. L.A. Wenger Contracting Co., Inc*., 91 NY2d 343 (1998) is misplaced as they predate *Rodriguez.*

Defendant HOLDINGS' motion to dismiss the complaint

Labor Law § 200 and Common Law Negligence

Defendant HOLDING moves for summary judgment dismissing Plaintiff's claims pursuant to Labor Law § 200 and common law negligence.

"Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (*Zukowski v. Powell Cove Estates Home Owners Association,* 187 AD3d 1099, 1101 [2d Dept 2020], quoting

Lombardi v. Stout, 80 NY2d 290, 294 [1992]). Unlike sections 240(1) and 241(6), section 200 does not impose vicarious liability on owners and owner's agents.

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed.

Plaintiff's accident arose not from a dangerous condition at the premises but by the means and methods employed and Defendant HOLDING did not control or supervise Plaintiff's work.

Where the manner of work is at issue, "no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v. City of New York*, 304 AD2d 611, 612 [2d Dept 2003].) Rather, when a claim is made due to alleged defects or dangers in the methods or materials of the work, it must be shown that the party to be charged has the authority to supervise or control the performance of the work. (*Zukowski v. Powell Cove Estates Home Owners Association,* 187 AD3d 1099 [2d Dept 2020]; *Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

Defendant HOLDING, as the owner of the subject premises, did not exercise the requisite level of supervision or control over Plaintiff's work and therefore has no liability under Labor Law § 200 or common law negligence. Plaintiff was injured while working at the express direction of his employer and his accident was a result of the means and methods of the work rather than a dangerous condition at the job site.

Labor Law § 240(1)

Defendant HOLDING moves to dismiss Plaintiff's claims under Labor Law § 240(1) as Plaintiff's injury was not the result of an elevation related hazard.

"Labor Law § 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured" (*Gasques v. State,* 59 AD3d 666 [2nd Dept 2009], quoting *Natale v. City of New York,* 33 AD3d 772, 773-774 [2d Dept 2006]).

Plaintiff does not oppose Defendants' motions as to this cause of action nor does he allege any facts which would support a finding that his accident was elevation related. Therefore, Defendant's motions to dismiss Plaintiff's § 240(1) claims are granted.

Defendant HOLDING's motion

Cross-claims against it for indemnification and contribution

Defendant HOLDING moves to dismiss claims against it by Defendants OPERATING and SYED for common law indemnification and contribution. Defendant HOLDING's motion should be granted because, as discussed above, HOLDING was not negligent as it did not control or supervise Plaintiff's work. If Defendant HOLDING is found liable pursuant to Labor Law § 241(6) it will be because it was vicariously liable for the methods of Plaintiff's employer.

Defendant HOLDING's Cross-Claim for Contractual Indemnification

Defendant HOLDING moves for summary judgment on its cross-claim for contractual indemnification against Defendant OPERATING.

The commercial lease between Defendant HOLDING and Defendant OPERATING identifies HOLDING as the Owner and OPERATING as the Tenant. The lease requires

OPERATING to indemnify HOLDING and its agents from all liability resulting from work on the premises. The indemnification clause of the lease states:

> 69. INDEMNIFICATION. In addition to any other indemnities required to be furnished by Tenant to Landlord under the terms of this Lease, Tenant shall indemnify and save harmless Landlord against and from all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses, including architect's and attorney's fees and disbursements, which may be imposed upon or incurred by or asserted against Landlord by reason of any of the following occurring during the term of this Lease:
>
> (i) Work or thing done by Tenant, its agents, contractors, servants, employees, licensees or invitees, in, on or about the Premises or any part thereof or any liens thereon; ...
>
> (iv) Any accident, injury (including death) or damage to any person or property occurring in, on or about the Premises or any part thereof or in, on or about any, sidewalk or space adjacent thereto; ...
>
> (vi) Any liability which may be asserted against Landlord or any lien or claim which may be alleged to have arisen against or on the Premises under the laws of the State of New York or of any other governmental authority; ...
>
> (Lease, p.13)

