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| <b>Richard v 1711 LLC</b>  |
| 2022 NY Slip Op 30819(U)   |
| March 10, 2022   |
| Supreme Court, New York County   |
| Docket Number: Index No. 155647/2017   |
| Judge: Alexander Tisch   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ALEXANDER TISCH PART 18**

*Justice*

-----X

ALVIN RICHARD, MELANIE RICHARD,  
Plaintiffs,

- v -

1711 LLC, RYDER CONSTRUCTION INC., MCCORMACK  
CONTRACTING, INC.,

Defendants.

INDEX NO. 155647/2017

07/07/2021,  
07/07/2021,  
07/07/2021,  
07/07/2021

MOTION DATE 07/07/2021

MOTION SEQ. NO. 002 003 004  
005

**DECISION + ORDER ON  
MOTION**

-----X

1711 LLC, RYDER CONSTRUCTION INC.  
Plaintiffs,

-against-

MCCORMACK CONTRACTING INC., EXCLUSIVE DRYWALL  
AND CONCRETE FINISHING, INC., CONSTRUCTION  
REALTY SAFETY GROUP, INC.

Defendants.

Third-Party  
Index No. 595554/2017

-----X

MCCORMACK CONTRACTING INC.  
Plaintiff,

-against-

EXCLUSIVE DRYWALL AND CONCRETE FINISHING INC.

Defendant.

Second Third-Party  
Index No. 595191/2018

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 212, 215, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 264, 269, 270

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 182, 213, 216, 262, 263, 266

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 214, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 265, 267, 268, 271

were read on this motion to/for

JUDGMENT - SUMMARY

On April 28, 2017, plaintiff Alvin Richard (plaintiff) was employed by third-party defendant/second third-party defendant Exclusive Drywall (Exclusive) as a taper and worked at a construction project located at 1711 First Avenue in the County, City and State of New York. Defendant/third-party plaintiff 1711 LLC (1711) is the owner of the property and retained defendant/third-party plaintiff Ryder Construction, Inc. (Ryder) to serve as the general contractor of the project. Ryder retained defendant/second third-party plaintiff McCormack Contracting Inc. (McCormack) who retained Exclusive as a subcontractor to perform taping work. Plaintiff alleges that he was working on a manual mobile scaffold in Apartment 11C of the premises, when the mobile scaffold moved or shifted, causing him to fall backwards to the ground.

Motion sequence numbers 002, 003, 004, and 005 have been consolidated for disposition. In motion sequence 002, plaintiffs Alvin Richard and Melanie Richard (collectively known as plaintiffs), move, pursuant to CPLR 3212 (a), for an order granting partial summary judgment pursuant to Labor Law §§ 240 (1) and 241 (6).

In motion sequence 003, McCormack moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiffs' claims. McCormack seeks summary judgment on its own claims for contractual indemnification as against Exclusive. McCormack also requests that the Court determine that plaintiff suffered a grave injury as defined by the New York State Worker's Compensation Law, and upon a finding of a grave injury, an order granting summary judgment in favor of McCormack on its claims for common law indemnification and contribution against Exclusive.

In motion sequence 004, third-party defendant Construction Realty Safety Group, Inc., (CRSG), moves pursuant to CPLR 3211 (a) (1) and CPLR 3212 for an order granting summary judgment and dismissing plaintiff's complaint. CRSG also moves, pursuant to CPLR 3211 (a) (1) and 3212 to dismiss all claims and cross claims by defendants 1711, Ryder, and Exclusive.

In motion sequence 005, 1711 and Ryder, move, pursuant to CPLR 3212, for an order granting summary judgment as against plaintiffs. They also seek an order granting summary judgment as to their cross claims for common law and contractual indemnification and dismissing all cross claims against 1711 and Ryder.

### **FACTUAL ALLEGATIONS**

#### **Plaintiff's deposition**

Plaintiff testified that he was involved in an accident on April 28, 2017, at a high-rise construction site located at 1711 First Avenue. Plaintiff was working for Exclusive, taping walls and ceilings in preparation for painting at sites including at the subject premises.

Plaintiff reported to a worker named "Seefor" who was a foreman. Seefor would contact plaintiff the night before the work day and tell him where to go and what to do. Plaintiff recalls that there was another worker who was present when Seefor was not in attendance, who acted similar to a foreman, and who told the workers what to do. Exclusive provided tape and Seefor provided drills. The workers utilized A-frame ladders and a Bakers scaffold which were provided by Exclusive. The workers were not provided with a safety harness.

Plaintiff did not recognize the entities known as 1711, Ryder, McCormack, or CRSG. He recalls that a worker from OSHA was present daily at the site named "Mike." He believes that Mike checked hardhats, ladders, and the Bakers scaffolds. However, he did not observe Mike check the scaffold involved in his accident.

On the date of his accident, plaintiff was assigned to work in a unit on the 11<sup>th</sup> floor and was working with a co-worker named "Davin." He recalls Seefor being present in the morning, as well as Mike. There were no ladders, scaffolds or Bakers scaffolds present on the floor when he arrived. A Bakers scaffold was brought to the floor by one of the workers from Exclusive after plaintiff requested a device from Seefor. The worker had told plaintiff that the scaffold was ready to be used.

At the time of his accident, plaintiff was the only worker in the apartment unit. He was utilizing the Bakers scaffold on a cement floor in a closet area. He did not receive instructions as to how to utilize the Bakers scaffold, except from a previously taken OSHA class which instructed workers to lock the wheels. It was the first time in which he was on that scaffold. He checked to ensure that the pins of the wheels were locked. Plaintiff recalls also checking the scaffold to see if it could move. He checked that the rails and platform were secure. Plaintiff believes that the platform of the scaffold was three to four feet off of the ground.

While he was on the top of the scaffold facing into the closet, plaintiff's hands were located over his head. Plaintiff described his accident as follows:

"A. All I can remember is I was on the scaffold. I just went on the scaffold, I started to put the mud on the wall, and, like, ten minutes I realized one of the wheels is moving with me. While the wheels is moving I was getting out of balance because I have so much things, I had mud and things in my hand.

MR. SINGER: Is mud the same as compound?

THE WITNESS: Yes, that's what I was calling mud.

A. As the scaffold is moving, I'm thinking which area I'm going to end up because I have so much. I seen I was going backwards. So I throw the hawk and the knives. So, if I throw it away all I can recall is I just go backwards."

NYSCEF DOC. NO. 92, at 108.

He further testified:

"Q. Okay. Now, what, if anything, did you reach for with your hands in order to try to balance yourself?

A. That time I couldn't reach for nothing, because it was – there's nothing to reach for because your hands can't grab nothing.

Q. Do you remember trying to touch the side wall of the closet on your right or on your left?

- A. It's the way the scaffold moves, I couldn't touch nothing. Because it moves so fast, I couldn't touch nothing.
- Q. Now, when you fell, I think you indicated you fell backwards onto your back, right?
- A. To my neck, yeah."

*Id.* at 140.

Plaintiff proceeded to fall backwards off of the scaffold, falling over two diagonal rails and onto his back. Plaintiff recalls that when the wheels started moving, the scaffold began to move away from the wall. He was unsure as to what caused its movement. At the time of his accident, plaintiff was holding a hawk tool in his right hand over his head, with a knife in his left hand. He does not recall if the wheels came off of the ground and was not told that the scaffold had fallen over. There were no witnesses to his fall, however Davin later came to his aid.

Plaintiff believes that the pins on the wheels were placed down. He did not make any complaints or hear of any complaints to Seefor regarding that the scaffold was not safe.

#### **Steve Gorey's deposition**

Steve Gorey (Gorey) testified that he works for Anbau Enterprises (Anbau) as a chief financial officer. In April of 2017, 1711 was the owner of the premises located at 1711 First Avenue and 360 East 89<sup>th</sup> Street. He maintains that employees of Anbau would visit the job site to observe the work being performed under the direction of Ryder, the general contractor. Gorey visited the premises about ten times since 2016 and would walk the site. Ryder was responsible for the site safety plan. McCormack was a subcontractor of Ryder. Gorey was not familiar with Exclusive, but later learned that it was a subcontractor of McCormack.

#### **Lochlann McEvoy's deposition**

Lochlann McEvoy (McEvoy) testified that he works as a foreman for McCormack, a general contractor. McEvoy's duties include ensuring that jobs run on time as scheduled, ordering materials, and looking over safety. McCormack was contracted by Ryder for framing, drywall, and trim work at the subject premises. McCormack had subcontracted the taping work to Exclusive. Exclusive had a

foreman and owner who were at the site regularly. McCormack did not supply the equipment which Exclusive utilized. Neither McEvoy nor anyone else at McCormack told Exclusive how it should conduct its work. If there were rooms ready for taping, McCormack notified Exclusive. McEvoy also interacted with Ryder employees on a daily basis.

McEvoy was present at the site on the date of plaintiff's accident. He recalls that Exclusive was taping in various locations and had about six to twelve tapers at the site. McEvoy did not witness the accident but received a call after it had occurred. McEvoy proceeded to plaintiff's location. He was told by workers that plaintiff had fallen off of a scaffold. Plaintiff had been utilizing a painter's scaffold which he noticed was upright when he arrived. He did not inspect the scaffold himself.

McEvoy did not recall if anyone told him what caused the fall. He did not inspect the equipment which Exclusive was utilizing, nor did he recall anyone complaining about the manner in which Exclusive was conducting its work. If he saw Exclusive conducting unsafe work, he would notify the foreman, Marcus or Sefus. He would not provide safety instructions to Exclusive, but if the workers were impacting the standard of quality by their performance, he would say something.

McEvoy did not have any conversation with anyone from Exclusive, Ryder or McCormack regarding the type of scaffold to use when performing taping work. McEvoy did not allow Exclusive employees to use McCormack's ladders or Bakers scaffolds and did not observe any Exclusive employees engaged in any unsafe practices on the day of the accident. He did not know who brought the scaffold to the subject floor.

At his deposition, McEvoy reviewed a picture of the scaffold and described the diagonal braces on the scaffold. He did not observe a top railing and did not know if the scaffold was to feature a top railing. Through OSHA training he had learned that Baker scaffolds over six feet needed a hand rail.

#### **Cephas Coward's deposition**

Cephas Coward (Coward), the owner of Exclusive, testified that Exclusive was performing finishing work as well as drywall taping at the premises. Coward reviewed a photograph of a painters

scaffold, a device commonly utilized for tapers. He maintains that the lowest platform on the scaffold was 12 inches from the ground, the highest platform was 24 inches off of the ground, and that there is usually no railing on the top of the barricade. The barricade would be located in front of the worker while they were working, and not behind.

Coward testified that prior to a worker utilizing the scaffold, all of the wheels should be locked. Exclusive would provide instructions on how to utilize the scaffolds including how to set up and lock the scaffold. The lock has a push mechanism in which the wheels would lock after a person pushes down. No instructions were provided to employees regarding what to do if they encountered an unlocked wheel.

At the subject premises, McEvoy was at the site on behalf of McCormack, Ryder would hold weekly meetings which were attended by contractors and supervisors, and Franklin Fraser or "Javon" would be present at the site for Exclusive. Coward maintains that if anyone asked his workers to do something, they would contact him and he would provide instructions. Coward attended meetings, supervised workers, provided directions of locations of where to work, and gave daily instructions. He would also check to make sure the workers were working in a safe manner. He did not receive any complaints that the equipment being utilized was defective or broken or that workers were not using their equipment properly.

Coward did not recall if plaintiff was present when he showed apprentices how to utilize a painter's scaffold. Coward was not present when plaintiff fell but received a call from Javon. He did not know where the painters scaffold was positioned and did not have a conversation regarding what caused plaintiff's fall. He was not told that there was anything wrong with the subject scaffold or who brought the scaffold to the apartment. Coward maintains that if the barricade was facing the wall, and a worker was located on top, there was nothing to prevent the worker from falling backwards off of the scaffold.

**Stuart Hall's deposition**

Stuart Hall (Hall), site safety manager with CRSG, worked at the 1711 project. Hall would walk the project daily and inspect the building as it was constructed. If he observed something wrong at the site he would contact the superintendent. CRSG would provide a site safety manager and a fire manager at the premises. He held a toolbox talk regarding rolling scaffolds with McCormack.

At the subject premises, Bakers scaffolds were primarily being used and the worker utilizing the scaffold should have performed an inspection of the scaffold. Hall would walk around the site to ensure that the scaffolds were set up properly. He did not recall if CRSG had a requirement that the site safety managers were to ensure that scaffolds and ladders were inspected prior to use. Hall did not complain to Ryder or to any superintendent and/or project manager or a trade regarding improper scaffold use. When he conducted walk throughs, Hall would look for housekeeping, scaffold use, and electrical items. For Bakers scaffolds, wheels would have to be locked and the flat forms would have to be secured. On the date of plaintiff's accident, Hall did not recall inspecting any tapers performing work on rolling scaffolds. If he saw any misuse of a scaffold by a taper, he would have corrected it or stopped the work.

Hall reviewed photographs of the scaffold and stated that it did not have a top railing which could be attached. He did not recall inspecting the subject scaffold on the date of plaintiff's accident. He was called to the scene after the accident and was told that plaintiff had fallen over the scaffold. Hall did not know if the scaffold tipped or locked or who owned the scaffold, but was aware that McCormack would have a duty to inspect it.

Hall would speak daily with McEvoy about what was occurring at the site and oversaw the subcontractors safety. While Hall may have inspected work on the eleventh floor prior to the accident, he did not recall inspecting plaintiff's work prior to his accident or inspecting the wheels of any rolling scaffold. Hall recalls observing McEvoy directly telling the tapers what to do and sometimes would see Ryder giving instructors to tapers. He did not receive any complaints about the subject scaffold.

**Thomas William Vita, Jr.'s deposition**

Thomas William Vita, Jr. (Vita) testified that he works for Ryder and that in April of 2017, he was an assistant superintendent. Vita would conduct inspections to make sure that the work matched what was being built. Pursuant to the contract, Ryder was responsible for the means and methods utilized to construct the building.

Ryder engaged with CRSG to develop a site safety plan. Bakers scaffolds, ladders, or anything that trades would be utilizing would be the responsibility of a "competent person" or their foreman. Ryder had the ability to stop the use of unsafe scaffolds, had the right to direct the company using the scaffold to replace the scaffold, and had the ability to shut down a job. Ryder contractually agreed with the subcontractors that they would control the means and methods of the job. However, Vita also testified that, pursuant to an agreement with the owner, Ryder had the right to control the means and methods of the job. Ryder had the obligation to supervise the entire job site and was responsible for the acts or omissions of any of the subcontractors.

Vita had been called about the subject accident and arrived at the scene at which time he was told that plaintiff had fallen off of a scaffold. He did not know who provided the subject scaffold nor had he heard any complaints about its use.

**Martin Bruno's affidavit**

Martin Bruno (Bruno) submits an affidavit dated January 28, 2021. Bruno is a safety expert and the President and CEO of Bruno Safety Consulting, LLC. He has worked for over 30 years in the construction and occupational safety profession and accident investigation services.

Bruno states that plaintiff's alleged accident was not caused by any negligence or violations of Labor Law §§ 200, 240 (1) and 241 (6) by McCormack. He states that if the safety device was utilized by plaintiff in the fashion that he described, with the steps facing inwards, then the plaintiff misused the device. He maintains that there is no basis, to a reasonable degree of construction safety certainty, to believe that the device failed its intended purpose or did not provide plaintiff with the proper protection.

Bruno states that there is no basis to believe that any of the casters or wheels malfunctioned and did not hold the device in place. Bruno states that the device is not intended to be utilized for lower level work that can be accessed while standing on the floor and that the horizontal bracing at the back of the device can obstruct access to the lower portion of a wall.

## DISCUSSION

### Standard of Law

“The 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 eliminate any material issues of fact from the case.” *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The burden then shifts to the nonmoving party “[t]o produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

### Motion Sequence No. 2

#### Labor Law § 240 (1)

Plaintiffs contend that summary judgment must be granted as against defendants 1711, Ryder, and McCormack, as to their claims of a violation of Labor Law § 240 (1).

Labor Law § 240 (1) provides in part:

“[a]ll 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.”

"Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks." *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1194 (2d Dept 2011). The Appellate Division, First Department, has held that "[t]he failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (internal quotation marks and citations omitted). The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001); citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence." *Tavarez v Weissman*, 297 AD2d 245, 247 (1st Dept 2002) (internal quotation marks and citations omitted). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves." *John v Baharestani*, 281 AD2d 114, 117 (1st Dept 2001) (internal quotation marks and citations omitted).

Plaintiffs argue that there is no dispute that the scaffold did not have safety railings, guardrails, barricades, or other protection to prevent a worker from falling. Plaintiffs argue that in addition, plaintiff was not provided with a safety harness or place to tie off.

In opposition, 1711 and Ryder contend that plaintiffs' motion for partial summary judgment pursuant to Labor Law § 240 (1) should be denied because plaintiffs fail to meet their burden of

establishing that the scaffold was defective or that it did not provide proper protection. 1711 and Ryder contend that the scaffold had guardrails on three sides, including but not limited to, the diagonal bracing on the side of the scaffold that plaintiff testified was behind him just prior to his accident. 1711 and Ryder contend that according to the affidavit of Bruno, the scaffold was not designed to have an additional rail installed on top of the diagonal guardrails on the end of the scaffold, that the scaffold's manufacturer forbids installation of additional rails, and that a horizontal rail could not be installed on the side of the scaffold where the steps are located.

1711 and Ryder also contend that based upon Bruno's affidavit, not only is personal fall protection equipment not required for workers at an elevation of twenty-four inches above the ground, but there is no personal fall arrest system which could work properly from the minimal height which plaintiff was above the ground. 1711 and Ryder contend that based upon the testimony, plaintiff fell because he lost his balance, and not because of a defect or inadequacy in the scaffold.

Also opposing the motion, Exclusive argues that while the scaffold included side safety railings and a diagonal cross-support, whether safety rails were necessary to provide the proper protection required by Labor Law § 240 (1) is a question of fact. Exclusive contends that plaintiff's argument that he should have been provided a harness for his work two feet off the floor lacks any evidentiary support.

Here, plaintiffs have made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240 (1) claim. Plaintiff fell off the scaffold from an elevated height. The scaffold which was supplied did not have adequate guardrails on all sides which were high enough to prevent plaintiff from falling backwards. While the scaffold did have a lower set of bars across the width of the scaffold, the location of the bars were too low to offer plaintiff protection from falling. Furthermore, no other type of protection or device was provided to plaintiff. *See Ordonez v One City Block, LLC*, 191 AD3d 412, 413 (1st Dept 2021) (holding that plaintiff established "that defendants violated Labor Law § 240 [1] and that the violation proximately caused plaintiff's injuries as the uncontroverted evidence shows that the scaffold supplied to plaintiff. . . lacked guardrails and that no other protective devices

were provided to protect him from falling”); *Martinez-Gonzalez v 56 West 75th St., LLC*, 172 AD3d 616, 617 (1st Dept 2019) (holding that the scaffold which plaintiff “was supplied with and directed to use lacked railings, and that he fell off when the scaffold tipped . . . [t]his evidence establishes prima facie a violation of Labor Law § 240 [1]”); *Sanchez v Bet Eli Co. Del. LLC*, 177 AD3d 478, 479 (1st Dept 2019) (holding that “[t]here is no dispute that the scaffold plaintiff was supplied with and directed to use lacked railings, and that he was not provided with any other safety devices”); *Celaj v Cornell*, 144 AD3d 590, 590 (1st Dept 2016) (holding that [p]laintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240 [1] claim by presenting undisputed evidence that he “fell off a scaffold without guardrails that would have prevented his fall” [internal quotation marks and citation omitted]).

Bruno’s affidavit which states that the device provided plaintiff with proper protection and that plaintiff should have reversed the scaffold toward the wall for its use, suggests comparative negligence which has been held to not be a defense to the Labor Law § 240 (1) claim. *See Crespo v Triad, Inc.*, 294 AD2d 145, 147 (1st Dept 2002).

Therefore, as the device did not provide plaintiff with adequate protection as it did not have a high protective safety rail which prevented him from falling backwards from an elevation, plaintiffs are entitled to summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

#### Labor Law § 241 (6)

Plaintiffs also contend that the part of their motion seeking summary judgment as to a violation of Labor Law § 241 (6) must be granted.

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

"[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

(6) 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 the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor. *St. Louis v Town of N. Elba*, 16 NY3d 411, 413 (2011). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements. *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 (2010).

Industrial Code Section 23-5.18 (b)

Plaintiffs allege a violation of Industrial Code section 23-5.18 (b) of the Industrial Code, which provides:

"[t]he platform of every manually propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule)."

Section 23-5.18 (b) of the Industrial Code has been held to be specific to support a Labor Law § 241 (6) claim. *See Morocho v Boulevard Gardens Owners Corp.*, 165 AD3d 778, 778-779 (2d Dept 2018); *Ritzer v 6 E. 43<sup>rd</sup> St. Corp.*, 57 AD3d 412, 412-413 (1st Dept 2008); *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281 (1st Dept 2005).

Plaintiffs contend that the manually propelled mobile scaffold which plaintiff utilized did not have adequate safety railings and that there is no evidence in the record that plaintiff was provided with any form of safety harness, tie off, lanyard or other fall-prevention device.

In opposition, 1711 and Ryder contend that this section of the Industrial Code is not applicable to the scaffold and that there is no requirement in Section 23-5.18 (b) for a horizontal top railing on all sides of an elevated work platform in Section 23-5.18 (b) or any other section of the Industrial Code. Also, in opposition, Exclusive argues that section 23-5.18 (b) of the Industrial Code only provides that a

railing must be provided for a mobile scaffold and that it does not require that railings surround the entire scaffold.

Here, the scaffold which was provided for plaintiff's use did not feature a safety railing which spanned the scaffold's length and which adequately provided protection in order to have prevented plaintiff from falling backwards. This is demonstrated by both the testimony of plaintiff as well as the photographs submitted of the subject scaffold which show the lack of a railing high enough to offer protection.

Therefore, as plaintiffs meet their burden to demonstrate a violation of Industrial Code section 23-5.18 (b) and as defendants fail to demonstrate that this section of the Industrial Code is not applicable, the part of plaintiff's motion seeking summary judgment as to Labor Law § 241 (6) predicated on a violation of Industrial Code section 23-5.18 (b) must be granted.

Industrial Code Section 23-5.18 (g)

Plaintiffs also allege a violation of Industrial Code section 23-5.18 (g), which provides:

"[w]henver any such scaffold is in use and is occupied by any person, such scaffold shall rest upon a stable footing, the platform shall be level and the scaffold shall stand plumb. All casters or wheels shall be locked in position."

Industrial Code section 23-5.18 has been held to be sufficiently specific to support a claim under Labor Law § 241 (6). *Quintero v 520 Madison Owners LLC*, 2021 NY Slip Op 32146 (U) (Sup C NY County, 2021).

Plaintiffs contend that section 23-5.18 (g) of the Industrial Code was violated because plaintiff testified that the scaffold started to move because one of the wheels was unlocked, causing him to lose his balance and fall.

In opposition, 1711 and Ryder contend that there is an issue of fact as to whether the scaffold actually moved and therefore it cannot be concluded that 1711, Ryder and/or McCormack violated Section 23-5.18 (g) as a matter of law.

In opposition, Exclusive contends that plaintiff testified that he checked the wheels to ensure that they were locked prior to using the scaffold, but then testified that the scaffold started moving prior to his fall. Exclusive maintains that there is no evidence in the record that any of the wheels malfunctioned as opposed to plaintiff failing to ensure one or more of the wheels were locked. Exclusive also contends that plaintiff's version of how the scaffold was placed in the closet is contested by Coward's testimony.

Here, based upon the testimony, there remains a question of fact as to why the scaffold moved and whether the lock on the wheel was located in a locked position as the device began to allegedly move. Therefore, the part of plaintiffs' motion for summary judgment pursuant to Labor Law § 241 (6), predicated on a violation of Industrial Code section 23-5.18 (g), must be denied.

### **Motion Sequence No. 3**

McCormack contends that plaintiffs' claims for common law negligence and a violation of Labor Law § 200 as against it must be dismissed.

Labor Law § 200 (1) provides, in pertinent part, as follows:

“[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998). When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive

notice of the allegedly unsafe condition that caused the accident. *See Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 (1st Dept 2004).

McCormack argues that it did not supervise, direct, or control the means or manner of work performed by plaintiff and that plaintiff testified that he had received all of his work instructions and supervision from Exclusive. McCormack argues that the subcontract between McCormack and Exclusive requires Exclusive to supervise its own workers. McCormack maintains that the owner of Exclusive testified that he purchased new platforms or scaffolds utilized only by his employees including the one that plaintiff utilized, that he routinely inspected them, and that there was no sharing of equipment and no other trade utilized that type of device. McCormack contends that the owner of Exclusive also testified that he would remove a scaffold from the site if it was defective and testified that he did not have a problem with a wheel failing to lock on the scaffolds.

In opposition, plaintiffs contend that due to the fact that the plaintiff was performing work for Exclusive, a subcontractor of McCormack, it cannot be disputed that the incident arose out of the work contracted by Ryder to McCormack. Plaintiffs argue that in the Ryder and McCormack construction trade contract, McCormack was responsible for construction means, methods and techniques. Plaintiffs argue that the fact that the subcontract between McCormack and Exclusive placed the obligation to supervise the work upon Exclusive is irrelevant because McCormack still retained a contractual obligation under its contract with Ryder to supervise and control the drywall work performed by its subcontractors and their employees.

In opposition, 1711 and Ryder contend that McCormack undertook the entire scope of work related to drywall, ceiling and carpentry work for the project and agreed to furnish all labor, supervision, materials, scaffolding, ladders, tools, equipment, supplies, insurance, permits and approvals necessary to complete its scope of work. They maintain that McCormack contractually agreed to supervise all work of its subcontractors needed to complete its scope of work.

Here, the testimony of the witnesses raises a question of fact as to whether McCormack had the authority to control the activity bringing about plaintiff's injury and was able to avoid or correct the condition. While Coward testified that there were no occasions in which McCormack was instructing workers how to conduct work, Vita testified that Exclusive's workers were directed as to what work to perform on a daily basis, and where to perform it by McEvoy, McCormack's foreman. Vita also testified that one of the workers who provided day to day supervision of Exclusive's work was McEvoy.

Hall's testimony regarding the work of McCormack at the site also conflicts with the testimony of Coward. Hall testified that McEvoy oversaw the subcontractors work at the site as McCormack had a small number of workers. Hall testified that McEvoy was responsible for supervising the work in reference to safety and that McCormack had a duty to inspect the subject scaffold before plaintiff's use. He maintains that McEvoy oversaw everything and that there was a supervisor or other foreman from a subcontractor of McCormack which was performing taping work who was in charge of the tapers. Hall testified that McEvoy would speak to this foreman and give directions who would then speak to the crew of tapers. He also recalls observing McEvoy directly telling the tapers what to do rather than going through the foreman.

Therefore, as a question of fact exists as to McCormack's work and supervision at the site and whether McEvoy supervised the work of the tapers, the part of McCormack's motion seeking summary judgment pursuant to Labor Law § 200, must be denied.

### Grave Injury

McCormack also contends that the Court has a sufficient basis to issue a finding that plaintiff has suffered a grave injury as defined in section 11 of the New York Workers' Compensation Law.

Section 11 provides, in relevant part:

“[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean

only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

NY CLS Work Comp § 11.

McCormack contends that the term “grave injury” as defined in the Worker’s Compensation Law specifies a “total loss of use of a hand” and also “quadriplegia.” McCormack contends that plaintiff’s injuries fall within the statutory definition on both grounds as plaintiff’s testimony and the expert affidavits evidence that plaintiff has lost total use of his right hand and he is an incomplete quadriplegic. McCormack contends that the findings of both Dr. Jeffrey M. Spivak and Dr. Joel B. Grad demonstrate that plaintiff has lost more than mere “functional use” of his right hand. McCormack further contends that there is no dispute that plaintiff has been correctly diagnosed with “incomplete quadriplegia, at C5-C7” or that the substantively equivalent diagnosis of “quadriplegia, incomplete” is a correct diagnosis of plaintiff’s condition.

In opposition, Exclusive contends that McCormack submits evidence showing the plaintiff suffered “virtual complete inability” to use his right hand and evidence that plaintiff was diagnosed with “incomplete quadriplegia.” Exclusive contends that counsel for McCormack wrongly claims that these injuries satisfy the definition of a “grave injury” under Workers’ Compensation Law § 11, and that this statute applies to “complete” loss of use of a hand and “quadriplegia”, and does not, apply to “virtual complete” loss of use or “incomplete quadriplegia.”

Dr. Jeffrey M. Spivak’s August 11, 2020 affirmation states:

“[r]egarding the cervical spine, there is residual stiffness expected from surgery with loss of approximately 50% of cervical motion based on the procedures performed. He has permanent neurologic deficits with a diagnosis of incomplete quadriplegia at the C5-7 level. He has lost functional use of his upper extremities, worst with loss of all use of the right hand. He has also lost functional use of his lower extremities; he is unable to transfer on his own and cannot walk in any meaningful way.”

NYSCEF DOC. NO. 169.

With regard to his right hand, Dr. Joel B. Grad's September 9, 2020 affirmation discusses this injury and states in part:

"Right Hand: based upon the virtual complete inability to move any of the five fingers of his right hand, it is my opinion, to a reasonable degree of medical certainty, that Mr. Richard would not be able to hold a toothbrush or open/close the buttons on his shirt/pajamas. He would also not be able to utilize an eating utensil (fork, spoon) to feed himself even if that utensil had been modified to accommodate a patient with these types of injuries. Due to the severe imitations in movement of his right arm, he is unable to move his right hand into position to attempt most of these functions even if he was able to move the fingers of his right hand. Due to the contractures of his right hand fingers, the digits are almost entirely frozen in a bent position which does not permit straightening of the fingers or any functional use. Most patients three years post-accident with this type of injury will have reached 100 percent maximal improvement. It is my opinion, to a reasonable degree of medical certainty, that the foregoing limitations of the right hand are permanent."

NYSCEF DOC. NO. 170.

In opposition, Exclusive fails to submit a medical expert's report which contradicts or questions the findings of Dr. Grad or Dr. Spivak. Therefore, as the physician affirmations state that there is a permanent limitation of plaintiff's right hand as well as quadriplegia suffered by plaintiff, and as there is no medical proof provided to dispute these findings, based upon these affirmations, the Court finds that plaintiff suffered a grave injury pursuant to section 11 of the New York Workers' Compensation Law.

#### Common Law Indemnification

McCormack argues that it is entitled to common law indemnification and contribution from Exclusive. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident.'" *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 (2d Dept 2005), quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 (1st Dept 1999); *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 (1st Dept 2004). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability

of each such person." *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 (2d Dept 2003) (internal citations and quotation marks omitted).

Exclusive contends that McCormack's motion for summary judgment as to common law indemnity must be denied on the basis that it is premature because questions of fact as to whether the plaintiff was the sole proximate cause of his own injuries.

Here, as issues of fact exist as presented by the testimony of the various witnesses which questions whether McCormack may have been negligent, the part of McCormack's motion seeking summary judgment as to common law indemnification and contribution must be denied.

#### Contractual Indemnification

McCormack also contends that its contract with Exclusive demonstrates that it should be granted contractual indemnification.

The Appellate Division, First Department, has held that " 'the intention to indemnify [must] be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.' " *Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 (1st Dept 2003), quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 (1987). "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. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *Correia v Professional Data Mgt.*, 259 AD2d at 65.

The indemnification clause of the "Subcontractor" contract between Exclusive and McCormack dated March 8, 2016 provides:

#### "4. INDEMNIFICATION

Indemnity. In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and indemnify, and hold harmless, at Subcontractor's sole expense, the Contactor, all entities the Contractor is required to indemnify and hold harmless, the Owner of the property and the officers, directors, agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury or death to any person(s) and for any and all property damage or economic damage, including all 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. This indemnity agreement shall survive the completion of the Work specified in the Contract Agreement.”

NYSCEF DOC. NO. 32.

McCormack argues that the indemnification agreement would apply to plaintiff’s accident and that Exclusive should provide coverage. McCormack also contends that it was not negligent.

Exclusive contends that McCormack has failed to show that the indemnification agreement was intended to include claims asserted by Exclusive’s own employees and failed to show that McCormack’s supervisor, McEvoy, did not supervise and control the means and methods of Exclusive’s work.

Here, as it remains unclear based upon the testimony, whether McCormack was negligent in any way and could have prevented the accident, the Court denies the part of McCormack’s motion seeking summary judgment as to contractual indemnification. *See Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 (1st Dept 2021) (holding as there has been no finding as to whether the subcontractor, owners or general contractor was negligent, the part of the motion seeking summary judgment as to contractual indemnification is premature).

#### **Motion Sequence No. 4**

In support of its motion pursuant to CPLR 3211 and 3212, CRSG first argues that it did not violate the Labor Law. However, the Court notes that plaintiffs maintain that they are not alleging any direct claims against CRSG. *See* NYSCEF DOC. 133.

CRSG next contends that contractual indemnification claims against it should be dismissed. Paragraph 11 of the subcontract agreement between Ryder and CRSG, which is dated January 12, 2015, states in part:

“[t]o the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless CM, Owner, Lender, Architect and any Additional Insureds identified in Attachment D, and their respective officers, partners, members, affiliates, managers, shareholders, directors, agents, employees, successors, and assigns (collectively,

"Indemnitees", individually, "Indemnitee") from and against all losses, claims (including, but not limited to, those alleging injury to third parties or damage to property of third parties), causes of action, lawsuits, costs, damages, and expenses (including the deductible amount of any insurance and, without limitation, attorneys' fees and disbursements), due to: (i) any personal injury, sickness, disease or death, or damage or injury to, loss of or destruction of property (including tools, equipment, plant and the buildings at the Project Site, but excluding the Work itself), including the loss of use resulting therefrom sustained at the Project to the extent caused by any negligent or wrongful act or omission of Subcontractor, its employees, subcontractors, representatives or other persons for whom Subcontractor is responsible and (ii) and claims asserted, or lien or notice of lien filed by any subcontractor or supplier . . . Subcontractor shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitee's negligence. . . ."

NYSCEF DOC. NO. 159.

CRSG contends that the alleged accident was not a result of its negligence or wrongful act or omission such that the indemnification provision would be triggered.

In opposition, 1711 and Ryder contend that CRSG admits that it contracted with 1711 and Ryder as site safety manager for the subject project and that CRSG's only basis for dismissal of 1711 and Ryder's claims for contractual indemnity are based on the foundation that CRSG did not procure proper insurance to provide 1711 and Ryder additional insured status. 1711 and Ryder contend that regardless of any purported insurance shortcoming, CRSG owed contractual indemnity to 1711 and Ryder for agreeing to be responsible for safety at the subject project. They argue that Ryder retained CRSG pursuant to a contract and agreed to act as the site safety manager and be responsible for furnishing all labor, materials and equipment required to prepare and provide a site-specific safety plan and program.

Here, the testimony of Hall, a safety manager for CRSG, raises a question as to whether CRSG may have been negligent. Hall testified that in April of 2017, he would conduct daily walk-throughs and would check that McCormack and the subcontractors were utilizing the scaffold correctly. He testified that he would check the work of McCormack and its subcontractors on a daily basis and recalls complaining about unlocked wheels. His inspection would entail locking the wheels of scaffolds, securing the flat forms, and checking the platform on top of the scaffold.

Hall testified that he may have inspected work on the eleventh floor prior to the accident and that if tapers were working on any type of rolling scaffolds, he would have inspected that work. However, he also testified that he did not recall inspecting any scaffolds of tapers working on rolling platforms on the date of plaintiff's accident. Hall also testified that he did not recall if he conducted a pre-inspection of any scaffolds that were being utilized by either McCormack or its subcontractors during the two months prior to plaintiff's accident.

Here, as Hall, during his occupational duties, was regularly inspecting scaffolds on behalf of CRSG on the floor of plaintiff's accident, and as it remains inconclusive if he inspected the subject scaffold, had notice of its condition, or what caused plaintiff to fall, it is unclear if any negligence may be attributable to CRSG. Therefore, as the indemnification clause requires coverage as a result of CRSG's negligence, the part of CRSG's motion seeking summary judgment as to contractual indemnification must be denied. Furthermore, as it remains undetermined if CRSG may have been negligent, the claims against it for common law negligence must not be dismissed.

#### **Motion Sequence No. 5**

1711 and Ryder contend that plaintiffs' claims pursuant to Labor Law §§ 200, 240 (1) and 241 (6) predicated on violations of 23-5.18 (g) and 23-5.1 (b) should be dismissed.

As to the claim of a violation of Labor Law § 200, in their memorandum of opposition, plaintiffs concede that the facts in the present case do not support a Labor Law § 200 or common law negligence claim against 1711 LLC or Ryder. *See* NYSCEF DOC. NO. 257, at 2, footnote 1. Therefore, the part of 1711 and Ryder's motion seeking to dismiss the Labor Law § 200 and common law negligence claims as against these parties is granted.

With regards to the claims of violations of Labor Law §§ 240 (1) and 241 (6), these sections of the Labor Law have been addressed in motion sequence 002. Therefore, the part of their motion seeking summary judgment as to Labor Law §§ 240 (1) and 241 (6) predicated on violations of 23-5.18 (g) and 23-5.1 (b), is denied.

### Contractual Indemnification

1711 and Ryder next contend that McCormack owes them contractual indemnification. They argue that McCormack agreed to defend and indemnify both 1711 and Ryder from and against all losses, claims, causes of action, lawsuits, costs, damages, and expenses to the extent arising out of or resulting from McCormack's performance of the work under an agreement. They argue that due to the fact that the plaintiff was performing work for Exclusive, a subcontractor of McCormack, it cannot be disputed that the incident arose out of the work contracted by Ryder to McCormack.

In Section 12.2 of the "Standard Form of Trade Contract" between Ryder, the "construction manager," and McCormack, the "trade contractor," the indemnification requirements are discussed. The contract provides:

"(a) To the fullest extent permitted by law, Trade Contractor shall indemnify, defend and hold harmless CM, Owner, Lender, Architect and any Additional Insureds identified in Exhibit E, and their respective officers, partners, members, affiliates, managers, shareholders, directors, agents, employees, successors, and assigns (collectively, "Indemnitees", individually, "Indemnitee") from and against all losses, claims (including, but not limited to, those alleging injury to third parties or damage to property of third parties), causes of action, lawsuits, costs, damages, and expenses (including the deductible amount of any insurance and, without limitation, attorneys' fees and disbursements, including attorney's fees and disbursements incurred in connection with enforcement of this indemnity), to the extent arising out of or resulting from the Trade Contractor's (and/or anyone else for whom Trade Contractor is responsible) performance of the Work and/or breach of this Agreement. Such obligations shall arise regardless of any claimed liability or the part of an indemnified party, provided, however, Trade Contractor shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitee's negligence. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any Indemnitee."

NYCEF DOC. NO. 199.

Here, the contract between McCormack and Ryder specifically sets forth indemnification requirements, which include the requirement that McCormack provide indemnification coverage for lawsuits which arise from McCormack's work, or anyone for which McCormack was responsible. As McCormack was responsible, by contract, for the work of Exclusive, plaintiff's employer, Ryder would be entitled to indemnification coverage for the subject accident. Therefore, the part of 1711 and Ryder's

motion seeking summary judgment as to their claim for contractual indemnification against McCormack must be granted.

1711 and Ryder also contend that Exclusive owes them contractual indemnification. They argue that Exclusive agreed to defend and indemnify McCormack and all entities McCormack is required to indemnify and hold harmless, which includes 1711 and Ryder.

Here, as discussed above, McCormack is to contractually indemnify Ryder. However, the indemnification clause between McCormack and Exclusive provides that Exclusive must indemnify McCormack as well as all entities which McCormack must indemnify, excluding only liability created by the sole and exclusive negligence of the indemnified parties. As issues of fact have been presented as to whether McCormack was negligent which in turn, impacts the contractual indemnification responsibilities of Exclusive, the Court denies the part of 1711 and Ryder's motion seeking summary judgment for contractual indemnification as against Exclusive.

1711 and Ryder also contend that CRSG owes them contractual indemnification as CRSG agreed to act as the site safety manager and be responsible for furnishing all labor, materials and equipment required to prepare and provide a site-specific safety plan and program.

As discussed in motion sequence 004, the indemnification clause between Ryder and CRSG requires a finding of negligence, a wrongful act, or an omission by CRSG. As a question exists as to whether CRSG may have been negligent, 1711 and Ryder's claims for contractual indemnification as against CRSG are premature. *See Pena v Intergate Manhattan LLC*, 194 AD3d at 578; (holding as there is "no finding has yet been made as to whether Beeche [subcontractor] or the Owners/GCs were negligent, the motion was premature"); *Gomez v Sharon Baptist Bd. of Directors, Inc.*, 55 AD3d 446, 447 (1st Dept 2008) (holding "[t]hus far there has been no finding that either [third party defendant] or its agents were negligent let alone that such negligence proximately caused plaintiff's injuries. Accordingly, summary judgment on the contractual indemnification claim is premature").

1711 and Ryder also contend that they are entitled to common law indemnification from McCormack, Exclusive and CRSG. With regards to common law indemnification, as discussed above, a party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident. *Orea v NH Hotels USA, Inc.*, 187 AD3d 476, 478 (1st Dept 2020) (holding defendant has not established its entitlement to common law indemnification as questions of fact exist concerning what party was negligent).

As it remains unclear to the Court from the testimony what caused the scaffold to move, and whether McCormack, Exclusive, or CRSG were negligent, the part of 1711 and Ryder's motion seeking common law negligence as against these defendants is premature.

### CONCLUSION

Accordingly, it is ORDERED that plaintiffs motion for partial summary judgment against defendants 1711, Ryder, and McCormack (sequence 002) is granted in part as to the claims asserting violations of Labor Law §§ 240 (1) and 241 (6) predicated on a violation of Industrial Code section 23-5.18 (b), and is otherwise denied; and it is further

ORDERED that McCormack Contracting Inc.'s motion (sequence 003) for summary judgment is denied; and it is further

ORDERED that Construction Realty Safety Group, Inc.'s motion (sequence 004) to dismiss and for summary judgment is denied; and it is further

ORDERED that 1711 LLC and Ryder Construction, Inc.'s motion (sequence 005) is granted in part to the extent that plaintiffs' common law negligence and Labor Law § 200 as against 1711 LLC and Ryder Construction, Inc. are dismissed; and summary judgment is granted on their claim for contractual indemnification against McCormack Contracting Inc.; and the motion is otherwise denied.

This constitutes the decision and order of the Court.

3/10/2022

DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE