At an IAS Term, Part 73 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 15th day of August 2022.

PRESENT:

HON. PETER P. SWEENEY,

Justice.

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RAUL TUY COSIGUA,

Plaintiff,

-against-

Index No.: 510143/19

REDLINE CONSTRUCTION & MAINTENANCE LLC, 346 43RD ST LLC, JOSEPH R. MCKECHNIE, JR., AHN Y. LEE-MCKECHNIE, MPC PLUMBING & HEATING, INC., GCG INDUSTRIES INC., ABC MANAGEMENT 1 TO 10, and ABC CONTRACTORS 1 to 10,

Defendants.

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JOSEPH R. MCKECHNIE, JR. and AHN Y LEE-MCKECHNIE,

Third-Party Plaintiffs,

-against-

REDLINE CONSTRUCTION & MAINTANANCE LLC and LEONE CONCRETE INC.,

Third-Party Defendants.

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The following e-filed papers read herein: NYSCEF No.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	89-130, 144-156, 159-177, 211-219
Opposing Affidavits (Affirmations)	179-180,181-187,188-198, 203-204, 205-210, 214-215, 216-219

Affidavits/ Affirmations in Reply 200-201,220-222, 223-226, 228-230
Other Papers:

Upon the foregoing papers, plaintiff Raul Tuy Cosigua (plaintiff) moves (in motion [mot.] sequence [seq.] number [no.] 5) for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability on the Labor Law §§ 240 (1), 240 (2), 240 (3), and 241 (6) claims against defendants/third-party plaintiffs Joseph R. McKechnie, Jr. and Ahn Y. Lee-McKechnie (hereinafter "defendant owners"). Plaintiff also moves (in mot. seq. no. 6) for an order, pursuant to CPLR 3403 (a) (3), granting him a special trial preference. Defendant owners move (in mot. seq. no. 7) for an order, pursuant to CPLR 3212, (i) granting summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims and (ii) granting summary judgment in their favor as to their claims for common law indemnity against third-party defendant Leone Concrete, Inc., (Leone). Leone cross-moves (in mot. seq. no. 8) for an order dismissing defendant owners' claims for common law indemnity and contribution.

Background and Procedural History

Defendant owners were the owners of property located at 346 43rd Street, in Brooklyn, New York. After purchasing the property, defendant owners demolished the existing building to develop the property into a four-level, three-family residence. They retained defendant Redline Construction and Maintenance, LLC, (Redline) as the general contractor for the project. Redline hired various subcontractors, including Leone, a masonry subcontractor to erect the outside structural walls of the building. Plaintiff was employed by Leone as a masonry helper. Leone had been working at the site for approximately three months and had erected all of the outside walls from the first level to the third. The Leone crew consisted of two masons, Gabriel and

Juan, along with two helpers, Pedro and plaintiff. Gabriel was the supervisor in charge of the rest of the crew.

On May 1, 2019, plaintiff and his three coworkers were engaged in building a masonry wall above the third story using cement blocks. In order to accomplish this task, they had constructed a six-foot high scaffold. The scaffold consisted of metal frames with wooden planking on top for the workers to use as a platform. It was set up along the edge of one of the sides of the building's third story floor, and the feet of the metal scaffold frames were set up directly on top of a cement board subsurface. It is undisputed that there were no base plates placed on the feet of the scaffold. Plaintiff was standing on top of the scaffold, which had cement blocks on it, as well as a tray of mixed cement, while Pedro was handing him blocks from below. Plaintiff testified that as he was standing on the scaffold holding a cement block that Pedro had just handed him, he heard a noise as if something was breaking and felt the scaffold moving sideways. The scaffolding broke through the floor's cement board subsurface, and fell over sideways, causing plaintiff to fall from the building, approximately 30 feet to the street level. It is undisputed that plaintiff was not provided with any safety harness to use when working on the scaffold. Plaintiff sustained various injuries, including a claimed traumatic brain injury.

Plaintiff commenced this action on May 7, 2019, by the filing of the summons and complaint, along with an ex-parte motion seeking an order to enjoin defendants from witness tampering, to preserve evidence and permit a site inspection on an expedited basis. The Order to Show Cause was granted, along with the temporary restraining order relief on May 8, 2019. All defendants have appeared except for Redline, against whom a judgment of default was granted

by the Court on February 7, 2021. Defendant MPC Plumbing & Heating, Inc.,[1](MPC) interposed an answer on May 22, 2019, and the defendant owners interposed an answer on June 14, 2019. On July 15, 2019, the Order to Show Cause was decided, which granted plaintiff's attorney and expert an inspection of the premises on or before July 29, 2019, ordering defendants to preserve all relevant evidence, including the scaffold, and fallen wall block, enjoining defendants from witness tampering, and other relief. An inspection of the site was conducted by plaintiff's expert, Anthony Dolhon, P.E., on July 23, 2019. On September 13, 2019, the defendant owners commenced a third-party action against Redline and Leone, and Leone answered on July 14, 2020. Plaintiff served Verified Bills of Particulars and amended Bills of Particulars, depositions and medical examinations were conducted, and plaintiff filed a note of issue on August 30, 2021. The following motions have ensued.

Plaintiff's Motion (MS-5)

Plaintiff moves for partial summary judgment on the issue of liability pursuant to Labor Law §§ 240 (1), 240 (2), 240 (3), and 241(6) as against the defendant owners.

Labor Law § 240 (1)

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 . . .

[1] On or about December 8, 2020, the parties entered into a stipulation of discontinuance as against MPC.

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 Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, the statute 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 (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). Accordingly, "[t]he purpose of the statute is to protect against 'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501). "In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, 'the single decisive question is whether [the] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner v New York Stock Exch.*, Inc., 13 NY3d at 603; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

The duty to provide the required "proper protection" against elevation-related risks is nondelegable and therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). "To

succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (*id.*). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240(1) and does not effect a reduction in liability" (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, "where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290). Conversely, "[a] plaintiff is the sole proximate cause of his or her own injuries and a defendant has no liability under Labor Law § 240 (1) when the plaintiff: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice" (*Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]; *see Gallagher v New York Post*, 14 NY3d 83, 88 [2010] ["Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury"]; *see Roblero*, 175 AD3d at 1447] ["When . . . the worker's own conduct is the sole proximate cause of the accident, no recovery under Labor Law § 240 (1) is available"]).

Plaintiff argues that as the scaffolding failed and toppled over, it was not constructed and placed as to provide proper and adequate protection to him which is a prima facie violation of Labor Law § 240 (1) and a proximate cause of his fall and injuries. In addition, he notes that the

failure to provide him with personal fall protection was a prima facie violation of Labor Law § 240 (1) that proximately caused his injuries. In support of his motion, plaintiff submits an affidavit from Anthony Dolhon, a licensed professional engineer. Mr. Dolhon affirms that he has over 35 years of civil engineering experience in the performance evaluation, failure analysis, cause and origin of failures, extent of structural and architectural failures, construction defects, assessment of construction materials, and the application of building codes and industry standards to the design, analysis, and rehabilitation of existing buildings, structures, and the infrastructure (NYSCEF doc. no.118, Dolhon aff at ¶ 3). Mr. Dolhon states that prior to rendering this opinion, he reviewed various construction drawings related to the project, various EBT transcripts, photographs and performed a site inspection on July 23, 2019, where he took various measurements and photographs.

Based upon his investigation and review of the aforementioned documents and testimonies, Mr. Dolhon opines, within a reasonable degree of engineering and construction site safety certainty, that there were several violations of Labor Law § 240 (1). Specifically, he opines that the scaffold, which was set up next to an open edge of the third-floor level, was not constructed or placed as to provide proper fall protection. Mr. Dolhon points out that the fact that the scaffold broke through the subfloor and toppled over sideways demonstrates that it was not properly constructed and placed and failed to provide plaintiff a safe place to perform his work. He notes that the failure to use base plates on the feet of the scaffold resulted in the feet of the scaffolding frames being placed directly on the cement board, causing an uneven and improper distribution of the weight of the scaffold, the workers and materials. This resulted in the scaffolding breaking through the subfloor, causing it to collapse and fall sideways, and plaintiff falling off the scaffold and over the side of the building down to the ground below. Additionally,

Mr. Dolhon notes that the scaffolding lacked safety rails and that a proper safety railing would likely have allowed plaintiff to grab it to hold on to or would have prevented his body from falling off the tilting scaffolding. Thus, he opines that the failure to provide a properly constructed safety railing was a violation of Labor Law § 240 (1) that proximately caused plaintiff's accident.

Mr. Dolhon further opines that since the scaffolding was placed so close to an unprotected edge, it needed to be tied or anchored to prevent it from toppling over the edge of the building, causing workers and debris to fall from a substantial height, and that this was also a violation of Labor Law § 240 (1) that proximately caused plaintiff's accident. Finally, he opines that the failure to provide plaintiff, who was working at a significant height, with a safety harness and tie off lines to protect him from falling off the scaffold was another violation of Labor Law § 240 (1) and a direct proximate cause of his fall.

In opposition, the defendant owners argue that this branch of plaintiff's motion should be denied because questions of fact exist as to whether he was the sole proximate cause of his accident. In this regard, they contend that it is undisputed that plaintiff and his crew members erected the scaffold that he alleges was "missing feet," was not anchored, did not have safety railing, and did not have adequate load strength. Thus, they assert there is a question of fact regarding whether plaintiff's own actions in improperly constructing the scaffold were the sole proximate cause of his accident.

Here, plaintiff has established prima facie his entitlement to judgment as a matter of law by demonstrating that he was engaged in work within the ambit of Labor Law § 240 (1) and that his injuries were proximately caused by "the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

Through plaintiff's testimony that while working on top of the scaffold without a safety harness, he heard a noise as if something was breaking and then the scaffold broke through the subfloor surface of the third level and toppled over sideways, causing him to fall approximately 30 feet to the street level, as well as the photographs showing the scaffold lying suspended over the edge of the building's third level, he has demonstrated, prima facie, that the statute was violated by the movement and/or collapse of the scaffold and that this violation was a proximate cause of plaintiff's injuries (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Cruz v Roman Catholic Church of St. Gerard Magella*, 174 AD3d 782, 783 [2d Dept 2019]; *Caban v Plaza Constr. Corp.*, 153 AD3d 488, 489-490 [2d Dept 2017]).

Additionally, it is well-settled that the absence of guardrails on a scaffold platform constitutes prima facie evidence of a violation of Labor Law § 240 (1) when a worker falls from the scaffold (*see Marulanda v Vance Assoc., LLC*, 160 AD3d 711, 712 [2d Dept 2018]; *Vasquez-Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828, 829 [2d Dept 2015]; *Garzon v Viola*, 124 AD3d 715, 716 [2d Dept 2015]; *Silva v FC Beekman Assoc.*, LLC, 92 AD3d 754, 755 [2d Dept 2012]; *Moran v 200 Varick St. Assoc., LLC*, 80 AD3d 581, 582 [2011]). Thus, plaintiff has demonstrated that his injuries were caused by two separate violations of Labor Law § 240 (1) and the burden shifts to defendant owners to raise a triable issue of fact regarding these violations.

In opposition to plaintiff's prima facie showing, the defendant owners have failed to raise an issue of fact with regard to the statutory violations or to demonstrate that the plaintiff's own acts or omissions were the sole cause of his accident (*see Lazo v New York State Thruway Auth.*, 204 AD3d 774, 776 [2d Dept 2022]; *Masmalaj v New York City Econ. Dev. Corp.*, 197 AD3d 1292, 1293-1294 [2d Dept 2021]; *Leon-Rodriguez v R.C. Church of Sts. Cyril & Methodius*, 192

AD3d 883, 885 [2d Dept 2021]; *Carrion v City of New York*, 111 AD3d 872, 873 [2d Dept 2013]; *Chlebowski v Esber*, 58 AD3d 662, 663, [2d Dept 2009]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]). "Where, as here, a violation of Labor Law § 240 (1) is a proximate cause of the accident, the plaintiff's conduct cannot be deemed solely to blame for it" (*Zong Mou Zou v Hai Ming Const. Corp.*, 74 AD3d 800, 801 [2d Dept 2010]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006]).

Accordingly, that branch of plaintiff's motion seeking partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against the defendant owners is granted.

Labor Law § 240 (2)

Labor Law § 240 (2) provides in pertinent part that:

> [s]caffolding or staging more than twenty feet from the ground or floor . . . , shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.

Plaintiff argues that this section was also violated. Plaintiff's expert, Mr. Dolhon opines that a safety railing was required and likely would have prevented plaintiff's fall and that the failure to provide it was in violation of Labor Law § 240 (2) which proximately caused his accident. He acknowledges that the scaffold plaintiff was working on was only six feet high but notes that it was positioned next to an unprotected edge and that the difference in elevation between plaintiff's work area and the ground below where he fell was approximately 30 feet or more.

In opposition, the defendant owners argue that this section is inapplicable to the facts herein as the scaffold was only six feet tall and was placed on the third floor of the building. They maintain that just because plaintiff fell 30 feet does not mean that Labor Law § 240 (2) is applicable or was violated.

The court finds that Labor Law § 240 (2) is inapplicable to the facts herein as the scaffold from which plaintiff fell was approximately six to seven feet above the ground upon which it had been set up, thus not more than 20 feet above as required to trigger the protections of this section of this statutory provision. The fact that plaintiff was caused to fall over the side of the building, approximately 30 feet to the street level below does not bring his accident within the ambit of a Labor Law § 240 (2) violation. Accordingly, that branch of plaintiff's motion seeking summary judgment on his Labor Law § 240 (2) claim is denied (*see Viera v WFJ Realty Corp.*, 140 AD3d 737, 739 [2d Dept 2016] [holding that "plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240 (2) cause of action, as his submissions presented a triable issue of fact as to whether the scaffold at issue was more than 20 feet above the ground"]; *Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403, 404 [1st Dept 2005] [holding that § 240 (2) applied where the float scaffold plaintiff was using at the time of his accident was elevated more than 20 feet and lacked guardrails]).

Labor Law § 240 (3)

Plaintiff also alleges that Labor Law § 240 (3) which provides that "[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use" was violated. In this regard, Mr. Dolhon opines that "[t]he scaffolding failed and toppled over when it broke through the subfloor indicates that it was not constructed and placed as to support four times the weight of workers and materials as required

by § 240 (3)" (NYSCEF Doc No.118, Dolhon aff at ¶ 71). He notes that the scaffolding was constructed in a manner such that the weight on it was not properly distributed, which contributed to its breaking through the floor surface that it was standing on and toppling over, which establishes a violation of § 240 (3) as a matter of law.

In opposition, the defendant owners argue that questions of fact exist as to whether this statute was violated, as there are disputed versions of events as to who and what was on top of the scaffold when the incident occurred. In this regard, they point to the assertion by plaintiff's counsel that plaintiff and two of his co-workers were standing on the scaffold at issue, along with the cement blocks being used to construct the wall. However, the defendant owners point to plaintiff's own testimony that he and his co-workers were each standing on three separate scaffolds (NYSCEF Doc No. 106, plaintiff's tr at 90, lines 18-24). Additionally, they point out that plaintiff testified that he does not know or remember the number of cement blocks that were on the scaffold with him at the time of the accident (*id.* at 9, lines 4-14). Accordingly, defendant owners argue that plaintiff cannot definitively establish the weight that was on the scaffold at the time of the accident.

Here, the court finds that plaintiff has failed to definitively establish what the weight was on the scaffold at the time of his accident, thus precluding a grant of summary judgment in his favor on this claim (*see Petticrew v St. Lawrence Cement, Inc.*, 57 AD3d 1266, 1268 [3d Dept 2008] [court found a question of fact regarding whether scaffolding should have been expected to withstand the weight of a spider excavator that collapsed onto plaintiff and the scaffolding]; *Kyle v City of New York*, 268 AD2d 192, 199 [1st Dept 2000] [plaintiff failed to proffer any evidence establishing that the scaffold could not support four times its weight, a precondition to recovery under Labor Law § 240 (3), thus an issue of fact remained regarding the applicability of

this statute]. Accordingly, that branch of plaintiff's motion seeking summary judgment in his favor on his Labor Law § 240 (3) claim is denied.

Labor Law § 241 (6)

Plaintiff also argues that he is entitled to summary judgment in his favor on his Labor Law § 241 (6) claim. Labor Law § 241 (6), provides, in pertinent part, that:

> 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 persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]).

In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

Plaintiff, in his bills of particulars, alleged the violation of the following Industrial Code sections in support of his Labor Law § 241 (6) claim: § 23-1.5, § 23-1.5 (a), § 23-1.15 (b), § 23-1.15 (c), § 23-1.15 (d), § 23-1.15 (e), § 23-1.16, § 23-1.16 (b), § 23-1.16 (d), § 23-1.16 (e), § 23-1.19, § 23-2.6, § 23-5.1, § 23-5.1(b), § 23-5.1 (c) (1), § 23-5.1(f), § 23-5.1 (j), § 23-5.3, § 23-5.3

(e), § 23-5.3 (g) (1), and § 23-5.3 (g) (2). However, in support of the instant motion, plaintiff asserts that his Labor Law § 241 (6) claim is predicated solely on defendants' violation of Industrial Code §§ 23-5.1 (b), (c) and (j); 23-5.3 (g), and 23-1.15. He argues that each of these violations was a substantial factor and proximate cause of the accident. To the extent that plaintiff asserted a violation of other Industrial Code sections in his bill of particulars, the court finds that plaintiff has abandoned all of the other Industrial Code sections as predicates for liability under this statute (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other provisions of the Industrial Code by failing to address them in his brief]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Industrial Code§ 23-5.3 (g) provides:

> (1) Footings for metal scaffolds shall be sound, rigid and capable of supporting the maximum design loads of such scaffolds without settlement or deformation. Such footings shall be secure against movement in any direction and shall have sufficient area to properly transfer the vertical post or end frame loads of the scaffolds to the ground, grade or equivalent surface without causing any unsafe condition.
> (2) Metal base plates of not less than 16 square inches in area by one-eighth inch in thickness shall be provided for the tubular ends of posts and for the legs of end frames which are in bearing contact with the footings or other supporting surfaces.

Industrial Code § 23-5.1(b) requires that:

> The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used.

Industrial Code § 23-5.1(j) provides in pertinent part that: "[t]he open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety

railings constructed and installed in compliance with this Part (rule). Exceptions: Any scaffold platform with an elevation of not more than seven feet . . ."

Whether plaintiff's submissions established as a matter of law that one or more of the above sections of the Industrial Code were violated and that such violation(s) was a substantial factor in causing plaintiff's accident need not be addressed. In this regard, the submission of proof establishing as a matter of law that a section of the Industrial Code was violated, and such violation was a substantial factor in causing a plaintiff's accident, does not establish a defendant's liability under 241(6) as a matter of law. Such evidence only constitutes some evidence of negligence and reserves for resolution by a jury "the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068 [1998]; *see Long v. Forest—Fehlhaber*, 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115 [1982]; *Baptiste v. RLP-E., LLC*, 182 A.D.3d 444, 445, 122 N.Y.S.3d 292, 294 [1st Dep't 2020]; *Seaman v. Bellmore Fire Dist.*, 59 A.D.3d 515, 516, 873 N.Y.S.2d 181, 182 [2nd Dep't 2009]; *Daniels v. Potsdam Cent. School Dist.*, 256 A.D.2d 897, 898, 681 N.Y.S.2d 852 [3rd Dep't 1998]).

Plaintiff's Motion (MS-6)

Plaintiff moves in mot. seq. no. 6 for an order, pursuant to CPLR 3403(a)(3), granting him a special trial preference. He argues that the interests of justice weigh heavily in favor of an expedited trial date under CPLR 3403(a)(3), because: (i) he suffered a traumatic brain injury which caused him to suffer from neurocognitive deficits with respect to memory, focus and concentration, and are expected to adversely affect his ability to participate at trial; (ii) as a result of the accident, he is totally disabled, unemployed and totally dependent on others for numerous

activities of basic daily living; and; (iii) the continued pendency of this action is expected to adversely impact his health, increase his state of emotional instability and may negatively impact his recovery from PTSD. Plaintiff maintains that there is no prejudice to defendants if a special trial preference is granted.

In support of his motion, plaintiff submits an affirmation from Dr. Vilor Shpitalnik, M.D., a physician licensed to practice medicine in the State of New York and Board Certified in psychiatry and neurology. Dr. Shpitalnik affirms that he has been treating plaintiff since his accident and opines that plaintiff is suffering from severe head trauma and traumatic brain injury. He notes that plaintiff has been experiencing ongoing neurocognitive deficits, including significant impairment of short-term memory, and that he has difficulty with concentration and focus. Dr. Shpitalnik notes that plaintiff experiences frequent episodes of headaches and has a balance disorder, which limits his ability to conduct many of the activities of basic daily living. He opines that the brain atrophy caused by plaintiff's traumatic brain injury is most likely permanent and progressive, and that the passage of time may limit his ability to communicate with his attorney and testify at trial. Dr. Shpitalnik further notes that plaintiff has become increasingly volatile and emotionally unstable and that he suffers from PTSD, which could be adversely affected by the passage of time. Accordingly, Dr. Shpitalnik recommends that a special trial preference be granted.

In addition, plaintiff submits an affirmation from Brian Greenwald, M.D., a physician licensed to practice medicine in the State of New York. Dr. Greenwald is Board Certified in Physical Medicine and Rehabilitation and in Brain Injury Medicine. Dr. Greenwald examined plaintiff several times and reviewed all pertinent medical records and the transcripts from plaintiff's deposition testimony. He opines that plaintiff suffered a significant traumatic brain

injury as a result of his accident, noting that brain MRI studies confirmed significant cortical atrophy in the inferior frontal and lateral orbitofrontal regions and that spectroscopy studies showed major metabolite derangements. Dr. Greenwald states that plaintiff experienced the primary brain injury on the day of his accident, and that MRI studies show that there was a secondary brain injury phase consisting of cellular changes within the brain and loss of brain tissue. Dr. Greenwald opines that plaintiff is disabled from any employment due to his traumatic brain injury and that:

> the passage of time will adversely affect Mr. Cosigua's ability to participate at the trial of this action due to increasing irritability, emotional instability, and the likely progressive nature of his neurocognitive deficits. To prepare for trial, Mr. Cosigua will need to communicate with his attorney and to be able to answer questions. As evidenced by his deposition testimony, he clearly had difficulties understanding basic questions and in formatting responses. If his neurocognitive conditions and emotional instability progress, which there is a likelihood that it will, his ability to participate at trial will be impeded even further (NYSCEF doc. no. 154, Dr. Greenwald's aff at ¶ 13).

Plaintiff further submits an affirmation from Mehrdad Golzad, M.D., a physician duly licensed to practice medicine in the State of New York, and Board certified in Psychiatry & Neurology, with a sub-specialty Board certification in brain injury medicine. Dr. Golzad affirms that he is one of plaintiff's treating neurologists and opines that plaintiff has suffered a traumatic brain injury. Moreover, he opines that plaintiff's

> persistent neurological signs and symptoms are expected to be permanent. Furthermore, there is a strong likelihood that his neurocognitive deficits will further deteriorate. Additionally, his persistent emotional instability, irritability, and lack of impulse control are also causally related to his brain injury. These will interfere and undermine his ability to prepare for trial and testify. In light of the above, I would respectfully request that you take these matters into consideration in granting . . . [plaintiff's request for a] special trial preference" (NYSCEF Doc No. 155, Dr. Golzad's aff).

In opposition, defendant owners argue that granting plaintiff's motion and awarding him special trial preference would be highly prejudicial as there is outstanding discovery. Specifically, they contend the outstanding discovery includes, but is not limited to, a supplemental deposition and medical examination of plaintiff regarding his July 2021 shoulder surgery; pre- and post-surgical medical examination of plaintiff as the Workers' Compensation Board approved him to have lumbar surgery; various authorizations and the depositions of recently identified caregivers. Additionally, the defendant owners maintain that plaintiff's motion is premature pending the adjudication of the summary judgment motions. Moreover, defendant owners assert that plaintiff has not established how his alleged progressive cognitive injuries demonstrate unusual or extraordinary hardship or the need for trial preference, noting that there is no indication, nor is it alleged, that his life expectancy will be reduced due to his injuries. They further assert that he has not demonstrated any financial burden resulting from his injuries inasmuch as he lives with family members that provide his care and he is receiving both medical and indemnity payments through the Workers' Compensation Board.

Leone also opposes this motion arguing that plaintiff has not shown that his current situation is sufficiently unusual or extreme to justify granting a preference.

In reply, plaintiff notes that he filed his Note of Issue and Certificate of Readiness certifying that all discovery was complete on August 30, 2021, and argues that if defendant owners believed there was outstanding discovery than they should have filed a timely motion to vacate Note of Issue, which they failed to do. Substantively, he contends that he has served the additionally requested authorizations. With regard to the need for an IME of his shoulder post-surgery, plaintiff points out that defendant owners have failed to formally designate a doctor to

conduct this IME, despite plaintiff informing them that he would be voluntarily produced. Finally, plaintiff maintains that defendant owners' contention that they need to conduct depositions of recently identified caregivers is a misstatement. In this regard, he notes that the fact that plaintiff had caregivers to assist him with his daily living activities was documented in his medical records as well as during his depositions, thus this is not new information. Accordingly, plaintiff reiterates his request that the court exercise its discretion and grant his motion seeking a special trial preference in this matter.

CPLR 3403 (a) (3) provides that a civil case shall be entitled to a trial preference when "the interests of justice will be served by an early trial". Whether the interests of justice will be served by granting of a preference rest within the discretion of the trial court (*see Nold v City of Troy*, 94 AD2d 930, 930 [3d Dept 1983]). A special trial preference should be granted only where unusual or extraordinary hardship has been convincingly demonstrated as it is an extraordinary remedy which results in the favoring of one case over the many others which are awaiting trial (*see Rago v Nationwide Ins. Co.*, 120 AD2d 579, 579 [2d Dept 1986]; *Bernard v Hyman*, 155 AD2d 403, 403 [2d Dept 1989]; *La Porta v Fretto Enter.*, 100 AD2d 713,713 [3rd Dept 1984]). Although the court is sympathetic to plaintiff's situation, he has failed to demonstrate that the interests of justice will be served by an early trial. Here, although plaintiff has submitted documentation regarding his inability to work since the accident, it is undisputed that he is receiving Workers Compensation benefits, his medical care is being paid for and he is living with his family members who assist him with his tasks of daily living, thus there is no indication of imminent indigency (*see Betke v Archwood Estates, Inc.*, 266 AD2d 328, 328 [2d Dept 1999]; *Thompson v City of New York*, 140 AD2d 232, 233 [1st Dept 1988]; *Rago v Nationwide Ins. Co.*, 120 AD2d 579, 579 [2d Dept 1986] [court denied a trial preference where

plaintiff failed to show imminent financial destitution or probability of death before trial]). Additionally, although there has been evidence submitted indicating that plaintiff's neurocognitive deficits may affect his ability to testify at trial, plaintiff has submitted to several days of deposition already and has testified regarding the aspects of the work site and accident that he could remember. Accordingly, plaintiff's motion seeking a special trial preference is denied.

Defendant Owners' Motion (MS-7)

The defendant owners move for an order pursuant to CPLR 3212: (i) granting summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims; and (ii) granting summary judgment in their favor as to their claim for common law indemnity against Leone.

Defendant owners argue that plaintiff's common law negligence and Labor Law § 200 claims must be dismissed as asserted against them as they did not exercise any supervision or control over plaintiff's work, did not provide equipment to him, did not create the alleged condition which caused his accident, and did not have any knowledge or notice of said condition. In this regard, they point out that plaintiff testified that he received all of his instructions and equipment from his employer, Leone. The court notes that plaintiff concedes that the record establishes that the defendant owners did not exercise any control of the means and methods of the work at the subject construction site and does not oppose this branch of the motion. Accordingly, that branch of the defendant owners' motion seeking summary judgment in their favor dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted and said claims are hereby dismissed as against defendant owners.

Common Law Indemnification

Next, the defendant owners seek summary judgment in their favor on their common law indemnification claim against Leone. The defendant owners argue that they are entitled to common law indemnification as a matter of law as there is no proof of negligence on their part and any liability imposed upon them is strictly statutory. Additionally, they maintain that the record establishes that they had no active role in supervising or controlling the construction activities of plaintiff's work and had no notice of any dangerous conditions. Moreover, they assert that Leone was both negligent and exercised actual supervision and control over the work that caused plaintiff's injuries. In this regard, the defendant owners point out that plaintiff testified that he received all of his instructions regarding the work he was performing from his Leone supervisor and coworkers, that Leone maintained exclusive supervision and control over plaintiff's work and provided the tools and materials to erect the scaffold. The defendant owners assert that Leone also decided whether or not to furnish safety devices to its employees, including plaintiff. Specifically, they point to the testimony of Leone's owner, Mr. Lella, who testified that helpers such as plaintiff "could not" wear a harness and/or connect to a lifeline because it would prevent them from doing their job (NYSCEF Doc No. 170, Lella tr at 36, lines 11-25; p.37, lines 2-4; p 111, lines 12-25; p 112, lines 2-16). Moreover, the defendant owners point to plaintiff's testimony that he had asked for a harness but had been instructed to work without one by Mr. Lella (NYSCEF Doc No. 106, plaintiff's tr. at 97, lines 16-24; p. 98, lines 6-12)

Further, the defendant owners contend that Leone owed a duty to plaintiff, its employee, to provide a safe workplace, which it breached by providing scaffolding which lacked proper footing and was unable to withstand the load of the bricks and personnel working upon it.

Finally, they maintain that judgment as a matter of law on the issue of common-law indemnification from plaintiff's employer, Leone, is permitted where, as here, he sustained a "grave injury." In this regard, the defendant owners note that plaintiff claims that he suffered a traumatic brain injury as a result of this incident that has rendered him unable to work. They point out that in support of his motion for a special preference, plaintiff has submitted an affirmation from Dr. Greenwald, his treating neurologist, in which he opines that plaintiff suffered a traumatic brain injury as a result of the accident "from a neurological perspective remains totally disabled from any employment as a result of the TBI" (NYSCEF Doc No. 173, Dr. Greenwald's aff at ¶ 13). In addition, they submit a report from Dr. Greenwald's examination of plaintiff on August 4, 2021, which states that plaintiff:

> suffered a traumatic brain injury on 5/1/19 and the consequent symptoms and impairments are causally related to this injury . . . . no further healing of injured brain tissue can be expected . . . [t]hese symptoms and impairments are permanent" and [plaintiff's] significant cognitive and behavioral impairments, as well as physical impairments, resulting from the traumatic brain injury he sustained on 5/1/19, prohibit him from any form of employment. The cognitive impairment from the traumatic brain injury he suffered on 5/1/19 independently prohibits him from being employable in any form in the future. The physical disability from the traumatic brain injury he suffered on 5/1/19 also independently prohibits him from being employable in any form in the future." (NYSCEF Doc No. 173, Exhibit B, Dr. Greenwald's 8/4/21 report).

Additionally, the defendant owners point to the affirmation from Dr. Golzad, a neurologist, who similarly opines that plaintiff sustained a traumatic brain injury and is disabled from any employment due to his traumatic brain injury, and that his persistent neurological signs and symptoms are expected to be permanent (NYSCEF Doc No. 174). Further, the defendant owners point to treating neurologist Dr. Shpitalnik's report stating that plaintiff suffered a traumatic brain injury and that conditions are most likely permanent and progressive (NYSCEF Doc No.

175). Finally, defendant owners point to the November 4, 2020, report of Dr. Elizabeth Ortof, MD, a neurologist who conducted an independent medical examination of plaintiff for the Workers' Compensation Board and diagnosed him with traumatic brain injury causally related to the accident (NYSCEF Doc No. 176).

Plaintiff submits an affirmation in support of this branch of the defendant owners' motion arguing that the medical evidence submitted establishes that he suffered a grave injury in the form of a traumatic brain injury.

In opposition, Leone argues that the defendant owners have failed to establish prima facie entitlement to summary judgment on their third-party claims for common law indemnity as they have failed to prove that plaintiff suffered a qualifying "grave injury" as defined by Workers' Compensation Law § 11. Leone contends that the defendant owners misunderstand the relevant standard for proving that an employee suffered a "grave injury" as the result of a traumatic brain injury. Specifically, Leone notes that a brain injury only rises to the level of a "grave injury" if the brain injury alone renders the plaintiff unemployable in all capacities on a permanent basis. Leone asserts that Dr. Greenwald improperly combines plaintiff's orthopedic injuries with his alleged brain injury to state in conclusory fashion that he is unemployable in any form. Additionally, Leone contends that Dr. Golzad fails to state that plaintiff's condition is permanent or provide any indication of what alternative forms of employment he considered and rejected, when rendering his opinion that plaintiff is disabled from any employment. Further, Leone maintains that Dr. Shpitalnik and Dr. Ortof fail to opine that plaintiff is unemployable in all capacities, noting that Dr. Ortof specifically opined that plaintiff's condition was not permanent. Thus, Leone argues that the defendant owners have failed to establish prima facie that plaintiff suffered a grave injury.

Leone argues that even if the court were to find that defendant owners established that plaintiff suffered a grave injury, Leone's submissions in opposition, and in support of its' cross motion, raise a question of fact. Here, Leone submits a report from neuropsychologist, Dr. Frank Maurio, who performed an independent medical examination of plaintiff on July 23, 2021, and opined that that despite his traumatic brain injury, plaintiff was not unemployable on a permanent basis. In addition, Leone points to the report of vocational rehabilitation specialist Richard Schuster Ph.D., who evaluated plaintiff on August 23, 2021, to assess his current cognitive status with particular emphasis on the effect of his cognitive/intellectual/academic condition upon his future vocational potential. Dr. Schuster evaluated various roles that plaintiff could perform in light of his alleged brain injury and his physical limitations due to orthopedic injuries and opined that plaintiff could be employed in roles such as a locker room/coat room/dressing room attendant, janitor/cleaner, laundry/dry cleaning, or conveyor operator/tender, with an earning potential of approximately $37,083 per year.

In reply, the defendant owners assert that Leone does not dispute that the accident was caused by its own negligence and that the defendant owners were free of any fault. Next, they contend that Leone fails to submit any legally admissible evidence to raise an issue of fact regarding whether plaintiff suffered a grave injury. In this regard, they note that the unsworn reports of Dr. Maurio and Dr. Schuster are as a matter of law legally insufficient under CPLR 3212 and CPLR 2106. Finally, the defendant owners argue that Leone's submissions fail to dispute the evidence that plaintiff's physical disabilities resulting from the traumatic brain injury rendered him totally and permanently unemployable in any capacity. In this regard, they note that Leone's experts only comment on the alleged neurocognitive deficits set forth in plaintiff's experts' affirmations and reports and did not comment on, or dispute, the alleged physical

deficits claimed by plaintiff related to his traumatic brain injury, including balance, walking, and vision difficulties, as well as headaches.

Leone cross-moves (mot. seq. no. 8) for an order dismissing the defendant owners' claims for common law indemnity and contribution on the ground that the defendant owners cannot establish that plaintiff suffered a grave injury, and thus these claims are barred citing to the same arguments and evidence submitted in opposition to the defendant owners' motion.

In opposition to Leone's cross motion, the defendant owners contend that it should be denied as it is untimely, pointing out that plaintiff filed the note of issue on August 30, 2021, and Leone failed to file the instant cross motion until six months later, on February 25, 2022. Moreover, they assert that Leone has failed to demonstrate good cause for this extreme delay. Substantively, the defendant owners argue that the cross motion should be denied for the reasons discussed in support of their own motion in this regard.

"In order to establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118-1119 [2d Dept 2011]; *see Buffardi v BJ's Wholesale Club, Inc.*, 191 AD3d 833, 834 [2d Dept 2021]).

Common law indemnification and contribution claims are statutorily barred against an employer in the absence of a grave injury (*see* Workers' Compensation Law § 11; *Fleming v Graham*, 10 NY3d 296, 299 [2008]; *Ironshore Indem., Inc. v W&W Glass, LLC*, 151 AD3d 511, 512 [1st Dept 2017]; *Grech v HRC Corp.*, 150 AD3d 829, 830 [2d Dept 2017]). "Grave injuries include, inter alia, 'an acquired injury to the brain caused by an external physical force resulting

in permanent total disability' . . . A 'permanent total disability' requires a showing that the injured employee is no longer employable 'in any capacity'" (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1013 [2d Dept 2019], quoting *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]; [internal citation omitted]; *see* Workers' Compensation Law § 11; *Grech*, 150 AD3d at 830]).

Initially, the defendant owners are correct that Leone's cross motion, which was not made until February 25, 2022, is untimely under Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, as it was made more than 60 days after the filing of the note of issue on August 30, 2021 (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; CPLR 3212 [a]). "However, an untimely cross motion for summary judgment may nevertheless be considered by the court 'where a timely motion was made on nearly identical grounds'" (*Dojce v 1302 Realty Co., LLC*, 199 AD3d 647, 649-650 [2d Dept 2021], quoting *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]). Here, as the defendant owners timely moved for summary judgment with respect to plaintiff's causes of action under the common law and Labor Law § 200 and on their claims for common law indemnity as against Leone, this court may properly consider Leone's cross motion (*see Sikorjak*, 168 AD3d at 780; *Sheng Hai Tong*, 144 AD3d at 890; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]; *Wernicki v Knippert*, 119 AD3d 775, 776 [2d Dept 2014]; *Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]).

Next, with regard to the defendant owners' argument that the court should not consider the reports of Drs. Maurio and Schuster on the ground that said reports are not in admissible form (*see* CPLR 2106; *Pascucci v Wilke*, 60 AD3d 486, [1st Dept 2009]; Leone has remedied this procedural error by submitting such reports in its reply papers in the appropriate form

(NYSCEF Doc Nos. 229 & 230). The court finds that the defendant owners have not been prejudiced by the technical defect in opposing the cross motion, thus the sworn version of the reports shall be considered by the court (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 [1st Dept 2009]; *Wester v Sussman*, 304 AD2d 656, 656 [2d Dept 2003]).

Turning to the merits of the defendant owners' motion and Leone's cross motion, the defendant owners have submitted evidence that establishes that plaintiff suffered a grave injury in the form of his traumatic brain injury which has caused significant cognitive impairment which renders him unemployable in any form in the future and that the physical disability from the traumatic brain injury, independently renders him unable to work in any capacity. Accordingly, the defendant owners have established that plaintiff suffered a grave injury resulting in permanent total disability and that he is unable to work in any capacity (*see Rubeis*, 3 NY3d at 417; *Padilla v Absolute Realty*, 195 AD3d 422, 424 [1st Dept 2021] [holding that plaintiff established he had suffered a grave injury in the form of a brain injury that he sustained after falling from a roof he was working on, that rendered him unable to work in any capacity]; *Goundan v Pav-Lak Contr. Inc.*, 185 AD3d 485, 485 [1st Dept 2020]; *Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001]). However, Leone submits evidence that raises a triable issue of fact as to whether plaintiff suffered a grave injury that caused permanent total disability rendering him unable to perform work in any capacity (*see Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1013 [2d Dept 2019] [holding that "the conflicting expert opinions proffered by the parties raised a triable issue of fact as to whether the injured plaintiff suffered a grave injury within the meaning of Workers' Compensation Law § 11"]; *Bush v Mechanicville Warehouse Corp.*, 79 AD3d 1327, 1329 [3d Dept 2010]; *Mendez v Union Theol. Seminary in City of N.Y.*, 26 AD3d 260, 261 [1st Dept 2006]; *Way*, 289 AD2d at 792-793]). Based upon the foregoing, that branch

of the defendant owners' motion seeking summary judgment on their claim seeking common law indemnification as against Leone is denied. Likewise, Leone's cross motion seeking dismissal of the defendant owners' claim for common law indemnification is denied.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot. Accordingly, it is

ORDERED that that branch of plaintiff's motion for summary judgment in his favor on the issue of liability for his Labor Law § 240 (1) claim is granted. That branch of his motion for summary judgment on his Labor Law § 241 (6) claim is denied. That branch of plaintiff's motion seeking summary judgment on his Labor Law §§ 240 (2) and 240 (3) claims and are denied; and it is further,

ORDERED that plaintiff's motion seeking a special trial preference pursuant to CPLR 3403 is denied; and it is further,

ORDERED that branch of the defendant owners' motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted and said claims are dismissed; that branch of their motion seeking summary judgment on their common law indemnity claim as against Leone is denied; and it is further,

ORDERED that Leone's cross motion seeking summary judgment dismissing the defendant owners' claims for common law indemnity is denied.

This constitutes the decision, order, and judgment of the court.

ENTER,

P.P.S.

J. S. C.

HON. PETER P. SWEENEY, J.S.C.

KINGS COUNTY CLERK
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