

Brereton v Queens Ballpark Co., LLC
2021 NY Slip Op 33631(U)
July 20, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 618481/2016
Judge: George M. Nolan
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FSHORT FORM ORDER

INDEX No. 618481/2016
CAL. No. 2020006800T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 1/7/21 (003)
MOTION DATE 2/11/21 (004 & 005)
ADJ. DATE 4/15/21
Mot. Seq. # 003 MotD
Mot. Seq. # 004 XMotD
Mot. Seq. # 005 XMD

-----X
BRIDGETTE BRERETON,

Plaintiff,

- against -

QUEENS BALLPARK COMPANY, LLC,
INSOMNIAC HOLDINGS, LLC, FOUR AND
TWENTY LLC, d/b/a BML-BLACKBIRD
THEATRICAL SERVICES INC., BML-
BLACKBIRD INC., and DIVERSIFIED
PRODUCTION SERVICES LLC,

Defendants.
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers filed by defendants Queens Ballpark Company, LLC, Insomniac Holdings, LLC, Four and Twenty LLC, d/b/a BML-Blackbird Theatrical Services, LLC, and BML-Blackbird Inc., on December 14, 2020; Notice of Cross Motion and supporting papers filed by defendant Diversified Production Services LLC, on January 15, 2021; filed by plaintiff, on January 28, 2021; Answering Affidavits and supporting papers filed by defendant Diversified Production Services LLC, on April 8, 2021;

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Replying Affidavits and supporting papers filed by defendants Queens Ballpark Company, LLC, Insomniac Holdings, LLC, Four and Twenty LLC, d/b/a BML-Blackbird Theatrical Services, LLC, and BML-Blackbird Inc., on April 8, 2021; filed by defendants Queens Ballpark Company, LLC, Insomniac Holdings, LLC, Four and Twenty LLC, d/b/a BML-Blackbird Theatrical Services, LLC, and BML-Blackbird Inc., on April 8, 2021; filed by defendant Diversified Production Services LLC, on April 8, 2021; filed by plaintiff, on April 13, 2021; Other ____; it is

ORDERED that the motion by defendants Queens Ballpark Company, LLC, Insomniac Holdings, LLC, Four and Twenty LLC, and BML-Blackbird Inc. for summary judgment dismissing the complaint and cross claims against them is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Diversified Production Services LLC for summary judgment dismissing the complaint and cross claims against it is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff Bridgette Brereton for summary judgment in her favor on the issue of defendants' liability on her claim under Labor Law § 240 (1) is denied.

Plaintiff Bridgette Brereton commenced this action to recover damages for personal injuries she allegedly sustained during her employ for nonparty 360 Productions on May 16, 2016, at a parking lot located at the premises known as Citi Field, located in Flushing, New York. The accident allegedly occurred when plaintiff was struck by three steel trusses during the takedown of light structures and apparatus from a prior event known as Electric Daisy Carnival ("EDC"). Defendants Queens Ballpark Company, LLC ("QBC") allegedly leased certain parking lots of Citi Field to defendant Insomniac Holdings, LLC ("Insomniac") to host EDC. Insomniac allegedly subcontracted with defendants Four and Twenty LLC, d/b/a BML-Blackbird Theatrical Services, LLC ("Four and Twenty"), BML-BlackBird Inc. ("BML-Blackbird"), Diversified Production Services LLC ("DPS"), and nonparty 360 Productions to perform certain services at the worksite. Plaintiff asserts claims against defendants for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6).

QBC, Insomniac, Four and Twenty, and BML-Blackbird now move for summary judgment dismissing the complaint and cross claims against them. They argue, among other things, that plaintiff's common-law negligence and Labor Law § 200 causes of action against them must be dismissed, since plaintiff is unable to identify the cause of her accident without engaging in speculation, and that they did not exercise the requisite authority to supervise or control her work. QBC, Insomniac, Four and Twenty, and BML-Blackbird also argue that they cannot be held liable pursuant to Labor Law § 240 (1), since plaintiff's accident was not height- or elevation-related, and that no safety devices would have prevented it. As to plaintiff's claims under Labor Law § 241 (6), they argue that the provisions relied upon to support her cause of action either lack the specificity required to qualify as a predicate for liability, or are inapplicable to this action. QBC, Insomniac, Four and Twenty, and BML-Blackbird also argue that Four and Twenty and BML-Blackbird (collectively, "BML") are not statutory defendants under Labor Law §§ 240 (1) and 241 (6). In addition, QBC, Insomniac, and BML contend that the cross claims against them for contractual indemnification and breach of contract for failure to procure insurance should be dismissed, since there was no contract between DPS and either QBC or BML, that the relevant indemnification provision of the contract between Insomniac and DPS is inapplicable to this action, and that Insomniac was not contractually obligated to procure insurance. In support of their motion, QBC, Insomniac, and BML submit, among other

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things, the transcripts of the deposition testimony of plaintiff, Alyxzander Bear, Kevin Brophy, Frank Prokop, Akiko Moritake, and Chris Covin.

DPS opposes the motion by QBC, Insomniac, and BML, and cross-moves for summary judgment dismissing the complaint and cross claims against it. With regard to plaintiff's common-law negligence and Labor Law § 200 causes of action, DPS contends that it did not have authority to supervise or control her work. With regard to plaintiff's claims under Labor Law §§ 240 and 241, DPS argues, in part, that it is not a statutory defendant within those sections of Labor Law. In support of its opposition to the motion by QBC, Insomniac, and BML, and its cross motion, DPS relies upon exhibits submitted with codefendants' motion.

Plaintiff opposes the motion by QBC, Insomniac, and BML, and the cross motion by DPS, and cross-moves for summary judgment in her favor on the issue of defendants' liability under Labor Law § 240 (1). She argues, among other things, that she is able to identify how her accident occurred without engaging in speculation, and that Insomniac, BML, and DPS acted in supervisory roles at the work site. As to her claims under Labor Law §240 (1), plaintiff argues, in part, that she was injured by falling objects at the worksite, and that the trusses generated a significant amount of force when they fell. In support of her opposition and her cross motion, plaintiff relies upon exhibits submitted with the motion by QBC, Insomniac, and BML.

At plaintiff's deposition, she testified that she was employed as a stagehand by 360 Productions at the time of the accident. Plaintiff referred to a "Frank" and "John" as her bosses, and testified that they directed to her to move the subject trusses. While she was unable to identify the precise entity employing Frank or John at her deposition, she testified that one of them was from Insomniac, and that the other one was from BML. She explained that they wore shirts bearing a company logo and identification tags. According to plaintiff's deposition testimony, the three trusses at issue were stacked on top of each other and placed on a dolly prior to the accident. Plaintiff testified that each truss weighed approximately three tons, that the topmost truss was approximately two feet above her head, and that no ratchet straps were attached to them. She further testified that her accident occurred when "[she] was in an argument with the Insomniac and Blackbird people over touching the truss." Plaintiff allegedly refused to move the trusses without a forklift. Another laborer allegedly assisted Frank and John in moving the subject trusses. When asked whether "[plaintiff] actually [saw] them physically pushing, or pulling, or doing anything else with the trusses," plaintiff answered in the affirmative. She elaborated that she saw them "attempt[] to move the truss" by pulling on it with their hands. She further explained that "[w]ithin two seconds, [s]he was on the ground," that she heard a "clang," and that the "[t]he truss was on top of [her]." She clarified that all three trusses separately fell on her. Plaintiff allegedly was wearing a hard hat at the time of the accident.

At Alyxzander Bear's deposition testimony, he testified that he served as Insomniac's director of productions on the date of the accident. He testified that Insomniac hired DPS to handle production, including the hiring of vendors, of EDC. He elaborated that DPS was "responsible" for "load in and load out."

According to Kevin Brophy's deposition testimony, he was a crew chief for Four and Twenty at the time of the accident, and he was a witness to plaintiff's accident. Brophy testified that the accident occurred when plaintiff was moving trusses, which were strapped together with a one- or two-inch piece of ratchet strap, on a dolly, with another laborer. He elaborated that "[he] saw her pull over a stack of truss [sic] . .

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.over onto herself” during the load out period, and that they fell within a matter of seconds. He described the trusses as weighing “60, 70 pounds, if that,” and reaching a height of “90-inches plus wheel height . . . so maybe 96 inches” when stacked on top of each other.

At Frank Prokop’s deposition, he testified that he was employed as “first electric” by Four and Twenty at the time of the accident. He explained that Four and Twenty was responsible for “the entire lighting package” for certain stages. He testified that while the stagehands were responsible for moving the trusses, someone from Four and Twenty occasionally “may have grabbed one end of the trusses to help someone with them.” Prokop testified that he had no involvement in moving the trusses. He also testified that “Blackbird,” namely, Kevin, had a supervisory role in directing stagehands. He further testified that while he had no specific recollection of the safety meeting taking place prior to the accident, he claimed that stagehands always were instructed that trusses should only be moved with two people.

According to Prokop’s testimony, prior to the accident, there were approximately six “stacks,” which consisted of three or four trusses stacked on top of each other on “wheel pads,” in a line to be transported into a truck. There allegedly was one stack that was not aligned with the rest of the stacks prior to the accident. Prokop testified that he specifically instructed plaintiff not to move that particular stack before the accident occurred. Prokop allegedly did not observe the trusses fall to the ground. Prokop testified that no one was closer in proximity to plaintiff than him at the time of the accident, and that he observed that the trusses were strapped together after the accident.

Akiko Moritake testified that she was employed as a site operations coordinator assistant for Insomniac in 2016. She further testified that DPS was responsible for the load out for EDC, and that she personally was involved in that process. She elaborated that her responsibilities included standing next to a truck, and ensuring that items properly were returned and packed. Moritake allegedly could not recall who did the physical work with regard to loading out.

Chris Covin testified that he was responsible for budgeting events and operations for DPS in 2016. He further testified that DPS was hired by Insomniac to provide site services for EDC, and that DPS only contracted with Insomniac. He explained that DPS’ responsibilities included dismantling “everything site related” after Insomniac took down “everything that is deemed as the show,” such as the lights and staging. He further testified that DPS was not responsible for disassembling the stages or lighting, and that no one from DPS coordinated the building and dismantling of steel structures.

At the outset, the Court considered the merits of the cross motion by plaintiff. Even assuming *arguendo* that plaintiff’s cross motion for summary judgment was untimely, a court may consider an untimely motion or cross motion for summary judgment where a timely motion for summary judgment was made on nearly identical grounds (*see Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 2021 NY Slip Op 08220 [2d Dept 2021]; *Munoz v Salcedo*, 170 AD3d 735, 95 NYS3d 358 [2d Dept 2019]; *Sikorjak v City of New York*, 168 AD3d 778, 91 NYS3d 186 [2d Dept 2019]; *Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 41 NYS3d 266 [2d Dept 2016]), as was the case here.

Labor Law § 200 is a codification of the common law duty of owners or general contractors to maintain a safe construction site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998];

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see *Cantalupo v Arco Plumbing & Heating, Inc.*, ___ AD3d ___, 2021 NY Slip Op 02783 [2d Dept 2021]). Liability premised upon Labor Law § 200, fall into two broad categories, namely, those involving the manner in which the work is performed, and instances where the workers are injured as a result of dangerous or defective premises conditions at a work site (see *Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 143 NYS3d 411 [2d Dept 2021]; *Devoy v City of New York*, 192 AD3d 665, 144 NYS3d 68 [2d Dept 2021]). Here, plaintiff's injuries did not arise from a defective condition inherent on the property, but rather from alleged defects in the methods or materials utilized in performing the subject work (see *Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 131 NYS3d 110 [2d Dept 2020]; *Kearney v Dynegy*, 151 AD3d 1037, 1039, 57 NYS3d 520 [2d Dept 2017]; *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Rodriguez v Metropolitan Transp. Auth.*, 191 AD3d 1026, 1027, 143 NYS3d 363 [2d Dept 2021], quoting *Rojas v Schwartz*, 74 AD3d 1046, 1046, 903 NYS2d 484 [2d Dept 2010]; see *Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 140 NYS3d 564 [2d Dept 2021]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Devoy v City of New York*, *supra* at 668, quoting *Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 655-656, 127 NYS3d 309 [2d Dept 2020]; see *Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 134 NYS3d 787 [2d Dept 2020]). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (*Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1191, 138 NYS3d 111 [2d Dept 2020], quoting *Ortega v Puccia*, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]; see *Cremona v Venture Holding & Mgt. Corp.*, 189 AD3d 994, 137 NYS3d 487 [2d Dept 2020]).

QBC, Insomniac, and BML made a prima facie case of entitlement to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against QBC. They established, prima facie, that QBC did not exercise supervision or control over the subject work (see *Marney v Cornell Kent II Holdings, LLC*, 194 AD3d 917, 2021 NY Slip Op 03170 [2d Dept 2021]; *Medina-Arana v Henry St. Prop. Holdings, LLC*, *supra*; *Turgeon v Vassar Coll.*, 172 AD3d 1134, 100 NYS3d 374 [2d Dept 2019]). Significantly, QBC allegedly bore no responsibility for the manner in which the work was performed, and none of its employees allegedly had the authority to supervise or control the work at issue. In opposition, plaintiff and DPS failed to raise a triable issue of fact as to whether QBC had the requisite supervision or control over the subject work (see *Marney v Cornell Kent II Holdings, LLC*, *supra*; *Medina-Arana v Henry St. Prop. Holdings, LLC*, *supra*; *Turgeon v Vassar Coll.*, *supra*). Plaintiff and DPS failed to specifically address the common-law negligence and Labor Law § 200 claims against QBC in their opposition papers. Accordingly, the portion of the motion by QBC, Insomniac, and BML seeking summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 against QBC is granted.

QBC, Insomniac, and BML failed to establish their prima facie entitlement to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action against Insomniac and BML. They failed to demonstrate, prima facie, that plaintiff was unable to identify the cause of her accident without resorting to speculation (see generally *Patrikis v Arniotis*, 129 AD3d 928, 12 NYS3d 174 [2d Dept 2015]; *Chilinski v LMJ Contr.*, 137 AD3d 1185, 28 NYS3d 390 [2d Dept 2016]; cf. *Antelope v Saint*

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Aidan's Church, 110 AD3d 1020, 973 NYS2d 769 [2d Dept 2014]). While the facts and circumstances surrounding the subject accident are heavily disputed, their submissions, including plaintiff's deposition testimony, are sufficient to raise a triable issue of fact as to whether she was struck by falling trusses. QBC, Insomniac, and BML further failed to eliminate triable issues of fact as to whether Insomniac or BML had the requisite authority to supervise or control the work giving rise to plaintiff's injuries (see *Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 103 NYS3d 571 [2d Dept 2019]; *Valdez v Turner Constr. Co.*, 171 AD3d 836, 98 NYS3d 79 [2d Dept 2019]; *Cruz v Cablevision Systems Corp.*, 120 AD3d 744, 992 NYS2d 281 [2d Dept 2014]). Notably, plaintiff's deposition testimony raised triable issues of fact regarding the involvement of Insomniac and BML in the injury-producing work. As previously indicated, plaintiff's deposition testimony indicates she considered Frank and John, who were from either Insomniac or BML, to be her bosses, and that they directly were involved in transporting the trusses that allegedly fell on her. Accordingly, the portion of the motion by QBC, Insomniac, and BML seeking summary judgment dismissing plaintiff's claims alleging common-law negligence and a violation of Labor Law § 200 against Insomniac and BML is denied, regardless of the sufficiency of the papers in opposition (see *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Labor Law § 240 (1) provides that property owners and contractors furnish, or cause to be furnished, safety devices which are "so constructed, placed and operated as to give proper protection" to workers (see *Jara v Costco Wholesale Corp.*, 178 AD3d 687, 115 NYS3d 49 [2d Dept 2019]; *Marulanda v Vance Assoc., LLC*, 160 AD3d 711, 75 NYS3d 74 [2d Dept 2018]). The purpose of Labor Law § 240 (1) is to "protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96, 7 NYS3d 263 [2015], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500, 601 NYS2d 49 [1993]). Moreover, an owner or contractor who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work giving rise to the injury (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 771 NYS2d 484 [2003]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*). In the case of a falling object, "Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured'" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 268, 727 NYS2d 37 [2001], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; see *Bianchi v New York City Tr. Auth.*, 192 AD3d 745, 144 NYS3d 101 [2d Dept 2021]). Labor Law § 240 (1) "does not automatically apply simply because an object fell and injured a worker; '[a] plaintiff must show that the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute'" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663, 985 NYS2d 416 [2014], quoting *Narducci v Manhasset Bay Assoc.*, *supra* at 268; see *Wiski v Verizon N.Y., Inc.*, 186 AD3d 1590, 129 NYS3d 341 [2d Dept 2020]). The application of Labor Law § 240 (1) requires a significant elevation differential, "even if the injury is caused by the application of gravity on an object" (*Simmons v City of New York*, 165 AD3d 725, 726-727, 85 NYS3d 462 [2d Dept 2018], quoting *Christiansen v Bonacio Constr.*, 129 AD3d 1156, 1158, 10 NYS3d 683 [3d Dept 2015]). An object's fall from a minuscule height is not the elevation-related injury contemplated by Labor Law § 240 (1) (see *Cambry v Lincoln Gardens*, 50 AD3d 1081, 857 NYS2d 225 [2d Dept 2008]; *Perron v Hendrickson/Scalamandre/Posillico (TV)*, 22 AD3d 731, 803 NYS2d 106 [2d Dept 2005]). Moreover, a plaintiff is not precluded from recovering under Labor Law § 240 merely because he or she was on the same level as the base of a falling object (see *Wilinski v 334 E. 92nd Hous. Dev Fund Corp.*, 18 NY3d 1, 935 NYS2d 551 [2011]). In determining whether an elevation differential

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is physically significant or de minimis, the court must also take into account “the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605, 895 NYS2d 279 [2009]; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, *supra*; *Kandatyán v 400 Fifth Realty, LLC*, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that the violation was a proximate cause of the injuries (see *Majerski v City of New York*, 193 AD3d 715, 2021 NY Slip Op 02147 [2d Dept 2021]; *Devoy v City of New York*, *supra*). While a plaintiff’s comparative negligence is not a defense to a Labor Law § 240 (1) claim, and does not effect a reduction in liability, a plaintiff cannot prevail on a Labor Law § 240 (1) claim if his or her actions were the sole proximate cause of the accident (see *Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 [2d Dept 2021]; *Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 131 NYS3d 48 [2d Dept 2020]).

QBC, Insomniac, and BML failed to establish their prima facie entitlement to summary judgment dismissing plaintiff’s Labor Law § 240 claim against them. They failed to establish, prima facie, that either Four and Twenty or BML-Blackbird was not an a contractor or statutory agent under Labor Law § 240 (see *Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 120 NYS3d 347 [2d Dept 2020]; *Johnsen v City of New York*, 149 AD3d 822, 49 NYS3d 898 [2d Dept 2017]). As previously set forth, the submissions of QBC, Insomniac, and BML failed to eliminate triable issues of fact as to whether BML had authority to supervise or control the injury-producing work. Moreover, their submissions present conflicting evidence regarding, inter alia, the dimensions and weight of the trusses at issue. Based on the record, the stacked trusses allegedly reached a height of roughly two feet above plaintiff’s head, and there is significant dispute as to the weight of each truss. Even assuming *arguendo* that plaintiff’s testimony regarding the weight of each truss is disregarded as incredible as a matter of law, as requested by QBC, Insomniac, and BML, their submissions failed to eliminate triable issues of fact as to whether that height differential constitutes a significant elevation differential given the combined weight of trusses and the force generated by them when they fell, so as to require a safety device as set forth in Labor Law § 240 (1) (see *Runner v New York Stock Exch. Inc.*, *supra*; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]; *Gutman v City of New York*, 78 AD3d 886, 911 NYS2d 458 [2d Dept 2010]). Brophy’s deposition testimony indicates that the trusses had a combined weight of approximately 180 to 210 pounds, and thus, they potentially would have generated a significant amount of force over their descent. QBC, Insomniac, and BML further failed to eliminate triable issues of fact as to whether the trusses fell due to the absence or inadequacy of an enumerated safety device (see *Wilinski v 334 E. 92nd Hous. Dev Fund Corp.*, *supra*; *Carlton v City of New York*, 161 AD3d 930, 77 NYS3d 445 [2d Dept 2018]). Accordingly, the portion of the motion by defendants QBC, Insomniac, and BML seeking summary judgment dismissing plaintiff’s Labor Law § 240 against them is denied, regardless of the sufficiency of the papers in opposition (see *Winegrad v New York Univ Med. Ctr.*, *supra*).

Plaintiff also failed to establish her prima facie burden for summary judgment in her favor on her Labor Law § 240 claim against QBC, Insomniac, and BML. The evidence relied upon by plaintiff in support of her cross motion failed to demonstrate, prima facie, that her conduct was not the sole proximate cause of her injuries (see *Battle v NY Devs. & Mgt., Inc.*, 193 AD3d 562, 2021 NY Slip Op 02446 [2d Dept 2021]; *Ponce-Francisco v Plainview-Old Bethpage Cent. School Dist.*, 83 AD3d 683, 920 NYS2d 406 [2d Dept 2011]; see also *Reyes v Astoria 31st St. Devs., LLC*, 190 AD3d 872, 139 NYS3d 352 [2d Dept 2021];

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Benavidez-Portillo v G.B. Constr. & Dev., 149 AD3d 681, 51 NYS3d 141 [2d Dept 2017]; *Serrano v Popovic*, 91 AD3d 626, 936 NYS2d 254 [2d Dept 2012]). As previously set forth, there are significant disputes in the facts and circumstances surrounding the subject accident. Based on the record, there are triable issues of fact including whether plaintiff's own conduct in attempting to move the trusses, without assistance, after being instructed not to do so was the sole proximate cause of her alleged injuries. Accordingly, plaintiff's cross motion for summary judgment in her favor on her Labor Law § 240 claim against QBC, Insomniac, and BML is denied, regardless of the sufficiency of the papers in opposition (*see Winegrad v New York Univ Med. Ctr.*, *supra*).

Labor Law § 241 "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, *supra* at 348; *see Cantalupo v Arco Plumbing & Heating, Inc.*, *supra*). "A plaintiff asserting a cause of action under Labor Law § 241(6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (*Bianchi v New York City Tr. Auth.*, *supra* at 748; *see Carey v Five Bros., Inc.*, 106 AD3d 938, 966 NYS2d 153 [2d Dept 2013]). The particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). Further, to impose liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case (*see Cantalupo v Arco Plumbing & Heating, Inc.*, *supra*; *Majerski v City of New York*, *supra*).

QBC, Insomniac, and BML established their prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claims against them. By her verified bill of particulars, plaintiff alleges violations of 12 NYCRR 23-1.5 through 23-1.8, and various violations of Occupational Safety and Health Administration ("OSHA") regulations. Inasmuch as plaintiff failed to address the branch of the motion by QBC, Insomniac, and BML seeking dismissal of her Labor Law § 241 (6) claims in opposition, the Court deems those claims abandoned and grants summary judgment dismissing them (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 107 NYS3d 718 [2d Dept 2019]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 68 NYS3d 84 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 43 NYS3d 483 [2d Dept 2016]). In any event, a review of the Industrial Code provisions cited by plaintiff in her bill of particulars reveal that they are inactionable general safety standards or inapplicable to this action (*see NYCRR 23-1.5–23-1.8*; *Gomez v 670 Merrick Road Realty Corp.*, *supra*; *Zaino v Rogers*, 153 AD3d 763, 59 NYS3d 770 [2d Dept 2017]; *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 42 NYS3d 293 [2d Dept 2016]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 NYS2d 593 [2d Dept 2013]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 875 NYS2d 242 [2d Dept 2009]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]; *Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 832 NYS2d 93 [2d Dept 2007]; *Sdregas v City of New York*, 309 AD2d 612, 765 NYS2d 610 [1st Dept 2003]; *Lawyer v Rotterdam Ventures Inc.*, 204 AD2d 878, 612 NYS2d 682 [3d Dept 1994]). Moreover, the OSHA regulations cited by plaintiff provide no basis for imposing liability under Labor Law § 241 (6) (*see Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 109 NYS3d 115 [2d Dept 2019]; *Marl v Liro Engineers, Inc.*, 159 AD3d 688, 73 NYS3d 202 [2d Dept 2018]; *Shaw v RPA Assoc.*,

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LLC, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]). Therefore, the branch of the motion by QBC, Insomniac, and BML for summary judgment dismissing plaintiff's claims under Labor Law § 241 (6) against them is granted.

DPS established its prima facie entitlement to summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence causes of action against it (*see Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085, 2021 NY Slip Op 02552 [2d Dept 2021]; *Fiore v Westerman Constr. Co.*, 186 AD3d 570, 128 NYS3d 628 [2d Dept 2020]; *Cusumano v AM&G Waterproofing, LLC*, 160 AD3d 922, 72 NYS3d 488 [2d Dept 2018]; *Fucci v Plotke*, 124 AD3d 835, 3 NYS3d 67 [2d Dept 2015]). DPS established, prima facie, that it was not an owner, contractor, or statutory agent under Labor Law §§ 240 and 241, and that it lacked the requisite authority to supervise or control the work that allegedly brought about plaintiff's injuries (*see Pereira v Hunt/Bovis Lend Lease Alliance II*, *supra*; *Fiore v Westerman Constr. Co.*, *supra*; *Cusumano v AM&G Waterproofing, LLC*, *supra*; *Fucci v Plotke*, *supra*). Moreover, inasmuch as plaintiff failed to address the branch of DPS' cross motion seeking dismissal of her claims under Labor Law § 241 in opposition, such claims are deemed abandoned, and are dismissed (*see Elam v Ryder Sys., Inc.*, *supra*; *Pita v Roosevelt Union Free Sch. Dist.*, *supra*; *Palomeque v Capital Improvement Servs., LLC*, *supra*). Further, as previously set forth, the Industrial Code provisions and OSHA regulations cited in plaintiff's bill of particulars were either inapplicable or insufficient predicates to impose liability under Labor Law § 241 (6).

In opposition, the opposing parties failed to submit evidence sufficient to raise a triable issue of fact as to DPS's liability under Labor Law §§ 200, 240 (1), and 241 (6), and in common-law negligence (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). At most, the record only shows that DPS had general supervisory authority over the subject work, which is insufficient in itself to impose liability under the Labor Law (*see Zupan v Irwin Contr. Inc.*, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]; *Fucci v Plotke*, *supra*; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]). Based on the foregoing, DPS is also entitled to summary judgment dismissing the cross claims asserted against it for common-law indemnification and contribution (*see Stone v Williams*, 64 NY2d 639, 485 NYS2d 42 [1984]; *Pereira v Hunt/Bovis Lend Lease Alliance II*, *supra*; *Tapinekis v Rivington House Health Care Facility*, 17 AD3d 572, 793 NYS2d 484 [2d Dept 2005]), and its cross claims for common-law indemnification and contribution against QBC, Insomniac, and BML are dismissed as academic (*see Hernandez v Asoli*, 171 AD3d 893, 97 NYS3d 227 [2d Dept 2019]; *Parabit Realty, LLC v Town of Hempstead*, 113 AD3d 661, 978 NYS2d 352 [2d Dept 2014]). Further, to the extent that plaintiff's cross motion seeks summary judgment in her favor on the issue of DPS' liability under Labor Law § 240, that portion of her cross motion is denied, as moot.

With regard to the cross claims for indemnification, a party's right to contractual indemnification depends upon the specific language of the parties of the relevant contract (*see Crutch v 421 Kent Dev, LLC*, 192 AD3d 982, 2021 NY Slip Op 01752 [2d Dept 2021]; *Mejia v Cohn*, 188 AD3d 1035, 136 NYS3d 480 [2d Dept 2020]; *Hanna v Milazzo*, 179 AD3d 907, 118 NYS3d 122 [2d Dept 2020]). Absent a legal duty to indemnify, a contract for indemnification should be strictly construed as to avoid imputing any duties which the parties did not intend to assume (*see Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 82 NYS3d 40 [2d Dept 2018]; *Petersen v Miller Auto Parts, Inc.*, 151 AD3d 893, 58 NYS3d 57 [2d Dept 2017]; *Tafolla v Aldrich Mgt. Co., LLC*, 136 AD3d 1019, 26 NYS3d 194 [2d Dept 2016]).

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QBC and BML established their prima facie entitlement to summary judgment dismissing DPS' cross claim for contractual indemnification against them (*see Maltese v Metropolitan Transp. Auth.*, 179 AD3d 780, 118 NYS3d 57 [2d Dept 2020]; *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 989 NYS2d 505 [2d Dept 2014]; *Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Here, there was no evidence of a contractual agreement between DPS and either QBC or BML. In opposition, DPS failed to raise a triable issue of fact (*see Maltese v Metropolitan Transp. Auth.*, *supra*; *Desena v North Shore Hebrew Academy*, *supra*; *Jamindar v Uniondale Union Free Sch. Dist.*, *supra*). DPS, in essence, concedes that it no contractual relationship existed between DPS and either QBC or BML.

However, Insomniac failed to establish its prima facie entitlement to summary judgment dismissing DPS' cross claim for contractual indemnification against it. The agreement between Insomniac and DPS set forth, in pertinent part, the following indemnification provision:

“To the fullest extent permitted by law, Insomniac expressly agrees to indemnify, defend and hold harmless DPS from and against any and all claims or loss arising out of any violation of any law, rule, regulation or order, and from any and all claims or liabilities, including reasonable attorneys fees, for loss, damage or injury to persons or property or whatever kind or nature arising from the acts or omissions of Insomniac, its parents, partners, affiliates, subsidiaries, successors or assigns and each of their respective agents, employees, representatives and contractors.”

Insomniac failed to establish, prima facie, that DPS would not be entitled to indemnification under the terms of the their agreement (*see Nugra v Aramalla*, 191 AD3d 683, 142 NYS3d 70 [2d Dept 2021]; *Byrd v Hughes*, 188 AD3d 975, 135 NYS3d 140 [2d Dept 2020]; *McDonnell v Sandaro Realty*, 165 AD3d 1090, 87 NYS3d 86 [2d Dept 2018]). In light of the foregoing, to the extent that the motion by QBC, Insomniac, and BML seeks dismissal of DPS' cross claim for contractual indemnification against Insomniac, that portion of their motion is denied, regardless of the sufficiency of the papers in opposition (*see Winegrad v New York Univ Med. Ctr.*, *supra*).

DPS failed to satisfy its prima facie burden dismissing the cross claim for contractual indemnification against it. Here, DPS does not specify its rationale for seeking dismissal of the remaining cross claim against it. The Court cannot grant summary judgment on a rationale not urged by DPS (*see Romanelli v Jones*, 179 AD3d 851, 117 NYS3d 90 [2d Dept 2020]; *Grucci v Grucci*, 174 AD3d 790, 102 NYS3d 885 [2d Dept 2019]). Accordingly, the balance of DPS' cross motion, seeking summary judgment dismissing the cross claim for contractual indemnification against it, is denied, regardless of the sufficiency of the papers in opposition (*see Winegrad v New York Univ Med. Ctr.*, *supra*).

The Court now turns to the portion of the motion by QBC, Insomniac, and BML for summary judgment dismissing the cross claim for breach of contract for failure to procure insurance against them. A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured, and that the provision was not complied with (*see Marquez v L & M Dev Partners, Inc.*, 141 AD3d 694,

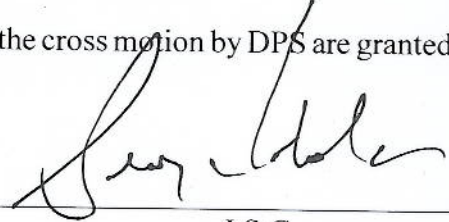
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35 NYS3d 700 [2d Dept 2016]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; *Tingling v C.I.N.H.R. Inc.*, 120 AD3d 570, 992 NYS2d 43 [2d Dept 2014]).

QBC, Insomniac, and BML established their prima facie entitlement dismissing DPS' cross claim against them based on their purported failure to procure insurance (*see Torres v 63 Perry Realty, LLC*, 123 AD3d 911, 1 NYS3d 142 [2d Dept 2014]; *Desena v North Shore Hebrew Academy, supra*; *Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 942 NYS2d 593 [2d Dept 2012]). QBC, Insomniac, and BML established, prima facie, that they were not contractually obligated to procure insurance. In opposition, DPS does not specifically address its cross claim alleging breach of contract for failure to procure insurance, and thus, it failed to raised a triable issue of fact (*see Torres v 63 Perry Realty, LLC; supra Desena v North Shore Hebrew Academy, supra; Ramcharan v Beach 20th Realty, LLC, supra*). Accordingly, DPS' cross claim based on the purported failure of QBC, Insomniac, and BML to procure insurance is dismissed.

According, the motion by QBC, Insomnia, and BML and the cross motion by DPS are granted in part and denied in part, and the cross motion by plaintiff is denied.

Dated: July 20, 2021



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION