SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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INDEX NO. 150079/2018

MOTION DATE _____

MOTION SEQ. NO. 003

JORGE TAOPANTA,

Plaintiff,

- v -

1211 6TH AVENUE PROPERTY OWNER, L.L.C., CUSHMAN & WAKEFIELD, INC.,1211 6TH AVENUE SYNDICATION PARTNERS JV, L.P., BENCHMARK BUILDERS, INC.,TWENTY - FIRST CENTURY FOX AMERICA, INC.,

Defendant.

DECISION + ORDER ON MOTION

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BENCHMARK BUILDERS, INC.

Plaintiff,

Third-Party
Index No. 595874/2018

-against-

LIBERTY CONTRACTING CORP.

Defendant.

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1211 6TH AVENUE PROPERTY OWNER, L.L.C., CUSHMAN & WAKEFIELD, INC., BENCHMARK BUILDERS, INC., TWENTY - FIRST CENTURY FOX AMERICA, INC.

Plaintiff,

Second Third-Party
Index No. 595817/2021

-against-

LIBERTY CONTRACTING CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 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

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

Upon the foregoing documents, the motion is determined as follows:

In this matter, Defendant 1211 6th Avenue Property Owner, LLC., ("1211") owned a commercial premises located at 1211 6th Avenue, New York, New York and leased part of the premises to Defendant Twenty-First Century Fox America, Inc. ("Fox"). In 2017, Fox hired Defendant/Third-Party Plaintiff Benchmark Builders Inc. ("Benchmark") as the general contractor for a gut renovation of its offices. Benchmark subcontracted with Third-Party Defendant Liberty Contracting Corp., ("Liberty") to be the

demolition contractor. Defendant Cushman & Wakefield, Inc. ("Cushman") was the property management company hired by Defendant 1211.

On July 20, 2017, while employed by Liberty, Plaintiff Jorge Fares Taopanta was removing demolition debris from the basement of the subject premises. At the time of his accident, Plaintiff worked with two others, wheeling two metal and glass doors on a dolly into an elevator from the basement to the first floor and then wheeled them to a Liberty garbage truck waiting on the street. Plaintiff testified at his deposition that when he and the other workers reached the garbage truck, they attempted to stand the door up vertically on the dolly to flip it into the truck. Plaintiff averred that while in the process of lifting the door, the dolly flipped over causing Plaintiff's co-workers to let go of the door, allowing the door to fall and crush Plaintiff's left hand against the hopper of the truck. Plaintiff claims that the door being moved at the time of his accident weighed over 300 pounds and stood over 13 feet tall and 5 feet wide.

Plaintiff pled causes of action based on Labor Law §240[1], §241[6] and §200 as well as common-law negligence. Plaintiff asserts the failure to provide him with a hoist and other safety devices to assist in placing the door in the garbage truck was a violation of Labor Law §240[1] which proximately caused his injuries. Defendants answered and Benchmark commenced a third-party action against Liberty asserting causes of action for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance. Defendants 1211, Cushman, Benchmark and Fox commenced a second third-party action against Liberty asserting causes of action for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

Plaintiff's motion for summary judgment summary judgment on the Labor Law §240[1] cause of action against 1211, Fox and Benchmark was denied by order of this Court dated July 7, 2021 (NYSCEF Doc No 108). In that decision, the Court held Defendants raised issues of fact concerning the applicability of Labor Law §240[1] and how the accident occurred.

Now, 1211, Fox, Cushman and Benchmark move for summary judgment dismissing Plaintiff's Labor Law §241[6], §200 and common-law negligence claims. Movants also seek summary judgment on their common-law and contractual indemnification causes of action against Liberty. Plaintiff and Liberty oppose the motion.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of triable material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

To establish liability on a Labor Law §241[6], a plaintiff must demonstrate that their injuries were proximately caused by a violation of the Industrial Code applicable under the circumstances (*see Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872 [2d Dept 2021]; *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec Co*, 81 NY2d 494, 501-505 [1993]). Each section of the Industrial Code relied upon a plaintiff must be a "concrete specification" "mandating a distinct standard of

conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015], *quoting Misicki v Caradonna, supra and Ross v Curtis-Palmer Hydro-Elec. Co.*, supra; *see also Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (*see Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), a plaintiff is not required to demonstrate freedom from comparative fault on a motion for summary judgment (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, supra; *see also Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

To be entitled to summary judgment, Defendant is required to show that all the sections pled by Plaintiff were not concrete, inapplicable or did not cause his injuries (*see generally Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020]).

In the complaint, Plaintiff pled Defendants violated the following sections of the Industrial Code: 23-1.7; 23-8.1(a - f, k, and l); 23-8.2 (a - i); 23-8.5; 23-9.8(a - 1); 23-1.7(d); 23-1.7(e)(1); 23-1.7 (e)(2); 23-2.1(a & b); 23-3.3(b, c, e, f, g and k); 23-1.22 (a)(b)(1-4); 5 23-1.28; and/or 23-3.3(l). In his bills of particulars, Plaintiff narrowed this list and only claimed reliance on sections 23-1.7; 23-8.1(a - f, k and l); 23-8.2 (a - i); 23-8.5 and 23-9.8 (a - 1). Newly claimed was that Defendants violated "OSHA regulations".

In support of the motion, Defendants demonstrated that all the Industrial Code sections cited by Plaintiff were inapplicable, insufficiently specific to be actionable or repealed (*see eg Becerra v Promenade Apartments Inc.*, supra; *Singh v Manhattan Ford Lincoln, Inc.*, 188 AD3d 506 [1st Dept 2021]; *James v Alpha Painting & Constr. Co., Inc.*, 152 AD3d 447 [1st Dept 2017]; *Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578 [1st Dept 2012]; *Fitzgerald v N.Y. City Sch. Constr. Auth.*, 18 AD3d 807 [1st Dept 2005]).

In opposition, since Plaintiff raised no argument in support of any of the above sections, he abandoned reliance on same (*see Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573 [1st Dept 2022]; *Digirolomo v 160 Madison Ave LLC*, 294 AD3d 640 [1st Dept 2021]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]). Instead, Plaintiff posits that Defendants violated section 23-1.28[a]. Plaintiff raising this provision for the first time in opposition to the motion is not fatal, as there does not appear any surprise or prejudice to Defendants exists (*see Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004]).

Insofar as Plaintiff is claiming that the hand cart he was using was not in good repair, that portion of section 23-1.28[a] is a non-actionable general directive (*see Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413, 413 [1st Dept 2014]). Plaintiff's assertion that this section was violated as the cart he was using lacked handles is unavailing. Nothing in that provision mandates that "hand-propelled" vehicles come equipped with handles. Plaintiff's reliance on *Gonzalez v City of New York*, 304 AD2d 709 [2d Dept 2003] is misplaced. As noted supra, the Appellate Division, First Department has taken the position that "section 23-1.28 (a) is a general directive that cannot serve as a predicate for liability under Labor Law § 241 (6)" (*see Wegner v State St. Bank & Trust Co.*, 298 AD2d 211, 212 [1st Dept 2002]).

Accordingly, Plaintiff's claim pursuant to Labor Law §241[6] fails as a matter of law.

Labor Law §200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). "A claim for common-law negligence may lie even though there is no Labor Law § 200 liability" (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing

on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Although "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another, this principle is not absolute and a plaintiff may claim that an accident was caused by both a defect in the premises and the manner in which the work was performed (*see eg Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018]).

Where a plaintiff's injuries arise out a dangerous condition at the premises "'a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], *citing Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition 'only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it'" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], *citing Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, supra at 144; *see also Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]).

Here, Plaintiff's accident arose out of the manner and means of his work, to wit the use and alleged inadequacy of the cart used, not a dangerous condition on the premises (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]). Defendants, therefore, were required to demonstrate, *prima facie*, that none of the Defendants had the authority to control Plaintiff's work (*see eg Goodwin v Comcast Corp.*, 42 AD3d 322, 323 [1st Dept 2007]).

Plaintiff testified at his deposition that he only received instructions from Franco and Maximo, his supervisors at Liberty. He also acknowledged that he never received directions from anyone from Fox regarding his work. Bryant O'Neal, an employee of Fox, testified that no one from Fox interacted with Liberty to ensure a safe work site was maintained. Contrary to Plaintiff's assertion, his own testimony concerning who instructed him regarding his employment sufficiently demonstrates Defendants' *prima facie* case (*see Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, 170 AD3d 509, 511 [1st Dept 2019]; *Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). In opposition, Plaintiff failed to proffer any evidence that any of the Defendants exercised the requisite control to raise an issue of fact.

Accordingly, Plaintiff's claims pursuant to Labor Law §200 and for common-law negligence fail as a matter of law.

Regarding the branch of the motion by Defendants for summary judgment on their claims for contractual indemnification from Liberty, "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *quoting Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Where there is no legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co.,*

L.P., 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* supra at 65).

Article 8[A] of the subcontract between Benchmark and Liberty reads as follows:

> To the fullest extent permitted by law) Subcontractor agrees to indemnify, defend and hold harmless Benchmark Builders, Inc., and additional indemnitees, if any, their officers, directors, agents, employees, consultants and partners (hereafter collectively "Indemnitees") from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought or assumed against any of the Indemnitees by any person or firm, arising out of or in connection with or as a result of or consequence of the performance of the Work of the Subcontractor under this agreement, as any additional work, extra work or add-on work, whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly, by the Subcontractor including any subcontractors thereof and their employees. The parties expressly agree that this indemnification agreement contemplates 1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and 2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault. Under no circumstance shall this agreement be interpreted to require Subcontractor to indemnify an Indemnitee for an Indemnitee's negligence or wrongdoing. Where partial indemnity is provided under this agreement, costs, professional fees, attorneys' fees, expenses, disbursement, etc. shall be indemnified on a pro rata basis. Indemnification under this paragraph shall operate whether or Subcontractor has placed and maintained the insurance specified under paragraph 5 hereof. Attorneys' fees, court costs, expenses and disbursements shall be defined to include those fees, costs, etc. incurred in defending the underlying claim and those fees, costs, etc. incurred in connection with the enforcement of this indemnity agreement.

Further, Article 2[G] provides that "'Indemnitees' shall include Contractor, and all parties Contractor is obligated by contract or otherwise, including its consultants, partners, officers, etc. to indemnify, defend and hold harmless".

Based upon the contract language, the obligation of Liberty to indemnify Defendants is triggered not only in the case of their negligence, but also when "arising out of or in connection with or as a result of or consequence of the performance of the Work of the Subcontractor" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1st Dept 2018]). Since the testimony and findings of the Court, supra, demonstrate Plaintiff's accident arose out of his work, Defendants have established this indemnification provision was trigged.

Common-law indemnification cannot be obtained "unless [the putative indemnitee] has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Further "[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision" (*id.*). Based upon the Court's rulings, supra, Defendants' liability, if any, will be purely vicarious under Labor Law §240[1] and Liberty, as his employer, supervised Plaintiff's work.

In opposition, Liberty's reliance on Workers' Compensation Law §11 is misplaced as Plaintiff has alleged he sustained a "grave injury", the loss of his left forefinger, and no evidence was proffered that the injury is not casually related to the accident (*see Cocom-Tambriz v Surita Demolition Contr., Inc.*, 84 AD3d 1300, 1301 [2d Dept 2011]).

However, since the issue as to Defendants' liability remains unresolved, summary judgment on the claims for contractual and common-law indemnification are conditional only (*see eg Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 [1st Dept 2018]; *see also Golec v Dock St. Constr., LLC*, 186 AD3d 463, 466 [2d Dept 2020]). The contractual indemnification claim is also limited to damages exceeding the limits of Liberty's insurance policy, which is also insuring Defendants in this action (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]). The anti-subrogation rule is implicated by the duty to defend, and Liberty's insurer acknowledged Defendants' tender (*see Pastorino v City of New York*, 191 AD3d 440 [1st Dept 2021]).

Accordingly, it is

ORDERED that the branch of Defendants' motion for summary judgment is granted to the extent that Plaintiff's claims under Labor Law §241[6] and Labor Law §200 as well as for common-law negligence are dismissed, and it is

ORDERED that the branch of Defendants' motion for summary judgment against Liberty on its claims for common-law and contractual indemnification are conditionally granted pending a determination of Plaintiff's Labor Law §240[1] claim and, based on the anti-subrogation rule, contractual indemnification is limited to Plaintiff's damages exceeding the limits of Liberty's insurance policy covering Defendants.

8/26/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

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