

<b>Vagle v L.S. Elec. Corp.</b>
2022 NY Slip Op 30427(U)
February 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 512493/16
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4<sup>th</sup> day of February, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,  
Justice.

-----X

ERIK VAGLE,

Plaintiff,

-against-

Index No.: 512493/16

L.S. ELECTRIC CORP., KNOX L. MCILWAIN,  
CLAIRE A. KELLY and CHRISTA M. KELLY,

Defendants.

-----X

L.S. ELECTRIC CORP.,

Third-Party Plaintiff,

-against

EVERLAST CUSTOM CONSTRUCTION CORP.,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

145-165,172-188,218-  
236,273, 285-292

Opposing Affidavits (Affirmations) \_\_\_\_\_

193-197,210-212, 237,  
249-252, 258-260, 261, 262,  
264, 265, 266, 293-296, 299

Affidavits/ Affirmations in Reply \_\_\_\_\_

263, 267, 271

Other Papers: \_\_\_\_\_

L.S. Electric Corp., (L.S.) moves (M.S.10) for an order pursuant to CPLR 3212, granting it summary judgment dismissing the verified complaint of plaintiff Erik Vagle

(plaintiff) and all cross claims against L.S.; and granting L.S. summary judgment on its common-law indemnification cross claim against Knox L. McIlwain (McIlwain), Claire A. Kelly (Claire) and Christa M. Kelly (Christa) (collectively, “defendant owners”). Plaintiff moves (M.S.11) for an order: (1) granting him summary judgment on the issue of liability against defendant owners and L.S., pursuant to Labor Law §§ 240(1), 241(6), and 200; and (2) granting him leave to supplement his bill of particulars to assert violations of Industrial Code §§ 23-1.21 (b) (4) (i) and 23-1.21 (b) (4) (iv), and deeming the supplemental verified bill of particulars timely served.

Defendant Christa moves (M.S.12) for an order granting summary judgment dismissing plaintiff’s claims as asserted against her, and granting summary judgment in her favor on her common-law indemnification cross claim against co-defendants McIlwain, Claire and L.S.

Third-party defendant Everlast Custom Construction Corp., (Everlast) moves (M.S. 13) pursuant to CPLR §§ 603 and 1010, severing the third-party action from the main action, or in the alternative, pursuant to CPLR 3124, (1) compelling the defendant owners to respond to Everlast’s Combined Demands and Notice for Discovery and Inspection dated August 25, 2020, (2) compelling all parties to appear for depositions conducted by Everlast; (3) compelling plaintiff to submit to Independent Medical Examinations (IME), including but not limited to examinations conducted by an orthopedic surgeon, neurologist, neuropsychiatrist, and neuropsychologist; and (4) extending the time for Everlast to file dispositive motions.

Defendants McIlwain and Claire cross-move (M.S.14) for an order granting them summary judgment on their cross claim for common-law indemnification against L.S.

### ***Background and Procedural History***

The defendant owners (McIlwain, Claire and Christa) jointly owned a multi-story residential building located at 120 3<sup>rd</sup> Place in Brooklyn. In Fall 2013, the defendant owners undertook a renovation of the premises that included the construction of a first-floor rear addition. L.S. was hired to perform certain electrical work in regard to the construction. Plaintiff was the owner of All Bridge Contracting Corp. (hereinafter, “All Bridge”), an interior and exterior renovation company that was retained to perform roofing work. Everlast Custom Construction (hereinafter, “Everlast”) was the entity that pulled the general contractor permit for the construction project. On April 10, 2014, Louis Santo (Santo), L.S.’s principal, was using an eight-foot fiberglass ladder to reach the landing of the third-floor roof in order to gain access to a fire escape. Santo used the fire escape to climb to the fourth-floor roof in order to work on wiring for a central air conditioning unit. He testified that he inspected the ladder prior to using it and found that it was safe to use. At some point, Santo left the ladder unattended and went to his van to retrieve a part. He testified that prior to leaving the site, he checked the ladder and ensured that it was secure, stable, and properly footed. At the same time, plaintiff came to the premises to inspect caulking work that had been performed by Pedro an All Bridge employee. Plaintiff testified that he did not see any other trades working when he arrived. He walked through the building to the rear yard and climbed an extension ladder to perform his inspection, while Pedro held the bottom of the ladder. Plaintiff alleges that while he was standing on the

5th or 6th rung of his ladder, the eight-foot fiberglass ladder, which had been positioned above him, unexpectedly fell through an opening in the wall and struck him on the head. t

On or about July 20, 2016, plaintiff commenced the instant action by the filing of a summons and complaint. Issue was joined by McIlwain and Claire with the service of their verified answer with cross claims on October 25, 2016; by L.S. with service of its verified answer with cross claims on November 1, 2016; and by Christa on March 27, 2017, with the service of her verified answer with cross claims. Plaintiff was deposed on May 30, 2018, January 22, 2019, and January 27, 2020. Louis Santo was deposed on February 13, 2020 and the depositions of McIlwain, Christa and Claire Kelly were completed on February 25, 2020. Thereafter, on March 10, 2020, L.S. commenced a third-party action against Everlast. Plaintiff filed a Note of Issue on March 13, 2020. The following motions have ensued.

***L.S.'s Motion (Mot. Seq. No. 10)***

L.S. moves for summary judgment dismissing plaintiff's claims and all cross claims asserted against L.S.. In addition, L.S seeks summary judgment in its favor on its common-law indemnification cross claim as against the defendant owners. L.S. argues that plaintiff's Labor Law claims are not applicable to L.S. as it did not own the premises, was not a general contractor or a statutory agent, and had no authority to direct, supervise or control the plaintiff's work or the safety of the construction site. It is undisputed that L.S. is not an owner or general contractor. However, Labor Law § 240(1) liability could be imposed upon if it were deemed an agent of the owners. L.S. did not have a contract with the defendant owners creating an agency and was merely performing electrical work, nor

did it have authority to coordinate any other trades at the job site and did not have authority to direct or control the work that plaintiff and All Bridge were performing. Nor was L.S. delegated the authority to ensure the safety of the work site or to stop any unsafe practices.

In opposition, plaintiff argues that L.S. should be deemed an agent of the owner for purposes of Labor Law § 240 (1) liability because it had supervisory control and authority over the work being done where the plaintiff was injured. In this regard, plaintiff notes that Santo testified that he had positioned the fiberglass extension ladder and leaned it against a wall to access the third floor and its roof. Plaintiff asserts that Santo failed to secure the ladder or lay it down when not in use, noting that Santo testified that either he or his employee positioned the ladder and does not remember if he secured it.

“A party is deemed to be an agent of an owner or general contractor under the Labor Law when [he or she] has supervisory control and authority over the work being done where a plaintiff is injured” (*Navarra v Hannon*, 197 AD3d 474, 475-476 [2d Dept 2021], quoting *Sanders v Sanders-Morrow*, 177 AD3d 920, 922 [2d Dept 2019]). “An agent's liability is limited “to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created” (*Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; see *Bennett v Hucke*, 131 AD3d 993,994 [2d Dept 2015]). “[T]he nondelegable liability imposed by Labor Law § 240 (1) attaches only to a contractor that has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of his injury” (*Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 488 [2d Dept 2006] [citations omitted]).

Here, L.S. has established that it was not delegated the authority to supervise or control the work that plaintiff was engaged in at the time of his injury, and thus cannot be deemed an agent of the defendant owners. Plaintiff fails to raise a triable issue of fact in opposition. Accordingly, that branch of L.S.'s motion seeking summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 claims as asserted against L.S. is granted, and said claims are dismissed as against L.S.

L.S. further seeks summary judgment dismissing plaintiff's common-law negligence claim and the owner defendants' cross claims seeking common-law indemnification. L.S. maintains that plaintiff fails to establish a prima facie case of negligence against L.S. and fails to establish a dangerous or defective condition for which L.S. can be held liable. L.S. asserts that plaintiff was injured due to his own failure to wear a hard hat at the site.

In opposition, plaintiff points out that the testimony reveals that Santo left the ladder at issue unsecured which created a dangerous condition at the worksite, which led to plaintiff's injuries. McIlwain and Claire also oppose this branch of L.S.'s motion for the same reason.

“A subcontractor ‘may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area’” (*Thomas v Benton*, 112 AD3d 812, 813 [2d Dept 2013], quoting *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2011] [internal quotation marks omitted]; see *Erickson*, 75 AD3d at 523). “An award of summary judgment in favor of a subcontractor dismissing a negligence cause of action is

improper where the evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries” (*Erickson*, 75 AD3d at 523, quoting *Marano v Commander Elec., Inc.*, 12 AD3d 571, 572-573 [2d Dept 2004]).

Here, the record reveals that L.S. was utilizing a fiberglass ladder in an area above the area in which plaintiff was performing work. Santo did not recall if he had secured the fiberglass ladder in any way. Plaintiff testified that while he was performing his work at the site, he was struck on the head by what he later learned was a fiberglass ladder that had fallen from the area above where he was performing his work.

The court finds that a triable issue of fact exists as to whether the work that L.S. was performing, and the failure to secure the ladder being used to perform such work, created a dangerous condition and an unreasonable risk of harm that resulted in plaintiff's accident. Accordingly, that branch of L.S.'s motion seeking summary judgment dismissing plaintiff's negligence claim is denied. That branch of L.S.'s motion seeking summary judgment on its cross claim seeking common law indemnification as against the defendant owners is denied, as is the branch seeking dismissal of the defendant owners' cross claim for common law indemnification. As this decision does not determine which party's negligence, if any, caused the subject accident, summary judgment would be premature with respect to common-law indemnification (*see Martinez v City of New York*, 73 AD3d 993, 999 [2d Dept 2010]; *Nasuro, LLC*, 49 AD3d at 832).

***Plaintiff's Motion (Mot. Seq. No. 11)***

Plaintiff moves for an order: (1) granting him summary judgment on the issue of liability against defendant owners and L.S., pursuant to Labor Law §§ 240 (1), 241 (6), and 200; and (2) granting him leave to supplement his bill of particulars to assert violations of Industrial Code §§23-1.21 (b) (4) (i) and 23-1.21 (b) (4) (iv), and deeming the supplemental verified bill of particulars timely served.

***Labor Law § 240 (1)***

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . .

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). Accordingly, “[t]he purpose of the statute is to protect against ‘such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured’” (*Ross v*

*DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501). “In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, ‘the single decisive question is whether [the] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential’” (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]). The duty to provide the required protection against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (see *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; see *Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*). “A worker’s comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]).

In opposition, Christa does not dispute that she is an owner of the premises but argues that the action should be dismissed as against her because she did not contract for the work resulting in the plaintiff’s injuries and did not have the right to control it. She asserts that the work was being done for the benefit of McIlvain and Claire to their unit. In

addition, Christa argues that should the court determine that she is not entitled to dismissal, plaintiff has failed to establish a prima facie violation of Labor Law §240 (1), and thus this branch of his motion should be denied. In this regard, Christa points to plaintiff's testimony that he did not see the ladder which allegedly fell on him prior to the accident and did not know how long it was on the roof of the adjoining structure. Christa contends that the plaintiff has failed to establish that the subject ladder was an object that fell while being hoisted or secured or that it needed to be secured for the purpose it was being used. In support of this position, she cites to *Henriquez v Clarence P. Grant Hous. Dev. Fund Co., Inc.* (186 AD3d 577, 577-578 [2d Dept 2020]), in which the Second Department upheld the Supreme Court's denial of plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action. The *Henriquez* court found that the plaintiff failed to establish that the plank that struck him was caused to fall due to the absence or inadequacy of a safety device, where he testified that he did not see what struck him and only learned about what had occurred when he awoke in the hospital and was informed by his coworkers. Christa notes that the plaintiff herein similarly did not see what struck him, and thus has failed to establish that it was an object that required securing for the purpose it was being utilized.

McIlwain and Claire also oppose plaintiff's motion in its entirety arguing that he has failed to meet his burden of submitting competent evidence in admissible form demonstrating his prima facie entitlement to summary judgment. Specifically, plaintiff testified that he did not see the object that is alleged to have struck him and that his assertion that it was a ladder is based upon information he states was given to him by his employee,

Pedro, who has not submitted any sworn statement or testimony. Thus, McIlwain and Claire contend that plaintiff has failed to demonstrate a prima facie violation of Labor Law § 240 (1).

In reply, plaintiff contends that he was struck by an unattended and unsecured extension ladder that had been leaning against the building in the area above where he was performing his work.

“To prevail on a motion for summary judgment under a section 240 (1) ‘falling object’” case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking” (*Pazmino v 41-50 78th St. Corp.*, 139 AD3d 1029, 1030 [2d Dept 2016], quoting *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]). “In addition, the plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Pazmino*, 139 AD3d at 1030, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

Here, the court finds that plaintiff has failed to establish his prima facie entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim. Plaintiff testified that he did not know what had struck him on the head until his coworker Pedro informed him that it was a ladder. Specifically, he testified that he never saw the ladder that struck him at the time of the accident and only saw it later after it had been re-erected (NYSCEF Doc No. 155, Plaintiff’s tr at 75, lines 17-23). Plaintiff also testified that he did not see any other workers performing work at the premises prior to his accident. He further testified that he stayed at the site for approximately one hour after the accident and that a worker from

another company came to the site and apologized to him stating that it was his fault (*id.* at 48, lines 15-25, 49-50, 51, lines 2-25, 52, lines 2-4, and 55, lines 14-21). The plaintiff did not know the name of the man or the entity for which he worked. Conversely, Santo testified that he and his coworker were working at the premises prior to plaintiff's accident and had used the fiberglass ladder. They were then informed about the accident by Pedro, who told him that the ladder from above (that L.S. had been using) fell and struck plaintiff. Santo testified that he did not see the ladder on top of plaintiff, but instead claimed that it was still in the area where he had been using it. Santo, however, did not recall if the ladder was in the same position that he had left it in (NYSCEF Doc No. 166, Santo tr at 53, lines 13-25, 54, lines 2-14, 57, lines 2-25, and 99, lines 4-18).

In light of the issues of fact as to how the accident occurred, that branch of plaintiff's motion seeking summary judgment pursuant to Labor Law § 240 (1) is denied (*see Henriquez*, 186 AD3d at 577-578 [court held plaintiff failed to establish that the object that struck him fell because of the absence or inadequacy of a safety device pursuant to Labor Law § 240 (1) where his testimony revealed that he did not see what had struck him and only learned what had occurred from his coworkers]; *Pazmino*, 139 AD3d at 1030 [court held that under the circumstances, where plaintiff was struck in the head by piece of wood, but did not see wood fall or from where it had fallen, he failed to demonstrate that it fell because of absence or inadequacy of safety device]).

***Labor Law § 241 (6)***

Plaintiff seeks leave to amend his bill of particulars to assert violations of Industrial Code §§ 23-1.21 (b) (4) (i) and 23-1.21 (b) (4) (iv) in support of his Labor Law § 241 (6)

claim. He argues that these code violations are based upon, and supported by, the deposition testimony and evidence before this court and were inadvertently omitted from his bill of particulars. Upon granting such relief, he seeks summary judgment on his Labor Law § 241 (6) claim as based upon violations of these Industrial Code provisions.

Labor Law § 241 (6), provides, in pertinent part, that:

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

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]).

“Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (*Matute v Town of*

*Hempstead*, 179 AD3d 1047, 1049 [2d Dept 2020]; *see* CPLR 3025[b].. Significantly, “leave to amend to identify certain relevant Industrial Code provisions may properly be granted, even after the note of issue has been filed, where, . . . , the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendants” (*Matute*, 179 AD3d at 1049; *see Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [2d Dept 2017]; *Galarraga v City of New York*, 54 AD3d 308, 310 [2d Dept 2008]).

Plaintiff asserts that Industrial Code § 23-1.21 (b) (4) (i) applies to the facts of the instant case and that defendants violated this provision. Industrial Code § 23-1.21 (b) (4)

(i) provides as follows:

(4) Installation and use [of ladders].

(i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.

Plaintiff argues that the unsecured ladder that struck him was used as a means of access between floors of the building and that it was not securely fastened. Additionally, he argues that the failure to secure the ladder was a violation of this provision thereby entitling him to summary judgment on his Labor Law § 241 (6) claim insofar as it is predicated upon section 23-1.21 (b) (4) (i).

In opposition, Christa argues that leave to amend should not be given as this Industrial Code provision is not applicable to the facts of the case. She asserts that the key determinative factor is whether the ladder in question was being used as a regular means of access between two levels of a building or structure which would require it to be nailed or otherwise securely fastened or affixed. Christa notes that on the date of the accident, the ladder was used to obtain access to the exterior landing of the third floor of the premises so that a fire escape could be accessed to reach the fourth-floor roof. Accordingly, she asserts that the ladder was only being used situationally and not as a regular means of access. Thus, Christa contends that this proposed amendment lacks merit and is not supported by the record.

McIlwain and Claire also argue that this branch of plaintiff's motion should be denied as the Industrial Code provisions he seeks to assert are not applicable to the facts of the instant case. They note that Santo testified that there were means to access the roof of the existing structure located inside the building (NYSCEF Doc No. 159, Santo tr at 88, lines 16-21).

In reply, plaintiff argues that the fiberglass ladder was the only means of access to the third floor and the highest part of the roof, and thus was required to be properly secured.

That branch of plaintiff's motion seeking leave to amend his bill of particulars to assert a violation of Industrial Code § 23-1.21 (b) (4) (i) is granted. However, the court finds that plaintiff has failed to establish his prima facie entitlement to summary judgment on his Labor Law § 241 (6) claim as predicated upon this provision inasmuch as the owner defendants have raised an issue of fact as to whether the ladder at issue was in fact used as

a regular means of access, and thus whether section 23-1.21 (b) (4) (i) is applicable to the facts of the instant case (*see M. Terc v 535 Coster Realty Inc.*, 176 AD3d 562, 563 [1st Dept 2019]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 462 [2d Dept 2008]).

Plaintiff also contends that Industrial Code § 23-1.21 (b) (4) (iv) applies and was violated. This provision provides that:

(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

Plaintiff asserts that this provision was violated as the owner defendants failed to secure the extension ladder and that this failure was a proximate cause of his injuries. Moreover, plaintiff argues that this provision is not solely applicable when a person is using a ladder. Plaintiff cites *Torres v Perry St. Dev. Corp.* (104 AD3d 672, 676 [2d Dept 2013]), in which the court stated “[c]ontrary to the defendants’ contentions, it is of no consequence that the plaintiff was not on the ladder when he was injured, so long as the violation of the Industrial Code was a proximate cause of his injuries.”

In opposition, Christa argues that plaintiff should not be permitted to supplement or amend his bill of particulars to assert a violation of § 23-1.21 (b) (4) (iv), as it is only applicable to a ladder upon which work is being performed from rungs between six and ten

feet above the ladder's footing at the time of the incident. She notes that it is undisputed that no work was being performed from the ladder that allegedly fell and struck plaintiff.

McIlwain and Claire also oppose this proposed amendment arguing that there is no evidence that anyone was working on the ladder that is alleged to have struck plaintiff at the time of the accident. Thus, they contend that this Industrial Code section is not applicable and is insufficient to support plaintiff's Labor Law § 241 (6) claim.

That branch of plaintiff's motion seeking leave to amend his bill of particulars to assert a violation of Industrial Code § 23-1.21 (b) (4) (iv) is denied. Although plaintiff cites to *Torres* in support of his contention that this provision is not only applicable when a person is using a ladder, a careful reading of *Torres* reveals that it involved an accident in which the plaintiff was struck by both a falling ladder as well as the person who had been working on it. Here, there was no one working on the ladder that struck plaintiff, and this Industrial Code provision applies "only when work is being performed from a ladder" (*Cordova v 653 Eleventh Ave. LLC*, 190 AD3d 637, 637-638 [1<sup>st</sup> Dept 2021], quoting *Arigo v Spencer*, 39 AD3d 1143, 1145 [4th Dept 2007]; see e.g., *M. Terc*, 176 AD3d at 563; see also *Artoglou*, 57 AD3d at 462). Accordingly, that branch of plaintiff's motion seeking leave to amend to assert a violation of Industrial Code § 23-1.21 (b) (4) (iv) is denied. To the extent that plaintiff asserted a violation of other Industrial Code sections in his bill of particulars, the court finds that plaintiff has abandoned all of the other Industrial Code sections as predicates for liability under this statute (see *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other

provisions of the Industrial Code by failing to address them in his brief]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017].

***Labor Law § 200 / Common-Law Negligence***

Plaintiff also seeks summary judgment in his favor on his Labor Law § 200 and common-law negligence claims as asserted against defendants. For the reasons discussed above that branch of plaintiff's motion on his common-law negligence claim as asserted against L.S. is denied. With regard to plaintiff's claims as asserted against the defendant owners, he argues that liability should be imposed upon them as the unsecured ladder constituted a dangerous condition at the worksite which they were responsible for maintaining in a safe condition.

Section 200 of the Labor Law statute is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Where, as here, "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the

dangerous or defective condition while having actual or constructive notice of it” (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]).

Plaintiff argues that the defendant owners had a duty to maintain a safe work environment and correct unsafe conditions at the site, and that the unsecured ladder was present at the site for a sufficient amount of time to constitute constructive notice and impose Labor Law § 200 liability on the defendant owners.

In opposition, Christa argues that this branch of plaintiff’s motion should be denied as it is undisputed that she did not hire any of the contractors, including plaintiff, and did not direct, supervise, or control the means or methods of his work, nor did she have the authority to stop the work. Moreover, she maintains that there is no evidence establishing the existence of any allegedly dangerous or defective condition with respect to the ladder or notice of said ladder being left unsecured at the site. Specifically, Christa points out that plaintiff himself testified that he never saw the ladder that struck him prior to the accident and only later saw the ladder from a distance (NYSCEF Doc No. 155, Plaintiff’s tr at 75, lines 17-23). Finally, she points to her own testimony that she had never seen the ladder depicted in the photograph she was shown during her deposition (NYSCEF Doc No. 164, Christa’s tr at 13, lines 12-22). Accordingly, Christa argues that she could not have had notice that the ladder was defective or negligently placed prior to plaintiff’s alleged accident.

Claire and McIlwain also oppose this branch of plaintiff’s motion, arguing that the plaintiff has failed to establish that they caused or created a dangerous condition at the site,

or that they had prior notice of such condition and failed to remedy it. In this regard, they point out that the record indicates that the ladder at issue was set up by L.S. on the morning of the accident and that their testimony reveals that neither Claire nor McIlwain were home at the time it took place as they were both at work. Thus, they argue that they neither created the alleged dangerous condition nor had actual or constructive notice of it. Moreover, they argue that plaintiff was negligent in failing to wear his hard hat on an active construction site, which caused or exacerbated his alleged injury.

In reply, plaintiff maintains that the unsecured ladder was present for a sufficient amount of time to impose liability upon the defendant owners.

“In cases involving a dangerous condition on the premises, ‘property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident’” (*Simmons v City of New York*, 165 AD3d 725, 728 [2d Dept 2018], quoting *Ortega*, 57 AD3d at 61. “To establish constructive notice, the plaintiff must show that the dangerous condition was visible and apparent and had existed for a sufficient time before the accident to permit defendants' employees to discover and remedy it. The general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's injury” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, it is undisputed that none of the defendant owners created the dangerous condition. In addition, plaintiff fails to establish that any of the owner defendants had actual or constructive notice of the ladder that had been placed by L.S. on the day of the

accident, and the testimony reveals that none of the defendant owners were present at the premises at the time of plaintiff's accident. Accordingly, that branch of plaintiff's motion seeking summary judgment in his favor on his Labor Law § 200 and common law negligence claims as asserted against the defendant owners is denied.

*Christa's Motion (Mot. Seq. No. 12)*

Christa moves for an order granting summary judgment dismissing plaintiff's claims and granting her summary judgment on her common-law indemnification cross claim against co-defendant owners McIlwain and Claire and defendant L.S.

Here, the court finds no merit to Christa's argument that plaintiff's claims should be dismissed as against her because she was not the party that contracted for the work that caused plaintiff's injuries. Although Christa did not contract for the work that was being performed at the time of plaintiff's accident, she is still an owner of the property subject to statutory liability.

With regard to plaintiff's claims as based upon a violation of Labor Law §§ 240 (1) and 241 (6) as predicated upon a violation of Industrial Code § 23-1.21 (b) (4) (i), as discussed above in relation to plaintiff's motion, the court has determined that questions of fact exist with regard to whether a violation of these statutes proximately caused plaintiff's injuries. Accordingly, that branch of Christa's motion seeking summary judgment dismissing these claims as asserted against her is denied. However, that branch of her motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as asserted against her is granted. The testimony reveals that she

lacked actual or constructive knowledge of the dangerous condition that caused plaintiff's injuries.

Summary judgment is premature with respect to that branch of Christa's motion seeking common-law indemnification (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097-1098 [2d Dept 2018]; *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012]).

***Everlast's Motion (Mot. Seq. No. 13)***

Everlast moves for an order, pursuant to CPLR 603 and 1010, severing the third-party action against it from the main action; or in the alternative, pursuant to CPLR 3124, (1) compelling the owner defendants to respond to Everlast's Combined Demands and Notice for Discovery and Inspection dated August 25, 2020, by a date certain; (2) compelling all parties to appear for depositions conducted by Everlast on dates certain following receipt of all outstanding discovery by Everlast; (3) compelling plaintiff to submit to IME's; and (4) extending the time for Everlast to file dispositive motions sixty (60) days after completion of all depositions.

In support of its motion, Everlast notes that the third-party summons and complaint was filed on March 11, 2020, and was not served until June 25, 2020. Everlast points out that all depositions had been completed prior to it being impleaded and plaintiff filed a note of issue on March 13, 2020. Everlast notes that given that discovery is complete, note of issue has been filed, and Everlast was not included in any of the discovery, it cannot properly defend itself in this action and thus severance is appropriate. Alternatively, Everlast argues that McIlwain and Claire should be ordered to respond to its discovery

demands, Everlast should be permitted to conduct depositions and IMEs and its time to make a dispositive motion should be extended to 60 days after the completion of all depositions.

Although plaintiff does not oppose that branch of the motion seeking severance, he opposes that portion of the motion seeking to depose to the extent that he seeks to limit questioning solely to Everlast and that said questioning only addresses material and subject matter not covered in his prior depositions.

McIlwain and Claire oppose severance arguing that any discovery necessitated by the third-party action, including depositions and medical examinations can be conducted in an expeditious fashion. They contend that there would be no prejudice to plaintiff or Everlast if the third-party action is not severed.

L.S. opposes the motion seeking to sever the third-party action from the main action and compelling L.S. to submit to a deposition. However, L.S. does not oppose the remainder of Everlast's motion. L.S. contends that it did not know of Everlast's existence and presence on this project until Claire was deposed on February 25, 2020, which revealed that Everlast had obtained the general contractor permit for the project. L.S. contends that is when it learned that Everlast had built the cinderblock masonry structure, which contained a cutout through which plaintiff claims the ladder fell and struck him. Thus, L.S. argues it is possible that the cutout was left unsecured by the defendant owners and Everlast. L.S. further points out that it commenced the third-party action within two weeks of learning of Everlast's involvement.

It is well settled that “the court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just.” In making its determination, “the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party” (CPLR 1010). “In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others” (CPLR 603). A party moving to dismiss or sever must demonstrate that a failure to do so will either cause an undue delay in the determination of the main action or will result in prejudice of the substantial rights of any party to the action (*see New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940,941 [2nd Dept 2016]). “Severance is ‘generally inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial consistency of verdicts will be served by having a single trial’” (*Barrett v New York City Health & Hosps. Corp.*, 150 AD3d 949, 951 [2nd Dept 2017], quoting *New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 [2d Dept 2011]).

Here, the court finds that the main action and the third-party action seeking indemnification involve common questions of law and fact, and that Everlast has failed to demonstrate that the failure to sever the third-party action will result in any prejudice. Thus, Everlast’s motion seeking to sever the third-party action is denied. The remainder of its motion is decided as follows: McIlwain and Claire are directed to respond to

Everlast's Combined Demands and Notice for Discovery and Inspection dated August 25, 2020, within 20 days of notice of entry of this order. EBTs shall be conducted, solely by Everlast, either in person or virtually via remote video-conferencing within 45 days of notice of entry of this order. Within 30 days of the completion of plaintiff's deposition, Everlast shall designate a physician to conduct an IME of plaintiff and said examination shall be conducted within 20 days of such designation. All parties are directed to cooperate with EBT and IME scheduling. Finally, that branch of Everlast's motion seeking an extension of time to make a dispositive motion is granted and said motion must be made no later than 60 days following the completion of all depositions.

***McIlwain and Claire's Cross Motion (Mot. Seq. No. 14)***

Lastly, McIlwain and Claire's cross motion for conditional summary judgment on their cross claim for common-law indemnification against L.S. is denied because, as noted above, there are issues of fact as to whether plaintiff's accident was caused by L.S.'s negligence (*see McDonnell*, 165 AD3d at 1097-1098; *Allan*, 99 AD3d at 833; *Perri*, 14 AD3d at 685).

***Conclusion***

Based upon the foregoing, it is hereby

**ORDERED** that branch of L.S.'s motion (mot. seq. no. 10) seeking an order dismissing plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 claims is granted and said claims are dismissed as against L.S.; that branch of L.S.'s motion seeking summary judgment dismissing plaintiff's common-law negligence claim as against it is denied; and

that branch seeking dismissal of the defendant owners' claim for common-law indemnification is denied; and it is further

**ORDERED** that plaintiff's motion (mot. seq. no. 11) is denied except to the extent that the plaintiff is granted leave to amend his bill of particulars to assert a violation of Industrial Code § 23-1.21 (b) (4) (i); and it is further

**ORDERED** that branch of Christa's motion (motion seq. no. 12) seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against her is granted; that branch of Christa's motion to dismiss plaintiff's Labor Law § 241 (6) claim is granted **except** to the extent it is predicated upon Industrial Code § 23-1.21 (b) (4) (i); that branch of Christa's motion seeking to dismiss plaintiff's Labor Law § 240 (1) claim as against her, and for summary judgment on her common-law indemnification cross claim over and against L.S, McIlwain and Claire is denied; and it is further

**ORDERED** that branch of Everlast's motion (mot. seq. no. 13) seeking an order severing the third-party action from the main action is denied; that branch of Everlast's motion seeking discovery and an extension of time to move for summary judgment is granted, the details of which are referenced herein; and it is further

**ORDERED** that McIlwain and Claire's cross motion (mot. seq. no. 14) is denied.

The foregoing constitutes the decision and order of the Court.

E N T E R,



J.S.C.