Asian v Flintlock Constr. Servs., LLC
2022 NY Slip Op 32581(U)
August 2, 2022
Supreme Court, New York County
Docket Number: Index No. 150767/2018
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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SAUL ASIAN, Index No. 150767/2018

Plaintiff,

-against-

FLINTLOCK CONSTRUCTION SERVICES, LLC, LICKEEN CONSULTING CORP., and LAM GROUP, LLC,

Defendants.

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FLINTLOCK CONSTRUCTION SERVICES LLC,

Third-Party Plaintiff,

-against-

SKY MATERIALS CORP.,

Third Party Defendant.

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PERRY, J.

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Saul Asian, a laborer on July 21, 2017, when, while working at a construction site located at 233 West 125th Street in Manhattan (the Premises), he was injured when he fell from the top of a wall onto scaffolding.

In motion sequence number 001, plaintiff moves, pursuant to CPLR 3212, for summary judgment in his favor on his common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against defendant/third-party plaintiff Flintlock Construction Services, LLC (Flintlock).

In motion sequence number 002, Flintlock moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims against it, as well as

for summary judgment in its favor on its third-party indemnification and breach of contract for the failure to procure insurance claims as against third-party defendant Sky Materials Corp (Sky).

BACKGROUND

On the day of the accident, non-party 233 West 125th Street Danforth, LLC (Danforth) was the owner of the Premises. Danforth hired Flintlock to provide construction management services in relation to a project at the Premises that entailed the demolition of an existing building at the Premises and the subsequent building of a new construction high rise (the Project). Flintlock hired Sky to perform, among other things, demolition work for the Project. Plaintiff was employed by Sky.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Sky as a laborer. He was supervised by two Sky employees, "Jimmy" and "Macario" (plaintiff's tr at 32). His supervisors directed his work and Sky provided his safety equipment and materials – including a "helmet, goggles and a harness" (*id.* at 100). He was wearing all his safety gear at the time of the accident.

On the day of the accident, Jimmy tasked plaintiff with demolishing an existing wall with a "chipping hammer" (a form of jackhammer) (*id.* at 38), which weighed approximately 80 to 100 pounds (plaintiff's second tr at 36). The wall was a "high, strong wall" made of brick and cement (plaintiff's tr at 39) (the Wall). Plaintiff's work area was at the top of a six-foot tall scaffold. When he stood on the scaffold, the Wall continued up "four feet, more or less" (*id.* at 51). The bricks that he was tasked with removing were at the top of the Wall.

Plaintiff testified that the day of the accident was his first day using the chipping hammer on the Wall (plaintiff's second tr. at 44). He also testified that photographs depicting him using a chipping hammer had been taken a day or two prior to the accident (*id.* at 60).

Plaintiff testified that, because the bricks he was tasked to remove were several feet above the scaffold, it was difficult to use the chipping hammer. He explained that, rather than being able to press down on the bricks with the chipping hammer and the full force of his weight, he had to lift the chipping hammer up to reach the bricks. Plaintiff explained that doing so required plaintiff to hold his arms and part of the chipping hammer above his head, causing him to be unable to use his weight to press down. According to plaintiff, using the chipping hammer in this manner was very uncomfortable and unsafe.

Plaintiff asked his supervisor to raise the scaffold "up to the level of the wall . . . so that [he could] step on the wall and on the scaffold at the same time" to be able to "press down" on the chipping hammer (plaintiff's tr at 46). His supervisor declined to do so because it would take too much time. He told plaintiff to "[j]ust do it' because we were behind" schedule (*id.* at 48). At his second deposition, plaintiff further explained that Jimmy, his supervisor, "ordered me to break the wall while I was standing . . . [o]n the wall" (plaintiff's second tr at 47).

Plaintiff and another coworker then climbed from the scaffold onto the top of the Wall and began working. While working at the top of the Wall, the chipping hammer produced "stones and dirt" (*id.* at 76). The stones and dirt, combined with the vibrations caused by his use of the chipping hammer, caused plaintiff to slip and fall from the Wall onto the scaffold below (*id.* at 76).

Plaintiff was shown several photographs depicting him working at the Project on days prior to the accident. He testified that they did not show the area where he was working on the

day of the accident. A separate photograph (marked as exhibit C) depicted plaintiff standing on the scaffold with his arms above his head pressing down on a chipping hammer, which was situated atop the Wall. Plaintiff testified that this photograph depicted "a position that [he] tried to break" but couldn't because his "arms didn't have that much strength" (plaintiff's tr at 59). He further testified that the photograph depicted the actual area where he fell from on the day of the accident.

Plaintiff was shown a copy of an accident report. He testified that it was accurate, except for the date. The report states that the accident occurred on July 20, 2017, while plaintiff testified that it occurred on July 21, 2017 (plaintiff's second tr at 84).

Deposition Testimony of Manuel de la Vega (Flintlock's Project Manager)

Manuel de la Vega testified that on the day of the accident, he was Flintlock's project manager for the Project. Flintlock is a construction management company. His responsibilities as Flintlock's project manager included the general administration of the Project, including the hiring of subcontractors. De la Vega was not present at the Premises on a daily basis. He was typically present once or twice a week.

Flintlock was hired by the owner of the Premises, non-party Danforth. The Project entailed the demolition of a preexisting building and the construction of a high-rise mixed-use building. Flintlock was responsible for overseeing the entire project, including hiring and monitoring the subcontractors (de la Vega tr at 26), scheduling work, general safety and general quality assessments and control. Flintlock hired Sky to perform excavation, foundation and superstructure work. Flintlock also hired the site safety company overseeing the Project and had the authority to stop work if subcontractors were working in an unsafe manner. At his

deposition, de la Vega agreed that Flintlock acted as Danforth's "eyes, ears and voice" (*id.* at 42).

At the time of the accident, principal demolition had been completed and "[e]xcavation" was ongoing (*id.* at 22). De la Vega was not present at the Premises at the time of the accident and did not learn about the accident until the instant action commenced. Because they were not made aware of the accident at the time it happened, Flintlock never prepared an incident report.

De la Vega was shown a contract and identified it as the contract between Danforth and Flintlock for the Project. He also identified a contract between Flintlock and Sky. De la Vega also testified that Flintlock did not provide any materials or equipment to Sky or supervise or direct its workers.

Deposition Testimony of James O'Donoghue (Sky's Consultant)

James O'Donoghue testified that at the time of the accident, he was a consultant working on behalf of Sky. Separately, he was the owner of Lickeen Consulting Corp. (Lickeen).[1] He worked on the Project for Sky, as its "[c]oncrete safety manager" (O'Donoghue tr at 15). He was responsible for worker health and safety and making sure that Sky was "up to code" and "didn't receive any DOB violations" (*id.* at 16).

O'Donoghue was present at the Project every day, and he walked the Premises multiple times a day. Sky provided safety equipment to its workers, including structural safety devices such as scaffolding, and personal safety devices such as safety harneses. According to O'Donoghue, workers only needed to be tied off at a height above six feet. He was responsible

[1] Lickeen is a party to this action, though no motions are presently before this court regarding Lickeen.

for making sure that Sky workers were properly tied off if necessary. He also held toolbox talks and safety meetings at the Project.

O'Donoghue testified that he did not witness the accident, and he learned of the accident later that day. He does not remember visiting the accident location, nor did he have any specific recollection of how the accident happened. He did not speak with plaintiff at any time. At his deposition, O'Donoghue was shown a copy of Sky's accident report and confirmed that he had written and signed the document. He did not recall preparing the document.

DISCUSSION

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993][internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 001 and 002)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Flintlock. Flintlock moves for summary judgment dismissing the same claim as against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . 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) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010][Roman, J. concurring]). Instead, 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]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

As an initial matter, Flintlock argues that it is not a proper Labor Law defendant as it is not an owner, contractor or agent of either, such that it can be held vicariously liable for plaintiff's injuries under Labor Law § 241 (6).

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [internal citations omitted]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Here, testimony establishes that there was no general contractor for the Project. Testimony also establishes that Flintlock directly hired the subcontractors at the Project, including plaintiff's employer, Sky, and the site safety manager (de la Vega tr at 26 [acknowledging that Flintlock hired and retained "all the subcontractors that were necessary" for the Project]. In addition, Flintlock was responsible for making sure that all the subcontractors were performing their work and were conforming to project specifications and safety regulations (*id.* at 33-34), pursuant to Flintlock's own site-specific safety plan for the Project (*id.* at 48). Flintlock also had the authority to stop work. Further, de la Vega agreed that Flintlock, essentially, functioned as the "eyes, ears and voice" of the owner (*id.* at 42).

Given the foregoing, Flintlock acted as an agent of the owner (*see e.g. Douglas v Tishman Constr. Corp.*, 205 AD3d 570, 571, 571 [1st Dept 2022] ["the construction manager of

the work site hired [subcontractor] to complete the concrete work under a contract that set forth [the construction manager's] safety guidelines. Thus [the construction manager] had the authority to exercise control over the work that brought about plaintiff's injuries"]; *accord Lind v Tishman Constr. Corp. N.Y.*, 180 AD3d 505, 505 [1st Dept 2020]; *Johnson v City of New York;* 120 AD3d 405, 406 [1st Dept 2014] [construction manager was an agent where it had broad responsibilities for coordination and supervision of the work, as well as acknowledging that it was "the eyes and ears" of the owner]). To the extent that Flintlock argues that it did not actually exercise any control over Sky, "[t]he determinative factor is whether [Flintlock] had a right to exercise control over the work, not whether it actually exercised that right" (*Santos v Condo 124 LLC*, 161 AD3d 650, 653 [1st Dept 2018]).

Thus, Flintlock is an agent of the owner for the purposes of the Labor Law and may be vicariously liable for plaintiff's injuries under Labor Law § 240 (1) and 241 (6).

Turning now to the substance of the instant accident, plaintiff was injured when he fell from the top of the Wall onto the scaffold below. Plaintiff's testimony established that he had to work from the top of the Wall because the scaffold was too low to allow him to perform his work in a safe and comfortable manner. Plaintiff also established that while working from the top of the Wall, he lost his balance and fell. Accordingly, the scaffold provided for plaintiff's work was insufficient to protect him from a gravity related injury.

In opposition, Flintlock argues that plaintiff was the sole proximate cause of his accident, because he could have worked from the scaffold, but chose not to. Specifically, Flintlock argues that there was no violation because the scaffold itself was up to code, did not collapse, and plaintiff's accident occurred solely because he chose to work from the top of the wall "to make his work more comfortable" (affidavit in opposition, ¶ 44). This is incorrect. The violation of

section 240 (1) occurred, not because the scaffold collapsed, but because the scaffold was of an insufficient height to allow plaintiff to perform his work safely (*see Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013] [holding that a violation of section 240 (1) was established through the plaintiff's testimony that the safety device he was using was "too short to enable him to reach" his work area]).

In any event, plaintiff's decision to work from a precarious position goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]). Indeed, "[i]t is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *see also Granieri v 500 Fifth Ave. Assoc.*, 223 AD2d 450, 451 [1st Dept 1996] [culpable conduct related to the improper placement of a ladder does not defeat a claim under section 240 [1]).

Thus, plaintiff is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim as against Flintlock, and Flintlock is not entitled to summary judgment dismissing the same.

The Labor Law § 241 (6) Claims (Motion Sequence Numbers 001 and 002)

Flintlock moves for summary judgment dismissing the Labor Law § 241 (6) claim as against it. Plaintiff moves for summary judgment in his favor on that part of his Labor Law § 241 (6) claim against Flintlock predicated upon violations of Industrial Code sections 12 NYCRR 23-1.7 (d), 23-1.7 (e) (2), 23-3.3 (b) (4) and (5) and 23-3.3 (c).

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

> "All 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, [and] equipped . . . 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 of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, plaintiff lists multiple violations of the Industrial Code in the bill of particulars. Except for sections 23-1.7 (d), 23-1.7 (e) (2), 23-3.3 (b) (4) and (5) and 23-3.3 (c), plaintiff does not affirmatively seek relief or oppose their dismissal. These uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Accordingly, Flintlock is entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) governs slipping hazards. This provision is sufficiently specific to support a Labor Law § 241 (6) claim (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259 [1st Dept 2005]). It provides the following:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

As relevant here, plaintiff testified that his accident was caused, in part, when he lost his footing due to vibration and debris caused by his work (plaintiff's second tr, at 76). As an initial matter, a vibration is not a slippery condition or foreign substance as contemplated by this provision. As to the debris caused by his work, such debris is not a "foreign substance" as contemplated by section 23-1.7 (d) (*Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215 [2d Dept 2017] [paper that the plaintiff slipped on was an "integral part of" the work that "does not constitute a 'foreign substance' within the meaning of 12 NYCRR 23-1.7 (d)"]).

Accordingly, section 23-1.7 (d) does not apply to plaintiff's accident. Therefore, Flintlock is entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (d). Plaintiff is not entitled to summary judgment in his favor on the same claim.

Industrial Code 12 NYCRR 23-1.7 (e) (2)

Industrial Code 12 NYCRR 23-1.7 (e) (2) governs "working areas." It is sufficiently specific to support a Labor Law § 241 (6) claim (*Singh v Young Manor*, 23 AD3d 249 [1st Dept 2005]). It provides the following:

> "The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

(id.).

While plaintiff testified that he slipped and fell, rather than tripped and fell, this section may still apply (*Lois v Flintlock Const. Services, LLC*, 137 AD3d 446, 447-48 [1st Dept 2016] ["Whether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability" of section 1.7 (e)]).

That said, plaintiff slipped on debris created by his own demolition. Such debris is an integral part of the work (*Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [1st Dept 2007] [section 23-1.7 (e) (2) was not violated where "the debris covering the scaffold resulted directly from the masonry work plaintiff and his co-worker were performing, and thus constituted an integral part of that work"]). Accordingly, section 23-1.7 (e) (2) is inapplicable to the accident.

Thus, Flintlock is entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2). Plaintiff is not entitled to summary judgment in his favor on the same claim.

Industrial Code 12 NYCRR 23-3.3 (b) (4) and (5)

Industrial Code 12 NYCRR 23-3.3 governs "demolition by hand." Subsection (b) governs demolition of walls and partitions.

Sections (4) and (5) provide the following:

> "(4) Employers shall not suffer or permit any person to work while such person is standing on top of a wall or any similar elevated structure of small area.
>
> "(5) In the demolition by hand of exterior walls, all persons performing such work shall be provided with safe footing in the form of sound flooring or scaffolds constructed and installed in compliance with this Part (rule)."

The parties do not provide the court with specific caselaw as to whether section 23-3.3 (b) (4) itself is sufficiently specific to support a Labor Law § 241 (6) claim, and the court's own research finds no case discussing this specific subsection.

For an industrial code provision to fall within the scope of section 241 (6), it must issue a "specific, positive command" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 504). Specifically, "only provisions of the Industrial Code mandating compliance with concrete specifications give rise to a non-delegable duty under Labor Law § 241(6)" (*Toussaint v Port Auth. of N.Y. and N.J.*, 38 NY3d 89, 94 [2022], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 505).

By its language, section 23-3.3 (b) (4) offers a specific, concrete command that workers shall not be permitted to work while standing on the top of a wall. Accordingly, section 23-3.3 (b) (4) is sufficiently specific to support a Labor Law § 241 (6) claim (*see e.g. Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413, 413 [1st Dept 2014] [regulation stating that damaged tools "'shall not be used' sets forth a sufficiently specific, positive command, the violation of which may serve as a predicate for plaintiff's cause of action pursuant to Labor Law § 241 (6)"]).

Here, it is undisputed that plaintiff was injured when, working from the top of a wall, he slipped and fell from the wall. That plaintiff was allowed to work from the top of the wall, in and of itself, was a violation of section 23-3.3 (b) (4), and said violation was a proximate cause of plaintiff's injuries.

In opposition, Flintlock argues that using a chipping hammer does not fall within the scope of section 3.3, because the use of a chipping hammer does not constitute "demolition by hand." This argument is unpersuasive (*see e.g. Balladares v Southgate Owners Corp.,* 40 AD3d 667 [2d Dept 2007] [section 23-3.3 applied to a plaintiff injured while demolishing a structure with a jackhammer]).

Thus, plaintiff is entitled to summary judgment in his favor on that part of his Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-3.3 (b) (4). Flintlock is not entitled to summary judgment dismissing the same.

With respect to section 23-3.3 (b) (5), the record reflects that plaintiff was provided with a scaffold constructed in compliance with the Industrial Code. That the scaffold was not sufficiently high is not an issue with respect to this provision. Accordingly, section 23-3.3 (b) (5) was not violated. Thus, Flintlock is entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-3.3 (b) (5). Plaintiff is not entitled to summary judgment in his favor on the same claim.

Industrial Code 12 NYCRR 23-3.3 (c)

Industrial Code 12 NYCRR 23-3.3 (c) governs inspections during hand demolition. It is sufficiently specific to support a claim (*see Leveron v Prana Growth Fund I, L.P.,* 181 AD3d 449 [1st Dept 2020]). Section 23-3.3 (c) provides the following:

> "During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect

> any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

Plaintiff argues that Flintlock failed to perform the requisite continuing inspections of the demolition operation in violation of section 23-3.3 (c). While there is some testimony establishing that a site safety supervisor was not present on the day of the accident, it is of no moment. Plaintiff did not fall due to any form of structural instability that would have been discovered by an inspection. Rather, plaintiff fell because he was standing on the top of the Wall while performing his work. While plaintiff argues that the vibrations from his work were a cause of the accident, such vibrations do not constitute the type of hazard contemplated by this provision (*see Mayorga v 75 Plaza LLC*, 191 AD3d 606, 608 [1st Dept 2021], *appeal denied*, 37 NY3d 962 [2021] [section 23-3.3 (c) found "inapplicable to the extent that the hazard arose from the demolition work itself as opposed to any structural instability caused by the progress of the demolition"]).

Thus, Flintlock is entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-3.3 (c). Plaintiff is not entitled to summary judgment in his favor on the same claim.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 001 and 002)

Plaintiff moves for summary judgment in his favor on his common-law negligence and Labor Law § 200 claims against Flintlock. Flintlock moves for summary judgment dismissing the same as against it.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black*

Diamonds LLC, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp*., 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012])

However, where an injury stems from a dangerous condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive

notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, the accident was caused when plaintiff slipped and fell while working from the top of the Wall. Accordingly, plaintiff's accident implicates the means and methods of the work. The record is devoid of any evidence that Flintlock had the authority to supervise or control the performance of the injury producing work – i.e. the demolition of the Wall.

In opposition, plaintiff argues that Flintlock was charged with the general safety oversight at the Project and hired the site safety supervisor. These responsibilities provide only general – not actual – supervisory control over the subject work. General control is insufficient to impute liability under section 200, as even where an entity "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

Thus, Flintlock is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it. Plaintiff is not entitled to summary judgment in his favor on the same claims.

Flintlock's Third-Party Contractual Indemnification Claims against Sky (Motion Sequence Number 002)

Flintlock moves for summary judgment in its favor on its third-party contractual indemnification claim against Sky.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d

774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

On August 30, 2017, Flintlock and Sky entered into a "Standard Form of Agreement Between Contractor and Subcontractor" regarding the Project at the Premises (the Sky Agreement). This agreement contains an indemnification provision. Notably, the Sky Agreement post-dates plaintiff's accident by nearly two months. Except for quoting the indemnification provision, no party addresses the substance of the Sky Agreement or whether it was intended to have a retroactive intent to the date of plaintiff's accident.

Therefore, the court is unable to determine whether the contractual indemnification provision was in force and effect at the time of the accident (*see Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410, 410 [1st Dept 2001] [denying summary judgment on third-party contractual indemnification claim where contract was "dated and executed after plaintiff's accident" because "there [was] nothing about these contracts to suggest that they were intended to have retroactive intent"]; *accord Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 366 [1st Dept 2005]). In addition, Sky's procurement of insurance consistent with the subsequently executed terms of the Sky Agreement, without more, merely raises a question of fact as to indemnification (*Mendez v Bank of Am., N.A.*, 181 AD3d 419, 420 [1st Dept 2020]).

Accordingly, Flintlock is not entitled to summary judgment in its favor on its third-party claim for contractual indemnification from Sky.

Flintlock's Third-Parry Breach of Contract for the Failure to Procure Insurance Claim against Sky (Motion Sequence Number 002)

Flintlock moves for summary judgment on its breach of contract for the failure to procure insurance claim as against Sky.

As discussed above, a question of fact remains as to whether the Sky Agreement applies retroactively to the accident, such that the Sky Agreement's insurance procurement provision was in force and effect at the time of the accident.

In any event, it is undisputed that Sky procured insurance. The only dispute is whether Sky's insurer has accepted tender this claim. Such an issue does not involve a breach of the insurance procurement provision (*see Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996] [the insuring party is not liable to another for breach of contract for the failure to procure insurance when it "fulfilled its contractual obligation to procure proper insurance on behalf of" the insured party]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [denying a breach of contract for the failure to procure insurance claim, noting that "[t]he insurer's refusal to indemnify Morse Diesel under the coverage purchased by Property Resources does not alter this conclusion"]). Here, Flintlock concedes that Sky procured insurance. Whether Flintlock is a proper additional insured under Sky's policy is not an issue before this court, and Sky's insurer is not a party hereto.

Thus, Flintlock is not entitled to summary judgment in its favor on its breach of contract for the failure to procure insurance third-party claim against Sky.

Flintlock's motion for summary judgment dismissing all cross claims and counterclaims against it (Motion Sequence Number 002)

Flintlock moves for summary judgment dismissing all cross claims and counterclaims against it. However, Flintlock does not identify any specific claims it seeks to dismiss or raise any arguments as to why such claims should be dismissed.

Accordingly, Flintlock is not entitled to summary judgment dismissing such claims.

The parties remaining arguments have been considered and were found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Saul Asian's motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated upon an alleged violation of Industrial Code 12 NYCRR 23-3.3 (b) (4), is granted as against defendant/third-party plaintiff Flintlock Construction Services, LLC (Flintlock); and the motion is otherwise denied; and it is further

ORDERED that the part of Flintlock's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent of dismissing the common-law negligence and Labor Law § 200 claims, as well as all Industrial Code violations (except for section 23-3.3 (b) (4), alleged against it; and the motion is otherwise denied.

This constitutes the decision and order of the court.

8/2/2022
DATE

WILLIAM PERRY, J.S.C.

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