Montero v International House
2022 NY Slip Op 32661(U)
July 26, 2022
Supreme Court, Kings County
Docket Number: Index No. 516925/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of July 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ZOILA MONTERO and TANIA TENEZACA, the Co-Administrators of the Estate of ANGEL PATRICIO ESPINOZA a/k/a ANGEL PATRICIO ESPINOZA and a/k/a ANGEL ESPINOZA, deceased,

Plaintiffs,

-against-

INTERNATIONAL HOUSE and PRATT CONSTRUCTION & RESTORATION INC.

Defendants.

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INTERNATIONAL HOUSE,

Third-Party Plaintiff,

- against –

ARLE ENTERPRISES CORP.,

Third-Party Defendant.

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PRATT CONSTRUCTION & RESTORATION,

Second Third-Party Plaintiff,

- against –

ARLE ENTERPRISES CORP.,

Second Third-Party Defendant.

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Index No. 516925/2019

DECISION AND ORDER

Motions Sequence #2, #3, #4

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed 65-93, 96-97, 99-136, 138-155,
Opposing Affirmations.....164-165, 166-175, 176-197, 199-201, 203, 204-206, 209-211, 213-217, 218, 222-225,
Reply Affidavits (Affirmations) 227, 228-229, 230-231, 232, 233,
Memorandum of Law..... 94, 98, 156, 198, 202, 207, 212, 226, 234

After a review of the papers and oral argument, the Court finds as follows:

Plaintiffs Zoila Montero and Tania Tenezaca, the Co-Administrators of the Estate of Angel Patricio Espinoza a/k/a Angel Espinoza (hereinafter either the "Plaintiffs" or the "Decedent") allege causes of action pursuant to New York State Labor Law §§200, 240, and 241(6) and common law negligence as against Defendants International House and Pratt Construction & Restoration, Inc. (hereinafter referred to collectively as the "Defendants"). Plaintiffs allege in their Verified Bill of Particulars that on July 12, 2018, while employed by Third Party Defendant Arle Enterprises, Inc. and working on a construction project at 524-527 Riverside Drive, New York, NY (hereinafter the "Premises" or "Project"), the Decedent Plaintiff suffered personal injuries and ultimately died after he was struck by a falling metal beam that had been part of a hanging scaffold being dismantled several stories above him.

Defendant/Third Party Plaintiff International House, purported owner of the Premises (hereinafter "International House"), now moves (motion sequence #2) for an order pursuant to 3212 for summary judgment dismissing the Plaintiffs' common law negligence, Labor Law 200, and 241(6) claims. International House contends that the motion should be granted as to the common law negligence and Labor Law 200 claims given that there is no indication that it had actual or constructive notice of any defective condition or that it supervised or controlled the Decedent Plaintiff's work. Also, International House contends that the Plaintiffs' Labor Law 241(6) claims should be dismissed as the code violations alleged by the Plaintiff are either insufficiently specific or inapplicable to the facts of this case.[1] International House also seeks summary judgment on its claims for indemnification and contribution as against Pratt Construction (cross-claim) and Arle Enterprises (third party claim).

The Plaintiff opposes the motion. The Plaintiffs contend that the Defendants have failed to meet their *prima facie* burden regarding notice. The Plaintiffs argue that the use of the fitness center roof for a

[1] The Plaintiffs in both their opposition and motion (motion sequence #3) only address Industrial Code provisions 23-1.7(a)(1) and 23-2.1(a)(2). Therefore, the Defendants' motions (motions sequence #2 and #4) in relation to the remaining Industrial Code provisions are granted. See *Elam v. Ryder Sys., Inc.*, 176 A.D.3d 675, 675, 107 N.Y.S.3d 718 [2d Dept 2019]. The remainder of this decision will only reference these remaining Industrial Code provisions.

staging area directly below the hanging scaffold, in conjunction with the lack of overhead protection, constitutes notice of a dangerous condition. The Plaintiffs also contend that the fact that the Project was issued a violation by the Department of Buildings, for apparently similar problems with the scaffolding, constitutes actual or constructive notice in relation to the Plaintiffs' common law negligence and Labor Law 200 claim. The Plaintiff also argues that International House has failed to meet its *prima facie* burden in relation to the Plaintiff's Labor Law 241(6) claims. The Plaintiffs also cross-move (motion sequence #3) for an order pursuant to CPLR 3212 as against both Defendants for summary judgment on the issue of liability. Specifically, the Plaintiffs contend that summary judgment should be granted as to the Plaintiff's Labor Law 240(1) claim in that this claim specifically relates to falling objects. As to the Plaintiff's Labor Law 241(6) claim, the Plaintiffs contend that this claim is supported by the Defendants' violation of Industrial Code provisions 23-1.7(a)(1) and 23-2.1(a)(2) and should result in an award of summary judgment.

Third Party Defendant/Second Third Party Defendant Arle also opposes the motion by International House. Arle contends that the motion by International House for common law and contractual indemnification should be denied as Arle contends that it was Pratt that was responsible for supervising the Project and that Arle did not directly contract with International House but was instead a subcontractor working with Pratt. Defendant/Second Third Party Plaintiff Pratt Construction and Restoration, Inc. (hereinafter "Pratt") also opposes the International House motion and argues that it has procured insurance and as a result, the motion by International House for indemnification should be denied.

Defendant/Second Third Party Plaintiff Pratt also moves (motion sequence #4) for an order pursuant to 3212 for summary judgment dismissing the Plaintiff's common law negligence, Labor Law 200, and 241(6) claims. Pratt also seeks an order pursuant to 3212 on its Third Party Complaint that seeks common law and contractual indemnity and contribution from third party defendant Arle. As stated above, the Plaintiffs oppose this motion and cross move for separate relief. Third Party Defendant Arle Enterprises also opposes that aspect of Pratt's motion as it relates to Pratt's claim for indemnification and

contribution. Arle contends that it was not responsible for the Plaintiff's injuries and that as a result, Pratt's claims for indemnification and contribution should be denied.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Labor Law § 200

"Labor Law section §200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site." *Rizzuto v. L.A. Wenger Contracting Co.,* 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073 [1998]. "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed." *Ortega v.*

Puccia, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 [2d Dept 2008]. "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed at a work site, an owner or manager of real property must have authority to exercise supervision and control over the work at the site." *Banscher v. Actus Lend Lease, LLC*, 132 AD3d 707, 709, 17 N.Y.S.3d 774, 776 [2d Dept 2015], quoting *Gallello v. MARJ Distributors, Inc.*, 50 A.D.3d 734, 736, 855 N.Y.S.2d 602, 605 [2d Dept 2008].

Turning to the merits of the motion made by International House (motion sequence #2), the Court finds that it has met its *prima facie* burden in relation to the Plaintiff's common law negligence and Labor Law 200 claims. International House contends that the Plaintiff's accident arose as a result of the dismantling of a hanging scaffold and as a result the Plaintiffs' negligence and Labor Law 200 claims arise from the manner in which the work was performed at the site. International House argues that it did not exercise supervision and control of the work performed at the site and as a result cannot be held liable under a common law negligence or Labor Law 200 theory. International House relies in part on the testimony of Lawrence Palfini, who has apparently been the Vice President of Facilities and site Operations for International House since 2016. As part of his testimony, when asked if the work at the Project was supervised by Pratt, Mr. Palfini stated "[y]es." (See International House Motion, Deposition of Lawrence Palfini, Page 28). In addition, Artur Budzinski, a foreman for Pratt, testified that Pratt was responsible for supervising the progress of work at the Premises. There was no testimony that International House conducted day to day supervision at the Premises. "Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspect the work product is insufficient to impose liability under Labor Law 200." *Medina-Arana v. Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1668, 131 N.Y.S.3d 110, 114 [2d Dept 2020], quoting *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 [2d Dept 2008].

In opposition, the Plaintiffs have failed to raise a material issue of fact as to whether International House exercised supervision and control of the Project in relation to the work performed at the work site. The Plaintiffs argue that International House had actual notice of the hazardous condition at issue, namely that the lack of an overhead protection on the fitness center roof during the scaffold operation was a danger to the Decedent Plaintiff. Further, the Plaintiffs contend that International House had actual or constructive knowledge of the condition at issue given that they had received a violation by the Department of Buildings. The Court finds that in the instant proceeding, the accident at issue was based on the means and methods of the work and was not a product of a defective or dangerous condition at the Premises. This is because Plaintiffs' allegation relates to the nature of how the scaffold was being disassembled and the failure to secure material from falling. "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." *Ortega v. Puccia*, 57 AD3d 54, 61, 866 N.Y.S.2d 323, 330 [2d Dept 2008]; *see also Kusayev v. Sussex Apartments Assocs., LLC*, 163 AD3d 943, 945, 83 N.Y.S.3d 262, 265 [2d Dept 2018]; *Wejs v. Heinbockel*, 142 AD3d 990, 992, 37 N.Y.S.3d 569, 571 [2d Dept 2016]. As a result, the Plaintiffs' common law negligence and Labor Law 200 claims are dismissed as against International House.

Turning to the merits of the motion made by Pratt (motion sequence #4), the Court finds that, even assuming Pratt had met its *prima facie* burden, there are issues of fact in relation to the Plaintiffs' common law negligence and Labor Law 200 claims against Pratt. Pratt, like International House, also contends that it did not direct or control the means or methods of the work being performed at the Project. However, a review of the testimony of Artur Budzinski (which Pratt did not offer, and which was provided and referenced by the opposing parties), who testified for Pratt and identified himself as a Project Manager for Pratt, shows that Pratt may have directly supervised and controlled the means and method of the work

consisting of disassembling the hanging scaffold. The method of disassembling the scaffold apparently caused the steel beam to fall, injuring the Decedent Plaintiff. During Mr. Budzinski's testimony, he acknowledged that Luis Encalada-Navaez, who was apparently the Decedent Plaintiff's foreman and principally worked for Decedent's employer Arle, was also required to be employed in some capacity by Pratt, in order to satisfy NYC Department of Buildings requirements related to construction projects with hanging scaffolds. When asked about this, Mr. Budzinski's answered "[t]o be the foreman on the job site, each foreman has to be on the payroll of the company and to be qualified and be -- obtain the foreman card issued by the New York City Building Department." (See Plaintiffs' Motion, Deposition of Artur Budzinski, NYSCEF Doc. 111, page 27). When asked if he was the project manager for the Project, Mr. Budzinski answered "[y]es." When asked if he went to the Premises two or three times per week, Mr. Budzinski stated "[y]es." When asked in what capacity he supervised the setup of equipment, he answered "[s]upervisor rigger." When asked directly about who at Pratt was responsible for controlling the means and methods of construction, Mr. Budzinki stated "[t]hat was me." When asked whether he was able to identify who was using the scaffold on the day of the Plaintiff's accident, Mr. Budzinski stated "[n]o, I'm not able." When asked if Luis Encalada-Navaez, who he spoke with after the incident, was able to tell him who was involved in the dismantling of the scaffold, he stated "[n]o." (See Plaintiffs' Motion, Deposition of Artur Budzinski, NYSCEF Doc. 111, pages 13, 19, 48, 139, 258, 261). Accordingly, there is an issue of fact relating to whether Pratt controlled the means and methods of the work that allegedly caused the Decedent Plaintiff's injuries. See *Torres v. Perry St. Dev. Corp.*, 104 AD3d 672, 676, 960 N.Y.S.2d 450, 455 [2d Dept 2013].

Labor Law § 240(1)

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

> "All contractors and owners and their agents ... 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) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]. Thus, the purpose of Labor Law § 240 (1) is "to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials." *Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]. Also, the duty to provide "proper protection" against elevation-related risks is nondelegable; therefore, owners and contractors are liable for the violations of their agents even if the owners or contractors have not exercised supervision and control over the subject work or the injured worker. *Rocovich*, 78 NY2d at 513. Lastly, this statute "is to be construed as liberally as may be" to protect workers from injury. *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 520–521 [1985], quoting *Quigley v. Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011].

Turning to the merits of the Plaintiffs' motion (motion sequence #3), the Court finds that they have met their *prima facie* burden as it relates to their Labor Law 240(1) claim. The Plaintiffs contend that the incident at issue was caused by a falling beam that had been part of a hanging scaffold that was in the process of being disassembled. "Absolute liability for falling objects under Labor Law § 240(1) arises only when there is a failure to use necessary and adequate hoisting or securing devices." *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1090 [2001]. The Plaintiffs have shown

that both International House, as owner, and Pratt as general contractor, are liable pursuant to Labor Law 240(1). In support of their application, the Plaintiffs rely on the deposition of Artur Budzinski, who testified for Pratt and identified himself as a Project Manager for Pratt, the deposition of Luis Encalada Narvaez, who was, at the time of the alleged incident, a foreman for Arle (and who also was employed by Pratt), Luis Murudumbay, a co-worker of the Decedent Plaintiff at the time of the accident, photos of the accident scene and the scaffolding, the affidavit of Douglas Miller, purported safety expert, and other related documents. This evidence, taken together, shows that the Decedent Plaintiff was injured by a falling object, that was unsecured during the dismantling process, while working at the Project. This qualifies for Labor Law 240(1) protection. The Plaintiffs have shown that "the object fell ... *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute." *Aguilar v. Graham Terrace, LLC,* 186 AD3d 1298, 1301, 131 N.Y.S.3d 48, 52 [2d Dept 2020], quoting *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1090 [2d Dept 2001]. In the instant proceeding, there was a significant risk that the unsecured beam would fall, requiring the use of an appropriate safety device to secure the beam. *See Bornschein v. Shuman*, 7 AD3d 476, 478, 776 N.Y.S.2d 307, 309 [2d Dept 2004]; *see also Portillo v. Roby Anne Dev., LLC.*, 32 AD3d 421, 422, 819 N.Y.S.2d 566, 568 [2d Dept 2006]; and *Gikas v. 42-51 Hunter St., LLC*, 134 A.D.3d 987, 988, 24 N.Y.S.3d 87, 89 [2d Dept 2015].

In opposition, Pratt fails to raise a material issue of fact that would prevent this Court from granting the Plaintiffs' motion for summary judgment on the Plaintiffs' Labor Law 240(1) claim.[2] Pratt seemingly relies on the affidavit of Charles C. Temple, a purported forensic engineer who states that "Encalada and Luis Murudumbay had removed the suspension cable, disconnected the pieces that hold the outrigger beam in place and had removed the steel cable from the counterweights." Mr. Temple also states that "it

[2] The Court notes that International House takes no position on the Plaintiffs' application as it relates to their Labor Law 240(1) claim. (See International House's Affirmation in Partial Opposition, Paragraph 2, NYSCEF Doc. 164).

is my opinion that Arle bears sole responsibility for the missing wiring for the junior I-beam that fell from the roof of the International House." Mr. Temple reaches this conclusion because it is his opinion that "Artur Budzinski, the project manager for Pratt Construction did not give any instructions to any of the workers as to how junior I-beams were to be removed from the pipe scaffolding frame." (See Pratt's Affirmation in Opposition to Plaintiffs' Motion, Affidavit of Charles Temple, NYSCEF Doc. 210). While Pratt argues that this shows that it was not Pratt that caused the accident, Pratt fails to address the fact that Encalada worked for both Arle and Pratt, a fact that was addressed by Pratt foreman Artur Budzinski in his deposition and as stated above. Additionally, Pratt clearly had a role as contractor at the Project, a role which carries, at least, statutory/vicarious liability. As such, Pratt has failed to raise a material issue of fact as to its liability relating to Plaintiff's Labor Law 240(1) claim. *See Escobar v. Safi*, 150 AD3d 1081, 1083, 55 N.Y.S.3d 350, 353 [2d Dept 2017].

Labor Law § 241(6)

Labor Law §241(6) imposes on owners and contractors a non-delegable duty "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." *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2nd Dept, 2015]; *Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983 [2nd Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2nd Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2nd Dept, 2010].

Turning to the merits of the Defendants' application that the Plaintiffs' claim made pursuant to Labor Law §241(6) be dismissed, the Court finds that there are issues of fact regarding Section 23–

1.7(a)(1) of the Industrial Code. "Section 23–1.7(a)(1) of the Industrial Code, entitled 'Protection from general hazards,' mandates the use of appropriate safety devices to protect workers from "overhead hazards" in areas 'where persons are required to work or pass that [are] normally exposed to falling material or objects.'" *Podobedov v. E. Coast Const. Grp., Inc.,* 133 AD3d 733, 736, 21 N.Y.S.3d 128, 131 [2d Dept 2015]. The Defendants were unable to eliminate triable issues of fact regarding their contention that the area in which the Decedent Plaintiff "was struck was not 'normally exposed to falling material or objects,' rendering 12 NYCRR 23–1.7(a)(1) inapplicable." *Gonzalez v. TJM Const. Corp.*, 87 A.D.3d 610, 611, 928 N.Y.S.2d 344, 346 [2d Dept 2011], quoting *Amerson v. Melito Const. Corp.,* 45 AD3d 708, 709, 845 N.Y.S.2d 457, 458 [2d Dept 2007]. Moreover, when Pratt foreman Artur Budzinski was asked whether he sought to avoid having pedestrians walk under the hanging scaffolds because there was a risk of falling objects striking pedestrians he stated "[y]es, correct." (See Plaintiffs' Motion, Budzinski Deposition, Page 76). As to both Defendants' and Plaintiffs' motions in relation to this claim there remain issues of fact regarding whether Section 23–1.7(a)(1) of the Industrial Code applies to the facts of this case. *See Millette v. Tishman Const. Corp.,* 144 AD3d 1113, 1115, 42 N.Y.S.3d 285, 287 [2d Dept 2016].

However, the Court finds that Industrial Code section 12 NYCRR 23–2.1(a)(2) does not apply to the facts of the case as a matter of law. As an initial matter, the Court notes that Industrial Code 12 NYCRR 23–2.1(a)(2) was necessarily found to be sufficiently specific to support a Labor Law 241(6) claim. See *Sinera v. Bedford-Webster LLC,* 187 AD3d 621, 131 N.Y.S.3d 137, 138 [2d Dept 2020]. 12 NYCRR 23–2.1(a)(2) states that:

> Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

In support of this application, the Plaintiffs rely on a New York City Department of Buildings violation, the depositions of Artur Budzinski, Luis Encalada Narvaez, and Luis Murudumbay, photos of

the accident scene and the scaffolding, and other related documents. The Plaintiffs contend that 12 NYCRR 23–2.1(a)(2) applies because it states that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." However, the beam that fell was not stored material but rather was part of a hanging scaffold that was in the process of being dismantled. Accordingly, NYCRR 23–2.1(a)(2) does not apply to the facts in this case as it does not apply to material and equipment that is being stored. *See Buckley v. Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 N.Y.S.2d 249, 257 [1st Dept 2007]. As a result, the Court finds that the Plaintiffs' 241(6) claim in relation to NYCRR 23–2.1(a)(2) is dismissed.

Indemnification and Contribution

International House

International House seeks as part of its motion (motion sequence #2), summary judgment on its claims for common law indemnification, contractual indemnification and breach of contract, as well as summary judgment dismissing any and all similar cross-claims and counterclaims against it. As an initial matter, the Court finds that International House is entitled to summary judgment in its favor dismissing Pratt's cross-claims for contribution, contractual indemnification and common law indemnification. International House argues that no contract exists requiring International House to indemnify any party to this action and International House had no duty to indemnify Pratt. A review of Pratt's opposition papers shows that Pratt does not materially oppose this application. Moreover, a review of the Agreement between International House and Pratt shows that there was no indication that International House was obligated to indemnify Pratt. *See Great N. Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417, 857 N.E.2d 60, 62 [2006]. Accordingly, the cross-claims for breach of contract, contribution and contractual and common law indemnification by Pratt as against International House are dismissed.[3]

[3] The Court also finds that the first and second counterclaims by Arle as against International House are dismissed. Arle asserted counter-claims against International House for common-law indemnity and/or contribution based

The Court also finds that International House has met its *prima facie* burden as it relates to its motion for summary judgment on its breach of contract cross-claim against Pratt. International House contends that this claim is related, in part, to the provision of the International House/Pratt contract that provides that Pratt have prior approval regarding subcontractors and also that any subcontractor would comply with the contract terms regarding insurance. "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendants' breach of its contractual obligations, and damages resulting from the breach." *Legum v. Russo*, 133 A.D.3d 638, 639, 20 N.Y.S.3d 124, 125–26 [2d Dept 2015]. In support of its position, International House points generally to its contract with Pratt and to the testimony of Lawrence Palfini, who is the Vice President of Facilities and site Operations for International House. A review of his testimony shows that he was not informed about Arle as a subcontractor until after the Decedent Plaintiff's accident when International House was apparently informed by an email from Pratt. (See International Houses' Motion, NYSCEF Doc. 82, Pages 80-88). In opposition, Pratt responds that it procured the insurance required by the contract with International House by providing a copy of the policy. However, Pratt does not respond to International House's breach of contract claim regarding Arle and prior permission. As a result, the application by International House regarding its cross-claims against Pratt for breach of contract is granted.

International House also contends that summary judgment should be granted on its contractual indemnification claims against Pratt as International House entered into a contract with Pratt wherein this issue was explicitly addressed. It is well settled that "[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*

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upon allegations of International House's negligence. Given the above decision granting International House summary judgment as it relates to the Plaintiffs' common law negligence and Labor Law 200 claims, the Court finds that Arle's counter-claims based on these allegations should be dismissed as well.

v. Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987], quoting *Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tanking v. Port Auth. of NY & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v. Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005].

The contract between International House and Pratt contains a section on Indemnification (9.15) that provides the following

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses including but not limited to attorney's fees, arising out of performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness disease or death or to injury to or destruction of tangible property (other than the Work itself), to the extent caused by the negligent acts or omissions of this Contractor, Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.I. (See International House Motion, Exhibit P, NYSCEF Doc. 85).

In the instant action, International House contends that its cross-claims against Pratt should be granted since it was free from comparative fault. International House argues that its liability is vicarious based upon statute. This is significant as "'[t]he party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability.'" *Jardin v. A Very Special Place, Inc.*, 138 A.D.3d 927, 931, 30 N.Y.S.3d 270 [2d Dept 2016], quoting *Arriola v. City of New York*, 128 AD3d 747, 749, 9 N.Y.S.3d 344 [2d Dept 2015]; see also *Van Nostrand v. Race & Rally Const. Co.*, 114 AD3d 664, 667, 979 N.Y.S.2d 638 [2d Dept 2014]. In the instant proceeding, the contract provisions at issue are sufficiently clear that indemnification stems from any claim made or suit brought "caused by the negligent acts or omissions of this Contractor, Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage loss or expense is caused in part by a party indemnified hereunder." The court has determined that International House has made a showing that it

did not have any involvement with the day-to-day activities on site; nor did it direct, supervise, or control the Plaintiff's activities. Moreover, the Plaintiff's accident arose out of the performance of the work International House contracted Pratt to perform, and for which Pratt retained Plaintiff's employer, Arle, to perform.

Pratt argues that the contract between Pratt and International House violates New York General Obligations Law §5.322.1. "An indemnification provision in a contract in connection with the construction, repair, or maintenance of a building and appurtenances and appliances thereof that seeks to indemnify a party for its own negligence is void as against public policy and unenforceable." *Leibel v. Flynn Hill Elevator Co.*, 25 AD3d 768, 768, 809 N.Y.S.2d 519, 520 [2d Dept 2006]. However, in the instant action, International House does not seek indemnity for its own negligence and "General Obligations Law §5-322.1 does not bar enforcement of contractual indemnification for vicarious liability." *Giangarra v. Pav-Lak Contracting, Inc.*, 55 A.D.3d 869, 871, 866 N.Y.S.2d 332, 334 [2d Dept 2008]. Since International House has no liability regarding the violation of the Labor Law 200 and common law negligence claim, its liability on the 240(1) claim is vicarious, and it has no arguable role in relation to the 241(6) claim, the contract indemnity provision is enforceable. "However, if there is no evidence of any fault on the part of the owner or contractor, the statute is not violated by allowing that owner or contractor to allocate responsibility through an indemnification agreement." *Connolly v. Brooklyn Union Gas Co.*, 168 AD2d 477, 478, 562 N.Y.S.2d 718 [2d Dept 1990]. "The burden is on the [contractor] to come forward with proof that the [owner] was, if not actually negligent, then at least at fault for the Labor Law violation, and, 'in the absence of such proof, the limitation on the force of the parties' indemnification agreement which results from application of General Obligations Law 5-322.1 is inapplicable.'" *Brown v. Two Exch. Plaza Partners*, 146 A.D.2d 129, 138, 539 N.Y.S.2d 889 [1st Dept 1989], *aff'd*, 76 N.Y.2d 172, 556 N.E.2d 430 [1990], quoting *Walsh v. Morse Diesel, Inc.*, 143 A.D.2d 653, 655, 533 N.Y.S.2d 80, 82 [2d Dept 1988]. However, the language of the subject contract provides

that International House's entitlement to indemnity from Pratt is premised upon Pratts negligence. Negligence on the part of Pratt has not been established. Although Pratt has statutory/vicarious liability as a contractor relating to Labor Law 240(1) and possibly Labor Law 241(6), it is unclear whether it was negligent. Therefore, International House's claim for contractual indemnification is denied.

"Implied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Mas v. Two Bridges Assocs. by Nat. Kinney Corp.*, 75 N.Y.2d 680, 690, 554 N.E.2d 1257, 1262 [1990]. "In order to establish their claim for common-law indemnification, the [moving] defendants were required to prove not only that they were not negligent, but also that the proposed indemnitor, [the contractor or subcontractor], was responsible for negligence that contributed to the accident or, in the absence of any negligence, that it had the authority to direct, supervise, and control the work giving rise to the injury." *Poalacin v. Mall Properties, Inc.*, 155 AD3d 900, 909, 64 N.Y.S.3d 310, 319 [2d Dept 2017]. In the instant matter, International House has failed to show that Pratt was negligent as a matter of law or had the requisite supervision. As a result, its application for common law indemnification and contribution is denied and any such claims will be addressed at trial.

As to Arle, the Court finds that International House is entitled to its cross-claim for contractual indemnification but not common law indemnity. In general, Workers' Compensation Law §11 prohibits "most third-party claims for contribution or indemnification against an employer for injuries sustained by an employee acting within the scope of employment." *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367, 795 N.Y.S.2d 491 [2005]. The two exceptions are when "the employee has sustained a 'grave injury' or when there is a 'written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant.'" *Id.*, quoting Workers' Compensation Law § 11. "Grave injury is a statutorily-defined threshold for catastrophic injuries, and includes only those injuries which are listed in the statute and determined to be permanent." *Blackburn v.*

Wysong & Miles Co., 11 AD3d 421, 783 N.Y.S.2d 609 [2d Dept 2004]. In the instant proceeding, the Decedent Plaintiff has suffered a grave injury and that issue is not contested.

Arle contends that International House's application should be denied as Pratt was primarily responsible for supervision over every aspect of the Project and Arle merely provided laborers. However, as stated above, Arle was arguably responsible for supervision over much of the work of the Decedent Plaintiff. What is more, the pertinent section (Rider Section 1 Indemnity) of the contract between Pratt and Arle states that Arle shall indemnify "the Owner" of the property. That section of the contract states as follows:

> In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor, all entities the Contractor is required 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. (See International House's Motion, Subcontract between Pratt and Arle, NYSCEF Doc. 86).

A review of Arle's Affirmation in Opposition to International House's application shows that there is no substantial dispute over the contract at issue, except with respect to Arle's supervision and liability. As stated above, while Pratt may have supervised the work at the Project as the general contractor, Arle may have also supervised its own employees, including the Decedent Plaintiff. As stated, the respective roles and liability of both Pratt and Arle are in question. However, "[s]o long as a written indemnification provision encompasses an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered, it meets the requirements of the statute." *Rodrigues v. N & S Bldg. Contractors, Inc.*, 5 N.Y.3d 427, 433, 839 N.E.2d 357, 360 [2d Dept 2005]. The language of the subcontract provides for broad indemnification required of Arle. The subcontract contains such language as the "fullest extent permitted by law" and "arising out of or resulting from the work." In this circumstance, International

House's freedom from culpable conduct and the fact that there is no provision requiring a determination of liability on the part of Arle, the indemnity provision is enforceable against Arle. Additionally, the subcontract referred to the owner of the property and when the "subcontract itself contained an indemnification provision expressly in favor of 'Owner,' the owner indemnitee's identity may be determined by reference to the incorporated prime contract where it is unclear from the face of the subcontract." *Goya v. Longwood Hous. Dev. Fund Co., Inc.*, 192 A.D.3d 581, 585, 146 N.Y.S.3d 59, 65 [1st Dept 2021]. Therefore, International House's application for summary judgment regarding its cross-claim for contractual indemnification against Arle is granted.

As stated above, "[i]mplied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Mas v. Two Bridges Assocs. by Nat. Kinney Corp.*, 75 N.Y.2d 680, 690, 554 N.E.2d 1257, 1262 [1990]. Moreover, "[l]iability for indemnification may only be imposed against those parties (i.e. indemnitors) who exercise actual supervision." *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 378, 953 N.E.2d 794, 801 [2d Dept 2011]. In the instant proceeding, as stated above, the extent of Arle's liability and oversight, if any, has yet to be determined.

In opposition, Arle points to the Workers' Compensation Law. However, Workers' Compensation Law 11 allows a party to assert a claim against an employer sounding in common law indemnity where the Plaintiff suffered a grave injury. *See Benedetto v. Carrera Realty Corp.*, 32 AD3d 874, 876, 822 N.Y.S.2d 542, 544 [2d Dept 2006]. In the instant proceeding, the Plaintiff Decedent suffered a grave injury that, as stated above, arose out of the performance of the work International House contracted Pratt to perform, for which Pratt retained Plaintiff's employer, Arle, to perform. Notwithstanding this, and as stated, Arle's role, oversight and liability has yet to be determined. Accordingly, International House's application for summary judgment on its cross-claim for common law indemnification and contribution against Arle is denied.

Pratt

Pratt also seeks (motion sequence #4) summary judgment on its claims against Arle for common law and contractual indemnification, contribution and breach of contract for failure to secure insurance. Although Pratt has been found liable as a matter of law as it relates to the Plaintiffs' Labor Law 240(1) claims, it may still seek contractual indemnification/contribution to the extent that it is not seeking same for its own negligence. *See Brooks v. Judlau Contracting, Inc.,* 11 N.Y.3d 204, 210, 898 N.E.2d 549, 552 [2008]. As stated above, the contract between Pratt and Arle explicitly and broadly provided that Arle would indemnify Pratt. Accordingly, although there are issues of fact relating to Pratt's negligence, Pratt is "entitled to conditional summary judgment on its claim for contractual indemnification; the extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident." *Cuomo v. 53rd & 2nd Assocs., LLC*, 111 AD3d 548, 975 N.Y.S.2d 53, 54 [1st Dept 2013]. Accordingly, Pratt is entitled to conditional summary judgment on its contractual indemnity claim.

As stated above, "[i]mplied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Mas v. Two Bridges Assocs. by Nat. Kinney Corp.,* 75 N.Y.2d 680, 690, 554 N.E.2d 1257, 1262 [1990]. Moreover, "[l]iability for indemnification may only be imposed against those parties (i.e. indemnitors) who exercise actual supervision." *McCarthy v. Turner Const., Inc.,* 17 N.Y.3d 369, 378, 953 N.E.2d 794, 801 [2d Dept 2011]. In the instant proceeding, as stated above, negligence on the part of, and the role and oversight by Pratt and Arle are still in question. Therefore, Pratt's common law negligence claim as against Arle is denied.

Moreover, the Court finds that Pratt has met its burden regarding Arle's failure to properly secure insurance pursuant to the contract between the parties, which required that Arle procure insurance naming Pratt Construction and International House as additional insureds. This contract language makes clear that Arle had a contractual obligation to procure insurance that named Pratt and International House as

additional insureds. As it relates to insurance, the pertinent section (Rider Section 2 Insurance) of the contract between Pratt and Arle states that:

> The Subcontractor shall procure and shall maintain until final acceptance of the Work, such insurance as will protect the Contractor, all entities the Contractor is required indemnify and hold harmless, the Owner, and their officers, directors, agents and employees, for claims arising out of or resulting from Subcontractor's Work under this Contract Agreement, whether performed by the Subcontractor, or by anyone directly or indirectly employed by Subcontractor, or by anyone for whose acts Subcontractor may be liable. Such insurance shall be provided by an insurance carrier rated "A-" or better by A.M. Best and lawfully authorized to do business in the jurisdiction where the Work is being performed.
>
> 2.1. The Subcontractor's Insurance shall include contractual liability coverage and additional insured coverage for the benefit of the Contractor, Owner and anyone else the Owner is required to name (as set forth.in the schedule below), and shall specifically include coverage for completed operations. The insurance required to be carried by the Subcontractor and any Sub-Sub-Contractors shall be PRIMARY AND NON-CONTRIBUTORY. With respect to each type of insurance specified hereunder, the Contractor's and Owner s insurances shall be excess to Subcontractor's insurance. (See Pratt's Motion, Subcontract between Pratt and Arle, NYSCEF Doc. 149).

The Subcontract Agreement Rider States in Section 2.4 that:

> Unless otherwise stipulated in the Contract Agreement, the Subcontractor shall maintain no less than the limits specified for each of the following insurance coverage's:
>
> a) Commercial General Liability using an industry standard unmodified coverage form Including contractual liability with minimum limits of $1,000,000 each occurrence, $2,000,000 aggregate with either per project or per location endorsement for property damage and bodily injury.

Moreover, it must be noted that "the standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense." *BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 8 N.Y.3d 708, 715, 871 N.E.2d 1128, 1132 [2007]. This standard generally provides that "[a]n insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer." *Salt Const. Corp. v. Farm Fam. Cas. Ins. Co.*, 120 A.D.3d 568, 569, 990 N.Y.S.2d 837 [2d Dept 2014]. In opposition, Arle has failed to raise a material issue of fact in as much as it argues that the provision providing for insurance obligations are vague and therefore null and void. A review of said provisions reflect detailed insurance requirements.

Accordingly, Pratt's application regarding its claim for breach of contract for the failure to secure insurance against Arle is granted.

Based upon the foregoing, it is hereby Ordered that:

International House's motion for summary judgment (motion sequence #2) seeking dismissal of Plaintiffs' common law negligence and Labor Law 200 claims is granted. That aspect of International House's motion seeking dismissal of the Plaintiff's Labor Law 241(6) claims is granted except that Plaintiffs' claim in relation to Industrial Code 12 NYCRR 23-1.7(a)(1) shall continue. International House's motion for summary judgment as it relates to its cross-claim as against Pratt for breach of contract is granted as provided herein. That aspect of International House's motion seeking summary judgment relating to its cross-claims for contractual and common law indemnification as against Pratt are denied. That aspect of International House's Summary Judgment motion relating to its third party action for contractual indemnification as against Arle is granted. That aspect of International House's summary judgment motion relating to its third party action for common law indemnification and contribution against Arle is denied. Any cross-claims by Pratt and counter-claims by Arle as against International House are dismissed.

The Plaintiffs' motion (motion sequence #3) is granted as it relates to the Plaintiffs' Labor Law 240(1) and all other relief sought is denied.

Pratt's motion for summary judgment (motion sequence #4) seeking dismissal of Plaintiffs' common law negligence and Labor Law 200 claims is denied. That aspect of Pratt's motion seeking dismissal of the Plaintiff's Labor Law 241(6) claims is granted except that Plaintiffs' claim in relation to Industrial Code 12 NYCRR 23-1.7(a)(1) shall continue. That aspect of Pratt's motion seeking summary judgment as to its second third party action claims for contractual indemnification and contribution against Arle is granted conditionally. That aspect of Pratt's motion seeking summary judgment as to its second third party action for common law indemnification against Arle is denied. Pratt's summary judgment motion on its second third party action claim for breach of contract as against Arle for failure to secure insurance is granted as provided herein.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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