At an IAS Term, Part 83 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 28th day of February, 2022.

PRESENT: HON. INGRID JOSEPH,
Justice.

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ALAN CRISTIAN ROMERO,

Plaintiff,

-against-

Index No. 512903/18

EVERGREEN GARDENS II LLC and
BROOKLYN GC LLC,

DECISION/ORDER

Defendants.

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EVERGREEN GARDENS II LLC and
BROOKLYN GC LLC,

Third-Party Plaintiff,

-against-

RELIABLE MASONRY CORP.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits/Affirmations Annexed	89-90, 157-159
Opposing Affidavits/Affirmations	116-118, 175, 199, 200-205
Affidavits/ Affirmations in Reply	207, 215-216
Other Papers (Copies of papers re: Bankr. Stay)	219, 220, 221

In this labor law dispute, defendants/third-party plaintiffs, Evergreen Gardens II LLC ("Evergreen") and Brooklyn GC, LLC ("Brooklyn GC"), move for an order, pursuant to CPLR § 3212, (1) granting them summary judgment dismissing plaintiff's claims sounding in common-law negligence and violations of Labor Law §§ 200 and 241 (6), and (2) granting summary judgment in their favor against third-party defendant

Reliable Masonry Corp. ("Reliable") on their contractual indemnification, common-law indemnification, contribution and breach of contractual insurance procurement requirements claims (Motion Seq. 3). Plaintiff, Alan Cristian Romero ("plaintiff") cross-moves for an order, (1) pursuant to CPLR § 3212, granting partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) causes of action, and (2) pursuant to CPLR § 5015, vacating any prior default on the motion (Motion Seq. 5).[1]

Plaintiff claims are premised upon common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on an accident that occurred September 14, 2017, when he was struck on the head by two bricks that fell directly from above where he was standing. Evergreen was the owner of the work site and it hired Brooklyn GC to act as the general contractor for the construction of an eight-story mixed use commercial and residential building. Pursuant to a written contract, Brooklyn GC thereafter hired Reliable as the masonry contractor to install the building's brick facade. Plaintiff was employed by Reliable as a mason.

According to plaintiff's deposition testimony, on the day of the accident, plaintiff's work involved laying bricks on the seventh floor of the building. Plaintiff did this work while standing on a mast climber, which is a kind of scaffold that can move up and down the face of a building. When it came time for plaintiff and his coworkers to take their lunch break, plaintiff asserts that the layer of bricks he had completed was mortared into

[1] The court notes that, although this action as against Evergreen was stayed by Evergreen's filing of a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Southern District of New York on February 22, 2021, plaintiff has submitted a copy of a stipulation so-ordered by a Bankruptcy Court Judge on October 29, 2021 that lifts the automatic stay with respect to Evergreen in order to allow plaintiff to continue the instant action as against Evergreen with the condition that any recovery from Evergreen is limited to the proceeds available under certain insurance policies and/or excess insurance policies.

position and that there were no loose bricks in the area where he had been working. In order to take their lunch break, plaintiff and his coworkers lowered the mast climber to the second floor. After the lunch break, plaintiff stood on the mast climber, which was still at the second floor, waiting for bricks and mortar to be loaded onto it before returning to the seventh floor to continue working. While he was waiting on the mast climber, plaintiff was struck on the head with two bricks that fell from above. Plaintiff did not see the bricks until after they hit him.[2]

In his deposition testimony, Moshe Blum, Brooklyn GC's construction superintendent, stated that he observed the bricks fall and hit plaintiff and that, at the time plaintiff was struck, plaintiff was ascending to the seventh floor on the mast climber. According to Blum, at the time of the accident, no one was working in the area from where the bricks fell.[3] Blum did state, however, that Reliable's work was approaching the safety netting and guardrails located around the parapet, and that this safety material had to be removed before Reliable could finish its work. According to Blum, prior to the date of the accident, he had observed that Reliable employees had, on occasion, left unsecure, loose bricks on the worksite, and that, after the accident, he went to the seventh floor, and observed some loose bricks at the top of the brick work. While Blum conceded that he did not witness what actually caused the bricks to fall, he opined that it was vibrations from the mast climber that caused the loose bricks to fall.

