At an IAS Term, Part 9 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 10th day of August, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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DIEGO ERNESTO VELASCO SALINAS,

Plaintiff,

- against -

PRATT INSTITUTE, LPCIMINELLI INC., LPCIMINELLI CONSTRUCTION CORP, LPCIMINELLI INTERESTS, INC., LPCIMINELLI SOLUTIONS LLC, THORNTON TOMASETTI FOUNDATION, DHS FRACO LLC, AND ALL STAR CONCRETE AND MASON, INC.,

Defendants.

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DECISION / ORDER
Index No. 506839/2018
Mot. Seq. # 5, 6, 7

PRATT INSTITUTE, LPCIMINELLI INC., LPCIMINELLI CONSTRUCTION CORP., LPCIMINELLI INTERESTS, INC., AND LPCIMINELLI SOLUTIONS LLC,

Third-Party Plaintiffs,

-against-

ECI CONTRACTING, LLC,

Third-Party Defendant.

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ECI CONTRACTING, LLC,

Second Third-Party Plaintiff,

-against-

ALL STAR CONCRETE AND MASON, INC.,

Second Third-Party Defendant.

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ECI CONTRACTING, LLC,

Third Third-Party Plaintiff,

-against-

R&D CONSTRUCTION/REN CORP.,

Third Third-Party Defendant.

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ALL STAR CONCRETE AND MASON, INC.,

Fourth Third-Party Plaintiff,

-against-

R&D CONSTRUCTION/REN CORP.,

Fourth Third-Party Defendant.

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PRATT INSTITUTE, LPCIMINELLI INC.,
LPCIMINELLI CONSTRUCTION CORP.,
LPCIMINELLI INTERESTS, INC.,
LPCIMINELLI
SOLUTIONS LLC,

Fifth Third-Party Plaintiffs,

-against-

R&D CONSTRUCTION/REN CORP.,

Fifth Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	157-158, 160-195, 196-241, 243-259
Opposing Affidavits (Affirmations)	276-287, 312-316, 318, 288-311, 333-334, 336-338, 339-340, 342-344 347-354, 356-359, 360, 362-366, 367-369, 371-373, 375-382
Reply Affidavits (Affirmations)	391, 392-394

Upon the foregoing papers, plaintiff Diego Ernesto Velasco Salinas (Salinas) moves (in motion sequence [mot. seq.] five) for an order, pursuant to CPLR 3212 and Labor Law §§ 240 (1) and 241 (6), granting him summary judgment on the issue of liability against defendants/third-party plaintiffs Pratt Institute (Pratt), LPCiminelli Inc. (LPCI, and, together with Pratt, the Owners), LPCiminelli Construction Corp., LPCiminelli Interests Inc., LPCiminelli Solutions LLC (collectively, the LPC Defendants) and All Star Concrete and Mason, Inc. (All Star).[1]

The LPC Defendants move (in mot. seq. six) for an order, pursuant to CPLR 3212 and 3215: (1) awarding them summary judgment dismissing all claims, cross-claims and counterclaims asserted against LPCiminelli Interests, LPCiminelli Solutions, and LPCiminelli Construction Corp., dismissing Salinas' Labor Law §§ 200 and 241 (6) and common-law negligence claims asserted against Pratt and against them, dismissing all claims, cross-claims and counterclaims asserted by DHS Fraco, third-party defendant ECI and defendant and third-party defendant All Star against Pratt and against them; (2) awarding summary judgment in favor of Pratt and them on their claims for contractual and common law indemnification asserted against third-party defendant/third-party plaintiff ECI Contracting, LLC (ECI) and All Star, or, alternatively, "awarding conditional summary judgment on any or all of those claims"; and (3) awarding them a default judgment on their cross-claims and third-party

[1] Salinas has discontinued this action as against defendant Thornton Tomasetti Foundation (*see* NYSCEF Doc No. 14). In addition, the parties stipulated to discontinue all claims asserted against defendant DHS Fraco, LLC (*see* NYSCEF Doc No. 396).

claims asserted against third-party defendant R&D Construction/Ren Corp. (R&D), and scheduling an inquest on damages.

Third-party defendant/third-party plaintiff ECI moves (in mot. seq. seven) for an order, pursuant to CPLR 3212: (1) awarding it partial summary judgment on its claims for contractual indemnification and breach of contract against All Star, and (2) granting it summary judgment dismissing the common-law indemnification and contribution claims asserted against it, All Star's counterclaim for contractual indemnification, Pratt's claims for breach of contract, the LPC Defendants' claims and Salinas' Labor Law § 241 (6) claim.

Background

On April 5, 2018, Salinas commenced this action by filing a summons and a verified complaint against all defendants except defendant All Star alleging that on February 12, 2018, he suffered an injury while installing and removing concrete wall forms in the building then under construction at 135 Emerson Place in Brooklyn (Premises). The record shows that Pratt owns the Premises and hired LPCI as the construction manager and general contractor to oversee the construction of a ten-story dormitory building. LPCI then hired ECI to perform concrete foundation work; later, the contract was amended by a change order to include superstructure work. ECI then subcontracted the work to All Star, which, in turn, subcontracted the work to R&D, plaintiff Salinas' employer.

On February 12, 2018, Salinas was tasked with removing forms (the equipment used to shape concrete walls; wet concrete is poured between the forms, it then solidifies into a wall) on or near the fifth floor of the building under construction. As relevant here, Salinas

was equipped with a safety harness, which had metal chains with hooks on the ends, and a safety line.[2] Removing forms involved removing the pins that held the forms in place; Salinas would remove each pin until the form became loose. There were several forms at each level, and Salinas explained that while he removed the pins from one form, his chains and hooks would be attached to the form (ostensibly still secured by pins) which was adjacent to it. After the pins were removed from a form, a co-worker would lift the loose form away from the wall.

The accident occurred while Salinas had his chain and hooks attached (also referred to as "tied off") to a form adjacent to a form which he had just finished removing the securing pins from. His co-worker, Hugo Duarte, had just finished lifting the form that Salinas had worked on. Salinas believed that the form which his chain and hooks were attached to was still secured by its pins – however, the form which Salinas was attached to suddenly fell; Salinas fell with it and struck a wooden platform approximately five stories below. Salinas suffered injuries, including a fractured pelvis, as a result.

The pleadings allege that the defendants violated Labor Law §§ 240 (1) and 241 (6), as well as certain applicable provisions of the Industrial Code (12 NYCRR Ch 1, sub. A) by, essentially, failing to provide Salinas with adequate protection against falling. Specifically, Salinas claims that attaching his chains and hooks to the form next to the one which he was working on was the accepted – but, for safety purposes, insufficient – practice among his co-

[2] Salinas emphasizes that, usually, he would use a safety line referred to as a "yoyo," available to him as part of his employer's equipment, but, on the date of the accident, he was using a tail line because all available "yoyos" were already being used by co-workers.

workers and supervisors. He asserts that, although he had a tail line to prevent falls, there was no adequate safe anchor point to attach it to. Also, Salinas continues, the record suggests that ECI was responsible for installing a fall-protection system with anchor points (referred to as "D-rings") attached to secure structures, but failed to do so. Salinas also points out the absence of any safety nets around the building under construction. In sum, Salinas concludes that defendants' failure to adequately protect him against falling violated both Labor Law § 240 (1) and 241(6), and the applicable provisions of the Industrial Code.

Salinas further alleges causes of action based on Labor Law § 200 and common-law negligence. The complaint alleges that defendants are owners, contractors or agents thereof, and therefore, are vicariously liable for violations of the Labor Law and the common-law duty of care without regard to fault or responsibility. Salinas argues that these Labor Law violations and negligent acts or omissions proximately caused his personal injuries. Salinas states that there is no serious dispute that he was on a construction site performing construction work.[3] Accordingly, Salinas seeks damages against defendants for these violations.

Defendants interposed answers, and discovery, motion practice and third-party practice ensued. As relevant here, the third-party claims involve indemnification (contractual and common-law), contribution and breach of the covenant to purchase and maintain insurance coverage. Also, by supplemental summons and amended complaint, plaintiff added All Star as a direct defendant; the LCP Defendants subsequently asserted indemnification,

[3] Work within the scope of the Labor Law's vicarious liability provisions is commonly referenced as "protected" activities, tasks or work. Workers covered by the statute are commonly referenced as "protected" workers.

contribution and breach of covenant to purchase and maintain insurance coverage causes of action as cross claims against All Star. On June 10, 2021, Salinas filed a note of issue with a trial by jury demand, certifying that discovery is complete and that this matter is ready for trial. The instant motions for summary judgment ensued.

Salinas' Partial Summary Judgment Motion

Salinas, in support of his motion for partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240 (1) and § 241 (6), asserts that he is entitled to judgment as a matter of law with respect to Labor Law § 240 (1) because he was injured as the result of an elevation-related risk while performing protected work. Specifically, plaintiff points out that it is undisputed that he was removing forms from the side of the subject building while he was five stories above ground level. He claims that, therefore, pursuant to Labor Law § 240 (1), defendants had a non-delegable duty to ensure that he was given "proper protection" against the risk of falling. Here, Salinas continues, "proper protection" would have consisted of anchored safety lines, D-rings and/or straps that he could have used to tie off to. Salinas suggests that, given the absence of adequate fall protection, he would attach his chain and hook to one of the nearby forms.[4] Moreover, Salinas testified that while he also had a tail line in addition to his chain and hook, there was nothing to hook the tail line to in the area where his accident occurred. Anticipating a claim that he should have used a nearby rebar to anchor himself, Salinas contends instead that the forms they were removing blocked

[4] Salinas emphasizes that several workers testified that it was a common and accepted practice for a form worker to tie on to a secure form next to one the worker was removing.

access to this rebar, and because the rebar was too short to attach a tail line to, and because it would not have safely held the clip from his tail line. Also, Salinas states that the record does not suggest it was safe to use the rebar as an anchoring spot.[5]

Next, Salinas notes the testimony of Ken O'Connor, who testified that doing form work without anchored safety ropes to tie off to was unsafe; he also testified that there also should have been a rope securing the form they were removing to prevent it from falling, and that he considered not using a rope to hold the form unsafe. Salinas points out that O'Connor also testified that a worker should never remove a form which was not first secured from falling by a rope.

Based on these facts and items of testimony, Salinas maintains that the Labor Law § 240 (1) violation is evident. The equipment he was given, Salinas continues, was not adequate fall protection while he was removing the forms. According to Salinas, there is ample appellate authority suggesting that a plaintiff is entitled to partial summary judgment on the issue of Labor Law § 240 (1) liability either where the plaintiff is not provided with a place to safely tie off to and/or where the plaintiff is not instructed regarding how to tie off safely. Salinas emphasizes that he was never directed to not tie off to other forms while he was working, and for that reason, he cannot be deemed recalcitrant.

Similarly, Salinas attempts to head off any suggestion that he was the sole proximate cause of his accident, and alleges that a defendant that is opposing summary judgment on the issue of Labor Law § 240 (1) liability on sole proximate cause grounds would necessarily

[5] Salinas submits the affidavit of an engineer who opines substantially the same.

have to establish that he had adequate safety devices available but chose for no good reason not to use them. Salinas points out that the sole proximate cause defense is meritless unless adequate safety devices were actually available to the injured worker; it is insufficient for defendants or employers merely to instruct workers to avoid using unsafe equipment or engaging in unsafe practices. Here, claims Salinas, there were no safety lines, straps or D-rings provided, and, therefore, attaching himself to another form cannot be the sole proximate cause of his accident. In sum, Salinas concludes that the record establishes that defendants failed to provide adequate equipment against the risk of falling; for this reason, argues Salinas, the court should award him partial summary judgment on the issue of Labor Law § 240 (1) liability against defendants.

Next, Salinas claims that he is entitled to partial summary judgment against defendants with respect to Labor Law § 241 (6). Salinas argues out that, like § 240 (1), § 241 (6) imposes absolute vicarious liability without regard to fault against owners, contractors and their agents for any violations of the Industrial Code that proximately cause injuries to construction workers. Here, Salinas continues, applicable Industrial Code provisions required defendants to provide him with safe working conditions and personal protective equipment; he claims they did not. More specifically, Salinas notes that one provision of the Industrial Code required defendants to provide a secure tail line or lifeline which he could have attached his safety harness chain and hook to; another Industrial Code section pointed out by Salinas required that defendants instruct him how to properly use a lifeline and harness. Also, Salinas cites another Industrial Code section that requires that forms are properly braced or tied together so as to maintain their position and shape. Here, argues Salinas, these Industrial

Code sections are applicable, and, therefore, defendants' failure to ensure compliance with these provisions violated the Industrial Code,[6] proximately caused his injuries, and also establish a prima facie Labor Law § 241 (6) claim. Salinas asserts that any purported defense is meritless for the same reasons as with regard to his Labor Law § 240 (1) claim. Accordingly, Salinas reasons that his motion under Labor Law § 241 (6) should be granted insofar as it seeks partial summary judgment on the issue of defendants' liability.

The Owners' Summary Judgment Motion

The Owners, in support of their motion for summary judgment, first claim that all claims should be dismissed against defendants LPCiminelli Interests, LPCiminelli Solutions, and LPCiminelli Construction Corp. The Owners note that LPCI's project manager testified at his deposition that the LPC Defendants were not involved in the project; this testimony is undisputed, they claim and no evidence to the contrary exists in the record. They surmise that Salinas simply sued those entities erroneously. For this reason, the Owners conclude that defendants LPCiminelli Interests, LPCiminelli Solutions, and LPCiminelli Construction Corp. are entitled to summary judgment dismissing all claims asserted against them.

Next, the Owners argue that Salinas' Labor Law § 200 and common-law negligence claims must be dismissed. In support, the Owners note that Labor Law § 200 codifies an owner's and general contractor's ordinary common-law duty to provide construction site workers with a safe place to work. The Owners maintain that Labor Law § 200 and common-law negligence causes of action asserted by an injured worker are sustainable in only two

[6] Plaintiff's engineer reaches the same conclusion.

situations: first, where the allegedly liable party supervised or controlled the means and methods of the work being performed, and second, where the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury.

The Owners emphasize that the Court of Appeals has stated that the "duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's . . . tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work." They suggest that if the accident arose out of the means and methods of a subcontractor, liability does not attach simply by virtue of either prior notice or an owner's, contractor's or agent's general supervisory authority to oversee and inspect the progress of the work. They claim that, indeed, an owner's or contractor's general supervisory authority at a work site, such as the right to stop a contractor's work if a safety violation is observed, or the authority to ensure compliance with safety regulations or the terms of a contract, does not suffice impose liability under Labor Law § 200. Instead, they continue, for a party to be subject to vicarious liability pursuant to § 200, the plaintiff must demonstrate that the owner, contractor or agent controlled the manner in which the plaintiff performed his or her work.

Here, claim the Owners, Salinas' alleged injuries were the consequence of the means and methods of his employer, ECI. They note his main allegation – that he was not provided with adequate protection against falling while he was tasked with removing concrete forms from the side of a building. They further contend that none of Salinas' allegations can reasonably be considered as claiming that a dangerous premises condition led to the accident.

The Owners reason that, therefore, they are subject to liability pursuant to common-law negligence principles or Labor Law § 200 only if they supervised or controlled Salinas' work.

The Owners argue that the record demonstrates that they did not exercise any such authority. First, they claim that the undisputed relevant deposition testimony shows that Pratt did not participate in any construction activities, did not visit the site daily, and had no role in enforcing safety rules. According to the Owners, these items of unrebutted sworn testimony suffice for this court to award summary judgment dismissing the common-law negligence and Labor Law § 200 claims against Pratt.

Next, the Owners argue that LPCI had only general supervisory authority in connection with the construction project. Specifically, they note that LPCI had general authority to administer the subcontract, oversee the schedule and examine the work quality; LPCI also had authority to oversee compliance with safety rules and regulations, and stop a subcontractor's work if LPCI agents observed unsafe practices.[7] The Owners assert that such activity is consistent with general supervisory authority and is insufficient for imposing common-law negligence and Labor Law § 200 liability.

The Owners emphasize that they were not responsible for the means and methods of ECI's work or Salinas' assigned tasks. They also point out that the record shows that Salinas never interacted with agents of either LPCI or Pratt. Moreover, they continue, deposition witnesses from ECI and other subcontractors agreed that LPCI and its safety monitor company

[7] The Owners offer examples: LPCI conducted general site safety orientations for all workers, and at one point conducted an "OSHA Stand Down" to refresh all workers on OSHA standards; LPCI also retained a third-party safety contractor to observe safety compliance and create safety audit reports.

never directed or controlled the means and methods of any subcontractor's work. Indeed, the Owners continue, the terms of the written agreement between LPCI and ECI (and other applicable written agreements) specify that ECI is solely responsible for the safety of its work and its workers; these agreements, the Owners continue, also disclaim any responsibility, control or authority of LPCI over ECI's work. Furthermore, add the Owners, the applicable contractual provisions required ECI to hire a licensed concrete safety manager for the duration of its work, which ECI did. They point out that the safety manager's job was to inspect and enforce safety practices for the concrete work, including stripping forms, and that the manager specifically inspected and observed form stripping work on the day of the accident. Therefore, the Owners reason the record establishes that only ECI – and not Pratt or LPCI – supervised or controlled ECI's work.

With respect to protection against gravity-related hazards, the Owners continue, ECI was entirely responsible for the design of the fall protection plan employed for the concrete superstructure work (as required by the written agreement between LPCI and ECI). Indeed, they add, ECI retained a professional engineer to prepare shop drawings of ECI's opening and edge protection plans for use during the work; these drawings showed what type of fall protection system ECI planned to use. Moreover, the Owners note that ECI and/or the engineer on ECI's behalf selected the methods used, but agents of Pratt and LPCI were not involved with these selections. The Owners point out that under the applicable written agreement, ECI was obliged to create a plan against gravity-related risks and present it to LPCI; they note that ECI complied with its obligation, but LPCI neither discussed potential alternative fall protection plans with ECI nor provided any approval or disapproval of the

plan. In short, the Owners conclude that the record shows that responsibility for protecting ECI workers against the risk of falling was undertaken solely by ECI.

Similarly, the Owners continue, ECI's actions after the subject accident demonstrate that ECI was solely responsible for the safety of its workers. The Owners note that, after the accident, only ECI proposed and implemented corrective measures to remedy the violations identified by the New York City Department of Buildings. Specifically, the Owners aver, after Salinas' accident, ECI obtained updated drawings of platforms, directed its engineer to update the shop drawings concerning opening and edge protection, documented changes to its practices and issued a memorandum outlining specific means and methods for form stripping. The Owners reason that the fact that ECI undertook remedial safety measures after the accident further demonstrates that ECI was solely responsible for worker safety before the accident.

The Owners conclude that the record demonstrates that they were not responsible for ECI's or Salinas' work, and, moreover, that the record establishes that ECI was solely responsible for this work. Because the subject accident resulted from the means and methods of ECI's work, they claim that Salinas' common-law negligence and Labor Law § 200 claims asserted against them must be dismissed.

For similar reasons, the Owners contend that all cross claims and counterclaims against them should be dismissed. The Owners point out that any claims for common-law indemnification or contribution are viable only against the parties who engaged in negligent conduct or omissions. Here, the Owners note, no negligence is traceable to them. They reiterate that no premises condition is at issue; instead, the accident occurred solely because

Salinas attached his harness to a form – work exclusively done by ECI. They further reiterate that the record not only establishes that they were not involved in directing ECI's work, but also establishes that ECI was solely responsible for both the safety of their workers and the manner in which their workers completed their tasks. They reason that, accordingly, they cannot have committed a negligent act or omission that led to the subject accident. They conclude that, therefore, any cross claim or counterclaim sounding in either contribution or common-law indemnification against them must be dismissed as meritless.

Also, the Owners allege that any cross claims or counterclaims against them sounding in contractual indemnification must likewise be dismissed. The Owners state that there is no provision in any relevant written agreement which requires them to indemnify any subcontractors involved with the construction project. Therefore, concludes the Owners, any such cross claim or counterclaim lacks support in the record and, accordingly, should be dismissed.

Next, the Owners assert that they are entitled to partial summary judgment on the issue of contractual indemnification against ECI. They note that LPCI hired ECI, pursuant to a written agreement, to perform concrete superstructure work. They point out that the written agreement contains a broad indemnification clause, through which ECI agreed to hold the Owners harmless for all claims that arise under ECI's work; this is irrespective of whether ECI or its agents committed a negligent act or omission. Also, they state that the subject indemnity provision contains the qualifier that the obligation to defend and indemnify it to the fullest extent permitted by law. Moreover, the Owners reiterate that their agents committed no negligent acts or omissions that contributed to the accident, and, as such, if the

Owners are liable here, their liability is merely passive, and they would be solely vicariously responsible for another company's active negligence. Lastly, the Owners allege that there is no serious dispute that Salinas' accident arose out of concrete superstructure work performed by ECI. This is true, the Owners press, even if ECI delegated some or all concrete superstructure work to All Star, its own subcontractor. In sum, the Owners reason that based on this record, the subject written indemnity provision contained in the agreement executed by ECI was valid, enforceable, and in effect at all relevant times; accordingly, the Owners conclude that they are entitled to partial summary judgment on their claim of contractual indemnification against ECI.[8]

The Owners also argue that they are entitled to partial summary judgment on the issue of contractual indemnification against All Star. They note that ECI hired All Star pursuant to a written subcontract agreement, in which All Star expressly agreed to hold "Indemnified Parties and Additional Insureds: Pratt Institute" and "LPCiminelli" harmless for all claims arising out of All Star's work. They claim that there is no serious dispute that Salinas' accident arose out of such work. Also, the Owners emphasize that they are not attempting to have another entity indemnify either of them for their own negligence –as stated above, they continue, the record belies any finding of actual negligence against them –and point out that the written indemnity provision agreed to by All Star is "[t]o the fullest extent permitted by law." Accordingly, the Owners claim, All Star must be required to defend and indemnify

[8] The Owners also allege that they are entitled to partial summary judgment on the issue of common-law indemnification because "ECI is guilty of some negligence that contributed to" the subject accident, because "[p]laintiff claims that there were no proper tie off points at the time of his accident, which was ECI's responsibility to provide."

them because they are free of any negligence, and their potential liability is merely vicarious. In sum, the Owners reason that, based on this record, the subject written indemnity provision executed by All Star was valid, enforceable, and in effect at all relevant times; accordingly, the Owners conclude that they are entitled to partial summary judgment on the issue of indemnification against All Star.

With respect to Salinas' Labor Law § 241 (6) claims, the Owners note that in order for an owner, contractor or agent to be liable under Labor Law § 241 (6), a plaintiff is required to establish a breach of an applicable rule or regulation of the Industrial Code that gives a specific, positive command. They continue that the plaintiff must demonstrate that any such breach must have proximately caused the alleged injuries. Furthermore, the Owners argue, even if the worker alleges the breach of a specific Industrial Code rule, the Labor Law § 241 (6) claims are unsustainable if the identified rule is not applicable to the facts of the case. Here, the Owners continue, Salinas alleges violations of Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-2.2, 23-2.6, and 23-5.3. The Owners aver that these provisions are either inapplicable to the instant facts or, if violated, were not the proximate cause of Salinas' injuries.

Specifically, the Owners first note that Industrial Code section 23-1.7 deals with overhead hazards, falling hazards and vertical passages. They claim that Salinas' accident did not involve such risks, and, therefore, this Industrial Code provision is not applicable to the instant facts. Also, the Owners assert that section 23-1.15 does not apply here because the accident was not caused by the absence or inadequacy of a handrail. They also allege that Section 23-2.6 does not apply here because Salinas was neither constructing a masonry wall

nor was he inside a building or structure. Moreover, they continue, section 23-5.3 does not apply here because that provision regulates metal scaffolds, and the alleged accident did not involve a metal scaffold. Lastly, the Owners add, even if section 23-1.16 (regulating safety belts, harnesses, tail lines, and lifelines) or section 23-2.2 (requiring forms to be inspected and braced together) were violated, Salinas still has no viable Labor Law § 241 (6) claim based on these provisions because his foolish acts and omissions – namely, his failure to properly "tie off" (or approach a supervisor to either obtain the equipment or locate places to "tie off") – were the sole proximate cause of his injuries. The Owners conclude that since Salinas cannot show that the violation of an applicable provision of the Industrial Code proximately caused his injuries, his Labor Law § 241 (6) claims thus lack merit and must be dismissed.

Lastly, the Owners assert that the court should grant their motion for a default judgment against R&D because it failed to timely appear. Specifically, the Owners note that R&D failed to interpose an answer to the third-party summons and complaint; accordingly, this failure warrants entry of a default judgment against R&D. The Owners argue that on an application for a default judgment, the movant has to offer only an affidavit or verified complaint that alleges enough facts to enable a court to determine that a viable cause of action exists; the affidavit or verified complaint must demonstrate the (1) proof of the facts constituting the claim; (2) defendant's default; and (3) the amount due. The Owners further point out that parties in default are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.

Here, the Owners claim, pursuant to R&D's subcontract with All Star, R&D agreed to undertake the same obligations as those undertaken by the other parties involved in the

construction project. The Owners assert that, pursuant to its contract, R&D undertook responsibility for the concrete superstructure work; they also emphasize that R&D's employees (including Salinas) were performing work related to the superstructure at the time of the accident. The Owners point out that the subcontract has a broad indemnity provision applicable to claims involving R&D work. The Owners reason that, therefore, Salinas' accident triggered R&D's obligation to indemnify them.[9] The Owners suggest that the relevant subcontract documents, coupled with the main pleadings in this action, constitutes proof of the relevant facts and R&D's liability for indemnification.

The Owners state that more than six months have elapsed since R&D was properly served with process through the New York Secretary of State; they further point out that, nevertheless, R&D has failed to either interpose an answer or move to dismiss. Accordingly, the Owners conclude, a default judgment in their favor against R&D is warranted (with an inquest on damages to be scheduled at the appropriate time). For these reasons, the Owners submit that their motion should be granted in its entirety.

ECI's Summary Judgment Motion

ECI, in support of its motion for summary judgment, alleges that it is entitled to contractual indemnity from All Star. ECI notes that it entered into a written subcontract agreement, dated March 27, 2017, with All Star; this agreement required All Star to perform concrete and masonry work (referred to as building the walls and floors, or "the

[9] The Owners claim that the Workers' Compensation Board found that R&D did not provide the required workers' compensation insurance at the time of the accident; therefore, the Owners argue, R&D is not entitled to the Workers' Compensation Law bar prohibiting common-law claims for indemnification and contribution against employers of injured workers.

superstructure") on the subject building under construction and contained a broad indemnification provision. This provision, ECI continues, requires All Star to defend, indemnify and hold ECI harmless with respect to claims that arise, directly or indirectly, out of or in connection with All Star's work. This is so, ECI presses, even if All Star, the indemnitor, either did not commit a negligent act or omission or hired another contractor to perform the subject work. Rather, claims ECI, given the broad "arising out of" language in the indemnity provisions of the agreement, it suffices that Salinas was an employee of R&D, All Star's subcontractor, and was performing work at the premises that All Star was contractually obligated to perform when the accident occurred. Specifically, ECI continues, the record establishes that, at all relevant times, Salinas was stripping forms from the exterior of the building; in other words, states ECI, Salinas was performing the superstructure work that All Star contracted to perform. ECI reasons that, therefore, Salinas' accident and injuries arose out of All Star's work for purposes of contractual indemnification.

Next, ECI maintains that the subject indemnification provision was in effect and enforceable at all relevant times. ECI notes that it neither employed plaintiff or directed the means and methods of his work; ECI reasons that, therefore, it is not subject to negligence liability relative to the accident. ECI emphasizes that it is not attempting to have All Star indemnify it for its own negligence; nevertheless, continues ECI, the subject indemnity provision, by its terms, is to be enforced to the fullest extent permitted by law. ECI concludes that, given that the record establishes these facts, ECI is entitled to summary judgment on its contractual indemnification claim against All Star.

Next, ECI alleges that All Star breached the subject agreement by failing to procure and maintain a commercial general liability insurance policy that names ECI as an additional insured. ECI notes that the agreement requires that All Star procure and maintain primary and umbrella insurance coverage that names ECI as an additional insured; ECI further points out that the agreement specifies that the umbrella policy limits must be equal to or greater than $10,000,000. Here, continues ECI, All Star did obtain coverage; however, when ECI formally contacted both All Star and All Star's primary and excess insurers and tendered the matter for defense and indemnity, ECI received no response (let alone an assumption of defense and indemnity) from either. ECI concludes that All Star, by failing to secure defense and indemnification in this case, has breached the applicable subcontract agreement.

Additionally, ECI claims that All Star breached the agreement by failing to procure and maintain excess/umbrella insurance with limits of at least $10,000,000. ECI points out that during discovery in the instant action, All Star disclosed that it had obtained primary and excess insurance policies, each with limits of $1,000,000 per occurrence. ECI notes that All Star's own discovery response establishes that it failed to maintain the contractually obligated policy limits; as such, reasons ECI, for this independent reason, All Star is liable to ECI for breach of the subcontract agreement. ECI concludes that this also demonstrates that ECI is entitled to summary judgment on its breach of contract claim against All Star.

Next, ECI claims that it is entitled to summary judgment dismissing all claims sounding in common-law indemnity and contribution asserted against it. ECI emphasizes that Salinas claims, in essence, that he was injured as a result of unsafe and inadequate means and methods regarding his work – specifically, that he was not provided with adequate protection

against the risk of falling while removing concrete forms, which was part of the superstructure work. ECI contends that any claim for common-law indemnification or contribution against it is viable only if (among other things) ECI exercised[10] authority over the means and methods of the injured person's work. The record establishes, and ECI maintains, that ECI subcontracted all superstructure work to All-Star, which, in turn, hired R&D, Salinas' employer, to perform the work. ECI asserts that the record shows that ECI did not employ Salinas and did not direct the means and methods of his work. Indeed, ECI points out that its involvement was limited to performing the foundation work and providing the forms; other than that, ECI did not provide labor, tools or equipment for the superstructure work.[11] In sum, ECI concludes that since its agents did not actively supervise Salinas' work, and since Salinas' claims invoke defendants' failure to provide him with adequate protection against gravity-related risks, ECI thus committed no negligent act or omission; accordingly, reasons ECI, no common-law indemnification or contribution claim against it is viable.

Also, ECI states that it is entitled to summary judgment dismissing All Star's counterclaim for contractual indemnification. ECI points out that the written subcontract agreement between it and All Star requires All Star to indemnify, defend and save harmless ECI. However, ECI continues, the record shows no provision in that agreement or any other written agreement that requires ECI to defend, indemnify or hold harmless all Star. For this

[10] ECI claims that even if it had supervisory authority over Salinas' work (which it does not concede), such unexercised authority is insufficient to impose common-law indemnification or contribution liability against it.

[11] ECI asserts that after it subcontracted the superstructure construction work to All Star, ECI retained only "general project management responsibilities, such as paperwork and submittals."

reason, ECI argues that All Star's counterclaim for contractual indemnification should be dismissed.

Lastly, ECI contends that the breach of contract claims asserted against it should be dismissed. ECI notes that the Owners have alleged that ECI failed to procure and maintain insurance coverage naming them as additional insureds. To the contrary, avers ECI, it obtained a commercial general liability policy with Certain Underwriters at Lloyd's, London, with limits of liability of $1 million per occurrence, that contains a blanket additional insured endorsement that affords additional insured coverage "[a]s required by written contract considering the contract is executed prior to loss." Thus, reasons ECI, any parties that, pursuant to written contract with ECI, must be named as additional insureds under commercial general liability policies – here, the Owners – are covered by the subject policy. ECI also notes that the record shows that ECI obtained three layers of excess insurance that, combined, have excess limits of $9 million. Thus, ECI reasons that it satisfied its contractual obligation by procuring insurance that comports with the contractual requirements and name the Owners as additional insureds on its primary and excess policies with total limits of $10 million per occurrence. Accordingly, argues ECI, the record belies any claim that ECI failed to comply with the covenant to procure and maintain insurance coverage for the Owners. For this reason, ECI concludes that it is entitled to summary judgment dismissing the breach of contract claims against it.

Opposing Arguments

In partial opposition to the Owners' motion, All Star asserts that the plaintiff's accident did not arise out of its work. Instead, All Star claims, the accident was a result of ECI's failure

to comply with its safety responsibilities. All Star notes that Salinas was allegedly injured from a fall he suffered while stripping concrete forms. All Star contends that ECI was the party responsible for both supervising form-stripping work and installing a fall-protection system for workers doing the same. All Star further alleges that the deposition testimony shows that ECI alone was responsible for site safety in this regard. Also, All Star claims that the record shows ECI was responsible for providing fall protection for the work and ensuring such protection was on site, and in use, and to oversee the safe operation of Salinas' work. This is so, continues All Star, because ECI submitted edge protection plans for the job, including for the installation and use of D-rings (devices embedded in concrete that serve as places where a worker may tie off) – All Star notes that ECI determined to use this fall protection system for the work. Had these fall protection plans been implemented, All Star claims, they would have been in place and used at the time of the superstructure work – including the form-stripping work Salinas was performing. All Star emphasizes that the record shows it was ECI's responsibility to ensure that these specific fall protection measures were on site, including in the specific area where Salinas worked. Indeed, All Star continues, in one instance, ECI, after being notified about deficient safety practices during the superstructure work before the plaintiff's accident, failed to address the reported deficiencies. Therefore, All Star reasons, the responsibility for alleged safety deficiencies regarding Salinas' work rests solely with ECI.

All Star notes that Salinas is alleging that defendants violated the Labor Law because he was not provided with adequate protection against the risk of falling while he worked. Based on this record, All Star claims, as ECI has acknowledged that fall protection was

exclusively within its scope of work, there is no basis to find that the accident arose out of All Star's work. All Star argues that, therefore, all common-law indemnification and contribution claims against All Star must be dismissed. All Star notes that common-law indemnification and contribution is properly sought only against an "actual tortfeasor" – a party that somehow brought about the injuries for which the party seeking indemnification or contribution is allegedly vicariously liable. In contrast, All Star points out that, here, it had no agents or employees working at the site; All Star delegated the entire scope of its work to its subcontractor, R&D. All Star acknowledges that it retained and had general supervisory responsibility over R&D; nevertheless, All Star maintains, such general authority is not equivalent, for purposes of contribution and indemnity, to actual negligent acts or omissions. Further, All Star avers that ECI's witness confirmed that All Star was not involved in either generating a plan to protect workers against falls or installing equipment for the same. All Star claims that since none of its agents could have reasonably committed such negligence, there is thus no viable common-law contribution or indemnity claim against it.

All Star further argues that the written agreement between the Owners and ECI confirms that the responsibility to provide and oversee fall protection for the concrete superstructure work was delegated to ECI. Specifically, All Star continues, the agreement expressly obligated ECI to provide all material, equipment and supervision related to and/or necessarily involved with the performance of the concrete work; indeed, All Star presses, the agreement provides that ECI "shall be solely responsible for the safety of its Work and of the safety of its agents, employees, material men, subcontractors and any entity working on [its] behalf[.]" The Owners, All Star argues, also allege that ECI was "entirely responsible for the

design of the fall protection plan for the concrete superstructure work" as was provided by the subject written agreement; they also note that ECI's engineer chose the fall-protection methods and equipment. All Star then points out that ECI's agent conducted daily safety inspections of the work area; these agents were also responsible for: inspecting the safety practices of the concrete work; enforcing site safety; overseeing such work; correcting unsafe work practices; monitoring that form-stripping was performed safely; implementing fall protection during such work and making sure the fall protection was in use. All Star also asserts that the record contains no evidence that it had the authority to direct, supervise, or control ECI with respect to worker safety during the form-stripping work. Instead, All Star concludes, the record shows that ECI was solely responsible for the same; in fact, surmises All Star, if the D-rings were installed – as ECI had stated it would do – Salinas would have had a place to attach his safety line, and the accident would likely not have happened.

In conclusion, All Star claims that the record shows that ECI had sole responsibility for proper fall protection and ensuring safe work practices during the form-stripping operation, which Salinas was performing when he allegedly fell and suffered injuries. Based on the record, All Star argues, any absence or inadequacy of proper devices (i.e., the lack of D-rings or other places where Salinas could attach a safety line) against the risk of falling establishes ECI's negligent conduct for failing to provide such devices. Coupled with the absence of any evidence of actual wrongdoing on its part, All Star concludes that it cannot be held liable for contribution or indemnity relating to Salinas' claims; accordingly, any motion for summary judgment on the issue of contribution or indemnity against All Star must be denied and the claims dismissed.

Acknowledging ECI's motion for summary judgment on (among other things) the issue of contractual indemnification against it, All Star first claims that ECI is not entitled to such relief because ECI is, in essence, attempting to have All Star indemnify it for its own negligence. All Star notes that a party seeking contractual indemnification must first prove itself free from negligence; if its negligence contributed to the accident, it cannot be indemnified against liability. All Star reiterates that, according to the record, the responsibility for ensuring that workers (such as Salinas) who removed concrete forms at a height had places on the superstructure where they could attach safety lines and harnesses was solely ECI's. Therefore, All Star reasons, if Salinas lacked adequate safety devices that would have protected him from the risk of falling, this omission is attributable to ECI. Accordingly, All Star argues, if one party in the instant action was indeed negligent, it was ECI; for this reason, All Star concludes, ECI cannot obtain indemnity from any party for ECI's negligence. For these reasons, All Star contends that ECI's motion, insofar as it seeks contractual indemnification against All Star, must be denied.[12]

Next, All Star suggests that ECI's breach of contract claims against it are meritless. All Star acknowledges ECI's claim that All Star did not obtain the required amount of excess/umbrella insurance coverage; however, All Star avers, the subject written agreement contains two differing excess/umbrella insurance procurement provisions, each of which sets

[12] All Star also alleges that the motion should be denied because: (1) the record contains conflicting contractual provisions that trigger indemnification from All Star, and, as such, an issue of fact exists as to what the correct terms of the indemnity are; (2) the accident did not arise out of All Star's work, and, therefore, any indemnity provision applying to All Star is not applicable here; and (3) any relevant indemnity provisions are in an agreement to which All Star was never a party, and All Star is not an assignee of said agreement.

forth a different coverage amount. Specifically, All Star maintains that one such provision requires a minimum of $10 million of excess or umbrella coverage; however, another provision merely requires $5 million. All Star reasons that, given the existence of the conflicting provisions, an issue of fact exists which precludes summary judgment.[13]

Additionally, All Star, opposing ECI's motion, reiterates that All Star is not an actual tortfeasor. Therefore, All Star asserts, for the same reasons advanced in opposing the Owners' motion for summary judgment against it, ECI has no viable common-law contribution or indemnity claims against it. Accordingly, All Star concludes that ECI's motion for summary judgment, insofar as it seeks relief against All Star, must be denied.

Finally, All Star addresses Salinas' motion for partial summary judgment. First, All Star argues that Salinas is not entitled to recover damages pursuant to Labor Law § 240 (1) because his unwise actions were the sole proximate cause of his injuries. All Star also opines that there was no Labor Law § 240 (1) violation, here because Salinas was equipped with adequate safety equipment: a harness, a tail line, and a chain that he used to anchor himself while stripping forms on the third floor without incident. All Star reasons that since Salinas had the same equipment while working on the fourth floor, performing the same work, the failure to "tie off" with adequate safety equipment is not a Labor Law § 240 (1) violation. All Star emphasizes that Salinas was equipped with a tail line which, during his deposition, he admitted was not attached to anything. Also, All Star notes that ECI, after investigating the accident, found that Salinas was "unlocking the 4th floor form to which he was still tied." All

[13] All Star further states that ECI cannot establish any recoverable damages necessary to support a breach of contract claim.

Star reasons that since Salinas' harness was improperly connected to the form which he was in the process of removing when the accident occurred, there exists a question of fact as to whether Salinas himself rendered the form unsafe, by unpinning it while he was tied off to it, proximately causing the accident in the process. Moreover, All Star suggests that Salinas' testimony that there was nothing which he could attach his tail line to is incredible, since photographs of the relevant area show protruding rebar above the level where he was working. For these reasons, All Star concludes that Salinas cannot establish that Labor Law § 240 (1) was violated, or that his injuries were proximately caused by something other than his own foolish choices.

Similarly, All Star claims that there is no merit to Salinas' Labor Law § 241 (6) cause of action. All Star notes that such a claim must be supported by an applicable Industrial Code provision, which has been violated; Salinas must also show that the violation was the proximate cause of the accident and injuries. Moreover, All Star adds, not every Industrial Code provision qualifies; the supporting provision must be a "specific, positive command," rather than a simple "reiteration of common law standards." Here, continues All Star, the Industrial Code sections cited by Salinas are either inapplicable to the facts or were not violated. Furthermore, All Star contends, Salinas cannot recover damages pursuant to Labor Law § 241 (6) if he was the sole proximate cause of the accident; it argues that the same analysis that applies to Labor Law § 240 (1) applies also to § 241 (6). Accordingly, All Star reasons, issues of fact exist as to whether defendants are liable pursuant to Labor Law § 241 (6), and, therefore, Salinas' motion seeking partial summary judgment with respect to Labor Law § 240 (1) and § 241 (6), must be denied.

In opposition to both Salinas' motion and ECI's motion, the Owners first assert that ECI is not entitled to dismissal of their common-law claims for contribution and indemnity against it. The Owners note that a claim for common-law indemnification or contribution requires proof that the proposed indemnitee engaged in a negligent act or omission that contributed to the alleged injuries, or exercised supervision or control over the means and methods which occasioned the alleged injuries. The Owners maintain that if the proposed indemnitee (here, ECI) bears responsibility for the means and methods of the applicable work, summary dismissal of common-law claims for indemnification and contribution is inappropriate. Here, contend the Owners, ECI was responsible for planning and installing a fall-protection system with respect to the superstructure work. Indeed, the Owners continue, in response to a government-issued site safety violation, ECI had to alter its fall arrest system and methods of form stripping – demonstrating that ECI exercised control over the means and methods of fall protection. In sum, the Owners suggest that ECI's fall protection practices which in use for concrete form stripping (Salinas' work) at the time of the accident were negligently designed, implemented or monitored, and ECI thus bears responsibility for the accident. For these reasons, the Owners conclude that ECI's motion should be denied to the extent it seeks dismissal of the Owners' common-law contribution and indemnification claims.

Next, the Owners assert that ECI is not entitled to summary judgment dismissing their claim that ECI failed to procure and maintain contractually obligated insurance coverage. More specifically, the Owners claim that it would be premature for the court to dismiss these causes of action. The record, the Owners continue, suggests that ECI may have attempted to

obtain the requisite insurance coverage; however, the Owners allege, it appears that ECI made material misrepresentations in the application for the insurance policy. Therefore, reason the Owners, the "policy" that ECI claims it obtained is actually void ab initio – and the subject policy never came into existence.

The Owners note that there is currently in Supreme Court, Westchester County a declaratory judgment action commenced against ECI by Lloyd's of London, its alleged insurer. The Owners note that the plaintiff in that action alleges that ECI obtained the policies at issue by way of fraudulent misrepresentations, and thus seek a declaration that the policies were void ab initio. The Owners reason that if the declaratory judgment is granted, then ECI never truly obtained the requisite coverage, and, therefore, would have breached the insurance-procurement provision of the applicable written agreement. Thus, the Owners argue, the record demonstrates an issue of fact as to whether ECI complied with the subject provision, and, therefore, ECI's motion must be denied insofar as it seeks summary judgment dismissing their breach of contract claims.

Similarly, the Owners maintain that the record contains questions of fact with respect to Salinas' Labor Law § 240 (1) claims. Specifically, the Owners contend that the record shows that Salinas was the sole proximate cause of his injuries, and, therefore, he is not entitled to recover damages pursuant to Labor Law § 240 (1). Here, the Owners aver, Salinas was provided with safety devices, and, therefore, his misuse of these devices prevents him from recovering under Labor Law § 240 (1). The Owners note Salinas' deposition testimony, in which he said that while he stripped concrete forms from an elevated position, he wore a harness that had an attached chain with two metal clips at the end; properly used, the clips

would have been attached to concrete forms that were not being removed. Also, the Owners continue, the harness was equipped with a tail line, intended to be tied to anchor points overhead. The Owners claim that Salinas was well-experienced with this equipment: he testified that during previous jobs, Salinas would normally attach the tail line to exposed rebar on the floor above, as an anchor point. Therefore, the Owners claim, from his prior experience, Salinas either knew or should have known that his harness should only be attached to a form (assuming that there were no other available anchor spots) that was still secured with pins to the structure.

The Owners claim that the record shows that Salinas foolishly attached his harness to a concrete form that was not so secured. In fact, the Owners continue, the record suggests that only Salinas could have removed the securing pins from the form which fell along with him. Thus, the Owners reason, Salinas either knowingly or negligently chose to attach his harness to an unsecured form – this suggests that Salinas was the sole proximate cause of his accident and injuries.[14] Moreover, add the Owners, the record belies Salinas' claim that there was no anchor location which he could have "tied off" to before the accident. The Owners emphasize Salinas' testimony that, in prior instances, he would attach his tail line to exposed rebar on the floor above the one where he was working. Also, the Owners acknowledge that Salinas testified that, prior to the accident, he was unable to attach the tail line to any rebar above him, and that is why he attempted to secure himself to a concrete form. However, the Owners note, the record contains photographs of the subject work area, and these photographs

[14] The Owners also claim that the record suggests that, prior to the accident, Salinas' co-worker cautioned him about the risks associated with not attaching the harness to permanent part of the building.

show exposed rebar above the level where Salinas worked. Additionally, the Owners claim, the record suggests that at all relevant times, Salinas was working with another worker, Hugo Duarte, who was able to tie off to exposed rebar on the sixth-floor. For these reasons, the Owners conclude that the record shows a question of fact exists as to the credibility of Salinas' statement that, prior to the accident, he was unable to attach his tail line to any anchor point.

The Owners note that Salinas, in support of his motion for partial summary judgment, has submitted the opinion of a purported expert engineer, who opines that neither the rebar nor the forms were appropriate anchor points. However, the Owners claim, the engineer fails to address the fundamental question: whether Salinas' conduct (attaching his harness to a concrete form that he had already unpinned/loosened, and failing to tie off to the rebar overhead) was the sole proximate cause of his accident. Also, the Owners note that the engineer claims that, prior to the accident, the rebar wasn't "evaluated" to determine whether it was a safe anchor point; however, the Owners reason, the lack of an evaluation is not proof that it would not have been safe (or at least prevented the accident) for Salinas to attach his tail line to the rebar. Additionally, the Owners point out that the engineer mischaracterizes the record when he suggests that Salinas was not trained to tie off to the forms and to the rebar overhead; to the contrary, Salinas specifically testified that he knew how to tie off in both ways, and had done so on prior occasions. Lastly, the Owners characterize the engineer's opinion as conclusory – his opinion that a violation of Labor Law § 240 (1) occurred is exclusively based on the fact that the accident happened, which is, as a matter of law, insufficient to demonstrate that such a violation took place. He but does not analyze the fall protection equipment furnished to Salinas and whether it would have prevented the accident.

In sum, the Owners conclude, this court should disregard the purported expert opinion, and deny Salinas' motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

Similarly, the Owners continue, Salinas is not entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6). The Owners contrast this statute with Labor Law § 240 (1), and point out that, unlike § 240 (1), § 241 (6) contains no specific safety standard in itself. Instead, the Owners aver, a viable § 241 (6) cause of action requires an injured worker to set forth a violation of a specific provision of the Industrial Code. Furthermore, the Owners add, the identified provision must: (1) contain a positive command; (2) be applicable to the facts; and (3) have been violated; also, the violation must be the proximate cause of the accident and injuries. Lastly, the Owners argue, appellate decisions establish that a violation of the Industrial Code is merely evidence of negligence that a trier of fact may consider, and, as, such, summary judgment is generally inappropriate with respect to Labor Law § 241 (6).

Here, and as stated in their motion for summary judgment dismissing the Labor Law § 241 (6) claims, the Owners maintain that the record establishes that the provisions of the Industrial Code cited by Salinas are inapplicable, were not violated, or, if violated, their breach was not the proximate cause of Salinas' accident. Alternatively, the Owners assert, if this court concludes from the record that applicable and sufficiently-specific Industrial Code provisions were violated, there nevertheless remain questions of fact for the trier of fact to determine. The Owners add that the same arguments related to the sole proximate cause doctrine apply equally to Labor Law § 241 (6) as they do to Labor Law § 240 (1), and for the

same reasons, there are questions of fact regarding the § 240 (1) claim, there are questions of fact concerning the § 241 (6) claim. For these reasons, the Owners conclude that Salinas' motion seeking summary judgment with respect to liability pursuant to Labor Law § 240 (1) and § 241 (6), must be denied.

In partial opposition to the Owners' motion for summary judgment, Salinas argues that the record establishes that defendants violated provisions of the Industrial Code, in particular, § 23-1.16, and, consequently, Labor Law § 241 (6), and that these violations proximately caused his injuries. Salinas notes that the duties imposed by § 241 (6) are nondelegable; accordingly, this duty cannot be delegated to an injured worker, and liability cannot be avoided by claiming that the worker should have alerted the defendants to their violations of the Industrial Code. Salinas asserts that the Owners seek to effectively penalize him for their own failure to satisfy their own nondelegable duty to provide him with adequate protection against falls and safe places which he could have anchored his safety harness to, as is expressly required by the Industrial Code.

Similarly, Salinas claims that the Owners' opposition to his arguments concerning Labor Law § 240 (1) – especially their contentions about sole proximate cause – lack merit. Salinas states that, contrary to the Owners' suggestion, attaching the harness to an adjacent concrete form was not the "misuse" of a safety device. Salinas argues that the record establishes he and his co-worker were acting in accordance with instructions from his foreman; he also cites relevant deposition testimony that indicates his supervisor's approval of workers who were removing forms to "tie off" to an adjacent form. Next, he alleges that the record shows that there were no alternative anchor points nearby when he performed the

work that precipitated the accident. Also, he notes his own testimony wherein he claimed he had nowhere safe which he could have attached his tail line to. Although Salinas acknowledges the Owners' contention that overhead rebar would have made an adequate anchoring point, he argues that the record contradicts their argument. He again notes his testimony, which stated that other forms blocked clear access to the rebar above, and, in any event, the protruding part of the rebar was too short and would not have safely held the clip from his tail line. Salinas again highlights his supervisor's testimony, which indicates that attempting to attach a line to exposed rebar was unsafe, and that workers at the site would not have been permitted to "tie off" to the rebar. Further supervisor testimony, continues Salinas, indicates that that an uncapped piece of rebar would not be a proper anchorage for a safety line. In any event, Salinas claims, the Owners' identification of a piece of rebar as a potential anchorage point does not establish that he was the sole proximate cause of his accident since the record lacks evidence that he was ever instructed to try to tie off to this rebar. In sum, Salinas argues that the record establishes that the accident was not a result of either his failure to follow a safety instruction or his decision to take a foolish and unnecessary risk. To the contrary, Salinas concludes, the record shows that he was not furnished with any equipment that provided adequate protection against elevation-related risks; as such, this court should deny the Owners' motion insofar as it seeks summary judgment dismissing his Labor Law § 240 (1) and § 241 (6) claims.

Lastly, Salinas asserts that issues of fact preclude an award of summary judgment dismissing his Labor Law § 200 and common-law negligence claims. Salinas points out that the Owners had the power to enforce site safety rules and to stop work that they either deemed

unsafe or which violated contract specifications. Indeed, Salinas claims, the contract between LCPI and Pratt made LPCI expressly responsible for supervision and oversight of the construction work, including work performed by subcontractors, and for site safety, including subcontractor employee safety. Moreover, Salinas suggests that the concrete form that fell constituted a hazardous premises condition, and also argues that the Owners have failed to show a lack of notice, actual or constructive, that the form was not properly braced or secured. Salinas contends that irrespective of whether the accident is seen as the result of negligent means and methods or as a consequence of a premises hazard, issues of fact exist that preclude summary judgment on the issue of Labor Law § 200 and common-law negligence.

In partial opposition to the Owners' motion for summary judgment, ECI claims that the Owners are not entitled to summary judgment dismissing the common law negligence or Labor Law § 200 claims asserted against them. ECI notes that these claims typically fall into two categories: injuries caused by alleged premises hazards, and injuries involving the means and methods of the plaintiff's work. ECI acknowledges that owners and general contractors are liable for "means and methods" cases only when their agents direct or control the subcontractor's work; here, claims ECI, a question of fact exists as to whether the Owners controlled the work that precipitated Salinas' injuries. ECI notes that the Owners retained an independent site safety contractor and employed a safety manager who was on site continuously. ECI also emphasizes that the contract between Pratt and LPCI states that LPCI is fully responsible for the safety of the workers on site and the performance of the work, including the employees of subcontractors. This contractual provision, continues ECI, belies any argument that responsibility for site safety was fully delegated to ECI. Also, ECI adds,

the Owners should remain subject to Labor Law § 200 and common-law negligence liability because they failed to coordinate the trades and subcontractors; specifically, ECI notes that rebar on the floor above Salinas had not yet been installed because the workers who were to install it were behind schedule. ECI claims that if the Owners had ensured that schedules were met, there would have been overhead rebar for Salinas to have safely attached his tail line to, and the accident consequently would not have happened. Finally, ECI argues that since the record does not establish (given that Salinas claims that he did not remove the securing pins) why the form which Salinas was attached to fell, a question of fact remains as to whether the unsecured form constituted a hazardous condition on the premises.

Lastly, ECI contends that the Owners have not established prima facie entitlement to judgment as a matter of law with respect to contractual indemnification against it. ECI emphasizes that the Owners, to obtain indemnification, must first prove themselves free from negligence, because they cannot be indemnified for liability if their negligence contributed, in any way, to the accident. ECI argues that the Owners have not shown that their agents were not responsible for any negligent acts or omissions that led to Salinas' accident. By the same reasoning that applies to Labor Law § 200 and common-law negligence, ECI continues, the Owners have not demonstrated their entitlement to summary judgment on the issue of contractual indemnification. Therefore, ECI concludes, to the extent that the Owners' motion seeks such relief, the motion should be denied.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues

of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]). The court must view the totality of evidence presented

in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]).

The court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Nevertheless, summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman*, 3 NY2d at 404 [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]). With these principles in view, the court turns to the substance of the motions.

Labor Law § 200 and Common-Law Negligence

The court first addresses the Owners' motion insofar as it seeks summary judgment dismissing Salinas' Labor Law § 200 and common-law negligence claims. Labor Law § 200 states, in applicable part:

> "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 protections to such persons."

Labor Law § 200 codified the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]).

This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]). "Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective

conditions at a worksite and those involving the manner in which the work was performed" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]).

Here, irrespective of whether the instant matter should be analyzed as a "manner of work" case or as a "hazardous condition" case, Salinas' Labor Law § 200 and common-law negligence claims must be dismissed.

Under the "manner of work" analysis, "[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" either that was performed by plaintiff or that produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, the record establishes that defendants did not control or supervise Salinas, his work, or any of the R&D workers. Salinas specifically testified that he could not name a single All Star (or ECI) employee. Furthermore, his testimony contains no indication that he took instruction from an agent of the Owners. Indeed, the record suggests that Salinas' work was overseen exclusively by R&D employees. Therefore, if Salinas' injuries are considered a consequence of the manner of his work or of R&D's work removing or installing forms, defendants are not subject to liability for causes of action sounding in common-law negligence and/or for violations of Labor Law § 200 (*id.*).

Accordingly, Salinas' Labor Law § 200 and common-law negligence claims are sustainable against the defendants only if the claims are viable according to ordinary premises liability principles (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007] ["(w)here a plaintiff's injuries stem not from the manner in which the work was being performed, but,

rather, from a dangerous condition on the premises, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident"]). The record in this case suggests two situations that could arguably be considered a premises hazard: the loose form which Salinas was attached to that fell, and the lack of secure anchor points (i.e., the system that ECI was responsible for installing). As for the loose form (assuming solely for this discussion that it constituted a premises hazard), the fact that Salinas, thinking it was secured, attached his chains and hooks to it belies any suggestion that it was visibly defective for an appreciable length of time (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"]). Furthermore, there is no indication that anyone –including, unfortunately, Salinas – had actual knowledge that the subject form was not secured. Moreover, there is no evidence in the record that anyone (save Salinas or, possibly, other R&D employees) were responsible for removing the securing pins from the subject forms; therefore, there is no evidence that any defendant caused the subject form to be unpinned and thus "loose." Accordingly, since the record indicates that no defendant either had notice (constructive or actual) of the unsecured form or had a part in loosening the form, no defendant is subject to Labor Law § 200 or common-law negligence liability with respect to the subject form.

To the extent that Salinas argues that ECI's failure to install a secure system of anchor points at which workers such as him could "tie off" to constitutes a premises hazard, the court

disagrees that the absence of safety equipment is akin to a mis-leveled floor or any type of a hazardous and non-transient premises condition, and in any event, the record shows that no defendant "created" such a hazard. Indeed, all other parties suggest that the responsibility for installing the system was solely ECI's. Similarly, and again assuming for the sake of discussion that ECI's failure to install fall protection constituted a premises hazard, there is no evidence of notice to the Owners. The Owners' deposition witnesses testified that they had no actual notice of the status of ECI's fall safety system. Moreover, the record does not contain any indication that the lack of such a system was visible and apparent for any appreciable length of time. This is another reason that the absence of something cannot be a "hazardous premises condition." For these reasons, Salinas has no viable Labor Law § 200 or common-law negligence claims against defendants.

Salinas' arguments to the contrary lack merit. As stated above, a defendant is not subject to Labor Law § 200 or common-law negligence liability unless the defendant either exercised supervisory control over the work performed or either created or had notice of the allegedly dangerous condition (*Sprague*, 240 AD2d at 394). The fact that defendants either had a duty (contractual or otherwise) to inspect the site or actually did inspect the site is insufficient to demonstrate an issue of fact as to the requisite supervision and control (*Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [1998] ["(a) defendant's mere presence at the worksite is insufficient to give rise to a question of fact as to the defendant's direction and control"]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Enos v Werlatone, Inc.*, 68 AD3d 712, 713 [2009]; *Loiacono v Lehrer, McGovern, Bovis, Inc.*, 270 AD2d 464 [2000]; *Richichi v Constr. Mgt. Tech.*, 244 AD2d 540, 542 [1997]).

Also, the fact that defendants had authority over site safety, and had the right to stop work if a safety violation existed, is immaterial, since the authority to enforce safety standards is insufficient to establish the control necessary to impose liability pursuant to Labor Law § 200 or common-law negligence (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [2004] ["(t)he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability"], citing *Shields v General Elec. Co.* , 3 AD3d 715, 716-717 [2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [2001]). More specifically, the right to generally supervise the work, stop a contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010]; *see also Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2012]).

Lastly, Salinas suggests that an issue of fact exists as to constructive notice, since "[t]he defendants fail to adduce any evidence regarding when and if it last inspected the subject formwork prior to the accident." To support this argument, Salinas cites *Weinberg v 2345 Ocean Assoc., LLC* (108 AD3d 524 [2013]). In *Weinberg*, the Second Department determined that it was error for the lower court to dismiss plaintiff's complaint because defendants, moving for summary judgment, "failed to demonstrate that they did not create a dangerous condition, nor did they establish that they properly maintained the sidewalk as required by Administrative Code of City of NY § 7-210 . . . [i]n addition, there was no testimony or other evidence as to when the sidewalk was last inspected before the accident, or what it looked like when it was last inspected" (*Id.*at 525).

Here, in contrast, the record shows that defendants did not "create" either the loose form or ECI's failure to install fall protection. Moreover, unlike the duty imposed on property owners by Administrative Code of the City of NY § 7-210 to maintain their sidewalks, a derogation of the common law, the Owners herein are under no statutory duty to regularly inspect the work of their subcontractors. Indeed, evidence of notice of a hazard must be clear and precise in order to create an issue of fact (*see e.g., Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2006]; *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]) and no such evidence exists here. In sum, since Salinas has not demonstrated that defendants supervised or controlled either his work or R&D's work, or that defendants had any notice of an allegedly hazardous condition, or that they created an alleged hazardous condition, defendants are entitled to summary judgment dismissing Salinas' Labor Law § 200 and common law negligence claims (*see e.g., Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2007]).

Labor Law §§ 240 (1) and 241 (6)

The court now turns to consider the motions insofar as they address Labor Law § 240 (1) and § 241 (6). Labor Law § 240 (1) states, in relevant part, that:

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

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [holding that owner or contractor is liable under Labor Law § 240 (1) "without regard to . . . care or lack of it"]).

Although this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 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] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]), the occurrence of an accident alone does not establish a Labor Law § 240 (1) violation; rather the plaintiff is required to show that the

violation was a contributing cause of the fall and consequent injury (*see e.g. Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]). Indeed, a successful cause of action under Labor Law § 240 (1) requires that the plaintiff establish both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall's Inc.*, 229 AD2d 569, 570 [1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Zimmer*, 65 NY2d at 524). A plaintiff alleging that the provided safety devices were inadequate must show that it was that inadequacy which proximately caused the plaintiff's injuries (*Wilinski*, 18 NY3d 1 [2011]). Generally, the issue whether a particular safety device provided proper protection is a question of fact for the jury (*see generally Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016]).

Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection

with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*,81 NY2d 5044, 501-502 [1993]; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc*., 54 AD3d 753, 754 [2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto*, 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated an Industrial Code provision that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d at 505) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 349). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [1995]).

Here, defendants have not demonstrated their entitlement to judgment as a matter of law dismissing either claim. Viewing the totality of the evidence presented in the light most favorable to Salinas, the party opposing summary judgment, and according him the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469,

470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]), his testimony indicates that he attached his hooks to a form he believed to be secure, and that he had no safe place which he could have attached his tail line to. Assuming the truth of Salinas' testimony for the purposes of opposing summary judgment, Salinas has a sustainable Labor Law § 240 (1) claim (*see e.g., Anderson v MSG Holdings, L.P.*, 146 A.D.3d 401, 402 [2017] [plaintiff established prima facie entitlement by showing that while subjected to elevation-related risk he was injured due to defendants' failure to provide him with proper fall protection – specifically an appropriate place to which to attach his harness). Indeed, Salinas' testimony suggests that the safety equipment he was provided with did not constitute "proper protection" against the risk of falling, as is required by the statute. Similarly, viewing all inferences in favor of Salinas, the court cannot find that his actions were the sole proximate cause of his injuries. To prevail on this defense, defendants must show that the injured worker "had adequate safety devices available; that he knew that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, this defense is unavailable where, as here, Salinas' injuries were "at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential" (*Nunez v Bertelsman Prop., Inc.*, 304 AD2d 487, 488 [2003]). Indeed, if the equipment given to Salinas did not provide "proper protection" against falls, Labor Law § 240 (1) was violated, and if the violation contributed to the accident, Salinas' conduct cannot be the sole proximate cause of his injuries (*see e.g., Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251,

253 [2008]; *see also Blake*, 1 NY3d at 290). Thus, for the purposes of opposing summary judgment dismissing his Labor Law § 240 (1) claim, Salinas' testimony indicates that the defendants' failure to provide him with "proper protection" against falls contributed to his accident and his injuries.

However, Salinas is likewise not entitled to summary judgment on these claims. Now viewing the record in the light most favorable to defendants, the opponents of Salinas' partial summary judgment motion, issues of fact exist as to Salinas' credibility, and whether his actions were the sole proximate cause of his injuries. Specifically, Salinas testified that, while working on other floors, he successfully attached his safety line to exposed rebar. Salinas also testified that, while performing the work that precipitated the accident, there was no rebar which he could have safely attached his tail line to. However, in opposition, defendants claim they have identified exposed rebar at the site which Salinas could have used for anchoring. Moreover, the testimony opposing Salinas' arguments suggests that no one other than he could have loosened the form that fell, suggesting that Salinas foolishly attached his chains and hooks to a previously loosened form. If believed, this suggests that Salinas either failed to use, or misused, an available safety device. While the record is not sufficient, because of Salinas' testimony, to dismiss his Labor Law § 240 (1) claim, his testimony demonstrates the existence of triable issues of fact (*see e.g.*, *Manna v New York City Hous. Auth.*, 215 AD2d 335 [1995], *lv denied* 87 NY2d 801 [1995]; *cf. Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 494 [2004] [no sole proximate cause defense where no evidence that injured worker "disobeyed an immediate instruction to use a harness or other actually

available safety device"). Salinas' testimony[15] presents an issue with respect to credibility, and "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]). Accordingly, Salinas' motion, insofar as it seeks partial summary judgment with respect to Labor Law § 240 (1), is denied (*Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712 [2007]).

Similarly, the court finds that defendants are not entitled to summary judgment dismissing Salinas' Labor Law § 241 (6) claim. To successfully oppose a motion for summary judgment dismissing a Labor Law § 241 (6) claim, a plaintiff must cite an applicable provision of the Industrial Code that contains concrete specifications with which owners and contractors must comply (*Donovan v S & L Concrete Constr. Corp., Inc.*, 234 AD2d 336, 337 [1996]). Here, Salinas alleges that defendants violated (among other provisions) subsection (b) of Industrial Code § 23-1.16 ("Safety belts, harnesses, tail lines and lifelines"), which states that:

> "Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a

[15] The court has disregarded Salinas' affidavit to the extent that it deviates from his deposition testimony (*cf. Lipsker v 650 Crown Equities, LLC*, 81 AD3d 789 [2011]).

> tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

This provision of the Industrial Code is sufficiently specific to support a Labor Law § 241 (6) claim and is applicable to the facts of this case (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404-405 [2017]). Moreover, resolving all inferences in Salinas' favor, as the court must do, the record contains evidence that this provision was violated and that the violation was the proximate cause of Salinas' injuries. Therefore, defendants are not entitled to summary judgment dismissing Salinas' Labor Law § 241 (6) claims.

However, and for the same reasons given with respect to Labor Law § 240 (1), Salinas is likewise not entitled to summary judgment with respect to Labor Law § 241 (6). A trier of fact could reasonably believe that Salinas misused the available safety devices, and, therefore, raises an issue of fact as to whether Salinas' actions were the proximate cause of his injuries (*see e.g., Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839 [2009]). For these reasons, Salinas' motion, seeking summary judgment on the issue of Labor Law § 241 (6), is denied.[16]

Indemnification and Breach of Contract

"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]). Here, the record indicates that the Owners executed a written

[16] The court reaches its conclusions based on the record without the affidavits of the purported experts, which consist mostly of legal conclusions, and, accordingly, should be disregarded (*see e.g., Wass v County of Nassau*, 166 AD3d 1052 [2018]). Alternatively, the dueling opinions with respect to Labor Law § 240 (1) and § 241 (6) demonstrate the existence of triable issues of fact.

agreement in which ECI agreed to indemnify the Owners for all claims arising out of ECI's work (concrete foundation and superstructure work). The record also shows that Salinas was injured while performing such work and that the agreement was in effect at all applicable times. Moreover, ECI cannot delegate its obligation to indemnify the Owners merely by delegating the work. Lastly, the record shows that the Owners are only subject to vicarious liability, and there is thus no indication that the Owners are attempting to have ECI indemnify them for their own negligence (*cf.* General Obligations Law § 5-322.1 [1]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.,* 89 NY2d 786 [1997] [for party to be entitled to indemnification must demonstrate that no negligent act or omission on its part contributed to accident and that its liability is therefore purely vicarious]). For these reasons, the Owners have demonstrated that they are entitled to a judgment of contractual indemnification against ECI.

Similarly, the Owners are entitled to contractual indemnification against All Star. Although the Owners were not a party to a written agreement with All Star, the Owners are the identified express beneficiaries of the contract. Specifically, the indemnification provision states "List of Indemnified Parties and Additional Insureds: Pratt Institute LP Ciminelli" – in a written agreement containing a broad indemnification provision. The contemplated work is the same: concrete superstructure work, which Salinas was performing. Moreover, contrary to All Star's contentions, the record establishes that the Owners have rights as third-party beneficiaries of the indemnification provision. Accordingly, the Owners have demonstrated that they are entitled to a judgment of contractual indemnification against All Star.

Finally, the Owners are entitled to dismissal of all contractual indemnification claims asserted against them. The record contains no evidence of any agreement that required the Owners to indemnify any of the subcontractors. Accordingly, all claims sounding in contractual indemnification against the Owners are dismissed, whether asserted as a cross claim, counterclaim, or third-party claim.

The court now turns to ECI's motion. ECI claims that all common-law indemnification and contribution claims asserted against it should be dismissed. To be sure, a successful claim for common-law indemnification requires a party to "prove not only that it was not guilty of any negligence beyond statutory vicarious liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999]; *see also Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [2004]), or, "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2003]).

Here, ECI claims that it neither had the requisite supervisory authority, nor was it guilty of any negligence that contributed to the accident. The court rejects both assertions. First, ECI was hired by the Owners to perform the concrete work, and, as such, had the authority to "to direct, supervise, and control the work giving rise to the injury" (*Id.*). The fact that ECI chose to delegate authority to All Star is of no moment. Additionally, the record shows that ECI was responsible for installing a fall protection system for the superstructure work but failed to do so; it is also established that the lack of a fall protection system contributed to

Salinas' accident. Accordingly, ECI has not demonstrated, as a matter of law, that it is not an "actual wrongdoer" which caused other parties (the Owners and All Star) to be subject to vicarious liability (*see generally McDermott v City of New York*, 50 NY2d 211 [1980]; *Oceanic Steam Nav. Co. v Compania Transatlantica Espanola*, 134 NY 461 [1892]). Accordingly, ECI is not entitled to summary judgment dismissing the common law claims for contribution and indemnity.

Similarly, ECI is not entitled to summary judgment requiring common law indemnification of it by All Star. The record shows that All Star, in the previously referenced written agreement, did in fact agree to indemnify ECI for claims arising from the concrete superstructure work. However, as stated above, a party seeking contractual indemnification must demonstrate that no negligent act or omission on its part contributed to the underlying accident, and that, therefore, its liability is purely vicarious (*Itri Brick & Concrete Corp.*, 89 NY2d 786 [1997]). However, here, ECI has not demonstrated this, since its failure to install a fall protection system undoubtedly contributed to the happening of the accident. Therefore, awarding ECI contractual indemnification against All Star would be tantamount to requiring All Star to indemnify ECI for ECI's negligence; doing so would be against the public policy of the State of New York (*Id.*).[17]

Lastly, ECI is not entitled to summary judgment with respect to either its motion to dismiss the Owners' claim against it or on its claim against All Star. "A party seeking

[17] However, ECI has shown its entitlement to summary judgment dismissing All Star's claim against it for contractual indemnification, since no written agreement in the record requires ECI to indemnify All Star.

summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2003], citing *McGill v Polytechnic Univ.*, 235 AD2d 400 [1997]; *DiMuro v Town of Babylon*, 210 AD2d 373 [1994]). Here, ambiguities in the relevant contract documents evince issues of fact as to All Star's obligations to procure insurance.[18] Therefore, ECI is not entitled to summary judgment on its breach of contract claim against All Star. However, and contrary to ECI's arguments, ECI has failed to demonstrate that it complied with the insurance procurement provisions contained in the written agreement between ECI and the Owners. ECI claims that it obtained the requisite insurance coverage as evidenced by a certificate of insurance issued by Lloyd's of London; however, the record shows that Lloyd's of London has commenced a declaratory judgment action[19] claiming that ECI obtained the subject policy (and several others) by way of fraudulent misrepresentations and that they should be declared void *ab initio*. Given that this declaratory judgment action could result in a judgment declaring that the policies are void, this court cannot find, as a matter of law, that ECI complied with its contractual insurance procurement obligations. Accordingly, ECI is not entitled to summary judgment dismissing the Owners' breach of contract claim.

[18] However, the court disagrees with All Star's contention that "ECI's breach of contract claim for failure to procure is unenforceable and must be dismissed."

[19] *Certain Interested Underwriters at Lloyd's London v ECI Construction LLC, et al*. (Sup Ct Westchester County [Index No. 68746/2019]).

Default Judgment

A plaintiff moving for leave to enter a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's failure to answer or appear (CPLR 3215 [f]; *see also Vanderbilt Mtge. & Fin., Inc. v Ammon*, 179 AD3d 1138, 1141 [2020]). "CPLR 3215 (f) requires that an applicant for a default judgment file proof by affidavit made by the party of the facts constituting the claim [but] [a] verified complaint may be submitted instead of the affidavit when the complaint has been properly served" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]).

Here, there is no evidence of either a verified complaint or an affidavit of a party (as contrasted with an attorney affirmation). CPLR 3215 is applied in the same manner to third-party claims. Here, the fifth third-party complaint served on R&D [Doc 116] is not verified, and there is no affidavit from an agent of any of the moving defendants/third-party plaintiffs. Accordingly, the branch of motion Seq. # 6, insofar as it seeks a default judgment against R&D, is denied.

Dismissal Against the LPC Defendants

The court grants the Owners' motion insofar as it seeks an order dismissing the action against LPCiminelli Construction Corp., LPCiminelli Interests Inc. and LPCiminelli Solutions LLC. The record contains no agreements or concessions implicating any of these three parties, and no party opposes this branch of the motion. This leaves as the remaining direct defendants LPCiminelli Inc., Pratt Institute, and All Star.

Accordingly, it is hereby

ORDERED that Salinas' motion (mot. seq. five) for partial summary judgment is denied; and it is further

ORDERED that defendants/third-party plaintiffs Pratt, LPCiminelli Inc., LPCiminelli Construction Corp., LPCiminelli Interests Inc. and LPCiminelli Solutions LLC's motion (mot. seq. six) is granted to the extent that: (1) the complaint is dismissed against LPCiminelli Construction Corp., LPCiminelli Interests Inc. and LPCiminelli Solutions LLC; (2) Salinas' Labor Law § 200 and common-law negligence claims are hereby dismissed; (3) Pratt Institute and LPCiminelli Inc. are awarded summary judgment on their claims for contractual indemnification against defendant/third-party plaintiff All Star and third-party defendant/third-party plaintiff ECI, who are directed to immediately assume their defense and reimburse the legal fees and disbursements incurred thus far; and (4) the contractual indemnification claims asserted against Pratt and LPCiminelli Inc. are dismissed; the motion is otherwise denied; and it is further

ORDERED, that any dispute as to the amount of the attorneys' fees and disbursements which Pratt Institute or LPCiminelli Inc. have incurred and are entitled to reimbursement for, the parties who are herein granted indemnification pursuant to this decision and order, for the period from the date each was brought into this action to the date All Star Concrete and Mason, Inc. and/or ECI Contracting, LLC assume their defense, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and disbursements to be awarded to such party.

ORDERED that ECI's motion (mot. seq. seven) is only granted to the extent that All Star's contractual indemnification claim asserted against ECI is dismissed; the motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.