The lease also includes an insurance procurement provision which states:

> 52. INSURANCE: The Tenant agrees to secure and maintain in force at all times and pay as additional rent for public liability insurance . . . for the benefit of Landlord.
>
> (Lease, p.9)

In opposition, Defendant OPERATING contends that the indemnification clause is unenforceable pursuant to General Obligations Law § 5-321 which states:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

However, the Court of Appeals has ruled in favor of contractual indemnification where a claim is made for indemnification under a commercial lease were there was broad indemnification language coupled with an insurance procurement provision (*see Great Northern Insurance v. Interior Constr. Corp*, 7 NY3d 412 [2006]). "We conclude that the

indemnification clause, which was coupled with an insurance procurement provision, obligates the tenant to indemnify the landlord for its share of liability, and that such a lease provision does not violate General Obligations Law § 5–321" (*Great Northern Insurance v. Interior Constr. Corp*, 7 NY3d at 415).

As the lease in this case contains an indemnification clause, coupled with the insurance procurement provision, it does not violate the GOL.

Thus, Defendant HOLDINGS is entitled to summary judgment on its cross-claim against Defendant OPERATING for contractual indemnification.

Defendant HOLDING's Cross-Claim for Failure to Insure

Defendant HOLDING moves for summary judgment granting its third cross-claim as against Defendant OPERATING for failure to procure insurance. As discussed above, Paragraph 52 of the commercial lease between HOLDING and OPERATING provides that the Tenant, OPERATING, agrees to procure public liability insurance.

"Lease provisions by which the tenant covenants to procure insurance and name the landlord as an additional insured are generally valid and enforceable . . . [a] landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant" (*Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]).

Defendant OPERATING failed to submit any evidence of a policy covering Defendant HOLDING for the accident. Defendant OPERATING submitted a denial letter from Liberty Mutual indicating that it had procured a "builders risk" insurance policy that did not cover bodily injuries. Also, the policy was in the name of Defendant OPERATING

and there was no indication that Defendant HOLDING was named as an additional insured.

Similarly, the denial letter from Nationwide Insurance does not indicate that Defendant HOLDING was an additional insured under the policy. Defendant OPERATING lastly submits a denial letter from Defendant HOLDING's insurer, Atlantic Casualty, indicating that its policy did not provide coverage for Plaintiff's accident.

As Defendant OPERATING has failed to submit any policy covering Defendant HOLDING for the accident, Defendant HOLDING is entitled to summary judgment on its cross-claim for failure to procure insurance.

WHEREFORE, it is ORDERED that Plaintiff is granted summary judgment as to liability against Defendant 2848 CHURCH AVENUE HOLDING, LLC, Defendant 2848 CHURCH AVENUE OPERATING LLC, and Defendant SYED RESTURANTS ENTERPRISES INC on his Labor Law § 241(6); and it is further

ORDERED that Defendant 2848 CHURCH AVENUE HOLDING, LLC is granted summary judgment dismissing Plaintiff's Labor Law § 240(1), § 200, and common law claims as against it; and it is further

ORDERED that Defendant 2848 CHURCH AVENUE HOLDING, LLC is granted summary judgment dismissing Defendant 2848 CHURCH AVENUE OPERATING LLC and Defendant SYED RESTURANTS ENTERPRISES INC's cross-claims against it for common law indemnification and contribution; and it is further

ORDERED that Defendant 2848 CHURCH AVENUE HOLDING, LLC is granted summary judgment on its cross-claim against Defendant 2848 CHURCH AVENUE OPERATING LLC for contractual indemnification; and it is further

ORDERED that Defendant 2848 CHURCH AVENUE HOLDING, LLC motion for summary judgment on its cross-claim against Defendant 2848 CHURCH AVENUE OPERATING LLC for failure to procure insurance is granted to the extent of holding that Defendant 2848 CHURCH AVENUE OPERATING LLC breached its duty under the lease to procure insurance.

This constitutes the decision and order of the Court.

ENTER,

J.S.C.