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[2] Plaintiff's testimony regarding his belief that the bricks fell because someone working above him dislodged them was based on what his coworkers told him after the accident and was not based on his own observations.

[3] The court notes that Blum, in a section of the accident report prepared by him that asks "what caused the event," wrote that "one guy was fixing safety on the roof and brick guy left loose brick on top of parapet wall and it fall down [sic] when he fixed it."

In contrast, Leonardo Simon, a Reliable supervisor, asserted in an affidavit submitted in opposition that, in his experience, a mast climber would not have caused enough vibration to dislodge a brick, even one used to hold a "masonry twig" of a "masonry line" in place.[4] Simon asserts that, although he did not witness the accident, a few minutes prior to the accident, he observed a worker, who was not employed by Reliable, removing poles and netting from an area directly above the seventh-floor area where plaintiff had been installing bricks and above where plaintiff was struck by the bricks.

Initially, Evergreen and Brooklyn GC contend that plaintiff's cross motion and opposition to their motion, which were not served and filed until December 23, 2020, cannot be considered because plaintiff failed to comply with the time constraints of a November 25, 2020 order that, in adjourning the return date of the motion to January 6, 2021, required plaintiff to file opposition to defendant's motion on or before December 9, 2020. Plaintiff's delay in opposing defendants' summary judgment motion, however, has no bearing on consideration of plaintiff's cross-motion for summary judgment because the November 25, 2020 order set no time limit for plaintiff to move for summary judgment,[5] and because plaintiff's motion was timely under CPLR 3212 (a) and local court rules since the note of issue that was filed on December 11, 2020 was thereafter vacated by an order (Knipel, J.) dated January 25, 2021 (*see Wells Fargo Bank, NA v Apt*,

[4] Simon stated that a masonry line helps ensure that bricks are installed in a level manner, and a masonry twig is a thin piece of metal at the end of a masonry line. A brick is placed on the twig in order to hold the masonry line in place and prevent it from being blown in the wind.

[5] In any event, a court may not require that a summary judgment motion be made earlier than 30 days after the filing of the note of issue (*see* CPLR 3212 [a]).

179 AD3d 1145, 1146-1147 [2d Dept 2020]).[6] The court will also consider plaintiff's opposition to defendants' motion because plaintiff has sufficiently detailed a reasonable excuse for his delay based on a law office failure in assigning counsel to submit the opposition papers, and defendants have not been prejudiced by the delay as they received additional time to submit their reply and opposition papers (*see Stango v Byrnes*, 200 AD3d 821, 822-823 [2d Dept 2021]; *Garcia v City of New York*, 189 AD3d 788, 789 [2d Dept 2020]).[7]

Labor Law § 240 (1)[8] imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant

[6] This court rejects defendants' suggestion that plaintiff's cross motion must be denied because plaintiff has failed to attach the pleadings to his motion papers (CPLR 3212 [b]) given that defendants submitted the pleadings as part of their own motion and the pleadings are thus already in the record before the court (*see Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1359 [2d Dept 2019]; CPLR 2001]).

[7] The court notes that, even if it were required to reject plaintiff's opposition papers, it would reach the same result regarding defendants' motion since, as discussed below, portions of defendants' requested relief would still be denied in view of initial burden of proof that applies to their motion even in the absence of opposition (*see Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927-928 [2d Dept 2021]; *Exit Empire Realty v Zilelian*, 137 AD3d 742, 743 [2d Dept 2016]) and in view of the affidavits in the record before the court appended to the timely opposition submitted by Reliable.

