

Kennedy v Marsh & McLennan Cos., Inc.
2021 NY Slip Op 32761(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 159118/2017
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 11

Justice

-----X

WILLIAM KENNEDY,

Plaintiff,

- v -

MARSH & MCLENNAN COMPANIES, INC. and ICON
INTERIORS INC.,

Defendants.

-----X

ICON INTERIORS, INC.,

Third-Party Plaintiff,

-against-

ADCO ELECTRIC CORPORATION and CENTRE STREET
SYSTEMS, INC.,

Third-Party Defendants.

-----X

INDEX NO. 159118/2017

MOTION DATE 05/05/2020,
05/22/2020,
05/29/2020

MOTION SEQ. NO. 001, 002, 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595028/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 188, 189, 190, 191, 192, 193, 205, 221, 278, 280 were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 140, 141, 142, 143, 144, 145, 194, 195, 196, 197, 198, 199, 200, 201, 202, 206, 241, 242, 243, 244, 281, 282 were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 284, 285 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents and oral argument held on November 30, 2021, the court decides as follows:

1) As to motion sequence 001:

(a) the court grants in part Defendant/Third-Party Plaintiff Icon Interiors, Inc.'s ("Icon") motion for summary judgment to the extent that the court grants the portion seeking dismissal of Plaintiff William Kennedy's ("Plaintiff") Labor Law § 241(6) claim pertaining to alleged violations of Industrial Code §§ 23-1.4(b)(4), 23-1.4(b)(13), 23-1.5(a), 23-1.5(b), 23-1.5(c)(3), 23-1.7(a), 23-1.7(a)(1), 23-1.7(a)(2), 23-1.7(b), 23-1.7(b)(i)(iii), 23-1.18(a), 23-1.18(b), 23-1.18(c), 23-1.18(c)(1), 23-1.18(c)(2), 23-1.18(c)(3), 23-1.32, 23-1.33(a), 23-1.33(b), 23-1.33(c), 23-1.33(f), 23-2.1(b), 23-2.2(a), 23-2.2(b), 23-2.2(d), 23-2.3(b), 23-2.6(a), 23-2.6(a)(1), 23-5.1(c) and (f) and denies the remainder of the motion;

(b) the court grants in part Plaintiff's cross-motion and grants summary judgment in Plaintiff's favor as to his claim under Labor Law § 240(1) as against Icon (uploaded on NYSCEF as a cross-motion to motion sequence 003) and denies the remainder of the motion;

2) As to motion sequence 002, the court grants in part Third-Party Defendant Adco Electrical Corporation's ("Adco") motion for summary judgment to the extent that the court grants dismissal of Icon's third-party claims for common law contribution, common law indemnification and failure to procure insurance, grants dismissal of Icon's third-party claim for contractual indemnification and contribution without prejudice and with leave to renew, grants dismissal of Third-Party Defendant Centre Street Systems, Inc.'s ("Centre Street") and former Second Third-Party Defendant

Advance Magazine Publishers, Inc.'s ("Advance") cross-claims and denies the remainder of the motion; and

- 3) As to motion sequence 003, the court denies Centre Street's motion for summary judgment.

Plaintiff brought this action against Defendants Marsh & McLennan Companies, Inc. ("Marsh") and Icon for alleged injuries he sustained on December 3, 2014 when he fell 15 feet from a scaffold which had collapsed and was alleged to be in a dangerous and hazardous condition. Plaintiff was employed by Adco. Plaintiff alleged common law negligence and violations of Labor Law §§ 200, 240 and 241(6) as to Icon's alleged violations of Industrial Code §§ 23-1.4(b)(4), 23-1.4(b)(13), 23-1.5(a), 23-1.5(b), 23-1.5(c)(3), 23-1.7(a), 23-1.7(a)(1), 23-1.7(a)(2), 23-1.7(b), 23-1.7(b)(i)(iii), 23-1.18(a), 23-1.18(b), 23-1.18(c), 23-1.18(c)(1), 23-1.18(c)(2), 23-1.18(c)(3), 23-1.32, 23-1.33(a), 23-1.33(b), 23-1.33(c), 23-1.33(f), 23-2.1(b), 23-2.2(a), 23-2.2(b), 23-2.2(d), 23-2.3(b), 23-2.6(a), 23-2.6(a)(1), 23-2.6(b), 23-3.3(c), 23-3.3(e), 23-3.3(f), 23-5 and 23-5.1.

The building is a commercial condominium. Plaintiff alleged in substance that Marsh was the owner and Icon the general contractor for renovation work being conducted on the premises located at 1166 6th Avenue, New York, New York. The property was managed by CBRE, Inc.

Plaintiff further alleged in substance that Icon directed Plaintiff to use a scaffold that was being built that day to repair a BX cable in the stairwell located between the 15th and 16th floors of a building. Icon hired Centre Street to install the scaffold. Plaintiff alleged in substance that he walked around the scaffold and it appeared to be safe and that Centre Street laborers told him it was safe for him to work on it.

Centre Street disputes Plaintiff's claims and alleged in substance that they were still working on erecting the scaffold, that it was not yet finished and that Plaintiff had no permission or authority to use it in its unsecured and unfinished condition.

Icon brought a third-party action against Adco and Centre Street for contribution, contractual indemnification and failure to procure insurance. Marsh brought a second third-party action against Advance, which was subsequently discontinued.

Icon now moves for summary judgment dismissal of Plaintiff's complaint and in its favor against Centre Street under motion sequence 001, Plaintiff cross-moves for summary judgment against Icon, Adco moves for summary judgment as to all cross-claims and third-party claims against it under motion sequence 002 and Centre Street moves for summary judgment dismissal of Icon's third-party complaint and any cross-claims asserted against it for contribution, indemnification and breach of contract under motion sequence 003.

The court previously granted Marsh's motion for summary judgment dismissal of Plaintiff's complaint under motion sequence 004 in a decision and order, dated May 26, 2021 (Doc No. 291). The court found that at the time of Plaintiff's accident Marsh had no interest in the premises and it did not hire Icon, nor manage the construction project. Chase had previously subleased the 14th through 16th floors to Advance and Advance had subleased the 15th floor to non-party Avison Young, Inc. and subleased the 16th floor to Redeemer Church.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary

proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Additionally, neither a general awareness that litter or some other dangerous condition may be present in an area in the general vicinity of the accident location is sufficient to create constructive notice (*id.* at 838 [internal citations omitted]).

1) Icon's Motion and Plaintiff's Cross-Motion for Summary Judgment Against Icon

Icon now moves under motion sequence 001 for summary judgment dismissal of Plaintiff's claims for common law negligence and Labor Law § 200 against it, as well as § 241(6) based upon several provisions of the Industrial Code, in its favor as against Centre Street for contractual indemnification and common law indemnification and for attorneys' fees and defense costs and contribution.

Icon argues in substance that Advance leased the 15th and 16th floors of the building and hired Icon to be the general contractor of its renovations. Icon hired Centre Street as carpenters to enclose the stairwell located between these floors and Centre Street constructed the scaffold. Icon argues in substance that it was not negligent, that it did not supervise, direct and/or control the construction of the scaffold or Centre Street's work and it had no notice of any defect with the scaffold. Icon further argues that the Industrial Code sections cited by Plaintiff are inapplicable or are not specific enough to support Plaintiff's claim under § 241(6). Icon also argues in substance that since dismissal of Plaintiff's claims under Labor Law §§ 200 and 241(6) is warranted, Icon is entitled to contractual and common law indemnification against Centre Street.

Plaintiff cross-moves for summary judgment in its favor as against Icon on its Labor Law §§ 240, 241(6) and 200 claims and opposes Icon's motion for dismissal of Plaintiff's Labor Law §§ 241(6) and 200 claims. Plaintiff argues in substance that it is entitled to summary judgment on its Labor Law §240 claim because Icon, as the general contractor, hired Plaintiff to perform electrical work that required Plaintiff to work from an elevated height and Icon failed to provide Plaintiff with adequate safety devices required to perform his work and the statute and that such violation was a substantial factor in causing Plaintiff's accident. Plaintiff further argues in substance that he walked around and underneath the scaffold and believed it was completed, in good condition and that the wooden boards were secured. Plaintiff further argues that one of the carpenters told him that the scaffold was completed.

A. Common Law Negligence and Labor Law § 200

It is well settled that Labor Law § 200 is the codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). General contractors may be held liable for unsafe premises conditions if they created or had actual or constructive notice of the condition and had control of the place where the injury occurred (*Murphy v Columbia Univ.*, 4 AD3d 200, 201, 202 [1st Dept 2004]). A plaintiff is not required to prove a general contractor's supervision and control over plaintiff when a plaintiff alleges that the injury arose from the condition of the work place created by or known to the general contractor, rather than the method of the plaintiff's work (*Roppolo v Mitsubishi Motor Sales of Am., Inc.*, 278 AD2d 149, 150 [1st Dept 2000]).

Here, the court denies the portions of Plaintiff's and Icon's motions regarding Plaintiff's common law negligence and Labor Law § 200 claims and finds that neither side met its burden

of demonstrating its entitlement to judgment in its favor as a matter of law as to these claims. Additionally, the court finds that questions of fact exist, including, but not necessarily limited to, whether Icon was negligent in causing or contributing to Plaintiff's injuries, whether a dangerous, defective or hazardous condition existed on a completed scaffold, whether it was improperly constructed and whether Icon knew or should have known of such condition; whether the installation of the scaffold was not yet complete and whether Icon knew or should have known that it was not complete; whether Icon sufficiently controlled or directed access and/or the work being performed on the scaffold when it allegedly directed Plaintiff to use the scaffold to complete his work and whether Plaintiff had permission or authority to use the scaffold.

Therefore, the court denies Icon's motion and Plaintiff's cross-motion as to Plaintiff's claims under common law negligence and Labor Law § 200.

B. Labor Law § 240(1)

Labor Law § 240(1) states that all contractors, 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]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety

practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the fall or the application of an external force was a foreseeable risk of the task being performed (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

An injured employee's comparative negligence does not prevent him from prevailing under the statute, however, an employer is not liable if the employee's own negligence was the sole proximate cause of his injuries, or if the employer made adequate safety devices available and instructed the employee on how to use them, but the recalcitrant employee failed to use the safety device as instructed (*Cahill*, 4 NY3d at 39-40; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 286-287 [2003]).

Courts have liberally construed Labor Law § 240(1). A plaintiff has the burden of showing that an elevation-related risk existed, that adequate safety devices of the kind enumerated in Labor Law § 240(1), which could have prevented the accident, were not provided, and that plaintiff was obligated to work at a height to complete the task (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

Here, the court finds that Plaintiff demonstrated his entitlement to judgment as a matter of law as to Plaintiff's claim under Labor Law § 240(1) and that Icon failed to demonstrate a

material issue of fact to refute this claim. The court finds that Plaintiff demonstrated that Icon violated § 240(1) by failing to provide or erect safety devices necessary to give proper protection to Plaintiff, that such violation was the proximate cause of Plaintiff's injury, that Plaintiff's injury was caused by an elevation-related risk and that Plaintiff's own negligence was not the sole proximate cause of his injury.

Therefore, the court grants judgment in Plaintiff's favor as against Icon on Plaintiff's Labor Law § 240(1) claim.

C. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon an owner or subcontractor, regardless of who controls or supervises the site, to use reasonable care to provide reasonable and adequate protection and safety to employees working at the site (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). Such duty extends to the safety of persons employed in or lawfully frequenting, all areas in which construction is being performed (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 348 [1998]).

Therefore, Plaintiff's § 241(6) claim is not dependent upon the degree of Defendant's control over his work, but rather it is dependent upon the application of the specific Industrial Code provisions (12 NYCRR) and a finding that the violation of the provisions were a result of negligence (*Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [citation omitted]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). The Industrial Code regulation must constitute a specific, positive command, and not be one that merely reiterates the common law standard of negligence (*id.*). The regulation must also be applicable to the facts of the case and be the proximate cause of a plaintiff's injury (*Buckley*, 44 AD3d at 271).

As an initial matter, although Icon moved to dismiss Plaintiff's § 241(6) claim premised upon all of the alleged violations of Industrial Code set forth in Plaintiff's Bill of Particulars, Icon failed to discuss dismissal of Industrial Code §§ 23-2.6(b), 23-3.3(c), 23-3.3(e), 23-3.3(f), 23-5 and portions of 23-5.1. However, Plaintiff only challenged dismissal and cross-moved for summary judgment on Industrial Code §§ 23-5.1(h), 23-1.5(a), 23-1.5(b), 23-1.5(2), 23-5.1(c) and 23-5.1(f). Therefore, Plaintiff is deemed to have abandoned its § 241(6) claims regarding the remaining Industrial Code provisions which were raised in Icon's motion as Plaintiff failed to specifically oppose dismissal as to these provisions.

Therefore, the court finds that Icon demonstrated its entitlement to summary judgment in its favor as a matter of law and for dismissal of Plaintiff's claims under Labor Law § 241(6) pertaining to alleged violations of Industrial Code §§ 23-1.4(b)(4), 23-1.4(b)(13), 23-1.5(a), 23-1.5(b), 23-1.5(c)(3), 23-1.7(a), 23-1.7(a)(1), 23-1.7(a)(2), 23-1.7(b), 23-1.7(b)(i)(iii), 23-1.18(a), 23-1.18(b), 23-1.18(c), 23-1.18(c)(1), 23-1.18(c)(2), 23-1.18(c)(3), 23-1.32, 23-1.33(a), 23-1.33(b), 23-1.33(c), 23-1.33(f), 23-2.1(b), 23-2.2(a), 23-2.2(b), 23-2.2(d), 23-2.3(b), 23-2.6(a), 23-2.6(a)(1), 23-5.1(c) and (f). The court finds that these sections of the Industrial Code are inapplicable to the facts of this case or are too general to support liability under § 241(6).

However, the court finds that Icon failed to demonstrate its entitlement to summary dismissal of Plaintiff's claims under Industrial Code §§ 23-2.6(b), 23-3.3(c), 23-3.3(e), 23-3.3(f), 23-5 and the remaining subsections of 23-5.1.

As to Plaintiff's cross-motion, the court denies the portion of Plaintiff's cross-motion seeking summary judgment in its favor as to his Labor Law § 241(6) claim and finds that Plaintiff failed to demonstrate as a matter of law that Icon violated Industrial Code §§ 23-5.1(h), 23-1.5(a), 23-1.5(b), 23-1.5(2), 23-5.1(c) and 23-5.1(f). Furthermore, the court precludes

Plaintiff from raising a claim under Industrial Code § 23-1.5(2) as it was not included in Plaintiff's Bill of Particulars. Additionally, as set forth above, the court grants Icon's motion to dismiss Plaintiff's claims under §§ 23-1.5(a), 23-1.5(b), 23-5.1(c) and 23-5.1(f). The court finds that material questions of fact exist as to § 23-5.1(h) including, but not necessarily limited to, whether the scaffold was erected with proper supervision, whether the installation was completed and whether Plaintiff had permission or authority to use it at the time of his accident.

Therefore, the court grants dismissal of portions of Plaintiff's Labor Law § 241(6) claim based upon the sections of the Industrial Code as set forth herein.

D. Indemnification

A party's right to indemnification may arise from a contract or may be implied based upon common law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when "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.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citations omitted]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008] [internal quotation marks and citations omitted]).

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006] [internal

quotation marks and citations omitted]). It is premised on “vicarious liability without actual fault,” which requires that “a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*id.* at 367 [internal quotation marks and citations omitted]). The shifting of loss under common law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common law indemnification “unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part” (*id.* at 377-378).

Here, the court denies the portion of Icon’s motion seeking summary judgment on its claims for contractual and common law indemnification against Centre Street. Although Icon argues that its contract with Centre Street included a hold harmless provision requiring Centre Street to indemnify Icon where a claim arises out of, or in connection to, Centre Street’s work, including attorney’s fees, as discussed herein, the court determines that questions of fact remain to be tried. Such disputed facts include, but are not necessarily limited to, whether Icon was negligent in causing or contributing to Plaintiff’s injuries; whether the indemnification provisions in the contract and Rider are ambiguous and conflict as to whether the indemnification provision requires the damages to be caused by Centre Street’s negligence or whether it must only arise out of Centre Street’s work; whether a dangerous, defective or hazardous condition existed on a completed scaffold; whether it was improperly constructed and whether Icon knew or should have known of such condition; whether the installation of the scaffold was not yet completed and whether Icon knew or should have known that it was not completed; whether Icon sufficiently controlled or directed access to the scaffold and the work being performed on the scaffold when it allegedly directed Plaintiff to use the scaffold to complete his work; and whether Plaintiff had permission or authority to use the scaffold.

Therefore, the court finds that Icon failed to demonstrate that it was not negligent, that it did not participate to some degree in causing or contributing to Plaintiff's injuries or that it had actual supervision or control over Plaintiff's use of the scaffold.

Therefore, the court grants in part Icon's motion for summary judgment to the extent that the court grants dismissal of the majority of Plaintiff's claims as to Labor Law § 241(6) based upon the Industrial Code Sections set forth above and the court denies the remainder of the motion. The court grants in part Plaintiff's cross-motion for summary judgment to the extent that the court grants summary judgment in Plaintiff's favor as to Plaintiff's claim under Labor Law § 240(1), but denies the remainder of the cross-motion.

2) Adco's Motion for Summary Judgment

Adco now moves under motion sequence 002 for summary judgment dismissal of all cross-claims and third-party claims against it. Icon's third-party claims against Adco are for contribution, common law and contractual indemnification, failure to procure insurance and failure to defend. Centre Street and Advance asserted cross-claims against Adco for contribution, contractual and common law indemnification and failure to procure insurance. Adco accepted Icon's tender for a defense.

Adco argues in substance that all cross-claims are barred by worker's compensation law, that Adco satisfied all of its contractual obligations and that the claims are barred by the anti-subrogation doctrine.

New York Workers' Compensation Law § 11 bars all causes of action for common law indemnification or contribution against an employer, unless the employee suffers a grave injury as defined by the statute.

Here, the court grants in part Adco's summary judgment motion to the extent that the court grants the portion dismissing Icon's third-party claims for common law contribution, common law indemnification and failure to procure insurance, grants dismissal of Icon's third-party claim for contractual indemnification and contribution without prejudice and with leave to renew if a verdict or settlement is in excess of the insurance obtained by Adco and grants dismissal of Centre Street's and Advance's cross-claims. However, the court denies the portion of Adco's motion seeking a conditional order that Centre Street is solely liable for Plaintiff's injuries because of its negligent construction of the scaffold as the court finds that questions of fact remain as discussed above.

Additionally, the court finds that the evidence clearly demonstrates that Plaintiff did not suffer a grave injury as defined by New York Workers' Compensation Law § 11. As such, since Plaintiff was allegedly injured during the course of his employment while working for Adco, the parties are barred from bringing their contribution and indemnification claims against Adco. Also, Adco demonstrated that there is no contract between Adco and Centre Street or Advance and Adco's contract with Icon does not require Adco to indemnify Centre Street or Advance.

Furthermore, the court agrees with Adco and finds that Adco demonstrated its entitlement to dismissal of Icon's claim for contractual indemnification and contribution without prejudice and finds that such claims are barred by the anti-subrogation doctrine since Adco's insurance company accepted Icon's tender for its defense. Should the circumstances change, or should a verdict or settlement exceed the policy limits, then Icon has leave to reinstate its claims for contractual indemnification and contribution.

Therefore, the court grants in part Adco's motion for summary judgment as set forth herein.

3) Centre Street's Motion for Summary Judgment

Centre Street now moves under motion sequence 003 for summary judgment dismissal of Icon's third-party complaint and any cross-claims asserted against it for contribution, indemnification and breach of contract. Centre Street argues in substance that it was not negligent and it was not a statutory agent of Icon under the Labor Law provisions because the scaffold had not yet been placed into use and it did not have control over access to the scaffold. Additionally, Centre Street argues in substance that it was not contractually obligated to defend and indemnify Icon because the contract required proof of negligence to trigger its duty to indemnify Icon and it satisfied its obligation to obtain the requisite insurance.

Centre Street further argues in substance that at the time of Plaintiff's accident, they had not yet completed the erection of the scaffold and it was not supposed to be used. Centre Street argues that Plaintiff admitted that it did not yet have railings and that the plywood was missing, exposing the wooden planks. The accident report indicated that Plaintiff slid off of an unfinished/unsecured scaffold that was being worked on. Adco signed the contract the day after Plaintiff's accident once the scaffold was fully installed. Centre Street further argues in substance that Icon controlled the work site and access to the scaffold and that Plaintiff ascended the incomplete scaffold without authority from Centre Street.

The court denies Centre Street's motion and finds that it failed to demonstrate its entitlement to judgment in its favor as a matter of law as to these claims. Additionally, the court finds that material questions of fact exist, including, but not necessarily limited to, whether Centre Street was negligent; whether the scaffold was defective; whether it was completed; whether it was a statutory agent of Icon; whether it supervised or controlled the scaffold and/or work site where the scaffold was located; whether Plaintiff was the sole proximate cause of his

accident; whether Plaintiff had the permission or authority to use the scaffold; whether the indemnification provisions in the contract and Rider are ambiguous and conflict as to whether the indemnification provision requires the damages to be caused by Centre Street's negligence or whether it must only arise out of Centre Street's work; and whether Centre Street satisfied its contractual obligation to purchase the requisite insurance.

Therefore, the court denies Centre Street's summary judgment motion.

As such, it is hereby

ORDERED that as to motion sequence 001, the court grants in part Defendant/Third-Party Plaintiff Icon Interiors, Inc.'s motion for summary judgment to the extent that the court grants the portion seeking dismissal of Plaintiff William Kennedy's Labor Law § 241(6) claim pertaining to alleged violations of Industrial Code §§ 23-1.4(b)(4), 23-1.4(b)(13), 23-1.5(a), 23-1.5(b), 23-1.5(c)(3), 23-1.7(a), 23-1.7(a)(1), 23-1.7(a)(2), 23-1.7(b), 23-1.7(b)(i)(iii), 23-1.18(a), 23-1.18(b), 23-1.18(c), 23-1.18(c)(1), 23-1.18(c)(2), 23-1.18(c)(3), 23-1.32, 23-1.33(a), 23-1.33(b), 23-1.33(c), 23-1.33(f), 23-2.1(b), 23-2.2(a), 23-2.2(b), 23-2.2(d), 23-2.3(b), 23-2.6(a), 23-2.6(a)(1), 23-5.1(c) and (f); the court precludes Plaintiff from raising a claim under Industrial Code § 23-1.5(2); and the court denies the remainder of the motion; and it is further

ORDERED that the court grants in part Plaintiff William Kennedy's cross-motion for summary judgment to the extent that the court grants summary judgment in Plaintiff William Kennedy's favor as against Defendant/Third-Party Plaintiff Icon Interiors, Inc. as to Plaintiff's claim under Labor Law § 240(1), but the court denies the remainder of the cross-motion; and it is further

ORDERED that as to motion sequence 002, the court grants in part Third-Party Defendant Adco Electrical Corporation's motion for summary judgment to the extent that the

court grants dismissal of Defendant/Third-Party Plaintiff Icon Interiors, Inc.'s third-party claims for common law contribution, common law indemnification and failure to procure insurance; grants dismissal of Defendant/Third-Party Plaintiff Icon Interiors, Inc.'s third-party claim for contractual indemnification and contribution without prejudice and with leave to renew should a verdict or settlement exceed the policy limits; and grants dismissal of Third-Party Defendant Centre Street Systems, Inc.'s and former Second Third-Party Defendant Advance Magazine Publishers, Inc.'s cross-claims, but denies the remainder of the motion; and it is further

ORDERED that as to motion sequence 003, the court denies Third-Party Defendant Centre Street Systems, Inc.'s motion for summary judgment; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment accordingly as follows:

1) in favor of Plaintiff William Kennedy as to his Labor Law § 240(1) as against Defendant/Third-Party Plaintiff Icon Interiors, Inc. and the court severs this claim and directs that an assessment of damages be conducted at the time of the trial of the remaining issues or at a date and time to be scheduled by the court;

2) in favor of Defendant/Third-Party Plaintiff Icon Interiors, Inc. as against Plaintiff William Kennedy as to Plaintiff's Labor Law § 241(6) claim pertaining to alleged violations of Industrial Code §§ 23-1.4(b)(4), 23-1.4(b)(13), 23-1.5(a), 23-1.5(b), 23-1.5(c)(3), 23-1.7(a), 23-1.7(a)(1), 23-1.7(a)(2), 23-1.7(b), 23-1.7(b)(i)(iii), 23-1.18(a), 23-1.18(b), 23-1.18(c), 23-1.18(c)(1), 23-1.18(c)(2), 23-1.18(c)(3), 23-1.32, 23-1.33(a), 23-1.33(b), 23-1.33(c), 23-1.33(f), 23-2.1(b), 23-2.2(a), 23-2.2(b), 23-2.2(d), 23-2.3(b), 23-2.6(a), 23-2.6(a)(1), 23-5.1(c) and (f) and such claims are hereby dismissed;

3) in favor of Third-Party Defendant Adco Electrical Corporation as against Defendant/Third-Party Plaintiff Icon Interiors, Inc. as to Defendant/Third-Party Plaintiff Icon Interiors, Inc.’s third-party claims against Third-Party Defendant Adco Electrical Corporation and the Third-Party Complaint is dismissed against Third-Party Defendant Adco Electrical Corporation only, as set forth herein; and

4) in favor of Third-Party Defendant Adco Electrical Corporation as against Third-Party Defendant Centre Street Systems, Inc. and former Second Third-Party Defendant Advance Magazine Publishers, Inc. as to their cross-claims against Third-Party Defendant Adco Electrical Corporation and such cross-claims are dismissed.

This constitutes the decision and order of the court.



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<u>12/23/2021</u>			<u>ERIKA EDWARDS, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		