[8] As is relevant here, Labor Law § 240 (1) provides: "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."

elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski*, 18 NY3d at 10). For accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663).[9]

The primary evidence before the court regarding the falling bricks comes from the testimony and affidavits from plaintiff, Blum, Brooklyn GC's superintendent, and Simon, a Reliable supervisor.[10] A juror might be able to infer from Blum's assertions, made in his affidavit and deposition testimony, that Reliable workers had left unsecured bricks lying around that could have come loose as a result of vibrations from the mast climber. Similarly, Simon's assertions that he observed a worker removing perimeter protection from an area above where plaintiff was working might allow an inference that this worker dislodged the bricks at issue. The assertions of Blum regarding the presence of unsecured

[9] There no dispute that the brick work plaintiff was performing is covered as work in the "erection" of a building under Labor Law § 240 (1), and that Evergreen, as owner, and Brooklyn GC, as general contractor, or the entity that fulfilled that rule, may be held liable under section 240 (1) regardless of whether they actually supervised or controlled plaintiff's work (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Barker v Union Corrugating Co.*, 187 AD3d 1544, 1546 [4th Dept 2020]; *Yaguachi v Park City 3 & 4 Apts., Inc.*, 185 AD3d 635, 635-636 [2d Dept 2020]).

[10] The court notes that plaintiff, in cross moving, relies on the deposition transcripts and other exhibits submitted by defendants in support of their motion and the affidavits submitted by Reliable in its opposition to defendants' motion.

bricks and those of Simon regarding the work being performed above plaintiff's location might support an inference that some sort of securing device or overhead protection was necessary under the circumstances (*see Hewitt v NY 70th St., LLC*, 187 AD3d 574, 574-575 [1st Dept 2020]; *Garcia v SMJ 210 W.18 LLC*, 178 AD3d 473, 473 [1st Dept 2019]; *Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707-708 [2d Dept 2019]; *Wellington v Christa Constr. LLC*, 161 AD3d 1278, 1280-1281 [3d Dept 2018]; *Cortes v Jing Jeng Hang*, 143 AD3d 854, 855 [2d Dept 2016]; *Stawski v Pasternack, Popish & Reif, P.C.*, 54 AD3d 619, 620 [2d Dept 2008]).

In contrast, plaintiff, in his own testimony, stated that he and his coworkers had mortared all the bricks into the wall and left no unsecured bricks where they had been working on the 7th floor are facts that weigh against finding that a Labor Law § 240 (1) safety device would have been necessary or expected to secure the bricks (*see Carlton v City of New York*, 161 AD3d 930, 933 [2d Dept 2018]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2d Dept 2011]; *Marin v AP Amsterdam 1661 Park LLC*, 60 AD3d 824, 825-826 [2d Dept 2009]). While the above noted assertions of Blum and Simon may allow an inference regarding the need for a section 240 (1) securing device, the witnesses did not see exactly where the bricks were located at the time they fell. This inability to identify what caused the bricks to fall, along with plaintiff's own testimony that there were no unsecured bricks on the seventh floor, precludes a finding, as a matter of law, that the bricks that struck plaintiff required securing for the purposes of the undertaking or fell because of the absence or inadequacy of a Labor Law § 240 (1) device (*see Millette v Tishman Constr. Corp.*, 144 AD3d 1113, 1115 [2d Dept 2016]; *Pazmino v 41-*

50 78th St. Corp., 139 AD3d 1029, 1030 [2d Dept 2016]; *Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 735 [2d Dept 2015]). Accordingly, plaintiff has failed to demonstrate his prima facie entitlement to summary judgment on his section 240 (1) claim and his cross motion must, thus, be denied regardless of the sufficiency of the opposition submitted by defendants and Reliable (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).[11]

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). In his bill of particulars, plaintiff identified a plethora of Industrial Code sections and Occupational Safety and Health Administration ("OSHA") standards alleged to have been violated. OSHA standards, however, may not be relied upon as a predicate for a section 241 (6) claim (*see Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2d Dept 2005]; *see also Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]), and defendants have demonstrated that Industrial Code sections 12 NYCRR 23-1.4(45), 23-1.5; 23-1.5(a), (b), (c)(1), (2) and (3); 23-1.7 (b)(1)(i), (ii), (iii), (d), (e), (e)(2)

[11] The court notes that the expert engineering affidavit proffered by plaintiff cannot be considered because it was submitted for the first time in reply (*see Caliber Home Loans, Inc. v Weinstein*, 197 AD3d 1232, 1236-1237 [2d Dept 2021]). In any event, the conclusory assertions of the engineer relating to the need for overhead protection or securing devices fail to demonstrate plaintiff's prima facie entitlement to relief. Additionally, Reliable has submitted an affidavit from an expert engineer who asserts that no Labor Law § 240 (1) device would have been needed to secure the recently laid bricks or any bricks used to secure the masonry twig.

and (f); 23-1.8, 23-1.22(b)(2), 23-1.30, 23-1.32, 23-1.33(a), 23-2.2, and (4); 23-2.3(a)(1) and (2), and (c); 23-2.5(a), 23-2.6(a), 23-3.2(a-d), 23-3.3, (b-m), 23-3.4(a-c), 23-5.1(e)(5); 23.5.1(f), 23-5.1(h); 23-5.1(j)(1); 23-8.1(a), (b)(1-5), (d)(1), (2) and (3), (e)(1) and (5), (f)(1)(i-v), (f)(2)(i) and (ii), (f)(4), (f)(6); 23-8.2(c)(3) and 23-8.2(f)(3), (g)(1)(i) and (ii), (g)(2)(i), (ii) and (iii), and (h); 23-8.5(b), (c)(1), (2) and (3)(i), (ii) and (iii), (e),(f), (h), (i), (j), (k), (I), (m), and (n) are either insufficiently specific or inapplicable to the facts here. Further, plaintiff is deemed to have abandoned reliance on these sections, because he failed to addressed them in his opposition papers (*see Debennedetto v Chetrit*, 190 AD3d 933, 935 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]). Plaintiff's Labor Law § 241 (6) cause of action is thus dismissed to the extent that plaintiff relies on those abovementioned sections.

Contrary to defendants' contention, however, 12 NYCRR 23-1.7 (a), addressing overhead hazards states a specific standard (*see Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]). Under 123 NYCRR 23-1.7 (a)(1), every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. As defendants have failed to submit evidentiary proof showing that the area where plaintiff was working was not normally exposed to falling material or objects, they have failed to demonstrate, prima facie, that 12 NYCRR 23-1.7 (a) is inapplicable to the facts and accident here (*see Salcedo v Sustainable Energy Options, LLC*, 190 AD3d 439, 440 [1st Dept 2021]; *Gonzalez*, 87 AD3d at 611). The portion of the defendants' motion that is addressed to plaintiff's Section 241 (6) claim, to the extent it is premised on 12 NYCRR 23-1.7 (a), must

therefore be denied, regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853).[12] The portion of plaintiff's cross motion relating to his Labor Law § 241 (6) claim premised upon this same section must similarly be denied.

With respect to 12 NYCRR 23-1.7 (a), the court finds that plaintiff has failed to submit evidentiary proof showing that the area at issue was normally exposed to falling material or objects (*see Crichigno v Pacific Park 550 Vanderbilt,* LLC, 186 AD3d 664, 665 [2d Dept 2020]). Further, the court notes that plaintiff raised, for the first time, in opposition to the defendants' motion and in support of his own cross motion, that defendants violated 12 NYCRR 23-5.1 (i), which sets standards for overhead protection on scaffolds when such protection is required (*see Doto v Asotria Energy II, LLC*, 129 AD3d 660, 664 [2d Dept 2015]). Assuming *arguendo* that plaintiff can utilize section 23-5.1 (i), it would be denied, since plaintiff has failed to submit evidentiary proof showing that the area at issue was subject to falling objects such that overhead protection would be necessary (*see Kauffman v New York City Sch. Constr. Auth.*, 55 Misc 3d 1208 [A], 2017 NY Slip Op 50455, *6 [U] [Sup Ct, Queens County 2017]; *see also Crichigno*, 186 AD3d at 665; *cf. Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]). In the same manner, plaintiff raised a claim based upon 12 NYCRR 23-1.17 (sets standards for life nets). Even if plaintiff could properly rely on this section, the court finds it is inapplicable because it is intended to protect falling workers, not falling objects (*see Venegas v Shymer*, ___ AD3d ___, 2022 NY Slip Op 00459 [2d Dept 2022]; *Kwang Ho*

[12] Blum's assertion that the subject area was not normally exposed to falling hazards is contained in an affidavit submitted for the first time with defendants' reply papers, and as such, it cannot be considered (*see Caliber Home Loans, Inc. v Weinstein*, 197 AD3d 1232, 1236-1237 [2d Dept 2021]).

Kim v D & W Shin Realty Corp., 47 AD3d 616, 619 [2d Dept 2008]). Thus, plaintiff's cross motion with respect his Labor Law § 241 (6) claim is subject to denial, regardless of the sufficiency of the defendants' opposition papers (*see Winegrad*, 64 NY2d at 853).

The defendants also move to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action. Cases involving common-law negligence and 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, 60 [2d Dept 2008]). This court finds that the defendants have demonstrated that the accident arose from the means and methods of Reliable's work, rather than a dangerous property condition. Namely, to the extent that Reliable workers left unsecured bricks at the worksite, this was done as part of their ongoing work at the project (*see Giglio v Turner Constr. Co.*, 190 AD3d 829, 830-831 [2d Dept 2021]; *Cody v State of New York*, 82 AD3d 925, 927 [2d Dept 2011]). Contrary to plaintiff's contentions, there is nothing to suggest that the alleged vibrations from the mast climber, in and of themselves, made it a dangerous property condition (*see Gasper v Ford Motor Co.*, 13 NY2d 104, 110-111 [1963]; *Gillis v Brown*, 133 AD3d 1374, 1376 [4th Dept 2015]). Rather, there is evidence that a dangerous condition may have arose from Reliable leaving unsecured bricks that could be dislodged by vibrations and failing to protect against such falling objects by providing overhead protection.

When a common-law negligence and section 200 claim arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general

contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto*, 91 NY2d at 352; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]; *Shaw*, 75 AD3d at 635-636). Without more, an owner or contractor's authority to stop the work or their general supervisory authority over the injury-producing work is insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Poulin*, 166 AD3d at 670-673; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]; *Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 787 [2d Dept 2016]).

Here, plaintiff, in his own testimony, stated that his work was exclusively supervised by Simon, a Reliable supervisor. Blum, in his testimony, added, with respect to Evergreen, that Evergreen did not provide safety equipment to the workers and did not have any employees present at the worksite to watch the work. Defendants have thus demonstrated, prima facie, that Evergreen did not exercise any authority over the work and thus may not be held liable for plaintiff's common-law negligence and section 200 claims (*see Debennedetto*, 190 AD3d at 938; *Poulin*, 166 AD3d at 670-673; *Goldfien*, 157 AD3d at 938; *Messina*, 147 AD3d at 749-750; *see also Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]).

Although general supervision and control over a subcontractor's work is insufficient to make a general contractor liable under the common-law and Labor Law § 200, liability may be found where it is shown that a general contractor is responsible for

coordinating the work of subcontractors and an accident results from a lack of coordination (*see Rizzuto*, 91 NY2d at 352-353; *Gardner v Tishman Constr. Corp.*, 138 AD3d 415, 416-417 [1st Dept 2016]; *Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dept 2013]). Here, the affidavit of Simon, submitted in opposition by Reliable, would allow an inference that the unidentified worker removing the netting and poles from above where plaintiff was working may have caused the bricks to fall onto plaintiff. Blum's own testimony that Brooklyn GC had general management authority of the jobsite,[13] and that he had the authority to stop work if he observed a worker performing potentially dangerous work above another worker demonstrates that Brooklyn GC had sufficient control over the work of Reliable and that of the worker who removed the netting[14] to avoid and correct the unsafe situation arising from any improper overhead work (*see Rizzuto*, 91 NY2d at 352-353; *Gardner*, 138 AD3d at 416-417; *Matthews*, 111 AD3d at 406). As a result, there are factual issues that require denial of the portion of defendants' motion seeking dismissal of the common-law negligence and section 200 claims as against Brooklyn GC.

As Evergreen did not have representative at the worksite and there is nothing in the record to suggest that it had any role in the coordination of the work, plaintiff has failed to demonstrate the existence of a factual issue requiring denial of this portion of the motion

[13] In his affidavit, Jacob Klein, Reliable's CEO, states that Blum, Brooklyn GC's construction superintendent, was in charge of sequencing the work of the various subcontractors on the job, and it was Blum who arranged to have laborers remove leading edge protection where Reliable needed to perform its work.

[14] Of note, although Blum denied observing anyone performing work above where plaintiff was working at the time of the accident, he did admit that there had been a worker removing the netting from the parapet above where Reliable workers had been working and that the removal of the netting was necessary to allow Reliable to progress with its brickwork.

as it relates to Evergreen. Evergreen is thus entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action as against it.

With respect to defendants' third-party claims against Reliable for contractual indemnification, the indemnification provision in the agreement between Brooklyn GC and Reliable provides, as is relevant here, that Reliable must defend and indemnify Evergreen and Brooklyn GC:

> "from and against all liability or claimed liability for bodily injury or death to any person(s) . . . including attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties."

Courts read provisions using this "arising out of the work" language very broadly, and have found that in cases like this, where a subcontractor's employee is injured and brings a claim against a party entitled to indemnification, that party may obtain indemnification from the subcontractor even if the subcontractor or its employee had nothing to do with causing the accident (*see O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept 2021]; *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773-774 [2d Dept 2010]; *Daily News, LP v OCS Sec.*, 280 AD2d 576, 577 [2d Dept 2001]; *Tkack v City of New York*, 278 AD2d 227, 229 [2d Dept 2000]).[15] Since Evergreen has demonstrated that

[15] The court notes that, although it is not clear from the language of the decision in *Tkach*, the briefs on appeal show that it was undisputed that plaintiff's employer had nothing to do with the material that was blown off the roof and struck plaintiff (*see* Defendant-Appellant-Respondent 2000 WL 34488651 and Defendant-Respondent/Third-Party Plaintiff 2000 WL 34488653).

it was not negligent as a matter of law, it is entitled to contractual indemnification from Reliable (*see Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 718 [2d Dept 2020]; *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1031 [4th Dept 2013]; General Obligations Law § 5-322.1). In view of the factual issues relating to Brooklyn GC's own negligence, the portion of defendants' motion seeking contractual indemnification must be denied with respect to Brooklyn GC (*see Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096-1097 [2d Dept 2018]).

With respect to defendants' common-law indemnification and contribution claims against Reliable, Simon's affidavit in opposition demonstrates the existence of factual issues as to whether the accident resulted from Reliable's negligence or its exclusive direction, supervision and control of the injury producing work and requires denial of this portion of their motion (*see McDonnell*, 165 AD3d at 1097-1098; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Additionally, the factual issues with respect to Brooklyn GC's own negligence preclude summary judgment in its favor (*see McDonnell*, 165 AD3d at 1097-1098). The court further notes, while not expressly argued in Reliable's opposition papers, that, unless defendants can show that plaintiff suffered a grave injury, the common-law indemnification and contribution claims against Reliable are barred by the exclusive remedy provision of the Workers' Compensation Law given that Reliable has pleaded Workers Compensation as an affirmative defense, Reliable was plaintiff's employer, and plaintiff's deposition testimony suggests that he is receiving or has received Workers' Compensation benefits (*see Galeno v Everest*

Scaffolding, Inc., ___ AD3d ___, 2022 NY Slip Op 00720 [1st Dept 2022]; *Grech v HRC Corp.*, 150 AD3d 829, 830-831 [2d Dept 2017]; Workers' Compensation Law § 11).

Finally, the portion of defendants' motion seeking summary judgment on its breach of contract claim based on Reliable's failure to obtain proper insurance is denied because there are factual issues as to whether the insurance procured satisfies the terms of the insurance procurement provision of the contract. The copy of the policy submitted by defendants shows that it contains a blanket additional insured endorsement, which is generally sufficient to satisfy contractual insurance obligations (*see Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dept 2020]; *Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *see also Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]; *cf. Gilbane v Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 135 [2018]). Although defendants have submitted a disclaimer letter from Reliable's insurer denying coverage for the accident, an insurer's disclaimer, in and of itself, does not necessarily show that a party has breached its contractual obligations. More specifically, a disclaimer may be based on an additional insured's failure to give timely notice of its claim or on an insurer's improper denial of coverage rather than the named insured's failure to purchase a policy providing coverage required by the contract (*see Bachrow v Turner Constr. Corp.*, 46 AD3d 388, 388 [1st Dept 2007]; *Binasco v Break-Away Demolition Corp.*, 256 AD3d 373, 375 [2d Dept 1998]; *KMO-361 Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dept 1998]).

Indeed, the disclaimer letter here, aside from suggesting that defendants failed to submit documentation regarding the contract requiring that defendants be named as

additional insureds, states grounds for denying coverage that would appear improper in view of the policy's language or caselaw addressing similar policy terms. For example, the questionable grounds for denying coverage include the assertion that coverage is denied because there has been no showing that Reliable was negligent (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]), that there was no showing that the accident was a result of Reliable's operations (*Regal Constr. Corp.*, 15 NY3d at 37-39), and that the contractual liability exclusion would apply (*see LaBoutique NY, Inc. v Utica Ins. Co.*, 18 Misc 3d 1132 [A], 2008 NY Slip Op 50266, *3-4 [U] [Sup Ct, Richmond County 2008]; *see also Westpoint Intl., Inc. v American Intl. S. Ins. Co.*, 71 AD3d 561, 562-563 [1st Dept 2010]; *Wright v Evanston Ins. Co.*, 14 AD3d 505, 506 [2d Dept 2005]). Since Reliable's insurer is not a party to this action, the propriety of the denial of coverage and the applicability of exclusions should first be determined in a declaratory judgment action against the insurer before any finding is made with respect to the adequacy of the coverage purchased by Reliable (*see Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]).

Based upon the foregoing, defendants' motion (Motion Seq. 3) is granted to the extent that (1) plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent that it is premised on Industrial Code sections 12 NYCRR 23-1.4(45), 23-1.5; 23-1.5(a), (b), (c)(1), (2) and (3); 23-1.7 (b)(1)(i), (ii), (iii), (d), (e), (e)(2) and (f); 23-1.8, 23-1.22(b)(2), 23-1.30, 23-1.32, 23-1.33(a), 23-2.2, and (4); 23-2.3(a)(1) and (2), and (c); 23-2.5(a), 23-2.6(a), 23-3.2(a-d), 23-3.3, (b-m), 23-3.4(a-c), 23-5.1(e)(5); 23.5.1(f), 23-5.1(h); 23-5.1(j)(1); 23-8.1(a), (b)(1-5), (d)(1), (2) and (3), (e)(1) and (5), (f)(1)(i-v),

(f)(2)(i) and (ii), (f)(4), (f)(6); 23-8.2(c)(3) and 23-8.2(f)(3), (g)(1)(i) and (ii), (g)(2)(i), (ii) and (iii), and (h); 23-8.5(b), (c)(1), (2) and (3)(i), (ii) and (iii), (e),(f), (h), (i), (j), (k), (l), (m), and (n). There exists issues of fact concerning plaintiff's Labor Law § 241 (6) cause of action premised upon 12 NYCRR 23-1.7; (2) plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed as against Evergreen; and (3) Evergreen is entitled to contractual indemnification from Reliable. The Defendants motion is otherwise denied.

Plaintiff's motion (Motion Seq. 5) is denied, including that branch of plaintiff's motion for relief pursuant to CPLR § 5015, since no judgment or order was entered against plaintiff on default.

This constitutes the decision and order of the court.

ENTER

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice